



States of Guernsey
Finance Sector
Development

Consultation Response Paper

On the potential introduction of a vertical arrangements block exemption under Guernsey's competition laws.

16 October 2020

1. Executive Summary

The Competition (Guernsey) Ordinance, 2012 (the “**Competition Ordinance**”) was introduced in order to protect consumers and to ensure that businesses compete fairly, without unfair advantages.

The Committee *for* Economic Development (the “**Committee**”) issued a consultation paper on 19th November 2019, to seek feedback on the proposal to introduce a block exemption, to exempt certain types of vertical arrangements. The consultation closed on 10th January 2020.

The consultation was both published online on gov.gg, and sent directly by email to the following:

- Carey Olsen
- Mourant Ozannes
- Ogier
- Commercial Bar Association
- Guernsey Finance
- Channel Islands Fuel Limited
- Channel Islands Co-operative Society
- Guernsey Motor Trade Association
- ATF Fuels
- Committee *for* the Environment & Infrastructure
- Guernsey Chamber of Commerce
- Trading Standards
- Guernsey International Business Association

This document provides a summary of the findings from the consultation, the main outcomes and next steps.

2. Background

The Committee proposed that a general vertical block exemption is implemented, in Guernsey, broadly in line with the European Commission’s Vertical Agreements Block Exemption Regulation (“**VABER**”).

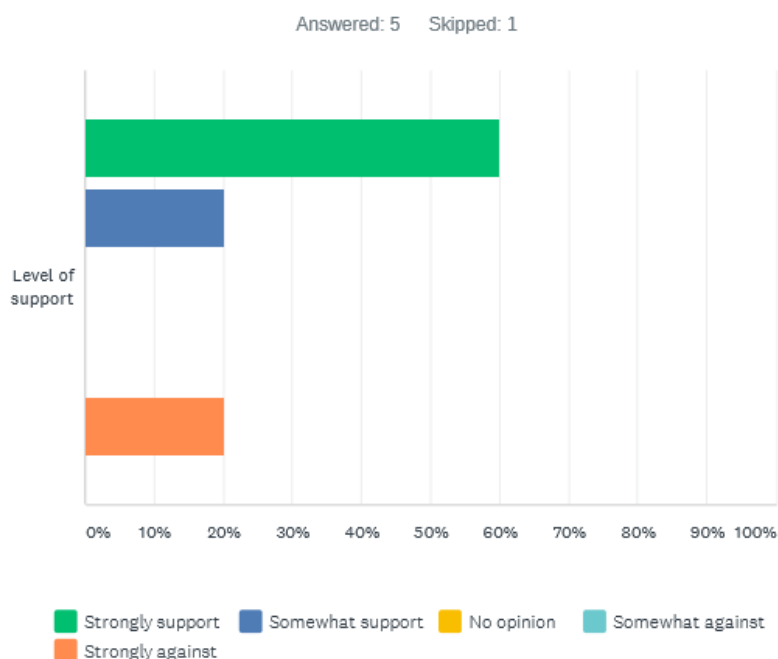
3. Responses and analysis

The Committee would like to thank those who took the time to contribute to the consultation. There were six responses to the consultation.

This document contains a summary of responses to the consultation and identifies the next stages. All responses to the consultation have been anonymised.

4. Consultation questions

Question 5¹: How strongly do you support the principle of introducing a single block exemption in Guernsey, covering vertical arrangements in general?



Three respondents were strongly supportive, with one respondent somewhat supportive, of the principle of introducing a single block exemption in Guernsey, covering vertical arrangements in general. One respondent was strongly against this.

Four respondents provided further comment on the reasoning behind their answer².

Positive comments included:

- It was highlighted that a consistent approach with VABER, and the introduction of a single block exemption will go some way in retaining/attracting international business on island and providing increased certainty in the application of domestic competition legislation.
- The approach will help achieve increased legal certainty in this area and provide cost-effective compliance for businesses compared with the costs of making individual applications as and when required. It would also mean a consistent application of this area of competition law throughout the European Union (“EU”) and the Channel

¹ Questions 1-4 not included as these contained personal details and company information.

² One respondent also provided comments on wider competition issues these included suggestions on mergers and acquisitions. These comments will be considered but it was not felt appropriate to include them in this response document.

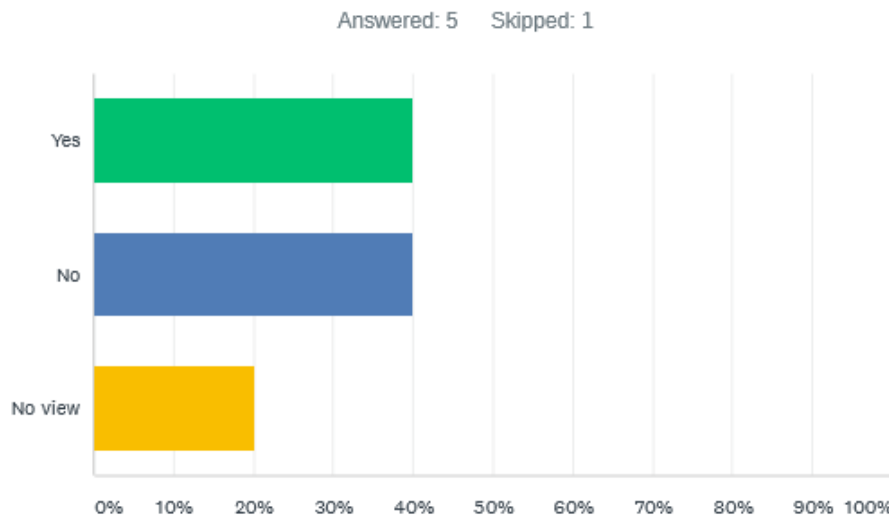
Islands (“CI”) (which is important in this particular area of competition law given the reliance the CI place on distribution networks between Europe and the CI).

- The approach would assist the Guernsey Competition Regulatory Authority (the “GCRA”) by relieving some of the administrative burden of considering individual applications on a case by case basis which would, with a block exemption in place, be exempt thus leaving more time for GCRA to consider and analyse more complex cases and continue to monitor changes in the local market requiring updates to the legislation/guidelines.
- Such an exemption would assist in addressing the majority of competition issues arising, thereby enabling both industry and the GCRA to focus on 'non-routine' issues.

Some negative comments included:

- Concern was raised that the recommendations were open to abuse, although further explanation was not provided.
- It was also noted that the consultation documentation did not provide specific verticals for exemption.

Question 6: Do you agree that the duration of the block exemption should be time limited as proposed?

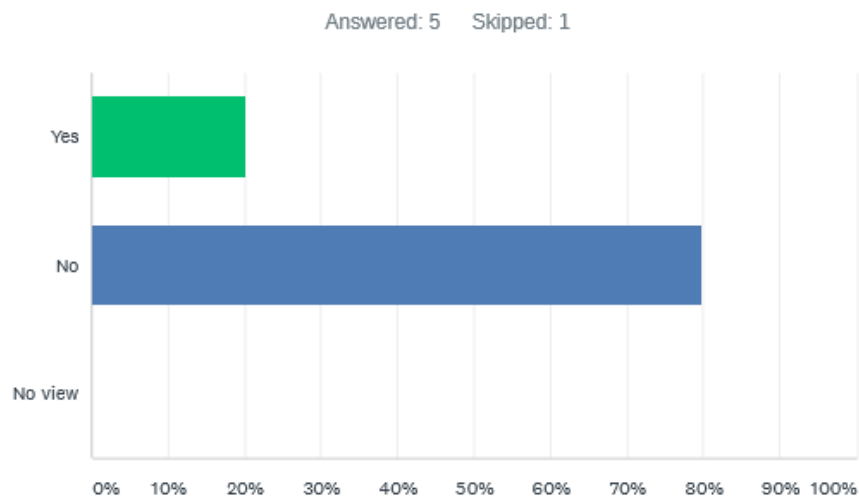


Five responses were received to question 6. The respondents were divided in their answers, with no majority agreement concerning the proposed duration of the block exemption.

Comments on this question included:

- One respondent commented that the GCRA’s recommendations in this regard seemed sensible.
- Another respondent noted that they disagreed with this proposal, and that the duration of the block exemption itself should not be time limited or prescribed under law. This was to avoid any issues or confusion arising from missing any prescribed deadlines for the renewal, extension or indeed termination of the block exemption. Instead it should be made clear from a policy perspective that the authorities are entitled to revisit, revise and update the legislation on an ongoing basis together with any accompanying guidelines (mainly to deal with any material changes in industry and market trends). There also needed to be a mechanism by which the legislation can be amended in line with the EU stance (where appropriate) should it change from time to time.
- The time period should not be set too short otherwise the benefit of certainty would be eroded.

Question 7: Do you agree that the block exemption should be limited to vertical agreements where both the supplier's and the buyer's market share are 30% or less?

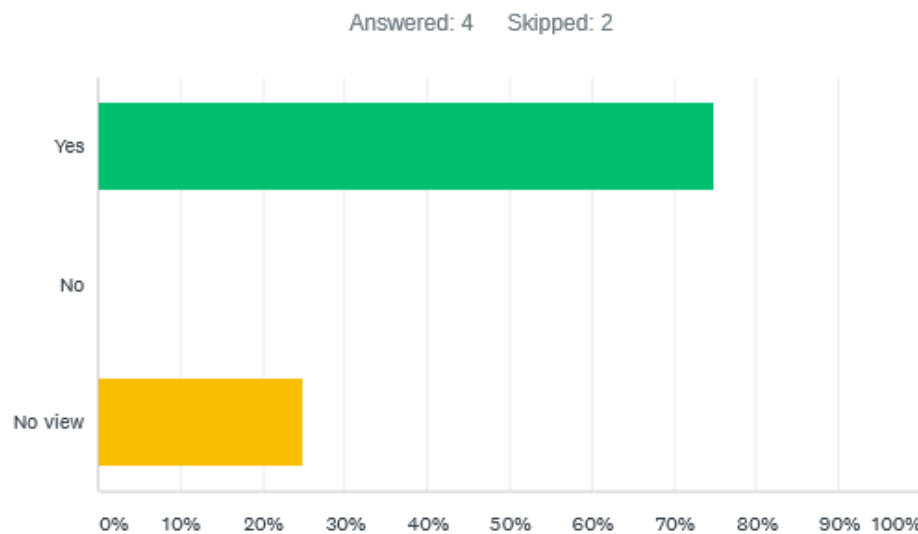


The majority of respondents, four in total, responded 'no' and disagreed that the block exemption should be limited to vertical agreements where both the supplier's and buyer's market share are 30% or less.

Comments on this question included:

- Uncertainty around the exact percentage share (when the applicability of the exemption was based on this) leaves a risk of litigation and 3rd party complaints.
- Market share should be at least 40%, so that more agreements rather than less could benefit from the block exemption, so long as there are no hard core restrictions in those agreements. Given that there are likely to be less "suppliers" and "buyers" operating in the CI overall, than in the EU as a whole, then it is likely their market shares in the CI will be higher in each case than an equivalent operation in the EU.
- Within the Guernsey marketplace, the percentage may be more appropriately set at a higher level than, for example, in the UK. This makes it more likely that there will be entities with a share higher than 30% (and therefore seeking exemptions or structuring around the limits). Even though in theory there may be less competition, in practice there is still a healthy environment which could be facilitated at, say, 40%.
- A lower percentage ensuring the inability to restrict competition may be acceptable.

Question 8: Do you agree that block exemptions should include hardcore restrictions?



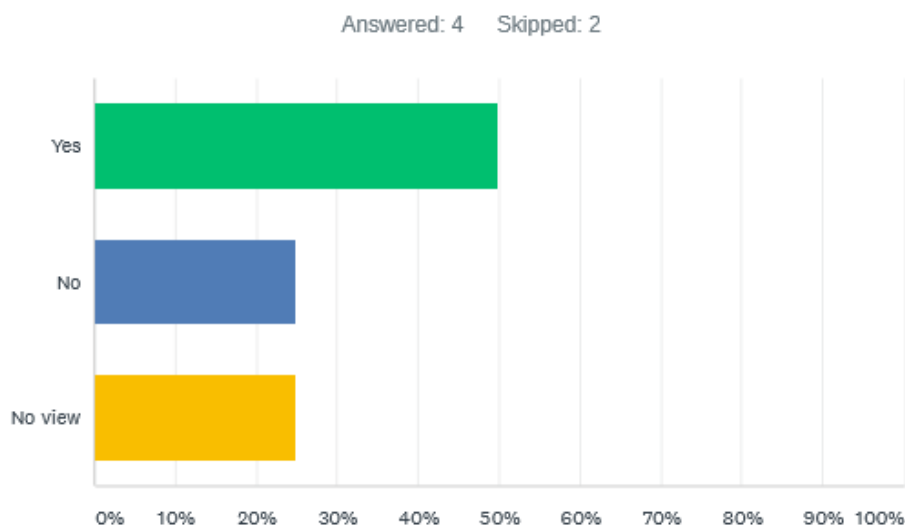
There was general agreement with the proposal that block exemptions should include hard-core restrictions. Any agreement containing one of these hard-core restrictions would not be entitled to benefit from the block exemption.

Comments included:

- Agreement with the proposal on the basis that this approach is consistent with that of VABER.
- It was noted that current discussion in the EU among stakeholders over whether some of the hard-core restrictions that are currently prohibited should continue to be exempted, or indeed whether the approach should be softened to some extent (e.g. online sales restrictions, retail price maintenance and dual pricing (in view of potential efficiencies)). Any hard-core restrictions should mirror those in the EU, so to the extent that the current hard core restrictions are revised in response to the EU consultation then the CI should be consistent in approach.
- In the employment context, it is generally advised that covenants of the proposed 5 years would be unenforceable by the courts and, even in a non-employment context, this seems rather a long period. Whilst Guernsey's market place generally enjoys healthy competition, such that a higher market share may be appropriate for an exemption (40% suggested), limitations on the length of non-compete strikes at a broad range of contractual arrangements. The proposed 5 year limit could be seen as the Committee/States endorsing (albeit indirectly) lengthy non-compete/restrictive covenants. These do arise in a number of business/professional contexts on Island, and can be particularly damaging in the small microcosm that Guernsey presents. Such provisions in contracts could also run the risk of being struck down by the courts as

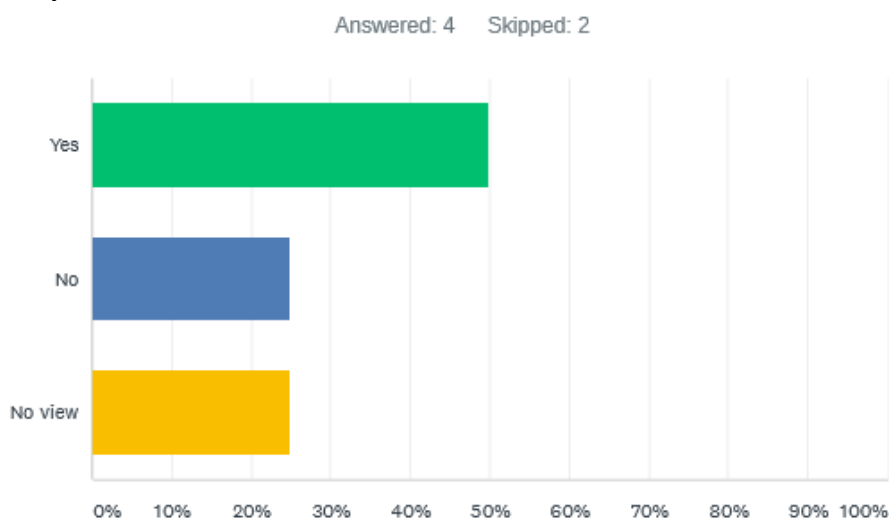
being unduly onerous restrictions and unjustifiable, except in very unusual cases. A shorter period would be appropriate, and/or clear wording to manage the risks noted.

Question 9: Do you agree with the hard-core restrictions proposed?



The hard-core restrictions proposed were conceptually the same as those set out in Article 4 of VABER.³ There were four responses to this question. Two respondents were in favour. Comments provided reiterated and reproduced the comments from the previous question.

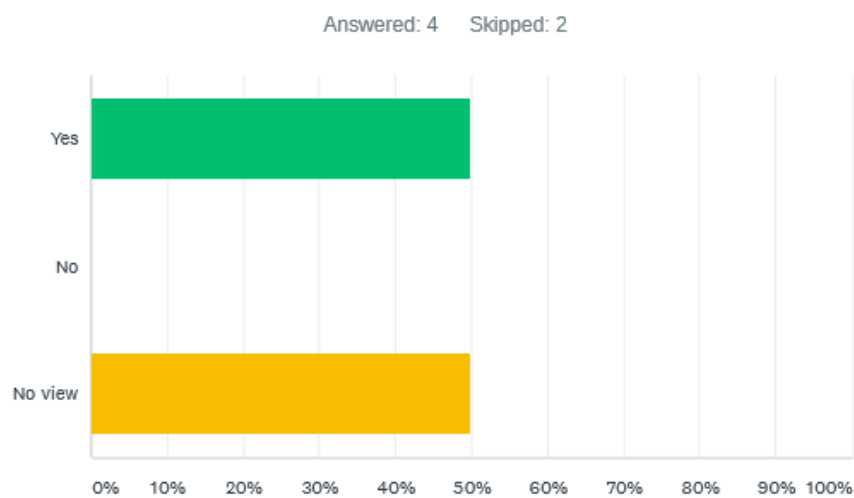
Question 10: Do you agree that non-compete obligations should only be able to benefit from the block exemption under the circumstances described in the consultation document?



³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&&from=EN>

Two respondents were in favour, while one response was against. The remaining three respondents either skipped or responded that they had no view. Reference was made to responses to the previous questions.

Question 11: Do you agree that block exemptions should include the same excluded restrictions as are contained in Article 5 of VABER?



Article 5 of VABER expressly excludes agreements that contain non-compete provisions from the ability to benefit from it⁴. There were only two responses, both agreed that block exemptions should include the same excluded restrictions as are contained in Article 5 of VABER. The remaining respondents either skipped or provided no view as an answer.

The comments on this question included:

- Agreement that this would achieve consistency with VABER.
- Reference to previous comments. The need to make adjustments to reflect Guernsey's particular circumstances.

Question 12: Please identify any other issues that you think the Committee should be aware of in developing policy proposals in respect of block exemptions:

Comments included:

- Similar comments to those already identified in this consultation response document.

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&&from=EN>

- Support and guidance would be useful, from the GCRA (including case law to refer to) on how to interpret and apply the block exemption provisions should they be adopted, given that (i) the application of the block exemption provisions will be new to the CI, and (ii) the suggestion from those who already benefit from it in the EU, is that there is a lack of clarity around some issues or lack of consistency in the application across member states/jurisdictions. The GCRA may also wish to consider doing some local workshops. There will need to be some thought given to retrospective benefit where there are undertakings in Guernsey who should have applied for an individual exemption between 2012 and the new law coming in (assuming it does) but didn't.

5. Conclusion

The purpose of the consultation was for the Committee to seek feedback on the proposal to introduce a general vertical block exemption, in Guernsey, in line with the European Commission's VABER.

The responses identified that there is support for introducing a block exemption, to exempt certain types of vertical arrangements. There was overall agreement that achieving a consistent approach with VABER would provide benefits to Guernsey in the form of legal certainty, as well as being more cost effective by reducing the administrative burden, on companies, which would otherwise have to apply to the competition authority for an individual exemption.

The results from this consultation have provided the Committee with an understanding of how industry views and wishes to progress with the potential introduction of a vertical arrangements block exemption.

6. Next steps

The Committee will use the findings of the consultation to develop and take forward policies in respect of the implementation of block exemptions.