



Jersey Competition Regulatory Authority ('JCRA')

Decision M 240/08

Proposed Acquisition

of

Shares in Jersey Royal (potato marketing) Limited

by

Hamel Bros Limited

La Ferme Limited

Old Mates Limited

THE NOTIFIED TRANSACTION

1. On 30 May 2008, the JCRA received an application (the ‘**Application**’) for approval under Articles 20 and 21 of the Competition (Jersey) Law 2005 (“the Law”) concerning the proposed acquisition of a 17.80% minority shareholding in Jersey Royal (potato marketing) Limited (‘**JRPM**’) currently owned by Jersey Produce Marketing Organisation Limited (‘**JPMO**’). The purchasers are three existing shareholders in JRPM, namely:
 - (i) Hamel Bros Limited (‘**Hamel**’);
 - (ii) La Ferme Limited (‘**Ferme**’); and
 - (iii) Old Mates Limited (‘**Mates**’).

Hamel, Ferme and Mates are together referred to in this Decision as the ‘**Shareholders**’ and each a ‘**Shareholder**’.

2. The JCRA published a notice of its receipt of the Application on its website and in the Jersey Gazette on 4 June 2008, inviting comments on the proposed acquisition by 18 June 2008. No comments were received.

THE PARTIES

(a) JRPM

3. JRPM is a company established under the laws of Jersey, owned by the parties listed in Table 1 below. According to the Application, JRPM is principally active in the growing of Jersey Royal potatoes which are then mainly exported to customers in the United Kingdom. It also hires tractors and trailers to Ferme.
4. JRPM currently is owned by a combination of Hamel, Mates, Ferme, JPMO and a private individual. As detailed below in Table 1, the effect of the proposed acquisition would be to eliminate JPMO’s shareholding in JRPM, and correspondingly increase the percentage ownership of Hamel, Mates and Ferme.

Table 1		
Pre and Post-Acquisition Ownership of JPRM		
Shareholders	Pre-acquisition (%)¹	Post-acquisition (%)²
Hamel	31.1	38.9
Mates	31.1	38.9
Ferme	17.8	20
JPMO	17.8	0
Private individual	2.3	2.3

(b) JPMO

5. JPMO is a company established under the laws of Jersey. According to the Application, JPMO is a marketing organisation active in the sale and export (mainly to the United Kingdom) of protected crops including tomatoes and capsicum.

(c) Hamel

6. Hamel is a company established under the laws of Jersey. According to the Application, it is a property holding company and is not active in any industry in Jersey.

(d) Ferme

7. Ferme is a company established under the laws of Jersey. According to the Application, it is a property holding company and is active in the Jersey dairy industry. Ferme operates a dairy farm. Ferme supplies consultancy services to JRPM and rents agricultural buildings and land to JRPM.

¹ The percentages do not add up to exactly 100% due to the rounding of the figures.

² The percentages do not add up to exactly 100% due to the rounding of the figures.

(e) *Mates*

8. *Mates* is a company established under the laws of the island of Jersey. According to the Application, it is a property holding company and is not active in any industry in Jersey.

THE REQUIREMENT FOR JCRA APPROVAL

9. The proposed acquisition satisfies the 40% share of supply threshold set out in Article 1(4) of the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the “**Order**”), based on the pre-existing activities of JRPM.
10. According to Article 20(1) of the Law, a person must not execute a merger or acquisition that satisfies a threshold set out in the Order except with and in accordance with the JCRA’s approval.
11. According to Article 2(1)(b) of the Law, a merger or acquisition occurs for the purpose of the Law if a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking. Concerning this matter, there is a question of whether it involves the potential acquisition of “control”, as defined in Article 2(1)(b). This question is analyzed below.

Acquiring direct or indirect control of the whole or part of another undertaking

12. Article 2(2) of the Law defines control in the following manner:

“Control in relation to an undertaking is to be taken to exist if decisive influence is capable of being exercised with regard to the activities of the undertaking.”

Article 2(3) provides a guideline for determining “influence”, namely:

“In determining if that influence exists all the circumstances are to be taken into account and not just the legal effect of any instrument, deed, transfer, assignment or other act done or made.”

13. Thus, for a merger or acquisition to exist under Articles 2(1)(b), 2(2) and 2(3), a person with decisive influence over one undertaking must gain the ability to exercise decisive influence over another undertaking.

Decisive Influence/Control over JRPM

14. There is no evidence to suggest that any of the shareholders, whether before or after the acquisition, have joint control of JRPM. The Application expressly states that Mates, Hamel and Ferme are and will remain totally independent of one another.
15. The Application states that under the Shareholders' Agreement, a special resolution (which is needed for JRPM to carry out certain strategic matters) requires a majority of at least 66.67%. Thus, a blocking minority requires at least 33.33% of the votes. As is clear from Table 1 above, no single shareholder currently holds this level of shareholding required for a blocking minority. However, as a result of the proposed acquisition, both Mates and Hamel would, individually, have blocking minority shareholdings of 38.8% each.
16. Under competition law as defined in the European Union,³ because such a blocking shareholding can produce a deadlock situation, the shareholder acquires decisive influence, and therefore control (in this case, so-called negative control).⁴ We see no reason to depart from this guidance in our interpretation of Articles 2(1)(b), 2(2) and 2(3) of the Law in Jersey.
17. Thus, as a result of the proposed acquisition, both Hamel and Mates would gain control over JRPM.

Decisive Influence/Control over Hamel and Mates

18. A further question is whether a person controls either Mates or Hamel or both. Table 2 below list the shareholdings in Hamel and Mates:

³ Article 60 of the Law requires that, so far as possible, matters arising under competition law in Jersey are treated in a manner that is consistent with the treatment of corresponding questions arising under competition law in the European Union.

⁴ *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No193/2004 on the control of concentrations between undertakings*, OJ C95/1 of 16 April 2008.

Table 2				
Company	Shareholder 1 % holding	Shareholder 2 % holding	Shareholder 3 % holding	Total in %
Hamel	47.5	47.5	5	100
Mates	50	50	-	100

19. The Articles of Association of each of Hamel and Mates are silent as to the majority required to pass a special resolution. Therefore Article 90 of the Companies (Jersey) Law 1991 applies, which provides that a special resolution is passed by a majority of not less than two-thirds of its members. It is clear from Table 2, that both principal shareholders of each of Hamel and Mates must agree to pass special resolutions in respect of each of Hamel and Mates. Therefore, each of the main shareholders has negative control over the respective undertakings Hamel and Mates, in that no one shareholder can adopt special resolutions without the consent of the other shareholder.
20. Possibly, there is also joint positive control. Joint control is where two or more persons have the possibility of exercising decisive influence over another undertaking. This normally means the power to block actions which determine the strategic commercial behaviour of an undertaking, and thus requires co-operation between the jointly controlling parties.⁵
21. Article 2(3) of the Law states that “*all the circumstances are to be taken into account*” when considering whether a decisive influence exists resulting in an acquisition.⁶ Relevant circumstances in this case are that the principal shareholders in both Hamel and Mates are family. Given that the individual beneficial owners of each Hamel and Mates are family members, the JCRA considers it very plausible that there is joint control as the shareholders are likely to have similar interests and hence similar voting behaviour in their respective

⁵ See *ibid* at paragraph 62.

⁶ See *Cementbouw Handel v Commission*, Case T-282/02 for an example of circumstances being taken into account.

companies. Hence, there may be joint positive control. For the purpose of this Decision, however, there is no need to establish joint positive control since negative control is sufficient.

22. On the basis of the above, the JCRA concludes that there is an acquisition of control under Article 2(1)(b) of the Law.

COMPETITION ANALYSIS

23. Under Article 22(4) of the Law, the JCRA must determine if the proposed acquisition would substantially lessen competition in Jersey or any part thereof, pursuant to the procedures set forth in the JCRA Merger Guideline. As detailed below, the JCRA concludes that this would not be the case.

24. For the purpose of this Decision, it is not necessary to define the market as the proposed acquisition would not result in any horizontal, vertical or conglomerate competition concerns that could result in a substantial lessening of competition, irrespective of the definition of the relevant markets. As indicated above, Hamel, Ferme and Mates are all property holding companies. Hamel and Mates are not active in any industry in Jersey and Ferme (which will only increase its shareholding from 17.8% to 20%) simply operates a dairy farm and provides certain consultancy services and rents property to JRPM.

ANCILLARY RESTRAINTS

25. The agreement implementing the proposed acquisition contains a non-compete clause for a period of three years. Under EC competition law, so-called ‘ancillary restraints’ – agreements that do not form an integral part of the asset or share transfer but are considered to be ‘directly related and necessary to the implementation of the concentration’ – are subject to analysis in a merger review.⁷ Therefore the JCRA has therefore assessed the non-compete clause under the merger provisions of the Law.

⁷ See *Commission Notice on restrictions directly related and necessary to concentrations* at paragraph 20, O.J. [2005] C56.

26. According to relevant guidance published by the European Commission,
- “(n)on-competition clauses are justified for periods of up to three years when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how.”*⁸
27. The Application states the following reasons as to why a period of three years is necessary for the protection of goodwill and know-how:
- i. There are few barriers to entry to the potato market and any former shareholder of JRPM could use goodwill they have acquired to establish or re-establish their own undertakings to competition;
 - ii. JRPM needs to maintain its connections to its supermarket client base which are a prerequisite to its success;
 - iii. JRPM has increased its investment in know-how which has been shared amongst its shareholders. In particular JRPM has invested in know-how about the control of pests and diseases in an environmentally friendly way;
 - iv. The three year period is proportionate to the initial and continuing investment of the shareholders in JRPM; and
 - v. JRPM has developed considerable customer loyalty.
28. The factors set out above appear to establish a reasonable basis for the protection of know-how and goodwill of JRPM, and the three year limitation period is within the period considered appropriate by relevant EC guidance, which the JCRA has no grounds to depart from in this matter.

⁸ *Ibid.*

CONCLUSION

29. For the reasons stated above, the JCRA concludes that the proposed acquisition does not substantially lessen competition. The JCRA therefore approves the proposed acquisition under Article 20(1) of the Law.

15 July 2008

By Order of the JCRA Board