



Competition (Jersey) Law 2005 Guidelines

1. What your business needs to know: a general introduction

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Introduction

Many businesses, ranging from the single trader to the largest corporate group, will be affected by the Competition (Jersey) Law 2005. This Guideline provides a general introduction to the Law's main provisions. More detailed information is given in a series of other Guidelines prepared by the Jersey Competition Regulatory Authority (JCRA).

Throughout this Guideline the term '**undertaking**' denotes the full range of business entities, including sole traders, partnerships, companies, groups of companies and trade associations as well as applying to States Committees and other public bodies insofar as they are carrying on commercial activities. It should be noted that the term 'undertaking' does not, however, apply to private individuals, unless they are acting in a business capacity.

Disclaimer

This Guideline is not a substitute for the Law. Anyone with particular questions concerning the application of this Guideline or the Law to specific facts should seek legal advice. Proof that a person has failed to comply with this Guideline is not proof that a person failed to comply with the Law. The JCRA may, however, rely on non-compliance with the Guideline as evidence toward establishing an infringement of the Law. This Guideline remains subject to amendment or revocation by the JCRA.

What is the Competition (Jersey) Law 2005?

In general terms, the Competition Law outlaws any agreements, business practices and conduct which have a damaging effect on competition in Jersey or any part of it.

More specifically, the Law prohibits:

- arrangements between undertakings which hinder competition, or are intended to do so (Part 2 of the Law);
- the abuse by one or more undertakings of a dominant position in a market (Part 3 of the Law); and
- certain mergers and acquisitions, unless the prior approval of the JCRA is obtained (Part 4 of the Law).

Under the Law, the JCRA has the power to investigate undertakings suspected to be involved in a breach of any of these prohibitions and to impose financial penalties and other penalties where appropriate. In addition, third parties may be able to claim for damages, including punitive damages, in the Royal Court.

When do the prohibitions take effect?

The prohibitions against arrangements hindering competition and abuses of dominance in Parts 2 and 3 come into force on 1 November 2005. The requirement to seek JCRA approval for certain mergers and acquisitions, contained in Part 4, came into force on 1 May 2005.

The Law provides a six month transitional period, allowing undertakings that are parties to pre-existing anti-competitive arrangements to end such arrangements and bring their actions into accordance with the Law. This transitional period starts on 1 November 2005 and expires on 1 May 2006. This period, however, applies only to anti-competitive arrangements made prior to 1 November 2005. Arrangements concluded on or after this date enjoy no transitional period. There is no transitional period for abuses of dominance or notifiable mergers and acquisitions.

Who enforces the Law?

Responsibility for enforcing the Law lies with the JCRA, contact details of which are given at the end of this Guideline.

In addition, the Law allows for any person aggrieved by a violation to bring a civil action in the Royal Court for damages and other relief.

Part 2 of the Law ‘anti-competitive arrangements’

This Part of the Law applies to both informal and formal arrangements whether or not they are set out in writing. So, for example, an informal understanding where companies A, B and C agree to increase prices will be prohibited in the same way as a formal agreement between competitors to set prices.

Within this Guideline, the term ‘agreement’ should be understood to refer to any arrangements between or among undertakings, or decisions or recommendations by associations of undertakings or concerted practices, all of which can include informal and formal arrangements.

Although many different types of arrangement may be caught by the prohibition, the Law lists specific examples to which the prohibition is particularly applicable. These include:

- agreeing to fix purchase or selling prices or other trading conditions;
- agreeing to limit or control production, markets, technical development or investment;
- agreeing to share markets or supply sources;

- agreeing to apply different trading conditions to equivalent transactions, thereby placing some parties at a competitive disadvantage; and
- agreeing to make contracts subject to unrelated conditions.

‘Appreciable effect’ on competition

Those agreements that do not have any *appreciable effect on competition* will not be caught by the prohibition.

The Guideline on **Anti-Competitive Arrangements** sets out how this will be determined. Although there will be circumstances in which this is not the case, an agreement is unlikely to have an appreciable effect where the combined market share of the parties involved does not exceed 25 per cent. However, agreements to fix prices, impose minimum resale prices, or share markets generally will be seen as capable of having an appreciable effect even where the parties’ combined market share falls below 25 per cent. (The Guideline on **Market Definition** gives details of how market shares will be calculated). This also may be the case where an agreement is one of a series of similar agreements that have a cumulative effect on the market in question.

Exemptions

An agreement that would otherwise fall within the scope of the prohibition may be exempted if it satisfies certain criteria. Exemptions include:

- **Individual exemptions** that may be granted for individual agreements upon application by one or more parties;
- **Block exemptions** that apply automatically to certain categories of agreement.

Further details of the exemptions and exemption criteria are given in the Guideline on **Anti-Competitive Arrangements**.

Part 3 of the Law ‘abuse of a dominant position’

This Part of the Law covers the *abuse* by one or more undertakings of a dominant position in a market. There is a two-stage test to this prohibition: first, the undertaking must be in a dominant position, which will be largely determined by the extent to which it can act independently of its competitors and customers; and secondly, it must have abused that position. (Independence in this context means the ability to raise prices without losing customers to such an extent as to make the price rise unprofitable.)

In determining whether or not an undertaking is in a dominant position, the JCRA will look first at its market share, if market share information is available. The European

Court of Justice has stated that dominance can be presumed, in the absence of evidence to the contrary, if an undertaking has a market share of above 50 percent.¹ Although the JCRA will work on a case-by-case basis, as a general rule an undertaking is unlikely to be considered dominant if it has a market share of less than 40 per cent. But this does not exclude the possibility that an undertaking with a lower market share may be considered dominant if, for example, the structure of the market enables it to act independently of its competitors. In looking at market structure, the JCRA will also consider the number and size of existing competitors as well as the potential for new competitors to enter the market. The Guideline on **Abuse of a Dominant Position** provides further details.

The Law gives examples of specific types of conduct that are particularly likely to be considered as abuse of a dominant position. These include:

- imposing unfair purchase or selling prices;
- limiting production, markets or technical development to the prejudice of consumers;
- applying different trading conditions to equivalent transactions, thereby placing certain parties at a competitive disadvantage; and
- attaching unrelated supplementary conditions to contracts.

Further details are set out in the Guideline **Abuse of a Dominant Position**.

Part 4 of the Law ‘mergers and acquisitions’

Part 4 requires that certain mergers and acquisitions receive approval of the JCRA prior to consummation. Further details, including the specific categories of mergers and acquisitions that require clearance, are set out in the Guideline **Mergers and Acquisitions**.

Consequences of infringement

Where an undertaking is found to have breached either prohibition, the JCRA may order it to terminate or change the offending conduct. Undertakings found to have infringed either prohibition also may be liable for a financial penalty of up to 10 per cent of their turnover in Jersey during the period of the infringement, up to a maximum of three years.

Furthermore, the JCRA has the power to order interim measures which require an undertaking to refrain from engaging in suspected illegal activity whilst an investigation into the matter is taking place. The JCRA will exercise this power only when it considers it necessary to take urgent action to protect third parties from suffering serious, irreparable damage, or to protect the wider public interest.

¹ Case C62/86 AKZO Chemie BV v Commission [1993] 5CMLR 215.

The conduct of any member of staff can cause a business to be in breach of the Law. It is therefore important that senior management educate and train staff on the importance of compliance with the Law.

Procedures

Notification

Undertakings are under no obligation to notify the JCRA about agreements or conduct. They may, however, seek a decision from the JCRA exempting from the Part 2 prohibition an arrangement that would otherwise be in breach: the grounds for exemption are set out in Part 2 and are discussed in the JCRA's Guideline **Anti-Competitive Arrangements**. They may also seek the JCRA's guidance on whether a particular agreement or conduct is likely to infringe Part 2 or 3 of the Law.

Any agreement which does not have an appreciable effect on competition should normally not be notified to the JCRA.

Complaints

If you think that one of your competitors, customers, suppliers, or any other undertaking has breached either of the prohibitions, you will be able to take your complaint to the JCRA. Please see the JCRA Guideline **How to Make a Complaint** for further details.

Investigation process

The JCRA will carry out an initial assessment to see whether it has reasonable cause to suspect that a person is in breach of the Law and if it so satisfied, may open an investigation.

The Law gives the JCRA wide-ranging powers to investigate suspected infringements of the prohibitions. The JCRA can require the subject of an investigation or other parties to provide relevant information or documents. The JCRA, or authorised officials acting on behalf of the JCRA, can also enter premises and require the production of documents and information relevant to the investigation.

Furthermore, if the JCRA obtains a warrant from the Royal Court, the JCRA – or its officers/authorised officials – can enter the relevant business premises, using reasonable force where necessary, and search for documents. Normally originals of any relevant documents will be taken away but copies will be supplied to the business where required.

Obstruction of a JCRA investigation under the Law, such as knowingly giving the JCRA false information or destroying or concealing relevant documents, is a criminal offence potentially punishable by fines and/or imprisonment.

The JCRA may contact and require information from suppliers, customers, or competitors of the company or companies under investigation. If issues arise during the investigation that may lead to further action being taken by the JCRA, the party being investigated will be given the opportunity to respond to these issues.

Infringement and exemption decisions

At the end of an investigation the party being investigated will be advised of the outcome of the investigation. If the JCRA considers that the agreement or conduct in question infringes one of the prohibitions, the undertakings involved will be informed of the case against them and given the opportunity to respond. If an infringement decision is subsequently taken, it will be published. If, following an application for exemption, the JCRA grants the exemption, it will publish the Decision.

Other consequences

Those parts of any agreement which are found to infringe Part 2 of the Law are null and void and therefore cannot be enforced.

Financial penalties of up to a maximum of 10 per cent of the undertaking's turnover in Jersey during the period of the infringement (up to three previous years) may be imposed for an infringement of Part 2 of the Law.

In addition, third parties who consider they have been harmed as a result of any unlawful agreement, practice, or conduct may have a claim for damages, including punitive damages, in the Royal Court.

Appeals

A decision by the JCRA that a person is in breach of the Law, or the imposition by the JCRA of a penalty, is subject to appeal to the Royal Court within 28 days.

Where can I get further information?

Information on the Law is given in a series of other Guidelines published by the JCRA. To obtain copies of the other Guidelines mentioned, please telephone the JCRA on 01534 514990 or e-mail: enquiries@jcra.je

To discuss any matter directly relating to the Law itself, please contact:

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