

Abuse of a Dominant Position: Article 82, the JJ Burgess Case and Geographical Location

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The purpose of this brief note is not to repeat the outline of "abuse of a dominant position". This can be found in a number of sources, including the JCRA Guidelines, some of which are listed below. The purpose is rather to highlight some distinctions of law or likely emphasis between EU and UK law and regulation on the one hand and the aims of the JCRA and the particular issues likely to arise in Jersey on the other. These notes are presented in the form of a checklist, which may be of assistance in preliminary discussions with clients, but they do not repeat the contents of the Guidelines, with which they should be read.

Bibliography for the law relating to abuse of dominance

JCRA Guidelines No. 5 Abuse of Dominant Position

OFT Guidance OFT 402 (www.ofg.gov.uk, go to "news and publications", scroll down to "business leaflets")

Bellamy & Child, "European Competition Law of Competition", 5/e, 2001

Richard Whish, "Competition Law", 5/e, 2001

UK Competition Commission Report on Supermarkets 2000 (on retailing)

The major authorities are all cited in the cases below (available from www.europa.eu.int and www.catribunal.org.uk):

Case C-7/97 *Bronner v Mediaprint* [1998] ECR I-7791 (The Advocate-General's Opinion reviews the law on dominance and "essential facilities", in the context of refusal to supply)

Genzyme v OFT [2004] CAT 4, specially §§482-499 (reviews the law on dominance in the context of pricing)

Burgess v OFT [2005] CAT 25 (reviews the law on dominance in the context of refusal to supply: see note attached)

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Competition Law (Jersey) 2005, Article 16

- (1) Except as otherwise provided by this Part, 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 is prohibited.
- (2) An abuse of a dominant position may, in particular, consist in –
 - a. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - b. limiting production, markets or technical development to the prejudice of consumers;
 - c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

In considering abuse of dominance the usual relevant stages are:

1. Is the body concerned an “undertaking” as defined?
2. Market power
 - a) Product market definition
 - b) Geographic market definition
 - c) Dominance
 - d) Barriers to entry
3. Abuse
4. Objective justification
5. Damages or other relief

Some points in relation to each stage are now considered.

(1) Is the relevant party an “Undertaking”? Potential problems involving public bodies or bodies carrying out public functions

1. The definition of an “undertaking” is important in abuse of dominance cases in circumstances in which the public sector competes or trades with the private sector. In most jurisdictions, including to a substantial extent in the EU and the UK, the public sector is protected from the effects of competition law. This may result in public bodies engaging in anti-competitive practices to the potential detriment of those with whom it competes and those whom it supplies, or, more significantly, with those from whom it purchases supplies. This is only unlawful under the Jersey Act and its EC and UK equivalents if the public body is an “undertaking” (although EC law does have some other provisions that might apply in some circumstances).
2. Unlike in EC and UK law, an “undertaking” is defined in the Jersey law as “a person who is carrying on a business and includes an association, whether or not incorporated, that consists of or includes such persons” (Competition (Jersey) Law 2005, Article 1, see also Anti-competitive arrangements Guidelines §2). It includes any public body insofar only as it “is carrying on a business” (Article 4).
3. In European law the jurisprudence has developed in terms of what is probably a different definition, namely carrying on an “economic activity”. Two situations are exemplified by the fairly extensive EU case law. First, a private or substantially private organisation may undertake public obligations. Thus in some continental jurisdictions medical insurance and pension funds have to include an element of “solidarity” – that is benefits are not wholly actuarially determined, and include an element of support for those representing a high risk.
4. Secondly a public organisation may undertake an obviously commercial function (such as running an airline or airport, or ferry terminal), which would clearly be covered, but it may also undertake some less clearly commercial activities, where part of its express function is

purchasing, notably for the health service. In addition some public bodies, the obvious example being the Ministry of Defence, are engaged in major sales of equipment.

5. One particularly interesting aspect from the point of view of Jersey is the observation in the Guidelines that a dominant buyer may “extract lower prices”, since abuse of buying power is the most likely abuse to be alleged in respect of the public sector. Another is the express inclusion of the public sector (handled very differently in EU and UK law). The OFT, on the other hand, is very reluctant to take on the excessive use of buyer power (as exemplified by the observations of the new chief executive in respect of the buying power of supermarkets), on the grounds that low prices benefit consumers. (Naturally low profitability stifles innovation and investment; obviously a balance needs to be struck to ensure that consumers pay no more than a reasonable amount for “essential” items, but equally benefit from appropriate levels of innovation and investment in “essential” goods and services, quite apart from any considerations of commercial fair dealing).
6. There has been resistance in the UK – and elsewhere in the EU – to accepting that public bodies as purchasers are covered by the “abuse” provisions. There is currently litigation in the ECJ, and judgment awaited, in Case C-205/03 *FENIN v Commission* concerning the point. This can be compared with a decision of the UK CAT in *BetterCare v OFT* [2002] CAT 7 in which the CAT held, controversially, that buying was just as much an economic activity as selling. In respect of the jurisprudence regarding “solidarity” and economic activities the case law is helpfully reviewed in *BetterCare* §§71-103.
7. In distinguishing between “carrying on a business” (Jersey) and being engaged in an “economic activity” (EU), it may be that in the former types of cases, where there is an element of “solidarity”, the organisation will be “carrying on a business” though not engaged in an “economic activity” under the restrictive EU jurisprudence. On the other hand in the latter type of case, where a public body *may* be engaged in an “economic activity”, such as bulk purchasing, it may not be “carrying on a business”. These points are certainly arguable.

(2) Does the undertaking have market power?

8. As the literature discusses, market power is generally assessed according to the following steps. They in any event provide a useful, indeed essential, first step in gathering appropriate information from clients, even though the authorities suggest there may be some overlap or other methods for demonstrating market power. Clients are unused to seeing the business from the competition law viewpoint, and certainly unlikely to provide the relevant information to their advisers without it being requested:
 - a) Product market
 - b) Geographic market
 - c) Dominance
 - d) Barriers to entry

(a) Product market definition

9. In which product market are the relevant goods or services sold? The test is one of substitutability, and must be relevant to the facts. For example bananas may be substitutable by other fruit to a caterer, but not to a person operating a banana ripening facility.
10. Frequently the market itself supplies an appropriate definition, (which must be tested for relevance). The SSNIP test is more or less enthusiastically applied by regulators and the courts (whether the alleged dominant firm can sustain demand in the face of a small but significant increase in price). The definition is ultimately a matter of judgment by the court, and rarely easy.

(b) Geographic market?

11. In which geographic market are the goods or services sold? This is also a test of substitutability, and also susceptible to the SSNIP analysis in certain cases. There are some aspects that may be particularly relevant to Jersey.
- a) The area need not be exact. In *Aberdeen Journals v OFT* [2003] CAT 11, the OFT held that the relevant geographic area was "Aberdeen or the circulation area of the Herald and Post" (§34).
 - b) The area may be small, for example as in *Aberdeen Journals* above, or "Knebworth and Stevenage": *Burgess v OFT* [2005] CAT 25 §§174-175, or it may be "the world".
 - c) The area may in particular be small in respect of certain services, particularly those in which it is usual for the customer to attend at the supplier's premises (or *vice versa*): doctors, dentists, some types of retailers, funeral directors, building trades.
 - d) "Goods" are likely to be substitutable over a very large area, particularly where orders can be placed by the retailer or the consumer over the internet, or by phone or catalogue. If prices are "too high" the issue is whether it is the retailer who is determining the level of prices (likely to be a local market) or the supplier (likely to be a wider market). Similarly in respect of exclusionary practices it is important to establish the level (retailer, wholesaler etc.) at which the alleged abuse is taking place in order to determine the geographic market.
 - e) The absence of authorities referring to small areas is not remarkable. In European law the requirement of an effect on interstate trade has effectively excluded "small" markets from the jurisprudence, airports being a notable exception: Case T-128/98 *Aeroports de Paris v Commission* §§137-144 and, on appeal, Case C-82/01P §96 (interesting also for a typical conflation of the product and geographic markets). The introduction of a domestic equivalent in the UK by the Competition Act 1998 has had the effect of opening up the more local service industries in particular to competition law, although this is not particularly evident from the investigations made by the OFT, which looks for bigger effects from its limited resources.

(c) Dominance

12. The primary question relates to the market share of the alleged dominant firm in the market defined. Dominance is unlikely to be found if the firm has less than 40% of the market share. Dominance is likely to be unavoidable with a market share of 70% or more. Market shares need to be read with the market shares of competitors, and whether they are significant enough to provide meaningful competition. Current European Commission thinking is that substantial market shares may be consistent with sufficient competition to ensure a lack of market power.
13. Market shares are generally difficult for the client to estimate, and the use of market shares is only one way of assessing dominance in a market. It is often necessary, therefore, to consider other ways of considering dominance, at least initially, despite a preoccupation in the texts with market shares. There may be other indicators, such as an undertaking's behaviour in a market, enabling it to price or provide levels of service consistent only with it being able to behave independently of competition. Or there may be planning or geographic features of the market (such as a port or harbour) which protect it from competitors.
14. Sometimes an undertaking cannot operate *at all* without supply from the alleged dominant firm, for example access to a ferry terminal (an "essential facility"). It is important to avoid the confusion sometimes made in the best informed circles that dominance can only be established if the undertaking provides an "essential facility". An undertaking may still be dominant even if not supplying an "essential facility" (after all, the EC shorthand is 50% market share), but the obligations on the owner of an "essential facility" may be greater. The Advocate General's Opinion in *Bronner* reviews the law.

15. There has been some expression of disquiet within the Caribbean islands amongst members of Caricom (which has recently adopted a competition law) that small islands will inevitably have a number of dominant firms simply as a result of their size and economies of scale, and that competition law imposes too great a burden on them. This complaint has some force. Dominant firms have a "special responsibility" which prevents them from engaging in competition using methods normally used by all firms – in particular price discrimination and some forms of below cost pricing. The European Commission is shifting its emphasis towards enforcement away from some kinds of abuses to exclusionary abuses. It is clear that the JCRA is aware of this problem but (1) it will be to some extent restricted by the European jurisprudence and (2) will have no control over private actions.
16. There have been no dominance cases in the UK in respect of retailing (except *Burgess* – funeral directors). Although 10% of consumer expenditure in the UK is spent on groceries and non-alcoholic drink the OFT is not generally interested in "small" cases. The *Burgess* case only reached the Decision stage on a technicality – the OFT had not wanted to pursue it. Thus insofar as Jersey law will be used to address the issue of high prices at the retailing level, there will be little experience to rely on (although the Competition Commission Report on Supermarkets in 2000 may be useful).

(d) Barriers to entry

17. If entry and exit to the market is easy then a dominant firm is unlikely to be able to exploit its large share of the market and thus will not have market power. Barriers tend generally to reinforce a finding of dominance, but there may be cases where barriers are low. Planning restrictions may contribute to barriers to entry, particularly in retailing.
18. If infringement cases are not regularly pursued, and if there are exclusionary abuses, then the lack of enforcement will itself provide a barrier to entry.

(3) Abuses

19. Under European (and UK) law the dominant firm has a "special responsibility" so that it is restrained in the way it can compete with newcomers or existing rivals. The extent of this responsibility is unclear (for example can the incumbent telecommunications company price discriminate by offering lower prices to new customers where that is the practice adopted by competitors?). There is no closed list of abuses, and a list of possible abuses is set out in the Guidelines. Some points of special interest in the context of Jersey are noted:

(a) Excessive prices

20. "Excessive prices" are understood to be a concern in Jersey. High prices have rarely been the subject of investigation. The European Commission has rejected investigation of excessive prices as "too difficult". In the UK the OFT and CAT considered pricing issues in *Genzyme v OFT* [2004] CAT 4, and also in a number of telecommunications cases, but none has a direct bearing on the appropriate calculations to be made in respect of prices alleged to be "too high", absent other issues that assist in establishing abuse. The JCRA Guidelines recognise this difficulty.
21. Of course unlawful agreements – particularly cartels – lead to higher prices, and in those cases a remedy can be found without needing to examine the level of prices themselves. Frequently high prices have been maintained through unlawful agreements controlling resale prices between manufacturer and/or distributor and/or retailer. Monopoly pricing is often associated with discriminatory pricing, which can also be attacked without investigating the level of prices themselves.
22. However, high prices are the natural and anti-competitive result of dominance, and are not usually or necessarily associated with unlawful agreements or price discrimination (which dominant firms tend obviously to avoid, as being transparently unlawful). If high prices are

themselves to be attacked, it is likely that Jersey will have to be pioneers and consider prices and profitability by a variety of means of comparison, as well as consideration of appropriate risks and returns. Of course there is considerable experience of calculating costs in the regulation of telecommunications, particularly in the context of calculating access charges. No one would claim that that experience suggests that it is easy, or that the results stand the test of time.

(b) predatory pricing

23. Predatory pricing is defined in terms of levels of prices at which it may be inferred the undertaking's motive is to exclude competitors. It is extremely difficult to make the necessary cost assessments in practice. It is curious that since the European Commission has refused to consider "excessive" pricing on the grounds that it is too difficult to establish as a matter of fact, it is nevertheless assumed in the literature that similar kinds of cost calculations may be made in respect of allegations of predatory pricing. As the Guidelines note, exclusionary behaviour is an abuse, quite apart from predatory pricing and it is therefore entirely possible to establish such an abuse without necessarily satisfying the tests for predatory pricing. This is something on which there is no relevant authority, and it is interesting to note that in the UK the OFT appears to regard pricing policies by supermarkets as abusive only if below cost, as defined in respect of predatory pricing, without separate consideration of whether targeted prices are designed to exclude competitors and potentially unlawful whatever their level.
24. It is interesting to note that the issue of predatory pricing and the "special responsibility" of the dominant firm was addressed by the Privy Council in *Carter Holt Harvey Building Products Group Ltd v The Commerce Commission* (14th July 2004), in which EC law was distinguished on that basis from New Zealand law. That makes that authority unreliable in respect of an interpretation of any EC-based law and it is likely that the decision in that case would have been different if assessed against the "special responsibility" of the dominant firm (this case is noted and distinguished because of the particular relevance of the Privy Council to Jersey).

Objective justification and remedies

25. No further observations are made in respect of objective justification (discussed in by the CAT in *Burgess*), save that the European Commission is considering finding a mechanism for introducing an "efficiency" defence which would add to "objective justification". Jersey, exceptionally, provides for an exemption on grounds of public policy, on application to the Economic Development Committee (rather than JCRA): Article 12.
26. Remedies include damages and other relief, including the possibility of punitive or exemplary damages: Article 51. However costs cannot be awarded against JCRA unless it "had no reasonable grounds for bringing the proceedings": Article 52.

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