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## Turning Round a Supertanker: the OFT's abuse of dominance case against CH Jones

In October 2013 the OFT decided to close an abuse of dominance investigation, launched in April 2010, against CH Jones, a leading provider of bunker fuel services to HGV fleets.[1] This outcome marked a significant reversal from a statement of objections ("SO") issued in February 2011, in which the OFT alleged that CH Jones had abused a dominant position by engaging in an anticompetitive attempt to exclude a rival.

A number of factors contributed to this turnaround, including a willingness of the OFT to subject its provisional conclusions to rigorous testing via a data room process, and to keep an open mind to the possibility that empirical analysis can rebut presumptions based on product characteristics and internal documents. This Brief examines these factors in more detail, and identifies some lessons for the effective enforcement of laws that prohibit the abuse of market dominance.[2]

1. See Decision on an alleged abuse of a dominant position by CH Jones Limited, OFT1511. The OFT's investigation took place under the Chapter II provisions of the UK Competition Act.

2. RBB assisted CH Jones with responding to the SO and presented an economic analysis on its behalf at an oral hearing with the OFT.

### Background and context for the case

The OFT's investigation was prompted by a complaint made by rival bunker fuel card provider UK Fuels. In April 2010 UK Fuels alleged that CH Jones was abusing a dominant position by engaging in exclusionary conduct aimed at eliminating UK Fuels as a competitor.

CH Jones and UK Fuels are both active in the supply of diesel bunker fuel card services. Diesel bunker fuel cards provide a means by which haulage fleet drivers can access fuel while on the road from a network of sites affiliated with the card operator. Bunker fuel cards offer hauliers two primary benefits: first, by centralising fuel procurement and payment, the use of fuel cards simplifies fleet administration; and second, bunker fuel cards provide access to diesel at wholesale terms reflecting fleet operators' purchase volumes, rather than the retail prices charged by filling stations.

Both CH Jones and UK Fuels operate two types of bunker fuel card: a direct bunker card and a pay as you go ("PAYG") bunker card. Under the direct bunker card model, hauliers purchase fuel from a wholesaler, who arranges delivery to the fuel card operator, who in turn allows the haulier to draw down an equivalent volume from any of its sites. Under the PAYG model, it is the fuel card operator who purchases fuel from wholesalers, which it then resells to hauliers as they draw diesel from the operator's site network. Hence, the key difference between the two models is that under the direct bunker model hauliers purchase diesel from a fuel wholesaler and purchase access to that fuel from the bunker card provider; whereas under the PAYG model fleet operators make a single payment to the card company for both fuel and access to that fuel. CH Jones and UK Fuels are the only two direct bunker card operators in the UK, while the oil majors (BP, Esso, Shell, Texaco and Total) provide PAYG bunker cards.

Based on UK Fuels' complaint, the OFT's SO provisionally found the following: that CH Jones held a dominant position in a distinct market for the supply of direct bunker card services; that CH Jones was abusing that dominant position by (inter alia) inducing site owners to agree exclusive contracts denying UK Fuels access to those sites; and that this conduct was aimed at eliminating UK Fuels as a rival to CH Jones in both the direct and PAYG bunker card markets.

3. Note that price differentials are not in and of themselves evidence of separate markets. If products sell at different prices that reflect differences in quality or characteristics customers may be willing to switch between those products in response to changes in their relative prices. For instance, even if PAYG fuel costs were higher than direct bunker fuel costs, direct bunker customers may nonetheless choose to switch to the increased convenience of PAYG cards following an increase in direct bunker costs that narrowed the price difference between the two types of card.

CH Jones did not dispute that it was engaged in vigorous competition against UK Fuels; indeed, a range of internal documents referred to in the SO made clear the company's aggressive approach to rivalry with UK Fuels. However, CH Jones contended that its direct bunker card activities are competitively constrained by PAYG bunker cards supplied by the oil majors, such that it cannot be considered to hold a dominant position despite accounting for more than 90% of direct bunker card supply volumes. Hence, the question of whether the supply of direct bunker card services is a separate product market was critical to the outcome of the case.

## Key substantive issues

The OFT's SO based its provisional finding that there is a relevant market for the supply of direct bunker fuel cards on a range of evidence. In order to allow CH Jones and its advisors to evaluate and assess this evidence the OFT established a confidential data room, which proved invaluable in testing the basis for the OFT's provisional finding.

The starting point for the OFT's market definition analysis was a review of product characteristics. The SO cited a number of differences between direct and PAYG bunkering, including the need for wholesale market expertise on the part of direct bunker customers, and the requirement that they commit to upfront purchasing and minimum purchase volumes.

Having reviewed CH Jones' SO response, however, the OFT accepted that insofar as these product characteristics differences might pose barriers to customer switching between direct and PAYG bunker cards, those barriers would operate in an asymmetric fashion. For the assessment of CH Jones' alleged dominance in the supply of direct bunker cards the relevant question is whether direct bunker customers are able to switch to PAYG bunker cards, not whether PAYG customers can switch to direct bunker cards. While wholesale market expertise, upfront purchasing and minimum volume requirements might pose a barrier to PAYG bunker card users switching to direct bunker cards, they would not impede a customer that had already overcome those barriers from switching to PAYG bunker cards where these issues do not arise. The SO had thus conceptually erred in assuming a symmetrical constraint between these products.

The OFT also relied on price differentials to distinguish direct and PAYG bunker cards. Based on a review of pricing data collected from a survey of fuel card users, the SO provisionally found that direct bunkering allowed hauliers to obtain fuel at a significantly lower cost than was available via PAYG bunker cards. If correct, this pattern of pricing could indicate a potential barrier to direct bunker customers switching to PAYG bunker cards.[3]

The materials made available in the OFT data room cast serious doubt on the OFT's finding of a price differential however. First, there were ambiguities in the price data that had been collected from customers. The OFT's survey of prices did not clearly distinguish direct and PAYG bunker customers, did not specify whether direct bunker fuel costs should include or exclude management fees paid to the bunker company, and did not specify whether customers should include or exclude VAT.

Second, the OFT collected average fuel costs over a four week period during which diesel prices were rising. Given that fuel costs for direct bunker customers (who purchase wholesale fuel in bulk) vary less frequently than fuel costs for PAYG bunker customers (who pay a price that varies weekly), this approach gave rise to a systematic bias towards higher PAYG bunker prices.

Third, and most importantly, in reviewing direct and PAYG bunker fuel card costs the OFT had failed to account for differences in customers' fuel purchase volumes. The SO thus compared fuel costs for high volume direct bunker customers to fuel costs for PAYG customers that generally purchased lower volumes. The information in the data room showed that larger PAYG customers with volumes comparable to those of direct bunker customers in fact obtained fuel at costs very similar to those paid by direct bunker customers.

Overall, the price data contained in the data room did not support the SO's provisional finding that direct bunker fuel costs are significantly lower than PAYG bunker fuel costs, and instead suggested that the two are very similar on a like-for-like basis.[4] The OFT accepted these criticisms, and concluded in its decision that there was no evidence of a price differential.

Finally, the OFT's SO presented a critical loss analysis that suggested the existence of a relevant market for direct bunker fuel cards.[5] In its SO the OFT examined price increases imposed by CH Jones following its acquisition of a rival direct bunker card operator, ReD, in 2009. The OFT found that following the ReD acquisition CH Jones had been able to impose a profitable price increase on some former ReD customers. It interpreted this evidence as indicating that CH Jones held market power over direct bunker fuel card customers.

The OFT accepted a number of criticisms of this analysis, including the failure to account for increases in service quality from which former ReD customers benefited following the merger with the larger CH Jones site network.

Most importantly, however, the data room process allowed CH Jones to produce an analysis of customer switching patterns following the 2009 price increase that contradicted the OFT's narrow product market definition. This analysis indicated diversion amongst direct bunker customers to PAYG bunker cards of between 40% and 70%. Diversion to UK Fuels' direct bunker fuel card, meanwhile, was found to be less than 30%. These results indicate that PAYG bunker cards exert a stronger competitive constraint on CH Jones' direct bunker business than UK Fuels' direct bunker fuel card. The OFT accepted that this evidence contradicts the hypothesis of a direct bunker fuel card market that does not include PAYG bunker fuel cards.

It is also notable that UK Fuels' responses to the SO disagreed with the OFT's provisional finding that there exists a separate product market for direct bunker card services. UK Fuels instead submitted that its PAYG bunker card lies in the same market as its direct bunker card. As the OFT acknowledged, this position would imply that oil majors' PAYG cards also lie in the same market as direct bunker fuel cards, thereby exerting a competitive constraint on CH Jones' direct bunker activities.

## Lessons and implications

It is widely recognised that Chapter II investigations, and abuse of dominance enquiries in general, take a substantial amount of time to process. In the CH Jones case the OFT commenced its investigation in April 2010, issued its SO and received CH Jones' response in 2011, but did not make its decision to close the investigation until October 2013. CH Jones was thus subject to three and a half years of legal uncertainty regarding its competitive behaviour.

While Chapter II investigations may appear to proceed at a glacial pace, however, the first lesson from the CH Jones case is that it is possible to turn around the supertanker. Having issued a 400 page SO, the OFT did carefully consider the written and oral representations

4. The similarity of the direct and PAYG bunker card fuel cost distributions was corroborated in the data room by statistical testing.

5. Critical loss analysis ("CLA") is a quantitative technique that directly addresses the market definition question of whether a hypothetical monopolist could profitably impose a small but significant non-transitory increase in price ("SSNIP"). CLA compares the maximum volume of sales a hypothetical monopolist could afford to lose following a SSNIP to evidence on the actual volume of sales likely to be lost.

made on behalf of CH Jones, and ultimately acknowledged that the evidence in the SO was insufficient to support the provisional conclusions reached. It was also prepared to explain the turnaround in its thinking in a fully reasoned published analysis. This is welcome news for firms involved in Chapter II investigations.

The second lesson is that whilst internal documents can provide relevant context to understand commercial and competitive motivations, they are not sufficient to make a finding of dominant firm abuse. CH Jones did not hold back from describing its vigorous approach to rivalry against UK Fuels in its internal documents. But since vigorous rivalry is a legitimate part of the competitive process that competition laws are designed to permit and even encourage, enforcement authorities need to look beneath the surface of such documents and conduct a thorough review of market evidence in order to build a robust case.

The third, related, lesson emerging from the case is the importance of the data room process. Access to confidential data collected by the OFT proved decisive in allowing CH Jones and its advisors to test the OFT's case and to rebut any adverse presumptions that might have arisen from the internal documents. Data room processes allow firms under investigation to ensure that evidence cited against them is interpreted correctly and that exculpatory material that might have been overlooked is brought to light. Access to evidence collected and analyses undertaken by regulators plays a crucial role in reaching robust decisions in all aspects of competition enforcement.

In summary, the CH Jones case shows that, while abuse of dominance investigations can be torturous and time consuming for companies under investigation, a process that provides suitable access to the evidence assembled, that gives due consideration to submissions made, and that permits the enforcement authority to reconsider its position even after the publication of an SO, can achieve the thorough scrutiny that effective competition law enforcement requires.