



COMPETITION LAW (GUERNSEY AND JERSEY)

2020 WORK PROGRAMME

Document No: CICRA 19/72

December 2019

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INTRODUCTION

The aim of the Channel Islands Competition and Regulatory Authorities (CICRA)¹ is to ensure markets work well for consumers taking account of both short and long term considerations.

Consumers is a general term embracing a range of end users including households, businesses and government.

The proposed strategic objectives for competition law enforcement together with the annual work programme for 2020 are set out below.

Background

CICRA is responsible for the administration of competition legislation in Jersey and Guernsey. This includes both behavioural competition law and the laws controlling mergers and acquisitions.

Experience gained over recent years indicates that the level of competition law awareness among key stakeholder groups in the Channel Islands is not as developed as it might be. This is by no means unique to the Channel Islands or confined to only jurisdictions where competition law is relatively new. However these relatively low awareness levels may prevent the full realisation of the benefits to the Channel Islands' economies, businesses and consumers that the States of Guernsey and the States of Jersey intended to flow from the introduction of competition law.

Over the course of the last two and a half years, the Authority has carried out a number of initiatives to raise awareness of competition law amongst its key stakeholder groups. The results of these initiatives have been very positive and the Authority intends to continue building on these as part of its 2020 work programme.

The Authority has also introduced new procedures that aim to ensure that mergers and acquisitions are handled more quickly and efficiently. These have been successful, with the average number of days taken to clear a merger at the first detailed review stage falling well within the administrative target of 25 days over the first three quarters of 2019. In addition, in 2016 the Authority made recommendations to the Governments in each Island in relation to reform of the merger control rules. Implementation of these recommendations in 2020 will allow the Authority to carry out additional procedural reforms, which will further improve the efficiency with which mergers are handled.

¹The Jersey Competition Regulatory Authority (JCRA) and Guernsey Competition and Regulatory Authority (GCRA) co-ordinate their activities in the Channel Islands. For the purposes of this document, the JCRA and GCRA are together referred to as CICRA, and all references to CICRA should therefore be read as references to each of the JCRA and GCRA unless the context otherwise requires.



PRIORITISATION PRINCIPLES

CICRA weighs up several aspects when prioritising how it allocates its resources. In particular, it weighs up whether the matter can be resolved in a manner that is actionable, realistic and meaningful.

Actionable – This prioritisation principle looks at whether CICRA has the necessary legal powers to properly assess and address the nature of the concerns that have arisen.

In its role as an economic regulator, CICRA has certain legal powers that allow it to intervene in specific sectors of the economy where competition and therefore choice tends to be limited and to “stand in the gap” as a proxy for the competitive pressures that would otherwise be present. Telecoms, ports and post are all subject to economic regulation in one or both Islands. When exercising its economic regulatory powers, CICRA can act in a forward looking way to prevent harm to consumers caused by a lack of competition. Examples of such forward looking action by CICRA include setting price controls and imposing service standards. By contrast, outside of those specific sectors, CICRA does not have the power to impose this type of forward looking measure – for example, it cannot set price controls for fuel supply in the Channel Islands or prescribe quality of service standards in the taxi sector. Instead, when it enforces competition law, CICRA intervenes to correct problems that have already occurred and puts a stop to harmful behaviour by businesses. In some sectors, the States have also decided that competition law should not apply and CICRA therefore has no power to intervene – one example is the Guernsey airline sector. There are also legal constraints on CICRA’s ability to acquire information. An example is when conducting market reviews in Jersey where CICRA has no power to require information from parties and must rely on voluntary provision and cooperation. The likelihood that parties will provide information in circumstances where they cannot be compelled to do so is therefore an obvious consideration when deciding to proceed with a market review.

The powers given by legislation as well as the absence of powers are all relevant in considering whether the Authority has the legal means to proceed in considering matters that may arise.

Realistic

Small market economies such as Guernsey and Jersey are subject to international commercial forces and developments with limited ability to make a meaningful impact on those. There are examples of mergers and acquisitions such as those between Lufthansa AG and British Midland PLC or Kraft Inc and Cadbury plc where Guernsey or Jersey may not be markets of significance to those transactions and the parties may even choose to abandon those markets if conditions are imposed that undermine their business in larger economies. In these circumstances small jurisdiction competition authorities like CICRA need to carefully weigh up whether the benefits of prohibiting certain transactions are realistically enforceable even if legal powers exist to do so. CICRA is also a small competition and regulatory authority and as such certain types of investigations are of a scale and complexity that are



better undertaken by competition authorities in larger jurisdictions. European Commission investigations into the behaviour of firms like Google or Amazon, which are often extremely large and complex with significant funds and staff to carry them out, demand a capacity and capability not available to a small authority. In the circumstances CICRA is likely to rely on the decisions of larger jurisdictions rather than prioritise such investigations. Even where it has the legal powers to do so, the practicalities of carrying out investigations and taking action are factors CICRA takes into consideration in deciding whether to take a matter forward.

Meaningful

Ultimately CICRA wants to be as sure as it can that the actions it takes have a net positive contribution to the functioning of local markets, mindful of the fact that any intervention – or indeed not intervening at all - will have some cost. It is also evident that parties affected by an investigation will experience its cost and benefit effects differently. Businesses under investigation will generally bear a greater burden of the cost of investigation whereas consumers or competitors who are impacted positively as a result of an intervention – for example through greater choice or ability to serve consumers - generally have a greater share of the benefit. Many of the duties placed on CICRA are in fact essentially about protecting principles of fairness to consumers and/or fair play in commercial behaviour between firms. Such benefits do not readily lend themselves to measurement in terms of monetary value but require a more subjective assessment of their value. The majority of areas in which CICRA is involved will involve strategic as well as tangible financial cost/benefit considerations. When a body such as CICRA contemplates whether to proceed with a matter brought to its attention, it therefore looks to consider not only the tangible but also the strategic benefits and costs. An example of where tangible costs and benefits are more readily estimated is the reduction in conveyance fees after price fixing was abandoned by law firms. A decision to monitor mobile mast emissions however involves fairly significant costs and delivers no financial benefit. On the basis of immediate financial costs versus benefits this would not be undertaken. However, strategically the benefits of providing assurances to citizens and users can be considerably greater than the costs since if citizens have insufficient assurances about their safety the quality of network provision is likely to suffer as planning consents are withheld and with that a decline in the quality of mobile services and associated benefits of portability of communications. Where mobile mast emission monitoring gives such assurances the opportunities and enhancement to our quality of life through access to modern services provides considerable strategic benefits even if not amenable to financial quantification.

VALUES

CICRA ensures that its team works with principled pragmatism in the forefront of their minds. We promote 3 key values and encourage our stakeholders to reciprocate :



- **Integrity** Maintain and expect high standards of integrity and respect
- **Openness** Maintain appropriate level of confidentiality, encouraging a culture of openness where possible
- **Accountability** We take responsibility for resolving issues in a constructive manner

COMPETITION LAW - STRATEGIC OBJECTIVES

The overarching objective for the administration of competition legislation in Jersey and Guernsey is **to ensure businesses compete fairly with each other.**

CICRA will achieve this objective by working in a way that :

- Generates positive, defined benefits associated with free markets for businesses and consumers in Jersey and Guernsey
- Has a positive impact on the economies of Jersey and Guernsey
- Delivers outcomes that are trusted and, as far as reasonable, consistent with international norms

The success of this will be measured by improvements in understanding of competition law, and the ability to focus on issues which have actual or potential competitive impact in Jersey and Guernsey.

Competition work carried out by the Authority can be divided into three areas :

1. Proactive : where work is initiated by CICRA.
2. Ex ante : where work is as a result of an application to CICRA and is non-discretionary.
3. Ex post : where work is as a result of a complaint or other information received, following assessment against prioritisation principles.

2020 Work Programme

Proactive

During late 2017 and 2018, a series of competition law training sessions were organised by CICRA, targeting a number of key stakeholder groups, including public procurement officials in Guernsey and advocates and legal advisers in both islands. Exit surveys from these training sessions demonstrated that the sessions had led to a significant improvement in levels of understanding of participants. CICRA continued this work in 2019 by carrying out further competition law training sessions. The Authority also published a number of competition law newsletters, which set out its thinking on certain key issues in greater detail.



1. Advocacy

By raising awareness and understanding of competition policy and its place in the wider policy context, key stakeholder groups can help keep businesses competitive. By being more informed, these groups can help by reporting companies that they think are not acting in a fair, competitive manner, which will help ensure businesses keep delivering more choice, quality, innovation and lower prices.

The 2020 work programme will therefore include continued engagement with businesses and other key stakeholders to develop awareness of competition legislation.

2. Competition Reviews (information gathering / provision of advice to government)

In order to gain greater understanding of legal or structural market issues, CICRA may carry out a review of any feature, or combination of features, of a market which prevents, restricts, or distorts competition (eg, in the form of higher prices, lower quality, or less choice of goods or services, or less innovation in relation to goods or services in Channel Islands markets). CICRA may then make recommendations to the Minister/Committee for change or a policy on market structure or legal framework.

During 2020, CICRA will make or receive recommendations through Government for market reviews as appropriate.

CICRA will also continue to work proactively with law officers in both jurisdictions to bring about recommended changes to the merger regime

Ex Ante / Reactive

CICRA is required to handle mandatory clearance and approval applications that are made to it under the laws in both jurisdictions.

3. Review of Notifiable Mergers and Acquisitions

CICRA's work in this area consists of reviewing mergers and acquisitions in order to assess whether or not they are likely to lead to anti-competitive outcomes. In simple terms, an excessively concentrated market risks a substantial lessening of competition. Transactions that are considered to threaten the competitive process can be prohibited or approved subject to 'remedies'

During 2020, CICRA will continue to assess notifiable mergers and acquisitions. In conjunction with the merger reform work being undertaken by the Governments in each island, it will also carry out a detailed review of procedures for the notification and the assessment of mergers and acquisitions.



4. Exemption Applications

Competition law allows parties to an agreement which might infringe the law to apply to CICRA for an exemption under certain circumstances. In broad terms, where the pro-competitive benefits of an agreement outweigh its anti-competitive effects, the agreement can benefit from an exemption.

During 2020, CICRA will monitor the impact of its advocacy work on the number of applications for exemption.

Ex Post / Reactive

CICRA's work in this area involves investigating suspected breaches of competition law which it becomes aware of as a result of a complaint or through other channels. CICRA will use its prioritisation principles to assess whether or not any particular case should be taken up.

5. Competition Law Investigations - where actionable, realistic and meaningful

CICRA has powers to investigate both anti-competitive agreements and the abuse of a dominant market position.

The rules on anti-competitive agreements apply to all companies irrespective of size or market position.

By contrast, the rules on abuse of dominance apply only to those companies that hold a position of economic strength that enables them to prevent effective competition. Such companies can behave to an appreciable extent independently of their competitors, their customers and ultimately consumers. This position does not preclude some competition, but enables the company which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it.

During 2020, CICRA will :

- Continue to assess complaints and other information provided to it in relation to this work stream.
- Keep under review its internal processes to ensure that these are in line with international best practice, taking into account the specific context of the Channel Islands.



NEXT STEPS

CICRA will continue to engage with key stakeholders in developing these work streams and progressing our strategic objectives.

CICRA notes in particular that the States of Jersey has approved additional funding for CICRA to support more extensive market analysis work in 2020 and subsequent years. CICRA is continuing to engage with the States of Jersey regarding the most appropriate and efficient way for this additional funding to be applied to support the ambitions set out in the States of Jersey Government Plan.

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