

Competition Guideline 2: Cartels

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 in respect of vertical arrangements, such as exclusive purchasing agreements, exclusive distribution agreements and franchise agreements. Specifically, this Guideline has been prepared to explain Part 2 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. Cartels

Cartels are a particularly damaging form of anti-competitive activity. Their purpose is to fix or control competitive variables such as prices by removing or reducing competition, and as a result they directly affect the purchasers of the goods or services concerned, whether businesses or private individuals.

They also have a damaging effect on the wider economy as they remove the incentive for the businesses involved to operate efficiently and compete effectively, while offering none of the economies of scale or scope of a monopoly. Cartels are regarded as sufficiently serious that in some jurisdictions, criminal prosecution is a legal option. This is not currently the case in Jersey.

Detecting cartels and taking action against their members is one of the Authority's top enforcement priorities under the laws. However, as cartels often operate secretly, we rely heavily on businesses and consumers to bring potential cartel activities to its attention.

What is a cartel?

In simple terms, a cartel is an agreement between businesses not to compete with each other. The agreement is often secret, verbal and informal.

Typically, cartel members may agree on:

- production levels;
- wholesale and/or retail prices;
- discounts;
- credit terms;
- which customers they will supply;
- which areas they will supply; or
- who should win a contract (known as 'bid rigging').

In some cartels several of these elements may be present.

Why should cartels be broken up?

Cartels allow businesses to achieve greater profits for less effort. For the customers of their goods or services this means:

- higher prices;
- poorer quality; and/or
- less or no choice.

The end-consumer suffers most from cartel agreements, and in the long term the economy is damaged, for example through higher inflation.

Spotting a cartel

There are a number of signs that may indicate that a cartel is operating. Some examples are where suppliers:

- raise prices by the same amount and at a similar time;
- offer the same discounts or have identical discount structures;
- quote or charge identical or very similar prices;
- refuse to supply a customer because of their location; and
- use give-away terms or phrases, such as:

- ‘the industry has decided that margins should be increased’;
- ‘we have agreed not to supply in that area’; or
- ‘our competitors will not quote a different price’.

The examples listed above are illustrative only and should not be construed as definitive or exhaustive. Their presence does not necessarily imply that a cartel is operating. Often, simultaneous price changes or charging similar prices among competitors are consistent with normal competitive responses in the market place. However, a business or customer should be particularly suspicious where several such patterns of conduct are present.

Where are cartels found?

Cartels can occur in almost any industry and can involve goods and services at the manufacturing, distribution or retail level.

Some sectors are more susceptible to cartels than others, because of their structure, or the way in which they operate, for example, where:

- there are few competitors;
- the products have similar characteristics, leaving little scope for competition on quality or service;
- input costs are transparent, predictable or well understood;
- communication channels between competitors are already established; or
- the industry is suffering from excess capacity or there is a general recession.

The fact that these conditions are not present does not rule out the possibility that a cartel is operating. Conversely, the fact that an industry shows some or all of these characteristics does not automatically mean that some form of cartel is operating, but customers should at least be alert to the possibility.

3. Bid Rigging

What is bid rigging?

Bid rigging is a form of cartel that may arise when contracts are awarded by a tender process. While the tender process seeks the most competitive bid, members of the cartel collude with each other on who should win a particular contract. The possibility of bid rigging will be particularly relevant to public sector purchasers, given their legal obligations to award certain contracts by competitive tender.

What are the signs of bid rigging?

In order to avoid detection, bid rigging operations are often sophisticated but there are certain signs that purchasers can look out for, particularly where contracts are awarded on a regular basis. Some signs to be aware of are the following:

- Do some suppliers unexpectedly decline an invitation to bid?
- Is there an obvious rotation of successful bidders?
- Is there an unusually high margin between the winning and unsuccessful bids?
- Do all bid prices drop when a potential new bidder comes on the scene, i.e. the new bidder is not a member of the cartel?

- Is the same supplier the successful bidder on several successive occasions, in a particular area, or for a particular type of contract?
- Are there one or more suppliers who continue to submit bids even though they consistently fail to win a contract?

How can you tackle bid rigging?

There are certain steps that you can take to hamper the success of bid rigging operations, or to reduce the likelihood that they will occur. For example, you can:

- make the criteria and qualifications of any bid as broad as possible, basically casting a wider net, so that they can be met by the widest range of suppliers;
- always shop around for suppliers when inviting bids;
- ask for bids to be broken down into as much detail as possible;
- keep records of bids for comparison purposes;
- insist that main contractors assign sub-contractors through a competitive process;
- Introduce a specific declaration from each bidder that they are not operating as part of any cartel and make this one of the terms of contract; and/or
- seek information from bidders about their associated companies and subsidiaries.

4. Taking Action

What else can you do to help tackle cartels?

The best defence against cartels is to be alert to the fact that they may exist and to operate an effective buying policy that takes this into account. You may find it helpful to make clear in your dealings with suppliers that you are well aware of the temptations of collusive behaviour and will bring any suspicions of such activity to the attention of the Authority.

What should you do if you have suspicions?

If you suspect that a cartel is operating, you should contact the Authority. The more information you can provide, the better placed the Authority will be to assess the need to take enforcement action.

In Jersey, being party to a cartel is not a criminal offence, but independently of any action taken by the Authority, third parties that consider they have been harmed as a result of an infringement may seek a remedy, including punitive damages, from the Royal Court of Jersey.

Immunity and the Authority's leniency policy

The Authority can grant complete immunity from, or a substantial reduction of, penalties that we may impose under the laws for businesses who are involved in a cartel and who are first to come forward with information about the cartel, in addition to cooperating fully with us throughout our investigation and any subsequent proceedings.

If a business is not the first to approach us about a cartel or has made an approach after we have already commenced an investigation into the cartel, providing information that assists us evidence the infringement, in addition to co-operating fully with us throughout our investigation and any subsequent proceedings, will result in a reduction in the financial penalty that we might otherwise have imposed.

For more detailed information about leniency, see Guideline 11 - Leniency Policy.

What can the Authority do?

The Authority has the power to investigate complaints of anticompetitive practices such as cartels if it has reasonable cause to suspect that the law has been infringed. If the information that you provide is sufficient to give us such grounds, it may start an investigation.

For more information on how we conduct investigations, see Guideline 10 – Investigation Procedures.

Can my identity be protected?

In order to investigate a complaint fully, the Authority may need to divulge the information it has obtained and the identity of the source to the undertakings being investigated. However, wherever possible your identity will be protected. If you are concerned about the disclosure of your identity, you should raise this with the Authority at the earliest opportunity.

For more information on how we deal with issues of confidentiality, see Guideline 10 – Investigation Procedures.

What action can the Authority take against cartels?

The Authority has the power to issue financial penalties to businesses that have infringed the law, in addition to imposing other remedies. Reporting your suspicions or providing information to us can therefore have a very real effect; not only will members of the cartel be penalised and your business protected, but a very strong deterrent message will be sent to other undertakings that may be contemplating cartel activity.

5. How can I find out more?

Please contact us 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.

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