



Guernsey Competition Law

GCRA Guideline 3 - Cartels

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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 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 Cartels

Cartels are a particularly damaging form of anti-competitive activity. Their purpose is to removing or reducing competition by fixing or controlling competitive variables such as prices. 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 Guernsey.

Detecting cartels and taking action against their members is one of the GCRA's top enforcement priorities under the 2012 Ordinance. However, as cartels often operate secretly, we rely heavily on businesses and consumers to bring potential cartel activities to our 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, ie, 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 GCRA.

What should you do if you have suspicions?

If you suspect that a cartel is operating, you should contact the GCRA. Our contact details are on page 14. The more information you can provide, the better placed the GCRA will be to assess the need to take enforcement action.

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

Immunity and the GCRA's leniency policy

The GCRA can grant complete immunity from, or a substantial reduction of, penalties that we may impose under the law 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 the GCRA's Leniency Policy.

What can the GCRA do?

The GCRA has the power to investigate complaints of anti-competitive 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, we may start an investigation.

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

Can my identity be protected?

In order to investigate a complaint fully, the GCRA 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 GCRA at the earliest opportunity.

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

What action can the GCRA take against cartels?

The GCRA 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 or if you suspect that a business is breaching the laws 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.