



Decision

Proposed acquisition of A E Surcouf & Sons Limited (t/a Esenmyne) by J J Fox Ltd (C-026)

Document No: JCRA 21/36

Date: 31 August 2021

Jersey Competition Regulatory Authority
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1. Summary

- 1.1 J.J. Fox Trading Limited (the **Purchaser**) proposes to acquire the entire issued share capital of A.E. Surcouf & Sons Limited (the **Target**), which trades under the name Esenmyne (the **Notified Transaction**). The proposed transaction has been notified to the Jersey Competition Regulatory Authority (the **Authority**) for approval pursuant to Article 21 of the Competition (Jersey) Law 2005 (the **2005 Law**).
- 1.2 The Authority has determined that the Notified Transaction will not lead to a substantial lessening of competition in any relevant market and hereby approves the Notified Transaction.

2. The Notified Transaction

- 2.1 On 25 June 2021, the Authority received an application from the Purchaser and the Target (the **Parties**) for approval of the Notified Transaction.
- 2.2 The Authority registered the application on its website with a deadline for comments of 9 July 2021. One submission was received and considered as part of the assessment below.
- 2.3 The clock was stopped on the assessment from 6 August to 25 August to allow the Parties the opportunity to provide further information to support the application.

3. The Parties

Purchaser

- 3.1 The Purchaser is a limited company incorporated in Jersey (Registration Number RC85972) and is a wholly owned subsidiary of J.J. Fox International Limited (Registration Number RC320) and a member of its group, the **J.J. Fox Group**.
- 3.2 The Purchaser is active in the supply of Fast Moving Consumer Goods (**FMCG**), such as confectionery, snacks, soft drinks, alcohol; packaging, hygiene and cleaning solutions; vending services; speciality coffee and tea supply; engineering services; commercial tableware, glassware and appliances and CAD design and catering equipment supply for restaurants and kitchens; and the wholesale distribution of tobacco products. Further details can be found at: <https://foxtrading.co.uk/#services>.
- 3.3 In addition to the businesses undertaken by the Purchaser, the J.J. Fox Group is also involved in property investment and development in the Channel Islands and UK, and owns the UK business name James J Fox, a cigar retailer. See also <http://www.foxinternational.co.uk/>.

Target

3.4 The Target is a Jersey food service business which is incorporated in Jersey (Registration Number RC1733), and owned by four private individuals.

3.5 The Target is active in the wholesale distribution of food services and retail markets with particular focus in the distribution of chilled and frozen foodstuffs, ambient food products, manufactured meat products and ice cream. Further details can be found at: <https://www.surcouf.co.uk/services/> which lists services to hotels, education and residential, cafes, and pubs and restaurants.

Reason for the Transaction

3.6 From the Purchaser's perspective, the reason for the acquisition is to diversify from the reliance on certain contracts, by augmenting the existing sales channels of FMCG, vending and packaging and hygiene into other product categories that provide synergy with its business. In particular, through the development into wider food markets, and into the hospitality sector. Efficiencies will improve service levels and profitability.

4. Requirement for Authority Approval

4.1 Under Article 2(1)(b) of the 2005 Law, a merger or acquisition (**merger**) occurs where a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking.

4.2 On completion of the Notified Transaction, the Purchaser will acquire all the share capital and as a result direct control of the Target. The Notified Transaction therefore constitutes a merger as defined in the 2005 Law.

4.3 According to Article 20(1) of the 2005 Law, a person must not execute certain mergers or acquisitions except and in accordance with the approval of the Authority. Article 4 of the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the **Order**) provides that where one or more of the parties to the proposed merger has an existing share of 40% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey, and if neither of the two exceptions apply, then the merger must be notified to the Authority for approval under Article 20(1) of the 2005 Law.

4.4 According to information provided by the Parties, the Purchaser has a greater than 40% share of supply of the wholesale distribution of tobacco products in Jersey. The notified transaction therefore requires the approval of the Authority prior to its execution¹.

5. Market Definition

5.1 Under Article 22(4) of the 2005 Law, the Authority must determine if the merger would substantially lessen competition in Jersey or in any part of Jersey. As an initial step, the Authority will identify the markets which are likely to be affected by the merger since market definition provides a framework within which the competitive effects of a merger can be assessed.

5.2 The boundaries of the market do not necessarily determine the outcome of the competitive effects of the merger as there can be constraints on the merger from outside the relevant market, segmentation within the relevant market or other ways in which certain constraints are more significant than others. The Authority will, where appropriate, take these factors into account in its assessment.

5.3 When defining a market, the Authority may take note of its own previous decision-making practice and/or market definitions applied by other competition authorities. However, these previous decisions are not precedents and are not binding, either on the merging parties or on the Authority. Competition conditions may change over time, changing the market definition. Market definition will always depend on the prevailing facts.²

Views of the Parties

5.4 The Parties proposed that the relevant markets for the purpose of assessing the competition effects of the merger should be:

- The independent wholesale of refrigerated and frozen food products within Jersey; and
- The independent wholesale of ambient food products within Jersey.

5.5 The Parties considered that both these should be defined in relation to independent wholesale only, excluding wholesalers that are tied to particular customers; for example, Waitrose, M&S, Tesco and Iceland.

¹ The Notified Transaction has only been notified for approval as it meets the test for a conglomerate merger, and not because of any horizontal overlaps or vertical relationship between the parties.

² This approach is consistent with that taken under EU law – see, for example, Joined Cases T-125/97 and T-127/97 [2000] ECR II-01733, paragraphs 81-82. Article 60 of the 2005 Law requires the Authority to attempt to ensure that so far as possible questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under European Union law in relation to competition within the European Union.

- 5.6 The refrigerated and frozen market comprises the wholesale distribution of food products that are required to be stored and handled at specific temperatures (normally 5 degrees Celsius or below). These include dairy, meat, poultry, seafood, fruit and vegetables and other delicatessen products. Frozen products include bakery, readymade meals, meat, poultry and seafood.
- 5.7 The ambient market comprises all food products that can be handled and stored at room temperature. These include grocery (tinned), cereals, rice and pulses, confectionary, snacks and other dry goods.
- 5.8 The parties state that there is no overlap in the products offered by Fox and Easenmyne in the wholesale supply of frozen and refrigerated products the Purchaser does not currently supply in this sector), and there is only a small overlap in the wholesale supply of ambient products. They both currently supply a different product range.
- 5.9 The parties were unable to provide independent third party data on their share of these markets, and stated that they do not currently consider themselves to be direct competitors as there is no meaningful overlap in the products offered by the Parties. The wholesale market is wider than Jersey only, and wholesale customers can go to a range of local and international providers, making the provision of market data more difficult to estimate.
- 5.10 The parties provided a list of local and international competitors to their business as follows:

Jersey		Non-Jersey
Refrigerated and Frozen	Ambient	
La Collette Cold Store	Mercury Distribution	Nisa
Cimandis	Cimandis	Booker
Valley Foods	Carob Enterprises	Brakes
United Foods	Valley Foods	Bunzl
Fungi Delecti		
Jersey Dairy		

5.11 Tenders by most customers will be sent to a variety of local and UK companies. There are approximately 20 suppliers, including direct manufacturers, included in the Government of Jersey procurement framework³. Some customers tender on an annual basis, others on a monthly basis. A recent example of a UK company winning a tender was seen with the Government of Jersey award for a contract worth in excess of £1M being given to a UK wholesaler.

Authority Consideration

5.12 The relevant product market is defined primarily by reference to the likely response of consumers and competitors. It will comprise products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the product's characteristics, prices and intended use. An undertaking cannot have a significant impact on the prevailing conditions of a market if customers can easily switch to other service providers.

5.13 The wholesale supply of food and related products⁴ has been considered by the European Commission⁵, the UK Competition and Markets Authority⁶ (**CMA**) and its predecessors, the Office of Fair Trading⁷ (**OFT**) and the Competition Commission⁸ (**CC**). A framework for assessment of this type of transaction was outlined by the CMA in the acquisition of Sysco Corporation of Kent Frozen Foods Limited⁹ which was also characterised by a lack of independent market data which meant that the CMA relied more on an analysis of the closeness of competition and constraints from other suppliers in the market.

5.14 Following this framework, the Authority has considered the impact of the Notified Transaction in the wholesale delivery of food and other related products in Jersey (**delivered wholesale**). This includes the delivered wholesale supply of a broad range of products across different temperature ranges to independent customers in Jersey by suppliers in Jersey and the UK. It was not necessary to reach a conclusion on the precise market since there are no competition concerns on any plausible basis.

³ www.gov.je/Government/Departments/ChiefOperatingOffice/Procurement/Pages/BecomingSupplier

⁴ 'Related products' include items such as catering equipment.

⁵ Case No COMP/M.7986 – Sysco/Brakes, Decision of 9 June 2015 (**Sysco/Brakes**)

⁶ Case ME/6490/14 – Cucina Acquisition (UK) Limited/certain assets of Fresh Holdings Limited, Decision of 16 February 2015 (**Brakes/Fresh Direct**)

⁷ Case ME/3727/08 – Brakes Bros Limited / Woodward Foodservice Limited, Decision of 19 August 2008 (**Brakes/Woodward**)

⁸ Competition Commission Report – Booker Group PLC / Makro Holding Limited, 19 April 2013 (**Makro Report**)

⁹ CMA – Anticipated acquisition by Sysco Corporation of Kent Frozen Foods Limited – Decision on relevant merger situation and substantial lessening of competition – 16 March 2018

6. Effect on Competition

- 6.1 The analysis of a notifiable transaction will consider whether the merger creates or enhances the ability or incentive to exercise market power, either unilaterally or in co-ordination with competitors, and whether other market forces (such as the entry of new competitors or countervailing power of customers) will eliminate this risk. The assessment will also consider any pro-competitive effects or efficiencies that may result from the merger.
- 6.2 When considering the effect on competition, the Authority has regard to the guidelines produced by the European Commission¹⁰ (**European Guidelines**). It may also consider the substantive merger guidelines applied by the Competition and Markets Authority in the UK, as well as those of other competition authorities.
- 6.3 With regard to the Notified Transaction, whilst the Purchaser holds a significant share of supply in the wholesale tobacco market in Jersey, for delivered wholesale there is only a very small horizontal overlap in products supplied by the Parties and no vertical supply relationship. Management estimates of relevant market shares do not exceed the indicative safe harbour levels provided for in the European Guidelines for horizontal mergers as the market share does not exceed 25%.
- 6.4 For non-horizontal mergers, the Commission is unlikely to find a concern where the market share post-merger of the new entity is below 30%. The only market identified where one of the parties exceeds this share is the wholesale supply of tobacco products by the Purchaser. The Target is not active in this market, and does not operate either up or downstream of the Purchaser.
- 6.5 The focus for conglomerate mergers is where companies are active in closely related markets (e.g. mergers involving suppliers of complementary products or products that belong to the same product range). The Target does not operate in a market closely related to the wholesale supply of tobacco, and there are no links to any product categories carried by the Target, or indeed other product categories carried by the Purchaser.

Closeness of Competition

- 6.6 As there is limited independent market information available, for caution, the Authority has considered way in which the Parties operate and the closeness of competition between the Parties pre-merger and the constraints which will continue to exist post-merger within the framework outlined in the CMA Decision¹¹
- 6.7 Distribution Channel – i.e. how customers procure their food supplies (e.g. delivered wholesale, contract delivery (third party logistics), from cash and carry, from retailers (e.g.

¹⁰ <https://op.europa.eu/en/publication-detail/-/publication/19597169-c020-4a72-816a-0b15416119f7>

¹¹ CMA – Anticipated acquisition by Sysco Corporation of Kent Frozen Foods Limited – Decision on relevant merger situation and substantial lessening of competition – 16 March 2018

supermarkets/others). Both Parties mainly deliver wholesale. They purchase, import, hold stock and sell non-exclusive products. They purchase products for wholesale and handle the physical delivery to the customer's premises, with storage in Jersey. In this respect, they face competitive constraints from other wholesale delivery methods, such as where customers purchase directly from manufacturers or wholesale suppliers based outside Jersey who deliver directly to the customer from the UK.

6.8 Food and/or Non-Food - both Parties supply a wide range food products. Fox also supplies non-food products, but does not supply frozen or refrigerated food products. They overlap in the wholesale supply of ambient food products only.

6.9 Product Range – i.e. broadline, as opposed to specialist suppliers, such as fruit and vegetable suppliers, fishmongers, meat suppliers, etc. The Parties do not currently overlap to any meaningful extent in the range of products supplied. The overlap relates to certain individual products such as confectionary and certain dried goods including herbs and spices. The turnover attributed to these goods by the Target is negligible, and any incremental increase in the supply of those products insignificant.

6.10 The range of products supplied tends to be led by customers, with the parties introducing new products to meet customer demand or requests. On this basis, it seems appropriate to consider all product ranges rather than considering any further product segmentation.

6.11 There are a variety of alternative supply options in all product categories supplied. Alternative service providers active in Jersey include Cimandis, Valley Foods, La Collette, Longueville Distributors, Eurofoods, United Foods, Carob, Booker (UK), Nisa (UK), Brakes (UK), and Bunzl (UK). There are also a number of smaller, specialist suppliers such as Jersey Fish, and Battricks Seafood.

6.12 Where difficult to compete with larger UK providers, such as Booker and Bunzl due to their scale, the Parties and other local providers, compete by holding stock on Island and customer service. Any increase in price or decrease in quality or range would undermine this position.

6.13 Food Temperature Range – i.e. frozen, chilled/fresh and ambient. As mentioned above, the Target provides both ambient and frozen/refrigerated product ranges. Fox is only active in the provision of ambient goods. The warehousing and transport requirements for the two types of products are different, including maintaining the 'cold chain' during transport and storage to Jersey

6.14 End-Use Industry – e.g. hotels, hospitals, education. Both Parties currently supply business-to-business (B2B) products to different end-use customers, however could presumably no reason

why customers could not switch between the two for different product lines. There is no reason to segment the market in this way for the purposes of the consideration of the Notified Transaction.

6.15 Customer Type - e.g. national or local/regional customers – sometimes referred to as independent customers. Both Parties supply to independent business customers in Jersey. There is no segmentation by area of Jersey. There is no segmentation geographically within Jersey.

Geographic Scope

6.16 Both Parties supply wholesale products to customers in Jersey. However, in this respect, they are actively in competition with wholesale suppliers outside the Island. Customers can arrange for supply of products from UK or other international wholesalers who would deliver directly to the customer rather than storage in Jersey. This limits the ability for any local Jersey firm to exercise market power.

Consideration

6.17 The Parties were unable to provide an accurate assessment of their market shares and submitted that they are not currently close competitors and do not compete for the same tenders. The market in Jersey is fragmented with a number of wholesale distributors competing for business, and a high ability for customers to switch between providers in the event of a price increase, decrease in quality or product range.

6.18 Based on the consideration above – the variety and number of competitors will continue to provide a sufficient constraint on the merged entity, and the entry or expansion of existing companies (from both within and outside Jersey) will mitigate the effect of the transaction on competition.

7. Third Party Views

7.1 During the consultation period, the Authority received one confidential response to the Notice of Application from a competitor to the Purchaser concerned that the Notified Transaction will strengthen the position of the Purchaser through the development of a 'one stop shop' for businesses in Jersey. They suggest that the Purchaser may then abuse a new dominant position by charging prices so low that they do not cover the cost of production, by enforcing exclusivity deals on customers or loyalty rebates or discounts, or by tying or bundling services.

7.2 The tobacco wholesale market is dropping by 6% a year in terms of volume as government seeks to reduce tobacco sale in future. This is one of the main motivating factors for this transaction.

There are no links between the wholesale supply of tobacco and the other product lines held by the parties.

7.3 Any risk of an abuse of dominance in the tobacco can be addressed through competition law remedies in the event of a complaint being received. The Notified Transaction does not appear to increase this risk.

8. Decision

8.1 Based on the previous analysis, the Authority concludes that the acquisition will not substantially lessen competition in Jersey or any part of Jersey; and the Notified Transaction is therefore approved under Article 22(1) of the 2005 Law.

31 August 2021

By Order of the Jersey Competition Regulatory Authority