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JERSEY COMPETITION LAW: FROM *LE GEYT* TO MODERN STATUTE

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1 On 23rd June 2004, the States debated and approved the draft Competition (Jersey) Law 200- (the "Competition Law"). The Competition Law introduces[1] a modern statutory system of internal competition law to the Island but, perhaps surprisingly, supplements Jersey customary law, as recorded by Le Geyt,[2] rendering "*des monopoles"* unlawful.

2 This article seeks to explain the background to the Competition Law and why a statutory scheme of regulation has been approved. To assist, some explanation of economic terminology is given. There is also discussion of the economic theory underpinning competition law, before the author considers the Competition Law itself as a mechanism for enhancing competition within the Island, and how it is likely to be interpreted.

THE BACKGROUND AT CUSTOMARY LAW

3 Many practitioners may be surprised to know that aspects of competition law are already applicable within the Island. Le Geyt's *Manuscrits sur la Constitution, les Lois, & les Usages de Jersey* contains a chapter headed '*Des Monopoles*'[3] in which he writes – '*Voicy sans contredit le plus commun et le plus favorisé de tous les crimes. C'est peut-estre que plusieurs de ceux qui le commettent, ne s'imaginent pas qu'ils fassent quelque chose d'illégitime, ou que les magistrats n'y font point eux-mêmes assès de réflexion. Si l'on examinoit exactement en quoy consiste le monopole, que de coupables qui se croyent gens de bien!*'[4] It seems that even in the time of Le Geyt only lip-service was being paid to the customary law prohibition against monopolistic and unfair trading practices.

4 A distillation of Le Geyt's writing on monopolies is set out in three articles entitled *"Des Monopoles"* and a section[5] relating to enforcement. The passages are as follows -

"DES MONOPOLES

ARTICLE 1

> *Il est deffendu d'acheter en gros les Provisions que les Estrangers apportent, comme Grains, Sel, Charbon, Chaux, avant qu'elles aient esté exposées en vente au public, à*

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[1] The Law is expected to be brought into force in 2005.
[2] *Essay pour des Reglemens Politiques.*
[3] *Manuscrits sur la Constitution, les Lois & les Usages de Jersey* Tome I, page 380, published by Philippe Falle on the authority of the States, 1846.
[4] "I turn to what is without doubt the most common and the most favoured of crimes. It may be that many of those who commit it, do not imagine that they are doing anything unlawful nor that the magistrates do not do it themselves without reflection. If one examines closely what is a monopoly, how many men of substance would be among the guilty!"
[5] Le Geyt, *Privilèges, Loix et Coustumes de L'Isle de Jersey, Privilèges de L'Isle de Jersey*, paragraph 16.

prix raisonnable, quatre Jours au bord du Vaisseau, out trois Jours, dont il y en ait un Jour de marché public, à peine de confiscation de la Marchandise sur l'acheteur & d'amende sur le vendeur.

ARTICLE 2

Acheter des Provisions de l'Isle pour les rencherir au peuple, & par là l'exclure de la liberté de les avoir de la premiere main à meilleur compte, est une espece de Monopole punissable arbitrairement.

ARTICLE 3

Les Combinaisons de n'acheter ni ne vendre qu'à certain prix, de n'offrir l'un sur l'autre, ou de ne point finir le travail qu'un autre auroit commencé, sont aussi des Monopoles que la bonne police ne peut souffrir, & que le Magistrat doit punir de la mesme maniere.[6]

5 The following translations are offered.

Of Monopolies

Article I

It is forbidden to bulk buy the goods brought in by foreigners, such as cereals, salt, coal, lime, before they have been offered for sale to the public, at a reasonable price, for four days on board the vessel, or three days out of which one should be a market day, on pain of seizure of the goods from the buyer and a fine for the vendor.

Article II

Buying up Island goods in order to sell them at a higher price to the public, thereby excluding the opportunity to have them directly at a better price, is a form of monopoly punishable at the discretion of the Court.

Article III

Schemes not to buy or sell except at a fixed price, not to bid against one another, or not to complete the work started by another, are also monopolies that good policing cannot accept, and that the judge must punish in the same way.

[6] *Essay pour des réglemens politiques, Titre III*, pages 97-8

6 It is clear that Le Geyt considered that conduct falling within these paragraphs constituted a criminal offence. At paragraph 16 of his *Privilèges de l'Isle de Jersey*[7] he wrote -

> *"Le Bailly & les Jurez ont aussi de tout tems … fait des ordonnances necessaires pour la bonne administration de la Police, particulierement pour punir & prevenir les Monopoles."*

This may be translated as follows -

The Bailiff and the Jurats have also always … issued orders necessary for the good management of the police, especially to punish and prevent monopolies.

7 These provisions are surprising in a number of ways. In addition to their age, which are very early for competition law, they are relatively comprehensive. Article I regulates the sale of imported goods, establishing procedures for their sale to the public at large and regulated price control. Article II prohibits attempts to profiteer from cornering the market in local goods. Article III renders price fixing and other concerted practices unlawful. Further, paragraph 16 of *Privilèges* indicates that not only were these prohibitions of some age by the time Le Geyt was writing, but that they were regarded as being of considerable importance. Today, these aspects of customary law have fallen into disuse.

8 Cursory research of other sources of Jersey and Norman customary law have not, to date, revealed any similar passages to those recorded by Le Geyt. Perhaps Jersey's compact island status and the rise of independent merchant traders, free of feudal control, led to a problem of profiteering around the time of Le Geyt which had hitherto been inconsequential.

9 A principle of competition law which is probably more familiar to modern practitioners can be found in the field of employment law. In *RA Rossborough (Insurance Brokers) Ltd. v Boon and Aziz* the Court stated that "A covenant in restraint of trade between an employer and an employee is unenforceable unless it is reasonable as between the parties and reasonable with reference to the public interest".[8]

10 EU competition law is arguably partially applicable in respect of trade in products (as opposed to services) within the Island, either where a party in Jersey agrees to do something within the EU, or where it does something within the Channel Islands which affects trade between member states.[9] (It will be noted that most of Jersey's trade in products, whether internal or external, originates from or is sent to the EU).

11 However, a comprehensive, effective and modern form of internal competition statute was lacking prior to the adoption of the Competition Law. Most advanced large

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[7] Published in *Privileges Loix & Coustumes de L'Isle de Jersey Livre I* page 5
[8] 25th July 2001, unreported, at paragraph 42.
[9] See Powell, *Applicability of European Union Competition Regulations in Jersey* (1997) 1 JL Rev 48

jurisdictions have some form of competition law and even some relatively small jurisdictions, such as the Faroe Islands with a population of only 46,000, have this type of law .[10]

12 Against this background, three additional factors have combined to create pressure to adopt a comprehensive competition law. First, in recent years, the States have pursued a so-called policy of "corporatisation" of activities undertaken by its trading committees. The dangers in relation to corporatisation were identified in P.90/2000 which was published against a background of concern that a cost-plus mentality could get out of hand. Such monopolies have no incentive to control costs, because they can pass them on to consumers unchecked. Secondly, the control of inflation, by encouraging fiercer competition and keener prices, was recognised as being important. Thirdly, there was an increasing awareness of the serious consequences of the want of competition in the Island. More sophisticated and widely travelled residents, many with access to e-commerce, have come to realise the deficiencies of a small market place when compared with the choice, variety and lower prices prevailing in markets elsewhere. In 2001, an investigation by a States Committee into fuel prices[11] concluded that excessive profits were being made within that sector. In 2003, it was reported that Island prices were in general a fifth higher than in the UK and in particular, that the price of bread was over 43% more expensive.[12] This has in turn led to political pressure to take active steps to improve competition locally.

COMPETITION LAW CONCEPTS

13 To appreciate the Competition Law, and its potential benefit to the Island's economy, calls for some understanding of the theories and terminology underpinning economics. Economics is a relatively new science which emerged as a mainstream academic subject at about the time of the Industrial Revolution. It has been dogged by imprecision of measurement, lack of consensus, diametrically opposing theoretical bases and thinly disguised political influence; not an encouraging basis for any form of law, which should aspire to be impartial, precise, intelligible and generally accepted. Despite such a controversial background, in modern times it has become received wisdom that certain aspects of regulation by competition law are capable of benefiting an economy.

14 The classical theory of economics derives from the first attempts to create economic models of the marketplace. The "perfect market" is a term of art, describing a situation where there are an infinite number of producers and consumers, no barriers to entry (which could prevent new producers from commencing production) and perfect access by consumers to information and to products or services. Such a market allows consumers to make rational decisions and to exercise unrestricted freedom of choice.

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[10] Statute No. 83 of 6 June 1997, Faroe Islands.

[11] *Fuel Prices in Jersey; a report to the Industries Committee of the States of Jersey*, Oxera, October 2001.

[12] *Comparison of Consumer Prices in Jersey and in the UK,* Policy and Resources Committee, Statistics Unit, June 2003.

15 The “perfect market” described above is by definition a utopian goal. Apart from the obvious impossibility of an infinite number of consumers or producers in any market, progress will itself militate against low barriers to entry due to the rapid increase in sophistication of products and services. Certain consumer products are now so complex, for example motor cars for the mass market, that only large multinational producers can realistically compete, given the technology and investment now required. Moreover, the so called perfect market will not in any event optimize the most efficient production in all circumstances. For example, intellectual property rights which deliberately limit competition in certain circumstances are necessary in order to reward and encourage investment and innovation.

16 However, the concept of the perfect market remains a useful point of comparison. It is now generally accepted that consumer interests are likely to be better served by multiple producers vying for satisfied customers, than by a Soviet style monopoly, which is the sole arbiter of what is produced, and which normally leads to poor quality and high prices. In economic parlance, in the perfect market, producers are “price takers” rather than “price makers”, meaning that they have to compete and accept rather than set the prevailing market price.[13]

17 “Monopoly” is the well known term applied to a market supplied by a single producer.[14] Competition law is also concerned with the wider regulation of suppliers including monopoly producers and concerns, duopoly producers (two producers) and oligopoly producers (a few, large producers). An effective competition law will also concern itself with formal or informal groups which band together to exert control over the marketplace (“cartels”) and/or which together exercise collective dominance over a market.

18 A further note on terminology relates to the term applied to those parties regulated by the law. The Competition Law regulates “undertakings”, meaning persons (not limited to legal personalities) who carry on a business. A business includes any economic activity, trade or profession whether or not carried on for profit[15] and therefore includes any economic or commercial trading activities of the States of Jersey which could equally be carried on by the private sector.

The aims of the Competition Law

19 The report of the Economic Development Committee which promoted the Competition Law lists the following benefits of competition. First, competition would force producers to keep their costs under control, giving consumers the twin benefits of lower prices and increased choice. Secondly, the pressure to keep costs down would force producers to allocate resources efficiently. This would benefit the economy as a whole by concentrating resources (especially the Island’s scarce labour pool) into the most

[13] According to the classical theory, by limiting production.
[14] As well as the famous boardgame, a local version of which was named “Jerseyopoly” and is about to be relaunched.
[15] Article 1(1) of the Competition Law.

profitable areas of production. Thirdly, competition would force producers to innovate, to develop new products and to use technology so as to obtain an advantage over competitors. How then, can those aims be achieved?

Competition law: the theoretical background

20 Modern competition law first gained prominence in the USA (known there as "antitrust" law). In that jurisdiction it is still principally based on three brief statutes[16] originating at the turn of the twentieth century. Originally, the interpretation of US antitrust law was based on a view that competition was harmed by a lack of competitors and that more numerous producers were implicitly a good thing. At that time, industrialisation was advancing apace and competitors were becoming fewer and larger. On this view there was inevitable scepticism that unchecked competition would adequately control the adverse effects of market power. By the 1930's, this theory had become known as the Harvard school of thought. It viewed market structure as a root cause of market failure, especially the concentration of production in limited hands leading to poor performance and excessive profit.

21 However, by the 1950s a radically different interpretation of antitrust law, known as the Chicago school[17] of thought, was taking hold in the US. This view is based on the notion that efficiency is the vital yardstick by which to determine competition decisions, thereby implicitly rejecting the notion that multiplicity of producers is necessarily a good thing. An additional feature of the Chicago school is its anti-interventionist stance. This school reached its high point in the 1980's when "Reaganomics", in the sense of minimum intervention of government in the economy, became official US government policy. Since then, the Chicago school has been the subject of much criticism and US antitrust policy might now be better described as a hybrid. The initiative represented by the case of *US v Microsoft*[18] shows how far US government policy has moved from the Chicago school.

THE COMPETITION LAW

22 Two of the fundamental provisions of the Competition Law, prohibition of anti-competitive arrangements (Part 2) and abuse of dominant position (Part 3) are based upon EU competition law, laid out in articles 81 and 82 of the Treaty of Rome 1957 (the "Treaty"). The third fundamental provision of the Competition Law is the control of mergers and acquisitions (Part 4). These three fundamental provisions are considered below, but some other important features of the Competition Law must first be reviewed.

23 The Competition Law provides[19] that the Authority[20] and the Court "shall attempt to ensure that so far as possible questions arising in relation to competition are dealt with in

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[16] The Sherman Act 1890, the Federal Trade Commission Act 1914 and the Clayton Act 1914.
[17] This school of thought is often associated with US antitrust lawyer and economist, Robert Bork. See Bork, *The Antitrust Paradox: A Policy at War with Itself*, 1993.
[18] 98-1232 (TPJ), 7 June 2000.
[19] Article 60.
[20] The Jersey Competition Regulatory Authority ("JCRA"). The JCRA was constituted by the Competition Regulatory Authority (Jersey) Law 2001.

a manner that is consistent with the treatment of corresponding questions arising under Community law in relation to competition within the European Community." This provision of the Competition Law[21] appears to raise EU competition case law to a quasi binding status and this article hereafter will accordingly refer extensively to EU authorities for guidance on how the Competition Law is likely to be approached and interpreted.

24 Other important features of the Competition Law are as follows -

(1) Enforcement. The JCRA is given extensive powers to investigate suspected infringements of the Competition Law, either in response to a complaint or of its own motion. It may serve a notice on a party under investigation, or any other party which appears to be in possession of relevant information or documents,[22] to provide them within a specified time, or to answer questions. An undertaking or person in default is guilty of an offence.[23] Power to enter premises under warrant granted by the Bailiff,[24] and an offence of obstruction[25] are also included.

(2) Although the JCRA is likely to be the primary enforcer of competition law, private enforcement is possible by an aggrieved person, allowing damages to be awarded for breach of specified statutory duties.[26] Injunctions may also be sought and awarded for breaches, including prospective breaches.

(3) The law is based on a "prohibition" rather than "control of abuse" approach. The significance of this is that sanctions may be applied to breaches of prohibited conduct. The JCRA can issue directions[27] which may ultimately be enforced by court order[28] and where satisfied a breach has been committed negligently, recklessly or intentionally, the JCRA may fine an undertaking up to 10% of its turnover during the period of breach, subject to a maximum of three years.[29]

Control of dominance

25 Part 3 of the Competition Law prohibits one or more undertakings from abusing a dominant position in trade for any goods or services in Jersey or in any part of Jersey.[30] It is vital to note that it is not dominance *per se* which is unlawful but its abuse. Article 16(2) gives a series of examples, not exhaustive, of possible abuse as follows -

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[21] Earlier drafts of the law were permissive and allowed regard to be had to any similar competition law (which would have included the UK Competition Act,1998) but the latest draft, with its "so far as possible" construction, appears to give near binding precedence to EU authority. This article of the Competition Law is clearly modelled on section 60 of the UK Competition Act, 1998.
[22] Including information held on computer under Article 28.
[23] Article 27.
[24] Articles 29, 30 and 31.
[25] Article 33.
[26] Article 51.
[27] Articles 36 and 37.
[28] Article 41.
[29] Article 39.
[30] Article 16(1).

(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."

26 In practice, the assessment of abuse of dominant position is approached in a logical step by step manner, commencing with identification of the relevant market and assessment of dominance and, if that is established, moving on to consider whether abuse has indeed taken place.

The relevant market

27 Defining the relevant market involves the assessment of the product market, geographical market and temporal market. In essence, what is being tested here is whether the market being placed under the microscope is truly a separate and distinct marketplace. The legal definition used is one of "interchangeability" or "substitutability" (or the lack thereof), because it is meaningless to say that an undertaking is "dominant" in a particular area if the product/services can easily be substituted with alternatives by consumers.[31] The economic term given to products which are not easily interchangeable is "inelasticity of demand or supply."

28 Relevant factors in defining the relevant market could be demand-based factors such as the physical characteristics of a product, price, intended use and the extent to which an increase in price of one product influences demand for another (known as "cross-elasticity of demand"). Supply-based factors would include the ability of alternative suppliers to switch production quickly and without significant cost into the market being considered ("supply side inter-changeability" or "potential competition").

29 The relevant geographical market is a factor which will often be an important consideration under the Competition Law, given Jersey's small size of 45 square miles. However, the assessment of a producer's dominance should only be made in the geographical area where competition can realistically be expected to take place. The test adopted in *L'Oreal v De Nieuwe AMCK*[32] is that "the possibilities of competition must be

[31] For example, it would be pointless to assess that a particular manufacturer of a computer game was dominant, if in practice consumers regarded other games as being a perfectly acceptable substitute, in which case the relevant market measure would be that for all games which were considered by consumers to be interchangeable.

[32]Case 31/80 [1980] ECR.3775.

judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products”.[33]

30 The temptation must, however, be resisted to assume that the shores of Jersey will always be the relevant geographical market. Many products are available by mail order or internet (suggesting a wider market) and certain products or services may be limited to a smaller area.[34]

31 Temporal markets refer to those subject to temporary alterations in operation. Examples are seasonal markets and markets subject to transient considerations, such as wars creating scarcity of supply. In practice, the temporary disruptions are separated from the normal conditions prevailing in the market.

Dominance

32 Once the relevant market has been clearly delineated, the analysis can move on to consider whether dominance is present. The test for dominance laid down in the *United Brands* case[35] is as follows -

> “The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.

33 The test is essentially two-fold, first, emphasising the independence of the undertaking or market strength; and secondly, the ability to prevent effective competition, meaning the ability to restrict other competitors from entering the market through barriers to entry.

34 Market strength is assessed *inter alia* by reference to the market share held by the undertaking. Anything above 50% has been considered to be a very large market share in EU caselaw. Market shares of 30 – 50% have also been considered to indicate market strength, and as the market share declines the share held by the next largest competitor will become increasingly relevant. Other factors in assessing market strength include *inter alia* buying power, historical patterns of fluctuation in market share and the potential for market entry.

35 The assessment of barriers to entry is a contentious area in both economics and law. The controversy relates to whether the costs of becoming established as a producer

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[33] See also the OFT’s guidelines on market definition (OFT 403 – see www.oft.gov.uk) and the EU Commission Notice [1997] OJ C372/5.
[34] Provision of office parking in St Helier, for example.
[35] *Supra.*

in a market are properly considered to be a barrier to entry or not. The EU approach is a practical one, simply considering the difficulty faced by a new entrant to a market, thereby holding the costs of establishment by an existing producer against it.[36] Barriers to entry can include legal hurdles (the Regulation of Undertakings and Development (Jersey) Law 1973, for example), technological advantages, economies of scale,[37] financial resources, vertical integration,[38] product differentiation[39] and conduct.

36 In summary, EU Law has adopted broad definitions of dominance but it is to be emphasised that abuse is also required to convert dominance into unlawful behaviour.

Abuse

37 The examples of abusive behaviour given in Article 16(2) of the Competition Law exactly replicate the list given in Article 82 of the Treaty. The European Court has defined abuse widely, using the teleological interpretation[40] characteristically seen from the European Court of Justice. The test applied is objective, not subjective. Abusive behaviours fall into the categories of exploitative abuses and exclusionary abuses.

38 Exploitative abuses include charging excessive prices. What is and is not an excessive price is controversial and in *General Motors Continental NV v Commission*[41] the European Court held that prices are excessive if they do not reflect the economic value of the goods. "Economic value" was not defined, and that case in fact decided that the prices were not excessive. Other cases have examined prices in markets in different European states and this has been used to measure whether a price is *prima facie* excessive. The difficulty with this approach is that different markets have different cost structures, and that would in particular be a difficulty in comparing markets in Jersey with those in the UK. Another approach has been to investigate costs and profits, to determine whether profits are excessive. What constitutes excessive profits has also not been defined by the Court.

39 Another type of exploitative abuse includes unfair conditions, illustrated in *BRT v SABAM,*[42] where a performing-rights society imposed wider obligations than were necessary, thereby unfairly restricting members' free use of copyright. A further type of exploitative abuse is "ex-inefficiency" or "quiet life". This is the theory that monopolies can settle back and become lazy, not having to innovate to compete. This theory was used in *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli,*[43] to hold that the refusal of dock workers to use modern technology to load vessels was an abuse. Most of the exploitative abuses are difficult to prove because they are so subjective in nature. That

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[36] In the sense that the existing undertaking will not be given credit for its costs of establishment (investment), which will simply be seen as a barrier to entry.
[37] I*e*: a certain minimum level of production required to be competitive within a market.
[38] The extent to which the undertaking owns its sources of supply and outlets.
[39] By which producers can persuade consumers to perceive relatively similar products as being different due to branding.
[40] In practice, this means judicial activism.
[41] Case 26/75 [1975] ECR 1367; [1976] 1 CMLR 95. See also the UK case of *Napp v DGFT* [2002] CompAR 13.
[42] Case 127/73 [1974] ECR 313; [1974] 2 CMLR 238.
[43] Case C-179/90 [1991] ECR I-5889; [1994] 4 CMLR 422.

has meant that most of the refusal of the European case law has involved exclusionary abuses.

40 Exclusionary or anti-competitive abuses allow dominant undertakings to protect their dominant market power by making it difficult for new entrants to enter the market and compete. The test applied by the Court is an objective one. Exclusionary abuses include export bans imposed by an undertaking on its customers (because in that way, producers can effectively erect trade barriers to segregate different markets).

41 Another form of exclusionary abuse involves price discrimination in the form of discounts/rebates and predatory pricing, which can be used to drive out existing producers or to prevent new competitors from entering a market. Discounts or rebates, typically given when a customer buys all its products from one producer (or different levels of discount for meeting different sales targets) can be abusive. Clearly, discounts for bulk buying can be a perfectly legitimate business practice and in *Hoffmann-La Roche v Centrafarm,*[44] the court held that provided that such discounts are objectively based on savings which can be made by the producer from selling in bulk, they are permissible. Such discounts must be open to all customers and objectively justifiable. However, where rebates or discounts are awarded informally on an *ad hoc* basis, varying between different customers and perhaps of short duration, it may indicate that the discount is being given to tie customers in and to prevent them from obtaining even small parts of their supply from a competitor. Such practices are regarded as abusive.

42 Predatory pricing is typically a price reduction to levels at or below cost price. In *Michelin v Commission,*[45] it was determined that if prices are fixed below average variable costs, predatory pricing will be presumed. If the prices are between average variable cost and average total cost,[46] pricing will be deemed to be predatory where it is part of a plan to remove competition. Predatory pricing is also more likely to be found if prices are reduced selectively in a way which does not bear resemblance to cost structures. For example in the case of *Irish Sugar plc v Commission,*[47] prices were cut in the border region of the Republic of Ireland to eliminate competition from Northern Irish imports.

43 Another exclusionary abuse is where a dominant undertaking refuses to supply services or goods. Freedom of contract is a basic principle of law, but in some cases a refusal to supply will be disallowed. The refusal must be objectively justifiable, and that does not mean on the supplier's commercial interest, but on more general grounds. In particular, refusal to supply in order to damage or deter competitors is not permitted, and, for example, a refusal to supply solvent used in the production of pharmaceuticals where

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[44] Case 102/77 [1978] ECR 1139; [1978] 3 CMLR 217.
[45] Case 322/81 [1983] ECR 3461; [1985] 1 CMLR 282.
[46] In other words fixed costs plus variable costs.
[47] Case T-228/97 [1999] ECR II – 2969; [1999] 5 CMLR 1300; [2000] All ER (EC) 198.

the producer had decided to enter a particular market in competition, was held to be abusive in *Commercial Solvents v Commission.*[48]

44 Refusal to grant licences for intellectual property rights can in limited circumstances also amount to an exclusionary abuse. It is legitimate for a producer to apply for and maintain intellectual property rights, because this encourages investment and innovation, but a producer may occasionally find itself in difficulty if it will not license other producers to compete, on the basis that the investment can be recouped by charging the appropriate licence fee.

45 An exclusionary abuse may also occur where there is a refusal to supply new competitors and grant access to essential facilities, for example, networks of gas pipes, satellite cables, the electricity grid or telephone lines. If (1) a facility is indispensable for carrying on a business and there are no potential substitutes; and (2) there are technical, legal, or economic obstacles which make it impossible or unreasonably difficult to replicate the essential facility, a competitor may be permitted access to that facility to allow it to compete. Of course, it will have to pay a reasonable price for access to those facilities. For example, in *London-European/Sabena*[49] the airline London-European was granted access to Sabena's computerised reservation system for the purpose of introducing a new air service between London and Brussels.

46 Another type of exclusionary abuse is bundling or tie-ins, where a dominant undertaking attempts to force consumers to obtain other unrelated supplies, for example as in *Napier Brown/British Sugar*[50] forcing consumers to use a particular haulage service for the delivery of their products.

Collective dominance

47 Abuse of dominance has in recent years also been increasingly applied to markets where more than one dominant producer is benefiting from dominance, in other words, oligopolistic markets. A classic example is the UK fuel supply market. In such markets, there is not much incentive for price cuts, because competitors immediately learn of such a cut and follow suit ("parallel behaviour"). In practice, in such oligopolistic markets, a "price leader" often emerges, who customarily acts as the first party to increase prices and the other market players quickly follow suit. In effect, the market is subject to the dominance of a few powerful producers.

CONTROL OF ANTI-COMPETITIVE AGREEMENTS

48 Article 8(1) of the Competition Law, modelled on Article 81 of the Treaty, provides that:-

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[48] Case 6 & 7/73 [1974] ECR 223; [1974] 1 CMLR 309.
[49] Commission Decision (88/589/EEC), OJ L317/47, 1988; [1989] 4 CMLR 662.
[50] Commission Decision (88/518/EEC), OJ L284/41, 1988; [1990] 4 CMLR 196.

"an undertaking must not make an arrangement with one or more other undertakings that has the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey".

49 Article 8(2) goes on to provide a non-exhaustive list of behaviour[51] which is likely to hinder competition and is in identical terms to the sub-paragraphs (a) to (e) of the Treaty, namely any arrangement whose object or effect is to -

"(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

50 Arrangements prohibited by Article 8(1) will be void to the extent they are anti-competitive.[52] Article 8(1) of the Competition Law differs from the Treaty in prohibiting "arrangements", rather than adopting the Treaty terminology of "agreements", "decisions", and "concerted practices". It appears the word "arrangement" has been chosen as a looser term, which may avoid the legalistic arguments which have been raised in relation to the Treaty terminology. It is worth noting that even under the Treaty wording, agreements, decisions and concerted practices are interpreted in the widest terms, including non-binding "gentleman's agreements" (*ACF Chemiefarma NV v Commission*),[53] unilateral behaviour, for example where Ford cars refused to supply right-hand drive vehicles to German Distributors (in effect, to protect Ford UK Distributors - *Ford Werke v Commission*[54]), understandings and non-binding recommendations likely to affect the behaviour of members of associations. It is presumed the term "arrangement" in the Competition Law will be interpreted at least as widely as the Treaty terminology, although they are different.

51 Due to the disjunctive construction of "object or effect", arrangements the "object" of which is to hinder competition to an appreciable extent[55] contravene the law, notwithstanding that the "effect" of the arrangement may be demonstratively neutral to

[51] This list is virtually identical to the examples of abuse of dominant position given at Article 16(2) *supra*.
[52] Article 8(3).
[53] Case 41, 44 & 45/69 [1970] ECR 661; [1970] CMLR 8083.
[54] Case 25 and 26/84 [1985] ECR 2725; [1985] 3 CMLR 528.
[55] *E.g.* in the supply of goods or services within the Island.

competition (and *vice versa*) - *Société Technique Minière v Maschinenbau Ulm GmbH* .[56] It is therefore no defence to a price-fixing arrangement to argue that it had no effect.

52 Despite the apparently wide interpretation set out above, a number of factors limit the scope of "anti-competitive arrangements".

(1) It is vital that the relevant market is precisely delineated. For example when considering the liquor supply market in relation to tied house arrangements,[57] does the market consist of supermarkets, off-licences and pubs or only some part of them?

(2) Where relevant, the "effect" of hindering competition must be carefully considered and not all arrangements to co-operate will be anti-competitive. In fact, co-operative ventures can be necessary or desirable to produce new or better products and therefore aid competition. Early EU caselaw sometimes ignored this fact, but in latter years the importance of analysing the market as a whole to determine the effect of an agreement has been recognised. In *Remia BV and Nutricia v Commission,*[58] clauses in business sale agreements which prohibit the vendor from establishing a new business in competition were deemed lawful, despite *prima facie* appearing to be anti-competitive. The rationale for this decision was that without such a clause, a purchaser would not be prepared to pay for goodwill, investment (in the form of the new purchase), might be discouraged and the net effect on the market as a whole would not be beneficial to competition.

(3) Under the Competition Law, the Economic Development Committee (the "Committee")[59] may, by Order,

(a) grant "*de minimis"* exemptions to small undertakings by reference to, for example, turnover, earnings, market share or number of employees;[60]

(b) grant class or "block" exemptions, aimed at particular types of agreement;[61]

(c) exempt specific agreements, which may be made by application by a party;[62]

(d) exempt certain agreements on public policy grounds; and

(e) exempt certain agreements involving land transactions.

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[56] Case 56/65 [1966] ECR 235; [1966] CMLR 357.
[57] The practice common in the UK whereby brewers own pubs and insist their tenants purchase the brewery's own products.
[58] Case 42/84 [1985] ECR 2545; [1987] 1 CMLR 1.
[59] A committee of the government, the States of Jersey.
[60] Article 11.
[61] Article 10.
[62] Known in EU competition law as "negative clearance".

(4) It should also be noted that under EU caselaw, parallel behaviour within an oligopolistic market has been deemed to be permissible, and will not necessarily be evidence of an "arrangement" without more. Oligopolistic markets (where there are few suppliers, as is often the case in Jersey) often naturally result in parallel behaviour between those suppliers, usually meaning close following in pricing behaviour. To determine whether such behaviour is unlawful, economic evidence has to be adduced. Factors such as readily available price information, limited numbers of customers and long-term advance purchasing requirements might indicate the natural operation of an oligopoly market which is lawful, rather than the result of an "arrangement".

Undertakings

53 Bodies which are linked through ownership are also excluded from the prohibition of anti-competitive arrangements.[63] In *Viho Europe v Commission,*[64] it was also held that that management agreements linking undertakings are excluded. However, in practise that will not form a loophole in the law: if the linked undertakings are hindering competition to an appreciable extent it is likely they will then fall foul of an abuse of dominant position and be caught under Part 3 of the Competition Law.

Hindering competition

54 The term "hindering" has been employed in the Competition Law, in preference to the EU competition law formulation of prohibition of agreements which act in "prevention, restriction or distortion of competition". The case of *Consten and Grundig v Commission*[65] indicates that an agreement will distort competition if, prior to implementation, it can be determined that the agreement would prevent or restrict competition which might take place between the parties to the agreement.

CONTROL OF MERGERS

55 Part 4 of the Competition Law provides that certain mergers or acquisitions, to be prescribed by Order, require prior consent from the JCRA.[66] No subordinate legislation has been published at the date of writing of this article. Where a Jersey company is in breach of this provision, title neither to its shares nor to any property situate in Jersey shall pass pursuant to the terms of the merger. The JCRA may refuse to approve a merger or acquisition if "it is satisfied that the merger or acquisition would substantially lessen competition in Jersey or any part of Jersey",[67] or if the applicant has failed to provide information or documents requested by the JCRA within a reasonable time.

CONCLUSION - WILL THE COMPETITION LAW ACHIEVE ITS AIMS?

[63] Article 14 of the Competition Law.
[64] Case C-73/95P [1996] ECR I-5457; [1997] 4 CMLR 419.
[65] Cases 56 and 58/64 [1966] ECR 299; [1966] CMLR 418.
[66] Article 20.
[67] Article 22(4)

56 Jersey is a small jurisdiction and doubt has been expressed about the wisdom of adopting this type of law. The cost of administering the law, estimated in the Report attached to the Proposition,[68] is £500,000 *per annum* from 2005. However, the benefits could be significant. The Island's Gross Domestic Product (GDP) exceeds £3 billion per annum[69] and a 0.016% increase in efficiency in the Island's economy would cover the £½ million annual costs. A 1% increase in efficiency would generate £30 million. So the potential benefits are large.

57 The Competition Law itself represents a largely tried and tested framework on which the Committee can construct its Orders and the JCRA can adopt its policies. The subordinate legislation, in particular, will be crucial in determining the extent of intervention in the local economy. It is submitted that only then will we be able to determine whether the Competition Law meets the needs of the Island in the way *Le Geyt* indicates the customary law may once have attempted.

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[68] P.37/2004.
[69] *States of Jersey Statistical Review* (2002), page 50, quotes GDP in 1999 at £2.825 billion at 2002 prices.