



Abuse of a dominant position by ATF Overseas Holdings Limited trading in Jersey as ATF Fuels

Case C1117J

Final Decision

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Summary of Final Decision

The Jersey Competition Regulatory Authority (“**JCRA**”) has completed an investigation into the supply of aviation fuel at the airport in Jersey following a complaint from a third party.

The investigation considered certain aspects of the behaviour of ATF Overseas Holdings Limited trading as ATF Fuels (“**ATF**”) in relation to the supply of aviation fuel into aircraft at Jersey airport. The JCRA has concluded that ATF holds a dominant position in the supply of Jet A1 aviation fuel at Jersey airport and has contravened the Competition (Jersey) Law 2005 (“**the 2005 Law**”) which prohibits abuse of a dominant position by its unfair discriminatory behaviour in the supply of that aviation fuel.

ATF has sought to reserve the market to itself by refusing to allow a fixed base operator (“**FBO**”) to purchase fuel from ATF for the purpose of supplying fuel to that FBO’s third party customers as part of a bundle of ground handling services at Jersey airport. This has caused harm to the business of the FBO as a potential competitor of ATF in respect of supplying Jet A1 aviation fuel to those customers since it was prevented from offering a valued bundle of services that included provision of aviation fuel. It also restricted those third party customers from making alternative arrangements for purchasing fuel at Jersey airport and instead obliged them to make their fuel purchase arrangements only with ATF.

ATF has also unfairly discriminated in its pricing in respect of sales of Jet A1 aviation fuel to that FBO (one of the largest buyers of aviation fuel at Jersey airport) and a potential reseller of fuel. It has done this by charging the FBO higher prices than other comparable customers. This has harmed the FBO’s own business by requiring it to pay higher prices for its fuel than would otherwise be the case. It has harmed the competitive process by reducing competition and choice and increased the costs and prices faced by third party customers buying aviation services from ABP at Jersey airport which are likely to face higher costs as a direct result of increased fuel prices.

For these reasons the JCRA has concluded that ATF has abused a dominant market position as prohibited by Article 16 of the 2005 Law.

(A) Background

Introduction

1. On 2 March 2015, following a complaint from a third party, the Jersey Competition Regulatory Authority (the “**JCRA**”) initiated an investigation regarding certain practices of ATF Overseas Holdings Limited, a limited liability company registered in the British Virgin Islands and trading in Jersey as ATF Fuels (“**ATF**”).
2. The JCRA sought to establish in this regard whether ATF had behaved anti-competitively in contravention of the Competition (Jersey) Law 2005 (“**the 2005 Law**”).
3. Having established that there was a reasonable cause to suspect that ATF was engaged in anti-competitive behaviour, the JCRA made a formal request for information under Article 27 of the 2005 Law. The complainant requested that the JCRA proceed without disclosing its identity for concern that disclosure could further damage its commercial operations and harm its relationship with ATF and Jersey Airport.
4. In reviewing the information the JCRA sought to establish whether, *inter alia*, ATF had entered into anti-competitive agreements or abused a dominant position. The investigation subsequently focused on two potential breaches of Article 16 of the 2005 Law.

The parties

ATF Overseas Holdings Limited

5. ATF Fuels is the trading name of ATF Overseas Holdings Limited, a limited liability company registered in the British Virgin Islands.
6. Under an agreement dated 27 June 2014 between ATF Overseas Holdings Limited and the Airport, ATF was engaged to supply aviation fuel at Jersey airport. It commenced supplies on 1 October 2014. Prior to that date, aviation fuel at Jersey airport was provided by Fuel Suppliers Channel Islands Limited (“**FSCI**”), a subsidiary of Rubis SCA (“**Rubis**”).
7. ATF supplies fuel at Jersey airport on an “into-plane” basis. This means that ATF stores the aviation fuel that it has imported into Jersey at the fuel farm at Jersey airport. It carries out the physical refuelling of aircraft under agreements with aircraft operators or those acting on their behalf, using refuelling equipment that it owns. It then invoices the aircraft operator (or the company acting on its behalf) for the aviation fuel supplied, title to which passes from ATF “at wingtip”.
8. Although ATF’s supply agreement with Jersey Airport is not expressed to be an exclusive one, the JCRA understands that ATF is the sole importer of aviation fuel into Jersey and the sole supplier and distributor of aviation fuel into aircraft at Jersey airport.

Aviation Beauport Holdings Limited

9. Aviation Beauport Holdings Limited (“**ABP**”) is a private company incorporated and registered in Jersey. ABP charters and operates private aircraft for passengers wishing to travel to and from Jersey airport as well as providing aircraft charters for customers outside the island. It also provides ground handling services¹ as a fixed based operator (“**FBO**”) to private aircraft and passengers arriving at and departing from Jersey airport. These services include aircraft handling, ramp services, hangarage, passenger processing, parking, provision of private lounge facilities and aircraft fuelling.
10. Prior to 1 October 2014, ABP had purchased aviation fuel at the Jersey airport from FSCI/Rubis for use in the aircraft that ABP chartered and operated. ABP also procured refuelling services from FSCI/Rubis for the private aircraft for which ABP provided ground handling services. In practice, this meant that private aircraft operators were able to purchase fuel directly from the airport fuel supplier or as part of a “bundle” of ground handling services from ABP, which included refuelling, and to receive a single invoice for these from ABP.

Procedure

11. Having conducted a preliminary assessment pursuant to its Guidelines on Investigation Procedures², the JCRA was satisfied it had reasonable cause to suspect that ATF’s conduct may have breached the 2005 Law in the supply of aviation fuel at Jersey airport. The JCRA therefore commenced a formal investigation under Article 26 of the 2005 Law.
12. An information request was issued to ATF under Article 27 of the 2005 Law on 2 March 2015, to which ATF responded with a number of files containing its email correspondence with its counterparties. A supplemental information request was made to ATF by email on 19 March 2015 seeking further information and clarification. On 31 July 2015 ATF was provided with key facts relevant to the investigation and a further information request was issued on 28 August 2015 containing specific questions relating to findings of fact. As a result of its investigation and information obtained from ATF, the JCRA came to the initial conclusion that ATF breached the 2005 Law by abusing its dominant position in the market and issued a draft decision to that effect to ATF on 11 September 2015.
13. In the draft decision of 11 September 2015 the JCRA set out its reasoning as to why it had reached the initial conclusion that ATF held a position of dominance in the market for the supply of aviation fuel (specifically Jet A1 aviation fuel) into aircraft at Jersey airport.
14. In its investigation, the JCRA identified two forms of behaviour by ATF which raised specific concerns:

¹ Ground handling services are defined in Directive in annex 1 to Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports.

² *Channel Islands Competition Laws, CICRA Guideline 10 – Investigation Procedures*, issued December 2012. Available at [http://www.cicra.gg/files/Guideline%2010%20-%20Investigation%20Procedures%20-%20Post%20Consultation%20\(3\).pdf](http://www.cicra.gg/files/Guideline%2010%20-%20Investigation%20Procedures%20-%20Post%20Consultation%20(3).pdf)

- ATF refuses to refuel other aircraft supervised by ABP in its capacity as an FBO. The owners and operators of such aircraft are required to have their own individual fuel accounts with ATF.
 - The price paid by ABP for aviation fuel for its own aircraft is higher than that typically charged to other customers purchasing similar volumes.
15. The JCRA did initially consider whether ATF may have been engaged in anti-competitive behaviour in breach of Article 8 of the 2005 Law by requiring companies to sign up to agreements which would restrict the sale of fuel to third parties or to fix the price at which fuel purchased from ATF could be resold. However, following receipt of information under the Article 27 request, ATF appears to have sought to impose this restriction only on ABP and no agreement was concluded with ABP to that effect. ABP also declined to purchase fuel at reduced prices for its own aircraft subject to conditions by ATF which would fix the price of fuel for resale to third parties.
16. The JCRA therefore did not conclude that there was a breach of Article 8 of the 2005 Law because there did not appear to be any agreement between the parties under investigation.
17. The JCRA received a detailed response to the draft decision from ATF and arranged a hearing meeting which took place on 3 December 2015. At the meeting ATF indicated that it would provide significant additional information and legal arguments that it was entitled to discriminate against ABP in its pricing, additional evidence to support the assertion that ABP imposed significant additional costs on ATF's fuelling operation compared to other customers and that its approach to pricing fuel sales to ABP was objectively justified.
18. Following the meeting, ATF provided a response setting out legal arguments to support its position but did not provide any additional evidence in relation to the costs or otherwise of its services. A transcript of the meeting was provided to ATF and ATF was again requested to provide the additional evidence that had been offered at the meeting to show that ABP imposed additional costs compared to other large fuel users and to demonstrate how this was taken into account in ATF's pricing methodology or structure. ATF declined to provide any further information.
19. An information request was also issued to Ports of Jersey Limited³ to seek relevant information concerning the arrangements for the supply of fuel at Jersey airport. In particular, in the absence of evidence to that effect provided by ATF, the JCRA sought to establish whether there was validity to ATF's argument in its correspondence that it was under a form of compulsion by the States of Jersey to behave in the manner of its treatment of ABP by the law and licensing requirements imposed on it. After assessing the information provided by Ports of Jersey Limited, the JCRA found no relevant information to support the fact that there existed a statutory licensing framework for fuel supply at Jersey

³ Ports of Jersey Limited is a company owned by the States of Jersey comprising Jersey Airport and Jersey Harbours. Prior to its incorporation in October 2015, it was a States of Jersey trading entity under the remit of Jersey's Economic Development Department and its agreements were signed by the group finance director for and on behalf of the public of the island of Jersey.

airport. The evidence demonstrated that fuel had previously been supplied at Jersey airport without any form of statutory licence and that where ATF and Jersey Airport made reference to licence agreements, these were effectively lease agreements for the occupation of land and premises.

20. Following the above process and assessment of all relevant evidence the JCRA has proceeded to issue this final decision.

(B) Legal Framework

Competition law framework

21. As a general rule, undertakings are free to set their own resale prices when selling goods and services. They are also, generally, free to choose with whom they contract and can decide to supply, or not to supply, any given customer.

22. However, competition law in Jersey provides that undertakings that are dominant in a market must not abuse that dominance. Article 16 of the 2005 Law states that:

(1) Except as otherwise provided by this Part, any abuse by one or more undertakings of a dominant position in trade for any goods or services in Jersey or in any part of Jersey is prohibited.

(2) An abuse of a dominant position may, in particular, consist in –

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties and thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that by their nature or according to commercial usage have no connection with the subject of the contracts.*

(3) For the purpose of this Article an abuse of a dominant position may consist of a failure or refusal to do something.

23. Conduct that is generally lawful for non-dominant undertakings, such as refusing to supply a particular customer, may therefore amount to an abuse of dominance if it is carried out by a dominant undertaking and that behaviour is likely to harm competition.

24. Therefore, in determining whether ATF's conduct in :

- (a) refusing to allow ABP to procure fuel supplies as part of the ground handling “bundle” of services ABP offers to its customers; and/or
- (b) the manner it determines the prices that it charges ABP for aviation fuel

contravenes Article 16 of the 2005 Law, the JCRA must determine:

- (a) The market on which ATF operates for the purposes of its arrangements with ABP;
- (b) Whether ATF holds a dominant position on that market; and
- (c) Whether ATF’s conduct amounts to an abuse of that dominant position.

25. In applying Article 16 of the 2005 Law, the JCRA must also 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 Community law in relation to competition within the European Community⁴.

Is ATF an “undertaking”?

26. Article 16 of the 2005 Law prohibits the abuse of a dominant position by one or more undertakings. An “undertaking” is defined in Article 1 of the 2005 Law as “a person who is carrying on a business and includes an association, whether or not incorporated, that consists of or includes such persons”. A “business” is defined as including “any economic activity...whether or not carried on for profit”.
27. The supply of aviation fuel is clearly an “economic activity”. Accordingly, JCRA is of the view that ATF is an “undertaking” for the purposes of the 2005 Law.

Supply of Aviation Fuel at Jersey Airport

28. As set out above, ATF is active in the supply of aviation fuel in Jersey to airlines and other customers including to a FBO. In October 2014, ATF took over the provision of fuel operations at Jersey airport from FSCI, a subsidiary of Rubis, on an interim basis. ATF is currently, and over the period of this investigation, the only provider of aviation fuel at this facility. ATF supplies aviation fuel to, and performs the physical refuelling of all aircraft refuelling at Jersey airport.
29. Aviation fuel is purchased by aircraft operators, including airlines and private aircraft owners, flying out of or based at Jersey airport. There are two grades of aviation fuel available at Jersey airport. Jet fuel (also referred to as ‘Jet A1’ or ‘Kerosene’) is used by jet and turbo-prop aircraft (which provide most commercial flights to and from Jersey). Aviation gas (also referred to as ‘Avgas’) is a fuel similar to petrol for motor vehicles and is mainly used by private light aircraft.

⁴ Article 60, 2005 Law.

30. In 2013, the value of the total sales of aviation fuel in Jersey was estimated at approximately £[X] million. Jet A1 aviation fuel constitutes by far the majority of the aviation fuel sales in Jersey. Figures provided by ATF indicate that sales of Avgas in the period October 2014 to February 2015 (inclusive) were [X] litres with a value of £[X]k, compared with sales of [X] million litres of Jet A1 fuel, at a value of £[X]m. For reasons set out in the product definition below, subsequent references to aviation fuel in this document refer to Jet A1 aviation fuel unless specifically referenced to include Avgas.
31. There are two approaches to pricing aviation fuel in Jersey (and elsewhere). The Posted Airfield Price (“**PAP**”) is typically paid by customers who purchase small volumes of aviation fuel. The other pricing standard, described as a “Platts based” or “Platt plus” price, refers to pricing which specifies a mark-up, usually given in pence per litre (“**ppl**”), to a reference price published by Platts⁵. The reference price is a relevant wholesale market price and is largely determined by movements in the international energy markets. Typically, Platts based pricing is applied to customers who purchase larger volumes of fuel at Jersey airport. The PAP is set by the fuel provider, its calculation is not usually disclosed to customers, it can be varied by the supplier and its relationship to the wholesale market price can vary significantly over time, whereas variation in the Platts-based price is determined by movement in the published Platts price. The Platts-based price is typically lower than the PAP as well as offering a number of advantages to customers, in terms of transparency, stability⁶ and risk mitigation. For example, it allows customers to hedge their future purchases of fuel against movements in oil prices and exchange rates using risk management products or services offered by third parties.
32. The majority of aviation fuel sold in Jersey, and in the Channel Islands as a whole (c. [X]%) is on a “Platts plus” basis, with the mark up reflecting the costs of importing and providing fuel to the local market, including an appropriate margin for the provider.

Relevant market

Introduction

33. When determining the relevant market on which to base an assessment, it is necessary to consider two elements. First, the product market, which is formed of the “focal” product and all other products that customers consider to be close substitutes for it. Second, the geographic market, which is the geographic area within which the supplier faces competition for the sale of the products. Geographic markets may be local, regional, national or international.

⁵ Platts (<http://www.platts.com>) is a provider of energy, petrochemicals, metals and agriculture information, and a premier source of benchmark price assessments for commodity markets. Information on European fuel products markets can be found here:

<http://www.platts.com/products/european-marketscan>

⁶ Subject to variations in wholesale market prices

Product market

34. Aircraft require aviation fuel in order to be able to operate. Aviation fuel is not substitutable for other types of fuel (e.g. marine fuel & automotive fuel) and so aviation fuel may be considered to form a distinct product market⁷.
35. As noted above, two types of aviation fuel are sold at Jersey airport: Jet A1 and Avgas. These products are not substitutable with each other; the correct fuel must be used to be compatible with the aircraft. Given that the complaint received by the JCRA has been in relation to the supply of Jet A1 aviation fuel, that the fuel used by ABP and required for its own aircraft and by third parties using its FBO services is Jet A1, and given that there has been no specific complaint in relation to the supply of Avgas, the JCRA has focussed its investigation only on the supply of Jet A1 aviation fuel. In the JCRA's view from the perspective of customers Avgas and Jet A1 fuel form two distinct product markets.
36. The JCRA has considered whether, from the perspective of an aircraft operator (which would include an operator chartering flights, such as ABP) the purchase of aviation fuel from a refinery would be a reasonable substitute for purchasing fuel on an "into-plane" basis from a fuel supplier at an airport. However, as noted above, (and as ATF itself has indicated) the investment in transport, storage and refuelling infrastructure that would be required to purchase aviation fuel ex-refinery and transport it to an airport for use would be prohibitively expensive for an individual aircraft operator, and particularly for an undertaking the size of ABP. This reasoning applies to third parties also.
37. For the above reasons, the JCRA considers that the relevant product market is the "into-plane" supply of Jet A1 aviation fuel⁸.

Geographic market

38. The JCRA considers that the relevant geographic market for the into-plane supply of aviation fuel is limited to each specific airport, in this case Jersey airport. A plane that has landed at Jersey airport and needs to refuel is not able to purchase that fuel anywhere other than at Jersey airport. In particular, because of the constraints connected with the availability of time slots, for reasons of safety, and because of the additional time and costs incurred, it would not be general practice for a plane that is bound for Jersey to divert to an alternative airport to refuel. Indeed, if an aircraft operator were to be required to do so as a matter of course, this would have significant consequences for its commercial reputation. In short, a plane that has landed at Jersey airport must, if it requires fuel, refuel at Jersey airport.
39. In the circumstances of this particular case, the JCRA also takes into account the fact that ABP purchases Jet A1 aviation fuel on an "into-plane" supply basis for its own aircraft and in

⁷ In its merger decision making practice, the European Commission has consistently found aviation fuel to form a product market distinct from other types of fuel: *Case No COMP/M.7387 - BP/ STATOIL FUEL AND RETAIL AVIATION*. Whilst not constituting a strict legal precedent, the JCRA considers the approach of the European Commission to be persuasive.

⁸ This is consistent with the approach of the European Commission, see, for example, *Case No COMP/M.7387 - BP/ STATOIL FUEL AND RETAIL AVIATION*, paragraph 28.

the past (prior to ATF taking over the supply of aviation fuel at Jersey airport) also procured “into-plane” fuelling services for its private aviation customers. As explained above, these customers, for reasons of practical convenience, have in the past chosen to purchase refuelling services as part of a bundle of ground handling services supplied by ABP. The geographic market for ground handling services is, necessarily, limited to each specific airport; an aircraft that has landed at Jersey airport can only purchase ground handling services at Jersey airport⁹. The JCRA considers that in the circumstances of this particular case, the fact that the behaviour by ATF consists, in part, of a refusal to allow ABP to procure refuelling services as part of a ground handling “bundle” (which can only be supplied at Jersey airport) and the absence of choice available to ABP in these circumstances strongly supports the view that the geographic market is limited to Jersey airport.

40. The JCRA’s view that the geographic market is limited to Jersey airport is also consistent with that of the European Commission, which has consistently found that the relevant geographic market for the into-plane supply of aviation fuel is limited to each specific airport¹⁰.
41. The JCRA has considered the contrary view expressed by ATF that the geographic market is wider than Jersey airport¹¹ and, in particular, that an aircraft landing at, or taking off from, Jersey airport has the option of refuelling at its airport of origin/destination.
42. For the reasons set out above, the JCRA does not accept this argument. In addition, the JCRA notes that the examples cited by ATF in support of its view are drawn from mergers between airlines, where, necessarily, different considerations (relating to the likelihood that passengers would switch between different point-to-point routes) would apply¹². For the above reasons, the JCRA considers that the relevant geographic market is Jersey airport.
43. The relevant market is therefore considered to be the market for the supply of into-plane Jet A1 aviation fuel at Jersey airport.

⁹ This conclusion is consistent with that of the European Commission, which has generally considered the geographic market for ground handling services to be limited to each specific airport (or, possibly, neighbouring airports, which is not relevant in this case as there is only one airport in Jersey). See, for example, Case No COMP/M.7021 – SWISSPORT/SERVISAIR, paragraph 44.

¹⁰ Case No COMP/M.7387 - BP/ STATOIL FUEL AND RETAIL AVIATION, paragraph 41.

¹¹ In its response to the JCRA’s Draft Decision, at page 9, ATF draws support for this view from the Canadian Competition Bureau, which has stated that: “an origin-destination city-pair will generally constitute a geographic market for the purposes of analysing competition in the airline industry.”

¹² See, for example, Case No COMP/M.6796 – AEGEAN/ OLYMPIC II, paragraph 41 and the approach taken in US cases such as the merger of American Airlines and US Airways: <http://www.justice.gov/atr/case/us-et-al-v-us-airways-group-inc-and-amr-corporation>. A “city-pair” market definition is adopted because: “passengers seek to depart from airports close to where they live and work, and arrive at airports close to their intended destinations. Most airline travel is related to business, family events, and vacations. Thus, most passengers book flights with their origins and destinations predetermined. Few passengers who wish to fly from one city to another would switch to flights between other cities in response to a small but significant and non-transitory fare increase.” (Competitive Impact Statement, UNITED STATES OF AMERICA, et al. v. US AIRWAYS GROUP, INC. and AMR CORPORATION).

Dominant Position

44. An undertaking is dominant if it can behave to an appreciable extent independently of its customers, competitors and consumers¹³.
45. ATF is the sole supplier of aviation fuel, and holds a de facto monopoly in the supply of Jet A1 aviation fuel, at Jersey airport. There is no statutory licensing requirement for the supply of aviation fuel in Jersey. Due to various constraints, there is no credible threat of entry in Jersey from a would-be competitor to ATF¹⁴.
46. The JCRA understands that Jersey Airport originally sought to introduce competitive arrangements for the supply of fuel at Jersey airport and disagreement on this issue led to the installation of ATF as airport fuel supplier and replacement of FSCI/Rubis. However, Jersey Airport has subsequently accepted the representations from ATF that the market is not large enough to support an additional full service fuel supplier and ATF remains a de facto (but not a de jure) monopoly supplier of aviation fuel at Jersey airport. Other barriers to entry include limited space at Jersey airport for additional fuel storage, relatively small volumes of fuel sold, complex fuel shipping requirements and other factors, such as high local labour costs and planning restrictions. The JCRA understands that Ports of Jersey Limited which owns and operates the airport has recently gone out to tender for the operation of fuel supply arrangements at Jersey airport, however the tender was framed in a way which (if another supplier were successful) would permit ATF to continue to supply fuel to existing customers and maintain exclusive supply arrangements for a period. Accordingly, it would be difficult for alternative suppliers to compete with the more favourable terms available to ATF and it is not attractive for other potential suppliers of aviation fuel to enter the market. ATF has told the JCRA that it would be unlikely to be economically viable for more than one operator to supply aviation fuel at Jersey airport¹⁵. The JCRA accepts that it is unlikely that a second supplier would consider entering the market for the supply of aviation fuel at Jersey airport.
47. As noted above, aviation fuel is characterised by a lack of substitutability with other fuel types. Customers thus cannot switch to other fuel types for a given aircraft. Therefore, the level of countervailing buyer power is very weak in the relevant market.
48. Given the significant barriers to entry, ATF is able to behave independently of its potential competitors. Furthermore, given the nature of the product, market conditions and ATF's monopoly of supply, ATF is also able to behave independently of its customers, and ultimately, consumers.
49. The JCRA thus considers that ATF is dominant in the market for the "into-plane" supply of aviation fuel at Jersey airport.

¹³ Case C-322/81 *Michelin v Commission* [1983], judgment of the Court of Justice of the EU dated 9 November 1983, para. 30.

¹⁴ These constraints are outlined in CICRA's *Review of the aviation fuel markets in Jersey and Guernsey*, issued November 2014. Available at <http://www.cicra.gg/files/Review%20of%20the%20aviation%20fuel%20markets.pdf>

¹⁵ Source: JCRA transcript of 3 December 2015 meeting.

Abuse of a dominant position

50. The 2005 Law provides a non-exhaustive list of types of conduct which may in particular constitute an abuse of a dominant position. It highlights a number of specific abuses in particular, these are:
- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions (Article 16(2)(a));
 - (b) limiting production, markets or technical development to the prejudice of consumers (Article 16(2)(b));
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties and thereby placing them at a competitive disadvantage (Article 16(2)(c)); and
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that by their nature or according to commercial usage have no connection with the subject of the contracts (Article 16(2)(d)).
51. The investigation considered certain aspects of the behaviour of ATF in relation to the supply of aviation fuel into aircraft at Jersey airport. The JCRA has concluded that ATF holds a dominant position in the supply of Jet A1 aviation fuel at Jersey airport and has contravened the 2005 Law by its unfair discriminatory behaviour in the supply of that aviation fuel.
52. ATF has sought to reserve the market to itself by refusing to allow a FBO to purchase fuel from ATF for the purpose of supplying fuel to that FBO's third party customers as part of a bundle of ground handling services at Jersey airport. This has caused harm to the business of the FBO as a potential competitor of ATF in respect of supplying Jet A1 aviation fuel to those customers since it was prevented from offering a valued bundle of services that included provision of aviation fuel. It also restricted those third party customers from making alternative arrangements for purchasing fuel at Jersey airport and instead obliged them to make their fuel purchase arrangements only with ATF.
53. ATF has also unfairly discriminated in its pricing in respect of sales of Jet A1 aviation fuel to that FBO (one of the largest buyers of aviation fuel at Jersey airport) and a potential reseller of fuel. It has done this by charging the FBO higher prices than other comparable customers. This has harmed the FBO's own business by requiring it to pay higher prices for its fuel than would otherwise be the case. It has harmed the competitive process by reducing competition and choice and increased the costs and prices faced by third party customers buying aviation services from ABP at Jersey airport which are likely to face higher costs as a direct result of increased fuel prices.

54. In effect, this behaviour constitutes a restriction on sales to third parties by ABP as well as discrimination in pricing and ATF has not been able to provide an objective justification for its behaviour.

Restriction on sales to third parties

55. Prior to the contract with ATF, FSCI/Rubis (the previous supplier) allowed ABP to sell aviation fuel (purchased from FSCI/Rubis) to third parties. In practice, FSCI/Rubis (whose contractual relationship was with ABP) would perform all physical refuelling to third parties (whose contractual relationship was also with ABP). FSCI/Rubis would charge ABP, who would in turn charge its third-party customer for the fuel supplied. In effect, this practice constituted a sale by ABP to third parties.
56. ATF refuses to refuel ABP's third-party customers' aircraft unless the relevant customer buys the fuel directly from ATF. While this restriction on third party sales is not contained in ATF's standard terms and conditions, ATF's practice has been to refuse ABP's requests for it to refuel its customers' aircraft unless the aircraft is registered to ABP, or unless the aircraft owners have a direct contract with ATF.

Unfair trading condition

57. This effectively prevents ABP from offering to third parties refuelling services to customers, cutting ABP out of the market for the resale of fuel, removing an important and potentially valued part of the service that as a local FBO it can offer to its aviation clients. ABP was permitted to sell fuel to third parties prior to ATF becoming the airport fuel supplier, and in the absence of an objective justification from ATF for such refusal, the restriction imposed by ATF constitutes an unfair trading condition imposed on ABP given ATF's dominant position in the relevant market.

Limiting markets

58. By refusing to allow sales to third parties, ATF is limiting ABP's activities in the FBO sector, preventing it from adding value and offering a complete set of bundled services to its customers. ABP's consumers now have reduced choice by being forced to have a direct contractual relationship with ATF. The restriction has the consequence of limiting markets to the prejudice of ABP's customers for ground handling services.

Imposing dissimilar conditions to equivalent transactions

59. There are no equivalent restrictions in ATF's treatment of other customers. For example, ATF permits Jersey Aero Club to procure fuel on behalf of third parties. World Fuel Services, which acts as an agent on behalf of clients to manage both fuel services and fuel price risks has also been able to purchase fuel from ATF on behalf of its third party clients. This practice by ATF in respect of ABP is discriminatory, involving the imposition of dissimilar conditions to equivalent transactions, thereby placing ABP at a competitive disadvantage.

Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that by their nature or according to commercial usage have no connection with the subject of the contracts

60. On occasion ATF has offered more favourable terms for its supply of fuel for use in ABP's own aircraft, but with the requirement that ABP will not sell fuel to third parties or that it passes on fuel to third parties at a price determined by ATF. In the absence of such an agreement, ATF continues to refuse to supply fuel to third party aircraft managed or maintained by ABP unless the owners of those aircraft pay ATF directly for the fuel. It is common practice for FBO's based at other airports, in Guernsey, the UK and across the world to offer fuel services. At Guernsey airport for example, both Aiglle Flight Support and Aircraft Servicing Guernsey are able to offer fuel to their customers and third parties are not required to purchase fuel directly from the airport supplier. When providing third party sales, the customer that is the immediate counter party (ABP) to the fuel supplier (ATF) would typically purchase fuel at the same rate and in the same manner as for its own use. Fuel would be paid for in ABP's account but transferred to the third party customer. The physical refuelling arrangements are in practice no different between these two processes, and charges to third parties would be handled by ABP, with or without mark up, at its discretion, as with any other retail operation. Making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations that by their nature or according to commercial usage have no connection with the subject of the contracts without objective justification is an abuse of dominant position.
61. ATF's abuse of its dominant position by refusing to supply fuel to ABP for third party sales has harmed the business of ABP, by removing a significant part of the ground handling services they were previously able to offer customers and preventing them from offering a wider range of ground handling services. It has harmed competition and the market by eliminating a source of potential competition in the market. By preventing third party customers from purchasing fuel from the local FBO ATF has reserved the market to itself. This has harmed customers by removing their ability to choose how they purchase services and removed their ability to purchase a comprehensive bundle of ground handling services from a single supplier at Jersey airport.

Objective justification for refusal to supply

62. In its response to the JCRA's draft decision, ATF stated that it was (objectively) justified in refusing to supply fuel to ABP for resale. It stated that ABP did not have a licence to supply fuel at Jersey airport and so was not entitled to make such sales. It further claimed (by reference to a list of legislative provisions) that it would be a breach of the law in Jersey for it to supply ABP. These points were repeated in ATF's "Submission on Abuse"¹⁶, where ATF stated that it would be unlawful for ABP to supply aviation fuel at Jersey airport unless ABP had a Fuel Operator's Agreement with Ports of Jersey (which it did not) and/or without state authorisation.
63. The JCRA does not accept that the arguments advanced by ATF on this point amount to an objective justification for its refusal to supply ABP. In applying Article 16 of the 2005 Law, the JCRA must 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 Community law in relation to competition within the European Community. Under EU competition law, an undertaking does not abuse a dominant position if its conduct is required by national legislation or where the legal/regulatory framework eliminates the possibility of competitive activity. This is because the harm to competition is caused by the State measure and not by the autonomous conduct of the undertaking¹⁷. Although ATF has provided the JCRA with a list of legislative provisions which it claims prevent it from making sales of fuel to resellers at Jersey airport, ATF has been unable to identify which specific provisions of Jersey law prohibit it from reselling fuel to ABP¹⁸.
64. The JCRA has conducted its own investigation and has found no such provision. The JCRA has also reviewed ATF's Licences and its Fuel Operators Agreement. None of these constitute a national law or regulation nor refer to any of the laws cited by ATF in its response to the JCRA's draft decision. Rather they amount to ordinary contractual arrangements between Jersey Airport and ATF. The Fuel Operators Agreement is an agreement between Jersey Airport and ATF under which ATF agrees to supply fuel at the airport. The Licences grant ATF the right to use certain parts of the airport for the purposes of supplying fuel. Neither the Licences nor the Fuel Operators Agreement contain provisions prohibiting ATF from making sales of fuel to resellers at Jersey airport.
65. The JCRA therefore concludes that Jersey law does not prohibit ATF from making sales of aviation fuel to resellers such as ABP at Jersey airport. ATF's refusal to do so is not mandated by Jersey law but, rather, amounts to an autonomous decision by ATF.

¹⁶ Submission on Abuse, sent by ATF to the JCRA by letter on 16 December 2015.

¹⁷ Cases C-184/13 etc *Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti*, EU:C:2014:2147, paragraphs 28 -29; Case 267/86 *Van Eycke v ASPA*, [1988] ECR 4769 paragraph 16.

¹⁸ See, for example, the comments made at the meeting between ATF and the JCRA where ATF and/or its representatives stated that a fuel supplier at Jersey airport required a licence from the Ministry ; that it thought it had an objective justification for refusing to supply, if the supply is to somebody who intends to resell when they are not licensed so there is no legal obligation for it as the only license holder to make supplies to someone who intends to make illegal supplies when they are not licensed and that the prohibition stemmed from a "general law obligation".

66. Based on the above, it is concluded that ATF's restriction on sales to third parties is an abuse of dominance under Article 16 of the 2005 Law.

Discriminatory pricing

67. In examining the operation of the relevant market, JCRA identified the pricing arrangements detailed below with three main pricing arrangements used by ATF:

- Sales at the PAP set by ATF (approx. [X] of the market, including ABP);
- Sales at a discount to the PAP ([X] of the market);
- Sales at a price connected to the independently published Platts market price for aviation fuel ([X] of the market).

68. In addition there are special arrangements for a small number of customers – such as prices related to Platts for small volume purchasers for their convenience or to allow them to independently hedge their fuel price exposure.

69. There are various contractual arrangements in place between ATF and its customers. The majority of customers (by number) purchase small volumes of fuel, and a large number of customers account for a small volume of overall fuel sales. These customers use ATF's standard terms and conditions, under which ATF provides fuel [X]. It is understood that buyers must provide affirmative consent to these terms and conditions before they are allowed to purchase fuel at Jersey airport. In some cases the terms are modified to allow a [X].

70. By contrast, a small number of large fuel purchasers account for the vast majority of fuel sales by volume and most of these larger customers have specific agreements in place with ATF. Some large customers use ATF's standard terms and conditions but have separately agreed [X]. This allows them a degree of transparency in pricing not afforded by the PAP and to hedge fuel purchases according to their needs. Others large customers have specific fuel contracts (e.g., [X]). These variations in terms and conditions, and in pricing, seem (largely but not entirely) to be based on industry standard contracts and are generally more favourable to customers than ATF's standard terms and conditions.

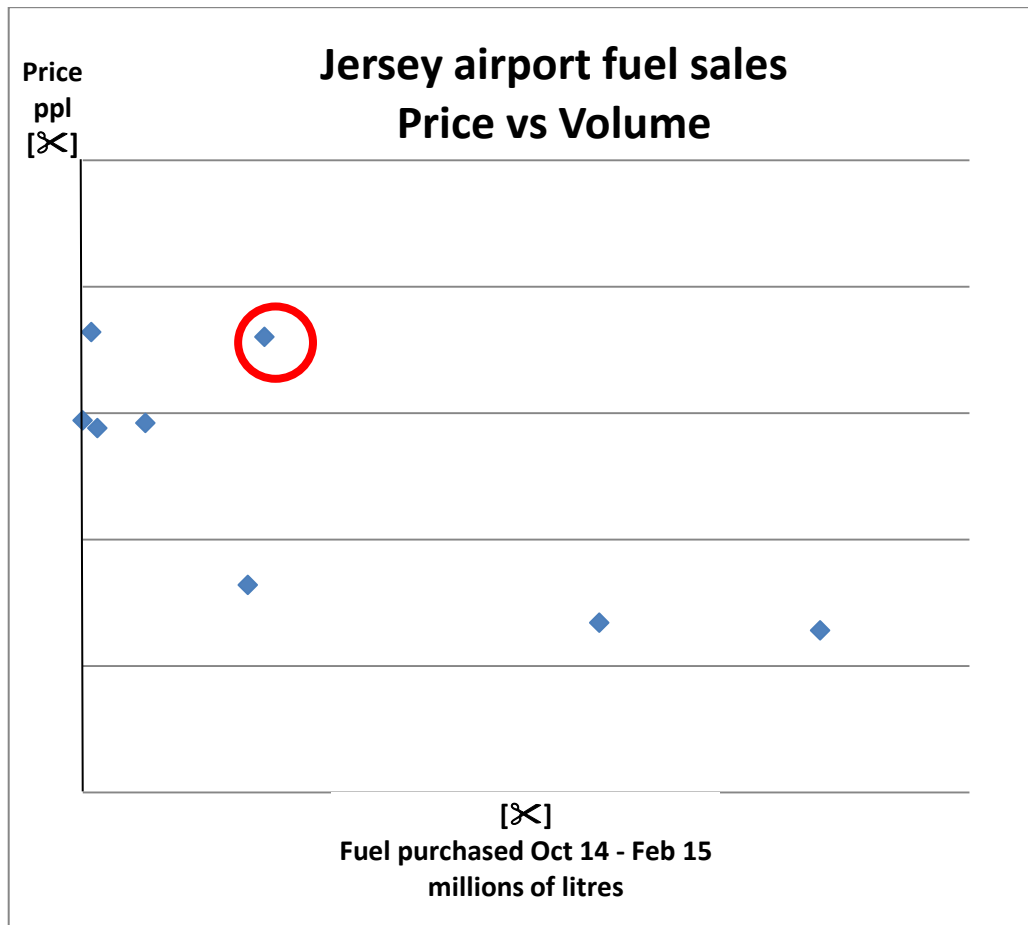
71. The JCRA notes that (as further outlined below) in its email correspondence with customers, ATF refers to committed fuel purchase volumes as an associated reason for discounted prices and mentions that normally it will consider offering Platts-based pricing to customers who purchase [X] litres or more of fuel annually. A table is provided below with details of pricing and volumes identified.

Pricing Arrangements Table

Customer	Basis for Pricing	Volume of Fuel Purchased in Litres October 2014 – February 2015	Average price paid in Pence Per Litre	Total
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	[X]

72. The figure below illustrates the relationship between volumes and pricing at Jersey airport for a range of customers. Over the period which was examined in detail (October 2014 – February 2015), the PAP varied from 9 pence per litre (“ppl”) above the Platts-based price (in October 2014), 24 ppl above the Platts price in November 2014 to 29.6 ppl above the Platts reference price (in February 2015). Thus the PAP increased significantly relative to the Platts-based price over this relevant period and would appear to be less predictable than a simple Platts related market price plus margin.
73. The evidence above indicates that customers who purchase larger volumes of fuel pay lower prices. [X], which purchased over [X] litres of fuel during the relevant period, paid a price of Platts plus [X] ppl while [X], which purchased less than [X] litres of fuel paid Platts plus [X] ppl. This is not an average, but a contracted price, and the price received by ATF is the relevant Platt’s market price uplifted by the mark up agreed in or alongside the contract. The uplift does not usually vary from month to month and variation in price is caused by changes in the underlying Platts published price.
74. The price at which ABP is obliged to purchase its fuel from ATF is the PAP rather than the Platts-based price. As already noted, the PAP is usually substantially higher than the Platts-based price. The following chart, based on the data (and table above) provided by ATF, shows that the price paid by ABP (outlined in red) is considerably out of line, and higher than, the equivalent price paid by other fuel purchasers.

Pricing and volumes chart



75. In response to the JCRA information requests, ATF indicated that it would generally only offer Platts-based pricing to customers purchasing more than [X] litres of fuel per annum. ABP purchases in excess of [X] litres of fuel per annum even after the significant reduction brought about by curtailing its reselling of fuel to third parties, but it does not receive Platts-based pricing from ATF or a discount to the PAP.
76. ATF has not provided any evidence to support an objective justification for offering Platt's based pricing to customers consuming less than [X] litres per annum but withholding it from ABP.
77. Email correspondence between ATF and these parties indicated that this arrangement was by special dispensation from ATF's board. It went on to state that information about this pricing arrangement should not be shared with other parties and, specifically, should not be mentioned to ABP. Such conduct and the particular reference to ensuring that these arrangements are not mentioned to ABP specifically (which could be viewed as a potential supplier/competitor) when the general statement on confidentiality had already been emphasised, is consistent with ATF pursuing an abuse of its dominant position in accordance with the 2005 Law section 47 (2) (b) with the specific caution in relation to ABP included because ATF was mindful that the conduct would be discriminatory and harmful to ABP's business.

78. A close comparator to ABP in terms of volume (without third party sales) since its fuel volumes purchased are very similar is [X]. However, the average price paid by ABP (which pays PAP) was significantly higher than that paid by [X] (which pays the Platts-based price) over the relevant period. The JCRA estimates that if ABP had paid the same prices as [X] (i.e., in the counterfactual scenario) for the period for which detailed information has been obtained, the cost of purchasing fuel for its own aircraft would have been reduced by approximately [X]%, or [X] pence per litre. This does not take into account any impact this would have on ABP's own customers, the loss of third party fuel sales, the knock on effects on ABP's ability to sell comprehensive, bundled services or of any reputational impact on its business.
79. Thus, ABP has incurred substantial and unfair additional financial cost as a result of ATF's price discrimination imposing higher fuel prices than consumers of comparable volumes with consequences for ABP's profitability and competitive position as a provider of aircraft chartering and management services. In turn overall market competitiveness will have been damaged through higher prices and ABP's aircraft charter and management service customers may have suffered harm through increased prices.

Objective justification for price discrimination

80. In its hearing with the JCRA and in previous correspondence, ATF had indicated that it intended to provide evidence to substantiate its view that higher prices charged to ABP were justified on the basis of the additional costs that were incurred in providing fuel to ABP compared to other fuel consumers.
81. ATF was reminded on several occasions that it had stated its intention to provide such evidence but ATF has not done so and in the last correspondence with the JCRA¹⁹ it indicated that it did not intend to provide any such evidence. In addition, ATF was asked to explain how the prices charged for fuel at Jersey airport reflected these additional costs and how the prices to customers were arrived at.
82. ATF was not able to provide this information or analysis and in the absence of any evidence that prices charged or the structure of prices reflect the costs incurred by individual customers, it is concluded that ATF cannot support its position that there is an objective justification for the price discrimination it engaged in with respect to ABP.
83. On the basis of the above assessment ATF is imposing differential pricing and dissimilar conditions on ABP in respect of equivalent transactions. Such an approach to pricing by ATF amounts to an abuse of dominance under Article 16 of the 2005 Law.

¹⁹ ATF letter of 15 February 2016.

Conclusion

84. Having investigated the behaviour of ATF in the supply of aviation fuel, the JCRA concludes that ATF holds a dominant position in the market for the supply of Jet A1 aviation fuel into aircraft at Jersey airport and that it has abused a dominant market position in breach of 2005 Law.

85. The JCRA will consider the appropriate remedy for this infringement following the issue of this decision and consider whether a fine or direction or combination of the two would be appropriate and, if so, at what level this should be imposed.

By order of the JCRA Board

30 March 2016