



10. Guideline on Investigation Procedures

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I. Introduction

This Guideline summarizes the JCRA's procedures used to investigate potential infringements of the Competition (Jersey) Law 2005 (the 'Competition Law'), the Telecommunications (Jersey) Law 2002 (the 'Telecommunications Law'), and the Postal Services (Jersey) Law 2004 (the 'Postal Law'). The JCRA's procedures with respect to potential infringements of the Competition Law have been discussed in previous guidelines,¹ and form the central basis of this current Guideline. The procedures the JCRA follows with respect to potential infringements of either the Telecommunications Law or Postal Law (including suspected infringements of licence conditions) are analogous to those followed with respect to the Competition Law. This Guideline attempts to highlight, however, where distinctions between these laws exist.

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.

II. The Initiation of an Investigation – Reasonable Cause to Suspect

The JCRA has no power to conduct 'spot-checks' to verify compliance with the Competition Law. It may only initiate a formal investigation where it has reasonable cause to suspect an infringement. Specifically, Article 26 of the Competition Law states that the JCRA may conduct an investigation if it has reasonable cause to suspect that one or more of the following circumstances exist:

- a party is in breach of Article 8(1) (the Competition Law's prohibition on anti-competitive arrangements);
- a party is in breach of Article 16(1) (the Competition Law's prohibition on abuses of dominance);
- a party is in breach of, or intends to breach, Article 20(1) (the Competition Law's prohibition on executing mergers and acquisitions without JCRA approval);² or

¹ See Competition (Jersey) Law 2005 Guideline, What your business needs to know: a general introduction, pg 7-8; Competition (Jersey) Law 2005 Guideline, How to Make a Complaint, pg 2; Competition (Jersey) Law 2005 Guideline, Application for Guidance & Exemption, pg 7.

² Note that these factors concern actual or intended breaches of Article 20(1), and not the merger review process the JCRA conducts upon receipt of a merger notification. The process the JCRA follows with respect to mergers notified to it is discussed in the JCRA's Guideline on Mergers and Acquisitions.

- a party is in breach of a direction issued by the JCRA under Articles 36, 27, 38, or 40.³

Whether a reasonable cause to suspect exists will depend on the JCRA's assessment of the information available. Information on potential infringements may come from complaints received by the JCRA,⁴ information the JCRA receives from leniency applicants concerning possible cartels,⁵ or information that otherwise becomes known to the JCRA, such as from the media or other public sources. Upon receipt of such information, the JCRA conducts a preliminary assessment to determine if the information provided, if proven, may result in a finding of a breach. Sources of information during a preliminary assessment can include any party or parties providing information to the JCRA, and public sources. Any information provided to the JCRA during this process is done on a strictly voluntary basis. The JCRA normally would expect to complete a preliminary assessment within two weeks, depending on the availability of information and the matter's complexity and apparent urgency.

Neither the Telecommunications Law nor Postal Law expressly incorporates the Competition Law's reasonable cause to suspect standard. As a matter of practice, however, the JCRA follows this standard in deciding whether to initiate investigations of potential infringements of either of these laws, including potential contraventions of licence requirements.

Under the Competition Law, Telecommunications Law, or Postal Law, the determination of whether a reasonable cause to suspect exists and, if so, if and when to commence a formal investigation, is within the JCRA's sole responsibility. Even if a reasonable cause to suspect exists, the JCRA may still decide either to not commence a formal investigation, or delay its initiation. The JCRA's decision may depend on considerations such as the gravity of the conduct involved; the harm or potential harm caused to Jersey's economy, consumers, or businesses; whether the dispute is more applicable to private resolution among the parties involved; the matter's apparent urgency; and other activities the JCRA currently is undertaking.

III. Formal Investigations

Should the JCRA decide to investigate a matter on the basis of a reasonable cause to suspect, it opens a formal investigation. Normally, the JCRA will contact the party or parties under investigation to inform them of the investigation and the basis for it (i.e., what conduct is suspected to have infringed the law). This may not be so, however, if the JCRA thinks a serious risk exists that the parties would conceal, remove, tamper with, or destroy potentially relevant evidence, in which case the JCRA may proceed by executing

³ In addition, the Competition Law allows the JCRA to commence a formal investigation with respect to a request made under Article 6(4) of the Competition Regulatory Authority (Jersey) Law 2001 by the Economic Development Department for a report, advice, or assistance on competition matters.

⁴ See Competition (Jersey) Law 2005 Guideline, How to Make a Complaint.

⁵ See JCRA Leniency Policy Under the Competition (Jersey) Law 2005.

one or more search warrants, as discussed below. This may be the case, in particular, with suspected cartels that infringe Article 8(1) of the Competition Law.⁶

During a formal investigation, the JCRA will collect information that appears necessary to determine if an infringement exists. In addition to public sources, sources of information can include the parties under investigation, competitors, customers, employees, suppliers, potential entrants into the affected markets, industry associations, and, perhaps, relevant States departments. Individuals or companies that initially provided information to the JCRA, such as complainants or leniency applicants, also can continue to be potential information sources. Subject to the confidentiality restrictions discussed below, the JCRA normally would expect to gain information from as many relevant sources as possible in an attempt to gain a complete picture of the conduct in question.

Part 5 of the Competition Law lists the tools available to the JCRA to collect information during a formal investigation. The most commonly used tool is a written request for documents and/or information under Article 27. The JCRA may send such a request to the parties under investigation or other parties that appear to have relevant information or documents. Such requests may require the recipients to provide the JCRA with documents or information, with the latter either being in writing or in person. The JCRA may issue multiple Article 27 requests, and more than one to a single party, if required to collect the information necessary for the investigation. Compliance with such requests is mandatory within the time specified.⁷ The Telecommunications Law and Postal Laws (as well as licences granted under those laws) provide the JCRA with similar powers.⁸

Part 5 of the Competition Law provides the JCRA with other investigation tools. These are the ability to obtain information stored electronically (Article 28), the ability to enter premises (Article 29), and the ability to enter and search premises under a warrant (Article 30). The JCRA's execution of a search warrant under Article 30 most likely would be in circumstances involving an alleged cartel where a danger exists that the parties may alter, tamper with, or destroy evidence upon notification of an investigation. The JCRA's powers under Article 30 include the seizure and retention of original copies of documents that appear relevant to the investigation. If documents are retained during the search, the JCRA must supply a list of these documents to the party from which they were obtained. In addition, Article 31(2) provides that a party that reasonably requires a retained document for its business and requests it must be provided with a copy of the document as soon as reasonably practicable.⁹

Once the JCRA has commenced a formal investigation, it will endeavour to conclude it as soon as possible. Given the range of potential matters under the Competition Law and

⁶ See Competition (Jersey) Law 2005 Guideline, Cartels pg 7-8.

⁷ In setting the appropriate response time, the JCRA will consider the amount and the complexity of the information and/or documents required, and also may consider requests for extensions.

⁸ See Postal Law Article 77, Telecommunications Law Article 23.

⁹ Neither the Telecommunications Law nor the Postal Law has provisions analogous to Articles 28-30 of the Competition Law.

their varying complexity, it is not possible to provide general guidance on the time the JCRA expects to take to conclude its investigations. With respect to any particular investigation it commences, however, the JCRA will endeavour to keep the party or parties subject to the investigation informed of its progress and the potential time-frame for completion.

During a formal investigation, the JCRA may only require the provision of documents and/or information that it believes are necessary for the investigation, as at the date when the information is either requested or collected.

The Competition Law permits the JCRA to order interim measures during a formal investigation if it considers appropriate as a matter of urgency to prevent serious, irreparable damage to a person or class of persons, or otherwise to protect the public interest. Prior to issuing a direction containing interim measures, the JCRA gives the party subject to such direction written notice and an opportunity to respond. Neither the Postal Law nor the Telecommunications Law contains an interim measure provision.

IV. Concluding a Formal Investigation and Reaching a Final Decision

If, as a result of the investigation, the JCRA determines that the information collected supports the conclusion that an infringement exists, it will draft a proposed decision. The JCRA will give the party or parties against which the proposed decision is taken written notice of the decision and a reasonable period to respond (specified in the notice). Any response provided must be in writing. In addition, the party or parties subject to the investigation may request a meeting with the JCRA during the response period. To maximize the utility of such meetings, parties are encouraged to submit written responses to the JCRA at least one full day in advance.

After this response period, the JCRA approves the final decision (subject to changes, if any, made during the response period) or it may decide to not go ahead with a final decision. A copy of the final decision will be provided to the party against which it is taken. The JCRA may also publicize notice of the decision, subject to the confidentiality considerations discussed below. After its receipt of the decision, the party will be given an opportunity to redact confidential information contained therein. After the party has had this opportunity, the JCRA will publish a public version of the decision on its website.

Alternatively, if based on the evidence collected the JCRA determines that an infringement has not occurred, it can end the investigation. The JCRA will inform the party or parties subject to the investigation that the matter has been closed, and confirm in writing if requested. Subject to the confidentiality considerations discussed below, the JCRA may also issue a public statement concerning the investigation's closure, should it consider the issuance of a statement to be in the public interest. The fact that the JCRA has ended an investigation does not prejudice its ability to re-open the matter, should additional information be received that provides a reasonable cause to suspect an infringement.

In addition to decisions, the JCRA can issue written directions and impose financial penalties. Directions are issued if necessary to bring the infringing conduct to an end. Financial penalties are possible if the JCRA is satisfied that the infringement was committed intentionally, negligently, or recklessly. The Competition Law limits financial penalties to 10% of a party's turnover during the period of the breach, for a maximum period of three years.

The party or parties subject to a JCRA decision, direction, or financial penalty under the Competition Law may resort to the appeal procedure set forth in Article 53.

The JCRA also may issue written directions under the Telecommunications Law or Postal Law, specifically to direct a licensee to comply with a licence condition with which it is found in breach.¹⁰ In addition, the JCRA may revoke a licence issued under either of these laws if a licensee fails to comply with a direction.¹¹ Unlike the Competition Law, however, the Telecommunication and Postal Laws require public consultation before the JCRA issues a direction ordering a licensee to comply with a licence condition, or before revoking a licence.¹² These laws contain their own appeal provisions.¹³

V. Commitments in Lieu of Formal Investigation or Enforcement Action

Given the potentially onerous requirements of a formal investigation or enforcement action, parties may wish to offer to the JCRA a commitment to take certain pre-emptive or remedial steps as an alternative to investigation and/or enforcement. The JCRA is willing to consider, and in appropriate cases accept, such commitments. Discussions on the scope for such commitments may be initiated by the party or parties concerned, or by the JCRA.

VI. Confidentiality

Article 44 of the Competition Law requires the JCRA to not disclose information it receives relating to a party's business or affairs. This does not apply to information that already was public at the time of its disclosure, or information for which consent to disclosure is received (by the party providing the information and, if different, by the party about which it relates). Thus, while the JCRA's investigations normally will be confidential, the JCRA may be released from the confidentiality restrictions where the matter is already in the public domain, or has been placed in the public domain by the party or parties being investigated. Additionally, Article 44 does not prohibit the JCRA

¹⁰ See Postal Law Article 20, Telecommunications Law Article 19.

¹¹ See Postal Law Article 21, Telecommunications Law Article 20.

¹² See Postal Law Article 23, Telecommunications Law Article 10.

¹³ See Postal Law Article 25, Telecommunications Law Article 12.

from releasing information it receives in summary form, such that individualized information of a specific party may not be ascertained.

Article 45 of the Competition Law permits the JCRA to disclose information it receives in particular circumstances. These circumstances include the furtherance of a JCRA investigation under the Competition Law. Before doing so, however, the Competition Law requires that the JCRA satisfy itself that the recipient will not further disclose the information, or use it for any purpose other than assisting the JCRA with the investigation.

In the interests of transparency, the JCRA publishes public versions of its decisions and directions. Public versions of such documents have confidential information redacted. The JCRA will consult with the party or parties subject to the decision prior to publication, for the purpose of allowing them the opportunity to redact confidential information. Failure to cooperate with the JCRA during this process can be deemed as consent to public disclosure of the entire decision.

The Postal and Telecommunications Laws also contain confidentiality protections similar to Article 44 of the Competition Law.¹⁴ The JCRA is permitted to disclose information for the purpose of facilitating the performance of its functions under these laws.

VII. Consequences of Obstructing a JCRA Investigation

The Competition Law contains severe penalties for obstructing a JCRA investigation. For example, under Article 33 it is a criminal offence for any person to falsify, conceal, destroy or otherwise dispose of any document or information potentially relevant to this Request or the JCRA's investigation. Failure to respond to a mandatory request also is a criminal offence. Under Article 55 it is a criminal offence to provide the JCRA with materially false, misleading, or incomplete information. A person committing such offences is potentially liable for penalties that include imprisonment of up to 5 years, payment of a fine, or both. The JCRA must report such offences to the Attorney General for prosecution. Both the Telecommunications Law and Postal Law also contain criminal sanctions for obstructing a JCRA investigation or providing the JCRA with materially false or misleading information.¹⁵

VIII. Conduct that may Infringe the Competition Law and Licence Conditions under the Postal Law or Telecommunications Law

Certain conduct may infringe both the Competition Law and conditions in licences issued by the JCRA under the Postal Law or Telecommunications Law. For example, licences issued by the JCRA under either of these laws may contain conditions that prohibit a licensee with significant market power from abusing a dominant position in a relevant

¹⁴ See Postal Law Article 75, Telecommunications Law Article 61.

¹⁵ See Postal Law Article 71, 77, Telecommunications Law Articles 23, 54.

market, which is similar to the prohibition against abuses of dominance set forth in Article 16(1) of the Competition Law.

Where information provided to the JCRA raises a reasonable cause to suspect that the conduct in question may violate both the Competition Law and licence conditions, the JCRA normally will conduct the investigation using the Competition Law's information gathering powers, discussed above. A finding of an infringement can lead to a decision, direction, and financial penalties under the Competition Law. In addition, an infringement also can lead the JCRA to find a party in contravention with licence conditions, and serve as the basis for one or more directions under the Telecommunications Law or Postal Law. Subsequent non-compliance with directions issued under either of these laws can provide grounds for licence revocation.

IX. Voluntary Requests for Assistance

Thus far, this Guideline has discussed the formal powers to compel the production of information and/or documents under the Competition Law, Telecommunications Law, or Postal Law. These formal powers, however, do not preclude the JCRA from requesting the voluntary production of information and/or documents. Voluntary requests may be particularly useful to monitor or measure the impact of past decisions and directions on markets or competition. Such enquiries may be oral or in writing, and may be used in addition to the use of mandatory powers. The JCRA cannot compel a response to a voluntary request, although responses are encouraged. The restrictions on disclosure described above apply to information supplied voluntarily, as do the prohibitions on supplying materially false or misleading information.

X. Protection from Self-Incrimination

The JCRA may require a party to provide specific documents or information, but cannot require the provision of answers that might involve an admission of the existence of a law infringement, which the JCRA has a duty to prove. The JCRA may, however, request documents or information concerning facts, such as whether a person attended a particular meeting, or whether a particular communication took place.

XI. Legal Professional Privilege

The JCRA may not require the disclosure of information or documents that would be protected from disclosure in the Royal Court on the grounds of legal professional privilege. In general, this privilege covers communications in confidence between a client and attorney made for the purpose of giving or seeking legal advice.

XII. Cooperation with Other Competition Enforcement Agencies

Certain conduct investigated in Jersey may be subject to investigation by competition authorities in other jurisdictions, such as the UK, France, Ireland or the European Union. The Competition Law allows the JCRA to cooperate with other competition authorities on matters that affect competition in more than one country.