



**Jersey Competition Regulatory Authority ('JCRA')**

**Decision M 171/08**

**Proposed Acquisition**

**of**

**E.C. Le Feuvre Agricultural Machinery Limited**

**by**

**Jersey Royal (potato marketing) Limited**

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## **I. EXECUTIVE SUMMARY**

1. This Decision concerns the proposed acquisition by Jersey Royal (potato marketing) Limited (**'JRPM'**) of E.C. Le Feuvre Agricultural Machinery Limited (**'ECLF'**). The acquisition encompasses the entire tractor and agricultural machinery business in Jersey currently owned and operated by ECLF and was notified to the JCRA under the provisions of Part 4 of the Competition (Jersey) Law 2005 (the **'Law'**).
2. JRPM is the largest grower of potatoes in Jersey. It is principally active in the growing of Jersey Royal potatoes which are then mainly exported to customers in the United Kingdom.
3. ECLF is a dealer which is active in both the sale of tractors and agricultural machinery and the provision of maintenance services in respect of the tractors and agricultural machinery it sells. It is the de facto sole agent in Jersey for a number of brands of tractors and agricultural machinery, most notably for the purpose of this decision, for John Deere tractors and Morrish Crawlers.
4. Under Article 22(4) of the Law, the JCRA must determine whether the proposed acquisition of ECLF by JRPM would substantially lessen competition in Jersey or any part of Jersey.
5. As detailed in this Decision, the JCRA concludes that, as originally proposed, JRPM's acquisition of ECLF threatened to substantially lessen competition in Jersey through input foreclosure. Specifically, through acquiring ECLF, JRPM would gain the ability and incentive to discriminate against non-JRPM potato farmers in Jersey in the provision of (i) the supply of Morrish Crawlers, and (ii) the supply of maintenance services and spare parts to Morrish Crawlers and John Deere tractors.
6. The conclusion that the proposed acquisition of ECLF by JRPM would lead to a substantial lessening of competition provides the JCRA with the grounds to refuse

to approve the proposed acquisition under Article 22 of the Law. As an alternative to prohibition, however, Article 22 of the Law also gives the JCRA the discretion to approve a proposed acquisition subject to conditions.

7. The JCRA has determined that a conditional approval is warranted in this case, as conditions can allow the proposed acquisition to proceed, and JRPM to gain efficiencies in the sales and servicing of agricultural machinery, while, at the same time, avoiding an appreciable adverse risk to competition in Jersey or any part thereof.
8. Accordingly, in this Decision, the JCRA approves the proposed acquisition of ECLF by JRPM subject to JRPM's compliance with the following conditions:
  - JRPM (as the new owner of ECLF) shall not discriminate in the terms and conditions in the supply of Morrish Crawlers to non-JRPM potato farmers;
  - With respect to the provision of maintenance services and spare parts for tractors and agricultural machinery purchased by existing or future customers of ECLF, JRPM (as the new owner of ECLF) shall provide such services and spare parts in a fair, reasonable and non-discriminatory manner;
  - That JRPM shall offer a Service Level Agreement in the terms set out in the Annex to this Decision to all existing and future customers of ECLF and shall adhere to its terms; and
  - That JRPM shall provide such information as the JCRA may require for the purposes of monitoring compliance with the above conditions.

## **II. THE NOTIFIED TRANSACTION**

9. On 9 April 2008, the JCRA received an application (the '**Application**') for approval under Articles 20 and 21 of the Law concerning the proposed acquisition

of ECLF by JRPM. The proposed acquisition encompasses the entire tractor and agricultural machinery business currently owned and operated by ECLF.

10. The JCRA published a notice of its receipt of the Application on its website on 11 April 2008 and in the Jersey Gazette on 12 April 2008, inviting comments on the proposed acquisition by 25 April 2008. Following the publication of the notice, the JCRA initiated its own market enquiries concerning the proposed acquisition. No responses were received during the public consultation, however, these may have been pre-empted by the JCRA proactively contacting some potentially affected parties.

### **III. THE PARTIES**

11. JRPM is a company established under the laws of Jersey. According to the Application, JRPM is principally active in the growing of Jersey Royal potatoes which are then mainly exported to customers in the United Kingdom.
12. ECLF is a company established under the laws of Jersey. ECLF is active in the tractor and agricultural machinery supply business. It acts as an agent in Jersey for a number of tractor and machinery manufacturers, providing sales, maintenance service and spare parts. Table 1 below lists the brands supplied by ECLF for different product categories.

| <b>TABLE 1</b>          |                             |
|-------------------------|-----------------------------|
| <b>Product category</b> | <b>ECLF supplied brands</b> |
| Standard tractors       | John Deere                  |
| Cultivators             | Breviglieri, Kuhn           |
| Ploughs                 | Lemken, Kuhn                |
| Flail Mowers            | Breviglieri, Kuhn           |
| Trailers                | Marshall Trailers           |
| Potato Harvesters       | Reekie                      |
| Crop Sprayers           | Unigreen                    |
| Excavators              | JCB                         |
| Crawlers                | Morrish                     |

#### IV. THE REQUIREMENT FOR JCRA APPROVAL

13. The parties applied for JCRA approval on the basis that, *inter alia*, ECLF has an existing share of 25% or more in the supply of agricultural machinery to persons in Jersey and that JRPM is active in the supply of goods (namely potatoes) that are downstream of those goods and services in which ECLF has an existing 25% or more share of supply. The proposed acquisition is therefore of a type described in Article 1(2) of the Competition (Mergers and Acquisitions) (Jersey) Order 2005. Article 20 of the Law requires that acquisitions of this type must not be executed without the JCRA's prior approval.

#### V. ANALYSIS OF THE PROPOSED ACQUISITION

14. Under Article 22(4) of the Law, the JCRA must determine if the proposed acquisition would substantially lessen competition in Jersey or any part of Jersey. It does so pursuant to the procedures set out in the JCRA Merger Guideline (the '**Guideline**').<sup>1</sup> Pursuant to Article 60 of the Law, the JCRA must try 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 competition law in the European Community.
15. In making this determination in past decisions the JCRA has, consistent with EC precedent, analysed proposed acquisitions in terms of their potential horizontal merger effects and vertical merger effects. Horizontal merger effects may arise when a proposed merger or acquisition involves undertakings that operate in the same relevant markets. Vertical merger effects may arise "*where a company acquires one of its suppliers or customers.*"<sup>2</sup>
16. There are no horizontal merger effects in this case. This is because the parties involved in the proposed acquisition – JRPM and ECLF – are not actual or potential competitors in Jersey. Therefore, consistent with prior JCRA merger

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<sup>1</sup> JCRA Guideline, *Mergers and Acquisitions* at 6.

<sup>2</sup> *Ibid* at 12.

decisions, there are no grounds for the JCRA to conclude that the proposed acquisition of ECLF by JRPM would substantially lessen competition on a horizontal level.<sup>3</sup>

17. Although the JCRA has no basis to conclude that the proposed acquisition of ECLF by JRPM would substantially lessen competition on a horizontal level, that is not the end of our analysis. Specifically, and as noted above, ECLF supplies goods and services to JRPM and other potato farmers in Jersey. It sells tractors and agricultural machinery, and provides ongoing maintenance services and spare parts for the tractors and agricultural machinery it sells. As a result of acquiring ECLF, the supply of these goods and services would be transferred to JRPM. Therefore, the JCRA must also assess the proposed acquisition's potential effects in a vertical context.
18. In a vertical context, the principal potential competitive concern arise from foreclosure.<sup>4</sup> Foreclosure "*describes a situation where actual or potential rivals access to suppliers or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete.*"<sup>5</sup>
19. One particular form of foreclosure is input foreclosure, where "*the merged entity gains the ability to deny or restrict its rivals' access to an important good or service, thereby raising the rivals' costs by making it harder for them to obtain supplies of the input under similar prices or conditions as before the merger.*"<sup>6</sup> Because, as noted above, JRPM's proposed acquisition of ECLF would result in JRPM becoming a supplier of goods and services to both itself and to non-JRPM potato farms in Jersey, the JCRA must determine whether the proposed acquisition would result in a risk of input foreclosure in Jersey.

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<sup>3</sup> See, e.g., JCRA Decision M178/08 concerning the Proposed Acquisition of Various SandpiperCI Limited Subsidiaries by Juland Limited at ¶ 10 (2 July 2008) ("[T]he merging Parties are not actual or potential competitors in Jersey. Thus, there are no grounds for the JCRA to conclude that the proposed acquisition would substantially lessen competition on a horizontal level.").

<sup>4</sup> See JCRA Decision M133/07 concerning the Proposed Acquisition of C.I. Traders Limited by Sandpiper Bidco Limited at ¶ 16 (27 July 2007)

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* ¶ 17.

20. *“For input foreclosure to be a potential concern, the vertically integrated firm resulting from the merger must have market power in the upstream market.”*<sup>7</sup> In addition, input foreclosure to be problematic, it must also significantly impede competition in the downstream market. The JCRA therefore must define relevant product and geographic market(s) with respect to the proposed acquisition, and assess market concentration in these markets.

A. Defining Relevant Markets and Estimating Market Concentration

21. The main aim of relevant market definition is to identify substitutes – actual or potential – to the goods or services under analysis. As stated in the JCRA’s Guideline on Market Definition:

*“The internationally accepted approach is to assume the relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose a small yet significant and non-transitory increase in price assuming all other terms of sale remain constant (this is known as the ‘SSNIP test’). The JCRA generally considers a SSNIP to involve a five to ten percent increase in price that is sustained for one year.”*<sup>8</sup>

22. In other words, does the supplier of the good or service in question have the ability to significantly increase its price without the attempt being defeated by either (i) customers substituting other goods or services (so-called demand-side substitution), or (ii) other suppliers introducing other competitive goods or services (so-called supply-side substitution).
23. Relevant markets are usually viewed in terms of both product and geographic dimensions. *“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.”*<sup>9</sup>

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<sup>7</sup> *Ibid.* ¶ 23 (citation omitted).

<sup>8</sup> JCRA, Guideline on Market Definition at 5.

<sup>9</sup> *Ibid.* ¶ 7.



The relevant geographic market is the physical region over which a product and its substitutes are supplied.

24. This matter principally involves ECLF’s supply of tractors and agricultural machinery and its supply of maintenance services and spare parts. ECLF currently supplies these goods and services to, principally, potato farmers in Jersey. The JCRA’s analysis of the relevant markets and market concentration is set out below.

*The Upstream Supply of Tractors and Agricultural Machinery*

25. A basic analysis of substitutability of the goods currently supplied by ECLF is set out below:

| <b>TABLE 2</b> |                   |                           |  |
|----------------|-------------------|---------------------------|--|
| <b>Ref.</b>    | <b>Product</b>    | <b>ECLF Brands</b>        | <b>Alternative Local Suppliers &amp; Brands</b>  |
| 1              | Standard tractors | John Deere                | 1. Tractor Services (Massey Ferguson)<br>2. W.M. Staite (New Holland)<br>3. L.C. Pallot & Sons (Class McCormick, Case IH, Zetor) |
| 2              | Cultivators       | 1. Breviglieri<br>2. Kuhn | 1. Tractor Services (Massey Ferguson)<br>2. W.M. Staite (Dowdswell, Reco)<br>3. L.C. Pallot & Sons (Kvernland)                   |
| 3              | Ploughs           | 1. Lemken<br>2. Kuhn      | 1. W.M. Staite (Dowdswell)<br>2. L.C. Pallot & Sons (Kvernland)  |
| 4              | Flail Mowers      | 1. Breviglieri<br>2. Kuhn | 1. W.M. Staite (Spearhead, Perfect)<br>2. L.C. Pallot & Sons (Ferri)   |
| 5              | Trailers          | Marshall Trailers         | 1. Tractor Services (Massey Ferguson)<br>2. W.M. Staite (AS Marsten)   |

|   |                   |                     |   |
|---|-------------------|---------------------|---|
|   |                   |                     | 3. L.C. Pallot & Sons (Bailey)  |
| 6 | Potato Harvesters | Reekie              | 1. W.M. Staite (Pearson, Asa Lift)<br>2. L.C. Pallot & Sons (Samro, Grimme) |
| 7 | Crop Sprayers     | Unigreen            | 1. W.M. Staite (Frazier, Kelland, Team, Gambetti)<br>2. JFTU (Hardi)        |
| 8 | Excavator         | JCB                 | 1. W.M. Staite (New Holland)<br>2. L.C. Pallot & Sons (Case Construction)   |
| 9 | Crawler Tractor   | Morrish Engineering | None  |

26. Table 2 shows that, with respect to Products 1-8, alternative sources of supply exist in Jersey. For standard tractors, for example, although ECLF currently is the sole supplier of John Deere tractors, other dealers in Jersey currently supply alternative brands of tractors, such as New Holland or Massey Ferguson. The same situation exists with respect to the supply of cultivators, ploughs, flail mowers, trailers, potato harvesters, and crop sprayers. The evidence available to the JCRA shows that purchasers substitute, and suppliers in Jersey actively compete against each other, in the sale of these products.
27. Therefore, the JCRA has no basis on which to conclude that the individual brands referenced in Products 1-8, above, constitute distinct relevant product markets. Moreover, for at least some of these products, the evidence indicates that the supply or potential supply of the goods in question may not be limited to Jersey. Concerning John Deere tractors, for example, JRPM states that during the peak potato harvesting season (May – July) it hires additional John Deere tractors from a company in the UK, to supplement its existing fleet in Jersey.

28. Based on the evidence of substitution concerning the supply of tractors, cultivators, ploughs, flail mowers, trailers, potato harvesters, and crop sprayers, the JCRA has no basis to conclude that, currently, ECLF has a significant degree of market power in these upstream markets. Based on this finding, the JCRA can conclude that input foreclosure will not arise from JRPM's proposed acquisition of ECLF, at least for the sale of these products. Stated simply, if JRPM attempted to engage in a foreclosure strategy post-merger, non-JRPM potato farmers would have the ability to counteract this strategy by substituting alternative sources of supply for the goods in question.
29. The same conclusion cannot be reached, however, with respect to Product 9, the supply of Morrish Crawlers. The Morrish Crawler is a unique, small, lightweight crawler tractor that has been specifically designed to open rows to enable the planting of potatoes. The JCRA understands from its enquiries that the Morrish Crawler is necessary for the majority of Jersey potato farmers because it:
- can operate on sloping land in wet conditions and in small irregularly shaped fields; and
  - makes rows with a high level of accuracy (precise to the millimetre) causing minimal damage to the land.
30. The JCRA has learnt that the Morrish Crawler was first supplied in Jersey in 1989, as a result of an approach by ECLF's current owner, Mr Le Feuvre, to Morrish Engineering, a small agricultural manufacturer in Devon. The JCRA has been informed that Mr Le Feuvre was looking for a crawler tractor to make rows to plant potatoes, by way of a replacement to the Ransome tractor that was no longer being manufactured. Following consultation with Mr Le Feuvre with regard to the requirements for a crawler tractor to be used in Jersey for potato farming, Morrish Engineering modified one of its existing products into the Morrish Crawler. Due to this relationship, ECLF has always been, and continues to be, the exclusive supplier of Morrish Crawlers in Jersey.

31. During its market investigations, the JCRA was informed by farmers and Morrish Engineering that there is currently no substitute in Jersey or the UK for the Morrish Crawler. This was supported by information supplied to us by other tractor dealers and agricultural engineers in the UK and Jersey.
32. The JCRA market enquiries have shown that all but one non-JRPM farmer has at least one Morrish Crawler, and that the use of these Morrish Crawlers has been an established farming method for approximately the last 20 years in Jersey potato farming.
33. The JCRA also has learned that very few Morrish Crawlers are manufactured. The JCRA has learnt that over the last 19 years approximately 26 Morrish Crawlers have been produced. Currently, only one new Morrish Crawler has been ordered for next year. The Morrish Crawler is not a production item and is made to order. Orders are generally placed at the end of the season August/September for delivery in December/January in time for the beginning of the season.
34. Based on this evidence, the JCRA concludes that a relevant product market exists for the supply of Morrish Crawlers. The relevant geographic market for this product is limited to Jersey. This is because the JCRA has been informed that the manufacturer, Morrish Engineering, refuses to sell Morrish Crawlers directly to Jersey farmers from its factory in the UK. It directs that all such sales must go through its local agent, ECLF. Currently ECLF is the only agent for Morrish Crawlers worldwide, as Morrish Engineering have not received any orders for Morrish Crawlers from its UK customers for some six years.
35. Within this relevant market, ECLF is currently the sole supplier of the Morrish Crawler, with a 100% market share. ECLF presumptively, therefore, appears to have a substantial degree of market power with respect to the supply of the Morrish Crawler in Jersey. This is based on ECLF being the long-standing sole supplier of the Morrish Crawler in Jersey, the importance of the Morrish Crawler to potato farming in Jersey, and the inability of customers currently to acquire substitutes for this product from other sources.

36. ECLF's current degree of market power with respect to the Morrish Crawler could be eroded based on the entry of new, competing products. For this to occur, the JCRA would have to conclude that entry would be timely, likely and sufficient to defeat the exercise of market power with respect to Morrish Crawler. During its investigations, the JCRA learnt that since 1989 there was, briefly at least, one competitor for the Morrish Crawler. However, the machine was not successful as its steering was not as precise as the Morrish Crawler and the product was soon withdrawn from the market. The JCRA considers that, given that the market for the Morrish Crawler is so small, it is insufficient to outweigh the level of investment and expertise required to produce a successful competing product. Therefore it is extremely unlikely that a timely new entrant with a substitute for the Morrish Crawler will enter the market to defeat the current market power of ECLF in relation to the Morrish Crawler.
37. ECLF's current degree of market power with respect to the Morrish Crawler could be eroded based on "buying power", i.e., the countervailing power of the purchasers of the Morrish Crawler. This does not appear to be the case with respect to the non-JRPM farmers that purchase Morrish Crawlers. Out of the approximately 26 Morrish Crawlers on the island, less than half (10) are currently owned by non-JRPM farmers (many of which were purchased second hand when the non-JRPM farmers returned to farming). Thus, the small volume of sales to non-JRPM farmers, combined with the fact that in the past 19 years no potato farmer in Jersey has produced its own substitute for the Morrish Crawler (i.e., there has been no self-sourcing) leads us to the conclusion that the exercise of buying power is not likely here, at least with respect to non-JRPM farmers in Jersey.
38. The JCRA therefore concludes that a relevant market exists for the supply of Morrish Crawlers in Jersey, and that ECLF has a substantial degree of market power in this market based on its status as the sole supplier.

*The Upstream Supply of Maintenance Services and Spare Parts*

39. The relevant market analysis, as well as the analysis of market power, may be different with respect to the supply of complementary goods and services such as maintenance and spare parts by ECLF, as opposed to the supply of new tractors and agricultural machinery.

40. The key issue, again, is one of substitution -- whether there are substitutes for the provision of maintenance services and spare parts for the tractors and agricultural machinery supplied by ECLF. Under EC competition law:

*“If there is a separate market for the complementary product, it may be that an undertaking that has no power over the ‘primary’ market may nevertheless be dominant in the ‘secondary’ one... It is an empirical question whether there is a separate aftermarket, depending on the extent to which customers are ‘locked in’ to a particular supplier.”<sup>10</sup>*

41. Therefore, in deciding whether substitutes exist for the supply of maintenance services and spare parts by ECLF, the JCRA must determine whether, having purchased tractors and/or machinery from ECLF, customers remain “locked in” to the dealership for the supply of maintenance services and spare parts. If so, a hypothetical monopoly supplier would possess market power with respect to the provision of maintenance services and spare parts.

42. The JCRA’s investigation has revealed that to a large extent customers are “locked in” to the dealership for the supply of maintenance services and spare parts, at least with respect to tractors. As regards the supply of maintenance and spare parts for John Deere tractors originally sold by ECLF, in the course of the JCRA investigation:

- John Deere Limited told the JCRA that in relation to spare parts, it (John Deere) only sells to Authorised Dealers. It is the same with diagnostic equipment needed to provide tractor repairs. Such equipment is only

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<sup>10</sup> Richard Whish, COMPETITION LAW at page 37 (5<sup>th</sup> ed. 2003).

made available to Authorised Dealers as repairs and maintenance which depend upon such specialised equipment needs to be carried out by persons who are trained in its use and who have the relevant technical information (which is delivered in electronic format to Authorised Dealers).

- Market enquiries have highlighted that local availability is a major factor determining the choice of John Deere spare parts and maintenance services. These enquiries have highlighted that potential overseas suppliers are not considered close substitutes to the local suppliers as the availability of local maintenance (particularly in the time-critical harvesting season) is a major factor determining the choice for new agricultural machinery and tractors.
- Moreover, while ECLF does not have exclusive rights to service John Deere tractors, [CONFIDENTIAL REDACTED], ECLF must provide certain services under warranty for free for 12 months (24 months in the case of “core engine”) thus creating a strong economic incentive for purchasers to exclusively use ECLF maintenance services at least for period the tractor is under warranty. In addition to that incentive, because John Deere only supplies spare parts and diagnostic equipment and information to its Authorised Dealers, even after the expiry of the warranty period, operators of such tractors are effectively dependent upon the Authorised Dealer for maintenance, repairs, servicing and spare parts.
- ECLF is the de facto exclusive distributor of John Deere tractors in Jersey. This is due to scale economies and Jersey’s small economy. Specifically, the JCRA understands that annual sales of around 160 tractors need to be achieved to justify setting up a dealership, whereas combined sales for Jersey and Guernsey per year are only around 40 units. [CONFIDENTIAL REDACTED]. As such, it is also the exclusive supplier of maintenance service to, and spare parts for, these tractors.

43. Furthermore, transparency of costing information and other terms of supply will have a bearing on whether a supplier of secondary parts and services is able to exercise market power, at least with respect to existing ECLF customers. An ability to exercise market power in a situation where the customer has incomplete information would be enhanced if the customer, when purchasing the primary product, namely the tractor, did not know of the proposed acquisition of ECLF by JRPM. In this case, the notification to the JCRA of the proposed acquisition was an unexpected event for those Jersey Royal potato growers who were not part of the JRPM group. If they had known otherwise, they may have switched to an alternative tractor supplier.
44. Therefore, the evidence indicates that customers of ECLF remain locked in to the dealership as regards the supply of maintenance services and spare parts, at least for John Deere tractors. Thus, a distinct relevant market appears to exist for the supply of maintenance services and spare parts for, at least, John Deere tractors originally supplied by ECLF. By definition, ECLF would have a market share of 100% in this relevant market.
45. Even though ECLF has a monopoly in respect of such services, if there are low barriers to entry, it would not have the ability to profitably exercise this market power. However, the Dealership Agreement with John Deere creates an effective barrier to entry, whether from within Jersey or from overseas, into the market for John Deere parts and services for the duration of the Agreement. [CONFIDENTIAL REDACTED]. As observed above, the small size of the Jersey market means that it is highly unlikely that John Deere would establish a second dealership here. Furthermore, the factors listed in Paragraph 42, above, make the exercise of buyer power by non-JRPM farmers unlikely
46. As regards the supply of maintenance and spare parts for Morrish Crawlers originally sold by ECLF, the JCRA understands that, in relation to spare parts, Morrish Engineering only sells to ECLF. Apparently there is no specific diagnostic equipment for repairs, but parts fabricated by Morrish Engineering will need to be made on special order via ECLF. [CONFIDENTIAL REDACTED].



47. Compared to John Deere tractors, the JCRA has been informed that there is less dependence on the dealer for the supply of maintenance services. This is because the Morrish Crawler has a generic engine, tracks and hydraulic system which: (i) can be serviced by any qualified agricultural engineer; and (ii) certain generic parts can be sourced independently from ECLF. The JCRA also has learnt that some non-JRPM farmers do take the time and effort to service their own Morrish Crawlers. However, even if farmers can self-service their Morrish Crawlers in some instances, they remain dependant on ECLF for the provision of specialised spare parts from the manufacturer, Morrish Engineering. Clearly self-service and ordering of spares takes more time and effort for the farmers than taking their machines to ECLF, so only a few non-JRPM farmers take this approach.
48. Therefore, as in the case of John Deere tractors described in Paragraph 42 above, the evidence indicates that customers of ECLF also remain locked in to the dealership for the supply of maintenance services and spare parts, for Morrish Crawlers. Thus, there is also a separate distinct relevant market for the supply of maintenance services and spare parts for Morrish Crawlers. Although there are certain generic parts that can be obtained independently from ECLF, the customers of ECLF are dependant on it for the supply of the specialised Morrish Crawler parts. Therefore ECLF would have the potential to exercise market power.
49. ECLF's apparent position of market power may be challenged if there are low barriers to entry. However, the de facto exclusive distribution agreement between Morrish Engineering and ECLF (which has been in place for nearly 20 years) for the supply of Morrish Crawlers, together with the fact that there is no substitute for the Morrish Crawler in the market, create an effective barrier to entry, whether from within Jersey or from overseas, into the market for the supply of maintenance services and spare parts for Morrish Crawlers. Such factors also would appear to prevent the exercise of buyer power by non-JRPM farmers for the supply of maintenance services and spare parts, for Morrish Crawlers.
50. The JCRA therefore concludes that with respect to the supply of maintenance services and spare parts by ECLF, two relevant product markets exist: (i) the

supply of maintenance services and spare parts for John Deere tractors, and (ii) the supply of maintenance services and spare parts for Morrish Crawlers. The relevant geographic market for both of these product markets is limited to Jersey, as there is no evidence that potato farmers in Jersey could reasonably obtain maintenance services and spare parts for either John Deere tractors or Morrish Crawlers from undertakings located outside of Jersey. The JCRA also concludes that ECLF currently has a substantial degree of market power in both of these markets.

*The Downstream Activity of Growing & Harvesting Potatoes in Jersey*

51. Because this is a vertical merger analysis, the JCRA must also consider the potential downstream market or markets.
52. According to the Application, JRPM is active in the growing, harvesting and supply of, primarily, Jersey Royal potatoes. In 2007, the JCRA granted approval for a proposed acquisition by JRPM of various assets from various growers.<sup>11</sup> The JCRA concluded for the purpose of that decision that Jersey Royal potatoes were a relevant product market.<sup>12</sup> There is no need to depart from this conclusion in the Decision. For the purpose of this Decision, therefore, the JCRA considers that there exists a relevant product market for the growing, harvesting and supply of Jersey Royal potatoes. As the growing and selling of Jersey Royal potatoes takes place in Jersey, the relevant geographic market is limited to Jersey.
53. JRPM appears to have a position of dominance in this relevant product market. In the Application, JRPM itself states that “*JRPM is dominant in the growing of potatoes in Jersey.*”<sup>13</sup> Concerning the export market to the UK, public reports state that JRPM has controlled up to 90% of this crop.<sup>14</sup>

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<sup>11</sup> Decision M081/06 of 11 April 2007 regarding the proposed acquisition by Jersey Royal (potato marketing) Limited of various assets of various growers.

<sup>12</sup> *Ibid.* ¶ 29.

<sup>13</sup> Application at 1.4 item (c) page 4.

<sup>14</sup> See Orlando Crowcroft, *UK export firm buys Island farm for £4m*, Jersey Evening Post at 5 (13 Aug. 2007).

*Relevant Market Conclusions*

54. In summary, therefore, the JCRA has defined the following relevant markets in this matter:

- The upstream market for the supply of Morrish Crawlers in Jersey;
- The upstream market for the supply of maintenance services and spare parts for Morrish Crawlers in Jersey;
- The upstream market for the supply of maintenance services and spare parts for John Deere tractors in Jersey; and
- The downstream market for the growing, harvesting and supply of Jersey Royal potatoes in Jersey.

B. Input Foreclosure Analysis

55. The European Commission recently identified the following three factors in assessing input foreclosure.<sup>15</sup> First, would the merged entity have the *ability*, post-merger, to substantially foreclose access to inputs? Second, would the merged entity have the *incentive*, post-merger, to do so? Third, would the foreclosure strategy have a significant detrimental effect on competition downstream? The JCRA assesses each of these three elements with respect to JRPM’s proposed acquisition of ECLF, below.

*Would the acquisition of ECLF give JRPM the ability to substantially foreclose access to inputs?*

56. According to the European Commission, the ability substantially to foreclose access to inputs depends on the merged entity having “*a significant degree of market power in the upstream market.*”<sup>16</sup>

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<sup>15</sup> See European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulations on the control of concentrations between undertakings* at ¶ 32.

<sup>16</sup> *Ibid.* ¶ 35.

57. As noted above, based on the evidence available to it, ECLF currently has a significant degree of market power in three upstream markets to potato farming in Jersey: (i) the supply of Morrish Crawlers in Jersey, (ii) the supply of maintenance services and spare parts in Jersey for John Deere tractors, and (iii) the supply of maintenance services and spare parts in Jersey for Morrish Crawlers. As a result of the proposed acquisition, ECLF’s current position of market power would be transferred to JRPM. Therefore, the JCRA therefore concludes that, with respect to these inputs, the proposed acquisition of ECLF by JRPM satisfies the first element of input foreclosure.

*Would the acquisition of ECLF give JRPM the incentive substantially to foreclose access to inputs?*

58. Having established the *ability* to foreclose rivals access to inputs, the next question is, in acquiring ECLF, would JRPM have the *incentive* to do so? In analysing this question the JCRA will consider both JRPM’s incentives to adopt a discriminatory course of conduct and considerations that may reduce, or even eliminate, this incentive.

59. The JCRA considers that JRPM would, post-merger, have an incentive to discriminate against non-JRPM farmers in the provision of goods and services listed in Paragraph 57, above. This incentive arises from JRPM’s position as, by far, the largest single producer of Jersey Royal potatoes in Jersey, and the relatively small scale of the ECLF operations it would acquire through the proposed acquisition, as detailed below in Table 3:

| <b>TABLE 3<sup>17</sup></b> |                               |                                   |   |
|-----------------------------|-------------------------------|-----------------------------------|---|
| <b>JRPM</b>                 | <b>Turnover from potatoes</b> | <b>Gross profit from potatoes</b> | <b>Total net profit (before taxation)</b> |
| 2007                        | £[...]                        | £[...]                            | £[...]                                    |
| 2006                        | £[...]                        | £[...]                            | £[...]                                    |

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<sup>17</sup>Figures confidential.

| <b>ECLF</b> | <b>Turnover</b> | <b>Gross profit from tractors &amp; agricultural machinery (sales and after sales)</b> | <b>Total net profit (before taxation)</b> |
|-------------|-----------------|--|---|
| 2006        | £[...]          | £[...]   | £[...]                                    |
| 2005        | £[...]          | £[...]   | £[...]                                    |

60. Table 3 indicates that the sacrifice in turnover, gross profit and net profit that JRPM would suffer from either denying or discriminating in access to the ECLF goods and services listed in Paragraph 57, above, would not be large relative to its turnover and gross and net profits derived from the sale of Jersey Royal potatoes. This is even more so when considering that, even prior to the proposed acquisition, JRPM was ECLF's largest customer, and therefore accounted for the largest percentage of ECLF's turnover and profits listed in Table 3. The JCRA estimates that, assuming constant profit margins and using data for the year 2006, JRPM would only need to increase its gross profit by four percent in order to compensate for the total loss of gross profit from sales and service from tractors and agricultural machinery.
61. Table 3 also highlights that there appears to be no countervailing buyer power by users of ECLF equipment. That is, the lost profits from customers buying their tractors and equipment from other dealers in the future, which is captured in the profit and turnover in the table above, would not provide a significant disincentive to JRPM to not engage in a foreclosure strategy to raise the costs of its competitors in the growing and harvesting of Jersey Royal potatoes. Stated simply, JRPM would have more to gain in the market for the growing and harvesting of Jersey Royal potatoes than it would have to lose in the markets for the sales and service of tractors and machinery.
62. In terms of disincentives to discriminate, JRPM cites the following: (1) the ability of John Deere to terminate the dealership in Jersey, and (2) the continuing ability of the JCRA to enforce the conduct prohibitions of the Law. The JCRA considers each of these factors, below.

63. In terms of John Deere's ability to terminate ECLF's existing dealership agreement, the JCRA notes that ECLF is required to not discriminate in the supply of such tractors, parts and equipment service. [CONFIDENTIAL REDACTED]. JRPM argues that John Deere's ability to terminate the agreement based on discrimination provides an effective deterrent to any incentive to disadvantage non-JRPM customers in the supply of maintenance services and spare parts.
64. The deterrence depends, however, on the willingness of non-JRPM potato farmers to complain to John Deere based on allegations of discrimination. It also depends on the willingness and discretion of a third party located outside of Jersey, namely John Deere, to terminate the agreement. [CONFIDENTIAL REDACTED].
65. Accordingly, while the ability of John Deere to terminate the dealership agreement in the event of a breach provides some comfort, the JCRA does not have sufficient evidence to conclude that John Deere would, in fact, do so, based on discrimination against non-JRPM potato farmers in the provision of maintenance and spare parts. Furthermore, the JCRA is not comfortable with leaving the potential to protect competition in Jersey within the discretion of an independent third party.
66. Moreover, while John Deere *may* have the incentive and ability to terminate its relationship with ECLF based on discrimination in the provision of maintenance and spare parts for John Deere tractors, the same cannot be said for the supplier of Morrish Crawlers, Morrish Engineering. Whilst there appears to be no formal contract in place with Morrish Engineering relating to the supply of Morrish Crawlers, [CONFIDENTIAL REDACTED]. This is primarily due to the success of the relationship which has lasted nearly 20 years, and the experience that ECLF has gained during that time of supplying and servicing the Morrish Crawler.
67. As regards to the JCRA's ability to enforce the conduct prohibitions of the Law, Article 16 of the Law prohibits abuses of dominance. Article 16(2)(c) states that an abuse of dominance consists in, in particular "*applying dissimilar conditions to equivalent transactions with other trading parties and thereby placing them at a*

*competitive disadvantage.*” This prohibition applies, and will continue to apply, to JRPM’s conduct, before and after its proposed acquisition of ECLF.

68. In considering whether or not the potential illegality of a particular course of conduct provides adequate disincentives for a party to engage in that conduct post-merger, the EC Commission states that it will consider, “*on the basis of a summary analysis: (i) the likelihood that this conduct would be clearly, or highly probably, unlawful under Community law, (ii) the likelihood that this illegal conduct could be detected, and (iii) the penalties which could be imposed.*”<sup>18</sup>
69. From the evidence collected in this analysis, as detailed above, it appears that, as a result of its proposed acquisition of ECLF, JRPM would have a significant degree of market power with respect to the supply of Morrish Crawlers in Jersey and in the supply of maintenance services and spare parts in Jersey to both John Deere tractors and Morrish Crawlers. JRPM’s significant degree of market power in the provision of these goods and services in Jersey would appear to equate to a finding of dominance under Article 16 of the Law,<sup>19</sup> although this would need to be established in any JCRA decision under Article 16. Thus, Article 16(2)(c)’s prohibition against anti-competitive discriminatory treatment would most likely apply to JRPM’s treatment of non-JRPM farmers in the provision of Morrish Crawlers and maintenance services and spare parts in Jersey to both John Deere tractors and Morrish Crawlers post-merger.
70. However, factors such as the likelihood of detection and the speed of an investigation make reliance on Article 16 potentially problematic. Specifically, we understand that Jersey Royal potatoes are generally planted from January to March and harvested from April to June, with April to June also being the key marketing window. The JCRA also has been advised that the optimal window for harvesting the preferred small size of Jersey Royal potatoes is only of two days. If alleged discrimination were to arise, it would be unlikely that the JCRA could complete an

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<sup>18</sup> European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulations on the control of concentrations between undertakings* at ¶ 46.

<sup>19</sup> See International Competition Network, *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws* (equating the concepts of “dominance” and “substantial market power”).

abuse of dominance investigation, and impose the appropriate remedies, during this relatively short time-frame. According, while the JCRA's continued ability to enforce the provisions of Article 16 of the Law provides some measure of comfort here that JRPM would not act in a discriminatory fashion post-merger, the JCRA concludes that the risk of future enforcement cannot be the sole legal protection provided to non-JRPM farmers.

*Would the foreclosure strategy have a significant detrimental effect on competition downstream?*

71. Finally, it must be considered whether a discrimination strategy would significantly impede competition in the downstream market: the growing, harvesting and supply of Jersey Royal potatoes in Jersey.
72. As noted in Paragraph 2, above, JRPM is the largest grower of Jersey Royal potatoes in Jersey. The production of Jersey Royal potatoes in Jersey, however, has recently changed with the entry of Albert Bartlett and Sons ("Bartlett"). In 2007, Bartlett purchased a farm on Trinity Hill with the intention of entering into competition with JRPM for the export of Jersey Royal potatoes to the UK. Bartlett's entry into Jersey appears to have resulted in the re-entry of a number of non-JRPM farms into the growing and harvesting of Jersey Royal potatoes. Specifically, public reports indicate that Bartlett's entry into competition with JRPM has resulted in three farmers re-entering the production of Jersey Royal potatoes, and an extra 1,000 verges of land in Jersey devoted to growing potatoes in 2008.<sup>20</sup>
73. The information available to the JCRA indicates that a material reason for the re-entry of these farmers into the production of Jersey Royal potatoes is the entry of Bartlett and the corresponding non-reliance on JRPM to get their potatoes to the major market in the UK.
74. Through the proposed acquisition of ECLF, however, these farmers will once again become dependant on JRPM for the production of their potato crops. Specifically:

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<sup>20</sup> See Ramsay Cudlipp, *Potato export rivalry 'good news for Island'*, Jersey Evening Post at 9 (2 Apr. 2008).



- As detailed above, all but one of the non-JRPM farmers depend on Morrish Crawlers for the planting of their seed potatoes. While demand for Morrish Crawlers is small in scale, the JCRA has been informed that many of these non-JRPM farmers will be needing to replace their existing Morrish Crawlers in the coming years. As a result of the proposed acquisition, the supply of this input (as well as associated maintenance and spare parts for it) would be under JRPM's control.
  - Certain non-JRPM farmers also have a high reliance on their existing fleet of John Deere tractors. Specifically, the existing fleets of two of these farmers comprise 70% John Deere tractors, meaning that they will remain dependant on JRPM for the provision of maintenance services and spare parts to a majority of their tractor fleet post-merger. These farmers have expressed concerns to the JCRA that, in the event of break-down, even small delays in maintenance can materially effect their ability to harvest potatoes on time or at all, given the short growing season.
75. Thus, the JCRA concludes that following a foreclosure strategy would materially increase the costs of downstream rivals. Taken to the extreme, it may also prevent downstream rivals from harvesting their potato crops on time. Both outcomes provide bases for the JCRA to conclude that a foreclosure strategy would materially impact competition in the downstream market.
76. Moreover, the JCRA also concludes that JRPM acquiring control of these key inputs also could raise barriers to entry into the growing and harvesting of Jersey Royal potatoes in Jersey. This is based on evidence that many non-JRPM farmers re-entered the production of Jersey Royal potatoes specifically because the entry of Bartlett made them no longer dependant on JRPM. Through acquiring ECLF, a level of dependance on JRPM is re-established, through JRPM gaining control of vital inputs to the growing and harvesting of Jersey Royal potatoes. As recently stated by the European Commission, raising barriers to entry into the downstream market can, itself, be grounds for a finding of a significant detrimental effect on competition downstream:

*“Second, effective competition may be significantly impeded by raising barriers to entry to potential competitors. A vertical merger may foreclose potential competition on the downstream market when the merged entity would be likely not to supply potential downstream entrants, or only on less favourable terms than absent the merger. The mere likelihood that the merged entity would carry out a foreclosure strategy post merger may already create a strong deterrent effect on potential entrants.”<sup>21</sup>*

### C. Analysis of Entry Barriers and Counterveiling Buyer Power

77. For the reasons stated above, the JCRA concludes that the acquisition of ECLF by JRPM would result in a prima facie risk of input foreclosure. However, in an input foreclosure analysis, JCRA also must assess whether *“factors such as the presence of buyer power or the likelihood that entry upstream would maintain effective competition.”<sup>22</sup>*
78. In respect to the Morrish Crawler, the JCRA has already found, in Paragraphs 36 and 37 above, that potential market entry or buyer power would not maintain effective competition. Given the low volume of sales of the Morrish Crawler and that the Morrish Crawler is a highly specialised machine; the JCRA is of the opinion that there is insufficient demand in the market to make new entry a likely scenario. The same conclusion is reached with respect to the provision of maintenance services and spare parts to Morrish Crawlers, as detailed in Paragraph 49, above.
79. As regards the spare parts for, and maintenance of, John Deere tractors, it has been noted at Paragraph 42 above that John Deere Limited only supplies spare parts and specialised equipment to its Authorised Dealers. ECLF is, de facto, the exclusive Authorised Dealer of John Deere in Jersey. Given the fact that annual sales of around 160 tractors need to be achieved in order to justify setting up a dealership,

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<sup>21</sup> European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* at ¶ 49.

<sup>22</sup> *Ibid.* ¶ 51.

and actual combined sales in Jersey and Guernsey only amount to around 40 tractors, it seems most unlikely that another dealership would be established to compete with JRPM after the proposed acquisition of ECLF.

D. Efficiency Analysis

80. Finally, the effect on competition arising from alleged input foreclosure “needs to be assessed in light of efficiencies substantiated by the merging parties.”<sup>23</sup>
81. JRPM claims that the proposed acquisition of ECLF would result in significant efficiencies and states that the expected efficiencies are the reason behind the proposed acquisition.<sup>24</sup>
82. JRPM states that the financial benefits to JRPM of the proposed acquisition of ECLF amount to between £[...] and £[...] per annum, to be achieved within two years.<sup>25</sup> The benefits are mostly structural and can be assumed to continue indefinitely.
83. The benefits to JRPM listed are:

| <b>TABLE 4<sup>26</sup></b> |   |
|-----------------------------|---|
| <b>Category</b>             | <b>Estimated Projected Savings/Benefits</b> |
| [CONFIDENTIAL REDACTED]     | £[...]                                      |
| [CONFIDENTIAL REDACTED]     | £[...]                                      |
| [CONFIDENTIAL REDACTED]     | £[...]                                      |

<sup>23</sup> *Ibid.* ¶ 52

<sup>24</sup> See the Application and the subsequent more detailed JRPM submission of 12 May 2008, estimating that within two years following the acquisition an improvement of between £90k and £110k can be achieved.

<sup>25</sup> Figures confidential.

<sup>26</sup> Figures confidential.

84. The JCRA has no reason to doubt these alleged benefits to JRPM and accepts that they are a reasonable estimate.
85. There is no indication, however, that the customers of ECLF, and in particular the captive customers with respect to the supply of Morrish Crawlers and the supply of maintenance services and spare parts, would benefit from these efficiencies. That is, to the extent JRPM gains efficiencies from its acquisition of ECLF, this would appear to enable JRPM to lower its own cost base in the production of Jersey Royal potatoes. It is not clear to the JCRA, however, how potentially affected customers of ECLF would benefit from these efficiencies.
86. In conclusion, while recognizing that efficiencies may be generated from the proposed acquisition, the JCRA concludes that these efficiencies are insufficient to outweigh the substantial lessening of competition outlined above.

E. Summary of Merger Analysis Conclusions

87. Based on the analysis set out above, the JCRA concludes that, as originally proposed, the acquisition of ECLF by JRPM would result in a risk of a substantial lessening of competition through input foreclosure in:
  - The supply of Morrish Crawlers in Jersey;
  - The supply of maintenance service and spare parts for John Deere tractors in Jersey; and
  - The supply of maintenance service and spare parts to Morrish Crawlers tractors in Jersey.

**VI. THE APPROPRIATENESS OF CONDITIONS**

88. Under Article 22(4) of the Law, the JCRA may refuse to approve an acquisition if it is satisfied that the acquisition would substantially lessen competition in Jersey. Alternatively, the JCRA may approve an acquisition subject to certain conditions. The JCRA has considered whether in this particular case conditions would remedy

the risk of a substantial lessening of competition that emerges from the proposed acquisition.

89. During the analysis of the proposed acquisition the JCRA proposed particular conditions which address the risk of a substantial lessening of competition. These conditions are:

- JRPM shall not discriminate in the terms and conditions of the supply of Morrish Crawlers to third party purchasers;
- JRPM shall provide maintenance services and spare parts to tractors and other agricultural machinery sold to third parties in a fair, reasonable and non-discriminatory manner;
- JRPM shall offer a Service Level Agreement (“SLA”) to all current and future customers of ECLF in accordance with the terms of the draft agreement set out in Annex 1 of this Decision, and shall adhere to its terms; and
- JRPM shall provide such information and documents as the JCRA may require, subject to any legally recognizable privilege and upon written request with reasonable notice, for the purpose of determining, monitoring or securing compliance with this Decision and the conditions attached thereto.

90. The JCRA has discussed these proposed conditions with JRPM and with third parties who had expressed concerns about potential discrimination arising from the acquisition. JRPM told us that it would not be opposed to the imposition of the conditions set out below, and the third parties indicated that the conditions, and in particular the SLA, addressed the possible negative effects resulting from the proposed acquisition.

91. The JCRA believes that approval of the proposed acquisition subject to JRPM's adherence to behavioral conditions is the appropriate way to conclude this matter. The JCRA has made this decision in light of the following considerations:

- The JCRA has concluded that the behavioural conditions outlined above address the risk of a substantial lessening of competition arising from the proposed acquisition. Thus, they allow the proposed acquisition to proceed, and JRPM to gain the potential efficiencies arising therefrom, while addressing the potential competitive concerns.
- As an alternative to a behavioral condition, the JCRA did consider requiring the divestiture of the Morrish Crawler line from ECLF. However, the sale of Morrish Crawlers is a very small business. Specifically, we understand that over the past five years, ECLF has sold only one Morrish Crawler in Jersey to a non-JRPM potato farmer. ECLF projects that non-JRPM sales of the Morrish Crawler will be only two machines in the next five years. The JCRA's own market research suggests a higher estimate of eight machines needed by non-JRPM farmers over the next five years. Both estimates, however, attest to the conclusion that the market for the supply of Morrish Crawlers in Jersey, while very important to potato farmers, is also very small. Furthermore, JRPM's own requirements of Morrish Crawlers surpass those of all non-JRPM farmers combined; indeed, JRPM informed us that the internalisation of the supply of Morrish Crawlers and costs savings arising therefrom was one of the efficiencies it expected to gain from the proposed acquisition. In these circumstances, the JCRA considers that requiring divestiture would not be an appropriate remedy.
- Finally, in its assessment of the proposed acquisition, the JCRA has considered both the factual (i.e., JRPM acquiring ECLF) and the counter-factual (i.e., JRPM is not permitted to acquire ECLF). In framing the appropriate counter-factual, the JCRA bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the

proposed acquisition. As the JCRA has previously observed, “[t]he status quo cannot necessarily be assumed to continue in absence of the merger[.]”<sup>27</sup> In this case, the current owner of ECLF has stated his clear intention to sell the dealership. If the JCRA does not allow the proposed acquisition to go ahead, then one of Jersey’s other dealers of tractors and agricultural equipment may attempt to acquire ECLF. Although such an acquisition would likely be subject to JCRA review and approval, it also would likely raise horizontal merger concerns that would be even more serious than the vertical concerns raised in this matter.

92. On these grounds, the JCRA considers it appropriate to approve the proposed acquisition subject to conditions.

## **VII. DECISION ATTACHING CONDITIONS**

93. Under Article 22 of the Law, the JCRA approves the acquisition of ECLF by JRPM, subject to conditions. Specifically, pursuant to Articles 22(2) and 22(3) of the Law, the JCRA’s approval is subject to the following conditions:

- JRPM shall not discriminate in the terms and conditions of the supply of Morrish Crawlers to third parties.
- JRPM shall provide maintenance services and spare parts to tractors and other agricultural machinery sold to third parties in a fair, reasonable and non-discriminatory manner.
- JRPM shall offer a Service Level Agreement to all existing and future ECLF customers in accordance with the terms of the draft agreement set out in Annex 1 of this Decision.
- JRPM shall itself adhere to the terms of the SLA.
- JRPM shall provide such information and documents as the JCRA may require, subject to any legally recognizable privilege and upon

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<sup>27</sup> JCRA Guideline, *Mergers and Acquisitions* at 8.

written request with reasonable notice, for the purpose of determining, monitoring or securing compliance with this Decision and the conditions attached thereto.

94. JCRA may, where appropriate, in response to a written request from JRPM showing good cause, modify or substitute one or more of the conditions set forth herein. The determination of any such application is a matter within the JCRA's sole discretion.
95. Compliance with the conditions set forth in Paragraph 93 is binding on JRPM and its directors and officers under Article 22(3) of the Law.

**16 September 2008**

**By Order of the JCRA Board**



## SERVICE LEVEL AGREEMENT

Dated [ ] 2008

### BETWEEN:

1. **JERSEY ROYAL (POTATO MARKETING) LIMITED** a company incorporated under the laws of the island of Jersey with company number 86695 of Thomas Edge House, Tunnel Street, St. Helier, JE2 4LU (“**JRPM**”); and
2. **[INSERT NAME OF E LE FEUVRE CUSTOMER]** of **[INSERT ADDRESS]** (“**non-JRPM user**”).

### 1 STATEMENT OF PURPOSE

- 1.1 Recognising that the maintenance of and spare parts for agricultural machinery and tractors of a specific brand may constitute relevant markets for the purpose of the Competition (Jersey) Law 2005 (the “**Law**”).
- 1.2 Recognising that it is in the interest of JRPM, the JCRA, ECLF and existing users of Equipment to prevent any infringement of the Law.
- 1.3 Recognising that without behavioural conditions to the approval by the JCRA the proposed acquisition of ECLF by JRPM would result in a substantial lessening of competition in Jersey.
- 1.4 Recognising that in its Decision dated 16 September 2008, the JCRA conditionally approved JRPM’s acquisition of ECLF subject to conditions, including:

- JRPM not discriminating in the terms and conditions of the supply of Morrish Crawlers;
- JRPM providing maintenance services, repair and provision of spare parts for tractors and other agricultural machinery sold by ECLF in a fair, reasonable and non-discriminatory manner;
- JRPM offering a Service Level Agreement (the “SLA”) in the terms of this document to all existing and future Clients of ECLF.

1.5 Recognizing that non-compliance with the aforementioned condition can be grounds for the JCRA to impose on JRPM one or more of the remedies set out in Articles 38 and 39 of the Law.

1.6 Striving to ensure that the needs and requirements all users of equipment are dealt with fairly and in accordance with the Law.

## 2 DEFINITIONS

For the purpose of this SLA, the following definitions apply:

|                      |  |
|----------------------|--|
| “ <b>Client</b> ”    | shall mean a user of Equipment;  |
| “ <b>ECLF</b> ”      | shall mean E.C. Le Feuvre Agricultural Machinery Limited of Kensington Chambers, 46/50 Kensington Place, St. Helier, JE1 1ET;  |
| “ <b>Equipment</b> ” | shall mean all tractors and other agricultural equipment supplied by ECLF whether prior to, or after, its acquisition by JRPM; |

|                         |   |
|-------------------------|---|
|                         |   |
| <b>“Group”</b>          | shall mean any company wherever registered or incorporated which is for the time being a subsidiary or a holding company of JRPM or a subsidiary of any such company (where subsidiary and holding company have the meanings ascribed to them in Articles 2 and 2A of the Companies (Jersey) Law 1991, as amended) and “Group Company” means a company in the Group;  |
| <b>“JCRA”</b>           | shall mean the Jersey Competition Regulatory Authority presently of 2nd Floor, Salisbury House, 1-9 Union Street, St Helier, Jersey JE2 3RF;  |
| <b>“JPRM”</b>           | shall mean Jersey Royal (potato marketing) Limited and any Group companies and for the purposes of conditions imposed by this SLA under Article 22(3)(c) of the Law, any director or other officer of JRPM or the Group companies. JRPM is entering into this SLA for itself and as agent for and as trustee for all Group companies and JRPM hereby confirms and warrants that it is duly authorised to do so. JRPM is a Client and following the acquisition of ECLF, will be a dealer of the equipment similar to Equipment; |
| <b>“Loan Equipment”</b> | shall mean a single mid range tractor loan made available on loan by JRPM to Clients that are users of tractors to be used for breakdowns subject to the terms of the “Terms of Use” document, supplemental to this Agreement;  |
| <b>“Service”</b>        | shall mean the maintenance, service, repair <i>et cetera</i> of Equipment;  |

|                                 |   |
|---------------------------------|---|
|                                 |   |
| <p><b>“Service Ledger”</b></p>  | <p>shall mean an internal JRPM working document (in intelligible written or electronic form) that is to be kept up to date at all times, documenting:</p> <ul style="list-style-type: none"> <li>(i) details of the Service requests and the job code numbers;</li> <li>(ii) each Service carried out on each item of Equipment;</li> <li>(iii) the date and time of the commencement and completion of each Service in (i) above;</li> <li>(iv) the identity of each item of Equipment Serviced sufficient to distinguish it from other items of Equipment;</li> <li>(v) the mechanic or engineer involved in providing the Service; and</li> <li>(vi) the nature of the Service carried out;</li> </ul> |
| <p><b>“Spares”</b></p>          | <p>shall mean the spare parts or equipment or any thing required to complete the Service of the Equipment; and</p>  |
| <p><b>“Spares Register”</b></p> | <p>shall mean the register of the spare parts or equipment required to complete the Service of the Equipment.</p>   |

### **3 EQUITABLE OPERATIONAL PROCEDURES**

#### **3.1 Equal Prioritisation of JRPM (or JRPM contract growers) and non JRPM users for the Service of Equipment**

3.1.1 Service requests by any Client shall be handled on a ‘first come, first served’ basis, where the order of receipt of the Service requests will determine the order of in which Service work is executed. This will be achieved and recorded for monitoring purposes by all Clients and JRPM registering Service requests of all Equipment with JRPM (including those made by JRPM itself as a Client or JRPM’s contract growers) either by way of an e-mail, by telephone or in person.

3.1.2 JRPM will register the details of the Service request in the Service Ledger. Each Service request will be designated a job code the number of which is allocated on the basis of the time of first receipt of the Service request. The job code will immediately be communicated to the Client.

3.1.3 If Service requests are made by any method other than by email, Clients should endeavour to confirm such requests by e-mail to [*insert JRPM email*] as soon as is reasonably practicable. JRPM will as soon as is reasonably practicable and in any event no later than 1 working day after the Service request was made record the Service request by emailing itself at the foregoing email addresses in order to maintain a comprehensive email record of all Service requests.

3.1.4 In the event that there is a question in relation to the performance of the Service by a Client, copies of all Service request emails received and the Service Ledger will be made available by JRPM to the Client for the purposes of inspection and verification of the order of servicing, and such other information as the Client shall reasonably require.

#### **3.2 Permissible Delay in the Service of Equipment and Rights to Information**

3.2.1 Unless the Service cannot be completed due to:

- (i) non-delivery of Spares; or
- (ii) the absence from work (due to sickness or other *bona fide* reason) of an engineer with necessary skills required to complete the Service request in question; and
- (iii) the factors mentioned in (i) and (ii) above are beyond JRPM's control;

each Service will be completed in the order of the job codes (see clause 3.1.1).

3.2.2 In the event that there is a question in relation to a delay in the Service of his Equipment raised by any Client, all relevant details from the Service Ledger and documentary records kept by JRPM regarding the Service of the said Equipment will be made available by JRPM to the said Client for the purposes of showing whether the delay is reasonable or legitimate.

### **3.3 Prompt ordering of Spares and reasonable availability of Express Delivery**

3.3.1 Any Spares which can reasonably be identified by JRPM as being required to perform the Service, will be ordered as soon as reasonably practicable. JRPM will record any such Spares identified in the Spares Register detailing date and time of entry on the Spares Register, the job code, mechanic or engineer involved and (when ordered) the date and time of order.

3.3.2 Once recorded on the Spares Register, the order will be placed as soon as reasonably practicable with the relevant supplier. Any order for Spares will be dealt with and processed according to the standards and charges applicable for all Clients (including JRPM or JRPM's contract growers), including arranging express delivery options as reasonable and appropriate where Spares are urgently required. In the event that there is a query from a Client in relation to a delay in

the timely ordering or delivery of Spares, details of the ordering and delivery process will be made available by JRPM to that Client for the purposes of showing whether the delay is reasonable.

3.3.3 If Spares are ordered from JRPM by any Clients (to be fitted other than by JRPM) the same ordering process will apply as in clauses 3.3 herein and will be confirmed by email in similar manner in accordance clause 3.1 above).

3.3.4 Spares received shall be utilised on behalf of Clients or delivered to Clients in accordance with the order placed on behalf of that client where identifiable, and where not practicably identifiable to a particular order made on behalf of a Client on a 'first come first served' basis in accordance with the date of identification of requirement for a Spare in the Service Register.

#### **3.4 Delivery, Utilisation or Re-direction of Spares**

In the event that a Client raises a question as to the order of delivery or utilisation of Spares on behalf of that Client, or other redirection of Spares from that Client, an inspection of the relevant documents and procedures applicable to those Spares will be made available by JRPM to that Client.

#### **3.5 Wilful neglect or poor standard of Service workmanship on non-JRPM Equipment**

In performing any Service, JRPM will provide all its Clients (including itself) with the same standard of care and skill, and that standard of care and skill shall be the level of care and skill as reasonably to be expected of a dealer.

#### **3.6 Exchange Equipment**

3.6.1 JRPM will keep the Loan Equipment reasonably available during the period from 01 January to 30 June. The Loan Equipment will be available in the event of a

serious breakdown only (i.e. breakdowns requiring major repair work to be carried out by JRPM engineers). The Loan Equipment will be available for a consecutive period of a maximum of 7 days after which the Loan Equipment should be re-allocated on the basis of equity. For the avoidance of doubt, JRPM is not required to provide Loan Equipment for routine Servicing, except by mutual agreement of JRPM and the Client.

3.6.2 The Client agrees to use and pay for the Loan Equipment in accordance with the 'Terms of Use' document supplemental to this Agreement (detailing charge rates and condition of return of Loan Equipment), details of which will be approved John Deere and, if required, the JCRA.

3.6.3 Priority for use of the Loan Equipment will be given on a similar basis as service provision detailed in clause 3.1 of this agreement. Using the information from the Service Ledger, the Loan Equipment will be made available on a first come, first served basis.

### **3.7 Pricing for Service by JRPM**

JRPM undertakes to ensure that:

3.7.1 Charges made in respect of labour involved in the provision of the Service shall be no more than the charges that JRPM understands is levied by other businesses utilizing similarly skilled mechanics / engineers.

3.7.2 When required, charges in respect of Spares are evidenced by manufacturers' invoices or price lists as appropriate.



**4 DATA PROTECTION**

JRPM undertakes that it is registered under the Data Protection (Jersey) Law 2005 and that the disclosure of any data will be in consistence with its obligations under that law, as amended from time to time.

**5 MISCELLANEOUS**

5.1 This agreement does not prejudice any existing contractual rights and obligations of that JRPM as a dealer has towards any users nor does it prejudice the rights of Clients under the laws of Jersey.

5.2 This agreement shall be governed by and construed in accordance with the laws of the island of Jersey and any dispute in relation hereto is subject to the non-exclusive jurisdiction of the courts of Jersey.

|                             |   |                                 |
|-----------------------------|---|---------------------------------|
| Signed for an on behalf of  | ) | _____                           |
|                             | ) | director / authorised signatory |
| <b>JERSEY ROYAL (POTATO</b> | ) |                                 |
| <b>MARKETING) LIMITED</b>   | ) | _____                           |
|                             | ) | director / authorised signatory |

**In acknowledgement of this agreement:**

|                                     |   |                                 |
|-------------------------------------|---|---------------------------------|
| Signed for and on behalf of         | ) | _____                           |
|                                     | ) | director / authorised signatory |
| <b>[INSERT NAME OF E LE FEUVRE)</b> | ) |                                 |
| <b>CONSUMER]</b>                    | ) | _____                           |
|                                     | ) | director / authorised signatory |