

Competition Guideline 11: Leniency

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 about the framework and procedure that the Authority will use for businesses / individuals who come forward and alert the Authority to the existence of a cartel and thus an infringement of the Competition (Jersey) Law 2005 (the **Competition Law**).

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. Leniency Programme

Cartels are agreements and/or concerted practices between two or more competitors, aimed at restricting competition through, for example, price fixing, market sharing or bid rigging. They are a damaging form of anti-competitive behaviour and as such are considered very serious violations of the competition laws. They injure consumers by raising prices and restricting supply, and in the long term they lead to a loss of competitiveness.

The Authority considers that businesses that are willing to ‘whistle-blow’ and put an end to their participation in a cartel should not be dissuaded from doing so by the high financial penalties to which they are potentially exposed. Therefore, the Authority considers that it is in the public interest to grant favourable treatment to businesses which bring the existence of cartels to its attention, in addition to cooperating fully with the investigation.

Article 36(4) of the Jersey Law provides that in addition to, or in place of, giving a direction to the parties concerned, the Authority may impose a financial penalty in respect of an infringement of those laws. The purpose of this Leniency Policy is to offer a strong incentive to 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 this guideline are satisfied. It is therefore at the Authority’s discretion as to whether full immunity or a reduction in the financial penalty imposed is awarded.

Unlike in some jurisdictions, cartel participation is not a criminal offence in Jersey. However, the Authority is not obliged to consider any immunity or leniency applications that businesses may have made to authorities in other jurisdictions in respect of the same or similar infringements. Similarly, if immunity or leniency is granted by the Authority, it does not exempt the business concerned from any penalty that may be imposed by competition authorities outside Jersey, where the parties’ conduct breaches not only the Jersey legislation but also the competition laws of other jurisdictions, such as the EU.

This guideline should be read in conjunction with Guideline 2 - Cartels, CICRA Guideline 10 - Investigations and CICRA Guideline 12 - Financial Penalties.

3. Forms of Leniency

Leniency will take the form of full immunity from, or a significant reduction of, the financial penalty that the Authority could impose on a business in respect of a breach of the competition laws through that business’ participation in a cartel. It does not extend

to the other consequences of infringing the laws, which include the fact that the unlawful agreement is void and cannot be enforced, and the possibility that third parties, who consider they have been harmed by the cartel, may lodge a claim for damages in the Royal Courts of Jersey.

If, at any time, the Authority determines that an applicant who has been granted, or is in the process of being granted, immunity or leniency subsequently fails to satisfy, in whole or in part, any of the requirements for immunity or leniency set out in this guideline, including providing false or misleading information, any immunity or leniency already provided or awarded will be revoked and any information supplied by the applicant may be used against them in our investigation. Moreover, under the competition law in Jersey, it is a criminal offence to provide false or misleading information, or to conceal or destroy relevant documents. Penalties for breaches can include significant fines or imprisonment.

Confidentiality

An applicant for immunity or leniency must not disclose to any third party, or otherwise communicate with any third party regarding:

- the applicant's immunity or leniency enquiry or application;
- any request by the applicant for clarification regarding its immunity or leniency enquiry or application; and
- any information provided by the applicant to the Authority for the purposes of, or in connection with, an immunity or leniency enquiry or application.

A business approaching the Authority with evidence of cartel activity may be concerned about the disclosure of its identity as a volunteer of information. The Authority will therefore endeavour to keep the identity of a business granted immunity or leniency confidential throughout the course of our investigation until the issue of a draft infringement decision.

Full Immunity

Unless a business was one of the leaders/instigators of the cartel or coerced others to join the cartel, the Authority will offer total immunity from any financial penalty to the first cartel member to submit evidence and information that enables the Authority to:

- carry out targeted inspections in connection with the alleged cartel; or
- establish an infringement of the competition laws.

However, conditions (a)-(e) below must be satisfied in order for full immunity to be granted.

From the time of its disclosure to us, the applicant must:

- (a) immediately withdraw from further participation in the cartel (except as may be directed by the Authority);

- (b) immediately refrain from any form of communication with the remaining cartel members (except as may be directed by the Authority);
- (c) not destroy evidence or disclose the fact or content of the application (except to other competition authorities). The obligation of non-disclosure is not breached if an applicant involves external lawyers to obtain legal advice;
- (d) provide us with access to all information, evidence and documents that are available to it regarding the existence, activities and membership of the cartel. The term document includes all computer files and written, recorded, and graphic materials of every kind in the possession, custody or control of applicant, whether or not available publicly. It also includes electronic correspondence and drafts of documents and copies of documents where the originals are not in the possession, custody or control of the applicant. Documents provided shall be complete and, unless legally privileged, unredacted and submitted as found in the applicant's files (e.g., documents that in their original condition were stapled, clipped or otherwise fastened together shall be produced in such form); and
- (e) maintain continuous, complete and expeditious cooperation with the Authority throughout the investigation and until the conclusion of any enforcement decision arising as a result of the investigation. This includes responding to all requests for information and making employees and directors available for interviews. Applicants are also encouraged to inform us prior to any planned dismissal of an employee/director who may have relevant information.

Leniency: reduction in financial penalties

If a business does not qualify for total immunity, is not the first to admit its participation in the cartel, or the Authority has already started an investigation into the cartel, the business may still benefit from a reduction in the level of the financial penalty, of up to 100%, if it provides evidence which represents significant added value, relative to the evidence already in our possession. The evidence provided must, by its nature or level of detail, strengthen our ability to evidence an infringement of the competition laws. The earlier an applicant applies for leniency, the more likely it is that it will provide evidence of significant value and thus receive a larger reduction in the financial penalty. However, any reductions awarded do not provide immunity from third party claims for damages.

The Authority will offer a reduction in any financial penalties if a business:

- provides key information that enables an infringement to be established; and
- conditions (a) – (e) above are satisfied.

The reduction in the level of financial penalty is discretionary. In order for the Authority to decide upon the appropriate level of reduction, it will take into account the stage at which the business came forward i.e. was it the first, second, third, etc. to apply for leniency, the evidence in our possession at that time and the value of the evidence provided.

Additional reduction in financial penalties

A business co-operating with the Authority's investigation in relation to cartel activity in one market (the first market) may also be involved in a completely separate cartel in another market (the second market).

If a business obtains a reduction in financial penalties in relation to its activities in the first market, it will also receive an additional reduction in the penalty levied in respect of the cartel in the first market (i.e. over and above the reduction that it would otherwise have received) as a result of its co-operation with the investigation into the cartel in the second market.

4. Procedure

If a business wishes to know whether immunity or leniency is available, or wishes to make such an application, a person authorised to represent the business must contact the Chief Executive of the Authority or his/her designate. Prospective applications can be discussed on a 'hypothetical' or 'no-names' basis. No specific documents or information need be disclosed at this time, although the business should be willing to discuss the types of documents or information that it could provide. An enquiry will not be considered to be an application for immunity or leniency, and before an application can be taken forward, the applicant's name must be disclosed.

Statement

If a business wishes to apply for immunity or leniency, this must be done in writing by submitting a statement in English. The Authority's staff will discuss the specific requirements in more detail, but the following is the minimum required information (with supporting evidence):

1. Details of the cartel arrangements, including:
 - the name and contact details of the business making the application for immunity or leniency;
 - details of the other cartel members, including business name, the names of key individuals and their location;
 - a detailed description of the affected relevant market (see Guideline 7 - Market Definition);
 - the duration of the cartel and the duration of the applicant's participation; and
 - the nature of the cartel conduct, including how it operates, its aims, activities and the estimated market volumes affected by the cartel.
2. All records and documents available to the applicant that evidence the cartel including, in particular, any contemporaneous evidence:
 - copies of relevant emails, meeting minutes, telephone records, diary entries, travel records and correspondence between cartel members and facilitators;
 - copies of any relevant internal reports, memos; and
 - copies of any relevant tender documents, supply agreements etc.

Please note that facilitator in this context means those businesses/individuals that were not cartel members themselves but assisted or allowed the cartel to operate. If any documents/records are not in English, the original document plus a translation in English must be submitted.

3. If the cartel arrangements were entered into outside Jersey:
 - details of how and by whom the cartel arrangements were given effect in Jersey, in terms of good/s and/or services supplied in or into Jersey.
4. Details of the information storage system used by the applicant, including:
 - the types of storage sources of data held;
 - where electronic storage systems such as computer servers are held; and
 - the changes to those systems over the past ten years that may affect the ability to recover electronic documents such as emails.
5. Information of any past or simultaneous immunity or leniency applications, detailing dates and the relevant jurisdiction/s.

Upon receipt of the statement, if any additional information is requested during the course of its investigation, a deadline for submission will be given and must be adhered to.

Granting Immunity

Having received an application, the Authority will acknowledge receipt, confirming the date of the application and whether the business is the first to apply for immunity.

Once the Authority has verified that the evidence submitted meets the relevant criteria for immunity and the business is entitled to apply for immunity, i.e. was not a leader in the cartel and/or did not coerce others to join, it will write to the business, advising that it has been granted conditional immunity from a financial penalty. If the relevant criteria are not met i.e. it is not the first to come forward, the applicant will be informed in writing that its application has been rejected and the business may then request that the Authority consider its application for leniency. The date on which we confirm the date of the immunity application will be the date applied to the leniency application.

The Authority will take its final position on the granting of immunity at the end of the investigation, to be sure that the conditions attached to immunity have been adhered to. If immunity is ultimately withheld, the business will not benefit from any reduction of the financial penalty.

Granting Leniency

Having received an application, the Authority will acknowledge receipt, confirming the date of the application. The Authority will assess applications for leniency in order of receipt. Once the Authority has assessed that the evidence submitted provides significant added value, the Authority will write to advise the business of our intention to apply a reduction of the financial penalty. This will be a date no later than the issuance of the

draft infringement decision. The final amount of the reduction will be determined at the end of the investigation, to be sure that the conditions attached to leniency have been adhered to; if the business has not complied, it will not benefit from any reduction of the financial penalty.

5. How can I find out more?

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

Jersey Competition Regulatory Authority
2nd Floor, Salisbury House
1-9 Union Street
St Helier
Jersey JE2 3RF

Tel: 01534 514990

Email: info@jcra.je

Web: www.jcra.je