



Competition (Jersey) Law 2005 Guidelines

3. Cartels

Contents

1.	Introduction	3
	Disclaimer	3
2.	Cartels	4
	What is a cartel?	4
	Why should cartels be broken up?	4
	How can purchasers spot a cartel?	4
	Where are cartels found?	5
3.	Bid Rigging	5
	What is bid rigging?	5
	What are the signs of bid rigging?	6
	How can consumers / purchasers tackle bid rigging?	6
4.	Taking Action	7
	What else can purchasers / consumers do to help tackle cartels?	7
	What should purchasers / consumers do if they have suspicions?	7
	JCRA leniency policy	7
	What can the JCRA do?	7
	Can my identity be protected?	8
	What action can the JCRA take against cartels?	8

1. INTRODUCTION

Part 2 of the Competition (Jersey) Law 2005 (the Law) prohibits arrangements between undertakings¹ that have a damaging effect on competition in Jersey. Arrangements include decisions by associations of undertakings and concerted practices whose object or effect is to hinder competition. The Law introduces wide-ranging powers of investigation and the ability to impose financial penalties on any undertaking found intentionally or negligently to have infringed the Law.

Cartels are a particularly damaging form of anti-competitive activity. Their purpose is to increase prices and as a result they directly affect the purchasers of the goods or services concerned, whether businesses or private individuals. They also have a damaging effect on the wider economy as they remove the incentive for their members to operate efficiently. The financial penalties imposed on participants in cartels are almost invariably very high. Cartels are regarded so seriously that in some jurisdictions they are prosecuted criminally. This is not the case, at least at this stage, in Jersey, although it may be an option for the future if the existing sanctions under the Law – already potentially severe – do not prove to be an adequate deterrent.

Detecting cartels and taking action against their members is one of the JCRA's top enforcement priorities under the Law. However, as cartels often operate secretly, the JCRA may have to rely heavily on information provided by others, notably the buyers of the goods or services concerned, in its efforts to stamp out cartels. This means that purchasers in the public and private sector have a particularly important role to play in the detection of cartels.

This Guideline is designed to help purchasers identify cartel activity and encourage them to bring their suspicions to the attention of the JCRA. It also highlights the JCRA's leniency policy, which may provide either total or partial immunity from penalties for cartel participants that report their conduct to the JCRA. More detailed information on the Law can be found on the JCRA's web site www.jcra.je, or by getting in contact with the JCRA².

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

¹ The term undertaking includes not only companies, but the full range of business enterprises including sole traders, partnerships, trade associations and non-profit organisations. It also includes States Committees and other public bodies, to the extent they are carrying on commercial activities. The JCRA Guideline on **Anti-competitive Arrangements** provides additional guidance on the definition of an undertaking.

² Jersey Competition Regulatory Authority, 6th floor Union House, Union Street, JE2 3RF. Tel. 514990. Fax 514991

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.

1. CARTELS

What is a cartel?

In its simplest terms, a cartel is an agreement between or among undertakings not to compete with each other. The agreement is usually verbal. Typically, cartel members may agree on:

- output levels;
- wholesale or retail prices;
- discounts;
- credit terms;
- which customers they will supply;
- which areas they will supply; or
- who should win a contract (known as ‘bid rigging’).

In some cartels several of these elements may be present.

Why should cartels be broken up?

Cartels allow undertakings to achieve greater profits for less effort. For the purchasers of their goods or services this means:

- higher prices;
- poorer quality; or
- less or no choice.

The ultimate consumer becomes the main sufferer from cartel agreements, and in the long term the economy suffers, for example through higher inflation.

How can purchasers spot a cartel?

There are a number of signs that *may* indicate that a cartel is operating. Some examples are where suppliers:

- raise prices by the same amount and at around the same time;
- offer the same discounts or have identical discount structures;
- quote or charge identical or very similar prices;
- use give-away terms or phrases, such as:
 - the industry has decided that margins should be increased;
 - we have agreed not to supply in that area; or
 - our competitors will not quote a different price.

These examples are non-exhaustive and the presence of these signs does not necessarily mean that a cartel is operating. Some, such as simultaneous price changes or similar prices, can be perfectly consistent with normal competitive responses in the market place. A purchaser should, however, be particularly suspicious where several of the signs are present.

Where are cartels found?

Cartels can occur in almost any industry and can involve goods and services at the manufacturing, distribution or retail level. Some sectors are more susceptible to cartels than others because of their structure or the way in which they operate, for example, where:

- there are few competitors;
- the products have similar characteristics, leaving little scope for competition on quality or service;
- communication channels between competitors are already established; or
- the industry is suffering from excess capacity or there is a general recession.

The fact that these conditions are not present does not rule out the possibility that a cartel is operating. Conversely, the fact that an industry shows some or all of these characteristics does not automatically mean that some form of cartel is operating, but purchasers should at least be alert to the possibility.

2. BID RIGGING

What is bid rigging?

Bid rigging is a form of cartel that may arise when contracts are awarded by competitive tender. Here members of the cartel collude with each other on who should win a particular contract. The possibility of bid rigging will be particularly relevant to public

sector purchasers, given their legal obligations to award certain contracts by competitive tender.

What are the signs of bid rigging?

Although bid rigging operations are often very sophisticated in order to avoid detection, there are certain signs that purchasers can look out for, particularly where contracts are awarded on a regular basis. Some signs might consist of:

- do certain suppliers unexpectedly decline an invitation to bid?
- is there an obvious rotation of successful bidders?
- is there an unusually high margin between the winning and unsuccessful bids?
- do all bid prices drop when a potential new bidder comes on the scene (i.e. who is not a member of the cartel)?
- is the same supplier the successful bidder on several successive occasions in a particular area or for a particular type of contract?

How can consumers/purchasers tackle bid rigging?

There are certain steps that purchasers can take to hamper the success of bid rigging operations or to reduce the likelihood that they will occur. For example:

- make the criteria and qualifications of any bid as broad as possible, basically casting a wider net, so that they can be met by the widest range of suppliers;
- always shop around for suppliers when inviting bids;
- ask for bids to be broken down into as much detail as possible;
- keep records of bids for comparison purposes;
- insist that main contractors assign sub-contractors through a competitive process;
- seek information from bidders about their associated companies and subsidiaries; and/or
- obtain a signed declaration of non-collusion from each bidder and make this a term of the contract.

3. TAKING ACTION

What else can purchasers/consumers do to help tackle cartels?

The best defence against secret cartels is to be alert to the fact that they may exist and to operate an effective buying policy that takes this into account. Purchasers/consumers may find it helpful to make clear in their dealings with suppliers that they are well aware of the temptations of collusive behaviour and will bring any suspicions of such activity to the attention of the JCRA under the Law.

What should purchasers/consumers do if they have suspicions?

If you suspect that a cartel is operating, you should contact the JCRA. Our e-mail address is: enquiries@jcra.je. Our telephone number is 01534 514990. The more information you can provide, the better equipped the JCRA will be to deal with your complaint.

Independently of any JCRA action, third parties that consider they have been harmed as a result of an infringement may seek a remedy, including punitive damages, from the Royal Court.

JCRA leniency policy

The JCRA will grant immunity from JCRA imposed financial penalties to the first person involved in a cartel to come forward on or after 1 November 2005 with information about the cartel, and cooperate fully with the JCRA throughout its investigation and any subsequent proceedings.

If a person is not the first person to approach the JCRA about a cartel or has approached after the JCRA has already commenced an investigation into the cartel, this may result in a significant reduction of the financial penalties that the JCRA might impose against the person.

Additional information about the JCRA's leniency policy can be found on its website www.jcra.je.

What can the JCRA do?

The JCRA has the necessary powers to investigate complaints of anti-competitive activity such as cartels if it has reasonable grounds for suspecting that either of the prohibitions in the Law has been infringed. If the information you provide is sufficient to give the JCRA

such grounds, it may launch an investigation. If the information is not sufficient, the JCRA might use it as the basis for informal enquiries.

Can my identity be protected?

In order to investigate a complaint fully, the JCRA often needs to divulge the information it has obtained and its source to the undertakings being investigated. It may, however, be possible to protect your identity if there is a good reason why this is necessary. If you are concerned about the disclosure of your identity, you should raise this at the earliest opportunity. The JCRA will discuss the matter fully with you.

What action can the JCRA take against cartels?

Cartels infringe Article 8 of the Law. The JCRA has the power to fine the undertakings that have committed an infringement, in addition to imposing other remedies. Reporting your suspicions or providing information to the JCRA can therefore have a very real effect: not only will members of the cartel be penalised, but a very strong deterrent message will be sent to other undertakings that may be contemplating cartel activity.