Guernsey Competition Law
GCRA Guideline 2 – Anti-competitive agreements

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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 law in Guernsey.

The purpose of this Guideline is to explain to consumers, businesses and their advisers the provisions in the Guernsey competition law in respect of cartels (arrangements between businesses that are especially damaging to competition). Specifically, this Guideline has been prepared to explain Part II of *The Competition (Guernsey) Ordinance, 2012* (the **2012 Ordinance**).

This Guideline should not be relied on as a substitute for the law. 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.

A 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 law[1].

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 Anti-Competitive Agreements

The 2012 Ordinance prohibits agreements between two or more businesses that prevent competition in Guernsey, regardless of where the agreements may have originated.

Types of anti-competitive agreements to which the 2012 Ordinance may apply are considered below. Certain types of agreement caught by the prohibition may be exempted when they satisfy certain statutory criteria. The types of exemption available and the criteria which need to be satisfied are discussed later in this guideline.

If an agreement infringes the prohibition in the 2012 Ordinance then it is void and the offending parties may be liable to financial penalties. In addition, third parties who consider that they have been harmed may have a claim for damages in the Royal Court.

3 Relevant Terms

Agreement

Agreement has a wide meaning[2] and covers agreements, whether legally enforceable or not, written or oral, as well as so-called 'gentlemen's agreements'. There does not have to be a physical meeting of the parties for an agreement to be reached: an exchange of letters or telephone calls may suffice if a consensus is arrived at as to the action each party will, or will not, take.

The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the agreement (although these facts may be taken into consideration in deciding the level of any financial penalty).

[2] Section 5 of the 2012 Ordinance prohibits "***agreements between undertakings***" which have the "object or effect of preventing competition". Section 60 then defines "agreements between undertakings" as meaning "any type of agreement, arrangement or understanding..". For the purposes of this Guideline, the GCRA has referred to the tests as requiring us to consider whether there is an "agreement", recognising that this concept has a wide meaning under the law.

Associations of undertakings (businesses)

Trade associations and professional and self-regulatory bodies are also included within the scope of the prohibition on anti-competitive agreements. The internal relationship between the businesses which form the association is also likely to be considered to be an agreement. Other measures operated or made by an association of businesses, such as rules, decisions or recommendations, are likely to be considered as agreements between the individual member businesses if they are intended to be binding or are actually implemented. In some instances, both an association and its participating members can be considered as undertakings (businesses) in competition law. The relationship of an association of businesses with third parties is likely to be considered as an agreement between businesses. In each case, the relevant legislative prohibition applies only if the relevant activity has the object or effect of preventing competition in Guernsey. It will be a question of fact in each case whether an association of businesses is itself a party to an agreement.

For more information on the application of competition law to trade associations and similar bodies, see GCRA Guideline 4 - Trade Associations & Professions.

Concerted practices

'Agreement' includes the EU competition law concept of concerted practices. A concerted practice may exist where there is informal co-operation without any formal agreement or decision.

In considering if a concerted practice exists, the GCRA will normally follow relevant European Community precedents established under Article 101 of the TFEU. The evidence that will be required to establish an infringement includes:

- the existence of positive contacts between the parties; and
- parallel behaviour as a result of such contacts that leads to conditions of competition that do not correspond to the normal conditions of a market.

The following are examples of factors which we may consider in establishing if a concerted practice exists:

- whether the parties knowingly enter into practical co-operation;
- whether the behaviour in the market is influenced as a result of direct or indirect contact between businesses;
- the level of transparency in the market (that is, the extent to which different firms can gain access to sensitive information from other firms, either directly or indirectly);
- the structure of the relevant market and the nature of the product involved; and
- the number of businesses in the market, and where there are only a few businesses, whether they have similar cost structures and outputs.

"In Guernsey"

The law applies only if the agreement has the object or effect of preventing competition in Guernsey or any part of it. This means, as a practical matter, that if an agreement is concluded outside Guernsey but still has the effect of preventing competition within Guernsey, it may still be subject to Guernsey competition law.

Preventing competition

The prohibition applies where the object or effect of the agreement is to prevent competition. Any agreement between businesses might be said to prevent competition to some degree, in that it restricts the freedom of action of the parties. That does not necessarily mean that the agreement has or will have an effect on competition, however, and the GCRA does not adopt such a narrow approach. We will assess the effect of an agreement on competition in Guernsey by examining its object and effect.

An agreement may be subject to Guernsey competition law if it has the object **or** effect (or both) of preventing competition. This prohibition applies, in particular, to agreements that have the object or effect of:

a) directly or indirectly fixing purchase or selling prices or any other trading conditions;
b) limiting or controlling production, markets, technical development or investment;
c) sharing markets or sources of supply;
d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[3]

Agreements between businesses in which one or more of these types of restriction is apparent can be said to have the 'object' of preventing competition. In addition, an agreement can be found to have the 'effect' of preventing competition when one or more of these conditions arise in a market as a result of the agreement. An agreement also may have both the object and the effect of preventing competition.

[3] This is a non-exhaustive, illustrative list.

In administering the 2012 Ordinance, the GCRA will typically apply the same requirement when considering whether an agreement has the effect of preventing competition within any market for goods or services in Guernsey.

Generally speaking, we take the view that an agreement will have no appreciable effect on competition if the parties' combined share of the relevant market/s does not exceed 25 per cent, although there may be circumstances in which this is not the case. We will, in addition, generally regard any agreement between businesses that:

- directly or indirectly fixes prices; or
- shares markets; or
- imposes minimum resale prices; or
- is one of a network of similar agreements which have a cumulative effect on the market in question,

as being capable of having an appreciable effect on competition, even where the parties' combined market share is below 25 per cent.

Even where the businesses' combined market share is higher than 25 per cent, we may find that the effect on competition of an agreement between them is not appreciable. Other factors concerning the content of the agreement and the structure of the market or markets affected by the agreement, such as whether competitors would be able to constrain the conduct of the parties, barriers to entry or the characteristics of buyers and the structure of the buyers' side of the market, will be considered in determining whether the agreement has an appreciable effect.

For more information, see GCRA Guideline 7 - Market Definition.

4 Examples of Anti-Competitive Agreements

Some guidance on the GCRA's approach to assessing common types of potentially anti-competitive agreements follows below. It should be noted, however, that any agreement that has an appreciable effect on competition is likely to be subject to the relevant legislative prohibitions, irrespective of whether or not it is of a type named in the illustrative list in the legislation or in this guideline, although it may be subject to exemption.

5 Directly or indirectly fixing prices

Agreements which explicitly and directly fix prices or the resale prices of any product or service are likely to infringe the prohibition set out in the 2012 Ordinance. The GCRA considers that such price-fixing agreements will have both the object and effect of hindering or preventing competition.

There are many ways in which prices can be fixed. It may be by fixing the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.

Price-fixing agreements may also cover discounts or allowances to be granted, transport charges, payments for additional services, credit terms or the terms of guarantees, for example. The agreement may relate to the charges or allowances quoted or to the ranges within which they fall or to the formulae by which ancillary terms are to be calculated.

Price-fixing agreements also may be found at different levels of the distribution chain, whether at wholesale, retail, or after-sale. For example, even if two companies competed on price for a particular product, an agreement between them to fix the amount that each charges for after-sales service to the product would be subject to the prohibition.

6 Agreements to Share Markets

Businesses may agree to share markets, whether by territory, type or size of customer, or in some other way. This may be as well as or instead of the price to be charged, especially where the product is reasonably standardised. Such an agreement is likely to have the effect, and may also have the object, of hindering or preventing competition.

There can be agreements, however, which have the effect of sharing the market to some degree but where that effect is no more than a consequence of the main objective of the agreement. Parties may agree, for example, each to specialise in the manufacture of certain products in a range, or of certain components of a product, in order to be able to produce in longer runs and therefore more efficiently. Such an agreement is caught by the prohibition where there is, or is likely to be, an effect on competition, but may, depending on the circumstances, qualify for an exemption as discussed below.

7 Collusive tendering ('bid-rigging')

Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that prospective suppliers prepare and submit tenders or bids independently. Any collaboration between actual or potential bidders as to whether, and if so, on what terms, they would bid is very likely to have both the object and effect of preventing competition, and will breach the prohibition in the 2012 Ordinance.

For more information see GCRA Guideline 3 - Cartels.

8 Cartels

Agreements or concerted practices of the three types described above – price fixing, market sharing and bid rigging – are commonly referred to as 'cartels'.

For more information, see GCRA Guideline 3 - Cartels.

9 Agreements to Limit or Control Production or Investment

An agreement to limit or control production may have the effect of preventing competition. Such an agreement may be the means by which competitors engage in price-fixing, or may relate to production levels or quotas. In some limited cases, such as an agreement intended to deal with structural overcapacity, the agreement may qualify for exemption.

Competitive pressures may be reduced if businesses in an industry agree to limit or at least coordinate future investment plans. It is likely that any agreement to limit or control investment will have the effect of preventing competition.

10 Joint Buying / Selling

An agreement between sellers to fix (directly or indirectly) the price that they are prepared to charge, or to sell only through agreed arrangements, limits competition between them. Such an agreement may be caught by the prohibitions in the 2012 Ordinance if it has an effect on competition, or if it has the object of preventing competition.

The same issues potentially arise in agreements between buyers. Joint buying agreements may have an appreciable effect on competition. Agreements designed to pool the purchasing power of smaller firms in an effort to drive purchase prices down, however, may qualify for an exemption if they are shown to be beneficial to efficiency and competition in downstream markets.

11 Information Disclosure

The disclosure of information, whether one-way disclosure or an exchange, may have an effect on competition where it serves to remove uncertainties in the market and therefore eliminate competition between businesses, such as where information is exchanged on pricing intentions (see below). It does not matter that the information could have been obtained from other sources. Whether the information disclosure has an effect on competition, or is even found to have the object of preventing competition, will depend on the circumstances of each individual case: the market characteristics, the type of information and the way in which it is disclosed.

As a general principle, the GCRA considers that the smaller the number of businesses operating in the market, the more frequent the disclosure, and the more sensitive and confidential the nature of the information which is disclosed, the more likely there is to be an effect on competition.

An agreement between competing businesses to exchange commercially sensitive information, whether directly or indirectly is likely to be regarded as having the object of preventing competition.

Disclosure of price information

The disclosure of information on prices may lead to price co-ordination and therefore the elimination of competition which would otherwise be present between the businesses. This would be the case whether the information disclosed relates directly to the prices charged or to the elements of a pricing policy; for example, discounts, costs, terms of trade and rates and dates of change.

The circulation of historical information or the collation of price trends may be less likely to have an effect on competition. An example may be where it forms part of a structured scheme of inter-business comparison that is intended to spread best industrial practice, in particular if the information is collected, aggregated and disseminated by an independent body, for example as part of a bench-marking exercise.

Disclosure of non-price information

The disclosure of information on matters other than price may have an appreciable effect on competition, depending on the type of information disclosed and the market to which it relates. The disclosure of statistical data, market research and general industry studies for example is unlikely to have an appreciable effect on competition provided that the information disclosed does not enable confidential or sensitive business information to be shared.

12 Advertising

Restrictions on advertising, whether relating to the amount, nature or form of advertising, will hinder or prevent competition to some degree. Whether the effect is appreciable depends on the purpose and nature of the restriction, and on the market in which it is to apply. Bona fide decisions aimed at curbing misleading advertising or at ensuring that advertising is legal, truthful and not deceptive are unlikely to have an appreciable effect on competition. On the other hand, limitations on truthful price advertising or comparative advertising are likely to be found to be subject to the prohibition in the 2012 Ordinance.

13 Standardisation Agreements

An agreement on technical or design standards may lead to an improvement in production by reducing costs or raising quality, or it may promote technical or economic progress by reducing waste and consumers' search costs. The agreement may, however, have an appreciable effect on competition if it includes restrictions on what the parties may produce or is, in effect, a means of limiting competition from other sources, for example by raising entry barriers.

14 Vertical Agreements

Certain types of so-called 'vertical agreements', ie, agreements between businesses at different levels of the production or distribution chain, may also be seen as hindering or preventing competition.

For more information see GCRA Guideline 11 – Vertical Agreements.

15 Other Anti-competitive Agreements

Competition in a market can be restricted in less direct ways than by fixing prices or sharing markets or by other examples set out above. Each case needs to be considered on its own facts.

Other agreements where the parties agree to cooperate may fall within the laws if they have an appreciable effect on competition. These include, for example, agreements for specialisation where each party agrees to produce particular products and supply them to the other, or to co-operate in research and development, and many joint venture agreements, in particular for the development of new products or markets.

16 Exemptions

An agreement that would otherwise be prohibited under the provisions on anti-competitive agreements may be exempted if it satisfies the conditions in section 6 of the 2012 Ordinance. The conditions allow an exemption to be granted to an agreement where it:

a) 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;

b) will allow consumers of those goods or services a fair share of any resulting benefit;

c) does not impose on the businesses concerned terms that are not indispensable to attainment of the objectives mentioned in sub-paragraphs a) and b); and

d) does not afford the businesses concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.

All conditions must be met. The objective and appreciable advantages must be sufficient to outweigh the agreement's hindrance to competition. This must be judged objectively. The onus of demonstrating that the conditions are met falls upon the parties to an agreement.

The agreement contributes to improving production or distribution or promoting technical or economic progress…

This criterion requires that the agreement must be likely to produce either quantitative or qualitative efficiencies. Efficiencies may create additional value for consumers by lowering costs, improving the quality of a good or service provided, or by creating a new good or service. Efficiency improvements claimed for the agreement must be clearly identified and justified.

…while allowing consumers a fair share of the resulting benefits

This is not limited to final consumers. It can include the customers of the parties to the agreement. If an improvement (for example, a cost reduction) is seen as benefiting the shareholders of the parties to the agreement only, the condition would not be satisfied. The views of customers and consumers are likely to be important in the consideration of the case for exemption and, in appropriate cases, the GCRA will seek them. The resulting benefits are likely to be those which flow from improvements in production or distribution. An agreement may lead, for example, to the faster development of new products or new markets or better distribution systems, so that the benefits to consumers also lie in the future. Consumers or customers may benefit either quantitatively (through lower price), qualitatively (through better products or service), or both, from an agreement. We take account of the likely dynamics of market conduct and competition in assessing whether or not this condition for exemption is satisfied.

Restrictions which are not indispensable to the attainment of the objectives set out in the first two criteria

To qualify for exemption, agreements may not include restrictions beyond those necessary for the attainment of the benefits that the parties demonstrate are likely to flow from an agreement. The agreement should contain the least restrictive means of achieving its aims. The GCRA will look carefully for any restrictions beyond those necessary to secure those benefits. If we conclude that an agreement contains unnecessary restrictions to competition, we may recommend that the parties remove such restrictions from their agreement in order to qualify for an exemption.

The possibility of eliminating competition in respect of a substantial part of the products in question

This criterion depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, ie, the reduction in competition that the agreement brings about. It calls for an assessment of the potential market effects that will result from an agreement. It normally requires the GCRA to define relevant product and geographic markets, and to assess the competitive impact of an agreement in these markets. An exemption application is unlikely to succeed if the parties are unable to show that there will continue to be effective competition in the market(s) for the goods or services with which an agreement is concerned. If, after an appropriate market analysis, we conclude that we are not satisfied that effective competition will continue, there can be no possibility of an exemption being granted.

For more information, see GCRA Guideline 9 – Applications for Guidance and Exemptions.

17 Block Exemptions

Under the 2012 Ordinance, the Committee *for* Economic Development may, after consulting with the GCRA, issue block exemptions which exempt particular categories of agreements which are likely to satisfy the statutory exemption criteria. An agreement that falls within a category specified in a block exemption will be automatically exempt from section 5(1) of the 2012 Ordinance and there will be no need to notify such an agreement to us. Any such block exemption may impose conditions or obligations subject to which the block exemption will have effect.

18 Small Businesses Exemptions

Under the 2012 Ordinance the Committee *for* Economic Development may, after consulting with the GCRA, provide that small businesses are exempt from section 5(1) of the Guernsey Ordinance.

A small business may be defined by reference for example to:

- turnover, earnings, market share or similar measures; or
- number of employees.

There may be conditions or obligations placed on the small businesses exemption.

A small businesses exemption has no application if the object or effect of the agreement is a serious restriction of competition such as price-fixing or market-sharing.

19 Consequences of Infringement

Null and void

Any agreement that infringes the prohibition of anti-competitive agreements is void and cannot be enforced, as are other agreements to the extent that they are 'tainted' by an anti-competitive agreement.

Financial penalties

Financial penalties of up to a maximum of 10 per cent of the turnover of a business during the period of contravention, for a maximum of three years, may be imposed for an infringement of Part II of the 2012 Ordinance.

Third party claims

Third parties who consider that they have been harmed as a result of an unlawful agreement can bring a claim for damages, including punitive damages, in the Royal Court.

20 How can I find out more?

Please contact us if you have a question about the competition law or if you suspect that a business is breaching the laws and wish to complain or discuss your concerns.

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Publications

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