

Competition Guideline 6: Applications for Guidance and Exemptions

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 provisions in the Jersey competition law that enable business to request guidance where there is a risk of infringing the competition laws, or to apply for an exemption from competition laws for an anti-competitive agreement. Specifically, this Guideline has been prepared to explain Part 2 and Part 6 of the Competition (Jersey) Law 2005 (the **Competition Law**).

Article 7 of the *Competition Law* provides that the Authority may publish guidelines on any aspect of that Law. Proof that a person has failed to comply with a guideline is not proof that the person has failed to comply with a requirement of the Competition Law. However, in proceedings where it is alleged that a person has failed to comply with a requirement of the Law:

- (a) Proof of a failure to comply with a guideline published by the Authority in respect of the requirement may be relied upon as tending to establish non-compliance with the requirement; and
- (b) Proof of compliance with the guideline may be relied upon as tending to establish compliance with the requirement.

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. Applications for Guidance and Exemptions

The competition laws in Jersey provide that businesses can seek guidance from the Authority on whether planned courses of action would be considered an anti-competitive arrangement or an abuse of dominance.

A business cannot ask for guidance on whether a planned course of action would breach the provisions in relation to mergers and acquisitions.

Guidance cannot be requested for current business conduct, because the laws only allow us to provide guidance on proposed courses of action.

The laws also allow us to exempt an arrangement from the law. In Jersey, the law does not allow for exemption in respect of an abuse of dominance.

The Need to Provide Correct Information

As detailed in this guideline, both requests for guidance and applications for exemption must be signed by an authorised representative of the applicant. Applicants requesting guidance or an exemption should note that it is an offence under the law to knowingly or recklessly provide the Authority with information that is false or misleading. Furthermore, the provision of false, incomplete or misleading information is grounds for us to withdraw guidance or an exemption. Thus, applicants must ensure that the information they provide to us is true, accurate, and complete to the best of their knowledge and belief.

3. Applications for Guidance

An application for guidance under Article 43 of the Competition (Jersey) Law 2005 must be made in writing and signed by an authorised representative of the applicant. The application must provide details of:

- The proposed course of action, including a copy of any agreement(s) the parties intend to sign;
- The parties involved;
- The products or services involved;
- Why the application for guidance has been made, i.e. why the parties believe that the proposed course of action may raise a compliance issue under the laws;
- The industry(ies) or market(s) that might be affected by the course of action (for more information see Guideline 7 - Market Definition);
- How competition works in the industry/market affected, for example, how vigorous competition is, and who the main participants are (including information on market shares, capacities etc. and the identity of the parties' main suppliers and customers, possible new entrants, and what possible substitute products exist);

- All documents prepared by or for the parties analysing the effect of the proposed course of action on markets or competition, including any projected financial data; and
- Local turnover for the parties for the last two years; and any arguments the parties wish to make that the proposed course of action does not infringe the laws, together with supporting evidence.

The confidentiality of information and documents submitted with an application for guidance is subject to the protections set out in the laws. An applicant is not required to disclose information or documents protected from disclosure by legal professional privilege. We have the discretion to modify the information required, depending on the circumstances.

The applicant seeking guidance must pay towards the work involved in connection with the application. The fee for simple guidance is a minimum fee of £5,000. Where the issues arising from the application, or the facts covered by the application, are more complex, the fee will depend on the Authority's estimate as to its reasonable costs, fees and expenses in connection with determination of the application. An applicant will be required to pay the fee when the application is made, and should discuss the amount of the fee that will payable before lodging the application.

Guidance will normally be provided within four weeks of a full application being made, subject to the complexity of the matter. The Authority also reserves the right to request additional information, and any delays in submitting the information are likely to delay the provision of the guidance.

A public version of the guidance that concludes that the planned course of action will not infringe the law will be published. Guidance that the planned course of action could infringe the law remains confidential between us and the applicant. However, in some circumstances, we may be unable to provide the guidance sought without consulting with other parties/competitors. In such circumstances, if the application contains confidential information, the applicant will be asked to provide a version of the application for disclosure to third parties.

Procedure

The Authority will consider the information provided and may ask for additional information or documents. The laws provide that if any information or documents that we reasonably require in order to give guidance are not provided within a reasonable time, we need not proceed with the request. If we send you a request for further information or documents, the request will advise you of the date by which you need to

respond. We may also ask you to attend one or more meetings to explain your application in more detail and to answer questions arising from the application.

We will provide our guidance to you in writing and a public version will be published on our website where we conclude that the planned course of action will not infringe the law. We will consult with you to ensure that all commercially sensitive information has been removed.

Effect of guidance

If the Authority gives guidance that a proposed course of action is unlikely to breach the competition laws, we cannot investigate the course of action unless we:

- Have reasonable cause to suspect that there has been a material change of circumstances since we gave the guidance;
- Have reasonable cause to suspect that the information on which we based our guidance was incomplete, false or misleading in a material particular;
- Have reasonable cause to suspect the course of action is a breach of the provisions of the law in respect of mergers and acquisitions; or
- Receive a complaint concerning the course of action, either before or after it is implemented by the parties.

4. Applications for Exemption

The Competition Law allows any party to an arrangement or proposed arrangement that might infringe Article 8 to apply to the Authority for an exemption. Exemptions are not available in respect of conduct that constitutes an abuse of a dominant position under Article 16, or a notifiable merger & acquisition under Article 20.

Qualifications for exemption

The Authority cannot grant an exemption to an anti-competitive arrangement unless it is satisfied that it:

- is likely to improve the production or distribution of goods or services, or to promote technical or economic progress in the production or distribution of goods or services;
- will allow consumers of those goods or services a fair share of any benefit resulting from the agreement or arrangement;
- does not impose on the businesses concerned terms that are not indispensable to attainment of the objectives mentioned in the bullet points above; and
- does not afford the businesses concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.

For more information see Guideline 1 - Anti-Competitive Arrangements.

How to make an application

Before submitting an application for exemption, an applicant may ask the Authority for an informal meeting to discuss whether the proposed application is necessary and, assuming it is, what specific information must be provided.

An application for exemption must be on the prescribed form and must provide the following information:

- details of the agreement or arrangement, including a copy of any agreement(s) the parties have signed or intend to sign;
- details of the parties involved;
- details of the products or services involved;
- details of the industry(ies) or market(s) that might be affected by the agreement or arrangement, (for more information see Guideline 7 - Market Definition);
- a description of how competition works in the industry/market effected, for example, how vigorous competition is and who the main participants are (including information on market shares, capacities etc., and the identity of the parties' main suppliers and customers, possible new entrants, and what possible substitute products exist);
- all documents prepared by or for the parties analysing the effect of the agreement or arrangement on markets or competition, including any financial data;
- what clauses of the agreement or arrangement the applicants think may be anti-competitive and why; and
- evidenced reasoning as to why the parties believe that the agreement or arrangement satisfies all four criteria for exemption as set out in the laws.

The application must be signed by an authorised representative of the applicant. The confidentiality of information and documents submitted with an application for exemption is subject to the protections set out the laws. The applicant should clearly indicate the information contained in or submitted with the application it believes is confidential and not subject to disclosure by us to third parties, giving reasons why this information should not be disclosed.

Upon receipt of an application, we will contact the applicant to confirm the scope of confidentiality. We will deem both the applicant and, if different, the person to whom the information relates, to have consented to the disclosure of information contained in or submitted with an application that has not been indicated as confidential.

The fee for an exemption is £5,000.

A decision on the granting of an exemption will normally be provided within four weeks of a full application being made, subject to the complexity of the matter.

Procedure

As with applications for guidance, the Authority will consider the information provided and may ask for additional information or documents. If you are sent a request for further information or documents, the request will advise you of the date by which you need to respond. We may also ask you to attend one or more meetings to explain your application in more detail and to answer questions arising from the application.

The laws provide that we must publish the details of an application for exemption as part of the public consultation and consider representations made to it. A notice of the application will be published in the local press and on our website. In addition, we may contact other industry participants, e.g. competitors, customers, suppliers and trade associations, concerning the application and the potential effect of an exemption on competition.

We will consider the information provided by the applicant together with any representations we receive from other parties when deciding whether an exemption would meet the four criteria referred to above.

If we grant an exemption, either with or without conditions or obligations, we will publish the decision on our website. Additionally, we may publish decisions to not grant an exemption. If an application for an exemption is not granted, we are likely to conclude that the arrangement hinders competition to an appreciable extent and is therefore prohibited and will issue an infringement decision to this effect.

Imposing conditions or obligations

The Authority may attach conditions or obligations to an exemption. We may also grant the exemption for a set period or post-date an exemption.

Examples of the type of condition that may be required are where an agreement or arrangement:

- covers several products and there are competition concerns associated with only one of the products - an exemption could be granted with the condition that the product likely to cause a lessening of competition is excluded from the agreement or arrangement; or
- would improve the production of a product, but it includes a clause that was so restrictive that it would eliminate competition in the distribution of that product – an exemption may be granted, subject to the condition that the clause is removed from the agreement or arrangement.

Effect of exemption

If the Authority grants an exemption for an agreement or arrangement, it cannot take any action regarding the agreement or arrangement during the period of the exemption. However, an exemption ceases to have effect if a condition or obligation is breached. Furthermore, we may withdraw an exemption, vary or remove a condition or obligation, or impose additional conditions or obligations if:

- there are reasonable grounds to believe there has been a material change in the circumstances since the exemption was granted; or
- there are reasonable grounds to suspect that the information on which the decision was based was incomplete, false or misleading in a material particular; or
- there has been a failure to comply with a condition or obligation.

A failure to comply with a condition or obligation may be brought to our attention by a third party complainant or by any other means.

5. Informal Approaches

Apart from the formal procedures described above, parties can also contact the Authority on an informal basis to ask about the competition laws in Jersey and the potential applicability of those laws to specific circumstances. Parties may informally approach us by letter, email, or phone, either directly or through their advisers. Information provided to us in such circumstances is subject to the protections from disclosure detailed in the laws.

The laws do not require us to respond to an informal approach, and the decision on whether or not to respond – as well as the timing, form and content of any response provided – are all within our discretion. Unlike guidance or exemptions, any response provided to an informal approach is not binding on us.

Depending on the circumstances, we may request that a party making an informal approach seek formal guidance or an exemption, for the conduct or potential conduct described.

6. Key Differences between Guidance and Exemptions

	Guidance	Exemption
Coverage	Any planned course of action that may breach prohibitions regarding anti-competitive arrangements or the abuse of a dominant position.	Planned or existing arrangements that may breach the provisions regarding anti-competitive arrangements. No exemption is possible in relation to the abuse of a dominant position or the mergers and acquisitions provisions.
Confidentiality	A public version of the guidance that concludes that the planned course of action will not infringe laws will be published.	The laws require that the Authority publishes details of exemption applications and decisions of exemptions that have been granted.
Legal Certainty	Provides parties with guidance on the potential applicability of the prohibitions regarding anti-competitive arrangements or abuse of a dominant position. However, guidance is no bar to action if the Authority receives a complaint or to a third party civil action.	If granted, an arrangement is exempt from the law. An exemption may be withdrawn in particular circumstances e.g. the terms of the arrangement materially change.
Fee	£5000 or more depending on complexity	£5000.
Time	Guidance will normally be provided within 4 weeks	A decision will usually be provided within 4 weeks
Consequences of Negative Decision	Guidance that the planned course of action could infringe the law remains confidential between the Authority and the applicant	A refusal to grant an exemption will be published, in addition to an infringement decision under the prohibitions regarding anti-competitive arrangements.

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