PUBLIC

Case M863/12

Proposed acquisition of La Rocque Fisheries Limited

by Jersey Oyster Company Limited and France Naissain SAS

Decision

Document No: CICRA 12/37 **July 2012**

Jersey Competition Regulatory Authority
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The Notified Transaction

1. On 19 June 2012, the Jersey Competition Regulatory Authority, ("**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 Jersey Oyster Company Limited ("**Jersey Oyster**") and France Naissain SAS ("**France Naissain**") (together "**the Notifying Parties**") of joint control of La Rocque Fisheries Limited (the "**Target**") (the "**Acquisition**").

2. The JCRA registered a notice of its receipt of the Application in the Jersey Gazette and on its website, both on 20 June 2012, inviting comments on the Acquisition by 4 July 2012. One comment was received and is detailed in paragraph 47 below.

3. In addition to the public consultation, the JCRA also spoke to Jersey Oyster's top five customers in Jersey, a Fisheries Officer, two growers and a possible new entrant, to seek their views about the Acquisition and their comments are detailed in paragraphs 39-51 below.

Overview of Oyster Production

4. Oysters[1] are sold at various stages in the production cycle. Seed oysters ("**seed**") by statute must be purchased from an approved hatchery at the start of the growing process; half-size oysters have been grown for about one year and are sold to oyster growers for relaying in nurseries; and full grown oysters are sold to customers in a range of sizes 1-5, Number 1 being the largest and taking the longest to produce and thus achieving the highest price.

5. Jersey is a significant producer of oysters. The vast tidal movement and the relatively warm and nutrient-rich sea water mean that the time required to grow full grown oysters is 2 years[2] in comparison to 3 years in the United Kingdom ("**UK**") and France, which reduces production costs and enables local growers to be competitive and achieve significant export sales.

[1] For the purposes of this Decision, unless specified, any reference to oyster is a reference to pacific oysters.

[2] Number 1 oysters would take 3 years to grow in Jersey waters.

6. The focus of local oyster growers is exports to France and the UK. Since 2008, the mortality of oysters has risen considerably throughout Europe as a result of the spread of the herpes virus, reducing French production to 80,000 tonnes a year, whereas the annual demand in France for oysters is thought to be about 150,000 tonnes. Consequently, the Western European price of oysters has doubled as a result of the deficit in supply.

7. The Notifying Parties estimate that the annual value of oysters supplied to wholesale customers in Jersey is no more than £50,000.

The Parties

(a) Jersey Oyster

8. According to the Application, Jersey Oyster is a Jersey-registered business, owned by Christopher Le Masurier. Jersey Oyster's main activity is the production of fully-grown oysters for sale locally and as exports and one of its assets is a small purification unit that is housed in a trailer. The business also grows speciality Bouchot mussels in Jersey for export to France and purchases mussels from the United Kingdom ("**UK**") and Ireland for onward sale to Jersey customers. The Notifying Parties submit that the rationale for exporting all locally grown mussels is that they are all ready to harvest within a very short time period; about 100 tonnes are available within a couple of weeks. In addition, the speciality mussels are relatively small in size and are not popular locally. Imported mussels are the right size for local consumers and can be kept fresh by being re-laid, enabling them to grow and improve in quality. According to the Application, Jersey Oyster supplies over 25% of the mussels sold in Jersey using imported stocks.

9. The company also owns Happy Hens, which supplies over 25% of the free range eggs[3] and asparagus to customers in Jersey.

10. Jersey Oyster also owns Rocquaine Shellfish Limited, a Guernsey-based subsidiary, which produces half size oysters and imports them to Jersey for re-laying.

[3] JCRA Decision M346/08, Acquisition of Happy Hens Limited by Jersey Oyster Company Limited, 7/1/08

11. Jersey Oyster's acquisition of another oyster farm, Jersiaise Fluke, in 2008 was also the subject of a JCRA decision.[4]

12. During 2011, Jersey Oyster bought [REDACTED]% of its seed requirements from France Naissain. Jersey Oyster is one of France Naissain's top five customers.

13. The turnover for Jersey Oyster for the year ending 31 December 2011 was £[REDACTED]. Of this, £[REDACTED] was attributable to the sale of oysters, but only £[REDACTED] was attributable to sales of oysters to customers in Jersey i.e. [0-5]% of the total value of Jersey Oyster's oyster sales.

(b) France Naissain

14. France Naissain is a French producer of larvae and hatchery-grown seed which is sold predominately in France but also to oyster growers in Jersey. France Naissain, owned 60% by Stephane Angeri and 40% by his wife, in turn owns 90% of Vendee Naissain which produces oyster seed for France Naissain. The remaining 10% of Vendee Naissain is owned by Stephane Angeri.

15. France Naissain also produces half size oysters and has an interest in a cosmetic business in France, SAS Ocealix.

16. According to the Application, Jersey sales represent [0-5]% of France Naissain's total sales of oyster seed. For the year ending 31 December 2011, France Naissain's total seed sales in Jersey were £[REDACTED];[5] of this, £[REDACTED] represented sales to Jersey Oyster, while £[REDACTED] of sales were to another oyster grower.

17. The turnover for France Naissain for the year ending 31 July 2011 was €[REDACTED].

18. Any reference in this decision to France Naissain includes reference to any of its subsidiaries.

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[4] JCRA Decision M193/07, Acquisition of Jersiaise Fluke Limited by Jersey Oyster Company Limited, 25/2/08
[5] Converted using an exchange rate of 1.241 as of 13 June 2012.

(c) Target

19. Shares in the Target (trading as Royal Bay Oysters) are held by 5 French individuals. According to the Application, the Target's financiers have threatened to enforce securities granted to them as part of finance facilities made available to the Target. The Target ceased trading in March/April 2012 and all of its oyster beds are currently bare. It will therefore be two years from seed being laid until mature oysters are ready to supply for consumption. Prior to it ceasing trading, the Target sold fully grown oysters to the UK and France and provided 60% of the fully grown oysters sold to Jersey customers. The Target holds a licence issued by the Economic Development Department ("**EDD**") to occupy and use 25 hectares of seabed on the south-east coast of Jersey, and its concession includes the only two 'Grade A' areas in the Island.[6] The Target also owns a purification plant which lies close to Jersey Oyster's facility in Grouville.

20. For the year ending 31 December 2011, the Target's turnover was £[REDACTED].

(d) The Acquisition

21. The focus of the business of the joint venture will be the export of half size oysters to French oyster growers. Therefore, post-acquisition, the acquired business will not compete with Jersey Oyster for the supply of mature oysters. The decision to supply half size oysters for export is in part because the Target's oyster beds are currently empty.

22. When France Naissain approached EDD[7] in 2011 to inquire about the possibility of acquiring the Target, EDD indicated that it would require France Naissain to obtain a local partner with requisite industry expertise.

23. It is proposed that the shareholding in the joint venture will initially be [REDACTED], and in time [REDACTED], between France Naissain and Jersey Oyster respectively. A shareholders' agreement will be drawn up subsequent to the JCRA's decision in respect

[6] Grade A oyster beds are desirable as only these waters are sufficiently free of *e coli* to allow the oysters to be supplied directly for raw consumption without purification. Notwithstanding that, there is no guarantee that the water will be awarded the same classification post-Acquisition as the Target's beds have been left in some disrepair.

[7] The EDD Minister issues licences for the establishment of fisheries and use of the seabed under the *Sea Fisheries (Fisheries) (Jersey) Regulations 2010*

of the Acquisition. However, the in principle agreement is that both parties will have a veto over essential matters such as the sale of shares and property. Producing the annual plan and making strategic decisions will be taken by the executive management team, which will comprise Mr Angeri (from France Naissain) and Mr Le Masurier (from Jersey Oyster) and two others. On the basis of its involvement in and veto over strategic business decisions, the JCRA is satisfied that Jersey Oyster will acquire "decisive influence" over the Target as the term is defined in Article 2(2) of the Law.

24. Jersey Oyster's increase in its stake in the joint venture to [REDACTED]% will be completed once the company [REDACTED]; however, at this stage, it is envisaged that this will occur twelve months from completion. If the Acquisition has been approved before the shareholders' agreement between the parties is finalised, then France Naissain will acquire all the shares in the Target and the shares will be transferred to Jersey Oyster as soon as the shareholders' agreement is completed.

The Requirement for JCRA Approval

25. Under 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(5)(b) of the Law, a merger or acquisition occurs for the purpose of the Law on the creation of a joint venture, "being a business activity carried on by a company formed by 2 or more persons to enable them to carry on that activity jointly by means of their joint control of the company or by means of their ownership of shares in the capital of the company". The JCRA is satisfied that the proposed transaction will result in both France Naissain and Jersey Oyster being able to carry activity on jointly by virtue of their ownership of shares in the Target.

26. The Notifying Parties applied for JCRA approval of the Acquisition on the basis that France Naissain supplies more than 25% of seed in Jersey and is thus active upstream of both Jersey Oyster's and the Target's production and supply of oysters. Once the Acquisition is completed, the Notifying Parties will be active in the vertically related markets of the supply of seed to oyster growers and the supply of oysters to Jersey customers and therefore the Acquisition falls within the conditions in Article 3 of the *Competition (Mergers and Acquisitions) (Jersey) Order* 2010 (the "**Order**").

27. The Notifying Parties also applied for JCRA approval on the basis that Jersey Oyster and the Target are competitors and together supply more than 25% of the oysters in Jersey and therefore the Acquisition also falls within the conditions of Article 2 of the Order.

28. 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

29. 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*.[8]

30. 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)

31. ''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".[9]

32. The JCRA has previously found that there are distinct product markets for mussels, oysters and scallops. Market inquiries conducted by the JCRA as part of its assessment of the Acquisition have suggested that there may in fact be distinct product markets for flat oysters and pacific oysters.[10] This segmentation is confirmed by the presence of

[8] JCRA (2010), *Mergers and Acquisitions,* at page 6.
[9] *Commission Notice on the definition of the relevant product market for the purposes of Community competition law,* O.J. C 372, 9 December 1997.
[10] JCRA Decision M193/07, Acquisition of Jersiaise Fluke Limited by Jersey Oyster Company Limited, 25/2/08, paragraph 8.

only one grower of flat oysters locally, who exports his entire production. Reportedly, no restaurant or hotel in Jersey offers flat oysters, which sell for double or triple the price of pacific oysters. It is possible that supply substitution would mean that flat oysters and pacific oysters lie in the same product market, since similar production facilities can be used for growing each of them. However, given that neither Jersey Oyster nor the Target are active in the production of flat oysters, the JCRA has proceeded on the basis that the relevant product market comprises pacific oysters.

33. The JCRA has reviewed possible vertical and horizontal effects on competition arising from the Acquisition. For the purposes of the Decision, the JCRA observes the market definitions it has previously adopted[11] and considers that there are two product markets relevant to the assessment of the competitive effects of the Acquisition. The first is an upstream market for the supply of seed for the production of pacific oysters. The second is a downstream market for the wholesale supply of pacific oysters.

ii) The Relevant Geographic Market

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

35. According to the Application, there are a number of approved hatcheries in France, the UK and Guernsey that can supply seed to growers in Jersey. All parties contacted accepted that France Naissain competes in a market that is broad in geographic scope, covering all of these territories.

36. The Notifying Parties contend that the market for the wholesale supply of oysters is regional, and wider than simply Jersey, because oysters are exported from Jersey to the UK and France. There has been conflicting evidence obtained during market inquiries in relation to the viability of importing oysters to Jersey from France or the UK, i.e. whether the geographic market is in fact wider than Jersey. This issue is discussed in greater detail in paragraphs 43-45 below, but overall, the JCRA is satisfied that imports are a viable alternative to locally-grown oysters. Therefore, for the purpose of this Decision, given that the Acquisition will not give rise to a substantial lessening of

[11] Ibid, paragraph 9.

competition, the JCRA has proceeded on the basis that the relevant geographic markets for both the supply of seed and the wholesale supply of pacific oysters covers at least the area bounded by France and the British Isles (including the Channel Islands).

Effect on Competition

37. As noted in paragraphs 26 and 27 above, the obligation to apply for the JCRA's approval of the Acquisition arose by virtue of the fact that i) France Naissain supplies more than 25% of the seed in Jersey and is active upstream of both Jersey Oyster's and the Target's production and supply of oysters and ii) Jersey Oyster and the Target are competitors and together supply more than 25% of the oysters in Jersey.

38. The JCRA has reached the view that the Acquisition will not substantially lessen competition in the market for the supply of seed and the market for the wholesale supply of oysters for the reasons set out in the following paragraphs.

Oyster seed

39. 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 European Commission,[12] 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.

40. France Naissain has a share of [80-90]% in the supply of seed to oyster growers in Jersey, including Jersey Oyster and the Target. However, on the basis of market inquiries undertaken with local oyster growers, and the fact that Jersey Oyster itself purchases [20-30]% of its seed from seed producers other than France Naissain, the JCRA is satisfied that if France Naissain were to withhold or reduce supply of seed to competitors of Jersey Oyster or the acquired business in Jersey, it would be easy for

[12] *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C265, Pages 6-25, 18 October 2008.

local oyster growers to source their requirements for seed elsewhere, as there are many alternative potential seed suppliers. This access to competitive alternative sources of seed means that France Naissain would not have the *ability* to foreclose access to seed.

Oysters

41. The Acquisition also gives rise to potential horizontal effects by virtue of Jersey Oyster and the Target being competitors, as well as the two largest producers of oysters in Jersey. According to the Application, Jersey Oyster holds licences to operate oyster fisheries of 31 hectares, and the Target, 25 hectares, on the seabed off the east coast of Jersey. The remaining two local growers have licensed areas covering 8 hectares and 1.75 hectares respectively, although according to the Notifying Parties, [90-100]% of the latter's product is flat oyster. There is also a new entrant, with a licence for 0.5 hectares, who has yet to lay any seed.

42. The JCRA has conducted extensive market inquiries with the Notifying Parties' customers and competitors in assessing the Acquisition. While some of the evidence received has been conflicting, most notably in relation to the viability of imports, on balance the JCRA is satisfied that the Acquisition will not lead to a substantial lessening of competition in the wholesale supply of oysters in Jersey.

Imports

43. The annual supply of oysters to customers in Jersey totals approximately 30 tonnes. Until this year, demand for oysters in Jersey was met solely by Jersey Oyster and the Target. In 2011, the Target supplied approximately 18-20 tonnes of oysters to customers in Jersey, with a wholesale value of approximately £25,000. Over the last five years, Jersey Oyster has supplied between 6 and 10 tonnes per annum to customers in Jersey. In recent years, the JCRA understands that the Target has been selling oysters to Jersey customers at prices considerably below the prevailing European market price. Since the Target ceased trading, Jersey Oyster has been the main supplier of oysters to Jersey customers, but the price charged has been calculated as the export price less the cost of transport. This has seen the wholesale price of oysters in Jersey double, from 17p each in March/April 2012 to 35p each presently. However, in general, seafood merchants who were contacted by the JCRA during market inquiries considered that the present

price is much more realistic and is more aligned to the prevailing market price in France.

44. There has been conflicting evidence as to whether imports are a sufficient constraint on Jersey producers. Rival oyster producers and most seafood merchants have contended that importing oysters to Jersey is not viable due to the product's short shelf life and the small numbers being imported: each seafood merchant in Jersey typically sells no more than 800–1000 oysters a week. By contrast, the Notifying Parties and one major seafood merchant stated that importing oysters is entirely possible, although strict health and safety restrictions must be followed with respect to re-tanking. If oysters are to be imported, they are likely to need to be purchased from a wholesaler who is able to purify them before shipping, as only the Target and Jersey Oyster have purification units locally. The Notifying Parties also provided evidence that (in June), at least one local restaurant was sourcing Scottish oysters either directly or via a local seafood merchant.

45. It could be observed that virtually every other food product is successfully imported to Jersey (including fish, seafood and mussels) and evidence suggests that oysters are widely traded in Western Europe. It is entirely possible that seafood merchants have not previously explored the possibility of importing oysters as the local wholesale price has traditionally been significantly below the prevailing price in France and the UK. Oysters available at local restaurants are often marketed as being "Jersey oysters", so local product might command a slight premium if imports were to become commonplace. On balance, given the evidence of existing imports and the views of a major seafood merchant, the JCRA is satisfied that imports will be a viable constraint on the merged entity now that the local price is more aligned to prices in Europe and the UK.

Entry

46. The barriers to entry for new local producers are high. The process of applying for an oyster bed licence (a licence usually lasts 6 years), obtaining separate permissions from both the Agriculture and Fisheries, and Planning Departments, will take more than two years. In addition, a new entrant must pay the cost of an environmental impact assessment (£18,000). Seed will then take 2 years to grow to mature size, although half grown oysters can be sourced and replanted. A new producer has been trying to commence production in Jersey for the last few years, with limited success.

47. Most parties interviewed stated that there are no more suitable oyster bed sites left in Jersey, although the Notifying Parties dispute this. One submission received by a potential entrant bemoaned the lack of concession sites and stated "*the area formerly occupied by the [Target] should be made available in smaller sections to those who wish to try their hand and prove themselves and to other existing local operations that wish to expand*."

48. Even if a new entrant were able to enter production, they would require purification facilities to sell the product direct to local customers, as all Grade B and Grade C oysters must be purified for 42 hours before consumption. Only Jersey Oyster and the Target have existing purification facilities and it has been suggested to us by the Notifying Parties that a trailer would cost £70,000, although others have said the associated electricity costs for the UV lights, coupled with spreading the fixed costs of purification over such a small numbers of oysters for local consumers, would not make this viable.

Competitive Suppliers

49. As previously mentioned, the production of oysters in Jersey greatly exceeds local demand. Any of the local growers could easily satisfy the whole of the Jersey demand for oysters if they wished to do so. There are two other existing oyster growers in Jersey, in addition to Jersey Oyster and the Target. One grower produces mainly flat oysters and exports all his production of both flat and pacific oysters. The other grower also exports all of its production directly to a French wholesaler, and has no interest in supplying to customers in Jersey due to the cost of diverting small volumes from export sales, making deliveries to local seafood merchants and arranging for purification.

50. Importantly, both of the existing local suppliers would require access to purification facilities in order to supply customers in Jersey. While purification facilities could be used for exports (as both Jersey Oyster and the Target have done), the cost of purification is sufficiently high relative to the value of local demand that local prices would need to increase significantly before investment in purification facilities became warranted.

Failing Firm

51. It appears that there were several potential buyers of the Target, albeit at a lower price than that offered by France Naissain, so the JCRA is not satisfied that the Acquisition could be found not to substantially lessen competition based on the failing firm doctrine alone.[13]

Conclusion

52. The Acquisition does involve the consolidation of the two remaining suppliers capable of immediately supplying local consumers with oysters. However, on balance, the JCRA is satisfied that oysters can be imported to Jersey, and that Jersey Oyster will remain constrained in respect of the prices that it charges to Jersey customers by the possibility of oyster supplies being sourced from producers in France or elsewhere in the British Isles.

53. In addition, the JCRA observes that the total value of wholesale demand for oysters in Jersey is small (being less than £50,000 per annum – see paragraph 7 above). While the JCRA is satisfied that the Acquisition will not lead to a substantial lessening of competition, it should also be noted that remedial action may not have been proportionate, given the limited potential harm to consumers from the acquisition of market power by the merged entity.

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

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

[13] *Commission Notice on the guidelines on assessment of horizontal mergers*, O.J. C31, paragraphs 89-91, 5 February 2004.