Case M928/12

Proposed acquisition of Amal-Grow Produce Limited and Amal-Grow Property Limited by Albert Bartlett & Sons (Airdrie) Limited

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PUBLIC

Decision

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Jersey Competition Regulatory Authority
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The Notified Transaction

1. On 19 November 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 Albert Bartlett & Sons (Airdrie) Limited (**Buyer**)**,** wholly owned by Bartlett International Holdings Limited (the **Purchaser**) of Amal-Grow Produce Limited (**Amal Grow**) and Amal-Grow Property Limited (individually and together the **Target**) from Messrs Le Brun, Greenwood and Mallett (the **Sellers**) (the **Acquisition**).

2. The JCRA registered a notice of its receipt of the Application on its website on 19 November 2012, inviting comments on the Acquisition by 3 December 2012. No comments were received.

3. The JCRA 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 34-37. The JCRA also spoke to a customer-supplier of the Target and a grower-supplier of the Target. Their comments are detailed at paragraphs 38-40 below.

The Parties

a) Purchaser and Buyer

4. According to the Application, the Purchaser, headquartered in Scotland, is 90% owned by Mr Ronnie Bartlett and is Britain's leading grower and packer of potatoes of different varieties, including the "Rooster". The remaining 10% of the shares are owned by a family trust.

5. Albert Bartlett (Jersey) Limited (**AB Jersey**), a 100% subsidiary of the Buyer, is a fresh produce supplier specialising in the export and marketing of Jersey Royals, predominantly to the United Kingdom, and currently processes and packs [40-50]% of the Island's total crop of Jersey Royals for export from its [REDACTED] dedicated independent growers. AB Jersey's growers are responsible for securing

the land and growing the crop to meet AB Jersey's customers' demands. AB Jersey [REDACTED] and also supplies virus-reduced seed to Jersey Royal growers upon request, [REDACTED].

6. The Buyer has entered into two sale agreements for the sale of Rooster and Vivaldi potato seed to the Target, which grants the Target the licence to grow and sell these varieties in Jersey. The revenue earned by the Buyer from these royalty payments was £[REDACTED] for 2010-2012.

7. Apart from the two sale agreements (see paragraph 6 above), the Buyer also sells Jersey Royal seed to AB Jersey, for onward sale to AB Jersey's local growers, and also earns revenue from the sale of other farming produce to help cultivate the land and land rental charges.

8. The unaudited worldwide turnover for the Purchaser (including its corporate group) for the year ending 31 May 2012 was £136.4 million.[1] Its unaudited turnover in Jersey was £[REDACTED][2] for the same period. The Purchaser and its subsidiaries do not sell Jersey Royal new potatoes (**Jersey Royals**) or other potatoes to customers based in Jersey (although UK customers may re-export these Jersey Royals or potatoes to Jersey).

b) Sellers and Target

9. The Sellers are the current shareholders and directors of the Target, which according to the Application, is comprised of two separate legal entities. Amal Grow is a specialist grower of outdoor vegetables and non Jersey Royal potatoes (**standard potatoes**) in Jersey, supplying retail and wholesale outlets. It has recently started supplying some retail outlets in Guernsey. The Target also processes and packages vegetables lines purchased from [REDACTED] local

[1] Reflects balance after all group intercompany sales have been eliminated.
[2] Turnover includes intercompany sales to other Purchaser Group companies such as the sale of other farming produce to help cultivate the land, the sale of seed to local growers and small rental charges. The revenue derived from leasing land to Jersey Royal growers for each of the last 2 years was £[REDACTED].

growers[3] and sold to retailers under the Amal Grow brand. The agreements are verbal and the local grower-suppliers' produce often acts as a supplement to the Target's own produce. The Application details that the Target will carry on business in the same way as currently during 2013 and, it is hoped, with the same supply arrangements.

10. Amal-Grow Property Limited (**Propco**) is a property holding company that owns legal title to the property known as High Cross Farm, where Amal Grow has developed a new farm unit. Propco also owns some adjoining fields. Amal Grow is Propco's sole tenant. The Sellers will sell their present shareholdings in Amal Grow and Propco to the Buyer.

11. The Target does not grow Jersey Royals, but it does grade other growers' Jersey Royal potatoes on behalf of AB Jersey. In 2011, this service accounted for [REDACTED]% of the Target's turnover.

12. According to the Application, during 2011, of the 2,011 vergeés of arable land allocated to the growing of outdoor vegetables in Jersey, the Target farmed [REDACTED]%.

13. For the year ending 31 December 2011, the Target's turnover in Jersey was £[REDACTED]. For the same period, the Target's turnover in Guernsey was £[REDACTED]. The Target has no turnover elsewhere in the world.

14. The total consideration to be paid for the Target is £[REDACTED], payable to the Sellers in the proportions of each of their shareholdings.

[3] During 2012.

The Requirement for JCRA Approval

15. 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.

16. The Acquisition involves the Buyer 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 has a share of 40% or more of the supply of locally grown outdoor vegetables, including lettuce (excluding potatoes) to supermarkets in Jersey. The Acquisition therefore falls within the conditions of Article 4 of the *Competition (Mergers and Acquisitions) (Jersey) Order* 2010 (the "**Order**"). In addition, the Target processes and grades potatoes for AB Jersey and is thus active upstream of its supply of Jersey Royals; therefore, the Acquisition also falls within the conditions of Article 3 of the Order.

17. 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

18. 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*.[4]

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

[4] *CICRA Guideline 6 - Mergers and Acquisitions, Draft Version*, at page 11.

Defining the affected relevant market(s)

(i) The Relevant Product Market(s)

20. ''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".[5]

21. The parties contend that the Target is dominant in the supply of certain individual vegetable lines grown locally in Jersey; in particular brassica vegetables[6] and lettuce. With the possible exception of lettuce, the parties regard the outdoor vegetables produced and supplied by the Target as substitutable and thus contend that it is not necessary to view any vegetable line or group of vegetables as a separate product market. However, they consider that there are separate product markets for Jersey Royals and standard potatoes and that the three product markets can be further segmented into sales to local supermarkets and sales to other types of customers.[7]

22. There is little local publically available data relating to the importation of outdoor vegetables and potatoes. In addition, few European Commission (**EC**) or UK Office of Fair Trading (**OFT**) cases have considered markets in this sector. However, the EC has previously viewed fresh vegetables and fresh fruit as separate product markets[8] and concluded that a further distinction can be made between the import/production and wholesale distribution levels of the supply chain.[9]

23. The JCRA considers that a relevant product market might exist for as narrow a category of products as outdoor vegetables grown in Jersey (with the exception of

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[5] *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).
[6] Common types of brassica vegetables include include cabbage, cauliflower, broccoli and Brussels sprouts.
[7] Farm shops, wholesalers supplying into the hotel and catering trade etc.
[8] Case No COMP/M.4896 *CVC Capital Partners/Katopé International* (8 February 2008).
[9] Case No COMP/M.5199 *De Weide Blik/ Atlanta*, para 10.

potatoes and Jersey Royals, see paragraph 24 below). Evidence for the existence of such a narrow product market includes the fact that the Channel Islands Co-operative Society (**Co-op**) ([REDACTED], Waitrose) has a policy of sourcing local produce, and they report that many local consumers exhibit a strong preference for local produce. As such, the constraint provided by imported vegetables may not be significant. On the other hand, both supermarkets report that they set their buying prices for Jersey vegetables by reference to [REDACTED].

24. In light of previous decisions, the JCRA considers that it is possible that Jersey Royals may constitute a separate and distinct product market from other potatoes, at least within the Jersey geographic market.[10] While it has not received evidence on the point, it is also possible that grading services for potatoes constitutes a separate product market.

25. In the absence of any evidence of potential horizontal, vertical or conglomerate effects (see discussion below), the transaction will not give rise to a substantial lessening of competition in any potential product market. Therefore, the JCRA need not make a definitive determination of the boundaries of the relevant product market. The JCRA has therefore observed the market definitions previously adopted[11] and proceeded on the basis that the following product markets are relevant to the Acquisition: i) the supply of outdoor vegetables (including lettuce) grown in Jersey ii) potatoes (not Jersey Royals) grown in Jersey iii) Jersey Royals; and (iv) grading services for potatoes. The JCRA does not consider that it is necessary to make a further distinction between customer groups (e.g. sales to local supermarkets and sales to other customers),[12] or particular vegetables.

[10] JCRA Decision M081/06 (2006) *Jersey Royal Potato Marketing Limited – Meleches Farm et al*
[11] Ibid
[12] Farm shops, wholesalers supplying into the hotel and catering trade etc.

ii) The Relevant Geographic Market

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

27. According to the Application, the relevant geographic market for all product markets is Jersey.

28. 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 dimension for all affected markets is Jersey.

Effect on Competition

29. As noted in paragraph 16 above, the obligation to apply for the JCRA's approval of the Acquisition arises by virtue of i) the Target's share of supply of outdoor vegetables grown in Jersey supplied to local supermarkets ii) the vertical relationship between the Target and AB Jersey for the supply of grading services for Jersey Royals.

30. The JCRA has reached the view that the Acquisition will not substantially lessen competition in the affected markets for the reasons set out in the following paragraphs.

31. Non-horizontal mergers are generally less likely to significantly lessen competition than horizontal mergers. Notwithstanding that there is a vertical relationship between the Target and AB Jersey, for i) the sale of Rooster and Vivaldi potato seed to the Target and ii) the provision by the Target to AB Jersey of grading services for Jersey Royals, the JCRA considers that the Acquisition does not give rise to vertical competitive effects through foreclosure of competitors to the merged entity. In particular, the JCRA notes that the Target

currently supplies grading services only to AB Jersey and its growers, and therefore, other producers of Jersey Royals must already have access to their own sources of grading services (and are therefore not vulnerable to foreclosure).

32. The Buyer and the Target supply complementary products, in that the Target supplies potatoes and vegetables, while the Buyer supplies Jersey Royals. As such, the JCRA has given consideration to a conglomerate theory of harm; i.e. the extent to which the merged entity would have the ability and incentive to leverage a strong market position in relation to locally-grown outdoor vegetables and standard potatoes so as to increase its market power in relation to Jersey Royals by means of tying, bundling or other exclusionary practices. Foreclosure could arise in two ways:

    a. As part of the supply of vegetables and potatoes by local growers to the merged entity, the merged entity could insist that if growers wish to supply it with vegetables, then they must also supply it with Jersey Royals on an exclusive basis, to the detriment of other suppliers of Jersey Royals; and

    b. As part of the supply of vegetables and potatoes by the merged entity to its customers (e.g. supermarkets), the merged entity could insist that customers obtain Jersey Royals from it on an exclusive basis, again to the detriment of other suppliers of Jersey Royals.

33. According to the Application, the Buyer supplies [40-50]% of the total Jersey Royals crop,[13] while the Target accounts for [50-60]% of locally-grown outdoor vegetables excluding potatoes, purchased by local supermarkets. For a number of individual vegetable lines (lettuce, calabrese/broccoli, carrots), the parties

[13] According to the Application this share of purchase may increase to some degree as a result of the Acquisition, but the parties contend it will not have a significant effect on competition in Jersey for this product market.

estimate that the Target has in excess of [80-90% share of supply in Jersey. For standard potatoes, the Target has an estimated [40-50]% share of supply in Jersey, but estimates that its share of supply of the same to local supermarkets is [70-80]%. It must be acknowledged that these estimates are based on land use and do not take account of the impact of imports into Jersey.

34. According to the Application, the Target faces very limited competition for supermarket sales. JCRA has spoken to two of the Target's top five customers to assess the ease with which customers could switch to alternative suppliers of locally-grown outdoor vegetables and potatoes (not Jersey Royals) if the merged entity engaged in tying and/or attempted to exploit its market power by raising prices in respect of the supply of locally-grown vegetables in Jersey.

35. Sales to the Co-op accounted for [REDACTED]% of the Target's turnover in 2011 and the Co-op has a policy of buying local produce. The Co-op only has one supplier for each vegetable line it supplies, and purchases its full requirement of outdoor vegetables and standard potatoes (when they are in season) from the Target, subject to negotiations on price. The Co-op sources Jersey Royals direct from independent local growers.

36. A representative of the Co-op was supportive of the Acquisition and had no concerns regarding the merged entity's ability or incentive to exert market power, partially because of the Co-op's buyer power. He said that members have told the Society that they will pay a premium for local produce, but if the merged entity were to raise its prices above competitive levels, the Co-op would, in the first instance, enquire of other local growers whether they could meet the Co-op's supply requirements, for example by diversifying or extending their existing offerings. Moreover, even though the Co-op does not currently import outdoor vegetables or standard potatoes when they are in season, the Co-op would import these products if necessary.

37. A second of the Target’s local customers, Waitrose, accounted for [REDACTED]% of the Target's turnover in 2011. It also had no concerns about the Acquisition. Waitrose has increased its purchasing of local produce during 2012 [REDACTED] A representative of Waitrose said that there would be no incentive for the merged entity to raise prices above competitive levels because they would lose the whole line and the sales from three supermarkets. However, if the merged entity attempted to exert its market power, Waitrose would initially approach other local growers to increase their supply and/or diversify their current offering, and then look to Guernsey and the UK for supplies.

38. The JCRA also spoke to two individuals, one a customer-supplier of the Target, and the other a supplier of the Target. According to the Application, only [REDACTED]% of the Target’s turnover is of product sourced from other growers. According to the Application, there are several growers producing standard potatoes for local sale direct to farm shops or direct to the wholesale trade, and a number of the Target’s grower suppliers also sell Jersey Royals to AB Jersey. Neither of the growers interviewed are financially dependent on sales to the Target.

39. One customer-supplier supplies the Target on a very occasional, ad hoc basis. He has no concerns about the competitive effects of the Acquisition. He purchases significantly more from the Target than he supplies. [REDACTED]. Roughly [REDACTED]% of his sales in his farm shop are sourced from the Target, while [REDACTED]% is imported or sourced from other local growers. As such, while losing the merged entity as a supplier would cause him some difficulties commercially, he is confident that he could access other supply routes locally or from imports if necessary.

40. Another supplier interviewed by the JCRA provides the Target with [REDACTED]. The supplier’s main business is growing Jersey Royals, although these are not sold to AB Jersey. [REDACTED].

41. Based on the information available and the interviews conducted, the JCRA considers that it would be self-defeating for the merged entity to increase prices or engage in exclusionary tying or bundling, as the Co-op and Waitrose ([REDACTED]) have buyer power and state that they could easily switch to other suppliers, whether local or off-island, if this proved necessary. Moreover, there is little protection for local producers from imports, and those interviewed have stated that it is often cheaper to import vegetables than source them locally.

42. Therefore, the JCRA is satisfied that the Acquisition will not give rise to horizontal, vertical or conglomerate effects on competition, and has concluded that the Acquisition will not substantially lessen competition in any relevant markets in Jersey.

<u>Ancillary Restraints</u>

43. 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 'directly related and necessary to the implementation of the concentration' – are subject to analysis in the merger review.[14]

44. 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.[15]

45. The Application details that the Acquisition (through the Share Purchase Agreement) will involve the imposition of non-compete and non-solicitation

[14] 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.

[15] See *ibid* at paragraph 20.

clauses for [REDACTED] years for Mr Le Brun in the "Bailiwicks of Jersey and Guernsey".[16] The JCRA is satisfied that the Acquisition does involve the transfer of goodwill. The EC guidance summarised above provides justification for these clauses for a period of up to [REDACTED].

46. Messrs Greenwood and Mallett will enter into new service contracts for [REDACTED] which will involve the imposition of non-compete and non-solicitation clauses "in the Bailiwicks of Jersey and Guernsey"[17] for [REDACTED] after completion. The JCRA is satisfied that so as not to breach the exercise of their duties while employees of the Purchaser group of companies, the EC guidance summarised above provides justification for non–solicitation and non-compete clauses for [REDACTED]. 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].

<u>Conclusion</u>

47. The JCRA has only seen draft copies of the transaction documents and this decision is conditional on them being executed in materially the same form.

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

24 December 2012 **By Order of the JCRA Board**

[16] Page 14 of the Share Purchase Agreement.
[17] Ibid