



Decision C038/06 and Order Imposing Financial Penalties
Under Articles 35, 37 and 39 of the Competition (Jersey) Law 2005
Concerning an Infringement of
Article 16(1) of the Competition (Jersey) Law 2005
by
Transport and Technical Services

Table of Contents

| | | |
|------|---|----|
| I | Introduction and Executive Summary | 2 |
| II | Background..... | 2 |
| | TTS and its Status as an Undertaking for the Purpose of this Decision | 2 |
| | Other Potential Waste Disposal Companies in Jersey | 4 |
| | Overview of waste disposal services | 5 |
| III | Procedural History | 6 |
| | Reasonable Cause to Suspect an Infringement | 6 |
| | Procedure | 6 |
| IV | Analysis..... | 11 |
| | Defining Relevant Markets | 11 |
| | Conclusions with Respect to Relevant Markets..... | 13 |
| V | Dominance | 13 |
| | Market share..... | 13 |
| | Barriers to Entry..... | 14 |
| | Countervailing power..... | 15 |
| | Conclusion | 15 |
| VI | Abuse | 15 |
| | Article 16(1)..... | 15 |
| | Article 16(2)..... | 15 |
| | Objective Necessity and Efficiencies..... | 17 |
| VII | Conclusion | 19 |
| | Conclusion concerning Article 16(1) of the Law | 19 |
| | Appropriate Remedy concerning the Infringement | 19 |
| | Penalty analysis..... | 21 |
| VIII | Decision and Financial Penalty Order | 22 |

I Introduction and Executive Summary

1. In 2006, the JCRA received a complaint alleging that the States of Jersey Transport and Technical Service ('TTS') had abused its dominant position in the provision of sewerage services. For the purposes of this Decision, the term 'sewerage services' means the emptying of waste from septic and tight tanks, the transportation of the waste to the disposal facilities at Bellozanne, and the discharge of the waste at those facilities. The complaint concerned the alleged restricted access to the Bellozanne treatment facility afforded to private waste disposal undertakings. The Bellozanne sewage treatment works is the main sewage works on the Island and the only suitable facility for the disposal of contents of septic and tight tanks. TTS both operates the Bellozanne facility and performs certain waste disposal services. It is not feasible for a private operator to replicate the disposal facilities at Bellozanne.
2. The result of the restricted access to Bellozanne is that certain types of liquid waste could only be disposed of by TTS. This, in effect, created a monopoly in Jersey, for TTS, for the emptying of septic and tight tanks, by preventing other potential suppliers of sewerage services providing such services. The aforementioned information provided the JCRA with a reasonable cause to suspect an infringement of Article 16(1) of the Competition (Jersey) Law 2005 (the 'Law').
3. Article 16(1) of the Law prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in Jersey or in any part of Jersey. Article 16(2)(b) of the Law specifies that an abuse of a dominant position may in particular consist in limiting production, markets or technical development to the prejudice of consumers.
4. The JCRA commenced an investigation into the matter. As a result of this investigation, the JCRA has determined that TTS abused its dominant position in the market for sewerage services in Jersey. To remedy this breach, herein the JCRA issues this Decision, under Article 35 of the Law, and a financial penalty under Article 39 of the Law. The amount of the financial penalty is £15,000.00, which has been determined in light of TTS voluntarily bringing this infringement to an end before the issuance of this Decision.

II Background

TTS and its Status as an Undertaking for the Purpose of this Decision

5. TTS, amongst other things, supplies the sewerage services covered by this Decision.

6. TTS is a Jersey States' department. A preliminary question faced by the JCRA in this matter was whether TTS was acting as an 'undertaking' in its provision of drainage services to septic and tight tanks in Jersey. Article 1 of the Law defines an 'undertaking' as 'a person carrying on a business[.]' In relation to States-controlled entities, Article 4 of the Law states:

'This Law applies to the States, a Minister, a body created by Act of the States and to any States Authority in so far as the States, Minister, body or States Authority is carrying on a business, but it does not apply to the States or such a Minister, body or States Authority when acting in any other capacity.'

7. Under applicable EC competition law principles,¹ the European Court of Justice ('ECJ') has repeatedly defined an undertaking as 'any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed'.² An economic activity is any activity consisting in offering goods and services on a given market.³ In addition, the fact that an activity is normally entrusted to public bodies cannot affect the economic nature of such activities, especially if the activity has not always been, and is not necessarily carried out by public entities.⁴ The JCRA's Guideline on Anti-Competitive Arrangements contains analogous guidance:

*'(u)ndertaking' includes any natural person, or group of persons, capable of carrying on commercial or economic activities relating to goods or services, whatever its legal status. It includes companies, firms, businesses, and partnerships, individuals operating as sole traders, agricultural co-operatives, trade associations and non profit-making organisations. It also includes the States . . . a body created by Act of the States and any States Authority, to the extent that they are carrying on an economic activity. An economic activity includes any activity consisting of offering goods or services in a market. Thus, to the extent that the States, or a body created or controlled by the States, engages in an economic activity, as opposed to solely acting in the public interest, its activities are potentially subject to scrutiny under the Law.'*⁵

8. In this matter, the JCRA has concluded that TTS is acting as an undertaking in its provision of sewerage services in Jersey. Specifically, TTS offers to drain septic and tight tanks, and remove the associated waste for remuneration. Because, therefore, TTS is offering this service to customers in a market, its

¹ Under Article 60 of the Law the JCRA must attempt to ensure as far as possible that questions arising in relation to competition are dealt with in a matter that is consistent with the treatment of corresponding questions arising under Community Law in relation to competition within the European Community.

² Case C41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH, par.21.

³ Case C118/85 Commission v Italy, par.7.

⁴ Case C41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH, par.22.

⁵ JCRA, *Guideline on Anti-Competitive Arrangements* at p 4.

activities can be considered to be those of an undertaking for the purpose of this Decision.

Other Potential Waste Disposal Companies in Jersey

9. According to the information available, in addition to TTS, there are three other potential suppliers of sewerage services in Jersey: Dyno-Rod ('Dyno-Rod'), Drain-It Limited ('Drain-It') and Drainway Services Limited ('Drainway') (hereinafter together referred to as the 'Companies' and each a 'Company').

Dyno-Rod

10. Dyno-Rod provides services including drain cleaning, rodding, jetting and drain surveys. Dyno-Rod has a Licence to Discharge issued by TTS in 2005, authorising the discharge of (i) sludge for propriety treatment plants, (ii) sludge from private pumping stations for maintenance purposes only and (iii) the contents of grease traps and residue from private drain cleaning operations.
11. Dyno-Rod did not empty tight tanks or septic tanks as its Licence to Discharge specifically excluded the discharge of waste from septic and tight tanks at the treatment works at Bellozanne. The covering letter enclosing the licence from TTS, sent in 2005, made it clear that any person contravening the law may be found guilty of an offence and liable to imprisonment for a term not exceeding two years, or to a fine, or both.

Drain-It Limited

12. Drain-It provides services including the installation of septic tanks and soakaways, drain cleaning and repairs and maintenance of pump stations. Drain-It has a Licence to Discharge issued by TTS in 1998 authorising the discharge of (i) sludge for propriety treatment plants, (ii) sludge from private pumping stations for maintenance purposes only and (iii) the contents of grease traps and residue from private drain-cleaning operations.
13. Drain-It did not empty tight tanks or septic tanks as the Licence to Discharge excluded the discharge of waste from (i) septic tank/soakaway systems, (ii) tight tanks and (iii) petrol or garage forecourt interceptors. The covering letter to the 1998 licence states that TTS 'ask that you pay particular attention to the exclusions listed on the Licence in order to prevent any conflict of interests.'

Drainway

14. Drainway provides services including drain cleaning, drain laying, removing drain blockages, and the maintenance of pump stations and septic tanks.

15. Drainway did not empty tight tanks or septic tanks. The Licence to Discharge did not allow Drainway to discharge the contents of septic tanks or tight tanks.

Overview of Waste Disposal Services

16. Households and companies produce liquid waste. Most households in Jersey are connected to the mains sewer system. However, connections to the mains sewer system are not always physically possible and/or financially viable. According to a States' document,⁶ the Island's bye-laws⁷ require buildings to be provided with adequate system of drainage, in accordance with specific standards, in the following order of priority:
 - Connection to the public sewer
 - Private sewer connecting to a public sewer
 - Tight tanks (also described as cesspits or cesspools). These are sealed tanks for the reception and temporary storage of sewage that must be emptied frequently.
 - Septic tanks, which have an appropriate form of secondary treatment. A septic tank separates the water and the waste, which has to be removed from time to time.
17. Both the tight and septic tanks have to be emptied frequently. According to public information, 'as regards the areas of the Island still not served by main drains, ... approximately 5000 properties (14%) remain unconnected, these properties being predominantly in the rural areas throughout the Island.'⁸ The TTS website discloses that the vast majority of private drainage systems in the Island comprise a septic tank and soakaway. According to public documents,⁹ TTS stated in 2005 that its tanker service visited 1,200 properties of which 77 were connected to a tight tank.
18. As explained below, the relevant product market for the purpose of this Decision is the market for sewerage services. For the purposes of this Decision, the term 'sewerage services' means the emptying of waste from septic and tight tanks, the transportation of the waste to the disposal facilities at Bellozanne and the discharge of the waste at those facilities.

⁶ Disposal of Foul Sewage, Supplementary Planning Guidance, Planning Advice Note 1, States of Jersey October 2005.

⁷ Part 6, Schedule 2, Requirement 22, Building Bye-laws (Jersey) 2004.

⁸ Written Question to the President of the Environmental and Public Services Committee by the Deputy of St John, 1240/5 (2289).

⁹ States of Jersey, Official Report, Tuesday 28 February 2006, sections 2.4 and 2.11.

III Procedural History

Reasonable Cause to Suspect an Infringement

19. In 2006, the JCRA received a complaint alleging that TTS had abused its dominant position in the provision of sewerage services. The complaint concerned high prices for such services and restricted access to the Bellozanne treatment facility afforded to private waste disposal undertakings. The result of the restricted access to Bellozanne was that certain types of liquid waste could only legally be disposed of by TTS. TTS operates the Bellozanne facility and was the only undertaking that emptied septic and tight tanks in Jersey.
20. The JCRA decided that there was a reasonable cause to suspect, in accordance with Article 26 of the Law, an infringement of Article 16(1) of the Law and started an investigation on 7 February 2007. Article 16(1) of the Law prohibits any abuse by one of more undertakings of a dominant position in trade for any goods or services in Jersey or in any part of Jersey. Article 16(2)(b) of the Law specifies that an abuse of a dominant position may in particular consists in limiting production, markets or technical development to the prejudice of consumers.

Procedure

21. On 30 March 2007, the JCRA advised TTS that it had received the complaint described above. The JCRA requested a meeting to discuss the issue.
22. The meeting took place on 4 April 2007. At the meeting, TTS did not dispute that access to Bellozanne for certain types of waste disposal was reserved for TTS and that the Companies were not allowed to discharge such waste at Bellozanne. TTS stated that this 'market sharing arrangement' was the result of an agreement between TTS and each Company. This arrangement was implemented through documents which purported to be licences issued by TTS.
23. On the basis of the information provided by TTS, the JCRA provisionally concluded that there appeared to be an infringement of Article 8 of the Law rather than Article 16 of the Law. 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. According to Article 8(2)(c) of the Law, this prohibition applies, in particular, to arrangements that have as their object or effect the sharing of markets.
24. During the meeting, the JCRA outlined the possible options for TTS. Firstly, TTS could terminate the alleged infringement and change the licences of each Company accordingly (thus allowing them to discharge the waste in question at

Bellozanne). Alternatively, TTS could apply for an exemption for the market sharing arrangement, pursuant to Article 9 of the Law.¹⁰ The JCRA gave TTS until the end of May 2007 to consider its position and to inform the JCRA of the course of action it would take. In this meeting, the JCRA also requested TTS to provide copies of the licences issued to the Companies. TTS agreed to provide copies but noted that each licence was over ten years old and would have to be extracted from the archives.

25. On 16 May 2007, the JCRA sent a letter to TTS summarising the contents of the meeting of 4 April 2007. The JCRA wrote as follows:

'You [TTS] informed us that both TTS and the three private contractors of sewage collection services on the Island have an agreement to share markets between themselves. We [the JCRA] advised you that such an agreement would appear to be at odds with Article 8(2)(c) of the Law, which prohibits undertakings from making arrangements that have an object or effect of appreciably hindering competition in Jersey or any part thereof, specifically by agreeing to share markets or sources of supply.'

The JCRA also reminded TTS that it agreed to provide the JCRA with copies of the licences for all undertakings that were affected, or had been affected, including Dyno-Rod, Drainway Services and Drain It, and that the JCRA would expect to receive copies of these licences by Thursday 31 May 2007.

26. On 7 June 2007 the JCRA received a response to the letter of 16 May 2007. TTS stated that it was seeking legal advice and that TTS would contact the JCRA upon receipt of this legal advice. TTS attached a copy of only one 'Licence to Discharge Agreement for the Bellozanne Sewage Treatment Works'. The licence attached was a copy of a fax containing a Licence to Discharge apparently issued or sent in 1998 to Drain-It. The relevant part of the licence stated:

'This Licence excludes the discharge of contents from:

- (i) Septic Tanks/Soakaway Systems*
- (ii) Tight Tanks*
- (iii) Petrol Forecourt of Garage Forecourt Interceptors*

***ANY FAILURE TO OBSERVE THE CONDITIONS OF THE LICENCE
MAY RESULT IN ITS WITHDRAWAL'***

27. The JCRA had a second meeting with TTS on 10 October 2007. At this meeting TTS stated that, based on the legal advice it had received, the 'agreements' appeared to require exemption under Article 9 of the Law. TTS

¹⁰ Article 9 of the Law allows the JCRA to exempt arrangements that would infringe Article 8, if the arrangement in question satisfies the criteria for exemption.

informed the JCRA that, based on this advice, TTS was preparing to submit a request for an exemption under Article 9 of the Law by the end of October. The JCRA again asked TTS to forward to the JCRA complete copies of each of the licences it had issued to the Companies. TTS agreed to find and provide these to the JCRA.

28. By August 2008 TTS had failed to submit an Article 9 exemption request to the JCRA, nor had it provided copies of the licences it had issued to the Companies (other than the one to Drain-It that TTS provided previously). In September 2008, the JCRA expanded the scope of the investigation and contacted each of the Companies.
29. In September 2008 the JCRA had a meeting with Dyno-Rod. Dyno-Rod stated that the 'market sharing arrangement' was not a mutual agreement at all, but was imposed upon it by TTS. TTS controls access to Bellozanne, which is the only place where the Companies can empty their tanks. Dyno-Rod supplied the JCRA with a copy of a licence dated 15 July 2005.
30. The JCRA also had meetings with each of the Companies at this time. Each Company insisted that the 'market sharing arrangement' was a unilateral decision by TTS that was forced upon them. TTS had unilaterally determined the scope of the 'licences' issued to the Companies. These 'licences' specifically prohibited the Companies from discharging contents from septic tanks, soakaway systems and tight tanks at Bellozanne. Without the ability to dispose of the contents at Bellozanne, the Companies effectively could not offer to empty septic or tight tanks.
31. On 16 September 2008 the JCRA asked TTS to explain the purported legal basis for the licences that TTS had issued to the Companies. In response to this, TTS requested a meeting. During this meeting, TTS stated that the licences were issued under the predecessor of Article 3(1) of the Drainage (Jersey) Law 2005 and now fall under Article 3 of that Drainage Law. TTS stated that it would contact the Companies in order to come to an arrangement that would replace the licences. The new arrangement would subsequently be filed with the JCRA for an exemption under Article 9 of the Law. It was agreed that the JCRA and TTS would meet again on 21 October 2008.
32. On 8 October 2008 the JCRA received a letter from TTS dated 7 October 2008, stating 'that there are competition issues over the clause in the licence which restricts the private sector to certain types of work and understand that there is a need going forward to open to market to full competition.' TTS asked if the changes it intended to make to the current licences could be delayed until 1 January 2009.

33. On 20 November 2008 TTS confirmed in writing that it was 'going to open up the market to full competition from 1 January 2009 or after we have obtained the necessary agreements from the Trade Union.'
34. On 28 November 2008 the JCRA responded to TTS explaining that it expected to receive a copy of the new licence by Friday, 30 January 2009, at the latest. Otherwise, it would have no option but to resolve this matter through immediate recourse to one or more of the formal procedures set out in Parts 5 and 6 of the Law.
35. The 30 January deadline passed without any communication from TTS to the JCRA. Accordingly, the JCRA recommenced its investigation, and to this end on 17 February 2009 the JCRA issued a written notice under Article 27(1) of the Law requesting TTS to provide specific information (the 'Request').
36. On 18 February 2009, after the JCRA had contacted TTS, TTS provided the JCRA with a draft agreement to be signed by TTS and each of the Companies, which would replace the existing licences.
37. On 4 March 2009 the JCRA received a response from TTS in relation to the Request. In this response, TTS stated that, contrary to its original assertion regarding the legal basis for the 'licences', 'the original 1995/96 licences were not issued under any legislation, merely a formal agreement between the contractor and the Department at the time.'
38. On 24 March 2009 TTS advised the JCRA that the Minister for Transport and Technical Services had signed a Ministerial Decision on Friday 20 March 2009 revoking the existing licences with effect from 30 March 2009 and that new agreements would come into effect on that day. The JCRA received evidence from some of the Companies that TTS had revoked the restrictive licences.
39. On 8 April 2009 the JCRA issued the proposed decision in this matter, including the order imposing financial penalties, to TTS under Article 35(2) of the Law. TTS was given until 5pm on 23 April 2009 to submit written representations.
40. On 17 April 2009 there was a meeting between the JCRA and TTS, during which the JCRA's proposed decision and the response of TTS thereto were discussed.
41. On 23 April 2009 the JCRA received written representations on behalf of TTS. In summary, the written representations argued:
 - That, based on certain statements made by the JCRA in a letter dated 4 March 2009, TTS had the impression that if it proceeded to voluntarily terminate the licences in question through the issuance of a Ministerial

Decision, the JCRA would close its investigation. Thus, in the view of TTS, proceeding to a formal decision in this matter and imposing a fine is contrary to commonly accepted notions of trust and good faith.

- That there was an absence of consumer harm resulting from the conduct of TTS
 - That the issuance of a formal decision and a financial penalty may be viewed as disproportionate and at odds with the regulatory approach in other jurisdictions. In support of this argument, TTS presented two reports of the UK water regulator, OFWAT. TTS said that these reports are relevant because they illustrate that OFWAT was prepared to resolve the issues raised in these cases in a cooperative and practical manner.
 - And finally, TTS made additional comments about specific paragraphs contained in the draft decision. The principal comment in this regard concerned the draft decision's penalty calculation.
42. The JCRA's response to the arguments raised by TTS is set out in the following paragraphs.
43. Concerning the first point, notwithstanding any impression that TTS may have had from the JCRA's letter dated 4 March 2009 (to which the JCRA gives no comment) subsequent correspondence received by TTS from the JCRA made it clear that the efforts of TTS to voluntarily end its infringement, and the JCRA's decision on whether or not to issue a formal decision and impose a financial penalty, were separate matters. While TTS's voluntary actions to terminate this infringement and open the market to competition would be taken into account in the JCRA's determination of whether or not to issue a formal decision and whether or not to impose any penalties, the ultimate resolution of this matter remained within the discretion of the JCRA Board of Directors.
44. Concerning the second point, under EC competition law an abuse of dominance does not necessarily depend on direct evidence of consumer harm in the form of higher prices. It also can be based on 'behaviour by a monopolist designed to, or which might have the effect of, preventing **the development of competition.**'¹¹ The European Commission recently reaffirmed this in guidance issued in February 2009, which states:

*'The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare, **whether in the form of***

¹¹ Whish, R., (2003), *Competition Law*, 5th Edition, p 194 (emphasis supplied).

*higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.*¹²

45. Here, as detailed below, the conduct of TTS prevented the development of competition and reduced consumer choice. In any event, the JCRA did in fact have evidence of direct consumer harm in the form of high prices charged by TTS for emptying tight tanks. That evidence is presented in paragraph 76 below.
46. Concerning the third point, as detailed above, the JCRA has also attempted to resolve this matter in a cooperative and practical manner. Its efforts to do so, however, have been protracted due to delays caused by TTS – first with respect to the Article 9 exemption request, which was never submitted, then with respect to the 30 January 2009 deadline, which passed without contact from TTS. In any event, the approach which the UK regulator may have taken in any particular case is not binding on the JCRA in Jersey.
47. Concerning the fourth point, the JCRA has incorporated many of the paragraph-specific comments raised by TTS. This includes the JCRA’s penalty calculation, as detailed in paragraphs 92 to 101 below. To the extent that these suggestions have been incorporated, however, they do not change the JCRA’s overall determination with respect to this matter.

IV Analysis

48. Any conduct in a market by one or more undertakings that amounts to the abuse of a dominant position in trade for any goods or services in Jersey or part of Jersey is prohibited by Article 16(1) of the Law and may be subject to financial penalties. The JCRA conducts a three stage test in order to determine if there has been an abuse of a dominant position.
 - First, it is necessary to determine the relevant product and geographic markets.
 - Second, the JCRA assesses whether an undertaking is dominant in the relevant market(s).
 - Third, if the undertaking in question is dominant, the JCRA determines whether the undertaking is abusing its dominant position.

Defining Relevant Markets

49. As set forth in the JCRA’s Guideline on Market Definition, a relevant market normally has two dimensions: a product market and a geographic market.¹³ The

¹² Guidance on the Commission’s enforcement priorities in applying Article 82, OJ [2009] C45/7, par 19 (emphasis supplied). *See also* Case C202/07 France Telecom SA v Commission, at par 105 (‘Article 82 EC refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure[.]’)

focus of market definition is to identify ‘those goods or services that are close substitutes in the eyes of buyers, and upon those suppliers who could produce, or who could easily switch to producing, those goods or services.’¹⁴

50. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.¹⁵ Defining a relevant product market usually has two components: demand-side substitution and supply-side substitution.
- Demand-side substitution exists if, in response to a small yet significant and non-transitory price increase in a good or service supplied, a significant number of customers would switch to other products.¹⁶
 - Supply-side substitution exists when, in response to a small yet significant and non-transitory price increase in a good or service supplied, other suppliers could easily start providing the good or service in the short-term, using largely unchanged production facilities and with little or no additional investment.¹⁷

A relevant product market encompasses the smallest group of goods or services, and the smallest number of suppliers, which satisfy these tests.

51. This matter involves the provision of sewerage services (concerning tight tanks and septic tanks) in Jersey.
52. As a result of the licences issued by TTS, persons with tight or septic tanks simply did not have a choice of providers of sewerage services. The purported licences issued by TTS effectively prevented other potential providers of sewerage services in Jersey from offering these services to persons with tight or septic tanks. The effect thereof was that TTS had the ability to impose a small yet significant and non-transitory price increase without the ability of potential demand-side substitution or supply-side substitution to respond. If TTS made such a price increase, customers would be unable to exert demand-side substitution because they could not realistically invest in equipment for emptying their tanks. Even if they did, they would most likely have been subject to the same prohibition on discharging the waste from such tanks at Bellozanne. Nor could they realistically switch from having a septic or tight tank to having full mains drainage connection. Similarly, the licences issued by

¹³ See JCRA Guideline, *Market Definition* at p 6.

¹⁴ *Ibid.* at p 5.

¹⁵ *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. [1997] C372, par 7.

¹⁶ See *ibid.* at 3 (‘The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer.’).

¹⁷ See JCRA Guideline, *Market Definition* at p 8.

TTS to the Companies operated as an absolute barrier to the provision of sewerage services.

53. To a large extent, the emptying of tight tanks and septic tanks requires identical skills and equipment. For the purposes of this Decision, there is no need to determine exactly to what extent the services of these two products are separate relevant markets.¹⁸
54. The JCRA therefore considers the provision of sewerage services, defined as the emptying of waste from septic and tight tanks, the transportation of the waste to the disposal facilities at Bellozanne, and the discharge of the waste at those facilities, as the relevant product market for the purpose of this Decision.
55. It is not feasible to transport effluent from tight and septic tanks to other jurisdictions for disposal. Therefore, the relevant geographical market for the purpose of this decision is Jersey.

Conclusions with Respect to Relevant Markets

56. On the basis of the above, the JCRA concludes that the relevant market in which to analyse this matter is the provision of sewerage services, as defined, in Jersey.

V Dominance

Market share

57. For Article 16(1) of the Law to apply, the undertaking must hold a dominant position in the relevant market in question (here, the provision of sewerage services, as defined in this Decision). Dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.
58. A useful starting point for analysing dominance is the market share of the undertaking in question. Here, during the period of the abuse, TTS was the sole provider of the sewerage services, thus having a 100% market share in the provision of these services in Jersey. Whereas a monopoly position in a relevant market is a strong indication of a dominant position, constraints imposed by the credible threat of entry by potential competitors or by the bargaining strength of the undertaking's customers can imply that a sole provider is not in a dominant position. Therefore, market shares have to be interpreted in the light of relevant market conditions.

¹⁸ Although, as detailed in paragraph 100 below, we do think it is appropriate to make a distinction between tight and septic tanks for the purpose of calculating the appropriate penalty.

Barriers to Entry

59. The licences issued by TTS prevented the Companies from discharging the effluent from tight tanks and septic tanks at the treatment works at Bellozanne. TTS reserved the right to dispose of such waste at Bellozanne for itself (or, more specifically, to the division of the TTS known as the Septic Tanker Service).
60. Based on information provided to the JCRA, in the mid-1990s TTS issued a series of purported 'licences' to private undertakings to allow for the discharge of certain effluents at Bellozanne. These licences specifically excluded discharge of contents from septic/soakaway tanks and tight tanks. These licences stated that 'any failure to observe the conditions of the licence may result in its withdrawal.'
61. In 2005, TTS issued a series of 'new' licences, purportedly under the authority of the Drainage (Jersey) Law 2005. The letters accompanying these licences stated:

'With the introduction of the Drainage (Jersey) Law 2005, we are issuing new licences to discharge into the foul sewer system. Unless otherwise stated, the only authorised point of discharge is at Bellozanne sewage treatment works. Please find your licence attached. I would ask that you pay particular attention to the exclusion listed therein. Discharge of a load from the list of exclusions without written permission from a designated officer will be deemed as contravention of the Drainage (Jersey) Law 2005. Any person contravening the law can be found guilty of an offence and liable to imprisonment for a term not exceeding two years, or to a fine, or both.'

The exclusions under the new licences included the discharge of contents from septic tanks/soakaway systems and tight tanks. Similar to the 1990s licences, the 2005 licences stated that 'any failure to observe the conditions will be deemed in contravention of the Drainage (Jersey) Law 2005.'

62. As detailed below, as a result of information gained during this investigation, the JCRA has serious doubts as to the legal validity of both the 1990s and 2005 licences granted by TTS. Furthermore, their effect was to create an absolute barrier to entry for private parties wishing to engage in the service of emptying of tight tanks and septic tanks in Jersey. The fact that none of the Companies violated the terms of their respective licences by offering sewerage services attests to the barrier to entry created by these licences.
63. The JCRA concludes that the purported licences issued by TTS created an absolute barrier to entry into the market for sewerage services thereby reaffirming TTS's dominant position in this market during the period of the abuse.

Countervailing Buyer Power

64. A dominant position may also be diminished by countervailing downstream buyer power. Tight tanks and septic tanks require emptying. Customers for this service are primarily individual households spread over the Island, who are not in themselves in a position to invest the sums necessary to acquire the facilities needed to empty their own tanks. Even in the highly unlikely event that customers could invest in such assets, they most likely would have faced the same ‘licensing’ restrictions imposed by TTS on each Company. The JCRA therefore concludes that there is no countervailing power on the part of customers.

Conclusion

65. On the basis of the above, the JCRA concludes that for the period of the abuse, TTS was dominant in the supply of sewerage services in Jersey.

VI Abuse

Article 16(1)

66. Article 16(1) of the Law states that ‘any abuse by one or more undertakings of a dominant position in trade for any goods or services in Jersey or any part of Jersey’ is prohibited.

Article 16(2)

67. Article 16(2)(b) of the Law specifies that an abuse of a dominant position may in particular consist ‘limiting production, markets or technical development to the prejudice of consumers.’ This provision covers potentially exclusionary conduct by a dominant undertaking, which has the effect of excluding competitors by means other than competition on the merits.
68. The European Commission recently provided guidance on exclusionary abuses of dominance in the document entitled *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*. In this document, the Commission equates exclusionary conduct with anticompetitive foreclosure, which it defines as ‘a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.’¹⁹

¹⁹ Guidance on the Commission’s enforcement priorities in applying Article 82 O.J. [2009] C45/7, par 19.

69. In this case, the JCRA concludes that the issuance of the licences by TTS satisfies the Commission's definition of anticompetitive foreclosure. Specifically, the issuance of the licences represented actions by TTS which eliminated effective access by private competitors to the market of emptying of tight tanks and septic tanks in Jersey and disposal of the waste. The result was that TTS was in a position to profitably increase prices for this service, to the detriment of consumers.
70. The Commission's guidance states possible evidence of 'actual foreclosure' may be relevant to the assessment: 'if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anticompetitive foreclosure.'²⁰ Here, the fact that the licences issued by TTS maintained TTS's monopoly for the provision of sewerage services for the entire period of the abuse provides evidence of actual foreclosure in the relevant market.
71. The JCRA also has evidence that the licences had the effect, in practice, of foreclosing actual or potential competition from the relevant market. Several potential competitors have told the JCRA of their willingness to enter the relevant market, but for the licences issued by TTS. Indeed, one Company did have the equipment required for the emptying of septic and tight tanks. This equipment was relinquished as a result of the restrictive licence.
72. Finally, the Commission's guidance states that 'direct evidence of any exclusion strategy' may also be relevant. Direct evidence includes documents and other materials 'which contain direct evidence of a strategy to exclude competitors.'²¹
73. In this matter, the JCRA has found direct evidence of an exclusion strategy by TTS, in the form of both the old 1990s licences and the new 2005 licences. Both the old and new licences specifically prohibited the Companies from discharging effluent from septic tanks and tight tanks at Bellozanne. TTS admitted, in its response to the JCRA's Article 27 Request, that the 1990s licences 'were not issued under any legislation, merely a formal agreement between the contractor and the Department at the time.'
74. The 1990s licences appeared to have been replaced in July 2005 with licences issued by TTS purportedly under the Drainage (Jersey) Law 2005.²² The JCRA has analyzed this law, however, and concluded that it provides no legal basis for TTS to prohibit private operators from discharging effluent from septic tanks and tight tanks at the Bellozanne facility.

²⁰ *Ibid* par 20.

²¹ *Ibid* par 20.

²² Although one Company contacted by the JCRA claims to have never received a new licence in 2005, and was under the apparent impression that its 1990s licence remained in force throughout the entire period of the alleged abuse.

75. The JCRA therefore concludes that both the 1990s licences and the 2005 licences constitute direct evidence of TTS's exclusion strategy with respect to the emptying of tight tanks and septic tanks in Jersey.
76. TTS's abusive conduct resulted in consumer harm in Jersey. This consumer harm arises primarily from the lack of consumer choice in the provision of sewerage services that arose from TTS's exclusionary licenses. Consumers have therefore had no choice but to accept the services on the conditions offered by TTS and were not able to seek offers from the Companies. In addition to a prevention of consumer choice, during the course of the investigation the JCRA also was provided with evidence of consumer harm in the form of high prices for sewerage services:
- The original complaint the JCRA received in 2006 was based in part on allegedly excessive prices charged by TTS to a private consumer for the drainage of a tight tank.
 - Analogous concerns of TTS's high prices for the drainage of tight tanks was expressed by a consumer in an article appearing in the Jersey Evening Post.²³
 - Finally, the JCRA received a letter from a consumer in December 2008, which stated in part:

'[W]e too have to pay £200 a time to have the [tight] tank emptied (which is normally about every 4 weeks). When we spoke to one of the private drain people enquiring whether they could empty our tank we were told they could do it at half the price if only the States allowed.'

Objective Necessity and Efficiencies

77. The Commission's guidance states that the Commission will also examine claims put forward by a dominant undertaking that its conduct is justified. A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces efficiencies will outweigh any anticompetitive effects on consumers.

Objective Necessity

78. The Commission states that conduct by a dominant undertaking which would ordinarily be considered to be abusive may be objectively necessary if, for example, it is considered necessary for health and safety reasons related to the

²³ See Ramsey Cudlipp, 'Unfair' waste system is investigated, Jersey Evening Post (2 Dec. 2008).

nature of the product concerned. In this context, the Commission states that it 'will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.'²⁴ In this regard, TTS states that it is critical for the Island to have sufficient available capacity to meet the demands of a failed pumping station or collapsed sewer. While not a regular event, TTS states that it is probable on several occasions each year that the tanker service has to be diverted from its normal domestic emptying service to provide emergency services to the Island's drainage network. A failure to do so would make TTS potentially liable under the Water Pollution (Jersey) Law 2000.

79. The JCRA does not dispute TTS's views on the need to deal with drainage emergencies in Jersey. However, the monopolization of the entire sewerage services market in Jersey, as defined in this Decision, would appear to be a disproportionate response. Instead, TTS could have sought to reach commercial agreements with the Companies to make their staff and/or equipment available in an emergency. TTS confirmed (as did the Companies) that it initially did not contact the Companies to assess whether they would or would not be willing to make capacity available during emergencies. When TTS contacted the Companies in late 2008, it transpired that they would in principle agree to this. For these reasons, this justification cannot be accepted.

Efficiencies

80. The Commission states that a dominant undertaking may also justify otherwise abusive conduct by showing that it is efficient. This, in turn, may be demonstrated by evidence which shows that the conduct in question would satisfy the four criteria for an individual exemption set out in Article 81(3) of the EC Treaty. These criteria are reflected in Article 9(3) of the Law in Jersey, which provides that the JCRA may grant an exemption to an otherwise anticompetitive arrangement if it is satisfied that the arrangement in question:
- 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;
 - will allow consumers of those goods or services a fair share of any resulting benefit;
 - does not impose on the undertakings concerned terms that are not indispensable to attainment of these objectives; and

²⁴ Guidance on the Commission's Enforcement priorities in applying Article 82, OJ [2009] C45/7, par 27.

- does not afford the undertakings concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.
81. Here, as stated above, when the JCRA originally examined this conduct under Article 8 of the Law, it invited TTS to justify it pursuant to the criteria set out in Article 9(3) of the Law. TTS originally stated its intention to the JCRA to submit an exemption application under this Article. It never did.
82. Even if TTS had submitted an exemption application, the JCRA concludes that it is highly unlikely that the conduct in question would have satisfied the four exemption criteria. Specifically, the fourth criterion requires that the conduct in question ‘does not afford the undertakings concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.’ The conduct in question here had this very effect: eliminating competition for the provision of sewerage services in Jersey. Therefore, the JCRA concludes that TTS’s conduct is not justified on the basis of efficiency.

Other Possible Justifications

83. TTS stated that a reason for its conduct was to protect jobs at the insistence of the union. Nowhere, however, in either JCRA or EC competition law precedents, has the need to protect jobs provided an acceptable justification to otherwise abusive conduct by a dominant undertaking. The JCRA therefore declines to accept this justification in this matter.

VII Conclusion

Conclusion concerning Article 16(1) of the Law

84. Based on the reasoning set out above, the JCRA concludes that TTS abused its dominant position in the provision of sewerage services in Jersey. The period of this abuse starts on 1 November 2005, the day Article 16(1) of the Law came into force, and ends on 30 March 2009, the day which the Ministerial Decision formally revoked the restrictive licences.

Appropriate Remedy concerning the Infringement

85. The first decision to make is whether, given the finding of an abuse of dominance in violation of Article 16(1) of the Law, the JCRA should address this infringement through an infringement decision. The JCRA’s Guideline on Investigation Procedures states:

‘Given the potentially onerous requirement of a formal investigation or enforcement action, parties may wish to offer to the JCRA a commitment to take certain pre-emptive or remedial steps as an alternative to investigation

and/or enforcement. The JCRA is willing to consider, and in appropriate cases accept, such commitments.'

86. TTS has argued that this is an appropriate case for the JCRA to accept voluntary commitments in lieu of pursuing enforcement in the form of a formal infringement decision. Specifically, it argues that the 20 March 2009 Ministerial Decision revokes the licences that were problematic under the Law, and that new arrangements are being concluded with private parties to allow access to Bellozanne for the discharge of effluent from septic tanks and tight tanks. Thus, in effect, TTS argues that the problem has been resolved and a decision is not necessary.
87. The JCRA disagrees. TTS was first made aware by the JCRA of a concern regarding the licences in March 2007. TTS was offered ample opportunity by the JCRA to terminate the infringement. TTS has shown considerable reluctance to speedily and voluntarily do so. The JCRA therefore concludes that this is not an appropriate case to accept voluntary commitments in lieu of formal enforcement action.
88. Thus, the JCRA concludes that a decision under Part 6 of the Law is necessary in this matter.
89. Article 37(1) of the Law states that '[i]f the Authority decides that there has been a breach of Article 16(1) it may give the undertaking such directions as it considers appropriate to bring the breach to an end.' Such directions can include orders that require the undertaking to cease or modify the conduct in question. In addition to, or in lieu of, such direction, under Article 39 of the Law the JCRA may impose financial penalties for infringements of Article 8(1).
90. The JCRA concludes that no direction is necessary under Article 37(1) of the Law. Pursuant to the Ministerial Decision of 20 March 2009, the conduct which infringed Article 16(1) – the licences issued by TTS – have been terminated on 30 March 2009 and new agreements have been issued. These new agreements are themselves subject to the prohibitions contained on the Law.²⁵
91. Although the JCRA has concluded that a direction is not necessary, Article 37(4) of the Law states that 'the Authority may . . . in place of giving a direction make an order imposing a financial penalty on the undertaking.' The JCRA must now determine whether or not the abuse of dominance in this matter warrants the imposition of a financial penalty on TTS under Article 39 of the Law.

²⁵ Such as the prohibitions on a dominant undertaking charging excessive prices for access (Article 16(2)(a)); imposing discriminatory terms of access to access, which favour access to Bellozanne to TTS over private waste disposal companies (Article 16(2)(c)); or placing supplementary obligations on private parties for access to Bellozanne that, by their nature or commercial usage, have no connection to access.

Penalty analysis

92. Article 39 provides for financial penalties for infringements of the Law. Article 39(1) of the Law states that the JCRA must not impose a financial penalty for an abuse of dominance unless it is satisfied that the infringement was committed intentionally, negligently, or recklessly.
93. The JCRA raised its concerns with TTS regarding the licences in March 2007. In October 2007 TTS informed the JCRA that, based on legal advice it had received, it appeared that the licences required an exemption under Article 9 of the Law. By definition, this means that TTS must have recognized, by this time at least, that the licences infringed Article 8 of the Law.²⁶ TTS, however, did not file for an exemption.
94. In October 2008, after the JCRA contacted TTS to express its concerns under Article 16 of the Law based on new information received, TTS wrote to the JCRA and stated ‘that there are competition issues over the clause in the licence which restricts the private sector to certain types of work and understand that there is a need going forward to open to market to full competition.’ TTS requested until 1 January 2009 to address this problem. The JCRA agreed, and indeed extended this deadline to 30 January 2009. Again, however, similar to TTS’s earlier promise for an exemption application, the 30 January 2009 deadline for voluntary action to redress the abuse came and went, with no communication or explanation from TTS to the JCRA.
95. It was only after the JCRA contacted TTS again, that TTS finally procured the Ministerial Decision terminating the old licences.
96. Based on these circumstances, the JCRA concludes that TTS’s infringement of Article 16(1) was negligent, at least, under Article 39(1), and a financial penalty is therefore appropriate.
97. Article 39(2) states that the amount of the financial penalty must not exceed 10% of the turnover of the undertaking during the period of the breach of the prohibition up to a maximum of 3 years.
98. As stated above, the period of the breach here started on 1 November 2005 and ended on 30 March 2009. It therefore encompassed the entire calendar years of 2006, 2007, and 2008.
99. According to TTS, the total turnover for the tanker service during the calendar years of 2006, 2007, and 2008 was £757,000. According to the limitation contained in Article 39(2), this would provide a maximum penalty of approximately £75,000.

²⁶ Article 9(1) of the Law states that an exemption is only required if the arrangement in question is subject to the prohibition contained in Article 8(1).

100. However, in its prior fining decisions, the JCRA has considered both aggravating and mitigating factors in its calculation of financial penalties to impose under the Law.²⁷ Aggravating factors have been sufficiently described above in this Decision. The mitigating factors in this case are the following:
- That TTS voluntarily terminated the infringing conduct through the issuance of the Ministerial Decision on 30 March 2009, prior to the JCRA's issuance of the proposed Decision to TTS on 8 April 2009; and
 - As detailed above, although TTS's conduct excluded competition from providing sewerage services to both septic and tight tanks, the complaints the JCRA has received on allegedly high prices concern the latter and not the former.
101. Based on these mitigating circumstances, the JCRA concludes that it is proportionate to base the penalty calculation of the provision of sewerage services to tight tanks only (to reflect the second mitigating factor) and to reduce the applicable fine by 50% (to reflect the first mitigating factor). According to TTS, its turnover for the provision of sewerage services to tight tanks in Jersey during the years 2006, 2007, and 2008 was £302,800. Therefore, the JCRA concludes that the appropriate fine in this matter is **£15,000.00**. The JCRA is satisfied that this amount adequately addresses the breach of Article 16(1) in this matter and is within the limit placed by Article 39(2) concerning the period of infringement in this matter. This amount is specific to this matter and is not controlling on penalties or other remedies that the JCRA may impose on parties found in breach of Article 16(1) in the future.

VIII Decision and Financial Penalty Order

102. Based on the facts and circumstances set out above, the JCRA concludes that TTS has infringed Article 16(1) of the Law.
103. Based on this infringement the JCRA imposes a financial penalty under Article 39 of the Law of £15,000.00 payable by TTS to the JCRA by no later than 15 August 2009.
104. TTS may pay this fine by any combination of cheque or wire transfer. Wire transfers may be made to the JCRA's account upon instructions available from the JCRA.

²⁷ Decision M170/08 imposing financial penalties on TUI AG and Decision 152/08 imposing financial penalties on Autogrill S.p.A.

105. If payment is not made by 15 August 2009, interest will accrue daily thereafter on any unpaid amount at four percentage points above the published base rate of the Bank of England.

14 May 2009

By Order of the JCRA Board