

Predatory Pricing

Response from the Jersey Competition Regulatory Authority (“JCRA”) 17 October 2007

This questionnaire seeks information on ICN members’ analysis and treatment of predatory pricing claims. Predatory pricing typically involves a practice by which a firm temporarily charges low prices in order to limit or eliminate competition, and thereby allows the firm to raise prices subsequently. This questionnaire concerns only treatment of single product discounts; rather than pricing practices involving multiple products (including bundling, tying, and related prices). Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

Analysis (elements and evidence)

1. Please provide the main relevant texts (in English if available) of your jurisdiction’s laws and guidelines on predatory pricing.

Article 16(1) of the Competition (Jersey) Law 2005 (the “Law”) prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in Jersey or any part thereof

Article 16(2)(a) of the Law states that an abuse of a dominant position may, in particular, consist in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.

Under Article 60 of the Law, the Jersey Competition Regulatory Authority (“JCRA”) and Jersey’s Royal Court must both attempt to ensure that, so far as possible, questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under EC law in relation to competition within the European Union. Relevant sources 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 EC competition law by member state courts and competition authorities. Recourse to such materials, however, only informs the JCRA’s analysis, and Article 60 does not prevent the JCRA from departing from EU precedents if it finds that circumstances specific to markets in Jersey warrant such a departure.

According to the JCRA’s Guideline on Abuse of a Dominant Position (the “Guideline”), “predatory pricing is a practice where prices are set so low as to eliminate one or more competitors and threaten the competitive process itself.”¹ In addition to eliminating competitors, predatory pricing can be used as a strategy to discipline competitors and make them compete less aggressively. This Guideline goes on to explain the circumstances when a

¹ JCRA, Guideline on Abuse of a Dominant Position at pg. 11.

dominant undertaking's prices can be considered predatory under the Law, and the concepts contained therein will be referred to throughout this response.

2. Please list your jurisdiction's criteria for an abuse of dominance/monopolization based on predatory pricing.

As explained in the Guideline, to find an abuse of dominance the JCRA conducts a two stage test:

- (1) *determine whether the undertaking is dominant in a relevant market and, if so*
- (2) *determine whether it is abusing the dominant position. The prohibition relates only to the abuse of a dominant position, not the mere holding of such a position.*

The Guideline further states that the JCRA can find an undertaking's behaviour an abuse "only after a detailed examination of the market concerned and the effects of the undertaking's conduct."²

3. Please explain the circumstances under which a firm's pricing is, or may be, considered "predatory" in your jurisdiction, by responding to the following questions:

a. As part of your analysis, does the price have to be below one or more measures of cost? **Yes/No**

i. If yes, please identify which of the following measures is/are used, as applicable:

Cost benchmark/measure	Used?		Comment
	Yes	No	
<u>Below marginal cost</u> (the cost of producing one more unit of output)			<i>Per relevant EC precedent, pricing below MC shows that the undertaking is incurring losses that could have been avoided, however, in most cases data on MC is not available</i>
<u>Below average variable cost</u> (cost that varies with output)	X		<i>Presumption under EC Law (see below)</i>
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all output)	X		<i>As per 2005 EC discussion document</i>
<u>Below average long run</u>	X		<i>In certain markets (see</i>

² JCRA, Guideline on Abuse of a Dominant Position at pg. 1.

<u>incremental cost</u> (average variable costs and product-specific fixed costs)			<i>below</i>
<u>Below average total cost</u> (cost including variable, fixed and sunk – non-recoverable – costs)	X		<i>With evidence of intent (see below)</i>
<u>Other measure of cost</u> (Please identify)			

- b. For each cost measure employed, please provide the definition of the measure used in your jurisdiction.

For AVC, standard definition, i.e., costs that vary with the amount of output produced

- c. Is the same cost measure applied in all cases? ~~Yes~~/No

- i. If different cost measures can be applied, for example on the basis of industry, please explain and provide examples, as available.

EC precedent indicates that pricing below average Long-Run Incremental Cost (“LRIC”) may be a more appropriate benchmark for industries characterized by high fixed costs and low variable costs. LRIC may therefore be the more appropriate cost benchmark in Jersey for sectors such as telecommunications or postal, although this has not been tested judicially.

- ii. If more than one cost measure can be applied in any individual case, please explain why and whether, in practice, this has raised issues.

- d. If price must be shown to be below cost, for which of the dominant firm’s sales must this be shown?

- i. Is the only relevant comparison between the cost measure and the dominant firm’s average price for all of its sales in the relevant market? Yes/No

1. If no, over which of the dominant firm’s sales can cost be compared?

While these questions have not been addressed judicially in Jersey, given that a dominant undertaking’s conduct would need to have an actual or potential detrimental effect in the market for an abuse to be found, it would appear unlikely that short-term losses or one-off sales could be considered to be predatory.

- e. Could a firm's price above average total cost ever be found to be predatory? Yes/No

Issue not yet addressed under the Law in Jersey

- i. If so, please explain the instances in which this might occur, and identify whether this has been the basis for actual enforcement.
- f. If prices do not have to be below a cost benchmark to be considered predatory, please explain the circumstances under which the firm's prices are considered predatory.
4. To be unlawful, must the alleged predatory pricing occur in the market in which the firm holds a dominant position/substantial market power? ~~Yes/No~~
- a. If no, please explain.

EC precedent suggests that a dominant undertaking can employ predatory prices in adjacent markets to protect or strengthen its position in the dominated market. Moreover, in certain circumstances, it may be considered abusive for an undertaking with a legal or protected monopoly in one market to use profits from that market to subsidize predatory prices in another, competitive market. Such a situation, however, may be more appropriately handled through sector-specific regulatory laws (that currently exist in Jersey in the postal and telecom sectors) than through the pure application of competition law.

5. Apart from the cost criteria referenced in question 3 above, must other objective criteria, such as the duration or continuity of the pricing behavior, be demonstrated for a finding of liability under a predatory pricing theory? ~~Yes/No~~

Likely, see above in response to Question 3(d)(i)

- a. If so, please explain. For example, if the behavior must be sustained over a certain time period, why, and for what period?
6. On what type of evidence do you rely to prove predatory pricing? Please explain, including examples as appropriate.
- a. Are cost data used? ~~Yes/No~~
- i. If so, are cost data from the firm used? ~~Yes/No~~
- b. Are there circumstances when cost data of other firms can be used? Yes/No.
- i. If so, please specify the circumstances.

Issue not yet addressed under the Law in Jersey

- c. What other data or information is used, if any? Please provide examples as relevant.
7. Does pricing below a particular cost benchmark create a presumption of predatory pricing? **Yes/No**

Under EC law, pricing below average variable cost is presumed predatory. However, as noted above in response to question 3(c), the use of AVC may not be appropriate in all markets.

- a. If yes, is this presumption rebuttable or irrebuttable? Please explain.

Rebuttable

- b. If the presumption is rebuttable, what must be shown to rebut the presumption?

That the pricing in question cannot otherwise have an actual or potential detrimental effect in the market in question, or is based on an objective justification

8. Is there a “safe harbor” from a finding of predatory pricing for pricing above a particular cost benchmark? **Yes/No**

- a. If yes, please explain, including the terms of the safe harbor.

9. Is recoupment (obtaining additional profits that more than offset profit sacrifices stemming from predatory pricing) required for a finding of liability under predatory pricing rules in your jurisdiction? **Yes/No**

Although, as detailed below, evidence that the dominant undertaking would be unable to recoup its losses incurred during the period of predation may be material in determining if the conduct in question has, or is likely to have, an actual or potential detrimental effect in the market in question.

If so:

- a. Is this assessment conducted separately from the analysis of the firm’s market power and the predation? **Yes/No**
- b. What factors are employed in assessing recoupment in your jurisdiction?
- c. Is there a specific recoupment calculation or amount to be shown? **Yes/No**

i. If so, what is this?

- d. Is there a relevant time period for recoupment? **Yes/No**

i. If so, what is it?

- e. Is it possible for recoupment to occur in a market different than the one in which the predatory pricing took place? Yes/No
 - i. If so, please explain and provide relevant examples.
- f. What degree of likelihood of recoupment is required (e.g., possibility or probability)?
 - i. Please provide examples of the recoupment standard of likelihood employed as part of your recoupment assessment.

10. Is the firm's intent relevant in predatory pricing cases? **Yes/No**

- a. If so, please describe the relevant type(s) of intent, and the evidence used to show the required intent, providing available examples.

As stated in the Guideline: "Where prices fall between average variable costs and average total costs, the JCRA would need to consider evidence on the dominant undertaking's intentions before establishing whether its behaviour is predatory. Pricing in this range for short-run periods will often be a rational strategy for an undertaking and represent legitimate competition. In that case, it would not be an abuse. If, however, prices were set at this level as part of a strategy to eliminate a competitor, this conduct would be considered an abuse."³ The intention to eliminate competition must be established on the basis of sound and consistent evidence.

- b. If objective conditions for predatory pricing -- for example, pricing exceeding a certain cost benchmark or recoupment -- are not demonstrated, does intent matter? **Yes/No**

- i. If so, please explain.

Evidence of intent is not needed for prices shown to be below average variable costs

11. In addition to proving below-cost pricing, must effects, such as market foreclosure or consumer harm, be demonstrated to establish liability? **Yes/No**

- a. If yes, please explain the elements assessed (e.g., exit or delayed entry of competitors, price increases, prevention or delay of price decreases) and the types of evidence required to do so.

As with all alleged abuses of dominance, the conduct in question must be shown to have an actual or likely detrimental effect on consumer welfare, for example, in terms of higher prices, reduced choice, or less innovation. It would appear unlikely that this situation could arise in situations where the dominant undertaking would not have the ability to recoup its losses incurred from following a predatory pricing strategy

³ JCRA, Guideline on Abuse of a Dominant Position at pg. 11.

Justifications and Defenses

12. What type of justifications or defenses, if any, are permitted for predatory pricing, *e.g.*, an efficiency, meeting competition or objective necessity defense? Please explain and provide examples, as relevant.

Not yet addressed under the Law in Jersey; however, as stated above, for conduct to be considered abusive, an actual or likely detrimental effect in the market is necessary. Also, pricing based on an objective justification also would be unlikely considered abusive.

- a. What is the standard of proof applicable to these defenses? Who bears the burden of proof? What evidence is required to demonstrate that these defenses or justifications are met?

Enforcement

13. Please provide the following information for the past ten years (as information is available):

- a. The number of predatory pricing cases your agency reviewed (investigated beyond a preliminary phase).

1

- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.

0

- c. The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction's predatory pricing rules (*i.e.*, "clearance decisions").

0

- d. Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision.

0

14. Does your jurisdiction allow private cases challenging predatory pricing?
Yes/No.

- a. Please provide a short description of representative examples, as available.

Article 51 of the Law allows civil actions for alleged Law violations to be brought by aggrieved persons in Royal Court. To date, no such actions have been filed.

15. Is predatory pricing a civil and/or a criminal violation of your jurisdiction's antitrust laws?

Civil only

- a. If both, what are the differences in the criteria applied to these categories?
- b. On what basis does the agency choose to bring a criminal or civil case?
16. As relevant, please provide a short English summary of the leading predatory pricing decisions/cases in your jurisdiction, including information on the method used to calculate costs, to the extent applicable, and, if possible, a link to the English translation, an executive summary or press release of the case.

As indicated above, thus far the JCRA has investigated one alleged abuse of dominance case. The matter was closed without enforcement action due to administrative priority.

17. Please provide any additional comments that you would like to make on your experience with predatory pricing rules and their enforcement in your jurisdiction, including, as appropriate but not limited to:
- a. Whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess predatory pricing, explaining these developments as relevant.
- b. Whether there are significant policy and/or practical considerations that may lead to greater or lesser agency enforcement against predatory pricing pursuant to unilateral conduct rules in your jurisdiction, *e.g.*, concern with the risks of false positives/false negatives, the existence of related laws such as a general ban on below-cost pricing, limited evidence of consumer harm, and/or difficulties in obtaining reliable cost data (please provide explanation as relevant).

Exclusive Dealing/Single Branding

*Response from the Jersey Competition Regulatory Authority (“JCRA”)
17 October 2007*

This questionnaire seeks information on the analysis and treatment of exclusive dealing (referred to as single branding in some jurisdictions) by ICN member competition authorities. For purposes of this questionnaire, we refer to “exclusive dealing” and “single branding” as conduct that requires or induces customers or suppliers to deal solely or predominantly with that firm. Nevertheless, this questionnaire does not cover tying, bundling, loyalty discounts, rebates or related practices, which your responses should therefore not address. Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

Legal Basis and Specific Elements

1. Please provide the main relevant texts (in English if available) of your jurisdiction’s laws and guidelines on exclusive dealing/single branding.

Article 16(1) of the Competition (Jersey) Law 2005 (the “Law”) prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in Jersey or any part thereof

Article 16(2)(b) of the Law states that an abuse of a dominant position may, in particular, consist in limiting production, markets or technical development to the prejudice of consumers.

Under Article 60 of the Law, the Jersey Competition Regulatory Authority (“JCRA”) and Jersey’s Royal Court must both attempt to ensure that, so far as possible, questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under EC law in relation to competition within the European Union. In the vertical context, particularly relevant guidance may be had from sources such as the European Commission’s Guidelines on Vertical Restraints, O.J. C 291/1 (13 Oct. 2000), the Commission’s document entitled Competition policy in Europe: The competition rules for supply and distribution agreements (2002), and the Guideline on Vertical Agreements published in December 2004 by the UK’s Office of Fair Trading. Recourse to such materials, however, only informs the JCRA’s analysis, and Article 60 does not prevent the JCRA from departing from EU precedents if it finds that circumstances specific to markets in Jersey warrant such a departure.

Concerning vertical restraints in general, the JCRA recently has published a draft guideline on vertical arrangements.⁴ As the issue of abuse of dominance

⁴ See JCRA, Draft Guideline on Vertical Arrangements (1 Oct. 2007).

based on single branding/exclusive dealing has not yet arisen under the Law in Jersey, the JCRA's responses to this questionnaire are based largely on the guidance provided in this draft guideline. This guidance, however, still should be considered tentative, because the draft guideline currently is subject to public consultation, which closes on 31 Oct. 2007.

2. Please list your jurisdiction's criteria for an abuse of dominance/monopolization based on exclusive dealing.

As explained in the JCRA's Guideline on Abuse of Dominance, to find an abuse of dominance the JCRA conducts a two stage test:

- (1) *determine whether the undertaking is dominant in a relevant market and, if so*
- (2) *determine whether it is abusing the dominant position. The prohibition relates only to the abuse of a dominant position, not the mere holding of such a position.*

This Guideline further states that the JCRA can find an undertaking's behaviour an abuse "only after a detailed examination of the market concerned and the effects of the undertaking's conduct."⁵

Exclusive Purchasing and Supply Arrangements

3. How does your jurisdiction define single branding or exclusive dealing? For example: Must a firm require that all purchases come from it or that all sales go to it? Can something less than "all purchases" or "all sales" be considered single branding or exclusive dealing? Please specify (providing actual percentages, as relevant).

The JCRA's draft vertical restraints guideline states that "an exclusive agreement includes agreements where a customer agrees to purchase all, or a substantial part (generally, 80% or more) of its total requirements of a given good or service from a single seller"⁶

4. Is the duration of the arrangement relevant to your assessment? Yes/No

As a matter of general guidance, the JCRA's draft vertical restraints guideline states that the longer the duration of an exclusive agreement, the potentially more problematic, and vice-versa

- a. If so, please explain how and why, providing examples.

5. Must the firm's use of such arrangements cover a substantial portion of the market? Yes/No

⁵ JCRA, Guideline on Abuse of a Dominant Position at pg. 1.

⁶ JCRA, Draft Guideline on Vertical Arrangements at pg. 9 n.4 (1 Oct. 2007).

- a. If so, how do you interpret this requirement, including any relevant percentage thresholds for the purchase or supply covered, and the evidence needed to determine whether this is met?

The JCRA's draft vertical restraints guideline indicates that this largely will depend on the position of the supplier. Specifically, it states that "[t]he effect on competition arising from the duration of an exclusive supply agreement may be affected by the market power of the supplier. For suppliers holding a position of dominance in a given market, even a modestly tied market share, or exclusive contracts of limited duration, may hinder competition."⁷

6. Does it matter whether the arrangement was requested by the non-dominant customer or supplier? **Yes/No**
 - a. If so, how and why?
7. Might otherwise legal exclusive dealing/single branding arrangements be deemed abusive if they contain other provisions, *e.g.*, an "English Clause" (requiring *e.g.*, the customer to report any better offers to the supplier, and prohibiting the customer from accepting the offer unless the supplier does not match it), rights of first refusal (right of, *e.g.*, the supplier to enter into an agreement with the customer according to specified terms, before the customer is entitled to enter into an agreement with a third party)? **Yes/No**

Potentially, per relevant EC precedents, although the matter has not yet been specifically addressed under the Law in Jersey

- a. If so, please explain and provide examples.

Presumptions and Safe Harbors

8. Are there circumstances under which a firm's use of single branding or exclusive dealing arrangements is presumed illegal? **Yes/No**
 - a. If so, please identify the circumstances.
 - b. Is the presumption rebuttable? **Yes/No**
 - i. If so, what must be shown to rebut the presumption?
9. Is there a "safe harbor" from a finding of liability under your single branding/exclusive dealing provisions? **Yes/No**
 - a. If so, please explain, including its terms.

The JCRA's draft vertical restraints guideline states that "exclusive agreements entered into by suppliers with a market share of 25% or less

⁷ JCRA, Draft Guideline on Vertical Arrangements at pg. 10 (1 Oct. 2007).

usually will not be seen as appreciably hindering competition, so long as they do not contain hard-core restrictions such as vertical price fixing.”⁸

In a decision concerning a vertical agreement assessed under the Jersey-law equivalent of Article 81(1), the JCRA recognized that, even if a vertical agreement may not itself raise competitive concerns when viewed in isolation, concerns may arise based on the prevalent use of such agreements among the suppliers in the relevant market, which could combine to create cumulative foreclosure effects that potentially restrict the ability of suppliers to enter or expand in the market.⁹

Effects

10. Must a market foreclosure effect be shown for an abuse? **Yes/No**

As with all alleged abuses of dominance, the conduct in question must be shown to have an actual or likely detrimental effect on consumer welfare, for example, in terms of higher prices, reduced choice, or less innovation. Specifically concerning vertical agreements, the JCRA’s draft vertical restraints guideline states:

“Whether these potential [vertical] restrictions amount to real restrictions for the purpose of the Law, however, depends on whether they restrict competition in practice to an appreciable extent. If, for example, from an economic perspective, the size of the Jersey market is such that only a single distributor is viable in any event, then any contractual exclusivity will have no practical effect of restricting competition which might otherwise have taken place, and thus the exclusivity will not be caught by the Law.”¹⁰

- a. How is market foreclosure defined in your jurisdiction?
- b. Which factors are taken into account to assess a market foreclosure effect (level of dominance, percentage of market demand/purchases or supply covered by the arrangement, existence of alternative sources of supply, entry barriers, scale economies, possibility and practicability of switching, others)? Please specify the factors considered, including, as relevant, the percentage of demand/supply covered.
- c. What evidence is used to demonstrate these effects and must the effects be actual, likely or potential effects?

11. Must other effects, e.g., on consumer welfare, be shown for an abuse? **Yes/No**

Although in virtually all cases these considerations would form part of the market foreclosure effect, discussed in response to the previous question.

⁸ JCRA, Draft Guideline on Vertical Arrangements at pg. 10 (1 Oct. 2007).

⁹ See, JCRA Decision C105/06 Concerning the Motor Fuels Supply Agreement between Esso Petroleum Company, Ltd and Roberts Garages Ltd Notified under Article 9 of the Competition (Jersey) Law 2005, at para. 26 (25 June 2007).

¹⁰ JCRA, Draft Guideline on Vertical Arrangements at pg. 2 (1 Oct. 2007).

- a. If yes, please specify what must be demonstrated and the evidence required.

Justifications/Defenses

12. What justifications/defenses are available to the dominant firm, *e.g.*, an efficiency, meeting competition or objective necessity defense? Please specify.

Not yet addressed under the Law in Jersey; however, as stated above, for conduct to be considered abusive, an actual or likely detrimental effect in the market is necessary. Also, conduct based on an objective justification also would be unlikely considered abusive.

- a. If there is an efficiencies defense, what efficiencies are considered (*e.g.*, relationship-specific investments, facilitating innovation, reduced transaction costs)? How are claims of improved service quality or reputation assessed?
- b. Are efficiencies balanced against competitive harm to determine whether liability attaches, or do they provide a complete defense without consideration of harm?
- c. Is there a meeting competition defense? Yes/ No.
 - i. If yes, please explain.
- d. What is the standard of proof applicable to these defenses? What type of evidence is required to demonstrate that the defenses are met?

Enforcement

13. Please provide the following information for the past ten years (as information is available):

- a. The number of exclusive dealing/single branding cases your agency reviewed (investigated beyond a preliminary phase).

1 (although matter was based on local law equivalent of Article 81 and did not involve a dominant undertaking)¹¹

- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.

1 (same matter as referenced above)

¹¹ JCRA Decision C105/06 Concerning the Motor Fuels Supply Agreement between Esso Petroleum Company, Ltd and Roberts Garages Ltd Notified under Article 9 of the Competition (Jersey) Law 2005, at para. 26 (25 June 2007).

- c. The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction's exclusive dealing/single branding rules (*i.e.*, "clearance decisions").

1 (the exclusive agreement was subject to the Law, but an exemption under the local law equivalent of Article 81(3) was granted, subject to compliance by the parties with specified conditions)

- d. Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision.

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14. Does your jurisdiction allow private cases challenging exclusive dealing/single? **Yes/No**

Article 51 of the Law allows civil actions for alleged Law violations to be brought by aggrieved persons in Royal Court. To date, no such actions have been filed.

- a. Please provide a short description of representative examples, as available.

15. As relevant, please provide a short English summary of the leading exclusive dealing/single branding cases in your jurisdiction and, if possible, a link to the English translation of the decision, an executive summary or the press release of the case.

As stated above, thus far the JCRA has taken one decision concerning exclusive dealing/single branding, in JCRA Decision C105/06 Concerning the Motor Fuels Supply Agreement between Esso Petroleum Company, Ltd and Roberts Garages Ltd Notified under Article 9 of the Competition (Jersey) Law 2005 (25 June 2007). This matter, however, was based on local law equivalent of Article 81 and did not involve a dominant undertaking. A copy of the decision can be found at:

<http://www.jcra.je/pdf/070703%20Esso%20Decision.pdf>

16. Please provide any additional comments that you would like to make on your experience with exclusive dealing/single branding rules and their enforcement in your jurisdiction, including, as appropriate but not limited to whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess exclusive dealing/single branding, explaining these developments as relevant.