

## **Chester City Council & Chester City Transport v Arriva plc, Arriva Cymru Limited & Arriva North-West Limited**

**By Fiona Banks<sup>1</sup>**  
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The High Court has just considered the application of Chapter II of the Competition Act 1998 in the context of the bus industry and, in particular, in relation to allegations of 'predatory pricing' and 'flooding the market'. In dismissing the action, Rimer J held that the claimants had failed to show that Arriva was dominant in the relevant market.

### **Background**

The litigation followed the announcement in August 2006 of Chester City Council's decision to sell its wholly owned subsidiary, Chester City Transport Limited ('CCT'), a bus company providing services in and around the City of Chester. Arriva wished to tender but was not prepared to do so on the terms stipulated by the Council. It did however offer to buy the assets and undertaking of CCT.

Under the Transport Act 1985, a bus operator must register local bus services and provide a minimum of 56 days notice before running them. On 10 September 2006, Arriva registered duplicate services on all of CCT's routes. These were subsequently de-registered with the exception of CCT's three most profitable routes.

The Council and CCT sought declarations, injunctions and damages, claiming that Arriva had breached section 18 of the Competition Act 1998: it was alleged that Arriva had abused a dominant position in the relevant bus market by threatening predatory behaviour directed at driving CCT out of business. Specifically, it was alleged that Arriva had engaged in predatory pricing by failing to cover its costs and had 'flooded' the market with overcapacity.

### **Dominance**

#### *The product market*

With regard to the relevant product market, Rimer J found that the Council had failed to prove that it was comprised exclusively of

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local bus services and he felt satisfied that there was an element of substitution between buses and other modes of transport. The Council's expert had failed to hypothesise a small but significant non-transitory increase in price for bus services of 10-15% to determine what alternative modes of transport (if any) became a substitute.

#### *The geographic market*

Both experts were agreed that the applicable geographic market in this situation was dictated by supply-side rather than demand-side substitutions. There was also broad agreement that in practice the market identification exercise requires the identification of bus depots within a "dead run" driving time (or "isochrone") of the town centre from which it would be economic to provide bus services into and within the town centre. Rimer J accepted the opinion of Arriva's expert, that when identifying a geographic market by reference to supply-side considerations it is a mistake, which had been made by the Council's expert, to include all geographic areas into which suppliers can substitute, regardless of whether this is towards or away from the focal market: only supply-side substitution *towards* the focal market is relevant to capture competitive constraints on that market.

The definition of the geographic market, adopted by the Council's expert, by reference to administrative districts rather than drive time isochrones, was held to be wrong in principle. Rimer J accepted that Arriva's expert's use of an isochrone for the determination of the geographic market is a well established technique and that a sensitivity analysis served as an appropriate check.

#### *The relevant metric*

In addition to the identification of the relevant market, there was an issue as to the right metric by which to measure the respective market shares of the bus operators within the relevant geographic market. Attempts by the Council to use "bus hours" as the best proxy guide to an operator's turnover and thus to its market share, were rejected as wrong in principle. No reliable link had been shown between bus hours and turnover.

Rimer J accepted the opinion of Arriva's expert that such a metric is not appropriate in any event for measuring market power in a case where the market is being determined on a supply-side basis since it does not measure what operators are capable of doing, only what they are *actually* doing. The more appropriate measure, put forward by Arriva, was bus numbers.

#### *Contestability*

The various sensitivity analyses conducted by the expert of Arriva failed to produce a market share for Arriva in excess of 31% which is insufficient to give rise to any presumption of dominance. In any event, Rimer J stated that even if this had not been the case, he would not have concluded that Arriva was dominant. Rimer J noted that in the case of local bus services, the low entry barriers enabled any operator to enter and led to a highly contestable market. As a result, Arriva would not be able to enter the market and operate to an appreciable extent independently of its competitors.

In view of the absence of any dominant position, no question of abuse arose.

***Paul Harris appeared on behalf of Arriva as Junior Counsel.***

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