



Channel Islands Competition Laws

Guideline 12 - Financial Penalties

Issued June 2013

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 how we calculate financial penalties for infringements of the *Competition (Jersey) Law 2005* and *The Competition (Guernsey) Ordinance, 2012*.

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.

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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 law in the Channel Islands

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

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 or conduct be stopped and levy financial penalties on businesses and individuals for the breach.

What types of organisation are considered a 'business'?

Throughout this guide, we refer to a 'business'. This term (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 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 Deciding to issue a financial penalty

The competition laws provide that in addition to, or in place of, issuing a direction, CICRA may impose a financial penalty on businesses for being party to an anti-competitive agreement and/or concerted practice, engaging in an abuse of a dominant position in a market or failing to notify a merger or acquisition that meets the relevant thresholds. In order to impose a financial penalty, we will usually need to be satisfied that the infringement was committed either intentionally, negligently or recklessly. Whether a financial penalty is imposed in the event of an infringement of the competition laws is otherwise at CICRA's discretion.

For further information about conduct that may result in the imposition of a financial penalty, see CICRA Guideline 2 - Anti-Competitive Agreements, CICRA Guideline 3 - Cartels, CICRA Guideline 5 - Abuse of Dominance and CICRA Guideline 6 - Mergers & Acquisitions.

The two objectives of CICRA's policy on financial penalties are:

- to impose penalties on businesses that infringe the competition laws, reflecting the seriousness of the infringement, and
- to ensure that the threat of penalties is a deterrent to engaging in anti-competitive practices, or, as the financial penalty relates to a merger or acquisition, a deterrent to failing to adhere to the notifying thresholds.

We consider that a financial penalty should be fair and proportionate, taking into account, for example, the profits made from the infringement, the effects on competition and the harm suffered by consumers. However, we will impose severe financial penalties in respect of agreements between businesses to fix prices or share markets and other cartel activities and serious abuses of a dominant position. We

consider that these are among the most serious infringements of competition law and the amount of the financial penalty will aim to deter both the businesses that are subject to an infringement decision and other businesses who, in the future, may consider engaging in conduct that is prohibited under the competition laws.

The amount of the penalty cannot exceed 10% of the worldwide turnover of the business (and the corporate group to which it belongs) during the period of the infringement, up to a maximum period of three years.

We encourage businesses to come forward with information relating to any cartel activities in which they are involved. Any business participating in cartel activity may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if the requirements for lenient treatment set out in our Leniency Policy are satisfied.

For more information see CICRA Guideline 13 – Leniency Policy.

Section 34(1) of The Competition (Guernsey) Ordinance, 2012 sets out a series of factors that we must take into consideration when deciding whether to impose a financial penalty and the amount of any such penalty:

- a. whether the contravention was brought to our attention by the business or person concerned,
- b. the seriousness of the contravention,
- c. whether or not the contravention was intentional, negligent or reckless,
- d. what efforts, if any, have been made to rectify the contravention and to prevent a recurrence,
- e. the potential financial consequences to the business or person concerned, and to third parties including customers and creditors of that business or person, of imposing a penalty, and
- f. the penalties imposed by us in other cases

Many of these factors are already incorporated into these guidelines. However, we will always ensure that we give consideration to these factors when making decisions regarding financial penalties. under The Competition (Guernsey) Ordinance, 2012.

3 Calculating the level of a financial penalty

In instances where it is decided that a financial penalty is appropriate, this Guideline outlines the general methodology for the setting of financial penalties, but the circumstances of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology.

For any infringement of the competition laws, other than a failure to notify a merger or acquisition that meets the relevant thresholds, the following three step approach may be used to calculate a financial penalty:

Step 1- Calculation of the 'basic penalty' with regards to the gravity of the infringement, multiplied by the number of years (or months) of the infringement

Step 2- Adjustments for aggravating or mitigating circumstances

Step 3- Reduction if the maximum penalty of 10% of worldwide turnover is exceeded.

Step 1 – Basic Penalty

The starting point for determining the basic penalty is calculated having regard to the value, in sterling, of the sales of goods or services (to which the infringement relates in either Jersey or Guernsey for the last full business year of the business' participation in the infringement. The value will be determined net of taxes directly related to the sales, e.g. Goods and Services Tax in Jersey. Generally, CICRA will base value of sales on figures from a business' audited accounts. However, in exceptional circumstances it may be appropriate to use a different figure as reflecting the true scale of a business' activities in the relevant market.

As a general rule, the basic penalty will be set at a level of up to 30%¹ of the value of sales; the more serious and widespread the infringement, the higher the percentage of the value of sales that will be used to calculate the basic penalty. Price-fixing or market-sharing agreements, other cartel activities and predatory pricing by dominant businesses are among the most serious infringements. The assessment of gravity will be taken on a case by case basis and we will consider all relevant factors, including; the nature of the relevant market and/or product, the structure of the market, the market share(s) of the business(es) involved, entry conditions and the effect on competitors, third parties and end consumers.

Where an infringement involves several businesses, an assessment of the appropriate basic penalty will be carried out for each of the businesses concerned, in order to take account of the real impact of the infringement of each business on competition.

Periods of less than 6 months will be counted as half a year; periods of more than six months but less than a year will be counted as a full year i.e. we will always round up to the nearest half year.

In determining the financial penalty we will use figures rounded to the nearest pound. When determining the appropriate amount of a financial penalty, we are not obliged to consider any financial penalties the businesses concerned may have incurred in other jurisdictions for the same or similar infringements.

¹ This figure is used by both the Office of Fair Trading, (2012) *Guidance as to the appropriate amount of a penalty*, OFT423, para 2.5, pg 8; and the European Commission (2006) *Guidelines on the method of setting fines* C210, para. 21.

Step 2– Adjustments to the basic penalty

Aggravating factors

The basic penalty may be increased where we find that there are aggravating circumstances, such as:

- the business is a recidivist (i.e. has been found previously to have committed infringements of the laws) – the basic penalty will be increased by up to 100%;
- repeated infringements by other businesses in the same corporate group;
- refusal to co-operate with an investigation, or efforts to obstruct us from undertaking an investigation, including providing false or misleading information;
- leading or instigating an infringement and/or coercing others to participate;
- continuing the infringement after the start of our investigation;
- infringements which are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisal sought by the business aimed at ensuring the continuation of the infringement.

Mitigating factors

The basic penalty may be reduced when we find that mitigating circumstances exist, such as:

- the business is acting under severe duress or pressure from another business;
- the business co-operates with us, which enables the enforcement process to be concluded more effectively and/or quickly;
- evidence is produced by the business concerned that it terminated the infringement as soon as we intervened (this does not apply to secret agreements or practices e.g. cartels);

- where evidence is provided that the infringement has been committed as a result of negligence rather than intent;
- genuine uncertainty on the part of the business as to whether the agreement or conduct constituted an infringement;
- previous steps having been taken by the business with a view to ensuring compliance with the competition laws;
- where the anti-competitive conduct of the business has been authorised or encouraged by public authorities or legislation; and
- where it is evidenced that the business demonstrates that its involvement in the infringement was substantially limited, i.e. it actually avoided applying the agreement by adopting competitive conduct in the market.

Increase for deterrence

To ensure that financial penalties have a sufficient deterrent effect, we may increase the basic penalty of those businesses which have a particularly large turnover beyond the value of sales to which the infringement relates.

Step 3 - Legal Maximum

The final amount of the financial penalty shall not, in any event, exceed 10% of the total worldwide turnover of the business (and the corporate group to which it belongs) during the period of the infringement, up to a maximum of three years. In instances where the financial penalty exceeds the legal maximum, it will be reduced to a sum that equals the legal maximum.

Where an infringement by a trade association or profession relates to the activities of its members, the financial penalty shall not exceed 10% of the sum of the total turnover of each member active on the relevant market affected by the infringement during the period of the infringement.

4 Mergers and Acquisitions

Where a purchaser fails to file a notifiable merger or acquisition with CICRA, in addition to having to pay the appropriate filing fee and submitting a full application form for assessment, we may also impose a financial penalty and issue an infringement decision.

Please read *CICRA Guideline 6 - Mergers & Acquisitions* for more guidance.

Our starting point will be to calculate a penalty following a four step approach:

Step 1 - identification of the turnover of the target business in Jersey and/or Guernsey for the last full business year, prior to the merger or acquisition being completed;

Step 2 – application of a percentage of turnover as a multiplier, adjusted for the impact of the transaction on competition;

Step 3 – use of the period of non-compliance as a multiplier; and

Step 4 – a reduction if the maximum penalty of 10% of worldwide turnover is exceeded.

As a general rule, the multiplier identified in step 2 will be 2% for a transaction that does not substantially lessen competition and/or is not adverse to the public interest (in Guernsey); the more significant the lessening of competition in the relevant market (or the more serious the adverse impact on the public interest), the higher the percentage of the value of turnover that will be used to calculate the financial penalty. The assessment of gravity in relation to the impact of the transaction on competition (or the public interest) will be taken on a case by case basis and we will consider all relevant factors, including the nature of the relevant market and/or product, the

structure of the market, the market share(s) of the business(es) involved, entry conditions and the effect on competitors, third parties and end consumers.

The amount determined at Step 2 will then be multiplied by the period between the transaction completing and the matter being notified to us, calculated as a percentage of the year and rounded up to the nearest whole number. Non-compliance is taken to end when we confirm in writing that a completed merger application form has been received and registered.

In determining the financial penalty, we will use figures rounded to the nearest pound. When determining the appropriate amount of a financial penalty, we are not obliged to consider any financial penalties the businesses concerned may have incurred in other jurisdictions for the same or similar infringements.

Example:

Annual Turnover: £3,000,000

Percentage of turnover: 2%

Period of non-compliance: 5 January 2012 to 16 June 2012: 163 days (45% of a year, rounded up from 44.6%)

Penalty = £3,000,000 x .02 x .45 = £27,000

Legal Maximum

The final amount of the financial penalty shall not, in any event, exceed 10% of the total worldwide turnover of the business (and the corporate group to which it belongs) during the period of the infringement, up to a maximum of three years. In instances where the financial penalty exceeds the legal maximum, it will be reduced to a sum that equals the legal maximum.

5 Payment and issuing infringement decisions

The infringement decision will specify the date by which the financial penalty must be paid; it will usually be two calendar months after the financial penalty has been imposed. If the penalty has not been paid by that date, interest will accrue daily thereafter on any unpaid amount at a rate 4% above the base rate of the Bank of England, determined by CICRA in the infringement decision. The Royal Courts of Jersey and Guernsey can also be asked for an order to enforce payment of a financial penalty.

A public version of the infringement decision, including the amount of the financial penalty, will be published on our website.

Under the competition laws, any financial penalties received by CICRA are paid to the Treasury of the relevant jurisdiction.

Ability to pay

In exceptional circumstances, we may, upon written request, take account of a business' inability to pay a financial penalty. We will not base our decision to reduce a financial penalty for this reason merely on the fact that a financial penalty will create an adverse or loss-making financial situation for the business concerned. A reduction will be granted solely on the basis of objective evidence provided by business, demonstrating that the imposition of the financial penalty would irretrievably jeopardise the economic viability of the business concerned.

6 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 law and wish to make a complaint 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 also request a copy of any of our publications by telephone from the numbers above.