



**Jersey Competition Regulatory Authority (“JCRA”)**

**PUBLIC VERSION OF**

**Decision M 489/09**

**Proposed Joint Venture**

**between**

**Jersey Post International Development Limited**

**and**

**Innovate Publishing Limited**

**and**

**a private investor**

## **Procedure**

1. On 9 November 2009, the JCRA received an application for approval under Articles 20 and 21 of the Competition (Jersey) Law 2005 (the “**Law**”) concerning a proposed joint venture (“**JV**”) by Jersey Post International Development Limited (“**JPIDL**”), Innovate Publishing Limited (“**Innovate**”) and a private investor. After additional information was provided by the Parties, the Application was registered in the Jersey Gazette on 13 November 2009 and on the JCRA website on 16 November 2009, inviting comments on the proposed JV by 27 November 2009. As detailed below, the JCRA received written comments from two third parties.

## **The Notified Transaction**

2. The Draft Joint Venture Shareholders’ Agreement states that the business of the JV is to be the sale of advertising and the design, print, production and distribution of a periodical advertising magazine. According to the Application, the proposed JV will produce a new weekly magazine, initially advertising vehicles for sale and related vehicle products.

## **The Parties**

### *(a) JPIDL*

3. JPIDL is registered in Jersey. According to the application, JPIDL is a 100% subsidiary of Jersey Post International Limited (“**JPI**”) controlled by the States of Jersey. JPI and its subsidiaries, particularly Jersey Post Limited (“**JPL**”), are active in, amongst other things, the supply of postal services including direct mailing. The area of activity that JPIDL will be involved in as part of the JV is the distribution and the printing of the magazine.

### *(b) Innovate*

4. Innovate is registered in Jersey and was set up specifically to enter into the proposed JV. Innovate is a sister company of Innovate Limited that according to the

Application is active in advertising, design, branding, marketing, publishing and events. Magazines published by Innovate Limited include Jacksons Magazine which is described as a “92 page high profile lifestyle publication distributed biannually FREE to 10,000 of Jacksons clients in the Channel Islands.”<sup>1</sup> The area of activity that Innovate will be involved in as part of the JV is design of and sale of advertising space in the magazine.

(c) *Private investor*

5. According to the Application, the private investor will take an estimated 33% share in the JV but will have no day to day role in the proposed JV.

**The Requirement for JCRA Approval**

6. According to Article 20(1) of the Law, a person must not execute a merger or acquisition of a type described by the Mergers Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the “**Order**”) except with and in accordance with the approval of the JCRA. According to Article 2(5)(a) of the Law, a merger or acquisition occurs for the purposes of the Law on the creation of a joint venture, being a business activity carried on jointly by two or more persons, whether or not in partnership.
7. Based on information provided by the Parties, the JCRA concludes that the proposed formation of the JV satisfies the Law’s definition of a merger or acquisition as set out in Article 2(5)(a) of the Law, and that the concentration requires notification to the JCRA under Article 1(4) of the Order because JPI has a share of supply of 40% or more of postal services and logistics in Jersey. On this basis, pursuant to the Order, the JCRA’s approval is required under Article 20(1) of the Law before the proposed JV is executed.

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<sup>1</sup> [www.innovate.je](http://www.innovate.je)

## **Assessment**

8. Under Article 22(4) of the Law, the JCRA must determine if the formation of the proposed JV would substantially lessen competition in Jersey or any part thereof. This determination usually involves the following steps: (1) defining the affected relevant market(s); (2) assessing concentration levels in the relevant market(s); (3) assessing the ability of the proposed JV to substantially lessen competition in the relevant market(s), either unilaterally or in co-ordination with competitors; (4) assessing whether other market forces, such as the entry of new competitors, eliminate the risk of a substantial lessening of competition; and (5) assessing any pro-competitive effects or efficiencies.<sup>2</sup> Not all steps may be necessary, however, if the JCRA can determine that the proposed JV would not substantially lessen competition in Jersey or any part thereof.
9. As detailed below, as a result of this analysis, the JCRA concludes that the proposed JV will not result in a substantial lessening of competition in Jersey or any part thereof.

## **Defining the Affected Relevant Market(s)**

### *(i) The Relevant Product Market*

10. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.<sup>3</sup>
11. The Parties indicate that they consider the relevant product market to be dedicated motor trade advertising magazines, but also acknowledge that there are alternative methods of advertising.
12. According to the European Commission, one can make a distinction between markets for publications and markets for the sale of advertising space in those publications.<sup>4</sup>

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<sup>2</sup> See JCRA Guideline, *Mergers and Acquisitions* at ¶ 8.

<sup>3</sup> See *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. C 372 at ¶ 2 (09.12.97).

As a starting point for the analysis, the JCRA will equally distinguish between a market for publications and a market for advertising space within publications.

A. *The Relevant Product Market for Publications*

13. European Commission precedents in the publishing sector indicate that the written press is divided into a number of distinct national or regional markets based on the type of publication (i.e. newspaper and magazines) and on the content of the publications involved and the identity of the target audiences.<sup>5</sup> Further segmentations also potentially occur due to other factors such as periodicity, style, presentation and price.
14. Also according to the European Commission, a strict demand-side approach to define a market for publications is not appropriate:

*“From a demand-side point of view, it is rare that two different publications be viewed as perfect substitutes. There usually are differences in the coverage, comprehensiveness and content provided by two different publications. (...) [A] strict demand approach would lead to the definition of a multitude of relevant markets of imprecise boundaries and small dimensions. This would not allow to properly assess the competitive relations between the different publishers and the impact of the notified merger on competition.”<sup>6</sup>*

15. For the purpose of this Decision, it is not necessary to exactly determine the exact scope of the publication product market as this would not affect the assessment.

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<sup>4</sup> Under Article 60 of the Law, the JCRA must attempt to ensure that, so far as possible, questions that arise under the Law in Jersey are dealt with in a manner that is consistent with the treatment of corresponding questions that have arisen under competition law in the EU.

<sup>5</sup> See, for example, Commission Decision Case M.5051 APW/GMG/EMAP of 7 March 2008, at ¶ 12.

<sup>6</sup> Commission Decision Case M.3917, Candover/Cinven/Bertelsmann-Springer of 29 July 2003, at ¶ 13.

*B. The Relevant Product Market for Advertising*

16. According to the Parties, there are alternative methods of advertising, notably the Jersey Evening Post newspaper, the magazine Jersey Trader, local TV, local radio, direct mail and the websites Jersey Insight and cicars.com.
17. In the European Commission's practice, advertising markets, similar to publishing markets, are divided according to the medium (newspaper, magazines, online) and commonality of contents, as well as target audience.<sup>7</sup>
18. In a small jurisdiction like Jersey, the division of relevant markets may be less strict. In many of the various markets identified by the European Commission, there is but one supplier. Therefore, whereas advertisers in larger jurisdictions may have a choice between several suppliers for each of the publications, and for example regard advertising in another magazine as an alternative rather than advertising in another type of publication, advertisers in Jersey may be more likely to see advertising in another type of publication as the closest (and only) type of alternative. In particular, it appears that the periodicity of the publications is highly relevant for the determination of the relevant market for advertising as for example daily and weekly publications would appear to be better suited for advertisement for passenger cars than monthly or annual publications.
19. For the purpose of this Decision, it is not necessary to determine the exact scope of the advertising markets as this would not affect the assessment.

*(ii) The Relevant Geographic Market*

20. The geographical market is the area over which substitution takes place. It comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently

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<sup>7</sup> See, for example, Commission Decision Case M.5051 APW/GMG/EMAP of 7 March 2008, at ¶ 22.

homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.<sup>8</sup>

21. According to the Application, the magazine is initially aimed at advertising vehicles for sale and related vehicle products such as insurance, valeting and garage services. These products are principally, if not only, targeted at customers living in Jersey and the most services will be provided by Jersey based suppliers. For example, Jersey specific legislation applicable to undertakings in the financial sector impose additional costs (and barriers to entry) on potential suppliers of car finance based in other jurisdictions. Therefore, for the purposes of this Decision the JCRA will assume that the geographical scope of the relevant product markets for both publication and for advertising is Jersey. If there are no competition concerns using these narrowly defined relevant markets, generally there will be no competition concerns if the market definition is widened to include other publications and sources of advertising.

### **Effects on Competition**

#### *A. The Relevant Market for Publications*

22. According to the Application, there is currently no dedicated magazine aimed at vehicles for sale and related vehicle products. However there are a few publications that are aimed at the car industry to a significant extent.

- As listed above, Innovate Ltd, a sister company of Innovate, publishes the biannual Jacksons Magazine. This is described as a high profile lifestyle publication first issued in 2004. One can safely assume that a biannual magazine would not be in the same relevant market as a weekly magazine, and hence this magazine will not be considered in the remainder.
- Jersey Trader is weekly a magazine published in Jersey first issued in 2008. One of the key sectors that the magazine appears to aim at is the car sector.
- The Jersey Evening Post issues a weekly Motoring supplement.

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<sup>8</sup> See JCRA guideline *Mergers and Acquisition*.

23. Irrespective of whether one assumes that these weekly publications (Jersey Trader and the Motoring supplement) are in the same relevant market for publications, the proposed JV would not result in a substantial lessening of competition in Jersey or any part of Jersey. If the market is limited to dedicated motor magazines, then the proposed JV would be the first entrant in this market. If the market is considered to be wider (to incorporate other weekly and monthly publications), the JCRA concludes that none of these other publications are issued by the JV, its shareholders or any undertaking related to these shareholders and therefore there would not be a substantial lessening of competition as a result of the creation of the proposed JV.

*B. The Relevant Market for Advertising*

24. Many advertisements for cars and car related products and services will require regularly updating to be effective. Given this assumption, daily and weekly publications may be the closest substitutes. As listed above, there currently are two weekly publications that aim to a significant extent at the car market:

- Jersey Trader is weekly a magazine published in Jersey first issued in 2008. One of the key sectors that the magazine appears to aim at is the car sector.
- The Jersey Evening Post issues a weekly Motoring supplement. The Jersey Evening Post itself is a daily newspaper that features cars and car related advertisements

25. Irrespective of whether one assumes that these weekly and daily publications are in the same relevant advertising market, the proposed JV would not result in a substantial lessening of competition in Jersey or any part of Jersey. If the market is limited to advertising in dedicated weekly motor magazines, then the proposed JV would be the first entrant in this market. If the market is considered to be wider (to incorporate other daily and weekly publications), the JCRA concludes that none of the advertisement space is offered by the JV, its shareholders or any undertaking related to these shareholders and therefore there would not be a substantial lessening of competition as a result of the creation of the proposed JV.



C. *Other potential competitive concerns*

26. As indicated above, the JCRA received two written submissions regarding the proposed JV. The submissions are unequivocal in that they state that they welcome competition. However, there are concerns relating to possible behaviour of some of the shareholders of the proposed JV.

**Concern regarding JP**

27. One concern voiced relates to the shareholder JPIDL, a company controlled by the States of Jersey. The concern is that there is the scope for a “real or perceived” subsidy to the JV from the profits made by the “legally protected, publically owned, postal service” and whether distribution rates charged by “the monopoly” JPL to the JV are different (and more favourable) to those charged to other customers.

28. This conduct, if pursued by JPL after the creation of the JV, could constitute grounds for an abuse of dominance, by JPL, under Article 16 of the Law. As the JCRA stated in Decision M171/08 concerning the Proposed Acquisition of E.C. Le Feuvre Agricultural Machinery Limited by Jersey Royal (potato marketing) Limited:

*“In considering whether or not the potential illegality of a particular course of conduct provides adequate disincentives for a party to engage in that conduct post-merger, the EC Commission states that it will consider, ‘on the basis of a summary analysis: (i) the likelihood that this conduct would be clearly, or highly probably, unlawful under Community law, (ii) the likelihood that this illegal conduct could be detected, and (iii) the penalties which could be imposed.’”<sup>9</sup>*

29. In this case, the possible conduct alleged in Paragraph 27, that is applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage, would likely constitute an abuse of dominance by JPL

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<sup>9</sup> JCRA Decision M171/08 concerning the Proposed Acquisition of E.C. Le Feuvre Agricultural Machinery Limited by Jersey Royal (potato marketing) Limited at ¶ 68 (16 Sept. 2008) (quoting European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulations on the control of concentrations between undertakings* at ¶ 46).

under Article 16. The likelihood that such conduct would be detected by the JCRA is high, given that fact that the postal services of JPL are regulated by the JCRA under the Licence issued by the JCRA under the Postal Services (Jersey) Law 2004. The conditions contained in JPL's licence include regular reporting obligations and JCRA information gathering powers. Finally, if an abuse of dominance was found against JPL, it could face penalties of 10% of its turnover for the period of the infringement, up to a maximum period of three years.

30. The JCRA is therefore satisfied that the factors listed in Paragraph 29 provide adequate disincentives for JPL to engage in the allegedly abusive conduct after the creation of the proposed JV.

#### **Concern regarding the private investor**

31. The other main concern is regarding the identity of the private shareholder. The submissions which the JCRA received list various concerns depending on the identity of the shareholder. Possibilities that according to the submissions raise competitive concerns are if the shareholder owns a car dealership, if the shareholder is a politician or if the shareholder is a member of staff at JPIDL.

32. The JCRA has assessed these concerns. [REDACTED].

#### **Decision**

33. In light of these factors, the JCRA hereby approves the proposed JV under Article 22(1) of the Law

**14 December 2009**

**By Order of the JCRA Board**