



Guernsey Competition Law

GCRA Guideline 10 – Investigation procedures

Issued June 2021

What this Guideline is about

This Guideline is one in a series of publications designed to inform businesses and consumers about how we, the Guernsey Competition and Regulatory Authority (**GCRA**), apply competition laws in Guernsey.

The purpose of this Guideline is to explain to consumers, businesses and their advisers the procedures that the GCRA uses to investigate potential infringements of *The Competition (Guernsey) Ordinance, 2012* (the **2012 Ordinance**).

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

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 law in Guernsey

In Guernsey, the 2012 Ordinance prohibits anti-competitive behaviour, including anti-competitive agreements between businesses and the abuse of a dominant position in a market. It also requires certain mergers and acquisitions to be notified to the GCRA for approval.

What powers does the GCRA have?

The GCRA 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 Guideline, we refer to a 'business'. This term (also referred to as an 'undertaking' in Guernsey competition law) means any entity engaged in economic activity, irrespective of its legal status, including companies, partners, cooperatives, States' departments and individuals operating as sole traders.

Note on European Union (EU) Competition Law

Guernsey competition law is modelled on the competition provisions in the Treaty on the Functioning of the EU (TFEU). Section 54 of the 2012 Ordinance provides that the GCRA and the Royal Court may take into account the principles laid down by, and any relevant decisions of, the European courts in respect of corresponding questions arising under EU competition law¹.

Relevant sources of EU competition law 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. Section 54, however, does not prevent us from departing from EU precedents where this is appropriate in light of the particular circumstances of Guernsey.

¹ The provisions of section 54 were amended with effect from 23 February 2021 by the European Union (Competition) (Brexit) (Guernsey) Regulations, 2021, regulation 1, which replaced the word “must” with the word “may”.

2 Transparency in investigations under the 2012 Ordinance

The GCRA is committed to acting transparently and openly when carrying out its work. Transparency is important for several reasons. First, it enables those affected by our decisions to verify that we are acting in a way that is procedurally fair. Second, it increases public awareness of our work and so encourages engagement with it. Third, as a result of increased engagement, transparency ensures that our decision making is based on the best available evidence and so improves the quality and robustness of that decision making and public confidence in it.

We will aim to achieve transparency in our work through:

- Ensuring, where possible, that the parties to a case and other involved persons, eg, complainants, are informed when key milestones in a case are reached, eg, when a case is opened;
- Engaging with the parties to a case and other involved persons at an early stage of a case and ensuring that an opportunity to provide views is given at appropriate points;
- Placing announcements on our website when a case is opened and key milestones in that case are reached.

We are mindful of our responsibilities under the law to preserve the confidentiality of certain information that is disclosed to us. We will comply fully with our legal obligations when deciding how and whether to publish or disclose any information provided to us in the course of an investigation.

3 Opening an Investigation

The GCRA has no power to conduct 'spot-checks' to verify compliance with the 2012 Ordinance. We may only open a formal investigation if we have 'reasonable grounds to suspect' that a business:

- Has contravened the 2012 Ordinance by entering into an anti-competitive agreement;
- Has contravened the 2012 Ordinance by abusing a dominant position;
- Has contravened, or intends to contravene, the 2012 Ordinance by executing a notifiable merger or acquisition without our approval;
- Has contravened any condition of an exemption or approval issued pursuant to the 2012 Ordinance;
- Has contravened a direction we have issued under certain sections of the 2012 Ordinance;

The GCRA may also conduct an investigation into any business or market in Guernsey or any matter concerning competition or to which its functions relate where it has reasonable grounds to do so in order to comply with a request made by the Committee *for* Economic Development for a report, market study or other document, advice, assistance or information.

Whether reasonable grounds to suspect exist will depend on our assessment of the information available. Information on potential infringements may come from complaints we receive, information we receive from leniency applicants concerning possible cartels, or information that otherwise becomes known to us, such as from the media or other public sources.

For more information see GCRA Guideline 8 – Complaints, GCRA Guideline 3 – Cartels and the GCRA Leniency Policy.

Upon receipt of such information, we conduct a preliminary assessment to determine the likelihood of finding a breach of the law. Sources of information during a preliminary assessment can include any party or parties providing information to us, and public sources. Any information provided to us during this process is done on a voluntary basis.

Having conducted a preliminary assessment, we determine whether reasonable grounds to suspect exist and, if so, if and when to commence a formal investigation. Even if reasonable grounds to suspect exist, we may still decide either not to commence a formal investigation or to delay its initiation. Our decision will depend on considerations such as: the gravity of the conduct involved; the harm or potential harm caused to the Guernsey economy, consumers, or businesses; whether the dispute is more applicable to private resolution among the parties involved; the matter's apparent urgency; and other activities that we are currently undertaking.

4 Formal Complainants

Under certain circumstances, the GCRA may grant Formal Complainant status to a party that brings alleged anti-competitive conduct to our attention.

Where a party is given Formal Complainant status, we assume that that party will be in a position to provide information that may assist us. There is therefore a presumption that a Formal Complainant will be consulted at certain key milestones in our investigation.

Formal Complainant status will be granted to a party:

- who requests such status; and
- who has submitted a reasoned, formal complaint to us which contains the information set out in Annex 1 to this Guideline; and
- whose interests are likely to be materially affected by the alleged conduct under investigation.

A Formal Complainant must submit a non-confidential version of its complaint to us. We may provide this document to the parties under investigation, if we consider that it is necessary to do so in order to respect their rights of defence.

If a Formal Complainant does not wish its identity to be revealed to the parties under investigation, it may make representations to us as to why this information should be kept confidential. We will, in so far as we are able to do so without harming the rights of the defence of the parties under investigation, seek to maintain a Formal Complainant's anonymity under these circumstances.

5 Opening a Formal Investigation

If the GCRA decides to investigate a matter, we will open a formal case. A case is opened when we have determined that there are reasonable grounds to suspect that the relevant legal provisions have been contravened and that the case falls within our administrative priorities.

Unless doing so would compromise our investigation, eg, where we intend to carry out a search under warrant, we will inform the parties directly involved that a formal case has been opened. They will be provided with the following information:

- A description of the case;
- The legal basis for bringing the case;
- The industry sector concerned;
- The reasons why we have opened a formal case.

We will also place a case opening announcement on our website, setting out the above information. We will not publish the names of the parties at this stage, unless there is a good reason for doing so.

6 Evidence gathering in Formal Investigations

During a formal investigation, we will conduct a robust, evidence based assessment of whether an infringement has occurred. In addition to public sources, information can be required from the parties under investigation, competitors, customers, employees, suppliers, potential entrants into the affected markets, industry/trade associations and relevant States departments. In particular, individuals or businesses that initially provided information to us, such as Formal Complainants or leniency applicants, are likely to be able to provide us with valuable further input. Subject to the confidentiality restrictions discussed below, we would expect to obtain information from as many relevant sources as possible in an attempt to gain a complete picture of the conduct in question.

We can only require the provision of documents and/or information that we believe are necessary for the investigation.

During a formal investigation we can mandate the provision of information and documents through issuing requests for information or by conducting an inspection without notice under warrant. We may also require parties to attend for interview.

Written requests for information and/or documents

We may send written information requests to the parties under investigation but may also require the production of information by other parties that appear to have relevant information or documents. Such notices may require the recipients to provide us with documents or information. In setting a deadline for responses, we will consider the amount and the complexity of the information and/or documents required. In certain circumstances we may consider requests for extension.

Interviews

We may require parties to attend for interview. A person required to attend for interview must attend at the time and place specified and answer all questions reasonably put to them by the Authority. They must also give the Authority all assistance in connection with the investigation that they are reasonably able to give.

Inspection without notice under warrant

In exceptional circumstances, where a danger exists that the parties may alter, tamper with, or destroy evidence upon notification, we have the ability to enter and search premises under a warrant. Our powers include the seizure and retention of original copies of documents that appear relevant to the investigation. If documents are retained during the search, we must supply a list of these documents to the party from which they were obtained. If a party reasonably requires a retained document for its business and requests it, we will provide a copy of the document as soon as reasonably practicable.

Interim measures

If we consider it appropriate as a matter of urgency to prevent serious, irreparable damage to a person or class of persons, or otherwise to protect the public interest, we can order interim measures during a formal investigation. Prior to issuing a direction containing interim measures, we give the party subject to such direction written notice and an opportunity to respond.

7 Draft Decision and Access to the File

If, as a result of the investigation, the GCRA determines that the information collected supports the conclusion that an infringement exists, we will prepare a draft decision (**Statement of Objections; SO**) setting out our preliminary conclusions on the conduct under investigation.

When preparing the SO, we may seek the views of Formal Complainant(s) if we consider that they would be able to assist us materially in testing the legal, economic or factual arguments on which we might wish to rely.

There will be an opportunity for any party that supplied information which will be contained in the draft decision to make confidentiality claims in respect of such information.

We will give the party or parties involved a copy of the decision and a reasonable period to make representations to us (specified in the notice), which will be not less than 28 days. Representations may be given in writing or orally.

Non-confidential versions of the draft decision will be provided to Formal Complainants.

A non-confidential version of the draft decision may also be provided to other third parties:

- who request a copy; and
- whose interests are likely to be materially affected by the alleged conduct under investigation; and
- who are likely to be able to provide input which will assist us in our investigation.

An announcement that an SO has been issued will be placed on our website together with a brief summary of the case, which will include the names of the parties to the case.

At the same time as issuing the draft decision, the GCRA will also give the addressees of the SO the opportunity to access the information held on the GCRA's case file. The case file contains documents that relate to matters contained in the SO, excluding certain confidential information (see section 7 below) and GCRA internal documents. The case file is made available so that addressees of the SO can properly defend themselves against the allegation that they have breached the 2012 Ordinance by reviewing the evidence on which the SO is based.

The GCRA will allow addressees of the SO a reasonable opportunity to access the case file. In general, the period of time for accessing the file will be the same as that given for the provision of written representations.

In order to ensure that the access to the file procedure is as efficient as possible, the GCRA will typically provide:

- a. copies of the documents that are directly referred to in the SO; and
- b. a schedule containing an index of all the documents on the GCRA's file.

Access to the file will be given electronically.

If the party or parties subject to the investigation wish to make oral representations to us, this will be arranged by the case team. We will prepare a transcript of any such meeting, a copy of which will be provided to the parties on request. Formal Complainants will not be invited to attend this meeting, but a separate meeting with us may be held if one is requested and we consider that such a meeting may assist us in our investigation.

After this response period, we will prepare a final decision (subject to changes, if any, made during the response period) or we may decide not to go ahead with a final decision. There will be an opportunity for any party that supplied information to be contained in the final decision to make confidentiality claims in

respect of such information. Failure by a party to cooperate with us in submitting duly substantiated confidentiality claims can be deemed as consent to public disclosure of the entire decision.

An announcement that a final decision has been taken will be placed on the GCRA's website together with a short case summary, the decision and the reasons for that decision. A non confidential version of the decision will be published on our website when all confidentiality claims have been considered.

Alternatively if, based on the evidence collected, we determine that an infringement has not occurred, we can end the investigation. We will inform the parties involved in the investigation that the matter has been closed and confirm in writing if requested. An announcement that a final decision has not been adopted will be placed on our website. The fact that we have ended an investigation does not prejudice our ability to re-open the matter, should we receive additional information that would justify doing so.

In addition to decisions, we can issue written directions and impose financial penalties. Directions are issued where necessary to bring the infringing conduct to an end. Financial penalties may be imposed if we are satisfied that the infringement was committed intentionally, negligently, or recklessly. Financial penalties are limited to 10% of the turnover of the business during the period of the breach, for a maximum period of three years.

We may also decide to close an investigation without adopting an SO or a final decision if parties decide to cease conduct that might constitute an infringement of the 2012 Ordinance. When considering whether to proceed to an SO or final decision in such circumstances, we will consider a range of factors, including whether a financial penalty is likely to be appropriate (in which case a final decision will need to be prepared), the degree of confidence that the GCRA has that the infringing conduct will not re-occur, and extent to which a final decision could provide

guidance to business on what is, and is not, acceptable under the law, or play an important role in developing the law where there is limited case law or precedent.

Parties may appeal a decision, direction, or financial penalty using the procedure set out in the 2012 Ordinance.

8 Confidentiality

The GCRA is permitted to disclose information that we have received relating to a party's business or affairs if disclosure would further the course of a formal investigation. This is an exception to the general rule that such information must not be disclosed.

Even where to do so would further the course of a formal investigation, we will generally not disclose information supplied to us if that information is commercially sensitive. Before we disclose any information, we will give the party who submitted it an opportunity to identify information that it considers to be commercially sensitive. Any claims of confidentiality must be duly substantiated.

Before disclosing information, including as part of the access to the file procedure and in our published documents, the GCRA will require all parties that have provided information during the investigation to make known to us which information they consider to be confidential and why. Such claims should be kept to the minimum necessary to protect confidentiality and, for reasons of transparency and open decision making, blanket or unsubstantiated claims will not be accepted. Having taken into account parties' confidentiality representations, the GCRA will decide whether it is appropriate to disclose the information.

Information may be viewed as confidential if it is:

- a. commercial information, the disclosure of which the GCRA considers would significantly harm the legitimate business interests of the business to which it relates; or
- b. information relating to the private affairs of an individual the disclosure of which the GCRA considers would significantly harm the individual's interests.

9 Consequences of obstructing an investigation

The laws contain severe penalties for obstructing an investigation. It is a criminal offence for any person to falsify, conceal, destroy or otherwise dispose of any document or information potentially relevant to our investigation. Failure to respond to a statutory notice to provide information is a criminal offence, as is the provision of materially false, misleading, or incomplete information. A person committing any such offences is potentially liable for penalties that include imprisonment of up to 2 years, payment of a fine, or both.

10 Conduct that may infringe the competition laws and licence conditions

Certain conduct may infringe both the laws and conditions in licences issued by GCRA under sector-specific² legislation. For example, licences issued by us may contain conditions that prohibit a licensee with significant market power from abusing a dominant position in a relevant market, which is similar to the prohibition against abuse of dominance set out in the competition laws.

Where information provided to us raises a reasonable cause to suspect that the conduct in question may violate both competition law and licence conditions, we will normally conduct the investigation using the competition law's information-gathering powers, discussed above. A finding of an infringement can lead to a decision, direction, and financial penalties under the competition law. In addition, an infringement can also lead us to find a party in contravention of its licence conditions and serve as the basis for one or more directions under sector-specific legislation. Subsequent non-compliance with directions issued under any of these laws can provide grounds for licence revocation.

² The Electricity (Guernsey) Law, 2001; The Telecommunications (Bailiwick of Guernsey) Law, 2001; The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001.

11 Voluntary Requests for Assistance

Thus far, this Guideline has discussed the formal powers to compel the production of information and/or documents under the competition laws and the sector-specific legislation. These formal powers, however, do not preclude the GCRA from requesting the voluntary production of information and/or documents. Voluntary requests may be particularly useful to monitor or measure the impact of past decisions and directions on markets or competition. Such enquiries may be oral or in writing, and may be used in addition to the use of mandatory powers. We cannot compel a response to a voluntary request, although responses are encouraged. The restrictions on disclosure described above apply to information supplied voluntarily, as do the prohibitions on supplying materially false or misleading information.

12 Self-Incrimination

There is a limited self-incrimination “use immunity” under the 2012 Ordinance. This means that answers given or information provided to the GCRA exercising its powers under the 2012 Ordinance may generally not be used against the party who provided the information in subsequent criminal proceedings against them.

13 Legal Professional Privilege

The GCRA may not require the disclosure of information or documents that would be protected from disclosure in the Royal Courts on the grounds of legal professional privilege.

14 Cooperation with Other Competition Enforcement Agencies

Certain conduct investigated in Guernsey may be subject to investigation by competition authorities in other jurisdictions, such as the UK, Jersey, Ireland or the European Union. The 2012 Ordinance allows the GCRA to cooperate with other competition authorities on matters that affect competition in more than one country.

15 How can I find out more?

Please contact us if you have a question about competition law in Guernsey, or if you suspect that a business is breaching the law 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.gcra.gg.

Annex 1

Information required in a written, reasoned complaint

- Name and legal form of the complainant.
- Name and legal form of the parties about whose conduct the complaint is being made.
- An explanation of why the complainant is materially affected by the alleged anti-competitive behaviour.
- A full description of the reasons for making the complaint, including:
 - The business of the party who is the subject of the complaint;
 - A summary of the events giving rise to the complaint, with relevant dates;
 - The complainant's view of the market affected by the alleged anti-competitive behaviour;
 - How customers are likely to be adversely affected by the alleged behaviour.
- A copy of all available evidence supporting the complaint.