

**Template pursuant to Section 3 (a) of the
ICN Framework on Competition Agency Procedures**

Jersey Competition Regulatory Authority, Jersey

The following template is submitted by *Jersey Competition Regulatory Authority, Jersey* pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

I. Introduction

The Jersey Competition Regulatory Authority (the **Authority**) was established by the *Competition Regulatory Authority (Jersey) Law 2001* (<https://www.jerseylaw.je/laws/unofficialconsolidated/Pages/05.075.aspx>), and is responsible for the administration of competition law and the regulation of certain defined sectors in Jersey – telecommunications, postal services, and air and sea ports.

In Jersey, the *Competition (Jersey) Law 2005* (<https://www.jerseylaw.je/laws/revised/Pages/05.070.aspx>) prohibits anti-competitive behaviour, including anti-competitive agreements between businesses and the abuse of a dominant position. It also requires certain mergers and acquisitions to be notified to the Authority for approval.

The Authority has a wide range of powers to investigate businesses suspected of breaching the law. It can order that offending agreements or conduct can be stopped and levy financial penalties on businesses and individuals for the breach.

Further details can be found on the website at: <https://www.jcra.je/>

There are a number of published Guidelines available on the website which explain how the Authority applies the laws it is responsible for administering and enforcing in Jersey¹. These are listed here and referred to where appropriate in the narrative below:

Policies / Guidelines²

- A Guide to Compliance
- Channel Islands Competition Laws – A Quick Guide
- Guideline 2 - Anti-Competitive Agreements
- Guideline 3 – Cartels
- Guideline 4 -Trade Associations & Professions
- Guideline 5 – Abuse of a Dominant Position

¹ CICRA refers to the Channel Islands Competition & Regulatory Authorities. CICRA dealt with competition and regulatory matters in both Jersey & Guernsey. On 1 July 2020, CICRA ceased to operate as a joint body. The Guidelines presently refer to CICRA, although the Authority continue to follow the same Guidelines.

² <https://www.jcra.je/legal-frameworks/>

- Guideline 6a – Mergers & Acquisitions – substantive assessment
- Guideline 6b – Mergers & Acquisitions – Procedure
- Guideline 7 - Market Definition
- Guideline 8 – How to raise a complaint
- Guideline 9 - Applications for Guidance and Exemptions
- Guideline 10 – Procedures for investigations conducted by CICRA
- Guideline 11 - Vertical Agreements
- Guideline 12 - Financial Penalties
- Guideline 12A – Sector Specific Financial Penalties
- Guideline 13 – Leniency Policy

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.

Please update your Template reflecting significant changes as they relate to the CAP, as needed.

b) **Non-Discrimination**

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

The Authority ensures that all of its procedures treat Persons in Jersey and outside of Jersey equally.

The Authority regulates businesses (also referred to as “undertakings” in the *Competition (Jersey) Law 2005*) engaged in economic activity, irrespective of their legal status or the manner in which they are funded, including companies, partnerships, cooperatives, States’ departments and individuals operating as sole traders. The Law defines an “undertaking” as a person carrying on a business and includes “associations”, whether or not incorporated, that consist of or includes such persons. As such, it does not distinguish Persons from Jersey and Persons from another jurisdiction.

The *Discrimination (Jersey) Law 2013* provides the protected characteristics (race, sex, sexual orientation, gender reassignment, pregnancy and maternity, age and disability). Article 6 of the *Discrimination (Jersey) Law 2013* provides that ‘A person discriminates against another person (the “subject”) if, because of a protected characteristic, the person treats the subject less favorably than the person treats or would treat others.

Article 6 of *The Human Rights (Jersey) Law 2000* provides the right to a fair trial. This is also contained in the *European Convention on Human Rights (ECHR)* at Article 6.

As such, Jersey competition laws, internal policies and the ECHR treat all Persons the same and ensure that they do not treat Persons of another jurisdiction less favorable.

c) Transparency and Predictability

Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.

Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.

Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available

Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.

Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.

Guideline 10 provides that the Authority is committed to acting transparently and openly when carrying out its work. It provides that they are acting in a way that is procedurally fair and increases public awareness of its work and encourages engagement with its work.

Transparency ensures that the Authority's decision making is based on the best available evidence and so improves the quality and robustness of that decision making and public confidence in it.

The Authority aims to achieve transparency through:

- (a) ensuring (where possible), that the parties to a case and other involved persons, are informed when key milestones in a case are reached;
- (b) engaging with the parties to a case and other involved persons at an early stage and ensuring that an opportunity to provide views is given at appropriate points;
- (c) placing announcements on the website when a case is opened and key milestones in that case are reached.

All of the above shows that the Authority is transparent and that proceedings are made available to the public.

It must be noted that the duties and responsibilities under the law to preserve the confidentiality of certain information that is disclosed to the Authority are adhered to.

d) Investigative Process

Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.

Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.

Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.

As provided for in Article 26(1) of the *Competition (Jersey) Law 2005*, the Authority may conduct an investigation if it has reasonable cause to suspect that a person (a) is in breach of Article 8(1), 16(1) or 20(1) or of an associated direction; or (b) intends to breach Article 20(1).

The Authority may also conduct an investigation if it has reasonable cause to do so in order to comply with a request made under Article 6(4) of the *Competition Regulatory Authority (Jersey) Law 2001* for a report, advice, assistance or information.

If Article 26 of the *Competition (Jersey) Law 2005* applies then the Authority may serve written notice on (a) a person mentioned in Article 26(1); or (b) any other person that appears to the Authority to be in possession of relevant information or documents.

The notice may require the person upon whom it is served to do both or either of the following:

- (a) to provide the Authority within a time specified in the notice information or documents that the Authority requires to carry out the investigation;
- (b) to answer questions in respect of information the Authority requires in respect of its investigation either forthwith or at a time and place specified in the notice.

Article 27(4) of the *Competition (Jersey) Law 2005* provides that 'an undertaking or person (a) who fails to comply with a notice served under paragraph (1); or (b) who knowingly or recklessly provides information that is false, misleading or incomplete, is guilty of an offence and liable to a fine.

In proceedings against an undertaking or person for an offence under paragraph (4) (a) it shall be a defence for the accused to show that there was a reasonable excuse for the accused failing to comply with the notice.

Turning to the Guidelines, Guideline 10 – Procedures for investigations conducted by CICRA would be relevant here.

The Authority has no power to conduct 'spot-checks' to verify compliance with the laws that they are responsible for. A formal investigation may only be opened if the Authority has 'reasonable cause to suspect' that Article 26 of the *Competition (Jersey) Law 2005* is relevant.

Whether a reasonable cause to suspect exists will depend on the Authority's assessment of the information that is available. Upon receipt of such information, the Authority conducts a preliminary assessment to determine the likelihood of finding a breach of the law or a licence condition.

Having conducted a preliminary assessment, the Authority determines whether a reasonable cause to suspect exists and, if so, if and when to commence a formal investigation. The decision will depend on

considerations such as: the gravity of the conduct involved; the harm or potential harm caused to the Jersey economy, consumers, or businesses; whether the dispute is more applicable to private resolution among the parties involved; the matter's apparent urgency; and other activities that the Authority are currently undertaking.

Unless doing so would compromise the investigation (e.g. where the Authority intends to carry out a search under warrant), it will inform the parties directly involved that a formal case has been opened. They will be provided with a description of the case, the legal basis for bringing the case, the industry sector concerned and the reasons why a formal case has been opened.

The Authority will also place a case opening announcement on their website, setting out the above information.

During a formal investigation, the Authority will conduct a robust, evidence based assessment of whether an infringement has occurred.

The Authority will keep the party or parties subject to the investigation informed of its progress and the potential time-frame for completion.

If, as a result of the investigation, the Authority determines that the information collected supports the conclusion that an infringement exists, the Authority will prepare a draft decision setting out their preliminary conclusions on the conduct under investigation. The Authority must, however, give the person written notice of its proposed decision and allow the person a reasonable time to make representations to it before making any decisions (Article 35(2) of the *Competition (Jersey) Law 2005*).

An announcement that a draft decision has been issued will be placed on the Authority website together with a brief summary of the case, which will include the names of the parties to the case.

In competition law investigations, at (generally) the same time as issuing the draft decision, the Authority will also give the addressees of the draft decision the opportunity to access the information held on the Authority's case file. The Authority will allow addressees of the draft decision a reasonable opportunity to access the case file. The party or parties subject to the investigation may request a meeting with the Authority during the response period. After this response period, the Authority will prepare a final decision or decide not to go ahead with a final decision.

An announcement that a final decision has been taken will be placed on the Authority's website together with a short case summary, the decision and the reasons for that decision. Alternatively, if based on the evidence collected, the Authority determine that an infringement has not occurred, the Authority can end the investigation. The Authority will inform the parties involved in the investigation that the matter has been closed, and confirm in writing if requested. An announcement that a final decision has not been adopted will be placed on the Authority website.

In addition to decisions, the Authority can issue written directions and impose financial penalties.

e) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

In relation to the preliminary assessment detailed above, the Authority normally conduct a preliminary assessment to determine the likelihood of finding a breach of the law or a license condition within two weeks, depending on the availability of information. However, the complexity and perceived urgency of the matter can influence these timescales significantly.

Once the Authority has commenced a formal investigation, it will endeavor to conclude it as soon as possible. Given the range of potential matters under the laws and their varying complexity, it is not possible to provide general guidance on the time the Authority expects to take to conclude its investigations. However, the Authority endeavor to keep the party or parties subject to the investigation informed of its progress and the potential timeframe for completion.

Depending on the nature of the mater under investigation updates may also be posted on the Authority's website.

f) Confidentiality

Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.

Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.

Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.

The Authority's rules, policies, guidance and applicable laws regarding the identification and treatment of confidential information are available on their website.

Article 45(2) of the *Competition (Jersey) Law 2005*, provides that the Authority must not disclose information unless it has satisfied itself that the recipient will comply with any conditions subject to which the disclosure is to be made, being conditions intended to ensure that the information is not used for any purpose other than that for which it is to be disclosed.

The Authority is permitted to disclose information that they receive relating to a party's business or affairs if disclosure would further the course of a formal investigation. This is an exception to the general rule that such information must not be disclosed.

Even where to do so would further the course of a formal investigation, the Authority will generally not disclose information supplied to them if that information is commercially sensitive. Before the Authority discloses any information, they will give the party who submitted it an opportunity to identify information that it considers to be commercially sensitive. Any claims of confidentiality must be duly substantiated.

Before disclosing information, including as part of the “access to the file” procedure and in the Authority’s published documents, the Authority will require all parties that have provided information during the investigation to make known to the Authority which information they consider to be confidential and why. Such claims should be kept to the minimum necessary to protect confidentiality and, for reasons of transparency and open decision making, blanket or unsubstantiated claims will not be accepted.

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

Under Article 10 of the *Competition Regulatory Authority (Jersey) Law 2001*, the Minister may, if he or she considers that it is desirable in the public interest to do so, give to the Authority written guidance, or general written directions, on matters relating to corporate governance, that is, relating to the system and arrangements by and under which the Authority is directed and controlled. Those matters may include matters relating to accountability, efficiency, and economy of operation of the Authority, but not matters relating directly to the performance of the Authority’s licensing or regulatory functions or its functions under Article 6(2) or (4) of the *Competition (Jersey) Law 2005*.

In particular, but without limiting paragraphs (1) and (2) of Article 10 of the *Competition Regulatory Authority (Jersey) Law 2001*, the guidance or directions may relate to conflicts of interest, the accounts of the Authority and their audit, borrowing by the Authority and the investment of the funds of the Authority.

Contracts for Members of the Authority contain explicit provisions relating to conflicts of interest:

h) Notice and Opportunity to Defend

Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.

Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant’s possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.

Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.

The timings in relation to a notice are dealt with in sections (d) and (e) above.

Parties may appeal a decision, direction or financial penalty under any of the laws that the Authority are responsible for using.

Under Article 53 of the *Competition (Jersey) Law 2005*, a person may appeal to the Court against –

- (a) a decision by the AUTHORITY that the person is in breach of Article 8(1), 16(1) or 20(1);
- (b) the giving of a direction to the person by the AUTHORITY or a requirement of, or a condition imposed by any such direction;
- (c) the imposition on the person by the AUTHORITY, in accordance with Article 36(4), 37(4) or 38(7), of a financial penalty or the amount of any such financial penalty.

A person may appeal in accordance with paragraph (1) of Article 53 of the *Competition (Jersey) Law 2005* within the 28 days after notice of a decision, the giving of a direction or the imposition of a fine to that person by the AUTHORITY or within such further period as the Court may allow if it considers it desirable to do so in the interest of justice.

i) Representation by Counsel and Privilege

No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.

Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law.

Notwithstanding the foregoing, Persons may be required to provide direct evidence.

Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice.

Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.

Guideline 10 – Procedures for investigations conducted by CICRA provides that 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.

j) Decisions in Writing

Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.

Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.

This is covered in section (d) above.

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

This is covered in the appeal process detailed at section (h).