

Competition Act 1998

Decision of the Director General of Fair Trading

ICL/SYNSTAR

20 July 2001

Case no CA98/6/2001

---

## SUMMARY

The Director General of Fair Trading (the Director) has concluded that ICL plc and certain of its subsidiaries (together referred to as ICL) are not in a dominant position in the market for the supply and maintenance of computer equipment with mainframe functionality in the UK. He has also concluded that there is no relevant secondary market for hardware maintenance services in the UK for ICL mainframe computers because of whole life costing by purchasers of hardware and other constraints on ICL. The Director has therefore decided to close the case with a finding that ICL has not infringed the prohibition imposed by section 18 of the Competition Act 1998.

Synstar Computer Services (UK) Limited (Synstar) had alleged that ICL was exploiting its monopoly power by not providing non-ICL hardware maintenance supported customers with certain diagnostic software. This enabled ICL to prevent third party maintainers (TPMs) from competing for hardware maintenance contracts for ICL mainframes. The Director had initially dismissed the complaint under the Fair Trading Act 1973 on the grounds that ICL had offered to make certain services available to customers who had hardware maintenance contracts for ICL mainframe computers with TPMs.

Further submissions were made by Synstar and court proceedings were commenced on 28 April 2000, in which Synstar claimed that ICL acted contrary to Articles 81 and/or 82 of the EC Treaty and section 2 and/or section 18 of the Competition Act 1998 by tying the provision of their computer hardware maintenance service to the provision of

their computer software maintenance and support service in respect of their mainframe computers. The Director re-opened the investigation and reassessed the complaint by Synstar under the Competition Act 1998 (which entered into force on 1 March 2000).

The investigation established that ICL was not in a position of market dominance. It has therefore not been necessary to investigate the allegations of abuse in this case.

## **I THE FACTS**

### **A The complaint**

- 1 In November 1997 Synstar complained that ICL was preventing it from competing with ICL in the provision of hardware maintenance services for ICL mainframe computers. The complaint was made under the Competition Act 1980 and the Fair Trading Act 1973.
- 2 On 2 March 2000 the complaint was dismissed by the Director on condition that ICL would provide certain services to customers who wanted to obtain hardware maintenance services from TPMs.
- 3 On 14 April 2000 Synstar wrote to the Director stating that it considered his findings and analysis to be inaccurate. On 28 April 2000 a claim was issued in the High Court and served on ICL by Synstar. Synstar's claim is that ICL, 'contrary to Articles 81 and/or 82 of the EC Treaty and section 2 and/or 18 of the Competition Act 1998, have tied the provision of their computer hardware maintenance services to the provision of their computer software maintenance and support service in respect of their mainframe computers'.<sup>1</sup> ICL's defence in these proceedings was served on 13 July 2000. On 30 March 2001, Lightman J stayed these proceedings pending, amongst other things, this decision.

### **B The undertaking**

- 4 ICL Sorbus Limited is a wholly owned subsidiary of International computers Limited which is itself a wholly owned subsidiary of ICL plc with Fujitsu being the ultimate parent.
- 5 ICL is a global IT services group that designs, builds and operates information systems and services for customers in the retail, finance, government, telecoms, utilities and travel markets. ICL services focus on electronic business, enterprise applications and the implementation and outsourcing of IT infrastructure.

---

<sup>1</sup> Claim no. HC000 2043.

## II LEGAL AND ECONOMIC ASSESSMENT

### A Assessment of dominance

#### DEFINITION OF DOMINANCE

6 To find an infringement of section 18 (the Chapter II prohibition) of the Competition Act 1998 (the Act), the Director must establish that ICL has abused a dominant position in a relevant market and that such abuse may affect trade within the UK.

7 The European Court has defined a dominant position as:

'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'.<sup>2</sup>

8 In assessing dominance the Director considers whether and to what extent an undertaking faces constraints on its ability to behave independently. Those constraints might be existing or potential competitors, or other constraints such as buyer power.

#### THE RELEVANT MARKETS

##### *The primary product*

9 The primary product that is the subject of the complaint is computer equipment with mainframe functionality.

10 ICL's computer equipment with mainframe functionality is 'a highly complex centralised computer, typically costing over £100,000 at current [2000] prices, which manipulates data received from all computers connected to it, which performs complex functions beyond the capabilities of connected computers, and which stores vast amounts of data accessible by many users at the same time.'<sup>3</sup> The 1999 Key Note Market Report on Computer Hardware, says that mainframes are used mainly as a central resource by large organisations. 'The

---

<sup>2</sup> Case 27/76 *United Brands v EC Commission* [1978] ECR 207; [1978] 1 CMLR 429.

<sup>3</sup> ICL's defence of the claim at footnote 1, para 2(c).

servers contain several processors and a large internal memory.<sup>4</sup> The end user gains access via a 'dumb' terminal or desktop PC 'or a mixture of both'.

11 Key Note's Market Review 2001<sup>5</sup> of the UK computer market states there are three basic types of computer system:

- Servers (i.e. multi-user systems, including mainframe);
- Workstations (i.e. single user desktop machines); and
- PCs (i.e. single user desktop or mobile computers).

12 ICL states that the boundary between mainframes and server-based systems has become increasingly blurred.<sup>6</sup> Independent sources demonstrate that the computer industry has come to understand the terms 'mainframe' and 'enterprise server' as interchangeable. One on-line technical glossary<sup>7</sup> describes the reasons for this as follows:

'An enterprise server is a computer containing programs that collectively serve the needs of an enterprise rather than a single user, department, or specialized application. Historically, mainframe-sized computers have been enterprise servers although they were not referred to as servers until recently. As smaller, usually UNIX-based servers and Wintel computers have become faster and have been provided with enterprise-wide program management capabilities, they have also been referred to as enterprise servers. In this usage, an enterprise server is both the computer hardware and its main software, the operating system. Examples are Sun Microsystems' computers with their UNIX-based Solaris or Linux systems, Hewlett-Packard ('HP') systems, the upper end of Windows 2000 systems, and IBM's iSeries systems (the largest of which is the zSeries 900 – formerly called the S/390).

Some companies use *enterprise server* to describe a 'superprogram' that runs under the operating system in a computer and provides services for the system administrator and for the business application programs and more specialized servers that run in the computer. Before this usage originated, such services were sometimes considered part of the operating system itself or came in separate software packages. Originally, many services provided by an enterprise server tended to be available only on IBM or similar mainframe computers while less

---

<sup>4</sup> Key Note, UK Market Report 1999, Computer Hardware, third edition, page 2.

<sup>5</sup> Key Note, UK Computer Market 2001, Market Review, ninth edition, page 5.

<sup>6</sup> See footnote 3.

<sup>7</sup> [whatis?.com](http://whatis?.com).

powerful computers ran specialized applications. As these smaller 'server' computers (such as those from Sun Microsystems and HP) became better adapted for business (and recently Internet) applications, the bundle of services required to manage a company-wide set of applications was renamed the 'enterprise server'.'

This is consistent with the descriptions in the Key Note series of market reports.

- 13 This investigation has established that there is a range of substitutes for ICL mainframe computers. These include powerful high-end servers supplied by such companies as IBM, Sun Microsystems and Compaq.<sup>8</sup> The terms 'mainframe', 'high-end server' and 'enterprise server' have become interchangeable.
- 14 ICL accepts the United Kingdom<sup>9</sup> as the narrowest possible geographic market for the supply of computers with mainframe functionality.

*Conclusion on dominance in relation to the primary product*

- 15 The largest hardware vendors in the UK by share of sales by volume (per cent), in 2000 were as follows:

Compaq	17
Dell Computers	9
Hewlett-Packard	9
Sun Microsystems	8
IBM	7
ICL	4
Others	46
Total	100 <sup>10</sup>

ICL considers that it has less than 10 per cent of the narrowest possible geographic market (i.e. the UK) for supply of computers with mainframe

---

<sup>8</sup> See paragraph 15 of main text. Key Note UK Computer Market 2001, Market Review, ninth edition, page 56.

<sup>9</sup> Paragraph 15, ICL's defence.

<sup>10</sup> Key Note UK Computer Market 2001, Market Review, ninth edition, page 56. This includes PC hardware, servers, datacommunications hardware and data processing peripherals. It has not been possible to isolate the shares for supply of computer equipment with mainframe functionality in the UK. Many hardware suppliers are present in more than one sub sector of the overall hardware market.

functionality.<sup>11</sup> Synstar has not contended that ICL is dominant in the market for supply of mainframe computers.<sup>12</sup>

- 16 The Director concludes that ICL's market share in the primary product does not support a finding of dominance.

*Secondary product*

- 17 The secondary product is hardware and/or software maintenance services for ICL mainframe computers. Secondary products are those purchased only if the customer has already purchased a primary product.
- 18 ICL's systems maintenance applies an integrally designed method of servicing based on diagnostic software, which addresses the serviceability and reliability of both hardware and software. This total systems maintenance service embodies three major components: hardware engineering service, software diagnostic tools and Virtual Machine Environment (VME) operating system, and super structure services.<sup>13</sup> In cases where hardware engineering service is separately contracted, ICL has developed a complementary systems and software support service.
- 19 VME is ICL's proprietary operating system software. All ICL customers are VME licensees. ICL's problems and resolution service (PC PARIS) is a stand-alone service available to any VME licensee. Information is provided via CD-ROM to enable own support and maintenance. ICL's support and maintenance (SAM) service is a proprietary software application made available to all VME licensees as part of the VME operating system. 'SAM generates maintenance service requests which are printed out by the customer'.<sup>14</sup>
- 20 ICL's system service is a subscription service that provides integrated system support services including hardware maintenance and software maintenance and support appropriate to the customer's mainframe. It offers the following:
- Recommended Repair Levels (RRL's) are a series of recommended corrections and alterations provided via magnetic tape and telelink. This information is available to non-ICL maintained customers via a quarterly CDROM (as part of PC PARIS);

---

<sup>11</sup> ICL defence paragraph 15.

<sup>12</sup> Case Associates Economists' Report of 8 February 2001 under cover of submission to OFT by Synstar dated 9 February 2001.

<sup>13</sup> ICL proposal for advanced systems maintenance at Annex 1 of Synstar's particulars of claim (see footnote 1).

<sup>14</sup> ICL defence, paragraph 24.

- The Maintenance Knowledge Database (MKB) has a telelink to the mainframe for diagnostic service. It uses SAM to identify problems and relay a fix if the problem relates to software. This form of diagnosis and fix is not available to TPMs or own maintenance customers;
- The OpenVME Inoperable Systems Access (VISA) is a remote on-line diagnostic system, which is used instead of SAM when the VME operating software will not load. It is not available to TPMs or own maintenance customers;
- The Remote Diagnostic Concentrator (RDC) is available to all licensees. It enables local control of the LAN and hub. There is also a diagnostic service attached to the RDC for hardware and SMARTfibre problems. All VME licensees can use this, but there is a further diagnostic facility to investigate hardware and firmware<sup>15</sup> problems on the SMARTfibre controllers and peripherals which are not available to TPMs or own maintenance customers.

21 The Director accepts ICL's description of its own system at paragraphs 17 to 43 of its defence<sup>16</sup> to the extent that they merely describe the services supplied by ICL.

(A) HARDWARE MAINTENANCE SERVICES FOR ICL MAINFRAME COMPUTERS OR HARDWARE MAINTENANCE SERVICES FOR MAINFRAME COMPUTERS.

22 Synstar considers that there is a separate market for hardware maintenance services for ICL mainframes.<sup>17</sup> It also refers to a market for hardware maintenance services for mainframe computers.<sup>18</sup> The Director does not accept the first argument because of the competitive constraints on ICL as set out in paragraphs 26 to 33 below. On the second, it is not necessary to establish whether there is a separate market because of the reasons set out in paragraph 23 below.

23 Even if the Director were to consider that there was a separate aftermarket for hardware maintenance services for mainframe computers, ICL's market share and the position of its competitors do not support a finding of dominance:

---

<sup>15</sup> Software (programs or data) that has been written onto read-only memory (ROM). Firmware is a combination of software and hardware.

<sup>16</sup> ICL's defence of the claim at footnote 1.

<sup>17</sup> Particulars of claim, paragraph 37.

<sup>18</sup> Particulars of claim, paragraph 12.

The leading maintenance/support companies in the UK by market share (%) 1999

Compaq/Digital	22.1
ICL	16.4
Computacenter	16.4
IBM	9.8
Hewlett-Packard	8.2
Synstar	7.4
Unisys	4.9
Bull	3.7
4Front	3.3
Computeraid	2.5
Others	5.3
Total	100 <sup>19</sup>

(B) SUPPLY AND MAINTENANCE OF COMPUTERS WITH MAINFRAME FUNCTIONALITY

24 The investigation has considered whether the supply of ICL mainframes and the supply of hardware maintenance for such computers are in the same market or form two separate markets. A single market definition may be justified if the behaviour in the aftermarket is constrained by behaviour in the primary. In *Hilti*<sup>20</sup> and *Hugin*<sup>21</sup> the European Court adopted a definition of separate relevant markets for the original purchase of a product and its maintenance. However, the more recent Commission case *Pelikan/Kyocera*<sup>22</sup> follows the economic analysis of the Commission's Notice on Market Definition<sup>23</sup> and is more relevant to this case.

25 Whether, and to what extent, ICL faces constraints on its ability to behave independently in the provision of hardware maintenance services for ICL mainframe computers depends on the following factors:

- i. whole-life costing,
- ii. lock in/willingness to switch, and

---

<sup>19</sup> Key Note UK Market Report Computer Services 1999, fifth edition page 24. This covers vendor maintenance, i.e. the provision of hardware maintenance by machine vendors; and third-party maintenance, i.e. providing maintenance for computers not supplied by the maintenance company. Support services include value-added product support services, such as help desks, disaster recovery and back-up.

<sup>20</sup> Case T-30/89 *Hilti v Commission* [1991] II ECR 1439; [1992] 4 CMLR 16.

<sup>21</sup> Case 22/78 *Hugin v Commission* [1979] ECR 1869; [1976] 3 CMLR 345.

<sup>22</sup> European Commission, XXVth Report on Competition Policy:1995 p.140.

<sup>23</sup> Commission Notice on the definition of relevant market for the purposes of Community Competition Law (97/C 372/03).

iii. reputation effects.

*Whole-life costing*

- 26 Whole-life costing is taking place where ICL customers who purchase a computer with mainframe functionality take account also of the likely future support costs, including hardware and software maintenance. Factors that demonstrate the likelihood of whole-life costing include:
- the presence of sophisticated buyers
  - the cost of the secondary product relative to the primary product
  - transparency of price information.
- 27 **Sophisticated buyers:** Purchasers of computer equipment with mainframe functionality are, because of the nature of the product, large corporate bodies or large public organisations. These frequently have their own IT units, or outsource this function to expert consultants.<sup>24</sup> These customers are, in general, well informed and sophisticated. They can be expected to assess the lifetime cost of purchasing the primary product and to have identifiable IT strategies which inform their purchasing decisions.
- 28 **Cost of secondary product relative to primary product:** Customers are more likely to whole-life cost if the secondary product is a relatively high proportion of the price of the primary product.<sup>25</sup> Information received from mainframe users indicates that, historically, maintenance costs for ICL mainframes have ranged from between 10 per cent to 50 per cent of the initial purchase price.<sup>26</sup>
- 29 **Transparency of price information:** The responses to the consultation included information on that available to the buyer about the cost of the mainframe and support thereof at the time of purchase. Typically, such a purchase is subject to competitive tender. This process provides itemised information about the price for hardware, operating system, application software and hardware/software maintenance.<sup>27</sup>
- 30 The conclusion therefore is that the majority of customers whole-life cost when purchasing computer equipment with mainframe functionality.

---

<sup>24</sup> The public sector is one of the largest customers for computer services companies accounting for 25.9% of industry revenues in 1999 (Key Note Market Report Computer Services 1999, fifth edition, page 60).

<sup>25</sup> See paragraph 5.8, OFT 403, March 1999.

<sup>26</sup> The Director consulted mainframe users, including ICL customers, ICL competitors and the complainant in 1998.

<sup>27</sup> See footnotes 26 and 28.

### *Lock-in/willingness to switch*

- 31 Another consideration is whether customers are locked-in to the primary product. Information received from ICL customers and other users of computers with mainframe functionality indicated that the majority<sup>28</sup> of those who responded would be willing to switch. The likelihood of customers switching is increasing because the 'product life cycles are short and ever shortening'.<sup>29</sup> Rapid technical improvement of the primary product has also encouraged customers to replace their computers with mainframe functionality more frequently.<sup>30</sup>
- 32 Synstar considers that there is a significant installed base of ICL mainframe users who are locked in because the proprietary VME related to the older ICL series of mainframe computers is not capable of being migrated to another system.<sup>31</sup> However, ICL stated in its defence<sup>32</sup> that only a handful of the systems supplied in the late 1970's remain in use, which are unlikely to remain in use for any further significant period of time, due to product lifecycle and falling costs. It further states that it is possible for ICL customers to switch their applications to other mainframes.<sup>33</sup> The ICL Trimetra range of computers can run Unix and Microsoft Windows NT Operating Systems, thus enabling customers to move/interlink with a network server system.

### *Reputation*

- 33 Recent market research shows that the computer industry is subject to vigorous competition.<sup>34</sup> A company's reputation is an important competitive factor. ICL's desire to protect its reputation as a supplier of mainframes and IT systems will act as a constraint on its behaviour in servicing.

### *Geographic market*

- 34 Mainframes and computers with mainframe functionality are likely to be built to order. Distribution for such high-end servers is normally direct from the manufacturer to the end user via the manufacturer's sales force. This would suggest a national market. ICL plc is an autonomous member of the group. Fujitsu acquired the UK company ICL in 1990 and ICL's operations are UK based.

---

<sup>28</sup> Letters received further to OFT consultation of February 1998 from ICL, Synstar, [...]

<sup>29</sup> Key Note, UK Market Review Computer Market 2001, ninth edition, page 15.

<sup>30</sup> Key Note, UK Market Review Computer Hardware 1999, third edition, page 12.

<sup>31</sup> Particulars of claim, paragraphs s 32d&e.

<sup>32</sup> ICL defence paragraph 62d.

<sup>33</sup> ICL defence paragraph 62f.

- 35 The relevant geographical market for the purposes of this case is therefore the UK.

*Conclusion on relevant market*

- 36 For the reasons set out at 26 to 33 above, ICL's behaviour in the supply of the secondary product is constrained by conditions relating to supply of the primary product. Hence there is not a relevant secondary market for hardware maintenance for ICL mainframe computers. There is a single market for the supply and maintenance of computer equipment with mainframe functionality in the UK.

CONCLUSION ON DOMINANCE

- 37 As ICL is clearly not dominant in supply of the primary product it is not dominant in the single market of the primary and secondary product i.e. that for the supply and maintenance of computer equipment with mainframe functionality in the UK.

**B Agreements**

- 38 The Director has not investigated whether the agreements between ICL and its customers for the supply or the supply and maintenance of computers with mainframe functionality are infringing section 2 (the Chapter I prohibition) of the Competition Act 1998.

- 39 By virtue of Article 3 of the Competition Act 1998 (Lateral and Vertical Agreements Exclusion) Order 2000<sup>35</sup> (the Exclusion Order), the Chapter I prohibition does not apply to an agreement to the extent that it is a vertical agreement. Article 2 of the exclusion order defines a vertical agreement for the purposes of the agreement as '...an agreement between undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase [or] sell...services'. For the purposes of such agreements, ICL and their customers operate at a different level of the production or distribution chain. *Prima facie*, the agreements between ICL and its customers are therefore excluded from the Chapter I prohibition.

- 40 Pursuant to Article 7 of the Exclusion Order, the Director may give a direction to withdraw the benefit of the exclusion in respect of an agreement if he considers

---

<sup>34</sup> 'Competitors are numerous, ranging from some of the world's largest corporations to many relatively small and highly specialised firms' Key Note, UK Computer Market 2001, ninth edition, page 14.

<sup>35</sup> SI 2000 No 310.

that (i) the agreement will, if not excluded, infringe the Chapter I prohibition; and (ii) that he is not likely to grant it an unconditional individual exemption. The Director will exercise these powers only rarely and has no information available to him that would support the exercise of these powers.

### **III NON INFRINGEMENT**

- 41 ICL is not dominant in the relevant market for the purposes of this case and cannot therefore have infringed the Chapter II prohibition.