Jersey Competition Regulatory Authority

PUBLIC VERSION

Case M882/12

Proposed acquisition of Agricola Group Limited

by Forfarmers UK Limited

Decision

Document No: CICRA 12/34 **July 2012**

Jersey Competition Regulatory Authority
2nd Floor Salisbury House, 1-9 Union Street, St Helier, Jersey, JE2 3RF
Tel 01534 514990, Fax 01534 514991 Web: www.cicra.je

The Notified Transaction

1. On 30 May 2012, 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 ForFarmers UK Ltd ("**Bidder**"), owned by ForFarmers Group B.V. (the "**Purchaser**"), of Agricola Group Ltd (the "**Target**"), a holding company for a group of companies which operates under the trade name 'BOCM Pauls' (the "**Acquisition**").

2. The JCRA registered a notice of its receipt of the Application in the Jersey Gazette and on its website, both on 1 June 2012, inviting comments on the Acquisition by 15 June 2012. No comments were received.

3. The JCRA also spoke to two of the Target's top five customers in Jersey, to seek their views about the Acquisition and their comments are detailed at paragraphs 41 and 42below.

4. The Acquisition was also notified to the European Commission ("**EC**") on 31 May 2012.

The Parties

(a) Purchaser

5. According to the Application, the Purchaser, headquartered in the Netherlands, is the holding company for an international group of companies active in the production and sale of broiler breeders[1] and the production and supply of animal feed and agricultural commodities (fertilisers, crop protecting agents, seed and planting material) in the Netherlands, Belgium and Northern Germany.

6. The Purchaser also holds 57.7% of the shares in raw materials supplier Cefetra B.V ("**Cefetra**").Cefetra is an international trading organisation that sources raw

[1] Chickens raised specifically for their meat.

materials worldwide and supplies them to the feed, food and fuel industries. The supply of raw materials for animal feed accounts for over **[REDACTED]**% of Cefetra's activities. The Purchaser is therefore active on the upstream market in relation to the Target's manufacture and supply of compound and blended animal feed (together "**animal feed**"). Through its subsidiary, Forfarmers UK Limited, the Purchaser intends to acquire all the shares in the Target.

7. As an ancillary activity, the Purchaser also provides miscellaneous agriculture sector services which inter alia, relate to the coordination of barn engineering and architecture and legal services such as environmental and building permits and subsidies.

8. According to the Application, the Purchaser also holds a 50% interest in HaBeMa Futtermittel GmbH & Co. KG, located in Germany, which manufactures compound feed and is active in the storage and handling of raw materials for the feed, food and fuel industries.

9. The worldwide turnover for the Purchaser for the year ending 31 December 2011 was £**[REDACTED]**.[2] None of the Purchaser's group of companies produces or supplies goods or services in Jersey.

(b) Target

10. The Target is the ultimate holding company of a group of companies which operate under the trade name BOCM Pauls ("**BOCM**"). **[REDACTED]**% of the shares in the Target are owned by **[REDACTED]** and **[REDACTED]**% is held by **[REDACTED]**. As the Target is the ultimate parent company for the group, the whole of the Agricola group will become part of the Purchaser's group of

[2] Converted from Euros using a rate of 1 Euro = 0.800850 GBP as of 23 May 2012.

companies as a result of the transaction. The Target is predominantly active in the United Kingdom ("**UK**") but has subsidiaries in both Germany and Romania.

11. According to the Application, BOCM produces and supplies animal feed for all types of livestock from its UK manufacturing sites. Sales outside the UK make up **[REDACTED]**% of BOCM's total sales. The Target supplies compound and blended animal feed, raw materials for animal feed and premixed animal feed to customers in Jersey.

12. For the year ending 31 December 2011, the Target's turnover in Jersey was £**[REDACTED]**. Of that, £**[REDACTED]** was from the sale of compound and blended animal feed, £**[REDACTED]** from the sale of raw materials for animal feed and £**[REDACTED]** was generated from the sale of premixed animal feed. The Target's turnover worldwide for the same period was £**[REDACTED]**.

(c) Bidder

13. The Bidder is a company incorporated for the purposes of acquiring the Target and as such does not carry on any trading activities. The Bidder is ultimately controlled by the Purchaser.

The Requirement for JCRA Approval

14. 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.

15. The Acquisition involves the Bidder acquiring control of the Target as defined under Article 2(1)(b). The parties applied for JCRA approval of the Acquisition on the basis that the Target is likely to have a share of 25% or more of the supply

of animal feed in Jersey and the Purchaser, via its subsidiary Cefetra, supplies raw material for animal feed in the UK and is thus active upstream of the Target's manufacture and supply of animal feed. Once the Acquisition is completed, the resulting corporate group would be active in the vertically related markets of the supply of raw materials for animal feed and the supply of animal feed in Jersey and therefore the Acquisition falls within the conditions of Article 3 of the *Competition (Mergers and Acquisitions) (Jersey) Order* 2010 (the "**Order**").

16. On the basis of these facts, pursuant to the Order and Article 20(1) of the Law, the JCRA's approval is required before the Acquisition is executed.

Assessment

17. Under Article 22(4) of the Law, the JCRA must determine if the Acquisition would substantially lessen competition in Jersey or any part thereof, pursuant to the procedures set forth in the JCRA's *Guidelines for Mergers and Acquisitions*.[3]

18. The JCRA has concluded that the Acquisition will not substantially lessen competition in Jersey or any part thereof, for the reasons set out below.

Defining the affected relevant market(s)

(i) The Relevant Product Market(s)

19. ''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".[4]

[3] JCRA (2010), *Mergers and Acquisitions,* at page 6.
[4] *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).

Overview of Animal Feed

20. Both parties produce and sell various types of animal feed, such as compound feed, blended feed and single feed.[5] Blended feeds are predominately used by dairy farmers and the cow is Jersey's main livestock animal. In composing a diet for an animal, a farmer can meet its nutritional needs in various ways, the main one being via compound and blended animal feed. This can either be bought ready-made or mixed by the farmer using raw materials and premixes sourced from a third party.

21. The parties contend that there are three product markets relevant to the assessment of the competitive effects of the Acquisition. The first is the upstream market of the supply of raw materials for the production of animal feed. The second is the upstream market of the supply of premixes.[6] The third is the downstream market for the supply of compound and blended animal feed.

Raw materials

22. The parties are both active in the market for raw materials for the production of compound and blended animal feed, but as it is only the Target that supplies raw materials into Jersey, the parties contend that the Acquisition does not raise any horizontal competition concerns. However, this assumes that the relevant geographical market is no wider than Jersey; in practice, the relevant geographic market is likely to be considerably wider than Jersey, for the reasons set out at paragraphs 27-32 below.

23. The EC in BAY Wa AG/RWA[7] has previously defined a product market for single feed but did not conclude on a further segmentation into 'roughage and moisture rich single feed' and 'raw materials for compound feed'. According to

[5] Single feed is referred to in the Office of Fair Trading's decisional practice as 'straights' and is feed which consists of a single substance i.e. grain. Single feed can be used directly by farmers as animal feed or as a raw material by manufacturers and farmers mixing their own feed, in order to arrive at a blended or compound feed.

[6] Also an input into animal feed.

[7] COMP/M.1362 – Bay Wa AG/RWA, 3 June 1999

the Application, only the segment of raw materials for compound and blended feed (and not ‘roughage and moisture rich single feed’) is relevant to an assessment of the vertical relationship involved in the supply of compound and blended animal feed. The parties submit that there are no vertical competition concerns and so the question of whether the product market should be further sub-segmented may be left open.

Premixes

24. According to the Application, premixes are a separate and product distinct market[8]and as it is only the Target that is active in the market for the production and supply of premixes, the parties contend that the Acquisition does not raise any horizontal effects in this product market in any case.

Compound and blended animal feed

25. The parties submit that the relevant downstream product market for assessing the Acquisition is the supply of compound and blended animal feed (together “**animal feed**”). The Office of Fair Trading (“**OFT**”) in the UK has previously concluded that animal feed lies in a separate product market to single feed, as there is limited demand-side substitutability and reportedly mixed evidence as to the commercial attractiveness of supply-side substitution.[9] According to the Application, single feed acts as a constraint on the price of animal feed due to the prevalence of home mixing. The parties estimate that 50% of all animal feed in the UK is home-mixed, but recognise the proportion is likely to be lower in Jersey due to limitations in terms of viability and a smaller range of raw materials.

26. From the information available the only conceivable competition concerns arising from the Acquisition are from possible vertical effects. For the purposes of the Decision, the JCRA observes the market definitions previously adopted by the EC and OFT and has therefore proceeded on the basis that the following product

[8] COMP/M.3177 – BASF/Glon-Sanders/JV, para. 8.

[9] OFT Case ME/5095/11: Anticipated acquisition by AB Agri Limited of the business and assets of the Uffculme Feed Mill, 1 September 2011.

markets are relevant to the Acquisition: i) the supply of raw materials for the production of compound and blended animal feed ii) the supply of premixes iii) the supply of compound and blended animal feed.

ii) The Relevant Geographic Market

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

28. According to the Application, the EC has previously concluded[10] that the geographic market for raw materials (and for single feed in general) was at least European Union ("**EU**") in scope and it was left open as to whether the market was worldwide. The parties contend that the market is worldwide because i) raw materials are traded in open cash markets and organised futures markets in Paris and Chicago; ii) raw materials are often sourced from the United States, Asia and South America for use in the EU; and iii) Cefetra, one of the Purchaser's subsidiaries, competes with different companies acting on a worldwide basis.

29. The EC has previously supported both a European Economic Area ("**EEA**") wide market[11] and national markets for the supply of premixes.[12] The parties contend that the geographic market for premixes is possibly worldwide, but at least EEA-wide due to low transport costs and the relative homogeneity of the products, but add that the exact definition of the geographic market can be left open in the absence of any competition concerns.

30. According to the Application, the relevant geographic market for animal feed is at least as wide as Jersey, but it emphasises that Jersey may be part of a wider macro regional market. All animal feed has to be imported into Jersey and with

[10] COMP/M.5410 – Forfarmers/Cefetra.
[11] COMP/M.2956 – CVC/PAI Europe/Provimi, para 17.
[12] COMP/M.6383 – Cargill/KoroFrance.

additional shipping costs and separate import duties the parties submit that Jersey could be considered a distinct separate market.

31. To the extent that the Acquisition raises competition concerns, if the geographic market for animal feed is Jersey, then there is a vertical relationship between the Purchaser and the Target. If the geographic market is considered wider than Jersey then there is also horizontal overlap as the two parties are competitors in the supply of raw materials for the production of animal feed.

32. For the purpose of this Decision, as the Acquisition will not give rise to a substantial lessening of competition, the JCRA has not sought to define definitively the geographic market(s). The JCRA has proceeded on the basis that the relevant geographic markets for premixes and raw materials are at least EEA-wide and the relevant geographic market for animal feed is at least as wide as Jersey, recognising that all products must be imported.

Effect on Competition

33. As noted in paragraph 15 above, the obligation to apply for the JCRA's approval of the Acquisition arises by virtue of the vertical relationship between the Purchaser and the Target and the facts that the Target is likely to have a share of 25% or more of the supply of animal feed in Jersey and that the Purchaser, via its subsidiary Cefetra, supplies raw material for animal feed in the UK.

34. The JCRA has reached the view that the Acquisition will not substantially lessen competition in the supply of animal feed in Jersey for the reasons set out in the following paragraphs.

35. Vertical mergers will often have either a neutral or beneficial effect on competition and may also produce some efficiencies. In accordance with the

stance taken by the EC,[13] the JCRA will usually only have concerns about vertical mergers when it considers that the merged entity would have the ability and incentive to harm its rivals – for example by raising prices for inputs - and the effect on consumers would be sufficient to reduce competition in the affected market such that a substantial lessening of competition might result.

36. The parties submit that the Target's market shares for premixes are so low, [0-5]% in the EEA and [5-10]% in the UK, that no competition concerns could arise. The parties contend that these market shares are so low as to be insufficient for the parties to engage in input or demand foreclosure. Within the EU, the parties estimate that the Target's market share for raw materials is [0-5]% and the Purchaser's is [10-20]%, while in the UK the Target has a market share of [0-5]% and the Purchaser has a market share of [5-10]%.

37. The parties submit that there are four alternative suppliers to the Target for animal feed in Jersey, including Countrywide Farmers ("**CWF**"). [REDACTED],[14] [REDACTED].[15] [REDACTED]. [REDACTED].[16]

38. Any vertical non-coordinated effects could impact on Jersey customers due to potential price increases flowing downstream as a result of input or demand foreclosure. The parties submit that even though the merged entity could refuse to provide access to inputs(i.e. raw materials) and might also have an incentive to do so, in terms of increasing market share downstream at the expense of foreclosed rivals, if the merged entity were to withhold or reduce supply to its customers, upstream competitors would be able to expand their capacity and it would be relatively easy for downstream competitors producing animal feed to source their requirements for raw materials elsewhere. This access to competitive alternative

[13] *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ C265, Pages 6-25, 18 October 2008.
[14] [REDACTED]
[15] [REDACTED]
[16] [REDACTED]

sources of raw materials means that the merged entity would not have the *ability* to foreclose its rivals' access to raw materials.

39. To illustrate that there is limited ability post-Acquisition for the merged entity to foreclose access to inputs for animal feed, the parties note that BOCM does not supply its own needs for the production of animal feed and has no plans post-Acquisition to source all its raw materials for animal feed from Cefetra. The Purchaser currently sources **[REDACTED]**% of its demand for raw materials from Cefetra, but this accounts for only **[REDACTED]**% of Cefetra's turnover. Moreover, Cefetra reportedly has many international competitors for the supply of raw materials and so the merged entity will not be able to affect input foreclosure.

40. According to the Application it would be self-defeating for the merged entity to increase prices for example, as the producers of animal feed could easily switch to other suppliers for raw materials and customers downstream have the ability to switch to home mixed feeds as a substitute. Given that all animal feed, raw materials and premix has to be imported into Jersey, the JCRA considers that the shipping costs attached to importing products for home mix mean that it may not act as a viable substitute and/or constraint to the extent that it may do in the UK.

41. The JCRA has spoken to two of the Target's top five customers to assess the ease with which local animal feed consumers could switch to alternative suppliers of animal feed if the merged entity did engage in foreclosure of rivals, and attempted to exploit market power in respect of supplies to Jersey. The Target sells feed to farmers via a local agent/distributor (the "**distributor**") who arranges haulage from the UK mill direct to local farms. The distributor stocks the range of BOCM products including poultry, dairy, goat, sheep and pig feed. The distributor also stocks brands other than BOCM for horse feed and poultry feed, for example. He had no concerns that he could source compound and blended animal feed from other UK mills/manufacturers and did not consider the Purchaser to be the only potential alternative supplier to the Target currently. He mentioned that there is

also a possible new UK entrant to the market for animal feed, who exhibited recently at a local industry road show.

42. The second of the Target's local customers, a dairy farmer, stated that he had not heard of two of the companies proposed as alternative suppliers to the Target. He viewed BOCM as the biggest producer of animal feed in the UK and added that due to the declining demand for animal feed, the UK producer base had become quite concentrated. However, the customer had no concerns about the Acquisition, and stated that if the merged entity's prices became uncompetitive, he would be able to ship the product himself from the UK, as there are a number of alternative suppliers to CWF and the Target. The one constraint to this working in practice is that he and smaller farms do not have a blower[17] and smaller farms may also not benefit from the economies of scale that can be achieved from large shipments. However, most of the larger dairy farms own a blower, and the farmer saw no reason why they would not blow the feed for the smaller farms.

43. The JCRA is satisfied that there is no evidence before it to suggest that the merged entity would have the ability and incentive to engage in vertical foreclosure, as there is competition upstream for the supply of raw materials and downstream for the supply of compound and blended animal feed. As such, the JCRA has concluded that there is no basis for concluding that the Acquisition would substantially lessen competition in any relevant markets in Jersey.

Ancillary Restraints

44. Under EU 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

[17] As part of the fee paid by farmers to the agent, the feed is blown into the bin hoppers. A blower would cost upward of £3,000.

'directly related and necessary to the implementation of the concentration' – are subject to analysis in the merger review.[18]

45. Applicable EC guidance states that non-competition and non-solicitation 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.[19]

46. The Application details that the Acquisition (through the Share Purchase Agreement) will involve the imposition of non-compete and non-solicitation clauses for varying periods of no more than **[REDACTED]** months for members of BOCM's senior management and other named individuals. The JCRA is satisfied that the Acquisition does involve the transfer of goodwill. On the basis of the EC guidance summarised above, this provides justification for non-compete and non-solicitation clauses with durations of up to **[REDACTED]** months.

47. The JCRA has therefore concluded that the non-compete and non-solicitation clauses are ancillary to the Acquisition and justified for a period of up to **[REDACTED]** months.

<u>Conclusion</u>

48. Based on the preceding analysis, the JCRA hereby approves the Acquisition under Article 22(1) of the Law.

3 July 2012 **By Order of the JCRA Board**

[18] See *Commission Notice on restrictions directly related and necessary to concentrations*, O.J. C 56/03 1, 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 EU.

[19] See *ibid* at paragraph 20.