



Guernsey Competition Law
GCRA Guideline 9 - Applications for
Guidance and Exemptions

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 provisions in Guernsey competition law in respect of anti-competitive agreements. Specifically, this

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 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.

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 Applications for Guidance and Exemptions

The 2012 Ordinance provides that businesses can seek guidance from the GCRA on whether planned courses of action would be considered an anti-competitive arrangement or an abuse of dominance.

A business cannot ask for guidance on whether a planned course of action would breach the provisions in relation to mergers and acquisitions.

Guidance cannot be requested for current business conduct, because the law only allow us to provide guidance on proposed courses of action.

The 2012 Ordinance allows the GCRA to exempt an agreement from the law. An exemption from the law may be granted by the Committee *for* Economic Development to a business or any class or description of business on grounds of public policy.

A business may also request guidance as to whether a planned course of action would contravene a condition of an exemption.

The Need to Provide Correct Information

As detailed in this Guideline, both requests for guidance and applications for exemption must be signed by an authorised representative of the applicant. Applicants requesting guidance or an exemption should note that it is an offence under the laws to knowingly or recklessly provide the GCRA with information that is false or misleading. Furthermore, the provision of false, incomplete or misleading information is grounds for us to withdraw guidance or an exemption. Thus, applicants must ensure that the information they provide to us is true, accurate, and complete to the best of their knowledge and belief.

3 Applications for Guidance

An application for an opinion under section 37 of the 2012 Ordinance must be made in writing and signed by an authorised representative of the applicant. The application must provide details of:

- the proposed course of action, including a copy of any agreement(s) the parties intend to sign;
- the parties involved;
- the products or services involved;
- why the application for guidance has been made, ie, why the parties believe that the proposed course of action may raise a compliance issue under the 2012 Ordinance;
- the industry(ies) or market(s) that might be affected by the course of action (for more information see GCRA Guideline 7 - Market Definition);
- how competition works in the industry/market affected, for example, how vigorous competition is, and who the main participants are (including information on market shares, capacities etc. and the identity of the parties' main suppliers and customers, possible new entrants, and what possible substitute products exist);
- all documents prepared by or for the parties analysing the effect of the proposed course of action on markets or competition, including any projected financial data; and
- local turnover for the parties for the last two years; and any arguments the parties wish to make that the proposed course of action does not infringe the laws, together with supporting evidence.

The confidentiality of information and documents submitted with an application for guidance is subject to the protections set out in the laws. An applicant is not required to disclose information or documents protected from disclosure by legal professional privilege. We have the discretion to modify the information required, depending on the circumstances.

The applicant seeking guidance must pay towards the work involved in connection with the application. The fee for simple guidance is £2,000. Where the issues arising from the application, or the facts covered by the application, are more complex, the fee will depend on the GCRA's estimate as to its reasonable costs, fees and expenses in connection with determination of the application. An applicant will be required to pay the fee when the application is made and should discuss the amount of the fee that will payable before lodging the application.

Guidance will normally be provided within four weeks of a full application being made, subject to the complexity of the matter. The GCRA also reserves the right to request additional information, and any delays in submitting the information are likely to delay the provision of the guidance.

A public version of the guidance that concludes that the planned course of action will not infringe the law will be published. Guidance that the planned course of action could infringe the law remains confidential between us and the applicant. However, in some circumstances, we may be unable to provide the guidance sought without consulting with other parties/competitors. In such circumstances, if the application contains confidential information, the applicant will be asked to provide a version of the application for disclosure to third parties.

GCRA procedure

The GCRA will consider the information provided and may ask for additional information or documents. The laws provide that if any information or documents that we reasonably require in order to give guidance are not provided within a reasonable time, we need not proceed with the request. If we send you a request for further information or documents, the request will advise you of the date by which you need to respond. We may also ask you to attend one or more meetings to explain your application in more detail and to answer questions arising from the application.

We will provide our guidance to you in writing and a public version will be published on our website where we conclude that the planned course of action will not infringe the law. We will consult with you to ensure that all commercially sensitive information has been removed.

Effect of guidance

If the GCRA gives guidance that a proposed course of action is unlikely to breach the competition laws, we cannot investigate the course of action unless we:

- have reasonable grounds to suspect that there has been a material change of circumstances since we gave the guidance;
- have reasonable grounds to suspect that the information on which we based our guidance was incomplete, false or misleading in a material particular;
- have reasonable grounds to suspect the course of action is a breach of the provisions of the law in respect of mergers and acquisitions; or
- receive a complaint concerning the course of action, either before or after it is implemented by the parties.

4 Applications for Exemption

The 2012 Ordinance carves out certain sectors of the Guernsey economy from the application of competition law, as follows:

- any matter in respect of which provision may be made under *The Public Transport (Guernsey) Law, 1984*, *The Milk and Milk Products (Guernsey) Law, 1955* or *The Air Transport Licensing (Guernsey) Law, 1995*;
- an agreement to the extent to which it is made in order to comply with a requirement imposed by or under an enactment in force in Guernsey;
- an agreement to the extent to which it is made in order to comply with, or to the extent to which it is or includes, a planning covenant within the meaning of *The Land Planning and Development (Guernsey) Law, 2005*; and
- any other matter specified by the Resolution of the States where they are satisfied that there are exceptional and compelling reasons of public policy why the Ordinance ought not to apply.

The 2012 Ordinance also allows any party to an agreement or proposed agreement that might infringe section 5 to apply to the GCRA for an exemption. Exemptions are not available in respect of conduct that constitutes an abuse of a dominant position under section 1 or a notifiable merger & acquisition under section 13.

There is a separate group exemption (a so-called “block exemption”) for agreements between businesses operating at different levels of the supply and distribution chain. These agreements are often referred to as “vertical agreements”. Vertical agreements that fall within the block exemption do not need to be notified to the GCRA for an individual exemption.

Qualifications for exemption

The GCRA cannot grant an exemption to an anti-competitive agreement or arrangement unless we are satisfied that it:

- 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;
- will allow consumers of those goods or services a fair share of any benefit resulting from the agreement or arrangement;
- does not impose on the businesses concerned terms that are not indispensable to attainment of the objectives mentioned in the bullet points above; and
- does not afford the businesses concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.

For more information see GCRA Guideline 2 - Anti-Competitive Arrangements.

How to make an application

An application for exemption must be on the prescribed form and must provide the following information:

- details of the agreement or arrangement, including a copy of any agreement(s) the parties have signed or intend to sign;
- details of the parties involved;
- details of the products or services involved;
- details of the industry(ies) or market(s) that might be affected by the agreement or arrangement, (for more information see GCRA Guideline 7 - Market Definition);
- a description of how competition works in the industry/market effected, for example, how vigorous competition is and who the main participants are (including information on market shares, capacities etc., and the identity of the parties' main suppliers and customers, possible new entrants, and what possible substitute products exist);
- all documents prepared by or for the parties analysing the effect of the agreement or arrangement on markets or competition, including any financial data;
- what clauses of the agreement or arrangement the applicants think may be anti-competitive and why; and
- evidenced reasoning as to why the parties believe that the agreement or arrangement satisfies all four criteria for exemption as set out in the laws.

The application must be signed by an authorised representative of the applicant. The confidentiality of information and documents submitted with an application for exemption is subject to the protections set out the laws. The applicant should clearly indicate the information contained in or submitted with the application it believes is confidential and not subject to disclosure by us to third parties, giving reasons why this information should not be disclosed.

Upon receipt of an application, we will contact the applicant to confirm the scope of confidentiality. We will deem both the applicant and, if different, the person to whom the information relates, to have consented to the disclosure of information contained in or submitted with an application that has not been indicated as confidential.

There is no fee involved for an application for an exemption.

GCRA procedure

As with applications for guidance, the GCRA will consider the information provided and may ask for additional information or documents. If you are sent a request for further information or documents, the request will advise you of the date by which you need to respond. We may also ask you to attend one or more meetings to explain your application in more detail and to answer questions arising from the application.

The 2012 Ordinance provides that we must publish the details of an application for exemption as part of the public consultation and consider representations made to it. A notice of the application will be published in the local press and on our website. In addition, we may contact other industry participants, eg, competitors, customers, suppliers and trade associations, concerning the application and the potential effect of an exemption on competition.

We will consider the information provided by the applicant together with any representations we receive from other parties when deciding whether an exemption would meet the four criteria referred to above.

If we grant an exemption, either with or without conditions or obligations, we will publish the decision on our website. Additionally, we may publish decisions *not* to grant an exemption. If an application for an exemption is not granted, we may conclude that there are reasonable grounds to suspect that the agreement prevents competition to an appreciable extent and may open an investigation into it.

Imposing conditions or obligations

The GCRA may attach conditions or obligations to an exemption. We may also grant the exemption for a set period or post-date an exemption.

Examples of the type of condition that may be required are where an agreement or arrangement:

- covers several products and there are competition concerns associated with only one of the products - an exemption could be granted with the condition that the product likely to cause a lessening of competition is excluded from the agreement; or
- would improve the production of a product, but it includes a clause that was so restrictive that it would eliminate competition in the distribution of that product - an exemption may be granted, subject to the condition that the clause is removed from the agreement.

Effect of exemption

If the GCRA grants an exemption for an agreement or arrangement, we cannot take any action regarding the agreement or arrangement during the period of the exemption. However, an exemption ceases to have effect if a condition or obligation is breached. Furthermore, we may withdraw an exemption, vary or remove a condition or obligation, or impose additional conditions or obligations if:

- there are reasonable grounds to believe there has been a material change in the circumstances since the exemption was granted; or
- there are reasonable grounds to suspect that the information on which the decision was based was incomplete, false or misleading in a material particular; or
- there has been a failure to comply with a condition or obligation.

A failure to comply with a condition or obligation may be brought to our attention by a third party complainant or by any other means.

5 Informal Approaches

Apart from the formal procedures described above, parties can also contact the GCRA on an informal basis to ask about the potential applicability of the 2012 Ordinance to specific circumstances. Parties may informally approach us by letter, email, or phone, either directly or through their advisers. Information provided to us in such circumstances is subject to the protections from disclosure detailed in the laws.

The laws do not require us to respond to an informal approach, and the decision on whether or not to respond – as well as the timing, form and content of any response provided – are all within our discretion. Unlike guidance or exemptions, any response provided to an informal approach is not binding on us. Depending on the circumstances, we may request that a party making an informal approach seek formal guidance or an exemption, for the conduct or potential conduct described.

6 Key Differences between Guidance and Exemptions

	Guidance	Exemption
Coverage	Any planned course of action that may breach prohibitions regarding anti-competitive agreements or the abuse of a dominant position.	Planned or existing arrangements that may breach the prohibitions regarding anti-competitive agreements. No exemption is possible in relation to the abuse of a dominant position or the mergers and acquisitions provisions.
Confidentiality	A public version of the guidance that concludes that the planned course of action will not infringe the laws will be published.	The 2012 Ordinance requires that the GCRA publishes details of exemption applications and decisions of exemptions that have been granted.
Legal Certainty	Provides parties with guidance on the potential applicability of the prohibitions regarding anti-competitive agreements or arrangements, or abuse of a dominant position. However, guidance is no bar to action if the GCRA receives a complaint or to third party civil actions.	If granted, an agreement is exempt from the section 5 prohibition. An exemption may be withdrawn in particular circumstances eg, the terms of the agreement or arrangement materially change.
Fee	£2,000, or more, depending on complexity	No fee
Consequences of Negative Decision	Guidance that the planned course of action could infringe the laws remains confidential between the GCRA and the applicant.	A refusal to grant an exemption will be published. The GCRA may open an investigation into the agreement.

8 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.