

Competition Guideline 3: Trade Associations & Professions

What this guideline is about

This guideline is one in a series of publications designed to inform businesses and consumers about how we, the Jersey Competition Regulatory Authority (the **Authority**), applies competition law in Jersey.

The purpose of this guideline is to explain to consumers, businesses and their advisers the provisions in the Jersey competition law in respect of vertical arrangements, such as exclusive purchasing agreements, exclusive distribution agreements and franchise agreements. Specifically, this Guideline has been prepared to explain Part 2 of the Competition (Jersey) Law 2005 (the **Competition Law**).

Article 7 of the *Competition Law* provides that the Authority may publish guidelines on any aspect of that Law. Proof that a person has failed to comply with a guideline is not proof that the person has failed to comply with a requirement of the Competition Law. However, in proceedings where it is alleged that a person has failed to comply with a requirement of the Law:

- (a) Proof of a failure to comply with a guideline published by the Authority in respect of the requirement may be relied upon as tending to establish non-compliance with the requirement; and
- (b) Proof of compliance with the guideline may be relied upon as tending to establish compliance with the requirement.

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

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.

In Jersey, the Competition Law prohibits anticompetitive behaviour, including anti-competitive agreements between businesses and the abuse of a dominant position in a market. They also require certain mergers and acquisitions to be notified to the Authority for approval.

What powers does the JCRA have?

The Authority has a wide range of powers to investigate businesses suspected of breaching the law. It 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 guide, we refer to a 'business'. This term (also referred to as an 'undertaking' in the respective laws) 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

The competition law in Jersey is modelled on the competition provisions in the Treaty on the Functioning of the EU. Jersey legislation places certain obligations on the Authority and the Royal Court when applying the competition laws. Article 60 of the Competition Law provides that so far as possible questions arising in relation to competition must be dealt with in a manner that is consistent with the treatment of corresponding questions arising under EU competition law.

As noted above, the Authority must endeavour to ensure that, as far as possible, competition matters arising in Jersey are dealt with in a manner consistent with – or, at least, that takes account of – the treatment of corresponding questions under EU competition law. Relevant sources 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. Article 60, however, does not prevent the Authority from departing from EU precedents where this is appropriate in light of the particular circumstances of Jersey.

2. Trade Associations and Professions

Trade Associations

A trade association, also known as an industry trade group, business association or sector association, is an organisation founded and funded by businesses that operate in a specific industry. A trade association participates in public relations activities such as advertising, education, political donations, lobbying and publishing, but its main focus is collaboration between companies, or standardization. Associations may offer other services, such as producing conferences, networking or charitable events or offering classes or educational materials. Many associations are non-profit organisations governed by bylaws and directed by officers who are also members.

Trade associations are the most common form of associations of businesses. There are trade associations in almost every sector of the Jersey economy and many businesses are members of international trade associations. The functions of such trade associations in furthering the trade interests of their members are diverse but they are broadly categorised as:

- promoting and protecting the interests of members in the media;
- collecting and disseminating statistics and market information, and information about legislation and Government policy;
- promoting standards, codes of practice or standard terms and conditions of sale;
- providing range of services of an advisory or consultancy nature on, for example, legal, accounting, training or environmental matters; and
- providing advice of a more commercial nature.

The functions of trade associations are useful to members, especially smaller firms. A trade association may, however, provide directly or indirectly the means for anti-competitive, or even collusive activity, and any decision, rule or recommendation of a trade association, or agreement between its members, which has an appreciable effect on competition, may fall within the competition laws.

The nature of the membership of a trade association is likely to be relevant in assessing whether an activity has an appreciable effect. An association will usually seek to make its membership as comprehensive as possible to maximise its influence on behalf of its members. A wide membership will also increase the effectiveness of any code of practice on members' conduct, devised and implemented by a trade association in its self-regulatory role. The wider the membership among those engaged in a market within Jersey, the greater the risk that any anti-competitive behaviour carried on by the association will have an appreciable effect. This will be of greater significance where members of a trade association are likely to be actual, or potential, competitors.

Under the Jersey competition law, the relationship of an association with third parties is likely to be considered as an agreement between businesses for the purposes of Part 2 of the Competition Law.

Examples of the rules, decisions, recommendations or other activities of associations that may hinder competition and therefore breach the relevant prohibitions of the laws are described in section 3 of this guideline and the possibility of exemption for such activities is explained in section 4.

The prohibition on abuse of dominant position in both laws also applies to the conduct of trade associations, professions and self-regulating bodies and/or their members. This is not covered in detail in this guideline. For more information see Guideline 5 - Abuse of a Dominant Position.

The involvement of a trade association in an infringement of the relevant prohibitions of the laws could result in fines being imposed on the association itself, its members, or both.

Professions

A professional association (also called a professional body, professional organisation, or professional society) is usually a non-profit organisation seeking to further a particular profession, the interests of individuals engaged in that profession, and the public interest. A professional body may lay down educational and experience qualifications for membership, keep a register of members, promote standards of conduct to be maintained by the members and enforce the standards through a complaints and disciplinary procedure. A professional body represents its members' interests in dealing with Government and other public bodies and the media.

A professional body is capable of being an association of businesses within the meaning of the prohibition on anticompetitive agreements and arrangements and so the rules and decisions of professional bodies are subject to the application of competition law. However, in assessing their rules and decisions, professional bodies should be aware that not every agreement between businesses or every decision of an association of businesses which restricts competition necessarily infringes the prohibition on anti-competitive arrangements within both laws.

Examples of restrictions that have previously been found to originate in professional bodies in the UK include restrictions on advertising, restrictions on forms of service provision (such as rules against partnership) and the issuing by professional bodies of recommendations on fees.

In assessing whether any of the rules and decisions infringe the prohibitions of either law, the Authority will typically apply a form of proportionality test, i.e. whether existing restrictions pursue a clearly articulated and legitimate public interest objective, whether they are necessary to achieve that objective and whether there are no less restrictive means to achieve this.

3. Scope of the Prohibition of Anti-Competitive Arrangements

The fact that members of a trade association or professional body are acting through the trade association or professional body does not affect the way in which the competition laws apply to their decisions, rules, recommendations or other activities. Their position is no better and no worse than if they were acting in the same manner outside the forum of

such a trade association or professional body. In each case, the prohibition of anti-competitive arrangements applies only if the relevant activity has the object or effect of preventing or hindering competition in a Jersey market.

Any such activity that does fall within the prohibition may be considered for exemption: a number of the examples below will often be candidates for exemption but rules, recommendations or decisions which result in price fixing are unlikely to be exempted. For more information on Exemptions, see Guideline 6 – Applying for Guidance and Exemptions.

The sections below provide examples of the decisions, rules, recommendations or other activities of trade associations and professional bodies that may breach the prohibition of anticompetitive arrangements. The examples are illustrative only and should not be construed as definitive or exhaustive.

Pricing

Collective price-fixing or price-coordination of any product or service is likely to breach the prohibitions, whatever form it takes. The Authority believes that any collective decisions or recommendations as to prices and charges, including discounts and allowances, are very likely to have the object or effect of preventing or hindering competition, and are unlikely to qualify for exemption.

Information exchange

- **General** - There are circumstances where there can be no objection to the exchange of information, whoever the exchange is made by, even between competitors, and whether or not under the aegis of a trade association or professional body. For example, the collection and publication of historic statistics are legitimate functions of trade associations and professional bodies.
- The exchange of information may, however, have an appreciable effect on competition where it serves to remove uncertainties in the market and therefore eliminate competition between members of trade associations or professional bodies. This will be the case even though the exchange might appear innocuous. It does not matter that the information could have been obtained from other sources. Whether or not the information exchange has such an appreciable effect on competition will depend on the circumstances of each individual case: the market characteristics, in particular the type of information, and the way in which it is exchanged. As a general principle, the Authority will consider the frequency of exchange and the sensitivity and confidentiality of the information that is exchanged.

Our general approach to information exchange is set out below:

- **Exchange of price information** - The exchange of information on prices may lead to price co-ordination and therefore eliminate competition which would otherwise be present between members of the trade associations and professional bodies. This will be the case whether the information exchanged 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 appreciable effect on competition. An example may be where it forms part of a structured scheme of inter-firm comparison which is intended to spread best industrial practice, in particular if the information is collected, aggregated and disseminated by an independent body. Many trade associations and professional bodies organise the exchange of such information amongst members. For example, bench-marking exercises are often operated by trade associations or professional bodies on behalf of their members. Much of this activity may have little effect on competition and therefore may not be caught by the prohibition.

The exchange of specific information on prices between competitors is, however, likely to reduce the uncertainties inherent in the competitive process and to facilitate the coordination of market conduct, whether the exchange is organised by the members themselves or, as is often the case, by or through a trade association or professional body.

- **Exchange of non-price information** – Depending on the type of information exchange and the market to which it relates, the exchange of non-price information may have an appreciable effect on competition. The exchange of statistical data, market research and general industry studies, for example, is unlikely to have an effect on competition provided that the information exchanged does not enable confidential or sensitive business information to be shared.

In general, the exchange of aggregated information on output and sales should not affect competition provided that it is sufficiently historic and cannot influence future competitive market behaviour. There may, however, be an appreciable effect on competition if it is possible to disaggregate the information and identify the participants. This may also be the case if the exchange relates to recent, current or future information.

Advertising

Restrictions on advertising, whether relating to the amount, nature or form of advertising, can restrict 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. Genuine rules or decisions of businesses aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful and decent, are unlikely to have an appreciable effect on competition, but restrictions which more generally prevent members from using advertising are another matter. Rules or decisions of trade associations or professional bodies prohibiting members from soliciting for business, from competing with other members, or from advertising prices, or prices below a minimum or recommended level, are all likely to be caught by the prohibition of anti-competitive agreements or arrangements in the laws.

For example, a professional body insisting that all members advertise in one advert and cannot advertise separately would likely be considered a breach of the laws.

Joint buying/selling

Any joint activities - for example, joint buying or selling or joint research - co-ordinated through a trade association would be subject to the prohibitions to the same extent as if they were done outside the medium of the association, i.e. by the businesses individually in an agreement.

Codes of conduct

A code of conduct may seek to introduce best practice into a particular sector and may include provisions for dealing with consumer complaints and a redress procedure. A code is unlikely to be successful in promoting consumer protection unless it is widely adopted and effectively enforced, but at the same time, it may limit the way participants can compete. If, however, the structure of the market is competitive and the code does not deal with prices or involve any element of market sharing, the effects on competition are less likely to be appreciable.

Technical standards

Trade associations and professional bodies may play a role in the negotiation and promotion of technical standards in an industry. This may limit the members' ability to be innovative in the products or services that they can offer, and there is therefore a restriction of competition. If entry barriers were to be raised significantly as a result of adoption of the standard, the effects on competition could be appreciable.

Terms of membership

Rules of admission to membership of a trade association or professional body should be transparent, proportionate, non-discriminatory, and based on objective standards. Those that are not may breach the prohibition on anti-competitive arrangements. Terms of membership will have an appreciable effect on competition where the effect of exclusion from membership is to put the business(es) concerned at a competitive disadvantage. Similarly, procedures for expelling members of an association may have an appreciable effect on competition, particularly where they are not based on reasonable and objective standards or where there is no proper appeals procedure in the event of refusal of membership or expulsion.

Certification

A trade association or professional body may certify or award quality labels to its members to demonstrate that they have met minimum industry standards. While such a scheme has benefits for consumers in the form of quality assurances, it may lead to a restriction of competition. A scheme is less likely to have an appreciable effect on competition and breach the prohibitions on anti-competitive agreements or arrangements where certification is available to all manufacturers that meet objective quality requirements. However, the standards must be objective and reasonable. Where manufacturers must accept additional obligations governing the products that they can

buy or sell, or restrictions as to pricing or marketing, the scheme is likely to have an appreciable effect on competition and be caught by the competition laws.

4. Exemptions

The Authority will consider any application for an exemption of a decision, rule, recommendation or other activity of a trade association or profession against the criteria laid down in the laws. To qualify for exemption, an activity:

- 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.

To qualify for exemption, we need to ensure that all of the above criteria are satisfied.

5. Consequences of Infringement – Void Contracts

Any agreement which has an appreciable effect on competition for the purpose of the prohibition on anti-competitive agreements or arrangements will be void unless it meets the conditions contained in Article 9 of the Jersey Law and obtains an exemption from the Authority.

6. Consequences of Infringement – Financial Penalties

The laws provide that the JCRA may impose a financial penalty on a business which has intentionally or negligently committed an infringement. The amount of the penalty imposed may be up to 10 percent of the worldwide turnover of the business.

The involvement of a trade association or profession in an infringement of the competition law may result in financial penalties being imposed on the association itself, its members or both the association and its individual members.

Where the infringement by an association or professional body relates to the activities of its members, the penalty cannot exceed 10 percent of the sum of the worldwide turnover of each member active on the market affected by the infringement.

7. Third Party Claims

Third parties adversely affected by an agreement which they believe is prohibited under either law may take action in the Royal Courts to require the businesses involved to set aside the agreement and/or to seek damages.

8. How can I find out more?

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

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