# PUBLIC VERSION

## Case M1000J/13

## Proposed acquisition of Marine Fuel 24/7 Limited by Gorey Marine Fuel Supplies Limited

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## Decision

**Document No: CICRA 14/15** **28 March 2014**

**Jersey Competition Regulatory Authority**
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## The Notified Transaction

1. On 17 February 2014, the JCRA received an application (the **Application**) for approval under Articles 20 and 21 of the *Competition (Jersey) Law* 2005 (the **Law**) of the proposed acquisition by Gorey Marine Fuel Supplies Limited **(Purchaser**) of the marine diesel pontoon owned and operated by Marine Fuel 24/7 Limited (the **Target**) from Mr Gary Whipp (the **Seller**) (the **Acquisition**).

2. The JCRA registered a notice of its receipt of the Application on its website on 17 February 2014, inviting comments by 3 March 2014. No submissions were received during the consultation, but we received one email objection on 8 March 2014 [redacted] in Jersey, with further details provided in a letter received on 18 March 2014. The comments of this party are discussed in paragraph 47 below.

3. We spoke to two representative bodies of boat owners – [redacted] - and their comments are discussed in paragraphs 43-45 below. In addition, we also spoke to a representative of Jersey commercial fishermen, and three of the Purchaser's customers - two from the Purchaser's current fuel pontoon at La Collette and one from the pontoon at Gorey Harbour, with a summary of their comments provided at paragraphs 29 and 43 below. We spoke to [redacted], particularly concerning its intentions with respect to purchasing the Target. We also spoke to a representative of the Ports of Jersey (**PoJ**) regarding licencing requirements for pontoons and the public tender process.

### Marine Fuel in Jersey

4. According to the Application, in 2012, Jersey's marine diesel sales for non-commercial vessels were 848,000 litres, including volumes sold to visiting boats. The JCRA estimates that the total value of the market for marine diesel supplied to non-commercial vessels in Jersey in 2012 was £[redacted].

5. The parties estimate that Jersey non-commercial marine fuel volumes (diesel and petrol) have dropped from 1.674 million litres in 2007 to 1.3 million litres in 2012. The Application cites a number of causes for the marine fuel market in Jersey to be declining, compared to Guernsey: the introduction of a Goods and Services Tax in Jersey in 2008 (no general sales tax applies in Guernsey), more expensive harbour dues in Jersey and the 4.8ppl licence fee levied by PoJ (which is not levied in Guernsey). The Application states that local larger diesel-powered boats regularly travel to Guernsey to refuel, so as to take advantage of lower prices (the Application states that there is a price difference of at least 8ppl between the islands for marine diesel). This statement was corroborated by the customers and industry representatives that we consulted during our market inquiries.

6. The Application states that marine diesel, as opposed to marine petrol, is used predominantly by larger pleasure boats. Based on data from 2007, the parties estimate that only 24% of all locally-registered boats are diesel-driven.[1] The parties submit that small boats will most likely be petrol-driven and, because of their limited tank capacity, it is not financially viable for these boats to refuel in Guernsey.

7. Marine diesel is dyed because it attracts no excise duty, but is otherwise exactly the same product as car diesel. There are five pontoons in the island which sell diesel and are accessible to the general public: three in St Helier, and one each at Gorey and St Aubin's Harbours. Of the five pontoons, two (including the Target) just sell diesel, while three sell both diesel and petrol. The three pontoons in St Helier are at Elizabeth Marina, La Collette Harbour and the

[1] 1346 boats, of a total fleet of 5592 boats

Old Harbour (where the Target is located). There is one pontoon in each harbour/marina – [redacted].

8. There is a sixth self-service pontoon in St. Helier that is used by commercial fishermen (the **Fishermen's pontoon**). [redacted] A representative of the Jersey Fishermen's Association estimated the fishermen's pontoon supplied 750,000 litres of marine diesel in calendar year 2013 i.e. nearly the same amount as the volume of marine diesel sold to non-commercial vessels in Jersey in 2012. We were also advised that a growing number (estimated at 10%) of the 165 locally-registered fishing vessels are petrol-driven, although only [redacted] fishermen buy petrol throughout the year. Given its location, the Purchaser's La Collette pontoon is the main supplier of marine petrol to these vessels. There are no plans for the Fishermen's pontoon to sell petrol.

*Licensing requirements*

9. In order to supply marine fuel in Jersey, the vendor must obtain a licence from PoJ. This licence provides that a fuelling service must be made available to both locals and visiting boat owners and, according to the Application, contains minimum service obligations. The parties argue that the licence protects boat owners from bad service or excessive prices on the part of pontoons, because PoJ can terminate a licence at any time if the licensee "materially fails or neglects to perform or observe any of the covenants, stipulations, conditions or agreements" in the licence. However, while PoJ offers a degree of regulatory oversight, there does not appear to be any grounds for PoJ to cancel a licence on the basis of excessive pricing.

10. The Seller is obliged to return the Target's licence to PoJ when his ownership of the pontoon ends. The licence is then subject to a public tender process that is advertised in the Jersey Gazette, so there is no guarantee that the Purchaser will in fact win the tender and acquire the Old Harbour licence. [redacted].

11. A licence fee of 4.8ppl must be paid by a licence holder to PoJ for each litre of marine fuel sold.

## The Parties

*(a) Purchaser*

12. Mr Huelin is the principal of Gorey Marine Fuels Limited and owns and operates (i) an attended marine petrol and diesel pontoon at Gorey Harbour, serving the east of the island, and (ii) an attended[2] marine petrol and diesel pontoon at La Collette in St Helier (**La Collette pontoon**).

13. The La Collette pontoon is the only attended pontoon in St Helier. The Application notes that the positioning of the La Collette pontoon means that access is for the most part[3] not dependent upon the tides, and all interested parties consulted by the JCRA confirmed that the location of the pontoon means it is especially well-placed to serve visiting boat owners. It is also used by local boat owners, including those berthed in Elizabeth Marina; as that is a tidal marina, access to the Elizabeth Harbour pontoon is only available for three hours either side of high tide.

[2] The La Collette pontoon is attended from 14 March to 14 October between 8am and 6.30pm, 7 days a week. When an operative is not present and/or in inclement weather conditions, a phone number is displayed and assistance provided within 20 minutes. Between October and March, the pontoon is attended 7 days a week on the top half of the tide between 8am and dusk.

[3] The pontoon is grounded for about 3 hours of a Spring tide at low tide, which occurs 3-4 days a month for six months of the year.

14. The current licence to operate the Gorey Harbour pontoon is for [redacted], which expires in [redacted] time and the current licence to operate La Collette pontoon is for [redacted], which expires in [redacted]. The Purchaser understands the Target's current licence is for [redacted] years but he intends to seek a [redacted] licence to operate the Old Harbour pontoon if he is successful in the public tender.

15. The Purchaser submits that as a result of the Acquisition, substantial efficiencies will be generated through reductions in overall insurance premiums for the Gorey, La Collette and Old Harbour pontoons.

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16. Both the Gorey and La Collette pontoons allow customers to pay with the Rubis card, which provides a discount of 4ppl. The Purchaser also intends to allow payment by Rubis card at the Old Harbour pontoon, post-Acquisition.

17. For the trading year ending 31 March 2013, the Purchaser's turnover in Jersey was £[redacted] (from a variety of businesses); of which £[redacted] was generated at the Gorey pontoon and £[redacted]was generated at the La Collette pontoon.

*(b) Target*

18. The Target operates a self-service marine diesel pontoon located in the middle of the Old Harbour, i.e. it is not accessible from land. The Target's pontoon is positioned so that it is accessible by most vessels at all tides.

19. The Target's pontoon opened in 2010 under the current ownership. A telephone has been installed on the pontoon and the Application notes that the Purchaser will continue to operate a phone assistance system.

20. The Seller has stated that he is selling the Target because [redacted]. In 2013, it supplied [redacted] litres of marine diesel, with turnover of £[redacted]. The total consideration to be paid by the Purchaser for the Target is £[redacted].

**<u>The Requirement for JCRA Approval</u>**

21. 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 purposes of the Law if a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking.

22. The parties applied for JCRA approval of the Acquisition on the basis that the Purchaser has an existing share of supply of 25% or more of the supply of marine diesel, as a result of which the Acquisition falls within Article 2 of the *Competition (Mergers and Acquisitions) (Jersey) Order* 2010 (the **Order**). In addition, the Acquisition also falls within Article 4 of the Order, that the Purchaser has more than 40% of the supply of marine diesel in Jersey.

23. 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.

**<u>Market definition</u>**

24. As noted in paragraph 22 above, the obligation to apply for the JCRA's approval of the Acquisition arises by virtue of the Purchaser's existing share in the supply of marine diesel in Jersey.

25. The parties submit that the relevant product market is marine petrol and diesel. However, the JCRA's analysis of market definition has concentrated on the market in which the Target competes. The Target only supplies marine diesel and because petrol and diesel are not substitutable, the JCRA considers that there are distinct markets for marine diesel and petrol.

26. Based on the fact that Jersey fishermen have access to their own diesel pontoon, and commercial vessels take sufficiently large volumes that they are able to refuel directly from tankers, rather than using pontoons, the JCRA has proceeded on the basis that the customer segment relevant to the Acquisition is non-commercial boats (pleasure boats or non-commercial fishing boats).

27. The parties submit that the relevant geographic market is wider than Jersey, and includes Guernsey[4] and may also include France. According to the Application, it is viable for boats over 8 metres to refuel in Guernsey, and there is some evidence that the significant price differences between Jersey and Guernsey have diverted a noticeable amount of demand for marine fuel from Jersey to Guernsey (see paragraphs 5 and 44). It also appears that the number of locally-registered boats that use diesel is relatively small as a proportion of the overall non-commercial fleet (see paragraph 6 and footnote 2), and that those boats tend to be larger than petrol-fuelled boats (and therefore more likely to be capable of refuelling in Guernsey).

28. However, for some Jersey-based diesel-powered boats, refuelling in Guernsey is not viable, and so they must use suppliers in Jersey. Moreover, the time and expense of travelling to Guernsey[5] to refuel means that suppliers in Guernsey will be, at best, an imperfect substitute for boats based in Jersey. The fact that the sustained price difference between the two islands is around 10% is an indication that they remain separate geographic markets.

29. A Gorey-based customer noted that even if the Purchaser did increase prices at the Gorey pontoon, it would not be worthwhile for him to burn fuel in travelling to St Helier to benefit from lower prices there. On the basis of this evidence, it is possible that separate local markets exist in Jersey, at least for some categories of vessels. This would reduce the Purchaser's market share in St Helier (both pre- and post-Acquisition), although those shares would still be high.

30. On balance, the JCRA has determined that Jersey is the appropriate geographic market, although it is recognised that suppliers in Guernsey can pose some competitive constraint for some categories of larger vessels.

31. The JCRA has therefore conducted its assessment on the basis that the relevant market is the supply of marine diesel to non-commercial boats in Jersey.

*Market shares*

32. The Target is located in St Helier, where the Purchaser already owns a marine diesel and petrol pontoon, La Collette pontoon, which has a significant market share. The parties estimate that La Collette pontoon accounts for [50-60]% by sales value of the relevant market. The Purchaser's pontoon at Gorey Harbour, also a combined petrol and diesel pontoon, accounts for a further [0-10]% of the relevant market, while the Target's market share is estimated at [10-20]%. In total, then, through the Acquisition, the Purchaser would increase his [60-70]% market share to [70-80]%, a market share at which substantial competition concerns would usually be expected to arise.

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[4] There are three pontoons and one harbour-side supplier in Guernsey, all supplying both diesel and petrol

[5] St Helier to St Peter Port by sea is more than 30 miles

33. The Application estimates that the Purchaser's main competitor, Elizabeth Marina pontoon (**Elizabeth pontoon**), operated by PC Boat Sales, accounts for about [20-30]% of the relevant market. The pontoon is not attended and for non-berthed boats, is only accessible three hours either side of high tide. The diesel pontoon at St Aubin's Harbour in the west of the island is estimated to have a [0-10]% market share and is located in a tidal harbour where access is entirely dependant on the tides.

34. The commercial fishermen's pontoon does not compete in the relevant market because it is operated by a key fob that is only available to the commercial fishing fleet.

**<u>Assessment</u>**

35. Under Article 22(4) of the Law, the JCRA must determine if the Acquisition would substantially lessen competition in Jersey or any part thereof. The JCRA has reached the view that the Acquisition will not substantially lessen competition in Jersey for the reasons set out in the following paragraphs. Principally, that conclusion is based on:

a) the finding that in the absence of the Acquisition, the Target is likely to exit the market;

b) the continued presence of competitive constraints from the pontoon at Elizabeth Harbour and marine diesel suppliers in Guernsey, supported by the views expressed by customers in relation to the Acquisition.

*"Exiting firm defence"*

36. The Seller asserts that in the absence of the Acquisition, there is a high likelihood that the Target would exit the market. Article 60 of the Law requires the JCRA, in its assessment of competition cases and mergers and acquisitions, to approach them in a manner that, so far as possible, is consistent with the treatment of corresponding issues under competition law in the European Union. The JCRA notes the discussion in the *Merger Assessment Guidelines*[6] of the UK competition authorities and the European Commission's Horizontal Merger Guidelines[7] on failing or exiting firms. The JCRA has previously considered the application of the "exiting firm defence" in *Gordon Bisson Motorcycles Limited/Motorama (Jersey) Limited*[8] and *La Rocque Fisheries Limited/Jersey Oyster Company Limited and France Naissain SAS*[9].

37. According to the European commission's guidelines, the "exiting firm defence" requires the satisfaction of three conditions: (i) that the firm being acquired would exit the market in the near future were it not for the merger; (ii) that the assets of the firm would inevitably leave the market; and (iii) that there is no less anti-competitive alternative purchaser. Noting the approach taken in the UK, the JCRA will also consider what would have happened to the sales of the Target in the event of exit.

38. In relation to the first and second conditions, the Seller has advised that he wants to sell the Target because [redacted]. The JCRA has seen documentary evidence from the manufacturer of the Target pontoon that it has a UK-based customer who is interested in buying the pontoon, and it has sought information from the Seller relating to refurbishment and transportation of the pontoon to Portsmouth. The Seller has stated explicitly that if the Acquisition is not approved he will sell the pontoon back to the manufacturer i.e. the Target would exit the market.

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[6] CC2 (revised) and OFT1254

[7] European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C31, 5 February 2004, paragraphs 89-91

[8] Case M961/13

[9] Case M863/12

39. In relation to the third condition, the Seller has provided evidence of having sought to sell the Target to a range of potential buyers. We spoke to [redacted], who declined an approach by the Seller to purchase the Target [redacted]. This party declined the offer [redacted]. The JCRA is therefore satisfied that there is no significant likelihood of a substantially less anti-competitive alternative to the Acquisition.

40. The JCRA has considered the potential for new entry but the barriers to entry are considerable. Even the expenditure necessary to adapt the Target to become a marine petrol pontoon is considerable.[10] Moreover, as noted in paragraph 7 above,[redacted]. Given the declining market and the expenditure required to develop a new pontoon, our judgment is that it seems relatively unlikely that entry would occur, at least in the short-term. However, PoJ will tender for a new fuel supplier at the Old Harbour, by advertising it in the Jersey Gazette, so that there is a possibility that the right to supply at that location would pass to a supplier other than the Purchaser. [redacted]. As such, if a bidder other than the Purchaser were to place a bid (thereby confounding our finding regarding the likelihood of entry), then the JCRA understands that the rights to operate at the Old Harbour will not be conferred on the Purchaser.

41. In light of the facts outlined above, the JCRA has concluded that the conditions required for the "exiting firm defence" exist in this case. Given the proximity of the Target's pontoon to the Purchaser's La Collette pontoon, it seems highly likely that the majority of the Target's sales would have switched to the Purchaser in the event of exit. Both this fact, and the fact that the right to operate at Old Harbour will not pass to the Purchaser if there is, in fact, an alternative bid, strengthens the JCRA's view that the Acquisition would be expected to have little effect on competition.

*Customers' views*

42. While the successful application of the "exiting firm" doctrine means that no substantial lessening of competition could be expected to arise, the JCRA has considered other evidence, to strengthen its confidence in its conclusions. In light of the high market shares and barriers to entry, the JCRA sought views from market participants, including the Purchaser's customers, about the effects of the Acquisition on competition.

43. The Purchaser's two La Collette pontoon customers, as well as [redacted], were all supportive of the Acquisition, as it related to seeing the Target pontoon being used more than it is currently. None of these respondents considered that the Purchaser increasing his prices was a valid concern; all felt such a pricing strategy would be self-defeating. [Redacted] submitted that if the Purchaser remained competitive on price, the Target pontoon would be busier than it is currently, as it is under-used. [Redacted] considered that it would be difficult to make the Target financially viable and that it would attract customers only if it was operated as efficiently as the La Collette pontoon. Those customers we spoke to felt that the Purchaser may win some more sales from visiting boat owners, but ultimately not many more local sales, because La Collette pontoon was so close, with the added benefit of being attended.

44. The [redacted] was sceptical that the Purchaser would ever seek to impose 'high' prices. For larger diesel-driven boats, [redacted] felt that the Purchaser already faces competition and is constrained by the much lower fuel prices offered in Guernsey. [Redacted] said the owners of larger diesel boats regularly sail to Guernsey for a weekend break and fuel up.

[10] Estimated at £[redacted]. The Target's pontoon would also have to be moved from its current location in order to be compliant with health and safety regulations

45. As part of our market inquiries, we were advised [redacted]. We also learnt that even though the La Collette pontoon is the only attended pontoon in St Helier, the Purchaser currently offers the lowest prices for marine diesel.

46. The [redacted] had no concerns about the Acquisition. The [redacted].

47. The main submission we received opposing the Acquisition came from [redacted]. [Redacted] accepted the potential benefits that the Purchaser and other stakeholders had cited. However, "in the strongest terms", felt that the Purchaser would be in a position to control the price of marine fuel in Jersey post-Acquisition, and that the Target should be run by another company which does not have existing pontoons. When [redacted] was informed that an alternative potential purchaser had turned it down, and that in the absence of the Acquisition proceeding there was all likelihood that the Target would exit the market, [redacted] was of the view that consumers have got used to the Target pontoon not working – citing the numerous complaints received [redacted] "all the time" from locals and visitors. [Redacted] considered that the pontoon was not currently helping anyone by being there.

48. [Redacted].

49. The JCRA notes the concerns of [redacted] regarding the Acquisition. The JCRA's acceptance of the "exiting firm defence" implies a finding that the reduction of competition in this market was inevitable. We also note that the concerns expressed by [redacted] were not shared by those customers that we consulted during market inquiries.

*Efficiencies*

50. In assessing whether efficiencies counter a lessening of competition, the JCRA is required to find that the efficiencies benefit customers directly, are verifiable and merger-specific.[11] The Application submits that there will be efficiencies for the Purchaser through cost reductions for administration and insurance. The Purchaser also submits that the increased volumes and revenues generated through the Acquisition will enable it to be able to continue to offer the only attended pontoon service in St Helier, at the La Collette pontoon. Several people we spoke to commented that consumers would benefit from the Acquisition by having the Target pontoon in the ownership of a professional operator, who would be more likely to ensure that it remained in working order.

51. While the JCRA considers that there will be unit cost savings accruing to the Purchaser as a result of the Acquisition, it is not satisfied that those savings are likely to be passed on to customers, given the limited competitive constraints. As such, it has not considered those efficiencies in deciding to approve the Acquisition.

## Conclusion

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

**28 March 2014** **By Order of the JCRA Board**

[11] European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C31, 5 February 2004, paragraphs 89-91