



Channel Islands Competition Laws
CICRA Guideline 10 – Investigation Procedures

Issued December 2012

What this guideline is about

This guideline is one in a series of publications designed to inform businesses and consumers about how we, the Channel Islands Competition and Regulatory Authorities (CICRA), apply competition laws in the Channel Islands. Details of how to obtain copies, are at the back of this guideline.

The purpose of this guideline is to explain to consumers, businesses and their advisers the procedures that CICRA uses to investigate potential infringements of the Channel Islands' competition laws or sector-specific legislation that we administer.

This guideline should not be relied on as a substitute for the laws themselves. If you have any doubts about your position under the laws, you should seek legal advice.

Contents

	Page
1 Introduction	4
2 Initiating an Investigation	7
3 Formal Investigations	9
4 Concluding a Formal Investigation	12
5 Confidentiality	15
6 Consequences of obstructing an Investigation	16
7 Conduct that may infringe competition laws and licence conditions	17
8 Voluntary Requests for Assistance	18
9 Protection from Self-Incrimination	18
10 Legal Professional Privilege	19
11 Cooperation with Other Competition Enforcement Agencies	19
12 How can I find out more?	20

1 Introduction

Why is competition important?

Open and vigorous competition is good for consumers because it can result in lower prices, new products of a better quality and more choice. It is also good for fair-dealing businesses, which flourish when markets are competitive.

Competition laws in the Channel Islands

In the Channel Islands, the *Competition (Jersey) Law 2005* and *The Competition (Guernsey) Ordinance, 2012*, prohibit anti-competitive behaviour arising from anti-competitive agreements between businesses or the abuse of a dominant position in a market. They also require certain mergers and acquisitions to be notified to CICRA for approval.

Sector-Specific Legislation

In Jersey, CICRA is responsible for administering and enforcing the *Postal Services (Jersey) Law 2004* and the *Telecommunications (Jersey) Law 2002*, and associated Directions issued by the States of Jersey.

In Guernsey, we are responsible for administering and enforcing *The Post Office (Bailiwick of Guernsey) Law, 2001*, *The Telecommunications (Bailiwick of Guernsey) Law, 2001* and *The Electricity (Guernsey) Law, 2001* and associated secondary legislation, including Directions issued by the States of Deliberation in Guernsey.

In this guideline, this legislation is jointly referred to as 'Sector-Specific Legislation'.

What is CICRA?

The Jersey Competition Regulatory Authority (JCRA) and the Guernsey Competition and Regulatory Authority (GCRA) co-ordinate their activities with respect to competition law enforcement in the Channel Islands. For the purpose of this document, the JCRA and the GCRA are together referred to as CICRA, and all references in this document to CICRA should therefore be read as references to each of the JCRA and the GCRA, unless the context otherwise requires.

What powers does CICRA have?

Through the JCRA and GCRA, CICRA has a wide range of powers to investigate businesses suspected of breaching the law. We can order that offending agreements of conduct be stopped and levy financial penalties on businesses and individuals for the breach.

What types of organisation are considered a ‘business’?

Throughout this guideline, we refer to a ‘business’. This term (also referred to as an ‘undertaking’ in the respective laws) means any entity engaged in economic activity, irrespective of its legal status, including companies, partners, cooperatives, States’ departments and individuals operating as sole traders.

A Note on European Union (EU) Competition Law

The competition laws in Guernsey and Jersey are modelled on the competition provisions in the Treaty on the Functioning of the EU. The Channel Islands' legislation places certain obligations on CICRA and the Royal Court in each island when applying the competition laws:

- In Jersey, Article 60 of the *Competition (Jersey) Law 2005* provides that, so far as possible, questions arising in relation to competition must be dealt with in a manner that is consistent with the treatment of corresponding questions arising under EU competition law; and
- In Guernsey, Section 54 of *The Competition (Guernsey) Ordinance, 2012* provides that CICRA and the Royal Court must take into account the principles laid down by and any relevant decisions of the European courts in respect of corresponding questions arising under EU competition law.

As noted above, CICRA must endeavour to ensure that, as far as possible, competition matters arising in the Channel Islands are dealt with in a manner consistent with – or, at least, that takes account of – the treatment of corresponding questions under EU competition law. Relevant sources include judgments of the European Court of Justice or General Court, decisions taken and guidance published by the European Commission, and interpretations of EU competition law by courts and competition authorities in the EU Member States. Article 60 and Section 54, however, do not prevent us from departing from EU precedents where this is appropriate in light of the particular circumstances of the Channel Islands.

2 Initiating an Investigation

CICRA has no power to conduct ‘spot-checks’ to verify compliance with the competition laws. We may only initiate a formal investigation if we have ‘reasonable cause to suspect’ that one or more of the following circumstances exist:

- a business has breached, or intends to breach, the law by entering into an anti-competitive arrangement;
- a business has breached, or intends to breach, the law by abusing a dominant position;
- a business is in breach of, or intends to breach, the law by executing a notifiable merger or acquisition without our approval;
- a business has breached, or intends to breach, a direction we have issued under the laws; or
- if the Minister for Economic Development requests a report, advice or assistance on competition matters under the provisions of the *Competition Regulatory Authority (Jersey) Law 2001*.

Whether a reasonable cause to suspect exists will depend on our assessment of the information available. Information on potential infringements may come from complaints we receive, information we receive from leniency applicants concerning possible cartels, or information that otherwise becomes known to us, such as from the media or other public sources.

For more information see CICRA Guideline 8 – Complaints, CICRA Guideline 3 – Cartels and the CICRA Leniency Policy.

Upon receipt of such information, we conduct a preliminary assessment to determine the likelihood of finding a breach of the law. Sources of information during a preliminary assessment can include any party or parties providing information to us, and public sources. Any information provided to us during this process is done on a voluntary basis. We would normally expect to complete a preliminary assessment within two weeks, depending on the availability of information, the complexity and perceived urgency of the matter.

The sector-specific legislation does not expressly incorporate the 'reasonable cause to suspect' standard. As a matter of practice, however, we follow this standard in deciding whether to initiate investigations of potential infringements of these laws, including potential contraventions of licence conditions.

Having conducted a preliminary assessment, we determine whether a reasonable cause to suspect exists and, if so, if and when to commence a formal investigation. Even if a reasonable cause to suspect exists, we may still decide either not to commence a formal investigation, or to delay its initiation. Our decision will depend on considerations such as: the gravity of the conduct involved; the harm or potential harm caused to the Jersey or Guernsey 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 that we are currently undertaking.

3 Formal Investigations

If CICRA decides to investigate a matter on the basis of a reasonable cause to suspect, we will open a formal investigation. Normally, we 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. In exceptional circumstances, if we think a serious risk exists that the parties would conceal, remove, tamper with, or destroy potentially relevant evidence, then we may proceed by executing one or more search warrants, as discussed below. This may be the case, in particular, with suspected cartels.

During a formal investigation, we will collect the 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/trade associations, and relevant States departments. Individuals or businesses that initially provided information to us, such as complainants or leniency applicants, can also continue to be potential information sources. Subject to the confidentiality restrictions discussed below, we would expect to obtain information from as many relevant sources as possible in an attempt to gain a complete picture of the conduct in question.

During a formal investigation, we can mandate the provision of information and documents through issuing written notices to produce. We may send such notices to the parties under investigation but may also require the production of information by other parties that appear to have relevant information or documents. Such notices may require the recipients to provide us with documents or information, with the latter either being provided in writing or in person. In setting a deadline for responses, we will consider the amount and the complexity of the information and/or documents required. In certain circumstances, we may consider requests for extension.

The sector-specific legislation provides us with similar powers.

For competition law matters only, we also have the ability to obtain information stored electronically.

In exceptional circumstances, where a danger exists that the parties may alter, tamper with, or destroy evidence upon notification, we have the ability to enter and search premises under a warrant. Our powers include the seizure and retention of original copies of documents that appear relevant to the investigation. If documents are retained during the search, we must supply a list of these documents to the party from which they were obtained. If a party reasonably requires a retained document for its business and requests it, we will provide a copy of the document as soon as reasonably practicable.

Once we have commenced a formal investigation, we will endeavour to conclude it as soon as possible. Given the range of potential matters under the laws and their varying complexity, it is not possible to provide general guidance on the time we expect to take to conclude our investigations. With respect to any particular investigation we commence, we 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, we can only require the provision of documents and/or information that we believe are necessary for the investigation.

If we consider it 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, we can order interim measures during a formal investigation. Prior to issuing a direction containing interim measures, we give the party subject to such direction written notice and an opportunity to respond.

The sector-specific legislation does not contain interim measure provisions.

4 Concluding a Formal Investigation

If, as a result of the investigation, CICRA determines that the information collected supports the conclusion that an infringement exists, we will prepare a draft decision. We will give the party or parties involved 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 us during the response period. To maximize the utility of such meetings, parties are encouraged to submit written responses to us at least one full day in advance.

After this response period, we will prepare a final decision (subject to changes, if any, made during the response period) or we may decide not to go ahead with a final decision. A copy of the final decision will be provided to the party or parties involved. We may also publicise the fact that a final decision has been taken, subject to the confidentiality considerations discussed below. After receipt of the final decision, the parties will be given an opportunity to redact any confidential information. After the parties have had this opportunity, we will place a public version of the final decision on our website.

Alternatively, if, based on the evidence collected, we determine that an infringement has not occurred, we can end the investigation. We will inform the parties involved in the investigation that the matter has been closed, and confirm in writing if requested. Subject to the confidentiality considerations discussed below, we may also issue a public statement concerning the investigation's closure, should we consider the issuing of a statement to be in the public interest. The fact that we have ended an investigation does not prejudice our ability to re-open the matter, should we receive additional information that provides a reasonable cause to suspect an infringement.

In addition to decisions, we can issue written directions and impose financial penalties. Directions are issued where necessary to bring the infringing conduct to an end. Financial penalties are possible if we are satisfied that the infringement was committed intentionally, negligently, or recklessly. The competition laws limit financial penalties to 10% of the turnover of the business during the period of the breach, for a maximum period of three years.

Parties may appeal a decision, direction, or financial penalty issued under the competition laws using the procedures set out in the relevant law.

We may issue written directions under the sector-specific legislation in order to require that a licensee comply with a licence condition which it is found to have breached. In addition, we may revoke a licence issued under these laws if a licensee fails to comply with a direction. Unlike the competition laws, however, the sector-specific legislation requires public consultation before we issue a direction ordering a licensee to comply with a licence condition, or before revoking a licence. The sector-specific legislation contains its own appeal provisions.

We may also decide to close an investigation without reaching a draft decision and/or final decision if parties decide to cease conduct that might constitute an infringement of the competition laws. When considering whether to proceed to a draft or final decision in such circumstances, we will consider a range of factors, including whether a financial penalty is likely to be appropriate (in which case a final decision will need to be prepared), the degree of confidence that CICRA has that the infringing conduct will not re-occur, and extent to which a final decision could provide guidance to business on what is, and is not, acceptable under the competition laws, or play an important role in developing the law where there is limited case law or precedent.

5 Confidentiality

The laws require CICRA not to disclose information we receive relating to a party's business or affairs. This does not apply to information already in the public domain, or information for which consent to disclosure is received (by the party providing the information and, if different, by the party to which it relates). Additionally, the laws do not prohibit us from releasing information we receive in summary form, such that information that relates to a specific party may not be identified.

In particular circumstances, including to further the course of a formal investigation, we are permitted to disclose information we receive. Before doing so, however, we must satisfy ourselves that the recipient will not further disclose the information, or use it for any purpose other than assisting us with the investigation.

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

The sector-specific legislation also contains confidentiality provision similar to those found in the competition laws. We are permitted to disclose information for the purpose of facilitating the performance of our functions under these laws.

6 Consequences of obstructing an Investigation

The laws contain severe penalties for obstructing an investigation. It is a criminal offence for any person to falsify, conceal, destroy or otherwise dispose of any document or information potentially relevant to our investigation. Failure to respond to a statutory notice to provide information is a criminal offence, as is the provision of materially false, misleading, or incomplete information. A person committing any such offences is potentially liable for penalties that include imprisonment of up to five years, payment of a fine, or both.

The sector-specific legislation also contains criminal sanctions for obstructing an investigation or providing us with materially false or misleading information.

7 Conduct that may infringe the competition laws and licence conditions

Certain conduct may infringe both the competition laws and conditions in licences issued by CICRA under sector-specific legislation. For example, licences issued by us may contain conditions that prohibit a licensee with significant market power from abusing a dominant position in a relevant market, which is similar to the prohibition against abuse of dominance set out in the competition laws.

Where information provided to us raises a reasonable cause to suspect that the conduct in question may violate both competition law and licence conditions, we will normally 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 us to find a party in contravention of its licence conditions, and serve as the basis for one or more directions under sector-specific legislation. Subsequent non-compliance with directions issued under any of these laws can provide grounds for licence revocation.

8 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 laws and the sector-specific legislation. These formal powers, however, do not preclude CICRA 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. We 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.

9 Protection from Self-Incrimination

CICRA 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 an infringement of the law, which we have a duty to prove. We may, however, request documents or information concerning facts, such as whether a person attended a particular meeting, or whether a particular communication took place.

10 Legal Professional Privilege

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

11 Cooperation with Other Competition Enforcement Agencies

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

12 How can I find out more?

Please contact us if you have a question about the competition law in either island, or if you suspect that a business is breaching the laws and wish to complain or discuss your concerns.

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Publications

All our publications, including the detailed guidelines we publish covering specific areas of the laws, can be downloaded from our website: www.cicra.je and www.cicra.gg. You can order copies of our publications by telephone from the numbers above.