



PUBLIC VERSION

Concerning Motor Fuels Supply Agreements between Esso Petroleum Company Limited and Citriche Limited notified under Article 9 of the Competition (Jersey) Law 2005

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A. Introduction

1. On 21 May 2014, the Jersey Competition Regulatory Authority (**JCRA**) received an application for an exemption (the **Application**) under Article 9 of the *Competition (Jersey) Law 2005* (the **Law**) concerning a multi-site Motor Fuel Supply Agreements between Esso Petroleum Company Limited (**Esso**) and Citriche Limited (**Citriche**) (the **Parties**) commencing 1 May 2013 (the **Notified Agreement**).
2. On 27 May 2014, the JCRA published details of the application in the Jersey Gazette and on its website, asking interested parties to submit comments on the application by 10 June 2014. No comments were received.

B. Notified Agreement

3. According to the Notified Agreement, Citriche agrees to purchase exclusively from Esso its total requirements of motor fuels for five of its fuel forecourts, located at Le Riches Forecourt Georgetown, Marks & Spencer St Peter, Marks & Spencer St John, Checkers Xpress Grouville and Checkers Xpress Five Oaks (the **Forecourts**). The exclusivity period is for five years starting from and including [REDACTED] (the **Term**).¹
4. Esso is one of three wholesale suppliers of motor fuels in Jersey. Esso currently exclusively supplies 10 independent retailers with motor fuels, out of a total of 34 forecourts² in Jersey. This includes the five forecourts that are the subject of the Notified Agreement.
5. In addition to supplying motor fuels to the forecourts, Esso agrees to support them in certain ways, including contributing to pump maintenance up to [REDACTED], at each of the Forecourts.

C. Analysis under the Law

6. The JCRA has considered the contents of the Notified Agreement and assessed its effect on competition in the context that was dealt with in detail in prior JCRA decisions regarding motor fuel distribution in Jersey.³
7. In these prior decisions, the JCRA concluded that the relevant product market is the wholesale supply of motor fuels and the relevant geographic market is Jersey.⁴ There is no reason to depart from those conclusions with respect to the Notified Agreement.

¹ The Notified Agreement may be terminated on 31 October 2015 by either party giving to the other party three months prior written notice.

² Esso calculated this figure using 2010 data from the JCRA *Road Fuel Market Study*, C695/11, August 2011 and comparing it with its own data.

³ See JCRA Decision C105/06 concerning the Motor Fuels Supply Agreement between Esso Petroleum Company Limited and the Channel Islands Co-operative Society, 25 June 2007; JCRA Decision C440/09 concerning the Motor Fuels Supply Agreement between Esso Petroleum Company Limited and the Jersey Farmers (Trading) Union Limited, 7 September 2009 and JCRA Decision C865/12, Fuel Supplies (C.I.) Limited and the Channel Islands Co-operative Society, 5 April 2012

⁴ See JCRA Decision C105/06 concerning the Motor Fuels Supply Agreement between Esso Petroleum Company Limited and Roberts Garages Limited, 25 June 2007, paragraph 19.

8. By volume, Esso has an estimated share of the wholesale market for the supply of motor fuel in Jersey of [30-40]% (including supply under the Notified Agreement).⁵ CI Fuels and FSCI have an estimated [20-30]% and [40-50]% share of the market respectively.⁶ Citriche controls five retail forecourts in the Island, with an estimated market share of 14%.⁷ Prior to the Notified Agreement, the forecourts were supplied on an exclusive basis by Esso.⁸
9. Although, the Notified Agreement relates to just 14% of the retail throughput of motor fuels in Jersey, in prior decisions concerning the supply of motor fuels, the JCRA has previously found that the common use of exclusive contracts in this sector can have cumulative foreclosure effects in the relevant market.⁹ To the best of the JCRA's knowledge, a substantial proportion of motor fuel supplied at a retail level in Jersey remains subject to single branding agreement. Furthermore, in prior decisions the JCRA has referenced additional factors which indicate that exclusive distribution agreement for motor fuels significantly affect competition in Jersey.¹⁰ Based on these circumstances, the JCRA concludes that the Notified Agreement would be likely to infringe Article 8 of the Law, and so require exemption under Article 9. However, given that Esso is now one of the two smallest of the three motor fuel wholesalers,¹¹ and that there is no extra proportion of total retail volumes in Jersey that will become subject to long-term exclusive terms by virtue of the Notified Agreement, the overall effect of the Notified Agreement on competition is less significant than may have been the case for other exclusive distribution agreements previously notified to the JCRA.
10. The JCRA has previously found that exclusive agreements in the motor fuels sector in Jersey between wholesalers and retailers may satisfy all four exemption criteria listed in Article 9(3) of the Law¹² - in particular, (a) that the agreement is likely to improve the production or distribution of goods or services, or to promote technical or economic progress in the production or distribution of goods or services; and (b) that the agreement will allow consumers of those goods or services a fair share of any resulting benefit.
11. The Notified Agreement is similar in certain respects to those that the JCRA has examined previously in the motor fuels industry. However, it is not clear from the Parties' application as to the manner in which, or the extent to which, the Notified Agreement will "improve the production or distribution of goods or services, or to promote technical or economic progress in the production or distribution of goods or services". For example, there is no evidence that the Notified Agreement will give rise to investment in fuel distribution infrastructure, which has been a feature of other fuel supply agreements that have been granted exemptions under Article 9; although the Parties assert that the period of exclusivity provides the retailer with confidence to invest in new facilities. The Application details that Esso will also provide £[REDACTED] towards pump maintenance for the period of the Notified Agreement at each forecourt. Esso maintains that it would not make such an investment without the long term exclusive purchase obligation and makes the assumption that in the absence of such

⁵ Estimated by Esso using 2013 supply volumes.

⁶ JCRA estimate based on Esso's 2013 supply volumes, JCRA *Road Fuel Market Study*, C695/11, August 2011 and that as of February 2014, CI Fuels draws down ex-rack from FSCI and not Esso.

⁷ JCRA *Road Fuel Market Study*, C695/11, August 2011

⁸ JCRA Decisions C479, C478, C477, C476, C475, October 2009

⁹ See JCRA Decision C416/09 concerning the Motor Fuels Supply Agreement between Esso Petroleum Company Limited and Crowe Holdings Limited, 17 July 2009, paragraph 21.

¹⁰ See *ibid*, paragraph 22.

¹¹ Esso had 43% of the supply of motor fuels in 2010, JCRA, C695/11, *Road Fuels Market Study*, August 2011

¹² See JCRA Decision C416/09 concerning the Motor Fuels Supply Agreement between Esso Petroleum Company Limited and Crowe Holdings Limited, 17 July 2009, paragraphs 24-51; JCRA Decision C440/09 concerning the Motor Fuels Supply Agreement between Esso Petroleum Company Limited and the Jersey Farmers (Trading) Union Limited, 7 September 2009, paragraphs 23-52.

investment, the full burden of the cost of pump maintenance/repair would be passed onto the customer.

12. Nor is there any direct evidence that criterion c) that the agreement will allow consumers of those goods or services a fair share of any resulting benefit is satisfied. In previous exemptions, the benefit of a loyalty card was a determining factor in the JCRA concluding that the criterion had been satisfied.¹³ However, the parties argue that the rebate¹⁴ Esso is able to offer against its own wholesale price may result in a reduction to the price paid at the petrol pump and that coupled with the pump maintenance fee and the certainty of a five year term, the dealer is given the means and incentive to make an investment in forecourt facilities to the benefit of consumers, which will help in-bed customer loyalty at a specific forecourt. The JCRA does not consider these factors constitute compelling evidence of customer benefits. The Parties argue that the benefits to consumers need only be of such extent as to outweigh the low level of risk, but the JCRA considers that the customer benefits arising from the Notified Agreement are extremely minimal. Nevertheless, the JCRA has had regard to the fact that the break clause at [REDACTED] further reduces the risk of foreclosure and therefore the risk to competition is low, as is the harm to consumers, both flowing from the provisions of the agreement itself and the wider context of the market place that only 14% of the retail market is affected.
13. In reaching a conclusion as to whether the criteria for an exemption under Article 9 are met, the JCRA has had most regard to the fact that by volume, Esso's share of supply for road fuel has dropped from [40-50]% in 2010 to [30-40]%,¹⁵ that the share of the total retail market attributable to the Notified Agreement is 10% and that Esso no longer supplies CI Fuels, and therefore the effect of the Notified Agreement on competition is likely to be less significant than may have been the case with previous similar exclusive agreements in the motor fuel sector. Moreover, with reference to the JCRA's vertical guidelines,¹⁶ it is entirely possible that exclusive agreements entered into by suppliers with a market share of 30% or less will usually not be seen as hindering or preventing competition. i.e. having an appreciable effect. Article 60 of the Law also requires the JCRA to consider that, as far as is possible, questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under Community law in relation to competition within the European Community. The Block Exemption Regulation does not apply if the market share of the supplier and/or buyer is less than 30 % i.e. it provides a *de minimis* threshold whereby undertakings can say with certainty that their agreements do not offend competition law. On balance, given that Esso is now one of the two smallest of the three motor fuel wholesalers and that there is no extra proportion of total retail volumes in Jersey that will become subject to long-term exclusive terms, the JCRA considers that the Notified Agreement is not likely to hinder or prevent competition and has concluded that on this occasion there is no reason to depart from its previous practice of granting an exemption under Article 9.
14. To ensure that exclusive contracts for the wholesale supply of motor fuels are not extended prior to their exclusivity period ending, in prior decisions, the JCRA has concluded that conditions are necessary to ensure that the exclusivity term does not exceed five years, and that the contract in question is subject to competitive bidding at the end of exclusivity term.¹⁷ Since

¹³ JCRA Decision (C865) *FSCI- CI Co-operative Society*, March 2012

¹⁴ 6.4 ppl

¹⁵ As above and estimations provided in the application, and increased slightly by the JCRA to reflect that as of February 2014, CI Fuels draws down ex-rack from FSCI and not Esso

¹⁶ JCRA Guideline 11, *Vertical Arrangements*

¹⁷ See JCRA Decision C440/09 concerning the Motor Fuels Supply Agreement between Esso Petroleum Company Limited and the Jersey Farmers (Trading) Union Limited of 7 September 2009, paragraphs 44-47 and JCRA Decision C105/06 concerning the Motor Fuels Supply Agreement between Esso Petroleum Company Limited and Roberts Garages Limited, 25 June 2007, paragraphs 56-63.

the Notified Agreement is substantially similar to those the JCRA has examined previously, the JCRA concludes that these same conditions are warranted in this matter on this occasion. These conditions are set forth below and are intended to avoid the risk of wholesale suppliers effectively isolating retail contracts from ever being subject to competition from other wholesale fuel suppliers.

D. Decision

15. By this Decision, the JCRA grants exemptions to the Notified Agreement under Article 9 of the Law, subject to compliance by Esso and Citriche with the following conditions:
 - a. If, at any time during the term of the Notified Agreement, Esso proposes to increase the length of the Exclusivity Period, Citriche may contact other wholesale suppliers of motor fuels to request competitive quotes.
 - b. Prior to formally agreeing to any extended Exclusivity Period with Esso, Citriche may serve notice on Esso in writing giving not less than 30 days and not more than 60 days notice to terminate the Notified Agreement.
 - c. As used herein, the term “Exclusivity Period” means an obligation by Citriche to purchase from Esso, or Esso’s nominated supplier, its total requirements of motor fuels for resale.
 - d. As used herein, an “extended” Exclusivity Period is any period extending beyond [REDACTED], whether by an amendment to the relevant Notified Agreement or by substitution of the relevant Notified Agreement with a new agreement.
 - e. Esso and/or Citriche 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.
16. The effective date of this Decision is 19 June 2014 and it will continue for a maximum period extending to midnight on [REDACTED]; unless the Notified Agreement is otherwise terminated prior to this time, in which case this exemption will expire upon the Notified Agreement’s termination.
17. Compliance with the conditions set forth in paragraphs 15 is binding on both Esso and Citriche, as well as on any of their assignees or successors.

19 June 2014

By Order of the JCRA Board