

# Competition Guideline 10: Investigation Procedures

## What this guideline is about

This guideline is one in a series of publications designed to inform businesses and consumers about how we, the Jersey Competition Regulatory Authority (the **Authority**), applies competition law in Jersey.

The purpose of this guideline is to explain to consumers, businesses and their advisers the procedures that the Authority uses to investigate potential infringements of the Competition (Jersey) Law 2005.

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

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## 1. Introduction

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.

In Jersey, the Competition Law prohibits anticompetitive 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 the Authority for approval.

### What powers does the JCRA have?

The Authority has a wide range of powers to investigate businesses suspected of breaching the law. It 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 (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 law in Jersey is modelled on the competition provisions in the Treaty on the Functioning of the EU. Jersey legislation places certain obligations on the Authority and the Royal Court when applying the competition laws. Article 60 of the Competition Law 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.

As noted above, the Authority must endeavour to ensure that, as far as possible, competition matters arising in Jersey 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, however, does not prevent the Authority from departing from EU precedents where this is appropriate in light of the particular circumstances of Jersey.

## 2. Transparency in investigations

The Authority is committed to acting transparently and openly when carrying out its work. Transparency is important for several reasons. First it enables those affected by its decisions to verify that it is acting in a way that is procedurally fair. Second it increases public awareness of the work of the Authority and so encourages engagement with it. Third as a result of increased engagement, transparency ensures that 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.

The Authority will aim to achieve transparency 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.

The Authority is mindful of its responsibilities under the law to preserve the confidentiality of certain information that is disclosed to it. It will comply fully with its legal obligations when deciding how and whether to publish or disclose any information provided in the course of an investigation.

## 3. Opening an Investigation

The Authority has no power to conduct 'spot-checks' to verify compliance with the laws it is responsible for. It may only open a formal investigation if it has '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 approval;
- A business has breached, or intends to breach, a direction issued under the law;
- 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 Guideline 2 – Cartels and Guideline 11 - Leniency Policy.

Upon receipt of such information, a preliminary assessment will be conducted 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 during this process is done on a voluntary basis. The Authority 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, the Authority will 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, it may still decide either not to commence a formal investigation, or to delay its initiation. This decision will depend on considerations such as: the gravity of the conduct involved; the harm or potential harm caused to the Jersey 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 are currently being undertaken.

#### 4. Formal Complainants

Under certain circumstances, the Authority may grant Formal Complainant status to a party that brings alleged anticompetitive conduct to its attention.

Where a party is given Formal Complainant status, it is assumed that that party will be in a position to provide information that may assist the Authority. 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. The Authority may provide this document to the parties under investigation, if it considers 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 as to why this information should be kept confidential. The Authority will, in so far as it is 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 the Authority decides to investigate a matter, it will open a formal case. A case is opened when it has determined that there is a reasonable cause to suspect that the relevant legal provisions have been breached and that the case falls within administrative priorities.

Unless doing so would compromise the investigation, e.g. where the Authority intends to carry out a search under warrant, it 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, the Authority 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, such as Formal Complainants or leniency applicants, are likely to be able to provide valuable further input. Subject to the confidentiality restrictions discussed below, the Authority 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 the Authority can mandate the provision of information and documents through issuing written notices to produce. The Authority 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 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 the Authority may consider requests for extension.

In exceptional circumstances, where a danger exists that the parties may alter, tamper with, or destroy evidence upon notification, the Authority has the ability to enter and search premises under a warrant. Authority powers include the seizure and retention of original copies of documents that appear relevant to the investigation. If documents are retained during the search, the Authority 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, the Authority will provide a copy of the document as soon as reasonably practicable.

Once a formal investigation has commenced, the Authority 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 the Authority expects to take to conclude its investigations. With respect to any particular investigation, the Authority 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.

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

Under the competition laws only, if the Authority considers 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, it can order interim measures during a formal investigation. Prior to issuing a direction containing interim measures, the Authority will 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. Draft Decision and Access to the File

If, as a result of the investigation, the Authority determines that the information collected supports the conclusion that an infringement exists, it will prepare a draft decision setting out our preliminary conclusions on the conduct under investigation.

When coming to a draft decision, the Authority may seek the views of Formal Complainant(s) if it considers that they would be able to assist materially in testing the legal, economic or factual arguments on which the Authority 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.

The Authority 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 in the investigation.

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

In competition law investigations, at (generally) the same time as issuing the draft decision, the Authority will also give the addressees of the draft decision the opportunity to access the information held on the Authority's case file. The Authority's case file contains documents that relate to matters contained in the draft decision, excluding certain confidential information (see section 7 below) and the Authority's internal documents. The case file is made available so that addressees of the draft decision can properly defend themselves against the allegation that they have breached the competition law by reviewing the evidence on which the draft decision is based.

The Authority will allow addressees of the draft decision a reasonable opportunity to access the case file. In general, the period of time for accessing the file will be the same as that given for the provision of written representations.

In order to ensure that the access to the file procedure is as efficient as possible, the Authority will typically provide:

- (a) copies of the documents that are directly referred to in the draft decision; and
- (b) a schedule containing an index of all the documents on the Authority's file.

Access to the file will usually be given by e-mail.

The party or parties subject to the investigation may request a meeting during the response period. To maximize the utility of such meetings, parties are encouraged to submit written responses at least one full day in advance. The Authority 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 may be held if one is requested and it is considered that such a meeting may assist the investigation.

After this response period, the Authority will prepare a final decision (subject to changes, if any, made during the response period) or 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 the 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 the website when all confidentiality claims have been considered.

Alternatively if, based on the evidence collected, the Authority determines that an infringement has not occurred, it can end the investigation. The Authority 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 the website). The fact that an investigation has ended does not prejudice the ability to re-open the matter, should additional information be received 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 the Authority 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, the Authority 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 a direction is issued 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 the Authority is responsible for using the procedures set out in the law.

The Authority 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, the Authority 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 the Authority has that the infringing conduct will not reoccur, 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

The Authority is permitted to disclose information that it has 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, the Authority must be satisfied that the recipient will not further disclose the information, or use it for any purpose other than assisting with the investigation.

Even where to do so would further the course of a formal investigation, the Authority will generally not disclose information supplied if that information is commercially sensitive. Before any information is disclosed, the Authority 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. Before disclosing information, including as part of the access to the file procedure and in published documents, the Authority will require all parties that have provided information during the investigation to make known to the Authority which information they consider to be confidential and why. Such claims should be kept to the minimum necessary to protect confidentiality and, for reasons of transparency and open decision making, blanket or unsubstantiated claims will not be accepted. Having taken into account parties' confidentiality representations, the Authority will decide whether it is appropriate to disclose the information.

Information may be viewed as confidential if it is:

- (a) commercial information, the disclosure of which the Authority considers would significantly harm the legitimate business interests of the business to which it relates; or
- (b) information relating to the private affairs of an individual the disclosure of which the Authority considers would significantly harm the individual's interests.

## 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 the Authority's 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 the Authority under sector-specific legislation. For example, licences issued 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 raises a reasonable cause to suspect that the conduct in question may violate both competition law and licence conditions, the Authority will normally conduct the investigation using the competition law's informationgathering 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 the Authority 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 Authority 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

The Authority 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 the Authority has a duty to prove. The Authority 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

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

## 14. How can I find out more?

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

## 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

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