



Jersey Competition Regulatory Authority (“JCRA”)

Decision M458/09

Proposed Acquisition

of

subsidiaries of Mourant Limited that conduct business

under the name Mourant International Finance

Administration

by

State Street Corporation

The Notified Transaction

1. On 10 December 2009, 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 by State Street Corporation (“**SSC**”) from Mourant Limited (“**Mourant**”) of 100% of certain subsidiaries of Mourant that conduct business under the name Mourant International Finance Administration (“**MIFA**”).
2. The JCRA registered a notice of its receipt of the Application in the Jersey Gazette and on its website, both on 11 December 2009, inviting comments on the proposed acquisition by 4 January 2010. No comments were received. In addition to the public consultation, the JCRA conducted its own market enquiries concerning the proposed acquisition. Finally, in addition to Jersey, the proposed acquisition required notification to, and approval by, the Irish Competition Authority (“**ICA**”) under the provisions of the Irish Competition Act. The JCRA has had contact with the ICA regarding the proposed acquisition.

The Parties

(a) Mourant

3. Mourant is a Jersey-registered company that operates in the financial services industry. Mourant du Feu & Jeune is affiliated to Mourant and provides offshore legal services.

(b) MIFA

4. According to the Application, MIFA is a global provider of financial administration services to the alternative investment community and corporate administration services to banks and institutions. It has a particular focus on the outsourced administration of private equity funds, real estate funds, hedge funds, funds of funds, companies who require corporate administration services, limited partnerships, unit trusts, special purpose vehicles and other vehicles commonly used in the structuring of international finance transactions where the promoters

of the structures are institutions. The companies comprising the target group described as MIFA are Mourant & Co. Limited, MIFA Services Limited, Mourant Services Guernsey Limited, Mourant Capital Markets Services Limited, Mourant Client Treasury Services Limited, Mourant Holdings Limited, Colomberie Services Limited and Mourant Fund Services LLC as well as their subsidiaries.¹

(c) *SSC*

5. According to the Application, SSC is a global provider to institutional investors of investment servicing, investment management and investment research and trading services – including fund administration services – to institutional investors. In Jersey, SSC is active in the provision of fund administration and custody services.

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.
7. Pursuant to the proposed acquisition, SSC would acquire control of MIFA as defined under Article 2(1)(b). The parties applied for JCRA approval under Article 1(1) of the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the “**Order**”), on the basis that the share of supply for the provision of fund administration services in Jersey (measured on the basis of the value of the assets under administration of the funds to which they provide services) is 31.15% for MIFA and 3.45% for SSC, which exceeds the relevant 25% threshold. On the basis of these facts, pursuant to the Order, the JCRA’s approval is required under Article 20(1) of the Law before the proposed acquisition is executed.

¹ Certain direct and indirect subsidiaries which form part of MIFA will be retained, however substantially all of the economic interest in these subsidiaries is part of the proposed acquisition.

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.²
9. As detailed below, the JCRA concludes that this would not be the case.

Defining the affected relevant market(s)

(i) The Relevant Product Market(s)

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.”³
11. The parties consider the proper relevant product market to be the provision of fund administration services, without making any further differentiation.
12. According to the Application, fund administration services are effectively a menu of outsourced service offerings. The European Commission in its Decision *State Street Corporation – Deutsche Bank Global Securities* of 16 January 2003⁴ states that fund administration services include acting as a trustee, depository or deposit-bank of mutual funds; accounting services and net asset valuations; share registration and taxation services; transfer agency; trustee and record keeping services; ancillary legal and secretarial services; and transaction and portfolio reporting services. This is consistent with the parties’ submission.
13. In Decision *M001/06 AIB Fund Administrators Ltd/Mourant & Co Ltd*, for the purpose of defining a relevant product market, the JCRA did not make a further distinction within fund administration services.

² JCRA Guideline, *Mergers and Acquisitions* at 6.

³ *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. C 372 at 2 (9 December 1997). 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 Case Number M.3027, ¶11.

14. For the purpose of this Decision, the JCRA therefore will assume that the relevant product market is fund administration services.

(ii) The Relevant Geographic Market

15. The relevant geographic market is, stated simply, the area in which competition takes place.

16. In the Application, the parties submit that the geographic market is global. The parties have provided information that indicates that the geographic market is at least regional and perhaps global from both a supply side and a demand side perspective.

17. From a supply side perspective, whereas Jersey regulations will generally require that a Jersey domiciled administrator be appointed for fund structures established in Jersey, it is not necessary to provide all administration services from Jersey in practice. Similarly, Jersey based suppliers of fund administration services can and do service both Jersey domiciled funds and those established in other jurisdictions, even though some of the activities included within the fund administration services may have specific national regulations or require a national presence.⁵

18. From a demand side perspective, the parties state that their clients are global businesses often requiring their supplier of fund administration services to be able to service all of their funds' requirements regardless of jurisdiction and thus provide global coverage.

19. While there is evidence supporting a global relevant market definition, for the purpose of this Decision the JCRA will assume that the relevant geographical market is limited to Jersey. If the proposed acquisition does not raise competition concerns in this most narrow geographical market, there will be no competition

⁵ The EC *State Street Corporation/Deutsche Bank Global Securities* Decision refers to requirements contained in Directive 85/611/EEC regarding the regulatory oversight of funds investing in transferable securities.

concerns if the geographical market is expanded to include suppliers located in other jurisdictions.

Effect on Competition

- 20. On the basis of the facts, the competitive analysis can be limited to the horizontal aspect, i.e. the potential effect of the proposed acquisition amongst Jersey based suppliers of fund administration services.
- 21. Both parties provide fund administration services in Jersey. The proposed acquisition is therefore expected to result in an increase in the market shares in Jersey.
- 22. The following table summarises the market shares for the relevant market based on the assets under administration, as well as the expected change in these shares resulting from the acquisition.

30 June 2009 market share in % on the basis of assets under administration⁶		
Supplier	Pre Acquisition	Post Acquisition
MIFA	31.15	
Bedell Trust Company	9.63	9.63
Saltgate	6.85	6.85
Aztec Group	5.87	5.87
R&H Fund Services	5.81	5.81
Nordic Capital	5.33	5.33
UBS	4.97	4.97
Ogier Fund Administration	4.17	4.17
SSC	3.45	34.6
Standard Bank	2.77	2.77
Others	20	20
Total	100	100

- 23. The table shows that MIFA currently is the largest supplier of fund administration services in Jersey, and this leading position would be assumed by SSC as a result of the proposed acquisition. There would still be, however, eight other major suppliers of fund administration services in Jersey, in addition to other smaller

⁶ Data as supplied in the Application based on the 2009 Lipper Fund Jersey fund administration survey.

suppliers. In addition, the JCRA notes that the combined market share of MIFA and SSC on the basis of the number of funds administered is considerably lower.

24. In addition to market shares, another commonly used indicator of market concentration is the Herfindahl-Hirschman Index (“**HHI**”). The HHI is calculated by adding the squares of the percentage market shares held by the competitors in the market. “[T]he change in HHI (known as the “delta”) is a useful proxy for the change in concentration directly brought about by the merger.”⁷
25. Based on the market shares for assets under administration provided above, the HHI analysis for the relevant market shows a post-merger HHI of between 1,483 and 1,883, with a delta of 215.⁸ According to the European Commission’s Guidelines, a proposed acquisition is unlikely to raise competition concerns if the post-merger HHI is between 1,000 and 2,000 with a delta below 250, except in special circumstances.⁹ The JCRA considers that there are no special circumstances and concludes that the market concentration does not raise competition concerns even in the most narrowly defined Jersey market for fund administration services.
26. The public consultation and market enquiries conducted by the JCRA have also not identified competitive concerns.
27. Based on the above, the JCRA concludes that the proposed acquisition would not lead to a substantial lessening of competition in Jersey or any part thereof.

Ancillary Restraints

28. Under European Union competition law, so-called “ancillary restraints” – agreements that do not form an integral part of the asset or share transfer but are

⁷ See *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 16 (5.2.2004).

⁸ The information lists the main competitors and a market share of 20% for “others”. The higher number applies when there is one supplier in this category, the lower lowest number applies when “other” contains in infinite number of minute suppliers.

⁹ See footnote 6, at ¶ 20.

considered to be “directly related and necessary to the implementation of the concentration” – are subject to analysis in the merger review.¹⁰

29. One form of an ancillary restraint is a so-called non-competition clause. Applicable EC guidance states that non-competition clauses for periods of up to two years are justified when the proposed acquisition includes the transfer of goodwill, and for periods of up to three years when the proposed acquisition includes the transfer of both goodwill and know-how.¹¹ Longer periods may be justified in “exceptional cases.”¹²
30. Another form of an ancillary restraint is a so-called non-solicitation clause. The EC guidance referred to above assesses that non-solicitation clauses have a comparable effect to non-competition clauses and are therefore evaluated in the same way.
31. The draft share sale agreement contains both non-solicitation and non-competition clauses.
32. According to the parties, there is considerable goodwill and know-how in the MIFA business, particularly in relation to certain business areas where SSC does not currently operate as extensively as MIFA, such as director services.
33. Regarding the proposed acquisition, the JCRA has no reason to depart from the EC guidance and concludes that the proposed protective covenants for a period of three years are ancillary to the proposed acquisition and justified.

Conclusion

34. Based on the preceding analysis, the JCRA hereby approves the proposed acquisition under Article 20(1) of the Law.

18 January 2010

By Order of the JCRA Board

¹⁰ See *Commission Notice on restrictions directly related and necessary to concentrations*, O.J. C 56/03 ¶¶ 1, 10 (5 March 2005).

¹¹ See *ibid.* ¶ 20.

¹² *Ibid.* ¶ 20, note 5.