



Jersey Competition Regulatory Authority ('JCRA')

Decision M338/08

Proposed Acquisition

of

VirtualizeIT Limited

by

Virtustream, Inc.

The Notified Transaction

1. On 16 December 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 100% of the issued share capital in VirtualizeIT Limited (“**VirtualizeIT**”) by Virtustream, Inc. (“**Virtustream**”).
2. The JCRA registered a notice of its receipt of the Application in the Jersey Gazette and on its website, both on 18 December 2008, inviting comments on the proposed acquisition by 5 January 2009. No comments were received.

The Parties

- (a) Virtustream*
3. According to the Application, Virtustream is registered in the state of Delaware in the United States. Virtustream was established for the acquisition. The registered shareholders in Virtustream are Columbia Funds and Blue Lagoon Capital, LP. According to the Application, the ultimate beneficial control of Virtustream – exercised through Columbia Funds - is by Columbia Capital Corporation, also registered in Delaware. Columbia Capital Corporation is a venture capital fund.
- (b) VirtualizeIT*
4. VirtualizeIT was incorporated in Jersey on 29 February 2008. The shares in VirtualizeIT are currently held by Julian Box, Lindsay Garrod, Matthew Planterose, Mark Thomas, Nigel Holland, Adam Ryan, and Andrew Conoops (collectively, the “**Vendors**”).
5. According to the Application, VirtualizeIT provides IT services such as the delivery of strategic IT infrastructure designs, incorporating servers, storage, networking, systems management and business continuity, using both traditional and virtual based technologies (“**Virtualization Services**”). In addition, VirtualizeIT is active in the provision of hardware and software.

The Requirement for JCRA Approval

6. According to Article 20(1) of the Law, a person must not execute certain mergers or acquisitions except with and in accordance with the approval of the JCRA. 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. Pursuant to the proposed acquisition, Virtustream will acquire 100% of the issued share capital in VirtualizeIT. Therefore, pursuant to the proposed acquisition control of VirtualizeIT will pass from the Vendors to Virtustream and, ultimately, Columbia Capital Corporation.
7. The Parties applied for JCRA approval under Article 1(4) of the Competition (Mergers and Acquisitions) (Jersey) Order 2005 on the basis that VirtualizeIT is likely to have a share of supply of 40% or more in the supply of Virtualization Services within Jersey. The proposed acquisition therefore requires the JCRA's approval under Article 20(1) of the Law before it is executed.

Assessment

8. 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.¹
9. From the Application and other information obtained from the Parties, the JCRA has concluded that Columbia Capital Corporation is a venture capital fund that does not have any investments in entities which are relevant or connected to customers, suppliers or competitors of VirtualizeIT. The market shares in the relevant markets, however defined, will not be affected, nor would the proposed acquisition appear to affect competition upstream or upstream or raise any other competition concerns.

¹ JCRA Guideline, *Mergers and Acquisitions* at 6.

Ancillary Restraints

10. Under European Union competition law, so-called “ancillary restraints” (which are agreements that do not form part of the asset or share transfer but are considered to be “directly related and necessary to the implementation of the concentration”) are also subject to analysis in an acquisition review.²
11. Article 10.5 of the Stock Purchase Agreement contains a clause preventing the Vendors from competing with VirtualizeIT for a period of two years after the acquisition. The JCRA has therefore assessed whether the restrictions in the non-compete clause are directly related to, and necessary for, the implementation of the acquisition.
12. Based on the specific circumstances, in particular the apparent relative importance of human capital in the provision of IT services, the non-compete clause appears to be directly related to and necessary for the implementation of the proposed acquisition, and therefore is ancillary to it. The non-compete clause also complies with the guidance given by the European Commission on such clauses, and we see no justification for departing from that guidance in this case.

Conclusion

13. The JCRA concludes that the proposed acquisition will not substantially lessen competition. Given this conclusion, the JCRA hereby approves the proposed acquisition under Article 20(1) of the Law.

7 January 2009

By Order of the JCRA Board

² See *Commission Notice on restrictions directly related and necessary to concentrations*, O.J. C 56/03, 10 (5 March 2005). 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.