



MEDIA RELEASE

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Competition Authority fines MSG £1.5 million for anti-competitive non-compete clauses

On 16 September 2021, the GCRA found that the Medical Specialist Group LLP (MSG) had infringed competition law in Guernsey by entering into non-compete restrictions with its consultants. Those restrictions prevented consultants from providing medical services in Guernsey for a period (between 18 months and 5 years) after leaving MSG (Non-Compete Restrictions). Following that decision, the GCRA has now decided to impose a financial penalty of just over £1.5 million on MSG for this infringement.

In this case, the basic penalty, which is calculated as a percentage of turnover and then multiplied by the number of years of the infringement, was just under £1.4 million.

However, the GCRA found that there were aggravating factors in this case. In the context of a settlement of private litigation, MSG sought to have the consultant who brought the Non-Compete Restrictions to the attention of the GCRA withdraw his complaint. It also required, as a condition of settlement, that its advocates be copied to all future correspondence between the GCRA and the complainant.

The GCRA considers that this conduct had the potential to obstruct its investigation. On that basis, it increased the amount of the fine by 10%, so that the final penalty in this case is £1,532,590 (see Notes to Editors).

The GCRA protects the interests of consumers and promotes trust in markets by promoting value and choice, supporting Government policy, and keeping the operation of markets and regulated companies under review. Effective competition is fundamental to the health of the economy and the perception of Guernsey as a well-regulated and modern jurisdiction.

Where the GCRA acts, it does so by following a clear set of principles and will be clear about the detriment caused by inaction. **ENDS**

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NOTES TO EDITORS

What is this case about?

This case is about the rights of ex-MSG consultants to work as medical practitioners in Guernsey after they leave MSG.

What happened?

MSG banned its ex-consultants from working as medical practitioners in Guernsey for between 18 months and 5 years after they left MSG. This clause applied even if the consultant wanted to move to a different specialism – for example, moving from paediatrics to general practice. It also prevented them from being indirectly involved in the provision of medical services in Guernsey – for example as a partner in a medical services business in Guernsey – for the same period.

What's the problem?

Free and fair competition between businesses usually leads to consumers getting better choice and best value for money. So Guernsey competition law says that, as a rule, businesses – which includes partnerships and self-employed consultants – have to decide for themselves whether and how they compete with each other. Because non-compete clauses like those used by MSG stop businesses from competing with each other, they are only allowed if they are absolutely necessary (objectively justifiable) or if the business can demonstrate to the GCRA that the pro-competitive effects of the clause (including the impact on consumers) outweigh its anti-competitive effects.

In this case, MSG was not able to provide any compelling evidence to show why, in the circumstances of this particular case, the clauses were absolutely necessary. This means that they are prohibited as they are likely to lead to harmful outcomes for competition and consumers in Guernsey. This might mean more limited choice for consumers, longer waiting times or higher prices.

How does the GCRA work out financial penalties?

When it works out financial penalties, the GCRA must follow a list of principles that are set out in Guernsey competition law. The principles apply both to the question of whether the business should be fined at all and to the amount of the fine. The GCRA also applies its own Guidelines and looks at how other competition authorities have approached similar cases. This enables it to make sure that its decisions are in line with common international standards.

In line with the law, its guidelines and having regard to international best practice, the GCRA takes a three-step approach.

First, it works out the basic penalty by using a percentage of the turnover of the business in the last year and multiplying it by the number of years the infringement lasted (up to a maximum of three). The percentage of turnover used will depend on how serious the infringement is.

In this case, the GCRA used 10% of MSG’s turnover for private medical services – which is the lowest possible starting point for a case like this one. Because the infringement had been going on for 8 years, a multiplier of 3 was applied.

Second, the GCRA considers whether there are any aggravating or mitigating factors. In this case, the GCRA found that MSG tried to obstruct its investigation. It did this by requiring first that the consultant who reported the non-compete clauses withdraw his complaint to the GCRA and second that MSG’s advocates be copied to any correspondence between that consultant and the GCRA. The GCRA found that this was an aggravating factor and so increased the penalty by 10%.

Third, the GCRA checks that the overall penalty does not exceed 10% of the turnover of the undertaking during the period of the contravention, up to a maximum period of three years.

Finally, in this case, the GCRA also conducted a “step back” exercise to make sure that the penalty was fair and reasonable in all the circumstances.

The full calculation is set out below:

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 £)

About the Guernsey Competition & Regulatory Authority:

The Guernsey Competition & Regulatory Authority (GCRA) (formerly the Office of Utility Regulation) was established under The Guernsey Competition & Regulatory Authority Ordinance, 2012. The GCRA

is responsible for regulating the telecoms, postal and electricity sectors and for the administration and enforcement of the Guernsey competition law since it came into force on 1 August 2012.