

STATES OF JERSEY

Economic Affairs Retail Strategy Review Sub-Panel

THURSDAY, 22nd FEBRUARY 2007

Panel:

Deputy G.P. Southern of St. Helier (Chairman)

Deputy J.A. Martin of St. Helier

Deputy K.C. Lewis of St. Saviour

Witnesses:

Mr. B. Brown (Executive Director, Jersey Competition Regulatory Authority)

Mr. C. Webb (Legal Adviser, Jersey Competition Regulatory Authority)

Deputy G.P. Southern of St. Helier (Chairman):

Thank you for coming. Welcome to this hearing of the Economic Affairs Scrutiny Panel Retail Strategy Review public hearing to hear evidence about the state of the retail market and, in particular today, perspectives on the competition aspects of the retail market. In front of you is a notice which tells you the conditions under which you are appearing. We have met before so I think you are probably aware of that. If I can just remind you, the microphones are for the recording, you will not hear anything coming through the speakers. So please, if the public are to hear, do speak up. Perhaps I can kick you off by asking you to give an overview of how you see the retail market in Jersey and particularly with respect to competition issues, in particular, in food retail.

Mr. B. Brown:

Sure. If I could just explain perhaps - just to put the thing in context - where our role fits in because, as you know, we have a number of roles in competition and regulation. We enforce the Competition (Jersey) Law on the one hand but we are also a sectoral regulator on the other. At the moment we regulate the telecom sector and the postal services sector. We have a third function, which is providing advice to the Economic Development Minister upon his request. Where he makes a request for us to give advice, the JCRA (Jersey Competition Regulatory Authority) considers the request, and if we decide to accept it, we go ahead and deliver the advice. That advice can be on any matter according to the law which relates to competition, regulation, utilities, monopolies and so on. So that could cover, potentially, quite a broad remit. I mention that in particular because you may be aware that in 2005 the Minister requested us to do a report on the food sector; in fact, at that time it was the Economic

Development Committee. I think the concern which justified the request was a perception that food prices in particular were higher in Jersey than in the UK. The request was made to us to report on what we thought the contributing causes to the situation may be. Chuck Webb, who you have met, was the person who led on that particular report. Would it be useful if perhaps he gave a short summary of the findings?

Deputy G.P. Southern:

That would be very helpful, I think.

Mr. C. Webb:

Okay, thank you. Just for the record, my name is Charles Webb, the Legal Adviser at the JCRA. The report which we published October 2005 essentially started from the Statistics Units' Retail Price Indexes, looking at comparisons between food prices in the UK versus Jersey, which found that there was a differential in certain products. We did our own survey, which is detailed in our report, which basically looked at certain goods. We did comparisons between Jersey, the Isle of Man and the UK. Why we chose the Isle of Man was simply because there was data publicly available from the Isle of Man. We tried to see if there was data available from Guernsey but it just was not as available as we saw from the Isle of Man. What we found comparison wise was that, in general, prices in Jersey were the highest of the 3 jurisdictions for various products, with Isle of Man being in the middle, UK being the lowest. Now I say "in general" because really it did vary. In some products Jersey was lower than Isle of Man; some products Jersey was lower than both jurisdictions; some products Isle of Man was cheaper than the UK - I would be happy if the Panel would wish to talk specifics - but that was the general price comparison part of the report. Now, the second part of the report was quite different, it looked at given these price comparisons, what can be reasons for them? The report basically named 5 potential reasons that could contribute to the price differentials. The first was higher costs of doing business in Jersey as opposed to the UK; higher costs in terms of labour, in terms of transport, property, et cetera. The report mentioned labour was probably the most significant cost differential between at least Jersey and the UK, keeping Isle of Man to the side for a second. The second contributing factor was basically small production scale. We commented, for example, that Jersey Dairy at Five Oaks is infinitesimally small compared to a major dairy in the UK, the same with C.I. Traders Bakery here in the Channel Islands. Simple economics teaches that if you have a bigger production factory you can drive down costs simply based on scale. The third related was the small scale of Jersey retailers compared to the UK. If you look at what we consider big retailers in the Channel Islands context, C.I. Traders, is, in a UK context, extremely small. So, what does that mean? Well, if you look at past learning from the Competition Commission back in 2000, the Competition Commission concluded that one advantage a larger retailer could have is in purchasing power with its suppliers and be able to purchase, again, higher scale, lower cost, purchase more in bulk. Purchasing power that the big guys enjoy, the smaller guys just do not have that same kind of power with respect to their suppliers, even if they collectively form

purchasing units, which we understand C.I. Traders is involved in here in the Channel Islands. The last 2 are - I will take the last one before the fourth one. The last one we mentioned was perhaps consumer purchasing habits. There was some evidence given to us that maybe tastes in Jersey differ from the UK. People here earn more money; they are closer to France; we may have more of a taste for nicer cheeses, et cetera. We mentioned that and we understood at the time the Stats Office may be exploring that in more detail but we did not analyse that in great detail, frankly. The last one, which is probably more our remit, is high levels of concentration. As a matter of fact, we recognise that in a lot of areas in Jersey's supply chain you have high levels of concentration in that you do not have a lot of market players. Retailing, for instance, we have 2 supermarkets. We have 1 dairy producer. I believe we have 2 major bread producers ... I could go on. Now, as I think the 3 of you know, simply having a monopoly or an oligopoly, even of itself is not a Competition Law violation and the high prices that can result from that do not necessarily infringe Competition Law, it depends on the facts. But I think learnings for the jurisdictions tend to support the fact that if you have fewer players in the market that in itself could have an inflationary effect on price.

Deputy G.P. Southern:

It was put to us yesterday that, for example, when the number of supermarket operators were reduced from 3 to 2, since that event competition has been working to keep prices down because food prices have risen at or below the level of the UK in the 2-year period following the sale of Safeway. It was put to us that competition can be healthy, and is healthy, even with only 2 major food retailers.

Mr. B. Brown:

Well, I think Chuck can add to this if he has got other information he wants to contribute. But I think there were a couple of effects which happened after the C.I. Traders-Safeway merger where you had a situation where apparently a substantial number of customers were choosing to go with a particular supermarket, not purely on the basis of price but on other factors, as we understand it. That may have had a kind of odd temporary effect of increasing competition in the short term, at least that was the suggestion that was made at the time. I do not know what has been said to the Panel about that, whether that effect is still there or not. But certainly, as Chuck said, generally speaking you would not expect prices to go down when 3 players become 2, in the longer term.

Mr. C. Webb:

If I could just add, Deputy Southern, we were observing, as everyone else, the fall out from C.I. Traders' acquisition of Safeway and that kind of high-profile consumer alienation, one would say, of Safeway and then Safeway's campaign to win back customers. From a competition perspective, I think all those were generally not bad things, they are not good things, you know, people competing hard for customers. But going back to the report, point 1 is we have not been called on to do a systematic price check about what has happened with prices since then. Point 2, going back to the report, we list

increased concentration as just one of many factors that could contribute to higher prices but not necessarily the predominant factor. This is one important part that I neglected to add previously. We listed the 5 factors as contributing to higher prices but we did not attempt to do an empirical study of what is a bigger factor – such as it one-third this, two-thirds that. If you could do a study like that, you probably can. It would be a very detailed piece of work and probably at the end it would just be guesswork, frankly.

Deputy G.P. Southern:

So, a deal of experience, in terms of pricing in the food sector in particular. Did you examine other sectors?

Mr. C. Webb:

No, this was just our remit under the 6(4) request from the EDC (Economic Development Committee).

Mr. B. Brown:

There are other cases in the food sector that we have been involved in. Most of our Competition Law investigations have to be treated confidentially so we cannot reveal the details of ongoing cases, for example, but this particular one was in the public domain. We were concerned that Jersey Dairy's wholesale pricing structure to retailers was such that it may have an impact on resale prices to customers and may have an inflationary effect on the retail price which customers were paying. We took this up with the Dairy and following our discussions the Dairy agreed to revise its wholesale pricing structure. Our understanding is that there has been evidence of retailers discounting milk since that intervention on our part. I think you are aware we are also involved in the discussions regarding the future structure of the milk industry, although that is a separate matter from retail, effectively. Obviously you are aware of our activities in the telecoms market where we have a lot of significant activity on the retail level. We have recently become the regulator of the postal services industry so we expect that we will be involved in retail prices for postal services.

Deputy G.P. Southern:

You mentioned a number of factors there but included in those was high concentration, so a relatively small number of firms. Do you have an opinion on whether another operator - let us say a major supermarket chain - would have a market effect and what impact might that have on the retail trade in Jersey?

Mr. B. Brown:

Well, my understanding, and we were not asked to comment on the *Experian Report*, although we have read it when it was produced. We understand that their finding was that there was a demand from consumers for additional retail capacity, a demand which was not being met. So one would logically

conclude from that that if there is a demand that is not being met and a new supplier comes on board to fill that demand then that should have the effect of boosting economic growth. On the competition side, again, for the reasons that Chuck mentioned, one would expect that 3 players rather than 2 players would have a positive effect on competition, both on price and in terms of, perhaps, service, quality and innovation. The more competition you have the more innovative competitors have to be to get a slice of the market. In telecoms, again, this is why the JCRA at least has welcomed the plan by Jersey Airtel to come into the market because they developed the market from 2 to 3 and I think one would expect positive effects for consumers to flow from that. I think the same principles would apply in other aspects of the retail sector.

Deputy J.A. Martin of St. Helier:

Sorry, can I just come in there? There are 2 questions really. First, you mentioned a lot of things there, not a lot of things in the report but a lot of things the JCRA regulate or keep an eye on. We in Jersey, I think, maybe expect too much of you, that is my opinion, because it is right across the sector, your comments on that. Secondly, you say that the *Experian Report* said that consumers wanted more retail space. In dealing with you with telecoms, would you confirm your job is just to make sure there is competition in the market, the knock-on effects to other small retailers? Because also the report said that they could probably - with a 50,000 or 100,000 square foot supermarket - take half of the retail shopping in Jersey. Now, is that competition or is that knocking out a lot of farm shops, local small retailers, not just giving competition to -- as it has been put to us? But what I want from you, that is not your job really, there is always someone else looking at the social economic impact to everybody else.

Mr. B. Brown:

Okay. Well, you have asked 2 questions there and if I could just take them in turn. I think you commented that perhaps the Jersey consumers or the Jersey public expect too much. It is true that we have a large workload and we have to prioritise. We also have to manage expectations as to what our powers can achieve because under the Competition Law, for example - I am not sure if there is anybody from the press here - I remember a headline which appeared in the run up to 1st May 2005 which was the date when the Competition Law or the first part of the Competition Law took effect, the part on Mergers and Acquisitions, and the headline said something like "Prices In Jersey To Fall From 1st May". So that gives an illustration. We were under no illusion that expectations were high. In fact, the Competition Law essentially allows us to intervene in respect of prices, for example, only when there is evidence of anti-competitive behaviour. Unless we have a reasonable cause to suspect that, for example, competitors are getting together and fixing pricing, that there is a cartel going on or there is some other anti-competitive arrangement or abuse of dominance going on, we do not have any power to intervene. It may be that if we do find evidence of anti-competitive practices and we do intervene, the result of that intervention may be to reduce prices. I mentioned the situation with the Dairy on wholesale prices which seemed to have that effect. So, it is really what I call ex-post intervention. You

know, you intervene after there is a problem that has been identified.

Deputy J.A. Martin:

Could you just expand on that? That is what I was going to ask seeing you are a one-size-fits-all in everything across the Island and you said you have to prioritise. Do you find you are reactive more than proactive? Have you got enough people out there in the event of some people coming to you all the time and telling you there is a problem or should you be identifying the problem before or looking in --

Mr. B. Brown:

Well, I will carry on and explain a little bit more about our role under the Competition Law and then I will compare that to our role in telecoms and postal because it is a bit different. Being an economic regulator is somewhat more of a proactive process than what the Competition Law allows us to be under Competition Law. So, under the Competition Law, as I say, we can only intervene, essentially, if there is evidence of anti-competitive conduct already, and that can come through a complaint from a consumer, from a competitor who is affected by anti-competitive behaviour, or it can come through what we read in the press. To give you an example of that, although this was to do with the merger so it was not, strictly speaking, anti-competitive behaviour in the normal sense, but we mentioned the C.I. Traders-Safeway, we felt that we needed to look at whether the deal had been completed before or after the Competition Law came into effect. That was something that we picked up through the press. The news broke that this deal was happening and we thought it was right for us to assess whether it was completed before the law came into effect or whether it had not been fully completed until after it came into effect, in which case, the JCRA would have jurisdiction to look at it. So, that is an example of how we can pick up things through the press. In terms of workloads, yes, even under the Competition Law we have a small team but what we do is we prioritise our resources and I think it is fair to say we have dealt with every complaint that has been lodged with us that appears to be valid. In some cases you may, after a few inquiries, informal inquiries with the complainant, find that there is no Competition Law issue. There may be a consumer protection issue or there may be a breach of contract issue but there may not be an issue of anti-competitive behaviour. In which case, we have to tell the complainant we cannot help and perhaps suggest to them another avenue of redress, the Consumer Council, the Citizens Advice Bureau or whatever. In other cases we do find a case to investigate and we start an investigation. As I say, we are duty bound not to reveal that publicly, although when we make a final decision or reach a negotiated settlement our practice is to make a press announcement at that point. In the telecoms it is slightly confusing because although we are a telecoms regulator and a postal services regulator, our Competition Law powers also extend to these sectors and there have been a number of cases in telecoms where we have intervened under the Competition Law and we have reached a negotiated settlement with the company concerned, whereby they have said "Okay". We say to them: "In our view there is a Competition Law problem here. We have got 2 choices; we can either proceed to a final decision, in which case the issue of penalties might come up if there is a breach, or we can

essentially negotiate a settlement whereby you agree to do X, Y and Z and then we do not need to take the case any further.” That has happened in a significant number of cases that we have been involved in, both in telecoms and in other sectors. So, that gives you an idea of the process under the Competition Law. Under the sector-specific laws, as we call them, on telecoms and postal, our remit is not just to look at questions of anti-competitive behaviour, abuse of dominant position, we have more proactive powers. At the moment, for example, it is public knowledge that we are looking at the issue of whether price control should be imposed on Jersey Post. That involves looking at how efficient Jersey Post is as an operator, whether its profit margins are excessive or not, all that sort of thing. We have got a public consultation paper on that subject out at the moment. In fact, the deadline for responses just expired last Friday. So, we will be very active on that issue in the next few months. That follows a similar process which we went through with Jersey Telecom a few years ago. So, that is the kind of proactive role we have in the sector-specific areas. Our role is not simply to police anti-competitive behaviour; it is to actively promote competition. So we have more extensive powers in those areas than we do in other sectors generally, for example, food retailing. We do not have sector-specific powers so we cannot regulate the prices which C.I. Traders or the Co-op charge to customers. We simply do not have that power.

Deputy J.A. Martin:

My second question was basically, it is not your job at the JCRA, if retailers are saying they want more retail space or another operator, to look at the other effects it will have on local retailers already here?

Mr. B. Brown:

Yes, I was going to come to your second question which was, I think, the knock-on effects of perhaps a new supermarket coming in; what effect that would have on small businesses, small retailers. That raises a very interesting and, in some ways, complex issue of economic analysis which I think the UK Competition authorities have wrestled with in the past, which is do supermarkets compete, and if so to what extent, with small food shops like the Spar and other small grocery shops? Are they serving 2 different markets, effectively, or is it one and the same market? If it is one and the same market then, yes, the fact that big supermarkets are competing with small ones could have potentially an adverse effect on small retailers if they are unable to achieve the same efficiency. If, on the other hand, they are really serving 2 separate needs, the weekly convenience shop as opposed to the sort of one-off impulse purchases so that there are 2 separate markets, then the fact that you have got large supermarket chains competing with each other will not necessarily have an impact on the small business. That is not an area that we have had any reason yet to look at in Jersey. It may have been something that we might have had to look at if we had had the jurisdiction to look at the C.I. Traders Safeway acquisition. I think the Competition Commission or the OFT (Office of Fair Trading) has done some analysis there and, I think, are finding in general that there are 2 separate markets. It becomes more complicated when you have the Tesco's, and so on, opening up these small, what they call express stores, or words to that effect, that

may have more of an impact.

Deputy J.A. Martin:

Sorry, just one more then carry on. You use the words “economic analysis” of the whole area, the whole industry and I did not realise that would be part of your job. But if it is part of your job, if we want to have a third operator come in and it would be a multinational big chain from the UK or France, would you think that that should be carried out before we even consider bringing in a third operator to see what is the market in Jersey? We are an island, we cannot attract people from 50 miles away to come to a massive -- well it will not be massive but it might be big in Jersey terms. We have only got the people on the Island, so would you advocate for this work to be carried out before we go and say we need 50,000 square feet?

Mr. B. Brown:

I distinguish between the 3 roles we have which are Competition Authority, sectoral regulator for Telecoms and Post and this advisory role. So, it is possible that this may be an area that if the States or the Economic Development Minister thought this was an area that the JCRA could usefully do a study on or that some other external consultant could do a study on, then that would be a route that is open to him. The other point I should make, perhaps, relates to how we are funded. We have an annual budget, as I think you know, which is granted by the States on Competition Law issues. That does not cover advisory work. So anything we do outside the realms of Competition Law or sectoral regulation in Telecoms and Post has to be specifically funded and requested from States’ resources. We cannot just go out and do things because we would not be funded to do that. We have to run ourselves efficiently and with a full workload. It is not a foregone conclusion that we would even be able to meet a request that was put to us; it would depend on our workload and resources at the time. We may take the view that either we cannot do it but recommend someone else who could do it if the States needed a recommendation, or we might feel that we could take the lead in producing it but subcontract part of it as we did in the recent advice on the proposed Jersey Telecom sale.

Deputy J.A. Martin:

My question is if before a UK or continental multinational comes in to Jersey, would you say that it needed to be done, whoever did it? I mean, at the end of the day, it will be down to if somebody comes in. In 2 or 3 years time it will be JCRA are not doing their job, right? If the JCRA have recommended that this, this and this be carried out before we let somebody in, you have done part of the job. But that goes back to my original question, is that part of your job?

Mr. B. Brown:

I am not entirely sure I have understood the question, I have to say. But I think the answer is “No”, unless we are specifically requested to look at what you are suggesting is the future economic effects of

a large retailer coming in.

Deputy J.A. Martin:

Yes.

Mr. B. Brown:

Unless we are specifically asked to do that then we would not be doing it. No, that would not be our job. Whether it is something that needs to be looked at is really a matter for the States. It is not for the JCRA to decide that.

Deputy J.A. Martin:

That is clear. That is fine, thank you.

Deputy K.C. Lewis of St. Saviour:

Further to Judy's question, you touched upon Tesco and Tesco Express. I do not want to seem we are giving away any confidences if we mention the fact the C.I. Traders is up for sale. If, for instance, say, Tesco, or a very, very large operator in the UK, were to buy C.I. Traders, what effect do you think that would have on the balance in Jersey?

Mr. B. Brown:

Well, can I say, first of all, that I think it may well - I will ask Chuck to add to this - be notifiable to us under the Competition Law, depending on whether it fulfils the financial thresholds laid down in the law whereby those transactions have to be notified to us for prior approval. If that was the case, then we would have to look at whether the proposed acquisition would substantially lessen competition in Jersey. That would really be the issue. You can imagine that the answer to that may well be significantly different if it is an overseas operator coming into Jersey for the first time and acquiring a local company than it would be if it was C.I. Traders and the Co-op deciding to merge. I think Chuck might be able to run through a few of the issues in the check list that we would have to go through.

Mr. C. Webb:

Yes. If I can, I would refer to a decision we just handed down in early January which is kind of similar, Deputy Lewis, to the hypothetical you raised in that it was that was the sale of Norman's, the acquisition of Norman's by a French company, Compagnie de Saint-Gobain, sorry, my accent. This was similar to the hypo you raised. In this case, a French company involved in the same kind of things that Norman's does, basically building supplies, I understand, do-it-yourself retail, et cetera, coming in and acquiring a local company. Under the Competition Law, as you know, this merger, as would an acquisition of C.I. Traders, was reportable to the JCRA based on the extent of Norman's activities in Jersey. The kind of issues we looked at in this merger was is there any market consolidation here? Is Saint-Gobain already

in the market? Is this 3 players going to 2, et cetera? In that case we decided there was a limited presence by Saint-Gobain in the market, it was very small in Jersey and there really was no appreciable market consolidation here. In the hypo you raise, a Tesco coming into acquire C.I. Traders, if it was the current circumstances, again, that is no market consolidation, it is basically not a 3 to 2 it is a 3 to 3, essentially. You replace one owner with another. Now, another thing we looked at in Norman's, which also would be relevant to your question, was well if there is no market consolidation at the horizontal level, is there a danger of a vertical level of anti-competitive effects? This was a real question with Norman's because Saint-Gobain, while not in the market, is a retailer here in Jersey. We understood that they otherwise supplied other retailers in Jersey with some of the goods that they sell. In a vertical context it is a little more complicated. If you look at post merger, would they have the incentive to discriminate or deny access to an essential facility or products that are sold downstream? In that case, we took a very hard look at it and we determined, at the end of the day, the answer was "No" and we cleared that deal unconditionally. But another area it would pay to look at is if Tesco is not already in the market on its own self, does it otherwise supply local retailers and is the acquisition going to change that? I think a very important qualification with merger analysis is the following: that when you are looking at a merger you are asking yourself what are the competitive effects of the merger? Like, what are the competitive effects of, say, a Tesco buying a C.I. Traders? Under the law we can only stop a merger if we are satisfied that the merger is going to result in a substantial lessening of competition. Now, that is limiting in that, let us say, there is a chance or a possibility that after an acquisition of C.I. Traders they may engage in predatory pricing somewhere down the road. Well, if there is no evidence of that at the time of the merger it is hard to call that an effect of the merger as opposed to a subsequent anti-competitive effect. We may, at a future date, have a time to look at the subsequent further-on market actions that the person may do in the market. But those actions would not be necessarily grounds to block a merger because they do not arise from the merger.

Deputy K.C. Lewis:

What do you think the effect would be if, for instance, a Tesco or ASDA or a major player went for a new build so it would be an additional competitor?

Mr. B. Brown:

Well, correct me if I am wrong, that would not raise an issue under the Competition Law at all if there is no acquisition. The entry of a new player in the market would not be a Competition Law issue. There would be planning issues perhaps or Regulation of Undertakings issues but I cannot see any Competition Law issues in that.

Deputy K.C. Lewis:

Even if it was of such a size that it was likely to be dominant or predominant in the market?

Mr. B. Brown:

Yes.

Deputy K.C. Lewis:

So, the suggestion, from Experian of 50,000, even 100,000 - but let us stick with 50,000 - square feet, which is a very large supermarket by Jersey standards and might account for one-third of the market or more, would that be an issue?

Mr. B. Brown:

It would not be an issue under the Competition Law. It may be a factor which the States might feel it wants to take into account under its legislative powers, but the mere acquisition of dominance under Competition Law is not a breach; it is how you use that position of dominance. So, if the new player became the dominant force within the market and acted in an anti-competitive way then that could amount to an abuse of dominant position which we could then tackle under the Competition Law. One would assume it would be taking its legal obligations seriously, would be aware of the Competition Law and the obligations that that imposes.

Deputy K.C. Lewis:

If it were the case, for example, if a new operator came in and started what you took to be predatory pricing, whose job would it be to prove that that pricing policy you are using is predatory? How does that happen?

Mr. B. Brown:

That would be ours. If it was indeed a dominant company and it was engaging in predatory pricing then we would have powers under the Competition Law to deal with that.

Deputy G.P. Southern:

Right. You made a remark there about in Mergers and Acquisitions you were looking at reduction of competition and whether vertical or horizontal. You were talking about whether you could impose some conditions. Conditions are within your bag of tricks, as it were?

Mr. B. Brown:

Well, I think we can give a practical, real-life example of that because of one case that we were involved in. We can give other examples but a typical case may be that if there is a competition problem that does not affect the complete horizontal overlap, but there may be an overlap in part of the business which substantially lessens competition in one sector, but not across all the activities of the merged company, the one remedy that might be open is to say to the parties that we will let this acquisition go ahead but on condition that you sell off this part of the business so that a dominant position is not

created through the merger. The practical example where we imposed the condition was the Ferryspeed case and, Chuck, you can go into the details of that.

Mr. C. Webb:

Yes. The Ferryspeed merger, that was a merger of Ferryspeed and Channel Express, we concluded as a result of our in-depth market analysis that the creation of this merger would lead, potentially, to anti-competitive effects in the market, defined as basically the shipment of refrigerated or temperature controlled goods to the Island (primarily food) because it was basically a market consolidation of 3 going to 2. In that case that gave us grounds under the law to just say no to the entire merger and if we say no to the entire merger, under Jersey Law that merger cannot proceed. Now, as an alternative to saying no to the merger the law also allows us to clear a merger with conditions. To step back, we interpret the law in accordance with how competition law is interpreted in the European Union. The European Union basically says conditions need to be sufficient to satisfy the authority that the otherwise anti-competitive effect that we foresee from this merger is going to be either significantly reduced or eliminated because of the conditions. In this particular case the parties offered to not otherwise acquire a very key asset, the warehouse that Ferryspeed would have required as a result of the merger, this being the Channel Express warehouse on the harbour. We did an analysis and concluded that that would reduce our fears enough to the extent that we allowed the merger to proceed on the basis that that warehouse was not acquired and sold off; in this case, rented off to a third party because the actual freehold is with Jersey Harbours. In that case the warehouse in question -- the new lessee came in, it is a company called DFDS Transport. So, the merger was allowed to proceed but without Ferryspeed acquiring the warehouse as they initially intended. That, in kind of Competition Law parlance, is called a "structural remedy" where you, as Bill suggested, allow the merger to proceed but you tell someone to basically chop off part of the company that it was looking to acquire. There are also, in broad terms "behavioural remedies". Now, this is something we have not imposed yet. This is something where you say you let the merger proceed as originally contemplated by the parties, but you impose remedies for your conditions to govern their behaviour post merger. You often see this come up - referring before when I said in a vertical context - if there is, for example, a situation where if a supplier is acquiring a retailer downstream and there is a threat that they will close off competing retailers from the supply or the service, that you will mandate that they supply the goods or service on reasonable terms. It would also be the same with access to an essential facility. The States state clearly, under the Jersey Competition Law, that the JCRA has the power to impose both in this merger and if neither remedy satisfies our concerns on the anti-competitive effect, we also have the power to block a merger.

Mr. B. Brown:

Could I just add 2 things to what Chuck said by way of clarification of 2 points that were made earlier? First of all, he referred to the fact that we looked at European case law to assist us in applying the Competition Law. It has been suggested in some circles that that is a case of applying large-scale

solutions to small-scale problems. Frankly, that criticism is unjustified for 2 reasons. One is that we do not have a discretion in the matter of the law. The Competition Law specifically says that in matters of Competition Law - I am not referring here to telecoms regulation or postal services regulation, but matters of competition law - we have to interpret the law as consistently as possible with European competition law. That is in Article 60 of the Competition Law, and that is there, I think, for the benefit of both businesses and for the competition authority, because it gives you effectively a body of guidance on what anti-competitive behaviour is. If you did not have that provision, then we would have potentially endless arguments about what is anti-competitive and what is not. It gives you a benchmark to go on. The second point I wanted to make was just to avoid any confusion. The Chairman mentioned the situation where a new entrant comes in and immediately is the dominant player. Can we stop that? The answer is no, but we can stop the creation of dominance, and I said in response to that that under competition law having a dominant position in itself is not a breach of the Competition Law. It is the abuse of a dominant position which is a breach. So that is, if you like, anti-competitive behaviour. Mergers are a somewhat different situation, because there we have the power to look at the future effects of a potential merger, and if we believe that the effect is to create dominance to such an extent that competition is going to be impaired, then we can stop it. So, if you like, organic entry or organic growth to become dominant is not an issue under competition law, but acquiring dominance through a merger is something the Competition Law addresses. That is standard practice across the globe.

Deputy G.P. Southern:

I think I am clear on that. Can I take you back to the *Experian Report*. Have you heard of the criticisms that have been made by several who were involved of the *Experian Report*? Do you share any of those criticisms, or have you any reservations about its central finding that the retail market could use another 50,000 square feet of food space?

Mr. W. Brown:

I do not think we can express a view on that. We are well aware that through the press some criticisms have been made but, as I said earlier, we have no remit to comment on the *Experian* conclusions and no reason to question the findings that they made, if only because we did not have access to the factual information on which they based their findings. I mentioned that we can only look at something like that when we are funded and requested specifically to look at it.

Deputy G.P. Southern:

But presumably were you to be asked to look at - and we opened this question before - the retail sector again, your starting point might be: "Well, we've read the *Experian Report*. This is how we understand the market." You would have to have taken a look at that and look at the criticisms, I would have thought, and say: "Are we starting from the right place?"

Mr. W. Brown:

Yes. Depending on how the terms of reference were set and always assuming that we decided to accept the request, that we had sufficient resources to look at it, then if it was a case of looking at the retail sector to assess the potential impact of a new supplier - this is purely hypothetical - then clearly we would want to make sure we were fully informed to give the advice, and the *Experian Report* and any follow up to that would be part of that research.

Mr. C. Webb:

If I can just add one quick thing. As one of the primary authors of our own food study, I can tell you from experience when we were examining the Jersey market for our own food study we read with interest both the *Experian Report* and the report produced by Professor Sparks on behalf of the Chamber of Commerce. As Bill said, we do not have a position on who has the right view of the market, nor have we been called on to give that position, but I can tell you from experience that looking at both reports provided us with valuable insight into conditions in the Jersey market, and we cite both reports as evidence in our own food report. But we have not reached a conclusion over who is ultimately right and who is ultimately wrong.

Deputy G.P. Southern:

You referred to economic growth before, and again it is in a point that has been put through in the last 24 hours that economic growth in a sector is one thing, but in, for example, the food sector, economic growth in food can only come if we increase population, effectively, because there is only so much we can eat. Where do you get that growth from? Surely it is the same money circulating in a different way. Would you agree that economic growth as applied to retail is a bit ...

Mr. W. Brown:

I would agree that the scope for economic growth may well vary from sector to sector. If you are saying that capacity is unmet, then the next question is, well, capacity for what? There may be a demand for a shop selling X, Y or Z but not for A, B and C. It could well vary from product to product.

Deputy G.P. Southern:

The fifth point on your factors, was it the quality, the taste factor, the specialist French cheeses that expand the market by a couple of per cent?

Mr. W. Brown:

I do not want to diverge too much from the core issue here but we are aware, obviously, of the recent proposals on Sunday trading laws, to look at Sunday trading laws. Now that may also be something that has an impact on growth. It raises some of the same issues. To what extent would opening shops on Sunday satisfy a demand that is not being met at the moment? It is the same sort of issue.

Deputy G.P. Southern:

Indeed. How much can we spend, and would be just be spending the same money over 7 days rather than 6? Yes, precisely.

Deputy K.C. Lewis:

Are there any trends happening in the UK and Europe that you would envisage would affect Jersey?

Mr. W. Brown:

Well, from a distance we are aware of the Competition Commission's inquiry into supermarkets, which covers a number of issues. I think they are looking at, for example, the policy of buying up land sites and what effect that is having on the competitive dynamics of the industry. I cannot see that that would really be an issue that would concern Jersey, given the limited land sites in any case, but also the environmental policy. I think that is more of a bigger country issue than a Jersey issue. They are looking at whether supermarkets are putting a price squeeze on suppliers. Well, again, the economics of the market may be somewhat different in Jersey. The buying patterns of the large Jersey supermarkets, the extent to which they are importing products as opposed to buying from local suppliers, I think, is different than in the UK. So we do try to keep abreast of what is going on in other countries and look at what the potential implications or the lessons may be for Jersey. But it is always on the basis that it is just generally keeping ourselves on top of things, as opposed to specifically going into it in depth and researching it, for the reasons I mentioned earlier.

Deputy K.C. Lewis:

Is anything happening on the European front we need worry about?

Mr. W. Brown:

On supermarkets, I personally am not aware immediately of anything. I would need to take a few minutes to brief myself back in the office, but are you aware of anything significant?

Mr. C. Webb:

Nothing in the supermarket sector on a European level. There has been consolidation internationally over the past several years by the likes of Ahold, et cetera, big European retailers. I know that those mergers have been looked at very closely in my home jurisdiction, for instance, the United States, and also in Europe. But generally those are looked at as to what are the effects on the local markets. Those are mergers that come on a case-by-case basis.

Mr. W. Brown:

It is difficult to come to any conclusion that there is a prevalence of retail mergers at the moment as

opposed to other types of merger. I think M and A (merger and acquisition) activity on the whole is going up.

Mr. C. Webb:

Yes, it is. But I do not think there is a prevalence of retail mergers right now, as opposed to the M and A activity you saw back in the early 2000s, where it was more a horizontal overlap, retailers buying retailers. I think a lot of the M and A activity right now is from investment firms, the Babcocks and Browns of the world making strategic investments, or what you call financial investments, and they do not really involve a horizontal overlap.

Deputy J.A. Martin:

Just going back to Geoff's question, if the States in their wisdom did agree or decide that we did need another supermarket, Geoff asked about a dominant player coming in from the UK. Would the JCRA have any problem if it was one of the existing 2 large supermarkets here who wanted to build and have the extra 50,000 square feet?

Mr. W. Brown:

You are talking here about new entry as opposed to acquisition, just starting from scratch?

Deputy J.A. Martin:

No, not new entry. We are told from the report that we can have a 50,000 square foot supermarket. The thinking would be then it would be somebody from outside. My question is would the JCRA have any problem with C.I. Traders or the Co-op going for that extra retail space in Jersey, to operate themselves? Would it skew the market under any of your laws?

Mr. W. Brown:

I see. So you are talking about one of the existing players in Jersey taking over the extra retail?

Deputy J.A. Martin:

Yes, them expanding instead of bringing somebody else in.

Mr. W. Brown:

Again, I think it comes back to is it an acquisition of a pre-existing business. I am not sure, Chuck will correct me if I am wrong, but I do not think we have jurisdiction under the Competition Law to look at the acquisition of land as such. We can only look at the acquisition of a business. So if C.I. Traders were the ones who wanted and got access to this extra land, this extra capacity, I do not think that is an issue that would be addressable under the Competition Law.

Mr. C. Webb:

No, if you are talking about a green field or brown field development on behalf of C.I. Traders or the Co-op, that would not be subject to our review under the Competition Law. It would still definitely be subject to a Regulation of Undertakings licence, and interestingly, the Competition Law did amend the Regulation of Undertakings Law, in that in granting new Regulation of Undertakings licences, the Regulation of Undertakings Department or EDD (Economic Development Department) is supposed to grant them in light of the provisions of the Competition Law and the decisions, directions of the JCRA, but how the Regulation of Undertakings would factor that consideration in their grant of a Regulation of Undertakings licence would not be our decision to make, it would be Regulation of Undertakings decision to make.

Deputy J.A. Martin:

Yes. It is just that it was put to us by somebody that it went on that we would get a new supermarket, the people already on the Island were not going to be allowed to bid for it, but we could not see where that fitted. You have just said it would not come under your ...

Mr. C. Webb:

No.

Deputy K.C. Lewis:

If I can just clarify that what you are saying is if a Jersey company bought a neighbouring company that would come under the JCRA but if it was a new build it would not?

Mr. W. Brown:

Yes.

Deputy K.C. Lewis:

Thank you.

Mr. C. Webb:

Deputy Lewis, the same applies to Tesco. If Tesco acquired C.I. Traders, that would be a merger and acquisition. If it built a huge new superstore in St. Martin, just green field, that is not a JCRA merger acquisition issue.

Deputy K.C. Lewis:

No. That would just be economic development, not under your remit?

Mr. C. Webb:

Well, it is a huge Regulation of Undertakings issue, obviously.

Deputy G.P. Southern:

Just to settle my mind, when you were talking earlier about the impact of a large supermarket on small traders - or you just hinted in a later comment - impact on local farmers, rather, and bringing in goods rather than buying locally, that is not a competition issue and would not be something that is within your remit? The impact.

Mr. W. Brown:

It could potentially be, in some respects. If it is a practice which is affecting competition and restricting competition, it may be something we can address under the Competition Law. On the small business point of view, it may be an issue that could come up in a merger that we are looking at. If 2 of the existing major players in Jersey were to merge, hypothetically, we would look at is that going to make the situation for small retailers worse in any way. It would be part of the overall consideration of the merger.

Deputy G.P. Southern:

Again, I move away from mergers and acquisitions, which is clearly in your remit. The expansion of retail in Jersey by, let us say, 50,000 square feet. Now, where that is placed, if it is placed in that street, is going to have a significant effect on that street's traders, town traders, the markets, et cetera. That in itself is not something that you would automatically go and take a look at and say: "This is our business"?

Mr. W. Brown:

No.

Deputy G.P. Southern:

Right.

Mr. W. Brown:

That would be a policy matter for the States.

Deputy G.P. Southern:

It is a policy matter for the States, yes. Okay, thank you.

Mr. J. Hopley:

Is there any possibility of the public asking questions?

Deputy G.P. Southern:

I am open to it. The problem is I have not consulted with them as to whether they are prepared to take questions. Are you?

Mr. W. Brown:

We will do our best, but we only have a couple of minutes. We have got to get back to the office.

Mr. C. Webb:

I do not care one way or the other, but just to know, is it on record or off record for the hearing?

Deputy G.P. Southern:

It will be on record.

Mr. C. Webb:

It will be on record?

Deputy G.P. Southern:

Yes.

Mr. W. Brown:

Yes, provided it is on the subject we have been discussing, then yes.

Mr. J. Hopley:

I will declare my interest. My name is Jim Hopley. I am the Retail Controller of the Co-op. My question is clear and simple and I think it would be in general agreement. I thank you for being very explicit about where your powers lie in terms of jurisdiction and the various aspects that you govern. But both the versions of the *Experian Report* mentioned and in the subsequent report that Mike King (... inaudible) there was a suggestion that should a new entrant come into the market, a major new store, be it a food store or a (...inaudible) shop, that could eventually lead to market failure. I think it meant by that it would have significant impact on a raft of retail outlets in the Island and it was suggested in those circumstances the remedy would be, in particular to Deputy Martin's comments, to call in the cavalry, in this case the JCRA, and you could do something about it. I have always had a problem trying to understand precisely what that meant, precisely what your powers would be to rectify a situation 2 or 3 years down the road once the damage had been done.

Mr. W. Brown:

Well, I sympathise with your uncertainty, because on the face of it, taking the situation you described and based on what we have been saying to the Panel earlier, I cannot readily see how that would be a

Competition Law issue. You are talking about a large retailer, an existing player becoming larger or a new entrant taking over a large chunk of new capacity and the effect that that would have on small retailers and perhaps in an extreme case hypothetically at least jeopardising their businesses and so on. I do not see that that would be a Competition Law issue. The only way I can see in which the JCRA might become involved in that is if the States were so concerned, if the Economic Development Minister was concerned about this as an issue and requested us to do a study on it. It sounds as if the issue may have been looked at already, but if they wanted a fresh study on it, they might conceivably ask us to look into what we thought of the prospects, what impact it would have on small retailers as part of our general advisory role. Again, it would be our discretion whether to accept that request, depending on what was going on at the particular time and our resources. But that is the only conceivable way in which I think the JCRA could become involved.

Deputy G.P. Southern:

Okay, I think that is fairly clear. One more question.

Deputy R.G. Le Hérisier of St. Saviour:

You had mentioned earlier about you would carry out a study, for example, if Tesco were going to engage in predatory pricing. Would that study be on the basis of answers they gave you, or would you study their historical record in other societies?

Mr. W. Brown:

I think what we have to be clear about here is what we mean by study, because when we use the term predatory pricing, it is normally used in the context of competition law, where a dominant company - and it would have to be a dominant company in the marketplace - engages in predatory pricing. That would be a matter for potential investigation under the Competition Law. So there we would have powers to investigate, and if we felt that a dominant company had engaged in predatory pricing, then we could require them to stop it. We could require them to adjust their prices so that they became non-predatory, and we could conceivably impose a penalty.

Deputy R.G. Le Hérisier:

What I am asking you is if there is a historical record in a number of places where they have engaged in these tactics? They have, for example, as was cited last night, sent a small supermarket chain to the wall in North Yorkshire, and I think Wales is another case. If that evidence should be brought to your attention if that evidence existed, would you say: "We are judging Tesco as a corporate organisation, and this is behaviour it has exhibited elsewhere which is documented and which therefore we should take note of"?

Mr. W. Brown:

I think I will defer to my legal adviser if he wants to add anything, but my answer to that would be that in deciding whether the incident in Jersey amounted to predatory pricing or not, we would not be entitled -- it would be incorrect for us to look at other cases. It would in fact be irrelevant to the other cases, because we have to judge each set of facts according to the law as it applies to the particular incident. Where it might conceivably come in is if there is an issue about penalties and if we decided in principle that a penalty was appropriate, what the appropriate level of the penalty should be. As you may know, under the law we have a power to impose penalties of up to 10 per cent of turnover maximum. Now, knowledge that the company in doing what it did was acting illegally - this is all hypothetical - but if it had been told off before by a UK regulator, competition authority, that this was wrong, then it may have an impact on the level of penalty, because they could not claim that they were unaware of the rules. That may potentially aggravate the penalty. But I think that is the only case.

Mr. C. Webb:

If I can just add to what Bill said, I agree with that, we could look at penalties. But I would like to differentiate between 2 scenarios here. One would be if Tesco came into the market on its own without an acquisition. As we testified earlier, we would not have the ability to review that. Now, let us say if Tesco was in the market; they built a superstore here or a store, and someone came in to us and said: "Look, Tesco predatorily prices in Exeter, Birmingham and Cardiff. You should investigate them for predatory pricing here in Jersey." If that is all they said to us in their complaint, I do not think we could, under the law, pursue that complaint, because under the law we need a reasonable cause to suspect that there is an abuse of dominance in Jersey. Now, if someone said in a complaint: "Look, Tesco predatory prices in markets A, B and C. Oh, and by the way, here is some evidence of it here in Jersey", that may raise our antennae a little bit. But once they are in the market, solely the history of what in other markets does not by itself raise a reasonable cause to suspect an abuse in Jersey. Now, in a merger scenario, if Tesco were to come in, or if any major UK multiple or continental multiple in that respect were to come in by merger, and if someone would say during our merger investigation: "Tesco engages in predatory pricing; you should look at this", in a merger scenario, we could legitimately ask them: "What are your pricing plans post-entry in Jersey?" because they cannot complete the merger until we determine there is no anti-competitive effect. So in that merger scenario it is a little bit different. But if they are already in, we would need a reasonable cause to suspect a market effect here in Jersey before we could pursue it under the law.

Deputy G.P. Southern:

Thank you.

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