

# 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**), apply competition law in Jersey.

The purpose of this guideline is to explain to consumers, businesses and their advisers 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, therefore, a breach of the Competition (Jersey) Law 2005 (the **Competition Law**).

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.

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

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## Table of Contents

What this guideline is about .....	1
1. Introduction .....	3
2. Cartels and competition Law.....	4
What is a cartel? .....	4
Why is cartel activity prohibited? .....	4
What are the consequences of engaging in cartel activity? .....	4
3. The Authority's leniency policy .....	5
What is leniency? .....	5
What is the purpose of this policy? .....	5
What is the scope of this policy? .....	5
Types of leniency .....	5
Conditions of leniency.....	6
Disclosure.....	7
4. Applying for leniency.....	8
Considering leniency.....	8
Initial enquiry .....	8
Formal application .....	8
Cooperation .....	9

## 1. Introduction

Cartels involve two or more businesses agreeing to act together to restrict or limit competition rather than compete independently. This can take various different forms – for example it may be formal or informal, an oral agreement or in writing. This kind of arrangement is a form of cheating designed to benefit cartel members while maintaining the illusion of competition – meaning that customers can lose out, with higher prices, poorer quality goods or services and/or less choice likely to occur. Fair dealing businesses also lose out if they are denied a level playing field to compete.

Cartels are therefore considered to go against the public interest as they deprive consumers and fair dealing businesses of the benefits of fair competition. They undermine competitiveness in the wider economy, hindering innovation, productivity and growth. For this reason, the Competition Law prohibits any cartel activity<sup>1</sup>.

The Authority has a wide range of powers to investigate businesses suspected of breaching the Competition Law. It can order that offending agreements and/or conduct be stopped and levy financial penalties on businesses for the breach. Under the Authority's leniency policy, businesses can avoid or reduce these consequences, if they come forward to report their own involvement in cartel activity.

This guideline sets out the Authority's leniency policy for businesses who are involved in a cartel and who are considering whether to apply for leniency. For more information businesses may wish to:

- Seek legal advice; and
- Contact the Authority to seek confidential guidance.

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

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<sup>1</sup> Article 8 of the Competition Law.

## 2. Cartels and competition Law

### What is a cartel?

Examples of a cartel include:

- Price fixing – when rival businesses agree what price they're going to charge or pay.
- Resale price maintenance – when a supplier and retailer agree what price the retailer will charge.
- Bid rigging – when rival businesses communicate before lodging their bids and agree amongst themselves who will win a contract.
- Cover pricing – a form of bid rigging where businesses agree to lodge bids that are deliberately intended to lose, so as to make another bid look more competitive.
- Market sharing – when rival businesses agree to divide a market (for example which geographic regions or customers each business will sell to) so that the businesses are sheltered from competition.
- Wage fixing – when businesses that compete for the same types of workers fix salaries or rates of pay.
- Agreeing output restrictions or quotas – when rival businesses agree to limit how much they will produce so that they can increase prices.
- Information sharing – when rival businesses reduce competitive uncertainty between them by sharing confidential information (such as the prices they plan to charge in future).

### Why is cartel activity prohibited?

Cartels deprive customers and fair dealing businesses of the benefits of fair competition. These actions harm consumers by raising prices, limiting choice and lowering quality. Over time, they undermine competitiveness in the wider economy, hindering innovation, productivity and growth. Therefore, cartel activity is treated most seriously.

Unlike in other jurisdictions, cartel participation is not a criminal offence in Jersey. However, the Competition Law prohibits any cartel activity<sup>2</sup> and where the Authority has reasonable cause to suspect cartel activity, it may investigate. This may lead to serious consequences for businesses involved.

### What are the consequences of engaging in cartel activity?

- **Financial Penalty:** As set out in the Competition Law, the Authority may fine a business involved in cartel activity up to 10% of its turnover. When determining the proportionate level of penalty, the Authority will take into account the specific circumstances of each case, for example, the length of time a business was part of the cartel activity and its role in the cartel.
- **Directions:** instead of, or in addition to, a financial penalty, a business may be issued with a direction which requires it to undertake any action the Authority considers appropriate to bring the cartel activity to an end.
- There may also be other consequences such as reputational damage, regulatory implications and being sued for damages by those who have suffered from the cartel.

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<sup>2</sup> Article 8 of the Competition Law.

### 3. The Authority's leniency policy

#### What is leniency?

Leniency may be appropriate if a business comes forward to tell the Authority about their involvement in a cartel and provides information and documentation in relation to that cartel. In return, the business will receive either full or partial immunity from the financial penalty that the Authority could impose on it in respect of a breach of the Competition Law through participation in a cartel.

#### What is the purpose of this policy?

The purpose of leniency is to offer a strong incentive to businesses to come forward with information relating to any cartel activities in which they are involved.

The Authority considers that businesses that are willing to 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 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.

#### What is the scope of this policy?

Leniency granted by the Authority under this policy extends to breaches of the Competition Law only. 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.

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 and UK.

#### Types of leniency

Any business participating in cartel activity may benefit from full immunity from, or a significant reduction in the level of, a financial penalty, if the conditions set out in this guideline are satisfied. It is at the Authority's discretion as to whether full or partial immunity is granted.

##### *Full immunity*

Unless a business was one of the leaders/instigators of the cartel or coerced others to join the cartel, full immunity may be available to a business if:

- the Authority has not already begun an investigation into the cartel;
- no other cartel members have already applied for leniency; and
- the information provided enables the Authority to carry out a targeted investigation in connection with the alleged cartel and/or establishes a breach of the Competition Law.

### *Partial immunity*

A business will not qualify for full immunity if:

- it not the first to admit participation in the cartel; or
- if the Authority has already started an investigation into the cartel.

However, a business may still apply for leniency and be eligible for a reduction in the level of financial penalty (up to 100%) where:

- it provides information which represents significant value to the progression of the investigation; and/or
- it provides key information that enables a breach of the Competition Law to be established.

In making its decision, the Authority 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 its possession at that time and the value of the evidence provided. Therefore, partial immunity is not guaranteed to be available - in some cases, the Authority may decide that it would not be in the public interest to grant leniency. The Authority will take this decision no later than the issuance of the draft infringement decision.

The final amount of any 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.

### Conditions of leniency

In order for full or partial immunity to be granted, the business must satisfy the following conditions from the time of the application:

- a) **Information** – the business must provide the Authority with all the information, documentation, correspondence and other evidence it has regarding the cartel activity. The business must not conceal or destroy any information, documentation, correspondence or other evidence at any time.
- b) **Cooperation** – the business must cooperate with the Authority throughout the application process. If an investigation is launched, the requirement to cooperate continues until any decisions and appeals have concluded. The business must also add significant value to the investigation, for example responding promptly and comprehensively to all requests and making employees and directors available for interviews.
- c) **Confidentiality** – the business must keep confidential and not disclose to any third party any information regarding an enquiry or application for immunity (whether or not immunity is granted) or any information provided by the Authority in relation to an enquiry or application for immunity or any subsequent investigation. The obligation of confidentiality is not breached if the business seeks external legal advice in relation to the matter.
- d) **Termination** – the business must not participate any further in cartel activity. The Authority will discuss with the business how it should go about terminating its involvement so as to avoid alerting the other cartel members that the Authority is aware

of the cartel. In some cases, the Authority may direct the business not to cease participation in the cartel immediately, for example to avoid ‘tipping off’ other cartel members that the Authority is aware of the cartel activity.

- e) **Admission** – if the Authority investigates and reaches a provisional finding of cartel activity and therefore a breach of the Competition Law, the business must admit it has engaged in cartel activity. In the meantime, the business must not behave in a way that would be inconsistent with such an admission, e.g. denying it has done anything wrong.

## Disclosure

The Authority understands that a business approaching the Authority regarding cartel activity may be concerned about the disclosure of its identity as a volunteer of information. The Authority will therefore 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.

## 4. Applying for leniency

This section sets out the process of a leniency application. The Authority is keen to ensure that the application process is as straightforward and proportionate as possible. In brief, it generally involves the following four stages:

- Considering leniency
- Initial enquiry; and
- Formal application; and
- Cooperation.

### Considering leniency

Before applying for leniency, businesses may wish to seek legal advice if they suspect that they may have engaged in cartel activity.

Before deciding whether to apply for leniency, the business will usually need to make internal enquiries – for example to check whether there is evidence of cartel activity. During this process, it is important that the business keeps the matter confidential (other than for the purpose of seeking legal advice), so as to avoid the risk that others become aware that the business is considering a leniency application. The business should also take steps to secure any evidence of the cartel activity so that it cannot be tampered with.

### Initial enquiry

A business may contact the Authority, in confidence, to find out if immunity would be available to it.

Whilst at this stage, it is not necessary to disclose the name of the business, the Authority will ask for certain details, such as the industry and the type of cartel activity. No documents need be disclosed at this time, although the business should be willing to discuss the types of documents or information that it could provide.

The Authority will check whether leniency is available, and if so which type. This usually takes up to two working days.

To make an enquiry for immunity, a business may contact us on **+44 (0)1534 514990** or email [competition@jcra.je](mailto:competition@jcra.je).

### Formal application

If leniency is available, the next step will be for the business to submit an application package. This usually consists of all the documents the business has that relate to the cartel activity, along with a leniency statement which contains a detailed description of the cartel activity.

Below is the *minimum* required information and documentation required within the application package:

1. The leniency statement, 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 facilitators 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 goods 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.

The application package must be submitted to:

**Email:** [Competition@jcra.je](mailto:Competition@jcra.je) or

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

## Cooperation

Once the Authority has reviewed the application package, it will advise the business on next steps.

If it has not already done so, the Authority will decide whether or not to launch an investigation into the cartel activity. If the Authority conducts a formal investigation of the cartel activity, it will ask the business to sign a letter confirming that it understands the requirement to cooperate with

the Authority as a condition of leniency. The Authority expects businesses to take a constructive approach to assisting any investigation, in return for the immunity or reduction in penalties granted under the leniency policy.

The Authority recognises that an investigation can be stressful for individuals and disruptive for businesses and therefore will only investigate when necessary, for as long as necessary. The Authority will therefore progress its investigations in a timely manner and will conclude its investigations as soon as reasonably practicable. When it becomes clear there is no need to continue an investigation, the Authority will end it promptly.

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