

Competition Act 1998

Notice of decision of Director General of Fair Trading  
No. CA98/13/2002

Harwood Park Crematorium Limited

6 August 2002  
(CP/0055-02)

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## SUMMARY

The Director General of Fair Trading (the Director) has made a decision that Harwood Park Crematorium Limited (Harwood) does not hold a dominant position in a relevant market. Therefore, Harwood has not infringed the Chapter II prohibition of the Competition Act 1998 in this regard.

In the light of the judgement of the Competition Commission Appeals Tribunal of 26 March 2002 on admissibility in the BetterCare case,<sup>1</sup> the Director has concluded that the views put forward in a letter of 28 February 2002 to the solicitors acting for JJ Burgess & Sons, a firm of funeral directors which had made a complaint, amounted to a decision that the Chapter II prohibition had not been infringed.

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<sup>1</sup> BetterCare Group Limited v the Director General of Fair Trading – Case: 1006/2/1/01

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Your ref CL/JS/BO155001  
Our ref CP/0055/02  
Date 28 February 2002

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Dear Sirs

**Competition Act 1998**  
**Harwood Park Crematorium Ltd**

Thank you for your letter of 18 February concerning Harwood Park Crematorium Limited (Harwood) addressed to my colleague Keith Davis. I refer also to information received by fax from your clients JJ Burgess & Sons (Burgess) yesterday. You have asked for an update in relation to the matters you have brought to the attention of the Office on behalf of your clients. Mr Davis has recently moved posts and, as his replacement, I am replying in his place.

As I understand it, your clients allege that Harwood, a subsidiary of Austin's Funeral Services, has behaved anti-competitively by refusing it access to its crematoria facilities.

You will recall from Mr Davis' letter of 25 January that we have considered this matter under the Chapter II prohibition of the Competition Act 1998 (the CA98). As Mr Davis set out in his letter, this involves a two stage test. First, it is necessary to demonstrate that the undertaking being complained about is dominant. Secondly, it must be possible to show that it is abusing a dominant position. The Director General has stated that he considers it unlikely that an undertaking will be dominant if it enjoys a market share of less than 40 per cent in a relevant market. It is also worth noting that while refusal to supply goods or services may in certain circumstances constitute abusive conduct, the Chapter II prohibition will nevertheless not be infringed if such a refusal can be objectively justified.

After careful consideration of the facts as set out in your letter and our own research into the local market, we take the view that there are no reasonable grounds for suspecting that the Chapter II prohibition has been infringed. In our view, Harwood is unlikely to be an essential facility, access to which would be indispensable to the competitive process. The Director General has stated, that



'an asset will not be an essential facility if other similar facilities compete within the same geographic market'<sup>1</sup>. With this in mind, we note that there are a number of competing crematoriums near to Stevenage. It is therefore unlikely that access to Harwood could be considered to be essential for effective competition.

The European Court has further defined dominance 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 consumers'<sup>2</sup>.

Our research has shown that, of the six crematoria normally used by branches of Burgess, only one is situated more than twenty miles away from Harwood. Research conducted in previous cases suggests that this is not an unreasonable distance to constitute a feasible alternative. As such, we consider that the West Hertfordshire, Enfield, Parndon Wood, St Marylebone and Vale crematoriums are part of the relevant geographical market. Figures provided by the Crematorium Society of Great Britain for 2000 suggest that no one firm is likely to enjoy dominance in a market for cremations defined in these terms. Despite being the busiest operator over this period, West Hertfordshire accounted for only 3226 or 25.5 per cent of the 12640 cremations carried out at the six crematoriums listed above. Harwood itself carried out 1833 cremations over the same period, which equates to a market share of 14.5 per cent. In our view, existing competition from other nearby crematoriums appears likely to act as a constraint on Harwood's ability to act independently of its competitors, customers or consumers.

We also note that Harwood is a relatively new entrant to the market. Before Harwood entered the market consumers would have had no choice but to have use an alternative crematoria facility. While we would not dispute the importance of Harwood to local residents in its immediate catchment area, the fact that cremations can be carried out at a number of alternative locations situated within a 20 mile radius of Harwood suggests that it is not likely to be dominant for the purposes of the Chapter II prohibition.

I should perhaps stress at this point that the purpose of the Competition Act 1998 is to protect the competitive process and not individual firms that may be competing in a particular market sector. Further, the Director General has no powers to intervene in individual contractual disputes where there are no reasonable grounds for suspecting an infringement of either prohibition or in situations that may appear otherwise 'unfair' or 'unreasonable'.

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<sup>1</sup> OFT Guideline Assessment of Individual Agreements and Conduct, p25.

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

To summarise, it is not that the concerns you have raised are unimportant, but that Harwood is not dominant in the relevant market. In the absence of dominance there can be no abuse of a dominant position. As such, we do not have reasonable grounds for suspecting a breach of the Chapter II prohibition. I am sorry to send you what I know will be a disappointing response, but hope that the above is useful in explaining our view.

Yours sincerely

Sean Davies  
Competition Enforcement Division 5