



Jersey Competition Regulatory Authority ('JCRA')

Decision C 416/09

PUBLIC VERSION

Concerning the Motor Fuels Supply Agreement between Esso

Petroleum Company Limited and Crowe Holdings Limited

Notified under Article 9 of the Competition (Jersey) Law 2005

Table of Contents

I.	INTRODUCTION AND EXECUTIVE SUMMARY	1
II.	NOTIFIED AGREEMENT	2
III.	OVERVIEW OF THE ANALYSIS UNDER THE LAW	2
IV.	ANALYSIS UNDER ARTICLE 8 OF THE LAW	4
V.	ANALYSIS UNDER ARTICLE 9 OF THE LAW	7
A.	Improvement in the Distribution of Goods or Services	8
B.	Allow Consumers a Fair Share of the Benefits.....	8
C.	Contains No Indispensable Restrictions to Competition	9
1.	The Necessity for the Exclusive Purchasing Obligation.....	9
2.	Length of the Exclusive Period.....	10
3.	Summary	13
D.	No Elimination of Competition in respect of a Substantial Part of the Goods or Services in Question	13
VII.	DECISION	14

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On 15 May 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 Crowe Holdings Limited trading as Three Mile Garage ('**TMG**') dated 24 April 2009 (referred to hereinafter as the '**Notified Agreement**').
2. On 20 May 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 3 June 2009. 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, TMG, and other third parties.
4. 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 TMG 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. NOTIFIED AGREEMENT

6. Esso is one of three wholesale suppliers of motor fuels in Jersey. Esso currently exclusively supplies [REDACTED] independent retailers with motor fuels.
7. TMG is an independent retailer of motor fuels, located at La Grande Route de St. Martin in St Saviour. Under the Notified Agreement, TMG agrees to purchase exclusively from Esso¹ a full range of motor fuels, including diesel and other fuels derived from petroleum for automotive vehicles.
8. [REDACTED]
9. [REDACTED]

III. OVERVIEW OF THE ANALYSIS UNDER THE LAW

10. 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.
11. 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*,² 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:

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

² 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.³
 - 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.⁴
12. 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 five 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 2005 Jersey report.
 - Information supplied to the JCRA, by each wholesale supplier of motor fuels in Jersey (see paragraph 20 below), as regards the amount of

³ See, respectively, Regulation (EC) No 2790/1999, O.J. L 336 (29 Dec. 1999) and O.J. C 291/1 (13 Oct. 2000).

⁴ 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.

throughput in 2008 for each filing station in Jersey (the ‘**Throughput Table**’).

- The JCRA Decision C105/06 of 25 June 2007 concerning the motor fuels supply agreement between Esso and Roberts Garages Limited notified under Article 9 of the Law (the ‘**Roberts Decision**’).

IV. ANALYSIS UNDER ARTICLE 8 OF THE LAW

13. 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.
14. The Notified Agreement is an exclusive arrangement between two independent undertakings, Esso and TMG with the effect of limiting competition during its duration. Based on the same reasoning set out in Paragraph 18 of the Roberts Decision, it is not necessary to assess whether the agreement has the object of limiting competition.
15. 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.”⁵
16. In Paragraph 19 of the Roberts Decision, the JCRA concluded that the relevant product market is the wholesale of motor fuels and the relevant geographic market is the Island of Jersey.
17. Three companies supply motor fuels at the wholesale level in Jersey – Esso, Rubis (which recently acquired Fuel Supplies (Channel Islands) Ltd (‘**Fuel Supplies**’), a

⁵ 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).

wholly owned subsidiary of Shell UK Oil⁶) and Total Channel Islands Ltd. According to the Throughput Table, the estimated respective shares of the wholesale supply of motor fuels among these three undertakings are as follows:

Table 1	
<u>Company</u>	<u>Market share</u>
Esso/PDJ	[40-50]%
Rubis/FSCI Shell	[20-40]%
Total	[20-40]%
	100%

18. According to the Throughput Table, there are 32 filling stations in Jersey. TMG has a market share of around [0-5]%.

Table 2	
<u>Forecourt</u>	<u>Market share</u>
26 other independent filling stations	[80-100]%
Four non-tied filling stations	[0-10]%
One station owned and controlled by Rubis	[0-5]%
TMG	[0-5]%
	100%

⁶ 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.

19. Although the Notified Agreement relates to a very minor market share of the supply of motor fuels in Jersey, European Guidelines⁷ state that in the case of vertical agreements it may be necessary to have regard to any cumulative effects of parallel networks of similar agreements. 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. The JCRA agrees with this guidance.
20. European precedent further provides 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.⁸ In Jersey, all three fuel suppliers enter into exclusive purchasing contracts with motor fuel retailers. [REDACTED].
21. 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.⁹
22. Although TMG 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.

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

⁹ 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[.]’).

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

V. ANALYSIS UNDER ARTICLE 9 OF THE LAW

24. 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.¹⁰ 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,¹¹ which under the Law in Jersey is accomplished through analysis of the Article 9 exemption criteria.
25. 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.

¹⁰ 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.

¹¹ European Commission, Vertical Restraint Guidelines, O.J. C 291/1 ¶ 141 (13 Oct. 2000).

A. Improvement in the Distribution of Goods or Services

26. 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.
27. 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.’¹² Similarly, the Irish Competition Authority found that such agreements provide efficiencies by facilitating investment in motor fuel distribution.¹³
28. In Paragraphs 31-35 of the Roberts Decision, 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.
29. 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

30. 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

¹² EEC Reg. No 1984/83, O.J. L173/5 ¶ 15 (22 June 1983).

¹³ Irish Competition Authority, Motor Fuels Category Licence ¶ 60 (1 July 1993).

satisfied.’¹⁴ Consumers must be, on balance, better-off as a result of the agreement than they were previously.

31. In Paragraph 37 of the Roberts Decision, 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, 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.
32. The JCRA therefore concludes that consumers in Jersey benefit from the Notified Agreement, and the second exemption criterion is satisfied.

C. Contains No Indispensable Restrictions to Competition

33. 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.’¹⁵
34. 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

35. As stated in the Roberts Decision, 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

¹⁴ JCRA Guideline, *Anti-competitive Arrangements*, pg. 12.

¹⁵ JCRA Guideline, *Anti-competitive Arrangements*, pg. 13.

components of such agreements and thus usually indispensable for the attainment of [their efficiencies].¹⁶

36. 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 31, 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.
37. 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 indicates that such obligations contribute to the achievement of such efficiencies, which may not be realized in the absence of them.
38. 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

39. The current length of the Notified Agreement's exclusivity period is five years [REDACTED].
40. This five year period corresponds to 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%.

¹⁶ 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).

41. 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. 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.¹⁷
42. As observed in Paragraph 53 of the Roberts Decision, 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. 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.¹⁸
43. 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. The JCRA therefore concludes that the five year exclusivity period is, on balance, 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 in practice does not exceed five years, and that the contract would be subject to competitive bidding at the end of exclusivity term.
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

¹⁷ See Consultancy Solutions Jersey Report at 26 (justifying the proposed three year period because this would 'force greater levels of competition between the three oil companies for retail market share').

¹⁸ 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.

- 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,'¹⁹ since the retailer otherwise had no right to terminate the contract at that point.
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 effectively terminating the non-compete obligation at the end of the five year period.'²⁰
46. Given these circumstances, the JCRA concludes that conditions are necessary to ensure that the Notified Agreement's stated five year term is, in fact, no longer than five years in practice. These conditions are set forth below in Section VII, and reflect the conditions the JCRA set in the Roberts Decision. They enable TMG to seek bids from other motor fuel suppliers if Esso proposes to extend the exclusivity period beyond five years. 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), TMG 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 TMG:

¹⁹ Consultancy Solutions Jersey Report at 26.

²⁰ European Commission, Guidelines on Vertical Restraints, O.J. C291/1 ¶ 58 (13 Oct. 2000).

- The conditions do not require TMG to propose changes to the Notified Agreement to Esso, nor do they require Esso to accept changes proposed by TMG.
- The conditions' application does not arise in situations where Esso and TMG 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* TMG to seek competitive bids or terminate the Notified Agreement; they only provide TMG with the *opportunity* to do so. Whatever TMG ultimately decides to do in such circumstances remains solely a matter within its commercial discretion.
- Finally, the conditions do not prevent TMG 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 TMG 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

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.'²¹ This assessment requires the definition of relevant product and geographic markets. As detailed

²¹ European Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty, O.J. C 101/08 ¶ 107 (2004).

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 suggest that negotiations for any solus tie are anything other than true free-market commercial negotiations.'²²
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 TMG with these conditions, the JCRA concludes that the fourth exemption criterion is satisfied.

VII. 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 five years in practice (to ensure that the third and fourth exemption criteria are satisfied). Another condition is intended to provide the

²² See Consultancy Solutions Jersey Report at 26.

- JCRA with the ability to monitor compliance by Esso and TMG 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 TMG 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, TMG may contact other suppliers of motor fuels to request competitive quotes.
 2. Prior to formally agreeing to any extended Exclusivity Period with Esso, TMG 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 TMG 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 [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 TMG 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. [REDACTED]
57. Compliance with the conditions set forth in Paragraph 55 is binding on both Esso and TMG, as well as on any of their assignees or successors.

17 July 2009

By Order of the JCRA Board