Channel Islands Competition Laws

A Guide to Compliance

Issued December 2012

What this quick guide is about

This guide 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 competition laws in the Channel Islands.

This guide provides a brief introduction to compliance with the *Competition (Jersey) Law 2005* and *The Competition (Guernsey) Ordinance, 2012.*

All businesses must comply with the competition laws and there may be serious consequences for businesses and individuals (including directors) for non-compliance.

More comprehensive information is available in a number of detailed guidelines we have published; details of how to obtain copies, are at the back of this guide.

This guide 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 laws 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 (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.

2 Compliance

There are different ways to ensure that your business complies with the law, but key to them all is instilling a compliance culture in your business. This means that managers at all levels, from the top down, need to understand the law and demonstrate a commitment to compliance.

CICRA acknowledges that the majority of businesses wish to comply with competition law. This guide is intended to help all businesses, large and small, to comply with competition law by suggesting a four-step process for achieving a competition law compliance culture. This is not a mandatory process. We recognise that a 'one size fits all' approach is not appropriate for competition law compliance and that the appropriate actions to achieve a compliance culture will vary, depending, for example, on the size and complexity of the business and the nature of the risks identified.

None of the examples provided in this guidance should be regarded as compulsory. They are included to provide ideas to businesses which are designing or refreshing their compliance activities.

The key point is that businesses should find an effective means of identifying, assessing, mitigating and reviewing their competition law risks in order to create and maintain a culture of compliance with competition law that works for their organisation. The nature of the sector in which a business operates and its own culture can also inform the risks and type of compliance that might be contemplated. Some businesses will find it beneficial to take legal or other professional advice in order to guide their compliance activities.

3 The Benefits of Compliance

While achieving a culture of competition law compliance requires an investment by the business, including a real commitment of management time, the benefits of this investment far exceed the cost.

Advantages of effective competition law compliance

Effective competition law compliance has greater benefits than just avoiding the adverse consequences of non-compliance mentioned below. Potential advantages of an effective competition law compliance culture include the following;

- The early detection and termination of any breaches that have been committed by the business, allowing, if appropriate, leniency applications to be made, potentially helping to reduce or eliminate financial penalties.
- Employees being able to recognise the potential signs that another business might be infringing competition law (particularly in situations where their own business might be the victim of such an infringement, and might decide to take appropriate action).
- Employees being confident in the legality of their position and able to compete vigorously for business, as well as knowing when they should seek advice on potential competition law issues.
- An effective culture of compliance with the law, not just competition law compliance, is an essential part of an ethical business culture, which can provide reputational advantages.

Consequences of breaching the competition law

Having an effective culture of competition law compliance will help a business to avoid the possible adverse consequences of breaching the law, including:

- Financial penalties of up to 10 per cent of worldwide turnover for the duration of the infringement, up to a maximum of 3 years;
- Negative reputational impact (both business and personal) associated with having breached the law;
- Considerable diversion of management time and the incurring of legal costs in order to deal with an investigation;
- Unenforceability of restrictions in agreements that infringe the law; and
- Legal action from those who have suffered harm as a result of the infringement.

Competition law compliance can sit comfortably, and be addressed in an integrated fashion, with other items on the governance agenda of a business, such as anti-money laundering controls, internal anti-fraud controls, health and safety and environmental concerns.

4 What about small businesses?

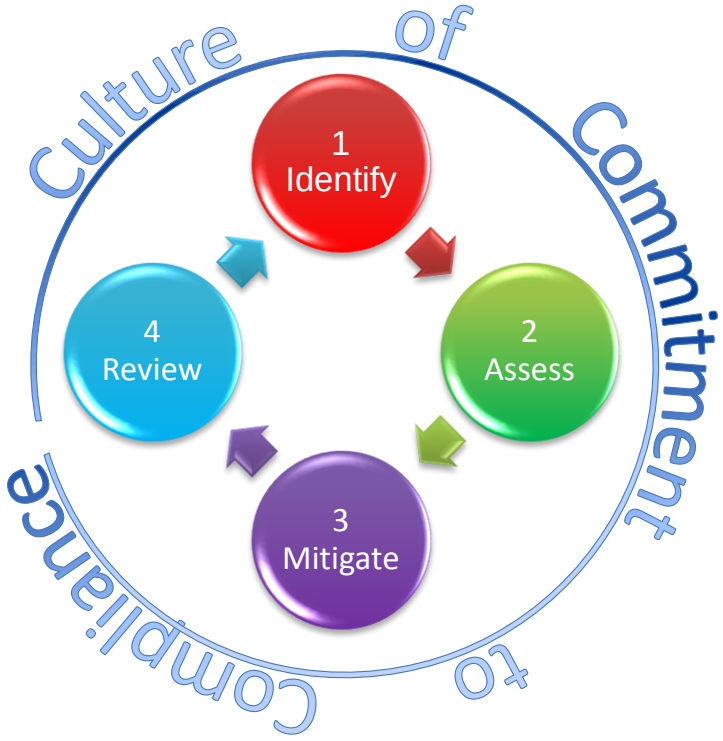
The competition laws apply equally regardless of the size of a business, from the sole trader to the biggest businesses in the islands. CICRA therefore expects all businesses to demonstrate a clear and unambiguous commitment to competition law compliance.

The risk-based, four step process described in this guidance is intended to help ALL businesses, regardless of size, to comply with competition law.

We recognise that size can be an important factor affecting the competition law risk profile of a business and the kind of risk-mitigation measures it ought to take. Smaller businesses must not ignore competition law and should take compliance measures that are proportionate to the degree of risk. In particular, all businesses, large and small, should consider and address their potential risk exposure with respect to cartels.

5 Risk-based, four step approach

CICRA's risk-based, four step approach can be summarised as follow:



Culture of commitment to compliance

A senior officer of the business should have the role of driving compliance within the business. Ultimately, however, accountability for ensuring commitment to compliance within a business rests with the most senior management (often this will be the directors). Without commitment at the highest level, any competition law compliance efforts are unlikely to be successful.

A commitment to compliance does not stop at the senior levels of a business. It should be demonstrated at all levels of the management chain. If there is any ambiguity in management's commitment to compliance, whether at the senior, middle or lower levels, then staff may feel that infringing competition law is 'worth the risk', for example in order to achieve extra sales to meet an internal target.

Step 1 – Identify the risks

Identify the key competition law risks faced by your business. These will depend upon the nature and size of your business.

Section 6 below discusses how to identify the risks in more detail.

Step 2 – Assess the risks

Work out how serious the identified risks are. Often it is simplest to rate them as high, medium and low. Businesses should consider assessing which employees are in high risk areas. These may include, for example, employees who are likely to have contact with competitors, as well as employees in sales and marketing roles.

Section 7 below discusses how to assess the risks in more detail.

Step 3 – Mitigate the risks

Set up appropriate training, policies, and procedures with the aim that the risks you have identified do not occur, whilst ensuring that you detect and deal with them if they do. What is most appropriate to do will depend upon the risks identified and the likelihood of the risk occurring.

Section 8 below discusses how to mitigate the risks in more detail.

Step 4 – Review

Review steps 1 – 3 and your commitment to compliance regularly to ensure that your business has an effective compliance culture. Some businesses review their compliance efforts on an annual basis; others review less frequently. There may be occasions when you should consider a review outside the regular cycle, such as when there is a significant change to your business or if you are subject to a competition law investigation.

Section 9 below discusses the review process.

6 Step 1 – Identify the Risks

The first step is for a business to identify its key competition law compliance risks. The risks will often depend upon the nature and size of the businesses in question. Businesses might also identify new risks when engaging in mergers and acquisitions or entering a new product or geographic market.

This section of the guide highlights some of the more common potential competition law risks that should be considered by a business in order to identify the ones relevant to it.

This is not a comprehensive guide to competition law and when identifying potential competition law risks, particularly those relating to more complex areas such as abuse of a dominant position, businesses may wish to consult with specialist legal and other advisers.

Types of competition law risk

Cartels

Cartels are the most serious form of anti-competitive agreement. They are agreements between businesses not to compete with each other, e.g. on price, discount levels, credit terms, or in respect of particular customers or in particular areas. Cartel agreements may be in writing but can often be verbal.

Cartels can also involve sharing or exchanging commercially sensitive information with competitors, either directly or indirectly through a third party, for example, competitors using a mutual supplier as a conduit to exchange pricing information.

In order to help identify potential risk areas, you should consider whether:

- You trade in a market in which 'everyone seems to know everyone else' in competing businesses;
- Staff, particularly in managerial or sales roles, often join your business from your competitors; or
- You have staff who have contact with staff from your competitors, whether frequent or not.

This list of considerations is illustrative only and should not be construed as definitive or exhaustive. None of the factors listed above in and of themselves constitute cartel activity. However, they can give rise to an increased risk, or be indicative of such activity, and may warrant assessment.

Other potentially anti-competitive agreements

Cartels are not the only activity that might infringe competition law. When identifying any potential competition law risk arising from agreements your business enters into, you should consider whether:

- You enter into contracts with exclusivity provisions of long-duration (5+ years);
- You enter into contracts with customers about the terms on which they can resell your goods or services, particularly where a supplier imposes fixed or minimum resale prices; or
- Your agreements involve provisions on collaboration with your competitors, such as agreeing to split markets.

This list of considerations is illustrative only and should not be construed as definitive or exhaustive. Agreements containing provisions such as those noted above will not necessarily infringe the competition laws. However, they can give rise to increased risk or be indicative of an anti-competitive agreement and may warrant assessment.

Abuse of a dominant position

A business that enjoys significant market power over a period of time might be in a dominant position. The assessment of a dominant position is not based solely on the size of the business and/or its market share. Whilst market share is important (a business is unlikely to be dominant if its market share is less than 40 per cent), it does not determine, on its own, whether a business is dominant. Dominance will typically depend upon a range of factors and may require a detailed legal and economic assessment; however, high market shares are generally a good proxy for significant market power.

A business is only likely to be in a dominant position if it is able to behave independently of the normal constraints imposed by competitors, suppliers and consumers.

When considering whether your business may occupy a dominant market position, you should consider:

- What are the relevant markets in which the business operates?
- Does your business have significant market shares over a long period of time?
- Are there barriers to entry or expansion that may prevent competitors from entering or expanding in the market?
- Do your customers exert any buyer power?

Anti-competitive conduct by a dominant business, by exploiting consumers, or tending to have an exclusionary effect on competitors, is likely to constitute an abuse.

When assessing whether your businesses is at risk of abusing a dominant position, you should consider whether:

- You are refusing to supply an existing customer without justification;
- You offer different prices or terms to similar customers without justification;
- You charge prices so low they do not cover the costs of production or service sold; or
- Customers purchasing one product are required to purchase a different one in addition (bundling / tying).

The list of considerations is illustrative only and should not be construed as definitive or exhaustive. None of the activities described above will necessarily constitute abuse. However, they give rise to increased risk, or be indicative of abuse, and may warrant assessment.

Mergers and Acquisitions

A business may be involved in a merger or acquisition as either a purchaser or vendor. In businesses that operate within more complex group structures, changes to the group structure may occur which themselves will be notifiable.

In Jersey	In Guernsey
We must be notified of and approve mergers that meet the following criteria: • When two businesses supply or purchase at least 25% of a particular good or service in Jersey. • When a business which supplies or purchases at least 25% of a particular good or service in Jersey plans to merge with an existing or potential customer or supplier. • With certain exceptions, where a business supplies or purchases 40% or more of a particular good or service in Jersey.	We must be notified of and approve mergers that meet the following criteria: • The aggregate turnover in the Channel Islands of the businesses involved in the merger is greater than £5 million; and • The turnover in Guernsey of at least two of the businesses involved in the merger exceeds £2 million.

These criteria are purely thresholds for notification for approval; they do not imply that the merger is necessarily problematic or will be automatically blocked by us.

However, management should familiarise themselves with these thresholds and seek professional advice if unsure.

7 Step 2 – Assess the Risks

Having identified the potential competition law risks within the organisation, the next step for a business is to assess the level of those risks. This can involve considering in turn each risk identified in Step 1 and assessing it as high, medium, low, or red, amber, green (or using some other scale).

We show below how such a categorisation might work in practice.

In relation to the risk of cartel activity, the following staff may be classed as:

- high risk – senior management, sales and marketing staff, staff dealing with competitors, staff responsible for setting prices;
- medium risk – management roles that do not involve regular contact with competitors, staff in administration functions whose activities could be used to support cartel activity;
- low risk – production staff, back-office employees.

This is illustrative only and should not be construed as definitive or exhaustive. There will be many other roles in a business not named above which should also be assessed as appropriate to the particular circumstances of your business.

8 Step 3 – Mitigate the Risks

The third step for a business is to mitigate its identified risks in a manner appropriate to the level of exposure. In most cases this includes implementing suitable training activities and embedding policies and procedures within the business.

As noted above, there is no one size fits all approach to achieving a compliance culture. The appropriate actions will vary by size of business and also by the nature of the risks identified.

Training

If competition law training is considered necessary or desirable, businesses should consider how best to focus the training in order to mitigate the level of identified risk; for example, by targeting training on those activities and individuals that are considered to be of higher risk. Training might also be supported by other activities such as testing of employees' knowledge and understanding of competition law and or written material summarising the requirements of the competition law.

Businesses may find that competition law compliance training is most effective when it is targeted to their industry and their employee's roles within the business, making it clear which activities they should avoid, how to report competition law concerns and risks as they arise, and who to contact for advice.

Some businesses might focus their training solely on competition law compliance, while others may decide to incorporate competition law training into a wider compliance training programme.

Small Businesses

Given their size and structure, the ways in which small businesses achieve competition law compliance are likely to be different from those of larger businesses. In particular, the efforts may be less formalised and structured than that which might be necessary in a larger business.

Reinforcing a compliance culture through policies and procedures

It is essential that alongside compliance training there is a commitment to competition law compliance, integrated into the day-to-day activities of the business. It is therefore necessary to have appropriate documented policies and procedures in place, tailored to the specific needs of the business. These must be accessible, understandable and subject to regular review.

Below are some examples of the measures a business might take with a view to creating an effective compliance culture within the business. (These will not be necessary or appropriate for all businesses).

- Ensuring legal advisors review contracts for compliance with competition law;
- Appointing 'compliance champions' within business units who take responsibility for promoting competition law compliance within the relevant unit; and
- Requiring that all employees have an obligation to report competition law concerns to suitably senior staff within the business and/or to the senior offices responsible for competition law compliance.

9 Step 4 – Review

It is important that businesses regularly review all stages of the process to ensure that there is commitment to compliance from the top, that the risks identified and the assessment of them have not and should not be changed and that the risk mitigation activities remain appropriate and effective. Appropriate adjustments should be made.

Key competition risks faced by a business may change over time. For example, market share might grow over time so that the risk of infringing the abuse of dominance rules becomes higher.

Reviews may also be appropriate outside the regular review cycle, such as in the following circumstances:

- Where it is possible that employees might have been exposed to, or involved in, a competition law infringement;
- Where the business comes under investigation for a competition law infringement;
- When the business enters into a new or different business area; or
- Following the acquisition of another business.

Some businesses incorporate a review of competition law compliance within their internal audit programme.

10 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 laws and wish to complain 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 order copies of our publications by telephone from the numbers above.