
# COMPETITION LAW PROCEDURES & INTERNATIONAL BEST PRACTICE

## INTRODUCTION

**WRITTEN BY:**

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Earlier this year, the Channel Islands Competition and Regulatory Authorities (the Competition Authority) became a signatory to the International Competition Network's Framework on Competition Agency Procedures[1] (the Framework). The International Competition Network (ICN) is a worldwide network of competition agencies set up to exchange best practice and the Framework is one of a large number of ICN initiatives aimed at efficient and effective antitrust enforcement worldwide for the benefit of consumers and businesses.

As well as establishing a mechanism for co-operation between participants, the Framework sets out a number of high level principles (Principles) that each competition authority must ensure are respected by, and incorporated into, its domestic procedural law. These include non-discrimination, transparency and predictability, defence rights, the appropriate treatment of confidential information and the availability of appeal to an impartial tribunal. Within six months of becoming a signatory, each participant is required to prepare an audit (referred to in the Framework as a Template) of its investigation and enforcement procedures, which should set out the main points of compliance of its domestic procedural rules with the Framework, as well as areas in which compliance is limited. The Template should then be updated as the participant's enforcement procedures are amended and improved to ensure that they are in line with the principles set out in the Framework.

The ten Principles are:

- **Non-discrimination** – equal treatment of persons of another jurisdiction in competition law investigation and enforcement proceedings;
- **Transparency and predictability** – publication of and adherence to procedural rules and guidelines;
- **Appropriate investigative processes** – informing those subject to an investigation about the existence and nature of the investigation, ensuring reasonable opportunities for engagement on material issues and ensuring that information requests are appropriately targeted;
- **Timing of investigations and enforcement proceedings** – efficient and timely investigation and enforcement;
- **Confidentiality** – publicly available guidance on the treatment of confidential information and an obligation to balance the principles of maintaining confidentiality and of fair, effective and transparent enforcement;
- **Conflicts of interest** – maintenance of impartiality and objectivity;
- **Notice and opportunity to defend** – timely notice of allegations, opportunity to access the file and to defend allegations;
- **Representation by legal counsel and privilege** – guaranteeing the right to legal representation and the recognition of legal privilege;
- **Decisions in writing** – the requirement to publish reasoned decisions and commitments in writing, setting out clearly the legal and factual basis on which they are based;
- **Independent review** – the need for an appeal mechanism to an independent tribunal;

It can be seen that the Principles set out in the Framework cover all aspects of competition law investigation and

## UPDATE ARTICLES:



1 A link to the Framework can be found at: https://www.internationalcompetitionnetwork.org/frameworks/

enforcement, from the opening of a case through to potential appeal. They also incorporate a number of general principles of administrative fairness and due process, such as the need for transparent and open decision making insofar as this is possible.

In this article, we argue that the Channel Islands appear to be well-placed to achieve a high degree of compliance with the Principles. This is both because the current domestic rules in each Island are already largely or wholly compliant and because both systems allow for further refinement of competition law procedures to bring them more fully into line with the principles of the Framework, if required.

## EXISTING PRINCIPLES OF CHANNEL ISLANDS LAW

It is axiomatic that the legal systems of both Guernsey and Jersey are founded on and incorporate principles of fairness, due process and the rule of law. As such, there is a presumption that the Competition Authority, which is a public body that exercises administrative powers granted by statute, will exercise those powers "in a manner that is fair in all the circumstances"[2]. In the context of the Competition Authority's role and functions, fairness will require that a person "who may be adversely affected by [a] decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification"[3] and that such a person will be "informed of the gist of the case which he has to answer"[4].

In addition, both Guernsey and Jersey have incorporated the European Convention on Human Rights (ECHR) into their domestic law[5]. ECHR rights include, notably, the right to a fair hearing and the prohibition of discrimination. Domestic legislation must, insofar as possible, be read and given effect in a way which is compatible with Convention rights. In general terms, therefore, given the commonality of the underlying rationale of the Principles, domestic law principles of administrative fairness and a presumption of compatibility with Convention rights, competition law procedural rules in the Channel Islands can and should be interpreted in a way that is compatible with the ethos of the Principles, particularly in terms of fair procedure and non-discrimination.

## EXISTING PROVISIONS OF CHANNEL ISLANDS LAW

In addition to the general principles above, the Principles are largely explicitly incorporated into the competition law statutory procedural rules and Competition Authority guidelines in both Guernsey and Jersey. For example:

- Both the competition law statutes and Competition Authority guidelines on how it applies these in investigations are published on the Competition Authority's website[6];
- Pursuant to Competition Authority Guideline 10[7], the Competition Authority informs parties under investigation as soon as such an investigation is opened, setting out the basis for opening that investigation and publishing a short case opening summary on its website[8];
- Parties have a statutory right to be heard in investigations[9] and the Competition Authority must give its decisions in writing[10], ensuring that these are also made publicly available[11 12];
- The right of appeal[13] is provided for by statute in both Guernsey[14] and Jersey[15].

It is therefore the view of the author that nothing in the legal framework in Guernsey or Jersey contravenes any of the Principles – indeed the doctrines underpinning the competition law procedural rules in the Channel Islands in combination with the specific rules themselves incorporate the vast majority of the Principles.

2 R v. Home Secretary ex parte Doody (1994) 1 AC 531, p560.
3 Ex parte Doody
4 Ex parte Doody
5 Human Rights (Jersey) Law 2000, Article 4(1); The Human Rights (Bailiwick of Guernsey) Law, 2000, s.3(1)
6 Principles c(i) and c(v).
7 https://www.cicra.gg/legal-frameworks/guidelines/investigation-procedures/
8 Principle d(i).
9 The Competition (Guernsey) Ordinance, 2012 (2012 Ordinance), s.43; Competition (Jersey) Law 2005 (2005 Law), Article 35(2).
10 2012 Ordinance, s.44; 2005 Law, Article 35(2).
11 Guideline 10, p.14.
12 Principle j.
13 Principle k.
14 2012 Ordinance, s.46.
15 2005 Law, Article 53.

## FURTHER IMPROVEMENT OF COMPLIANCE WITH THE PRINCIPLES

Notwithstanding the view of the author that both jurisdictions are largely compliant with the Principles, it may nevertheless be the case that certain Principles could be more fully or explicitly set out in the competition law procedures in each Island.

There are at least three possible ways in which the competition law procedures could be further improved to incorporate the Principles more comprehensively.

First, the Competition Authority has the power to publish guidelines in both Guernsey and Jersey. Thus, Article 7(1) of the Competition (Jersey) Law 2005 (2005 Law) provides that:

"the Authority may publish in such manner as it considers most appropriate a guideline on any aspect of this Law."

The Competition (Guernsey) Ordinance, 2012 (2012 Ordinance) contains provisions in similar, but arguably broader, terms[16], empowering the Competition Authority to issue guidelines:

> "in connection with the administration, implementation and enforcement of this Ordinance and any matter relating to it".

In the author's view, the provisions of the 2012 Ordinance are clearly wide enough to empower the Competition Authority to adopt guidelines on competition law procedures since they specifically cover matters relating to administration, implementation and enforcement of the competition law. The Jersey provisions, whilst narrower, permit guidelines to be published on "any aspect" of the Law; in the view of the author, the procedures under which the law will be administered and enforced are an "aspect" of the Law and thus may properly be the subject of Competition Authority guidelines.

Second, the UK courts have found that the "equivalency" provisions of UK domestic competition law apply to competition law[17] procedural rules in the same way as they apply to the substantive competition law provisions. In its judgment in the Pernod[18] case, the Competition Appeal Tribunal (CAT) stated that:

"In relation to "administrative fairness" we have already indicated above that in Community law, the principle that the complainant has a "right to be heard" has stood for forty years, since the Community system was set up in 1962. [.....] The consistent development of the case law since 1962 (see e.g. paragraphs 204 and 205 above) reinforces our view that the procedural opportunities afforded to complainants form a basic element of administrative fairness in the system of Community competition law as a whole. The principle of administrative fairness as regards complainants finds its expression in the legislative provisions we have already referred to above. In all these circumstances, we are of the view that, by virtue of section 60 of the Act, we should resolve the questions before us in the same way as they would be resolved under Community law in an equivalent situation."[19]

Although the UK provisions on achieving conformity with EU competition law in its domestic competition law regime are more prescriptive than those in either Guernsey or Jersey[20], there appears to be no reason in principle why the Competition Authority could not seek to rely on the domestic conformity provisions[21] to develop Guernsey and Jersey rules on competition law procedures in line with those in force in the European Union.

Third, and finally, it would clearly be possible for either legislature to amend the competition laws to include further detailed rules on procedure.


## CONCLUSION

Over the next few months, the Competition Authority will work on preparation of the Template to identify areas of compliance and potential gaps in the domestic competition procedural rules. If necessary to ensure that the procedures in place in the Channel Islands are compliant with international best practice as set out in the Principles, the Competition Authority will consider whether the issue of further guidelines would be appropriate.

16 S.55(1) of the 2012 Ordinance provides as follows:
"The Authority may issue such guidelines as it considers appropriate:
(a) In connection with the administration, implementation and enforcement of this Ordinance and any matter relating to it (and generally for the purposes of this Ordinance), and
(b) For the purpose of providing practical guidance in respect of any provision made by or under it and any duties, obligations, requirements, restrictions, prohibitions and liabilities arising under or in connection with it and the procedures and best practices to be observed by undertakings affected by it."

17 Competition Act 1998, s.60.

18 Pernod Ricard SA and Campbell Distillers Limited v. Office of Fair Trading [2004] CAT 10

19 Pernod, paragraphs 232 - 234

20 Under UK competition law, the court and the competition authority must determine competition law questions in a way consistent with EU competition law, insofar as it is possible to do so. In Jersey, the court and the Competition Authority must "attempt to ensure that so far as possible" that questions arising under domestic competition law are dealt with in a manner consistent with the treatment of corresponding questions under EU law. In Guernsey, the court and the Competition Authority must take into account ECJ jurisprudence on corresponding questions when making decisions under domestic competition law.

21 2012 Ordinance, s. 54; 2005 Law, Article 60.

# COMMISSION OPENS COMPETITION LAW INVESTIGATION INTO AMAZON

*The European Commission (Commission) has announced that it has opened a further investigation into Amazon. The Commission is considering whether Amazon's use of commercially sensitive third party data from retailers who sell through the Amazon platform breaches competition law. The Commission's final decision in the case will be of interest to businesses in the Channel Islands as it considers how competition law impacts on suppliers who also compete with their retail customers.*

Amazon provides an online platform through which products are sold. In providing this platform, it has a dual role. First, it sells products itself on its website as a retailer. Second, it provides a marketplace through which independent sellers can sell products directly to consumers. In its capacity as the provider of a marketplace, it collects commercially sensitive data about the activities of the independent sellers using the platform, such as the products that they sell and the details of their transactions through the platform. Of itself, there is no competition issue with a supplier collecting this type of information. Competition issues could, however, arise if Amazon uses data legitimately collected in its capacity as platform provider to inform how it behaves when acting as a retailer in competition with independent sellers. To deal with the competition issues that can arise from this dual supplier/retailer role, it would be good practice to put in place so-called "Chinese walls" to ensure that commercially sensitive information about other retailers does not pass from the supplier function to the retailer function of its business.

It is likely that the existence (or lack) of mechanisms to prevent information flow within Amazon will be an area of focus for the Commission in its investigation, as it notes that one part of its investigation will concentrate on the terms of Amazon's agreements with its marketplace sellers and the extent to which these permit Amazon to use and analyse third party seller information.

Commenting on the investigation, Commissioner Margrethe Vestager, said:

"European consumers are increasingly shopping online. E-commerce has boosted retail competition and brought more choice and better prices. We need to ensure that large online platforms don't eliminate these benefits through anti-competitive behaviour. I have therefore decided to take a very close look at Amazon's business practices and its dual role as marketplace and retailer, to assess its compliance with EU competition rules."

# COMMISSION FINES CANON €28 MILLION FOR GUN-JUMPING

*The Commission has fined Canon, the Japan-based imaging and optical products manufacturer, €28 million for "gun jumping" when acquiring Toshiba Medical Systems Corporation (TMSC). The case will be of interest to Channel Islands businesses and practitioners, since it confirms the importance of avoiding gun jumping, even in the case of transactions that are clearly unproblematic.*

As is the case in the Channel Islands, EU merger control rules require that merging companies notify qualifying mergers for clearance and do not implement them until they are cleared. The purpose of these requirements is to safeguard a competition authority's ability to detect and investigate mergers.

On 12 August 2016, Canon notified the Commission of its intention to acquire TMSC and the merger was unconditionally cleared by the Commission on 19 September 2016.

The transaction was implemented by way of a two-stage "warehousing" process, with Commission approval being sought after completion of the first step but before the second step had been carried out. The Commission concluded that the first and second steps together formed a single, notifiable merger and that, by carrying out the first step, the parties had taken steps to implement the merger before approval had been granted. This contravened the standstill provisions of the EU merger regulation.

This case is of interest since it underlines that, as in the Channel Islands, failure to notify a qualifying merger may attract a financial penalty, even where the merger does not lead to a substantive competition problem and is cleared without the need for a second detailed review (Phase II).

# CMA FINES CONSTRUCTION FIRMS £36 MILLION FOR BREAKING COMPETITION LAW

*The UK competition authority (the Competition and Markets Authority (CMA)) has imposed fines totalling more than £36 million on three construction firms that participated in a Great Britain-wide price-fixing and market sharing cartel. The case is of interest both because of the sector involved, which has been the subject of repeated infringement decisions, and because two out of the three cartelists used the CMA's settlement procedure to achieve a reduction in their fines.*

Following an investigation by the CMA, three construction firms have received substantial fines for their part in a price-fixing and market sharing cartel for the supply of concrete drainage products. At the time of the infringement, the firms were, according to the CMA, the leading players in this market. The cartel ran for almost seven years and involved senior executives of each firm attending cartel meetings, some of which were recorded by the CMA and used as evidence to support its infringement decision.

In 2018, two out of the three firms accepted their part in the illegal arrangements and were therefore able to benefit from a reduced fine under the CMA's settlement procedure.

The CMA's Chief Executive, Andrea Coscelli, said:

> "These companies entered into illegal arrangements where they secretly shared out the market for important building products and agreed to keep prices artificially high. This is totally unacceptable as it cheats customers out of getting a good deal. The CMA will not hesitate to issue appropriately large fines in these cases and we will continue to crack down on cartels in the construction sector and in other industries."

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