



Jersey Competition Regulatory Authority ('JCRA')

Public Version of

Decision C 440/09

Concerning the Motor Fuels Supply Agreement between Esso

Petroleum Company Limited and The Jersey Farmers

(Trading) Union Limited Notified under Article 9 of the

Competition (Jersey) Law 2005

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On 1 July 2009, 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 The Jersey Farmers (Trading) Union Limited trading as Five Oaks Sion (‘**Five Oaks**’).
2. On [REDACTED], Esso signed an exclusive supply agreement with [REDACTED] for a period of [REDACTED].¹ On [REDACTED], the agreement was novated to [REDACTED] with a new exclusivity period of [REDACTED]. On [REDACTED], the agreement was novated to The Jersey Farmers (Trading) Union Limited, with no change to the exclusivity period. All the above constitute the ‘**Notified Agreement**’.
3. On 3 July 2009 the JCRA published details of the application in the Jersey Gazette and on its website, asking interested parties to submit comments on the application to the JCRA by 17 July 2009.
4. The JCRA has conducted a detailed analysis of the Notified Agreement’s effects on competition. The JCRA concludes that the Notified Agreement is subject to Article 8 of the Law (which prohibits restrictive agreements). 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. [REDACTED] This exemption is conditional on compliance by both Esso and Five Oaks 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).

¹ According to the request, the first delivery was made on 1 July 2001.

II. NOTIFIED AGREEMENT

6. Esso is one of three wholesale suppliers of motor fuels in Jersey. At the time of the application, Esso supplies [REDACTED] independent retailers with motor fuels. Five Oaks is an independent retailer of motor fuels, located at Five Oaks Garage Sion, La Grande Route de St John, Trinity. Under the Notified Agreement, Five Oaks agrees to purchase exclusively from Esso² a full range of motor fuels, including diesel and other fuels derived from petroleum for automotive vehicles.
7. [REDACTED]
8. [REDACTED]

III. OVERVIEW OF THE ANALYSIS UNDER THE LAW

9. In response to the application the JCRA must first determine if the Notified Agreement is 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.
10. 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.

² This type of exclusive purchasing commitment in the motor fuels industry is known as a 'solus tie.'

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

- The current EC Block Exemption Regulation (**‘BER’**) and the European Commission’s Guidelines on Vertical Restraints.⁴
- The Decision by the Irish Competition Authority dated 1 July 1993 granting a block exemption under Irish competition law to motor fuel supply agreements within the Republic of Ireland.⁵

11. In addition, 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 five years old, the JCRA understands that it still is the most recent and comprehensive review of the supply of motor fuels in Jersey.
- The JCRA Decision C105/06 of 25 June 2007 concerning an exemption for the motor fuels supply agreement between Esso and Roberts Garages Limited notified under Article 9 of the Law (the **‘Roberts Decision’**).
- The JCRA Decision C416/09 of 17 July 2009 concerning an exemption for the motor fuels supply agreement between Esso and Crowe Holdings Limited trading as Three Mile Garage (the **‘Three Mile Garage Decision’**) and the information provided in relation to the JCRA’s assessment of that request for exemption.

IV. ANALYSIS UNDER ARTICLE 8 OF THE LAW

12. 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

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

⁵ 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 of the Law in Jersey.

an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey.

13. The Notified Agreement is an exclusive arrangement between two independent undertakings, Esso and Five Oaks, with the effect of limiting competition during its duration. Based on the reasoning set out in Paragraph 18 of the Roberts Decision,⁶ it is not necessary to assess whether the agreement has the object of limiting competition.
14. The question is, therefore, whether the Notified Agreement has the effect of appreciably hindering competition in Jersey or any part thereof. European precedent provides that ‘(a)greements and practices fall outside the scope of application of Articles 81 and 82 when they affect the market only insignificantly having regard to the weak position of the undertakings concerned on the market for the products in question.’⁷
15. In Paragraph 19 of the Roberts Decision,⁸ the JCRA concluded that the relevant product market is the wholesale of motor fuels and the relevant geographic market is the Island of Jersey.
16. Three companies supply motor fuels at the wholesale level in Jersey – Esso, Rubis (which recently acquired Fuel Supplies (Channel Islands) Ltd (**Fuel Supplies**), a wholly owned subsidiary of Shell UK Oil)⁹ and Total Channel Islands Ltd. In Paragraph 17 of the Three Mile Garage Decision, the estimated respective shares of the wholesale supply of motor fuels among these three undertakings are as follows:

⁶ As confirmed in Paragraph 14 of the Three Mile Garage Decision.

⁷ European Commission, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, O.J. C 101/81 (27 Apr 2004).

⁸ As confirmed in Paragraph 16 of the Three Mile Garage Decision.

⁹ JCRA Decision M169/08 regarding the Proposed Acquisition of Fuel Supplies (C.I.) Limited by Vitogaz SA (a wholly owned subsidiary of Rubis SCA) of 2 July 2008.

<u>Company</u>	<u>Market share</u>
Esso/PDJ	[40-50]%
Rubis/FSCI Shell	[20-40]%
Total	[20-40]%
	100%

17. According to Paragraph 18 of the Three Mile Garage Decision, there are 32 filling stations in Jersey. Five Oaks has a market share of around [0-5]% of the total throughput of motor fuel in Jersey.
18. Although the Notified Agreement relates to a very minor share of the retail throughput of motor fuels in Jersey, as set out in Paragraph 19 of the Three Mile Garage Decision the JCRA may have regard to the cumulative effects of parallel networks of similar agreements within the relevant market. Even if a single agreement or network of agreements is not capable of appreciably affecting competition, the effect of parallel networks of agreements, taken as a whole, may be capable of doing so.
19. In Jersey, all 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.¹⁰

¹⁰ 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 widespread 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[.]’).

20. Although Five Oaks has a very low market share, the JCRA concludes that the individual agreement significantly affects competition in the Jersey fuels market for the following reasons:

- It is relatively easy to expand the supply of fuel through a specific forecourt once the physical installations are in place. Therefore, it would be possible and even relatively easy to expand relative supply from any forecourt.
- There are only 32 forecourts on the Island, of which 31 are independent. Due to legislative requirements, it is relatively difficult to increase the number of forecourts. Therefore, one could argue that the Notified Agreement affects over 3% of the independent forecourts in Jersey.
- There are indications that while the density of forecourts in Jersey is high compared to the UK, the average throughput in Jersey is low compared to the UK and that the number of forecourts in Jersey is declining steadily. As the exemption is for five years, the JCRA considers it prudent to take into account that the average throughput per forecourt may increase during this time.

21. Taking the above considerations into account, the JCRA concludes that the Notified Agreement significantly affects competition in the Jersey fuels market.

22. On these grounds, the Notified Agreement is subject to Article 8(1) of the Law. The JCRA therefore must analyse whether it satisfies the Article 9 criteria for an exemption.

V. ANALYSIS UNDER ARTICLE 9 OF THE LAW

23. The BER applies to exclusive purchasing 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 exceeds this limitation, the Notified Agreement

would not be subject to the BER within the EU.¹¹ 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,¹² which under the Law in Jersey is accomplished through analysis of the Article 9 exemption criteria.

24. 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

25. 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.
26. In examining analogous agreements in the fuel sector, both the European Commission and Irish Competition Authority have found that they produce efficiencies. Specifically, 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.'¹³ Similarly, the Irish Competition Authority found that such agreements provide efficiencies by facilitating investment in motor fuel distribution.¹⁴

¹¹ 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.

¹² European Commission, Vertical Restraint Guidelines, O.J. C 291/1 ¶ 141 (13 Oct. 2000).

¹³ EEC Reg. No 1984/83, O.J. L173/5 ¶ 15 (22 June 1983).

¹⁴ Irish Competition Authority, Motor Fuels Category Licence ¶ 60 (1 July 1993).

27. In Paragraphs 31-35 of the Roberts Decision,¹⁵ the JCRA determined that the efficiencies that supported the granting of exemptions under European and Irish competition law are no less apparent in Jersey. The JCRA's investigation of the Notified Agreement in this matter provides no reason to depart from this prior determination.
28. The JCRA therefore concludes that the Notified Agreement generates efficiencies that facilitate the distribution of motor fuels in Jersey, and the first exemption criterion is satisfied.

B. Allow Consumers a Fair Share of the Benefits

29. 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.'¹⁶ Consumers must be, on balance, better-off as a result of the agreement than they were previously.
30. In Paragraph 37 of the Roberts Decision,¹⁷ the JCRA cited consumer benefits that have been found by the European Commission and other authorities as arising from agreements such as the Notified Agreement. Specifically, there are several fuel suppliers on the Island. Competition results in more choice and lower prices for Jersey consumers. Also, as indicated above, exclusive contracts may be required to induce suppliers and owners of independent forecourts to invest in improving their services. This, in turn, stimulates both intra-brand and inter-brand competition among forecourts in Jersey for the supply of motor fuels to consumers. The JCRA's investigation of the Notified Agreement in this matter provides no reason to depart from this prior determination.
31. The JCRA therefore concludes that consumers in Jersey benefit from the Notified Agreement, and the second exemption criterion is satisfied.

¹⁵ As confirmed in Paragraph 28 of the Three Mile Garage Decision.

¹⁶ JCRA Guideline, *Anti-competitive Arrangements*, pg. 12.

¹⁷ As confirmed in Paragraph 31 of the Three Mile Garage Decision.

C. Contains No Indispensable Restrictions to Competition

32. 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.’¹⁸

33. 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

34. As stated in the Roberts Decision,¹⁹ in examining motor fuel supply agreements, the European Commission and the Irish Competition Authority have 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].’²⁰

35. The reason for this conclusion is that exclusive purchasing obligations provide the supplier with guaranteed outlets for its products for the period of the exclusivity. As observed above in Paragraph 28, 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.

36. Evidence indicates that the benefits that can arise from exclusive purchasing obligations are apparent in Jersey. 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

¹⁸ JCRA Guideline, *Anti-competitive Arrangements*, pg. 13.

¹⁹As confirmed by Paragraph 35 of the Three Mile Garage Decision.

²⁰ 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).

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

37. 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

38. The current length of the Notified Agreement's exclusivity period is [REDACTED].
39. The maximum period of exclusivity allowed under the BER in the EU regarding exclusive purchasing agreements where the market share of the supplier does not exceed 30% is five years.
40. Market characteristics in Jersey may suggest that a shorter period of exclusivity is preferable, as it would enable the three suppliers to compete among themselves for motor fuel supply agreements more frequently.
41. As observed in Paragraph 53 of the Roberts Decision,²¹ however, there is a risk that a shorter 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. An agreement with longer term will offer the supplier additional sales volumes that would not be available under an agreement with a three-year term. It has been argued to the JCRA 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.²²

²¹ As confirmed in Paragraph 42 of the Three Mile Garage Decision.

²² 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.

42. Taking these considerations into account, in this Decision the JCRA grants an exemption under Article 9 to the Notified Agreement through its current termination date of [REDACTED]. The exemption therefore runs from 1 July 2009 (the date the Agreement was notified to the JCRA) through [REDACTED]. The JCRA concludes that this may be considered as indispensable to the achievement of the Notified Agreement's efficiencies. This term is also within the five-year exclusivity period generally allowed under EC competition law and under prior JCRA exemption decisions concerning the supply of motor fuels in Jersey.
43. This conclusion is based on the assumption, however, that the Notified Agreement's exclusivity period does not, in practice, go beyond [REDACTED] and that the contract would be subject to competitive bidding at the end of the exclusivity period.
44. 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,'²³ since the retailer otherwise had no right to terminate the contract at that point. Whereas the Notified Contract was novated, no actual deliveries of fuel occurred before [REDACTED].
45. As stated in Paragraphs 57-58 of the Roberts Decision, the JCRA had found evidence of this type of conduct occurring in Jersey. 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 the BER in the EU, which provides that there must be 'no obstacles . . . that hinder the buyer from

²³ Consultancy Solutions Jersey Report at 26.

effectively terminating the non-compete obligation at the end of the five year period.²⁴

46. Given these circumstances, the JCRA concludes that conditions are necessary to ensure that the Notified Agreement's stated term does not, in fact, go beyond [REDACTED]. These conditions are set forth below in Section VI, and reflect the conditions the JCRA set in the Roberts Decision. They enable Five Oaks to seek bids from other motor fuel suppliers if Esso proposes to extend the exclusivity period beyond the termination date. Furthermore, prior to formally agreeing to any extended term during the current exclusivity period (whether through amendment to the Notified Agreement or by signing a new agreement), Five Oaks has the ability to terminate the Notified Agreement. These conditions are intended to avoid the risk of suppliers effectively isolating retailer contracts from ever being subject to competition by other fuel suppliers.
47. The following points concerning these conditions are expressly noted and provided to give guidance to Esso and Five Oaks:
 - The conditions do not require Five Oaks to propose changes to the Notified Agreement to Esso, nor do they require Esso to accept changes proposed by Five Oaks.
 - The conditions' application does not arise in situations where Esso and Five Oaks 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* Five Oaks to seek competitive bids or terminate the Notified Agreement; they only provide Five Oaks with the *opportunity* to do so. Whatever Five Oaks ultimately decides to do in such circumstances remains solely a matter within its commercial discretion.

²⁴ European Commission, Guidelines on Vertical Restraints, O.J. C291/1 ¶ 58 (13 Oct. 2000).

- Finally, the conditions do not prevent Five Oaks 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. Summary

48. The JCRA concludes that the Notified Agreement satisfies the third exemption criterion, subject to compliance by Esso and Five Oaks to certain conditions which are set forth in Section VI, below.

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

49. 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.'²⁵ 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.
50. Both the JCRA's assessment and the Consultancy Solutions Jersey Report indicate that a healthy state of competition exists among the three fuel suppliers in the relevant market. Evidence presented to the JCRA includes information which shows that the contractual terms and conditions 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

²⁵ European Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty, O.J. C 101/08 ¶ 107 (2004).

suggest that negotiations for any solus tie are anything other than true free-market commercial negotiations.’²⁶

51. 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.
52. 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 Five Oaks with these conditions, the JCRA concludes that the fourth exemption criterion is satisfied.

VI. DECISION

53. The JCRA concludes that the Notified Agreement is subject to Article 8(1) of the Law.
54. 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 the termination date 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 Five Oaks during the term of this exemption.
55. By this Decision, the JCRA hereby grants an exemption to the Notified Agreement under Article 9, subject to compliance by Esso and Five Oaks 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, Five Oaks may contact other suppliers of motor fuels to request competitive quotes.

²⁶ See Consultancy Solutions Jersey Report at 26.

2. Prior to formally agreeing to any extended exclusivity period with Esso, Five Oaks 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 Five Oaks to purchase from Esso, or Esso’s nominated supplier, its total requirements of motor fuels for resale from [REDACTED].
4. As used herein, an ‘extended’ exclusivity period is any period extending beyond [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 Five Oaks 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.
56. The effective date of this Decision is 1 July 2009, and it will continue for a maximum period extending to [REDACTED]
57. Compliance with the conditions set forth in Paragraph 55 is binding on both Esso and Five Oaks, as well as on any of their assignees or successors.

7 September 2009

By Order of the JCRA Board