



Jersey Competition Regulatory Authority ('JCRA')

Decision C 105/06

**Concerning the Motor Fuels Supply Agreement between Esso
Petroleum Company, Ltd and Roberts Garages Ltd Notified
under Article 9 of the Competition (Jersey) Law 2005**

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On 22 December 2006, the JCRA received an application for an exemption under Article 9 of the Competition (Jersey) Law 2005 (the 'Law') concerning the Motor Fuel Supply Agreement between Esso Petroleum Company Limited ('Esso') and Roberts Garages Ltd ('Roberts') dated 24 May 2006 (referred to hereinafter as the 'Notified Agreement').
2. On 12 January 2007 the JCRA published details of the application in the Jersey Gazette and on its website (www.jcra.je), asking interested parties to submit comments on the application to the JCRA by 26 January 2007. In addition, the JCRA contacted motor fuel suppliers, distributors and retailers in Jersey, as well as other potentially interested parties, to solicit their views.
3. The JCRA has conducted a detailed analysis of the Notified Agreement's effects on competition. This investigation has involved the cooperation of Esso, Roberts, and many third parties.
4. As a result of this investigation, the JCRA concludes that the Notified Agreement appears to be subject to Article 8 of the Law. The JCRA further concludes that the Notified Agreement satisfies the exemption criteria under Article 9 of the Law, subject to certain conditions intended to limit the Notified Agreement's period of exclusivity.
5. Thus, in this Decision the JCRA conditionally exempts the Notified Agreement under Article 9. The term of this exemption runs from 1 June 2006 to 1 June 2011, [CONFIDENTIAL REDACTED]. This exemption is conditional on compliance by both Esso and Roberts with certain conditions, and also remains subject to the provisions of Article 9 of the Law including, but not limited to, Articles 9(8) to 9(13).

II. THE NOTIFIED AGREEMENT

6. This matter generally involves the wholesale supply of motor fuels from suppliers such as Esso to independent retailers such as Roberts. The motor fuels supplied are then sold at retail by Roberts to motorists in Jersey.
7. Under the Notified Agreement, Roberts agrees to purchase motor fuels exclusively from Esso on a wholesale level for retail sale at four Roberts service stations located in Jersey.¹ These stations are located at Springfield Road, Bel Royal, Grève D'Azette, and Kensington Place.² The Notified Agreement covers the supply of a full range of motor fuels, including diesel and other fuels derived from petroleum for automotive vehicles.
8. [CONFIDENTIAL REDACTED].
9. [CONFIDENTIAL REDACTED].
10. In addition to supplying motor fuels to Roberts, Esso agrees to support Roberts in certain ways, including by contributing to pump maintenance at Roberts' service stations.
11. [CONFIDENTIAL REDACTED].
12. [CONFIDENTIAL REDACTED].
13. The Notified Agreement is the latest in a series of motor fuel supply agreements between Esso and Roberts. The agreement between Esso and Roberts immediately prior to the Notified Agreement had [CONFIDENTIAL REDACTED]. This prior agreement was terminated by Esso and Roberts upon the commencement of the Notified Agreement.

¹ This type of exclusive purchasing commitment in the motor fuels industry is known as a 'solus tie.'

² Subsequent to the conclusion of the Notified Agreement, in January 2007 the service station at Kensington Place closed for redevelopment.

III. OVERVIEW OF THE ANALYSIS UNDER THE LAW

14. In response to the application the JCRA must first determine if the Notified Agreement is potentially subject to Article 8 of the Law, which prohibits anti-competitive arrangements in Jersey. If the Notified Agreement is subject to Article 8, the JCRA must further examine if it qualifies for an exemption under Article 9.
15. Article 60 of the Law requires that the JCRA attempts to ensure that, so far as possible, questions arising under Articles 8 and 9 are dealt with in a manner that is consistent with the treatment of corresponding questions that have arisen under competition law within the European Union. As stated in the JCRA's *Guideline on Anti-Competitive Arrangements*,³ relevant sources of authority under Article 60 include judgments by the European Court of Justice or Court of First Instance, decisions taken and guidance published by the European Commission, and interpretations of EU competition law by Member State courts and competition authorities. In this matter the JCRA has had particular regard to the following authorities:
- The current EC Block Exemption Regulation ('BER') and the European Commission's Guidelines on Vertical Restraints.⁴
 - The former EEC Regulation No 1984/83 concerning the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements. Although the BER subsequently has superseded this decision, it includes specific analysis of motor fuel supply agreements and thus remains relevant to the current matter.
 - The Decision by the Irish Competition Authority dated 1 July 1993 granting a category licence to exclusive purchasing agreements for motor fuels. This decision granted a block exemption under Irish competition law to motor fuel

³ A copy of this Guideline is available at www.jcra.je/law/guidelines.aspx

⁴ See, respectively, Regulation (EC) No 2790/1999, O.J. L 336 (29 Dec. 1999) and O.J. C 291/1 (13 Oct. 2000).

supply agreements within the Republic of Ireland, which remains in force. The relevant provisions of Irish competition law are based on the applicable provisions of EU competition law, i.e., Articles 81(1) and 81(3) of the EC Treaty, which in turn correspond to Articles 8 and 9 in the Law in Jersey.

16. Article 60 requires recourse to EU precedents only to ‘corresponding questions’ that may arise in Jersey and only ‘so far as possible.’ While EU precedents, and in particular precedents from smaller Member States like Ireland may be instructive, care must be observed before applying such precedents to Jersey’s circumstances as a small island economy. In this regard, in addition to the information the JCRA has received from the parties and from third parties concerning the supply of motor fuels in Jersey, the JCRA has had particular regard to the following:

- The report produced in 2004 for the States of Jersey Economic Development Committee by Consultancy Solutions for the Oil Industry (‘Consultancy Solutions’) concerning the importation, storage and supply of petroleum products in Jersey (as used hereinafter, the ‘Consultancy Solutions Jersey Report’). Although this report is now approximately three years old, the JCRA understands that it still is the most recent and comprehensive review of the supply of motor fuels in Jersey.
- A similar report produced for the States of Guernsey Commerce and Employment Department by Consultancy Solutions concerning the importation, storage and supply of petroleum products in Guernsey, released in May 2007 (as used hereinafter, the ‘Consultancy Solutions Guernsey Report’). Although the focus of this report is Guernsey, it updates in certain respects information contained in the 2004 Jersey report.

IV. ANALYSIS UNDER ARTICLE 8 OF THE LAW

17. Article 8(1) of the Law states that an undertaking must not make an arrangement with one or more other undertakings that has the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey. The Notified Agreement is an arrangement between two independent undertakings, Esso and Roberts. The question is, therefore, whether it may be viewed as having the object or effect of appreciably hindering competition in Jersey or any part thereof.
18. The Notified Agreement does not contain any restrictions, such as resale price maintenance, that likely could be viewed as having the object of restricting competition.⁵ Thus, the question under Article 8(1) is whether the Notified Agreement may have the effect of appreciably hindering competition.
19. The analysis of whether the Notified Agreement may have the effect of appreciably hindering competition requires the JCRA to define relevant product and geographic markets. The relevant product market here is the sale of motor fuels for resale to the public, and the relevant geographic market is the Island of Jersey. These definitions are consistent with both the Irish Decision noted above,⁶ as well as with economic realities in Jersey – in which service stations like Roberts currently may source motor fuels from one of three domestic wholesale suppliers, and factors concerning the importation and storage of motor fuel in Jersey make the purchase of motor fuels from additional off-island suppliers impractical. The relevant product market includes the full range of motor fuels provided by a supplier to a retailer under a supply contract.⁷

⁵ See, e.g., European Commission, Vertical Restraint Guidelines, O.J. C 291/1 ¶ 47 (13 Oct. 2000) (describing vertical agreements to fix prices as having the object to restrict competition); JCRA Guideline, *Anti-competitive Arrangements*, pg. 7 ('[A]rrangements which explicitly and directly fix . . . resale prices of any product or service are likely to infringe [Article 8(1)].').

⁶ See Irish Competition Authority, Motor Fuels Category Licence ¶ 16 (1 July 1993) ('The relevant product market is that of motor fuels and other petroleum-based products for resale to the public. The relevant geographical market is the State.').

⁷ See UK Office of Fair Trading, *Competition in the supply of petrol in the UK* ¶ 7.5 (May 1998) (At wholesale and retail, the supply of unleaded and diesel fuel are in the same market).

20. Currently, three companies provide motor fuels at the wholesale level in Jersey – Esso, Shell UK Oil (through its wholly owned subsidiary Fuel Supplies (Channel Islands) Ltd), and Total Channel Islands Ltd. According to the Consultancy Solutions Jersey Report, the respective shares of the wholesale supply of motor fuels among these three undertakings are the following:

<u>Company</u>	<u>Est. Share</u>
Shell	45%
Esso	43%
Total	12%

21. These respective shares of supply are likely to have changed somewhat since the Consultancy Solutions Jersey Report was produced. Specifically, Esso has informed the JCRA that it has lost the business of a number of service stations in the past few years, most of which have switched to either Shell or Total, while others have closed. While these changes may have changed the precise market share numbers of the three suppliers to a certain extent, the information available to the JCRA indicates that the relative market positions of the three suppliers in Jersey have not materially changed.
22. At the retail level, the Consultancy Solutions Jersey Report provides the following data for the respective market shares of forecourt operators:

Table 2			
<u>Retailer</u>	<u>Location(s)</u>	<u>Number of Sites</u>	<u>Est. Share</u>
Roberts	Various	5	23.5%
C.I. Traders	Various	6	17.5%
C.I. Coop	St Peter	1	7.4%
Falles Motor Group	Longueville & Airport	2	6.1%
Freelance	Les Augres	1	4.4%
Shell St Mary	St Mary	1	3.5%
Other	Various	22	37.5%

23. The JCRA's investigation indicates that the shares among retailers also have changed somewhat since the Consultancy Solutions Jersey Report in 2004. Specifically with respect to Roberts, it has gone from five service stations to three, as a result of the closure of the Pontac site in 2006 and the current redevelopment of Kensington Place.⁸ As a result, its current market share may have been reduced to somewhere in the range of 15-18%, and it may no longer be the largest retailer of motor fuels in Jersey.
24. Thus, on the best information available to the JCRA, the Notified Agreement involves a commitment by the first or second largest retailer of motor fuels in Jersey, with a market share of around 15-18%, to purchase fuels exclusively from the second largest supplier of motor fuels in Jersey, with a wholesale market share of around 40%.
25. European competition law precedent indicates that an exclusive purchasing agreement entered into in such circumstances has the potential, at least, to appreciably hinder competition. The BER applies to exclusive purchasing

⁸ See *supra* note 2, concerning the Kensington Place redevelopment.

- agreements with a duration of no longer than five years if the market share of the supplier does not exceed 30%. Because Esso's market share in Jersey well exceeds this limitation, the Notified Agreement would not be subject to the BER within the EU.⁹ The European Commission's Vertical Restraint Guidelines state that exclusivity obligations between one and five years entered into by undertakings that are not dominant but have market shares exceeding the BER's 30% threshold usually require a proper balancing of pro- and anti-competitive effects,¹⁰ which under the Law in Jersey is accomplished through analysis of the Article 9 exemption criteria.
26. European precedent further counsels that the potential effects of the Notified Agreement on competition should not be viewed in isolation, but in the economic circumstances of the market(s) in question.¹¹ In Jersey, the three fuel suppliers enter into exclusive purchasing contracts with motor fuel retailers. The prevalent use of such contracts among the three suppliers could create cumulative foreclosure effects in the relevant market, potentially restricting the ability of suppliers to enter or expand in this market.¹²
27. In addition to the exclusive purchasing requirement for motor fuels, other restrictions [CONFIDENTIAL REDACTED] could also have the effect of appreciably hindering competition. For example, the Irish Competition Authority noted that contractual restrictions on a retailer's ability to sell a service station, 'constrain exit and entry to the trade in the retail sale of motor fuels, and therefore they affect competition in the trade.'¹³

⁹ Although the BER does not apply in Jersey, analysis of the Notified Agreement in the context of the BER still is potentially relevant under Article 60.

¹⁰ European Commission, Vertical Restraint Guidelines, O.J. C 291/1 ¶ 141 (13 Oct. 2000).

¹¹ See Judgment of the European Court of Justice in *SA Brasserie de Haecht v. Consorts Wilkin-Janssen*, Case 23-67 (12 Dec. 1967).

¹² See European Commission, Vertical Restraint Guidelines, O.J. C 291/1 ¶ 142 (13 Oct. 2000); see also Irish Competition Authority, Motor Fuels Category Licence ¶ 19 (1 July 1993) (the existence of wide-spread use of exclusive supply agreements 'tends to introduce a considerable degree of rigidity into the market, and makes it difficult for a new entrant to enter the market on any significant scale, since most of the important potential customers are not available, at least in some cases until their solus agreements have expired[.]').

¹³ Irish Competition Authority, Motor Fuels Category Licence ¶ 33 (1 July 1993).

28. Finally, and as detailed in Section V.C.2, the Notified Agreement appears to be the latest of a series of exclusive purchasing agreements between Roberts and Esso, and it was agreed to in circumstances that precluded competitive bidding for this contract by other wholesale suppliers.
29. On these grounds, the Notified Agreement appears to be subject to Article 8(1). The JCRA therefore must analyze whether it satisfies the Article 9 criteria for an exemption.

V. ANALYSIS UNDER ARTICLE 9 OF THE LAW

30. To qualify for an exemption under Article 9, the JCRA must be satisfied that the Notified Agreement meets all four of the exemption criteria listed in Article 9(3). The application of these criteria is discussed below.

A. Improvement in the Distribution of Goods or Services

31. The first criterion, Article 9(3)(a), requires that the Notified Agreement either improve the production or distribution of goods or services, or promote technical or economic progress in the production or distribution of goods or services. Stated simply, the Notified Agreement must be likely to produce either quantitative or qualitative efficiencies. Efficiencies may create additional value for consumers by lowering costs, improving the quality of a good or service provided, or creating a new good or service.
32. In examining analogous agreements in the fuel sector, both the European Commission and Irish Competition Authority have found that they produce efficiencies. The European Commission has stated that contracts such as the Notified Agreement ‘allow long-term planning of sales and consequently a cost effective organization of production and distribution.’¹⁴ Similarly, the Irish Competition Authority found that such agreements provide efficiencies by facilitating investment in motor fuel distribution:

¹⁴ EEC Reg. No 1984/83, O.J. L173/5 ¶ 15 (22 June 1983).

*'The investment by the supplier ensures security of supply by providing assured outlets for its product, and retailers are guaranteed regular supplies provided that they comply with the terms of the agreement. This allows long-term planning of sales and consequently cost-effective organization of production and distribution. It also allows suppliers to undertake the necessary investment in storage and shipping facilities.'*¹⁵

33. The Irish Competition Authority also has noted that cost savings result from such agreements. Specifically, '[t]he costs of distributing motor fuels to a limited number of exclusive outlets which purchase in large quantities are lower than delivering smaller volumes to a large number of outlets selling two or more brands at the one service station.'¹⁶
34. Through its investigation, the JCRA has determined that the efficiencies that supported the granting of exemptions under European and Irish competition law are no less apparent in Jersey. The existence of exclusive purchasing contracts for motor fuels has been found by other regulators to facilitate the establishment and maintenance of service stations, and the Consultancy Solutions Jersey Report found that 'many of the forecourts on Jersey are modern, well-developed with up-to-date pumping equipment and canopies.'¹⁷ Esso also has informed the JCRA that the existence of contracts such as the Notified Agreement has provided a platform for its recent investments in Jersey's infrastructure involved in the storage and distribution of motor fuels. These include recent upgrades to the La Collette facility and an upgrade to the domestic trucking fleet, which Esso indirectly financed.
35. Based on these considerations, the JCRA concludes that the Notified Agreement generates efficiencies that facilitate the distribution of motor fuels in Jersey, and therefore the first exemption criterion is satisfied.

¹⁵ Irish Competition Authority, Motor Fuels Category Licence ¶ 60 (1 July 1993).

¹⁶ *Ibid.*

¹⁷ Consultancy Solutions Jersey Report at 25.

B. Allow Consumers a Fair Share of the Benefits

36. The second criterion, Article 9(3)(b), requires that consumers receive a fair share of the benefits arising from the arrangement. ‘If an improvement . . . is seen as benefiting only the . . . parties to the agreement, the condition would not be satisfied.’¹⁸ Consumers must be, on balance, better-off as a result of the agreement than they were previously.

37. Both the Irish Competition Authority and European Commission have found that consumers benefit from agreements such as the Notified Agreement, with the former stating:

*‘Consumers benefit from these improvements especially because they are ensured supplies of motor fuel of satisfactory quality in a safe and environmentally secure environment while being able to choose between different brands. The exclusive purchasing system leads to more efficient distribution and to better facilities and services at dealer and company stations, to the benefit of consumers. They have a choice between stations offering degrees and types of service. The system should ensure both intra-brand and inter-brand competition, including price competition.’*¹⁹

38. Again, these conditions appear to be equally applicable in Jersey. As noted above, consumers in Jersey benefit from generally modern, well maintained service stations,²⁰ which appears to be the case in particular with the facilities operated by Roberts. The evidence also indicates that having dedicated service stations selling an individual brand (i.e., Esso, Shell, or Total) has contributed to both vigorous intra-brand and inter-brand competition for the sale of motor fuels.²¹ Specifically, data collected on the price of unleaded fuel from various service stations in Jersey shows the variation in intra-brand and inter-brand retail

¹⁸ JCRA Guideline, *Anti-competitive Arrangements*, pg. 12.

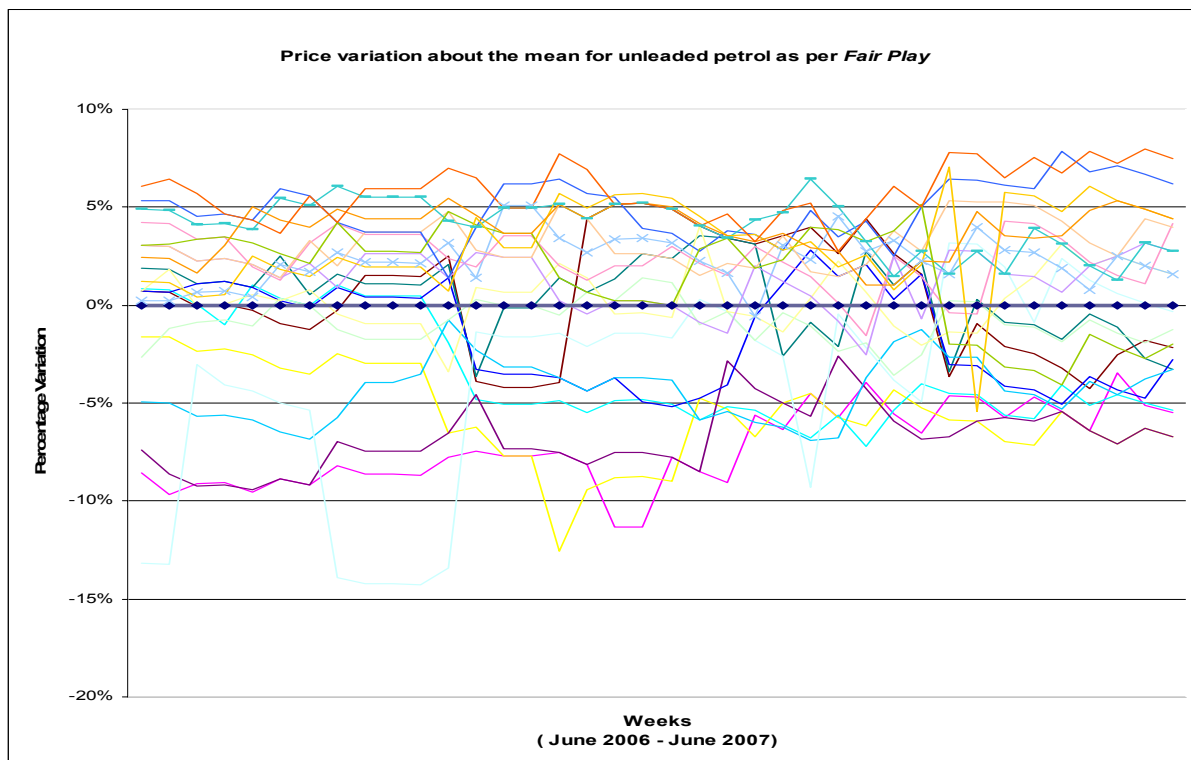
¹⁹ Irish Competition Authority, Motor Fuels Category Licence ¶ 60 (1 July 1993); *see also* EEC Reg. No 1984/83, O.J. L173/5 ¶ 16 (22 June 1983) (Consumers benefit ‘because they are ensured supplies of goods of satisfactory quality at fair prices and conditions while being able to choose between the products of different manufacturers.’).

²⁰ *See supra* ¶ 34.

²¹ Intra-brand competition is competition between retailers of the same brand (e.g., Esso vs. Esso), while inter-brand competition is competition between retailers of different brands (e.g., Esso vs. Shell vs. Total).

prices during the period of June 2006 – June 2007 (as collected by the *Fair Play* column in the *Jersey Evening Post*), and is set forth below:

Chart 1



39. Each line in Chart 1 represents each retailer's prices as reported in the *Fair Play* column over the period stated compared to a constant mean of zero.²² Chart 1 indicates a wide range of prices for unleaded fuel in Jersey, with differences in price ranging as high as 20-25%.²³ These data are consistent with the recent findings of the Consultancy Solutions Guernsey Report, which states that within a Jersey survey of 22 garages, 'some 17 different pump prices were noted; only occasionally were two garages displaying the same price.'²⁴ This Report

²² The mean price is the average price of the retail prices across the petrol stations as stated in *Fair Play* for each week. The mean price is held constant at zero each week and then each individual price is compared to this by taking the difference between the individual price and the mean price and expressing this as a percentage.

²³ Similar ranges are observed in the other prices reported by *Fair Play*: diesel and discounted unleaded.

²⁴ Consultancy Solutions Guernsey Report at 28.

concluded that ‘a more healthy state of competition has emerged, to the benefit of consumers and tourists in Jersey.’²⁵

40. Based on these considerations, the JCRA concludes that consumers in Jersey benefit from the Notified Agreement, and therefore the second exemption criterion is satisfied.

C. Contains No Indispensable Restrictions to Competition

41. The third criterion, Article 9(3)(c), asks whether the Notified Agreement contains ‘restrictions beyond those necessary for the attainment of the benefits that the parties demonstrate is likely to flow from the agreement.’²⁶ It should be the least restrictive means of achieving its efficiencies.

42. The key focus of the JCRA’s analysis in this area is the Notified Agreement’s requirement that Roberts purchase motor fuels exclusively from Esso during the contract’s term. The result of this restriction is that Roberts may not purchase motor fuels from either Shell or Total during this time.²⁷ While it appears, as detailed above, that the Notified Agreement produces efficiencies, it is appropriate in the context of the third criterion to consider whether exclusivity, and the duration of the exclusivity, are both indispensable to achieve the efficiencies, or whether they could be achieved by less restrictive means.

1. The Necessity for the Exclusive Purchasing Obligation

43. In examining motor fuel supply agreements, both the European Commission and Irish Competition Authority found that ‘the exclusive purchasing obligation . . . and non-competition clause . . . are essential components of such agreements and thus usually indispensable for the attainment of [their efficiencies].’²⁸

²⁵ *Ibid.* at 32.

²⁶ JCRA Guideline, *Anti-competitive Arrangements*, pg. 13.

²⁷ The exclusivity is not mutual, as Esso remains free to supply motor fuels to other retailers in Jersey, in addition to Roberts.

²⁸ See EEC Reg. No 1984/83, O.J. L173/5 ¶ 17 (22 June 1983); Irish Competition Authority, Motor Fuels Category Licence ¶ 63 (1 July 1993).

44. The reasons for these conclusions are that exclusive purchasing obligations provide the supplier with guaranteed outlets for its products for the period of the exclusivity. This helps to provide the purchaser a platform to invest in its services and compete against other motor fuel retailers (who themselves more often than not are subject to similar arrangements with either Esso or another supplier), thereby contributing to both inter-brand and intra-brand competition.
45. While motor fuels may be supplied even in the absence of exclusivity obligations like that contained in the Notified Agreement (i.e., through purchases on the ‘spot’ market), such a form of supply could result in increased costs in a jurisdiction like Jersey. In larger jurisdictions, such as in the United Kingdom, the JCRA understands that larger retailers can and do purchase motor fuels directly from suppliers at refineries or terminals. Given that there is no domestic refinery capacity in Jersey, and given the much smaller scale of Jersey retailers compared to their UK counterparts,²⁹ such a supply does not appear to be a viable alternative here. While it is conceivable that suppliers such as Esso would import motor fuels even to satisfy demand in a spot market, such imports likely would be at a much lower volume, and hence potentially at a higher cost, than is currently available.
46. As indicated above, evidence indicates that the benefits that can arise from exclusive purchasing obligations are apparent in Jersey. Jersey consumers generally benefit from modern, well-equipped service stations, and this appears to be the case with respect to the facilities operated by Roberts. Under the Notified Agreement Esso contributes to pump maintenance of Roberts’ service stations. There also have been recent upgrades to Jersey’s motor fuel storage and distribution assets. Moreover, both inter-brand and intra-brand competition in Jersey appears to be robust. While exclusive purchasing obligations, such as the one contained in the Notified Agreement, may not be the *sole* reason for such efficiencies, both foreign precedent and the evidence available to the JCRA

²⁹ According to the Consultancy Solutions Jersey Report, the entire Jersey motor fuel market is worth only 0.2% of the entire UK market, or is equivalent to five large hypermarket petrol stations.

indicates that such obligations contribute to the achievement of such efficiencies, which may not be realized in the absence of them.

47. The JCRA thus concludes that the Notified Agreement's exclusive purchasing obligation, in and of itself, is indispensable to the attainment of the efficiencies described in Section V.A, above. This still leaves open the question, however, of the length of the Notified Agreement's exclusive period.

2. Length of the Exclusive Period

48. The current length of the Notified Agreement's exclusivity period is five years.
49. This five year period corresponds to the maximum period of exclusivity allowed under the BER in the EU. Esso has informed the JCRA that a majority of its motor fuel supply contracts in both the UK and Republic of Ireland also are for five year terms.
50. A focus of the JCRA's investigation was whether this five year term appeared appropriate in Jersey's economic context. During our investigation, the JCRA received suggestions that the contract should either have no period of exclusivity, or a reduced period of six or twelve months. The Consultancy Solutions Jersey Report recommends a maximum exclusivity period of three years.³⁰
51. The reason this is important is that during the period of exclusivity the retailer in question (here, Roberts) is prevented from purchasing motor fuels from alternative suppliers. Esso, Shell, and Total compete with each other to sign-up service stations to exclusive contracts to provide outlets for which they can sell their motor fuels in Jersey. Retailers are attracted by the contractual terms the suppliers may offer, in terms of the selling price for the motor fuels (which, in turn, is customarily determined in Jersey by discounts or rebates off the supplier's scheduled wholesale prices), financial support provided to the retailer, and other incentives. However, this form of competition among the three suppliers can only arise upon the end of a retailer's exclusivity period with its current supplier.

³⁰ Consultancy Solutions Jersey Report at 26.

52. These market characteristics in Jersey would suggest a short period of exclusivity is preferable, as it would enable the three suppliers to compete among themselves for motor fuel supply agreements more frequently. This consideration appeared to be the reason for the Consultancy Solutions Jersey Report's recommendation that the exclusivity period for motor fuel supply agreements be limited to three years.³¹
53. There is a risk, however, that decreasing the exclusivity period could have the effect of increasing the wholesale price of motor fuels (through a reduction in discounts or rebates offered by the supplier), to the detriment of retailers and, potentially, consumers. In making an offer to supply motor fuels over a set period, the JCRA understands that a supplier will estimate the total sales of motor fuels over the proposed length of the agreement. An agreement with a term of five years will offer the supplier additional sales volumes and returns in years four and five that would not be available under an agreement with a three-year term. The JCRA understands that this provides a supplier with the ability to offer a better price for motor fuels (in terms of increased discounts or rebates) at the outset, compared to a shorter term agreement where the additional income stream is not guaranteed.³²
54. Based on these considerations, and with the observation that five year contracts are prevalent for the supply of motor fuels in other jurisdictions, the JCRA is hesitant to require a shortening of the Notified Agreement's exclusivity period. This view is supported by the absence of evidence that the suppliers could offer better terms of sale for three year supply contracts as opposed to five year supply contracts. To the contrary, the evidence discussed in the previous paragraph suggests that suppliers may be forced to offer worse terms of sale, in terms of price, for a three year contract compared to a five.

³¹ See *ibid.* (justifying the proposed three year period because this would 'force greater levels of competition between the three oil companies for retail market share').

³² Additional considerations arise when, in addition to supplying motor fuels, a supplier makes capital investments in the retailer's facilities. This factor does not arise materially, however, with respect to the Notified Agreement.

55. In light of these considerations, the JCRA concludes that the five year exclusivity period is indispensable to the achievement of the Notified Agreement's efficiencies. This conclusion is based on the assumption, however, that the Notified Agreement's exclusivity term is limited to five years in practice, and that the contract would be subject to competitive bidding at the end of this period.
56. The evidence available to the JCRA indicates, however, that this has not always been the case, both in the relevant market in general and specifically with respect to the Notified Agreement. According to the Consultancy Solutions Jersey Report, suppliers in Jersey traditionally have been able to prevent competitive bidding for their retail contracts by extending the exclusivity period with the retailer prior to the contract's termination. Specifically, under the ten-year exclusivity terms which, at that time, Consultancy Solutions found to be prevalent in Jersey, the supplier would offer to renew the supply contract, with a new exclusivity period, during the sixth, seventh, or eighth year of the agreement. If agreed to by the retailer, 'the incumbent supplier can effectively isolate the competition from bidding for the contract,'³³ since the retailer otherwise had no right to terminate the contract at that point.
57. While the Notified Agreement's term is five years, not ten, during its investigation the JCRA was informed that this risk identified in the Consultancy Solutions Jersey Report appears to have occurred with respect to Esso and Roberts. Specifically, as noted in Paragraph 13, prior to the Notified Agreement Esso had a previous motor fuel supply contract with Roberts with an exclusivity period that expired in [CONFIDENTIAL REDACTED]. Roberts requested changes to this contract, [CONFIDENTIAL REDACTED]. Esso agreed, but subject to Esso and Roberts signing a new agreement (which is the Notified Agreement), with a new, expanded period of exclusivity. Roberts had no practical ability to seek bids from competing fuel suppliers during this time, since it was still subject to the exclusivity obligation of its then-current fuel supply contract with Esso.

³³ Consultancy Solutions Jersey Report at 26.

58. The JCRA further understands that this is not the first time Esso and Roberts have agreed to extend the exclusivity period in the absence of competitive bidding from other suppliers. Specifically, the contractual relationship between Esso and Roberts extends back at least forty years, and neither Esso nor Roberts could recall the last time this contract was subject to competitive bidding.
59. The effect of such a practice is to extend the exclusivity period beyond what is stated in the motor fuels supply contract. This, in turn, would appear to be at odds with both European and Irish precedents concerning the length of exclusivity periods. Specifically, exclusivity periods of up to five years are permissible under the BER within the EU; however, there also must be ‘no obstacles . . . that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period.’³⁴ In similar fashion, the block exemption for motor fuel supply agreements granted by the Irish Competition Authority does not cover clauses that extend the length of exclusivity beyond the permissible period, or place restrictions on the retailer’s ability ‘from engaging in the sale of competing motor fuels after the agreement has been terminated[.]’³⁵
60. By effectively extending the period of exclusivity, the supplier is able to prevent the contract in question from ever being subject to competitive bidding. This, in turn, effectively prevents the retailer from seeking bids from other motor fuel suppliers, which may offer better terms and conditions than that offered by the current supplier.
61. Based on these considerations, the JCRA concludes that conditions are necessary for the Notified Agreement to satisfy the third exemption criteria. These conditions are necessary to ensure that the Notified Agreement’s stated five year term is, in fact, no longer than five years in practice.
62. These conditions are set forth below in Section VII. They enable Roberts to seek bids from other motor fuel suppliers if Esso proposes to increase the current five-

³⁴ European Commission, Guidelines on Vertical Restraints, O.J. C291/1 ¶ 58 (13 Oct. 2000).

³⁵ Irish Competition Authority, Motor Fuels Category Licence ¶ 71 (1 July 1993).

year exclusivity period. Furthermore, prior to formally agreeing to any extended term during the current five-year exclusivity period (whether through amendment to the Notified Agreement or by signing a new agreement), Roberts has the ability to terminate the Notified Agreement. These conditions are intended to address situations such as that described in Paragraph 57, and they should facilitate the Notified Agreement being subject to competitive bidding at some point (i.e., no later than its current expiry date) and to avoid the risk of suppliers effectively isolating retailer contracts from ever being subject to competitive bidding.

63. The following points concerning these conditions are expressly noted and provided to give guidance to Esso and Roberts:

- The conditions do not require Roberts to propose changes to the Notified Agreement to Esso, nor do they require Esso to accept changes proposed by Roberts.
- The conditions' application does not arise in situations where Esso and Roberts agree to amend the Notified Agreement but not otherwise extend the exclusivity period.
- Even in circumstances where the conditions would apply, their application does not *require* Roberts to seek competitive bids or terminate the Notified Agreement; they only provide Roberts with the *opportunity* to do so. Whatever Roberts ultimately decides to do in such circumstances remains solely a matter within its commercial discretion.
- Finally, the conditions do not prevent Roberts from negotiating with Esso, or any other fuel supplier, during the term of the Notified Agreement, for a new agreement to be formally concluded and commence upon the expiry of, or after the end of, the Notified Agreement's current termination date. Such a new agreement, depending on its nature, may require an exemption under Article 9.

3. Other Potential Restrictions

64. As noted above, the Irish Competition Authority found that restrictions on a retailer's ability to sell its business [CONFIDENTIAL REDACTED] restricted competition.³⁶ The Authority further found, however, that such provisions are indispensable to the achievement of the agreement's benefits, as they guarantee the period of exclusivity, 'without which the supplier would not have provided the initial special commercial and financial advantages,' regardless of changes in the supplier's ownership.³⁷ Through its investigation of this matter, the JCRA has found no grounds on which to depart from this conclusion.
65. In summary, therefore, the JCRA concludes that the Notified Agreement satisfies the third exemption criterion, subject to compliance by Esso and Roberts to certain conditions which are set forth in Section VII, below.

D. No Elimination of Competition in respect of a Substantial Part of the Goods or Services in Question

66. This criterion 'depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction in competition that the agreement brings about.'³⁸ This assessment requires the definition of relevant product and geographic markets. As detailed above, the relevant product market in this matter is the sale of motor fuels for resale to the public, and the relevant geographic market is the Island of Jersey.³⁹
67. Both the JCRA's investigation of this matter and the Consultancy Solutions Jersey Report indicates that a healthy state of competition exists among the three fuel suppliers in the relevant market. Evidence presented to the JCRA includes Esso's loss of service station contracts to either Shell or Total,⁴⁰ as well as additional information which shows that the contractual terms and conditions

³⁶ See *supra* ¶ 27.

³⁷ Irish Competition Authority, Motor Fuels Category Licence ¶ 69 (1 July 1993).

³⁸ European Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty, O.J. C 101/08 ¶ 107 (2004).

³⁹ See *supra* ¶ 19.

⁴⁰ See *supra* ¶ 21.

offered by the suppliers to retailers can vary substantially. These findings are consistent with that of the Consultancy Solutions Jersey Report, which found that ‘[c]ompetition amongst the three fuel suppliers on Jersey remains intense. . . . We see no evidence to suggest that negotiations for any solus tie are anything other than true free-market commercial negotiations.’⁴¹

68. Competition among the three suppliers in this relevant market may only arise, however, when a retailer’s current contract reaches the end of its exclusivity period. As detailed above, the Notified Agreement was not subject to this form of competition when it was signed by Esso and Roberts, nor has Robert’s supply contract appeared to have been subject to any form of competitive bidding within the past several years, at least.⁴²
69. The JCRA thus concludes that the conditions necessary to ensure the Notified Agreement satisfies the third exemption criterion apply equally to the fourth. Based on the compliance of Esso and Roberts with these conditions, the JCRA concludes that the fourth exemption criterion is satisfied.

VI. GROUNDS FOR RETROACTIVITY

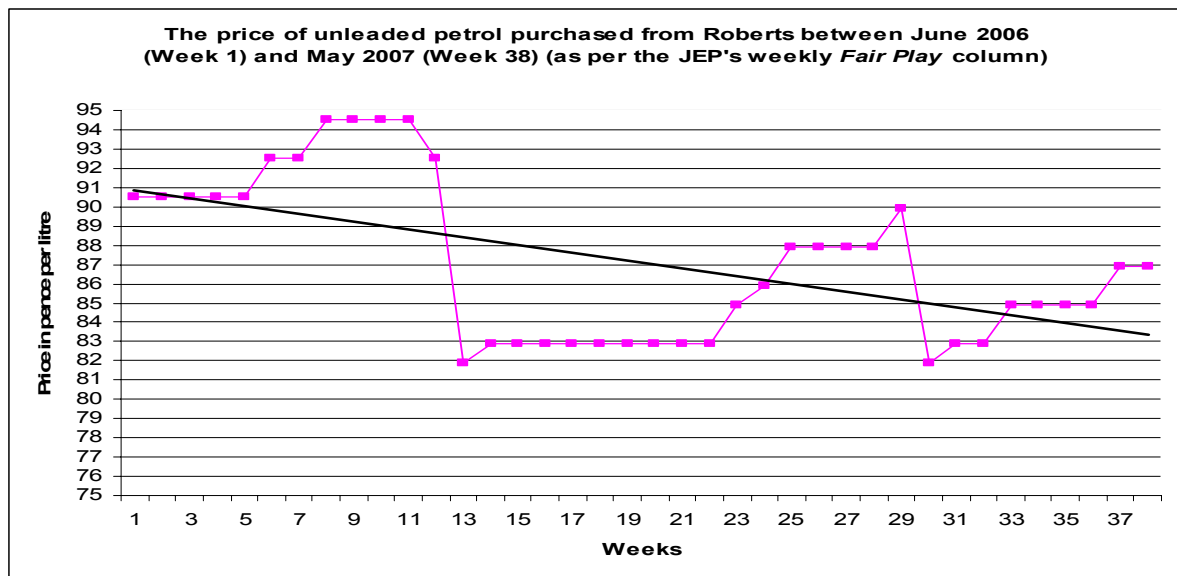
70. As stated in Section VII, the effective date of the exemption granted herein is 1 June 2006. Article 9(7) of the Law gives the JCRA the discretion to provide that an exemption takes effect prior to the date on which it is granted. Two grounds exist which support the JCRA’s exercise of this discretion here.
71. The first is that the party requesting the exemption, Esso, observed the JCRA’s suggested procedures with respect to this matter. Specifically, Esso sought the JCRA’s guidance, under Article 43 of the Law, on the Law’s potential application to this type of agreement. The JCRA responded that the agreement appeared potentially subject to Article 8 of the Law, and therefore recommended that Esso seek an exemption under Article 9. Esso thereafter applied for the current exemption with respect to the Notified Agreement.

⁴¹ See Consultancy Solutions Jersey Report at 26.

⁴² See *supra* ¶¶ 56-60.

72. The second is that publicly reported data on Roberts' prices of motor fuels indicates that the grounds supporting the JCRA's grant of an exemption in this matter, discussed in Section V, above, have not changed [CONFIDENTIAL REDACTED]. Set forth below in Chart 2 are Roberts' prices for unleaded petrol, as reported in the *Fair Play* column, [CONFIDENTIAL REDACTED].

Chart 2



73. Chart 2 shows that while Robert's prices for unleaded petrol have fluctuated during the period in question, their general trend has been markedly downward.⁴³ The fluctuations that have occurred appear to reflect fluctuations in global oil prices during this time, to which Esso, Roberts, and others involved in this industry, are subject.⁴⁴
74. [CONFIDENTIAL REDACTED].
75. Thus, on these grounds, the JCRA determines that retroactive application of this exemption is justified.

⁴³ Similar results are observed concerning Robert's prices for discounted unleaded and diesel, as also reported in *Fair Play*.

⁴⁴ This observation is based on data available from Platts concerning 95 Octane unleaded fuel, which is the octane level of the unleaded fuel available from Roberts and reported in *Fair Play*.

VII. DECISION

76. The JCRA concludes that the Notified Agreement appears to be subject to Article 8(1) of the Law.
77. The JCRA also concludes that the Notified Agreement satisfies the criteria for exemption, subject to certain conditions under Article 9(6). Specifically, these conditions are intended to ensure that the Notified Agreement's exclusivity period does not extend beyond five years in practice (to ensure that the third and fourth exemption criteria are satisfied). Another condition is intended to provide the JCRA with the ability to monitor compliance by Esso and Roberts during the term of this exemption.
78. By this Decision, the JCRA hereby grants an exemption to the Notified Agreement under Article 9, subject to compliance by Esso and Roberts with the following conditions:
1. If, at any time during the term of the Notified Agreement, Esso proposes to increase the length of the Exclusivity Period, Roberts may contact other suppliers of motor fuels to request competitive quotes.
 2. Prior to formally agreeing to any extended Exclusivity Period with Esso, Roberts may serve notice on Esso in writing giving not less than 30 and not more than 60 days notice to terminate the Notified Agreement.
 3. As used herein, the term 'Exclusivity Period' means an obligation by Roberts to purchase from Esso, or Esso's nominated supplier, its total requirements of motor fuels for resale.
 4. As used herein, an 'extended' Exclusivity Period is any period extending beyond [CONFIDENTIAL REDACTED], whether implicated by an amendment to the Notified Agreement or by the substitution of the Notified Agreement with a new agreement.

5. Esso and/or Roberts shall provide such information and documents as the JCRA may reasonably require, subject to any legally recognizable privilege and upon written request with reasonable notice, for the purpose of determining, monitoring or securing compliance with this Decision.

79. The effective date of this Decision is 1 June 2006, and it will continue for a maximum period extending to 11:59 pm on 1 June 2011; [CONFIDENTIAL REDACTED].

80. Compliance with the conditions set forth in Paragraph 78 is binding on both Esso and Roberts, as well as on any of their assignees or successors.

25 June 2007

By Order of the JCRA Board