



## **CICRA Guideline 10 – Procedures for investigations conducted by CICRA**

Re-issued [July 2016]

## **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 the laws we have the responsibility for administering and enforcing 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	Transparency in investigations	6
3	Opening an investigation	7
4	Formal Complainants	9
5	Formal investigations	10
6	Concluding a formal investigation	13
7	Confidentiality	16
8	Consequences of obstructing an investigation	16
9	Conduct that may infringe the competition laws and licence conditions	17
10	Voluntary Requests for Assistance	17
11	Protection from Self-Incrimination	18
12	Legal Professional Privilege	18
13	Cooperation with Other Competition Enforcement Agencies	18
14	How can I find out more?	19
Annex 1	Information required in a written, reasoned complaint	20

# 1 Introduction

## What is CICRA?

The Channel Islands Competition and Regulatory Authorities (CICRA) is the name given to the Jersey Competition Regulatory Authority (JCRA) and the Guernsey Competition and Regulatory Authority (GCRA). CICRA's aim is to ensure that consumers receive the best value, choice and access to high quality services, in addition to promoting competition and consumers' interests. 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?

CICRA has a wide range of powers to investigate businesses suspected of breaching the laws it is responsible for applying. We can order that offending agreements or conduct be stopped and levy financial penalties on businesses and individuals for a breach.

## **What laws does CICRA have responsibility for?**

- **Competition law in the Channel Islands**

Competition law in the Channel Islands CICRA has the responsibility for the Competition (Jersey) Law 2005 and The Competition (Guernsey) Ordinance, 2012. Both prohibit anti-competitive behaviour arising from anticompetitive 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*, the *Air and Sea Ports (Incorporation) (Jersey) Law 2015* 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 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 or manner in which it is funded, including companies, partners, cooperatives, States’ departments and individuals operating as sole traders.

## 2 Transparency in investigations

CICRA is committed to acting transparently and openly when carrying out its work. Transparency is important for several reasons. First it enables those affected by our decisions to verify that we are acting in a way that is procedurally fair. Second it increases public awareness of our work and so encourages engagement with it. Third as a result of increased engagement, transparency ensures that our decision making is based on the best available evidence and so improves the quality and robustness of that decision making and public confidence in it.

We will aim to achieve transparency in our work through:

- Ensuring, where possible, that the parties to a case and other involved persons, e.g. complainants, are informed when key milestones in a case are reached, e.g. when a case is opened;
- Engaging with the parties to a case and other involved persons at an early stage of a case and ensuring that an opportunity to provide views is given at appropriate points;
- Placing announcements on our website when a case is opened and key milestones in that case are reached.

We are mindful of our responsibilities under the law to preserve the confidentiality of certain information that is disclosed to us. We will comply fully with our legal obligations when deciding how and whether to publish or disclose any information provided to us in the course of an investigation.

### 3 Opening an Investigation

CICRA has no power to conduct 'spot-checks' to verify compliance with the laws we are responsible for. We may only open 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;
- 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*;
- A business that we license under sector-specific legislation has breached that sector-specific legislation; or
- A business that we license has breached one or more conditions of its licences.

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.

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 or a licence condition. 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, but the complexity and perceived urgency of the matter can influence these timescales significantly.

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.



## 4 Formal Complainants

Under certain circumstances, CICRA may grant Formal Complainant status to a party that brings alleged anti-competitive conduct to our attention.

Where a party is given Formal Complainant status, we assume that that party will be in a position to provide information that may assist us. There is therefore a presumption that a Formal Complainant will be consulted at certain key milestones in our investigation.

Formal Complainant status will be granted to a party:

- who requests such status; and
- who has submitted a reasoned, formal complaint to us which contains the information set out in Annex 1 to this Guideline; and
- whose interests are likely to be materially affected by the alleged conduct under investigation.

A Formal Complainant must submit a non-confidential version of its complaint to us. We may provide this document to the parties under investigation, if we consider that it is necessary to do so in order to respect their rights of defence.

If a Formal Complainant does not wish its identity to be revealed to the parties under investigation, it may make representations to us as to why this information should be kept confidential. We will, in so far as we are able to do so without harming the rights of the defence of the parties under investigation, seek to maintain a Formal Complainant's anonymity under these circumstances.

## 5 Formal Investigations

If CICRA decides to investigate a matter, we will open a formal case. A case is opened when we have determined that there is a reasonable cause to suspect that the relevant legal provisions have been breached and that the case falls within our administrative priorities.

Unless doing so would compromise our investigation, e.g. where we intend to carry out a search under warrant, we will inform the parties directly involved that a formal case has been opened. They will be provided with the following information:

- A description of the case;
- The legal basis for bringing the case;
- The industry sector concerned;
- The reasons why we have opened a formal case.

We will also place a case opening announcement on our website, setting out the above information. We will not publish the names of the parties at this stage, unless there is a good reason for doing so.

During a formal investigation, we will conduct a robust, evidence based assessment of whether an infringement has occurred. In addition to public sources, information can be required from the parties under investigation, competitors, customers, employees, suppliers, potential entrants into the affected markets, industry/trade associations and relevant States departments. In particular, individuals or businesses that initially provided information to us, such as Formal Complainants or leniency applicants, are likely to be able to provide us with valuable further input. 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.

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 keep the party or parties subject to the investigation informed of its progress and the potential time-frame for completion.** Depending on the nature of the matter under investigation updates may also be posted on our website.

We can only require the provision of documents and/or information that we believe are necessary for the investigation.

Under the competition laws only, 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 measures provisions.

## 6 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 setting out our preliminary conclusions on the conduct under investigation.

When coming to a draft decision, we may seek the views of Formal Complainant(s) if we consider that they would be able to assist us materially in testing the legal, economic or factual arguments on which we might wish to rely.

There will be an opportunity for any party that supplied information which will be contained in the draft decision to make confidentiality claims in respect of such information.

We will give the party or parties involved a copy of the decision and a reasonable period to respond (specified in the notice). Any response provided must be in writing.

Non-confidential versions of the draft decision will be provided to Formal Complainants.

A non-confidential version of the draft decision may also be provided to other third parties:

- who request a copy; and
- whose interests are likely to be materially affected by the alleged conduct under investigation; and
- who are likely to be able to provide input which will assist us in our investigation.

An announcement that a draft decision has been issued will be placed on our website together with a brief summary of the case, which will include the names of the parties to the case.

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. We will prepare a transcript of any such meeting, a copy of which will be provided to the parties on request. Formal Complainants will not be invited to attend this meeting, but a separate meeting with us may be held if one is requested and we consider that such a meeting may assist us in our investigation.

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. There will be an opportunity for any party that supplied information to be contained in the final decision to make confidentiality claims in respect of such information. Failure by a party to cooperate with us in submitting duly substantiated confidentiality claims can be deemed as consent to public disclosure of the entire decision.

An announcement that a final decision has been taken will be placed on CICRA's website together with a short case summary, the decision and the reasons for that decision. A non confidential version of the decision will be published on our website when all confidentiality claims have been considered.

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. An announcement that a final decision has not been adopted will be placed on our website). 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 under some legislation if we are satisfied that the infringement was committed intentionally, negligently, or recklessly. Where applicable, financial penalties are limited to 10% of the turnover of the business during the period of the breach, for a maximum period of three years.

Under sector-specific legislation we may issue written directions 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 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.

Parties may appeal a decision, direction, or financial penalty under any of the laws we are responsible for using the procedures set out in the relevant law.

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 law. 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 law, or play an important role in developing the law where there is limited case law or precedent.

## **7 Confidentiality**

CICRA is permitted to disclose information that we have received relating to a party's business or affairs if disclosure would further the course of a formal investigation. This is an exception to the general rule that such information must not be disclosed. Before doing so, 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.

Even where to do so would further the course of a formal investigation, we will generally not disclose information supplied to us if that information is commercially sensitive. Before we disclose any information, we will give the party who submitted it an opportunity to identify information that it considers to be commercially sensitive. Any claims of confidentiality must be duly substantiated.

## **8 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 5 years, payment of a fine, or both.



## **9 Conduct that may infringe the competition laws and licence conditions**

Certain conduct may infringe both the 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.

## **10 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.

## **11 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.

## **12 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.

## **13 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.

## 14 How can I find out more?

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

2<sup>nd</sup> Floor Salisbury House  
1-9 Union Street  
St Helier  
Jersey  
JE2 3RF

Suite 4  
1<sup>st</sup> Floor Plaiderie Chambers  
St Peter Port  
Guernsey  
GY1 1WG

T: +44 (0) 1534 514990  
E: [info@bicra.je](mailto:info@bicra.je)

T: +44 (0) 1481 711120  
E: [info@bicra.gg](mailto:info@bicra.gg)

### Publications

All our publications, including the detailed guidelines we publish covering specific areas of the law, can be downloaded from our website: [www.bicra.je](http://www.bicra.je) and [www.bicra.gg](http://www.bicra.gg). You can order copies of our publications by telephone from the numbers above.

# Annex 1

## Information required in a written, reasoned complaint

- Name and legal form of the complainant.
- Name and legal form of the parties about whose conduct the complaint is being made.
- An explanation of why the complainant is materially affected by the alleged anti-competitive behaviour.
- A full description of the reasons for making the complaint, including:
  - The business of the party who is the subject of the complaint;
  - A summary of the events giving rise to the complaint, with relevant dates;
  - The complainant's view of the market affected by the alleged anti-competitive behaviour;
  - How customers are likely to be adversely affected by the alleged behaviour.
- A copy of all available evidence supporting the complaint.