



Guideline for Regulatory Investigations

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Purpose of this guideline

The Jersey Competition Regulatory Authority (the **Authority**) was established by the Competition Regulatory Authority (Jersey) Law 2001¹. The Authority has responsibility for the administration and enforcement of:

- Competition (Jersey) Law 2005 (the **Competition Law**)²
- Air and Sea Ports (Incorporation) (Jersey) Law 2015 (the **Ports Law**)³
- Postal Services (Jersey) Law 2004 (the **Post Law**)⁴
- Telecommunications (Jersey) Law 2002 (the **Telecoms Law**)⁵

Within this guideline the Ports Law, the Post Law and the Telecoms Law are together referred to as the **Regulatory Laws**. This guideline sets out the investigative and decision-making processes the Authority follows when conducting an investigation under the Regulatory Laws⁶, which could result in the imposition of a regulatory sanction.

Notes:

- This guideline is for guidance only. Any variation to the approach set out in this guideline will be explained.
- This guideline should not be relied on as a substitute for the Regulatory Laws. If you have any doubts about your position under the Regulatory Laws, you should seek legal advice.

¹ [Competition Regulatory Authority \(Jersey\) Law 2001 \(jerseylaw.je\)](#)

² [Competition \(Jersey\) Law 2005 \(jerseylaw.je\)](#)

³ [Air and Sea Ports \(Incorporation\) \(Jersey\) Law 2015 \(jerseylaw.je\)](#)

⁴ [Postal Services \(Jersey\) Law 2004 \(jerseylaw.je\)](#)

⁵ [Telecommunications \(Jersey\) Law 2002 \(jerseylaw.je\)](#)

⁶ The Authority's approach to investigations under the Competition Law are set out in [Guideline 10 - Investigation Procedures](#)

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1. Introduction

The Authority

The Authority is established by way of the Competition Regulatory Authority (Jersey) Law 2001. Further functions and legal duties relating to the Competition Law and the Regulatory Laws have been set out in further legislation passed by the States of Jersey. These functions and duties relate to the promotion of competition in the supply of goods and services in Jersey, together with the economic regulation of port operations, postal services and the telecommunications sector.

The Authority is not a judicial body. Court rules and procedures do not apply to the decisions that it takes. The Authority takes administrative action in accordance with powers vested in it that are set out in the legislation that it administers, which includes the Regulatory Laws.

Independence

The Authority is independent of the Minister for Sustainable Economic Development and of the States of Jersey, and regulates its own proceedings. To support this, as an independent body, the Authority has a broad range of formal powers given to it by different laws to enable it to administer and enforce the Regulatory Laws.

The Authority's powers

Where, in the opinion of the Authority, a licensee is, has been, or appears to be, in contravention one of the Regulatory Laws, which includes contraventions of licences issued under the Regulatory Laws, the Regulatory Laws provide the following powers:

The Ports Law	<ul style="list-style-type: none">• Issuance of a direction to comply with licence conditions• Enforcement of a direction through civil proceedings• Imposition of a financial penalty to enforce a condition• Revocation of licence for failure to comply with a direction to comply with licence conditions
The Post Law	<ul style="list-style-type: none">• Issuance of a direction to comply with licence conditions• Civil proceedings for not having a licence or failing to comply with a direction• Revocation of licence for failure to comply with a direction
The Telecoms Law	<ul style="list-style-type: none">• Issuance of a direction to comply with licence conditions

	<ul style="list-style-type: none">• Civil proceedings for not having a licence or failing to comply with a direction• Imposition of a financial penalty• Revocation of licence for failure to comply with a direction
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The Authority may also take action against a person⁷ who is carrying out an activity which requires a licence under one of the Regulatory Laws, without having first been granted a licence under one of the Regulatory Laws.

Through the use of its powers under the Regulatory Laws, the Authority aims to meet a number of objectives:

- To deter future contraventions.
- To control or mitigate risk.
- To raise awareness of regulatory requirements.
- To prevent financial gain or benefit through non-compliance with regulatory requirements.

⁷ As defined in the Interpretation (Jersey) Law 1954 to include any body of persons corporate or unincorporated.

2. Approach to regulatory investigations and decision-making

Introduction

This section sets out the Authority's approach to regulatory investigations and its decision-making. It includes guidance on its likely engagement and contact with the subject of the investigation, complainants and third parties, and how it will gather information, publish information and deal with confidential information.

Although the statutory framework for each different type of investigation may differ⁸, the process will broadly be the same for each.

Fair, transparent and efficient

The Authority seeks to ensure the investigations it carries out are conducted in a fair, transparent and efficient manner. To this end, the Authority will:

- Engage with the subjects of an investigation at an early stage and ensure that opportunities to provide representations are provided;
- Ensure the subject of an investigation and any other involved persons, e.g. complainants, are informed when key milestones are reached; and
- As and when appropriate, place announcements on its website when an investigation is opened and update where key milestones are reached.

The Authority will keep the subjects of its investigations up-to-date on the progress of the investigation. The Authority will meet with the subject of an investigation and complainants or other third parties, and/or provide updates, when it is appropriate to do so on a case-by-case basis, depending on the nature of the investigation and the stage the investigation is at.

Confidential

The Authority is mindful of its responsibilities under each of the Regulatory Laws to preserve the confidentiality of certain information that is disclosed to it. The Authority will comply fully with its legal obligations when deciding how and whether to publish or disclose any information provided in the course of an investigation.

Open mind

If the Authority opens an investigation, it does not mean that it has determined that a contravention has occurred. The purpose of an investigation is to establish the facts so the Authority can decide what further action, if any, is necessary and, if so, the nature of that action.

⁸ Depending on the Regulatory Law under which the investigation is being conducted.

Impact and timescales

The Authority recognises that a regulatory investigation can be stressful for individuals and disruptive for businesses. The Authority will therefore only investigate when necessary, for as long as necessary. When it becomes clear there is no need to continue an investigation, the Authority will end it promptly.

The Authority will therefore progress its investigations in a timely manner and will conclude its investigations as soon as reasonably practicable.

3. The stages of investigation and decision-making

Introduction

This section sets out the stages of the Authority's investigative and decision-making processes, including how it initiates the investigative process.

Initiating the investigative process

The Authority can decide to initiate the investigative process on the basis of a wide range of situations, which give cause for concern that a breach of the Regulatory Laws and/or licence condition may have occurred. For example,

- A complaint from a member of public or a competitor or customer of a licensee;
- An apparent failure to comply with a direction issued under one of the Regulatory Laws; or
- A regulatory notification.

A review of the information received, and any supporting evidence, will be conducted. If the review reveals it to be a matter which falls within the Authority's remit. i.e. under its duties or functions under either the Competition Law or the Regulatory Laws, a preliminary assessment will be conducted (see below). Note, if the matters falls within the Authority's Competition Law remit, the following process will progressed in accordance with its [Guideline 10 - Investigation Procedures](#).

The stages of investigation and decision-making

Stage 1	Preliminary Assessment	A preliminary assessment of relevant information will be conducted to determine the likelihood of a contravention having occurred or occurring and, if so, whether it is appropriate to investigate.
Stage 2	Information Gathering	Where it is appropriate to investigate, further information will gathered to establish the facts and evidence of the case. This stage may also include on-site visits and/or interviews. Using the information gathered, an investigation (or technical) report will be prepared which outlines the findings of the case and the evidence relied upon to reach

		those findings and shared with the subject of the investigation for comment.
Stage 3	Contravention	Based on the facts and evidence established through the course of the investigation, the Authority will make an initial determination on whether a contravention has occurred.
Stage 4	Triviality and subsequent steps	Based on the Authority's initial decision and taking into account the full facts and circumstances of the case, the Authority will decide if the contravention is material and, if it is satisfied with the steps to comply and remedy. Note, the legal test here differs between the Regulatory Laws, see section 6.
Stage 5	Regulatory Action	If appropriate, the Authority decides the quantum of the financial penalty and/or the content of the directions.

Engagement with the subject of an investigation

Through the course of an investigation, the subject will be provided with appropriate updates. Further, at Stage 1 of the investigation, the subject will be provided with the name and contact details of the investigation lead who will be their primary contact through the investigation. The following steps in the Authority's processes where, typically, the investigation lead will engage with the subject of an investigation:

- **Stage 1:** subject will be informed that it is under investigation and the scope of the investigation (see section 4 for more details);
- **Stage 2:** subject will be invited to comment on the factual accuracy of the draft investigation/technical report prior to it being finalised.
- **Stage 3:** the subject of the investigation will be informed of the Authority's initial decision.
- **Stages 3 and 4:** subject will be provided with the opportunity to make representations on the Authority's decision on contravention and triviality and subsequent steps.
- **Stage 5:** during the statutory notice period, subject will be provided the opportunity to make further representations.

The Authority will generally provide updates to the subject and any complainant on the progress of investigations, including when it expects to reach specific milestones. The Authority will also provide updates where this changes.

The Competition Law⁹

Certain conduct may infringe both the Regulatory Laws, including conditions of licences issued by the Authority under those laws, and the Competition Law. For example, licences issued may contain conditions that prohibit a licensee with significant market power from abusing a dominant position in a relevant market, which is similar to the prohibition against abuse of dominance set out in the Competition Law. Where information provided raises a reasonable cause to suspect that the conduct in question may violate both the Competition Law and the Regulatory Laws, the Authority may investigate under either or both remits.

Legal Professional Privilege

The Authority may not require the disclosure of information or documents that would be protected from disclosure in the Royal Court on the grounds of legal professional privilege. In general, this privilege covers communications in confidence between a client and a legal practitioner made for the purpose of giving or seeking legal advice.

⁹ The Competition (Jersey) Law 2005.

4. Stage 1: Preliminary Assessment

Introduction

The preliminary assessment is the early, initial stage of the investigation process. A preliminary assessment is conducted where the Authority suspects a contravention of a regulatory requirement has occurred, to establish if an investigation should be initiated.

Conducting the preliminary assessment

The information assessed at this stage can come from a number of sources and is typically provided on a voluntary basis. The timeframe for the completion of a preliminary assessment depends on a variety of factors, including:

- The availability of information;
- Timing and resourcing implications;
- The complexity of the situation; and
- The perceived risk.

Outcome of the preliminary assessment

If the preliminary assessment indicates a contravention has occurred, the Authority, with consideration to its Prioritisation Principles¹⁰, will decide whether to open an investigation. Even if the preliminary investigation indicates a contravention, the Authority can still decide either not to commence an investigation, or to delay its initiation. This decision depends on the gravity of the conduct involved; the harm or potential harm caused; whether a private resolution is more appropriate; the matter's apparent urgency, including any apparent ongoing risk; and the Authority's available resource.

Opening an investigation

The Authority will consider opening an investigation where:

- A licensee has failed or is failing to comply with one or more of the conditions of the licence issued to it under one of the Regulatory Laws;
- A licensee has breached or is breaching a direction issued to it under one of the Regulatory Laws; or
- A person is carrying out an activity which requires a licence under one of the Regulatory Laws, but has not been granted a licence under the relevant Regulatory Laws.

¹⁰ [jcra-prioritisation-principles.pdf](#)

If the Authority decides to investigate a matter, and unless doing so would compromise the investigation, the Authority will inform the subject of its decision to investigate at the earliest opportunity. The subject will be provided with the following information:

- The scope of the investigation;
- The legal basis for the investigation;
- The reasons for the investigation;
- The case lead¹¹;
- (If appropriate) A copy of the case opening statement to be published on the Authority's website;
- (If appropriate) A request for information; and
- A copy of this guideline.

Note, the Authority may expand the scope of an investigation if it becomes aware of new issues that warrant investigation, or reduce the scope if it decides that it is no longer appropriate to pursue particular aspects. When it changes the scope of an investigation, the Authority will inform the subject and update its website accordingly.

Case opening statement

Unless it is inappropriate for reasons of confidentiality, the Authority will publish a case opening announcement on its website.. The Authority will not identify the subject(s) of the investigation at this stage, unless there is a good reason for doing so.

Alternative resolution

In some cases, the Authority may seek to resolve an issue without the need for an investigation. For example, if the Authority is satisfied the business has taken, or has offered assurances that it will take, appropriate steps to address any concerns the Authority has identified such that there is no need for further action.

In such circumstances, the Authority will write to the subject of the investigation, to explain the basis on which it has decided not to proceed to open an investigation, and the circumstances in which it might reconsider the need to open an investigation in future (for example, in the event that the organisation did not take the steps which it had said that it would or the Authority received further evidence of a potential compliance issue). Such cases will generally not involve the Authority taking any decision about whether or not any regulatory or legal provision has been contravened.

¹¹ The person who will lead the case for the Authority and be the subject's main contact throughout the investigation.

5. Stage 2: Information Gathering

Introduction

The Authority relies on accurate information, provided in a timely manner, to progress its regulatory investigations and, therefore, information gathering is the cornerstone of its investigations.

Both the Post Law¹² and the Telecoms Law¹³ provide the Authority with the power to require the provision of information, at a specified time and in a specified manner and form. Licences issued under the Ports Law and the Telecoms Law contain a condition which requires the provision of information, when requested by the Authority.

The Authority will use these powers to obtain information for the purposes of progressing regulatory investigations covered by this guideline.

Requests for information

A formal request for information will be issued in writing, using the Authority's powers under the relevant Regulatory Law and/or licence condition. The request for information will prescribe the information required and for what purpose. The request will stipulate the deadline for response, as well as the manner and form in which the response is to be made.

When making requests, the Authority will ensure:

- Requests are relevant to the scope of the investigation;
- Requests are proportionate to the uses to which the information is to be put;
- Recipients are reasonably expected to know or be in possession of the information requested; and
- Recipients are provided a reasonable timeframe¹⁴ within which to provide the information.

Failure to comply with a request for information issued under the Post Law or the Telecoms Law may constitute a criminal offence. The provision of false or misleading information to the Authority is also prohibited under the Post Law and the Telecoms Law and so may constitute a criminal offence. Where a criminal offence is suspected, the Authority will refer the matter to the Attorney General. Failure to comply with a request for information issued under a Ports licence constitutes a contravention which can result in further regulatory action.

¹² Article 77 of the Post Law.

¹³ Article 23 of the Telecoms Law.

¹⁴ What the Authority considers a reasonable timeframe may differ depending on the specific circumstances of a case.

Other information

If required to progress the investigation, the Authority will use its information gathering powers under the Regulatory Laws to request information from third parties whom the Authority considered may be in possession of relevant information. Information may be requested from competitors, customers, employees, suppliers, potential entrants into the affected markets, industry/trade associations, and the Government of Jersey departments.

Assessment of information

The assessment of the information gathered is a critical stage in the Authority's investigative process. Each piece of information will be considered to establish the facts of the case. Following the assessment, further information may be requested.

Outcome of the information assessment

A report will be produced following the information gathering and assessment. The purpose of the report is to document the findings of the investigation. The evidenced relied upon to reach those findings will be cited within the report. The report will serve as clear, comprehensive and objective record of the investigation.

The subject of an investigation will be provided with a copy of the draft report and invited to make comments on its factual accuracy and submit further information to the Authority for consideration when finalising the report.

The final report will form the basis of the Authority's further decisions (see section 6) in relation to a case.

6. Stages 3 to 5: Authority Decision-making

Introduction

This section sets out how the Authority decides the outcome of a regulatory investigation and the appropriate regulatory action i.e. financial penalty and/or direction, or in the case of a failure to comply with a direction, revocation of the licence. This involves consideration of matters such as triviality (how serious a contravention is) and the steps taken by persons to comply with the relevant obligation and to remedy a prior contravention.

Stage 3: Contravention

Following the conclusion of stages 1 and 2, the Authority will make an initial determination if the matter under investigation demonstrates a contravention by the subject of the investigation. To decide, the Authority will apply the facts of the case, as set out in the investigation report, against the relevant regulatory requirements and/or legal obligations.

The Authority's initial decision as to whether a contravention has occurred or not will be communicated to the subject of the investigation as soon as practicable after the decision has been made. At this time, the subject will be informed of the Authority's next steps.

Where it is decided that no contravention has occurred, the investigation will be closed. Where it is decided a contravention occurred, the Authority is required to consider if regulatory action should be taken (see below).

Stage 4: Triviality and subsequent steps

The Regulatory Laws provide that the Authority shall not issue a direction or a financial penalty where it is satisfied that:

- A contravention is trivial; or
- Steps have been taken to comply and remedy following the contravention (known as the **subsequent steps test**). The legal test for this is slightly different depending on the relevant legislation – see table below.

Therefore, where the Authority has decided a contravention has occurred, it is required to consider the triviality of the contravention. Examples of where the Authority may consider a contravention to be trivial may include:

- A contravention which did not give rise to any potential or actual harm.
- A contravention of negligible duration.
- A contravention of negligible or no detrimental impact.

If the Authority determines a contravention to be material (not trivial), it is required to consider the subsequent steps test, i.e. the steps taken by the subject *following* a contravention to comply and remedy. The details of the subsequent steps test varies between each of the Regulatory Laws:

The Ports Law	<p>in relation to the giving of a direction: <i>‘the licensee is taking effective steps to comply with the condition and to remedy any deleterious effects of the contravention.’¹⁵ or</i></p> <p>in relation to the imposition of a financial penalty: <i>‘...the licensee is taking reasonable steps to comply with the condition or to remedy any deleterious effects caused by the contravention.’¹⁶</i></p>
The Post Law	<p>in relation to the giving of a direction: <i>‘...the licensee is taking steps to comply with the condition and to remedy the effects of the contravention.’¹⁷</i></p>
The Telecoms Law	<p>in relation to either giving a direction or the imposition of a financial penalty: <i>‘...the licensee is taking reasonable steps to comply with the condition or to remedy any deleterious effects caused by the contravention.’¹⁸</i></p>

Note, neither triviality nor a subsequent steps test is applicable where the Authority is giving consideration to revocation of a licence.

Draft Decision

Following the Authority’s initial decisions on contravention, triviality and the subsequent steps test, the subject of the investigation will be issued with a Draft Decision which sets out the Authority’s decisions on contravention, triviality and subsequent steps and the reasons for its decisions.

Prior to the Authority finalising its decisions, the subject will be provided with the opportunity to make representations to the Authority, within a specified timeframe determined by the Authority.

Taking into account any representations received, the Authority will finalise its written decision which, at the appropriate time, will be published on its website.

¹⁵ Article 18(8)(c) of the Ports Law.

¹⁶ Article 20(2)(b) of the Ports Law.

¹⁷ Article 20(2) of the Post Law.

¹⁸ Article 19(2G) and Article 19A(13)(b) of the Telecoms Law.

Stage 5: Regulatory Action

Where the Authority is satisfied that a contravention is material and that the subject of the investigation has not met the relevant subsequent steps test, the Authority is required to give consideration to the appropriateness of a direction and/or a financial penalty.

If the Authority decides to issue either a direction or financial penalty, it will decide the content of the directions and/or the quantum of financial penalty¹⁹.

The subject of the investigation will then be issued with proposed directions and/or a notification in relation to the proposed financial penalty.

Notice period

Each of the Regulatory Laws requires the Authority to notify the subject of an investigation of its intention to take regulatory action(s). The Ports Law and Post Law require 29 days' notice and the Telecoms Law requires 28 days' notice. During the notice period, subjects have the opportunity make further representations for the Authority's consideration.

After the review period and taking into account any representations made, the Authority will finalise and publish all relevant documentation and close the case.

Alternatively if, taking into account any representations made, the Authority decides the regulatory action previously decided upon is no longer appropriate it will return to an appropriate earlier stage in the process.

Publication and case closure.

The Authority will publish its decision, including the reasons for its decision on its website. After which, the case will be closed.

No further action

Where the Authority, is satisfied that a contravention is trivial or that the subject has taken the relevant subsequent steps test, the legal threshold for consideration of a direction and/or financial penalty would not be met. Therefore, the Authority would take no further action in relation to the investigation and the investigation would be closed.

Note, the Authority's decision in relation to the investigation will be published on its website.

¹⁹ Based upon [Guideline 12A Sector Specific Penalties](#).

Right to Appeal

Each of the Regulatory Laws provides the subject of an investigation to appeal the Authority's decision. The right to appeal differs slightly between the Regulatory Laws therefore, whilst summarised below, it is recommended that the Regulatory Laws are considered directly on this matter.

The Ports Law	<p>An appeal may be made:</p> <ul style="list-style-type: none">• By the applicant, where the exercise consists of a refusal of an application;• By the licensee, in so far as the exercise consists of the enforcement of any condition contained in the licence;• By any person, where the exercise consists of the grant of a licence;• By any person, where the exercise consists of giving, or declining to give, a direction under Article 18; or• By any person, where the exercise consists of the imposition of a financial penalty under Article 20.
The Post Law	<p>An appeal may be made:</p> <ul style="list-style-type: none">• By the applicant, where the exercise consists of a refusal of an application;• By any person, where the exercise consists of the grant of a licence, in respect of that grant or against the inclusion or exclusion of a particular condition;• By any person where the exercise otherwise relates to a licence, including giving or deciding not to give, a direction under Article 20.
The Telecoms Law	<p>An appeal may be made:</p> <ul style="list-style-type: none">• By the applicant, where the exercise consists of a refusal of an application;• By the holder of an approval, where the exercise consists of the grant of an approval, to the imposition of any condition to the approval;• By the holder of an approval, where the exercise otherwise concerns an approval, against the exercise;

	<ul style="list-style-type: none">• By any person, where the exercise consists of the grant of a licence, in respect of that grant or against the inclusion of a particular condition;• By any person, where the exercise otherwise relates to a licence, including:<ul style="list-style-type: none">○ The giving, or failure to give, a direction under Article 19;○ The imposition of a financial penalty under Article 19A, or the amount of any such penalty imposed.
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