



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

**Decision M 114/07**

**Proposed Acquisition**

**by**

**Spar (Channel Islands) Limited**

**of several stores from**

**C.I. Newsagents Limited**

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## **I. EXECUTIVE SUMMARY**

1. This Decision concerns the proposed acquisition by Spar (Channel Islands) Limited ('Spar'), which operates retail outlets under the 'Spar' name, of primarily 13 retail outlet convenience stores from C.I. Newsagents Limited ('CIN'), which mainly operates under the 'rStore' name. This proposed acquisition was notified to the JCRA under the provisions of Part 4 of the Competition (Jersey) Law 2005.
2. As a result of its analysis, the JCRA concludes that the proposed acquisition raises the risk of a substantial lessening of competition in two areas: (i) a horizontal overlap in a part of Jersey roughly delineated by the northern parts of the A10 (La Grande Route de St Laurent) and the A8 (La Route de la Trinité), and (ii) with respect to certain ancillary arrangements agreed to by the Parties. However, the JCRA also is satisfied that remedies proposed by the Parties address both concerns, meaning that the proposed acquisition may proceed, subject to compliance with conditions imposed by the JCRA in this decision, without an appreciable adverse risk to competition in Jersey or any part thereof. Accordingly, in this Decision, the JCRA approves the proposed acquisition, subject to the Parties compliance with certain conditions specified herein.

## **II. INTRODUCTION**

3. On 10 April 2007, the JCRA received an application for approval under Articles 20 and 21 of the Competition (Jersey) Law 2005 (the 'Law') concerning the proposed acquisition by Spar (Channel Islands) Limited ('Spar') of 13 retail outlets from C.I. Newsagents Limited ('CIN') (together the 'Parties').
4. Initially, some detail was missing from the application, and additional information was requested and received. The application was registered on 17 April 2007. The JCRA published a notice of its receipt of the application on its website and in the Jersey Gazette, inviting comments on the proposed acquisition by 2 May 2007. No comments were received. In addition to public consultation, the JCRA consulted with some of the Parties' competitors and customers concerning the proposed acquisition.

5. On 17 May 2007, the JCRA advised the Parties that the JCRA had potential competition concerns regarding the proposed acquisition and that the JCRA would need to conduct a full investigation, as provided for in the JCRA guideline *Mergers and Acquisitions* (the ‘Guideline’).<sup>1</sup> As stated in the Guideline, a full investigation requires the Parties to the proposed merger or acquisition to pay an additional fee to cover the JCRA’s reasonable fees and costs associated therewith. The JCRA’s examination of this matter was thus suspended pending receipt of this fee, which was not received until 4 July 2007.

### **III. THE NOTIFIED TRANSACTION**

6. The letter of intent dated 5 April 2007 sets out the basic details of the proposed acquisition. If implemented, the proposed acquisition would result in Spar providing retail services from 13 retail outlets currently utilised by CIN. This would involve the take-over of:

- the goodwill of these convenience store businesses;
- the leases (or, in the case of one location, the grant of a new lease by Spar instead of CIN);
- all the tenants fixtures and fittings and other equipment belonging to CIN and situated at the locations;
- a van; and
- the ‘sound and seasonable’ stock in trade present at the locations on the date upon which the acquisition shall be completed (the ‘completion date’).

7. Table 1 below is a list of the 13 locations that are part of the proposed acquisition:

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<sup>1</sup> This guideline can be found on the JCRA’s website [www.jcra.je](http://www.jcra.je).

<b>Table 1: Locations that are subject to the proposed acquisition</b>		
1	rStore	David Place
2	rStore	Green Island
3	rStore	Gorey
4	rStore	Mulcaster Street
5	rStore	Trinity
6	rStore	St John
7	rStore	Maufant
8	rStore	Six Roads
9	rStore	La Moye
10	rStore	Charing Cross
11	rStore	Bath Street
12	Pickwicks	Quennevais Parade
13	Pickwicks	Queen Street

8. The letter of intent also includes the option for Spar to acquire, alone or in combination, three properties from CIN or its parent, The Guiton Group Limited. This option may be exercised up to six months after the completion date. Two of these properties are residential properties (14 St Marks Road and 1 Raleigh Avenue, both in St Helier); the other property (Maufant Premises) is the location of one of the rStore locations that is part of the acquisition.

#### **IV. THE PARTIES**

(a) *CIN*

9. According to the application, CIN is a Jersey-registered business, wholly-owned by The Guiton Group Limited ('Guiton'), also a Jersey-registered business. The ultimate owner of Guiton is Claverley Croup Limited, a company incorporated in England and Wales. Guiton is the 100% owner of Jersey Evening Post Limited, the publisher of the *Jersey Evening Post* and the only wholesale newsagents handling UK newspapers and magazines. Guiton is also the 100% owner of Itex, a

computer and supplies company active in Jersey and Guernsey.

10. At the time of submission of the Merger Application Form, Guiton also operated 6 retail shops in the Isle of Wight and 14 shops in the Isle of Man. In line with Guiton's policy to relinquish their retail operations in Jersey, the shops in the Isle of Wight and in the Isle of Man were recently sold. CIN will retain two retail outlets in Jersey. However, these retail outlets are not in the convenience stores sector but are a newsagents and a gift shop, respectively.

(b) *Spar*

11. According to the application, Spar is a Jersey-registered business, wholly-owned by the Lodestar Group Limited ('Lodestar'). Lodestar is also the 100% owner of the Channel Island Wholesale Company ('CIWG') (active in the wholesale of foods and beverages), Yacht Hotel Limited (which holds and operates the Royal Yacht Hotel), and Britannia Properties (Channel Islands) Limited (a property holding company).

## **V. THE REQUIREMENT FOR JCRA APPROVAL**

12. Based on information provided by the Parties, the JCRA concluded that the proposed acquisition requires notification under one or more of the thresholds set out in the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the 'Order'), namely under Articles 1(1), 1(2) and/or 1(4). On this basis, pursuant to the Order, the JCRA's approval is required under Article 20(1) of the Law before the proposed acquisition is executed.

## **VI. OVERVIEW OF THE ASSESSMENT**

13. Under Article 22(4) of the Law, the JCRA must determine if the proposed acquisition would substantially lessen competition in Jersey or any part thereof, pursuant to the procedures set forth in the Guideline.
14. Under Article 60 of the Law, the JCRA must attempt to ensure that, so far as

possible, questions that arise under the Law in Jersey are dealt with in a manner that is consistent with the treatment of corresponding questions that have arisen under competition law in the European Union.

15. The JCRA identifies two different levels where potential competitive effects may arise. The first is the market at the retail level and the second is the market at the wholesale level. The Parties have stated that there are no other vertical relationships involving any undertaking within CIN or Lodestar and the retail and/or wholesale market. Therefore, the analysis is limited to these two markets.
16. As detailed below, as a result of this analysis, the JCRA concludes that the proposed acquisition would raise the risk of a substantial lessening of competition with respect to the retail level. This risk is substantially eliminated, however, with the imposition of conditions to the JCRA's decision under Article 22(1). The acceptance of these conditions by the parties would allow the proposed acquisition to proceed. Also as detailed below, the JCRA also concludes that conditions to its decision are necessary concerning certain ancillary arrangements agreed to by the parties.

## **VII. DEFINING THE AFFECTED RELEVANT MARKET(S)**

### **a. Retail Markets**

#### *(i) The Relevant Product Market*

17. 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>2</sup>
18. For the purpose of this Decision, and in line with precedent, the relevant markets are defined as particular outlets distributing a particular range of products rather

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<sup>2</sup> *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. C 372 at 2 (09.12.97).

than the individual products supplied. Also in line with EU precedent,<sup>3</sup> the JCRA will use the range of products defined as ‘at least the food and non-food products that are normally found in convenience shops’ as the basis of the product market definition.

19. The Parties consider the market in which they operate in Jersey to be the convenience market, being the market which the Experian Report<sup>4</sup> identifies as the market for consumables. A key question is whether convenience stores as such form a relevant product market distinct from other retail outlets from the perspective of the Jersey consumer.
20. There are several possible distinctions that can be made to differentiate between retail outlets. The JCRA has to consider whether it would be appropriate to apply in Jersey distinctions that have been applied in larger economies. Possible distinctions that have been used in EC Competition Law are (a) the size of the retail outlet and (b) opening hours.

#### *Size of Retail Outlet*

21. It may be possible to define a relevant market according to floor space. However, the JCRA’s investigation indicates that a distinction on floor space appears to be less relevant in Jersey. For example, one convenience store identified a nearby Spar as well as a large supermarket, the Co-op Grande Marché, as his main competitors even though the Co-op Grand Marché obviously has a much greater floor space than the Spar or the convenience store. There are also Jersey specific aspects that should be taken into account. For example, the overall size of the Jersey market (a population of less than 90,000 inhabitants) and the restricted space available on the Island imply that even the largest supermarket in Jersey will be small in comparison to the average supermarket in the UK market, that

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<sup>3</sup> Commission Decision Case M1221, Rewe/Meinl of 3 February 1999, at number 10.

<sup>4</sup> Assessment of Jersey’s Retail Sector, consultancy paper prepared by Experian Property Consultancy, December 2007.



may cater for a much larger and perhaps more heterogeneous customer base.<sup>5</sup> This implies that it would not appear to be appropriate to strictly adhere to the footage based market delineation used in the Office of Fair Trading ('the OFT') and the Competition Commission ('the CC') precedent.<sup>6</sup>

22. Therefore, for the purpose of this Decision, the relevant retail product market is not determined on the basis of the outlet floor size.

### *Opening Hours*

23. The longer the opening hours, the greater the possibility that the outlet can cater for consumer demand. Whereas large supermarkets are generally limited to opening hours extending to office hours and early weekday evenings and Saturdays, convenience shops generally have longer opening hours. This implies that those retail outlets that are open for fewer hours only place a partial competitive constraint on retail outlets with longer opening hours.

24. Of the retail outlets known to the JCRA that could possibly be part of the relevant product market, there are five locations that are closed on Sundays, including the main supermarkets.<sup>7</sup> We note that there are no significant differences in opening hours other than that the major supermarkets are closed on Sundays. Therefore, the single most important competitive advantage that the smaller outlets have appears to be restricted to Sunday trading.

25. For most purchases there are no compelling reasons for consumers in general to make their purchases on Sundays and therefore there appear to be possibilities for

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<sup>5</sup> The Experian Report (p.8) notes that the market structure in the UK and Jersey are widely different, where the 'Big Four' have 70% of the UK market and where the 'Third Tier' have 10%, whereas the similar percentages in Jersey are 0% and 51% respectively.

<sup>6</sup> See for example the decisions in footnotes 15 and 16 below.

<sup>7</sup> Checkers Rue de Pres, Checkers St Brelade, Co-op Grande Marché St Helier, Co-op Grande Marché St Peter and Safeways Superstore St Helier. With respect to opening hours it should be noted that that the current Shops (Sunday Trading) (Jersey) Law 1960 only allows trading on Sunday if permission is granted.

- substitution by purchasing on other days.<sup>8</sup> Therefore, there are no compelling reasons to exclude the five stores that are closed on Sundays from the relevant retail product market.
26. Nevertheless, for the purpose of this decision, we will assume that the market definition is restricted to those retail outlets that open at least some hours on Sundays. If there are no competitive concerns using this narrow definition of the market, there will generally be no competitive concerns when including retail outlets that are closed on Sundays since this would reduce any potential effect on competition that the acquisition may have.
27. Therefore, for the purpose of this decision we will therefore assume that the relevant retail product market includes all the retail outlets that offer at least the range of products defined as food and non-food products that are normally found in convenience shops and that are open for at least some hours on Sundays.

*(ii) The Relevant Geographic Market*

28. The geographical market is the area over which substitution takes place. It comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.<sup>9</sup>
29. For retail outlets such as convenience stores, relevant geographic markets generally have been defined in terms of a ‘catchment area.’ A catchment area comprises the area around a store from which most of its customers originate.
30. Precedent from the UK suggests that with respect to convenience stores, the

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<sup>8</sup> One obvious exception to this is the sale of Sunday papers, the sale of which is not restricted to retail outlet that offer the standard range of food and non-food items offered by convenience stores.

<sup>9</sup> See JCRA guideline *Mergers and Acquisition*.

catchment area (and hence, the relevant geographic market) is a radius of between ½ and 1 mile around the retail outlet, depending on the circumstances.<sup>10</sup>

31. The JCRA considered whether this precedent from the UK is applicable in Jersey. As part of this analysis, the JCRA considered the following:

- On the demand-side (that is, the behaviour of customers), there is some evidence that shopping behaviour in Jersey is influenced by daily movements on the Island, meaning that small catchments areas may not be appropriate. A reason for this is that the major concentration of shops is in St Helier and that most of the employment in, for example, the financial sector, is in St Helier. Thus, people who work in St Helier but live in another parish may have the ability to substitute purchases done in their home parish for purchases done in St Helier.
- On the supply side (that is, the behaviour of suppliers), there is some evidence that there are economies of scale for suppliers such as Spar to market and price their products on an Island-wide basis. Indeed, both Spar and CIN follow a ‘national’ pricing policy with respect to Jersey, meaning that regardless of location, the prices of goods sold in their convenience stores are the same. This would support the notion that the relevant geographic market is Island wide.

32. The JCRA concludes that the most prudent approach is to apply the UK precedent in Jersey and define the relevant geographic area in terms of a radius of between ½ and 1 mile around the retail outlet. The reasons for this conclusion are the following:

- Consistent with prior JCRA merger decisions and EU precedent, the JCRA generally favours a narrow approach with respect to market definition. If a proposed acquisition is unlikely to substantially lessen competition when a market is viewed narrowly, it is even less likely to do so if the relevant market is expanded to include additional sources of supply.

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<sup>10</sup> See, for example, the Decision of the Office of Fair Trading in *Musgrave Investments – Londis* ¶ 8 (30 Sept. 2004).

- Article 22(4) of the Law states that the JCRA may refuse to approve a proposed merger or acquisition if the transaction would substantially lessen competition in Jersey *or any part of Jersey*. This implies that in drafting and enacting the Law, the States intended the JCRA to examine potential local market circumstances in its review of proposed mergers and acquisitions reported to it for approval.
- With respect to the evidence summarized above in Paragraph 31, which may support the conclusion of an Island-wide market:
  - Not all consumers in Jersey may have the ability to substitute outlets in St Helier for their local convenience store. This would include consumers who do not work in St Helier, or otherwise have no opportunity to satisfy their convenience store needs there because of their age and physical condition or family commitments.
  - Even for consumers that do work in St Helier, they may not have reason to go there on Sundays which, as detailed above, is a limiting parameter of the relevant product market. This implies that for all consumers in Jersey, on at least one day of the week (and perhaps after-hours on other days as well), they will be dependent on their local convenience store.
  - As for the conduct of suppliers, the JCRA is hesitant to rely on the current policies of private entities for the protection of consumers' interests. Economic circumstances may currently result in suppliers following Island-wide pricing and marketing policies, but the circumstances (or, and perhaps more importantly, the suppliers' perception of them) may change. The JCRA concludes that consumers can only be protected through the attachment of conditions to its decision concerning the proposed acquisition. These conditions would require Spar to follow Island-wide pricing policies as a condition to the JCRA's approval of the proposed acquisition.

**b. Wholesale Markets**

*(i) The Relevant Product Markets*

33. The wholesale market can be differentiated on the basis of various criteria. First, the wholesale level involves a category of products provided to (for the purpose of this decision) retailers, and the provision of each of these categories of products may in itself be a relevant market.<sup>11</sup> In addition to the actual sale of the products to the retailer, it may include services such as the storage and distribution of ambient, chilled or frozen products. Second, the range of products and/or services supplied may affect the relevant market.
34. The JCRA has investigated if there is evidence to support these criteria for differentiation. There is no evidence that a distinction between sales, storage and distribution is useful, as all wholesalers contacted offer the three services in combination. CIWG has provided a breakdown of the wholesale market in the following product categories:

<b>Table 2: Potential Wholesale Product Categories</b>
Tobacco
Beers, wines & spirits
Soft Drinks
Ambient grocery
Chilled & frozen grocery
Ice Cream
Confectionary
Crisps & Snacks
Non-food toiletries
Non-Food household

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<sup>11</sup> In general, wholesale services extend to the supply of goods to hotels, restaurants, etc, however for the purpose of this decision the JCRA is only concerned with the supply of goods to retailers.

35. It may be possible that customers do not regard buying from a group of wholesalers that only offer a limited number of product categories a substitute for a wholesaler offering all products categories. Smaller retailers, in particular, may require a single wholesaler to provide a wide range of products, and cannot practically source different products from different retailers.

36. Therefore, the JCRA will examine the potential effects of the proposed acquisition in terms of both the individual product categories identified in Table 2, and the supply of those products taken in the aggregate.

(ii) *The Relevant Geographic Market*

37. CIWG provides wholesale services to the whole of Jersey. The other suppliers of wholesale services also provide their services to the whole of Jersey. There are no indications that relevant geographic wholesale market is smaller than Jersey

38. The JCRA also has evidence that some retail outlets obtain part of their supplies from wholesalers that are based in the UK.

39. The JCRA concludes that the relevant market geographic wholesale market is Jersey. If there are no competitive concerns in this narrowly defined geographic market, there would generally be no competitive concerns if the geographical market were expanded to include suppliers based in either the UK or other areas outside of Jersey.

## **VII. EFFECTS ON COMPETITION**

### **a. Retail Markets**

40. As detailed above, the JCRA has analyzed the proposed acquisition's potential effects on a local level in Jersey (i.e., catchment areas defined as ½ to a 1 mile radius for the retail outlet in question) for stores that offer at least the range of products defined as food and non-food products that are normally found in

convenience shops and that are open for at least some hours on Sundays.

41. Based on this approach, there are many locations where, after the proposed acquisition, several competing sources of supply would remain. For example, following the proposed acquisition customers in St Helier would still have an alternative retail outlet within a mile of each Spar outlet. This results in the conclusion that competition will not be substantially lessened in St Helier. Similar conditions exist in other densely populated areas in Jersey, such as Quennevais, and indeed most of the rural areas as well.
42. With respect to one rural area in Jersey, however, the proposed acquisition would appear to substantially reduce the number of sources of supply. This area is roughly delineated by the northern parts of the A10 La Grande Route de St Laurent and the A8 La Route de la Trinité. In this general area there are three rStores outlets (Trinity, Six Roads and St John) and two Spar outlets (Haut Croix and Sion). There are no other relevant retail outlets in this area. This implies that this area would have a reduction from - currently – retail outlets from two competitors to - post-acquisition – outlets from one competitor. In this area, therefore, the proposed acquisition has the potential, at least, to substantially lessen competition.

**b. Wholesale Markets**

43. A potential vertical issue exists as CIWG, part of the buyer Lodestar, is a wholesale business supplying both independent retailers and their own, vertically integrated, Spar retail outlets.
44. The possible competitive concern arises with respect to the fact that, if CIWG were to be or become dominant on the wholesale level, Lodestar may have had an incentive to worsen its offer through CIWG to independent retailers so that these may be disadvantaged at the retail level relative to the Spar retail outlets. Such a strategy may affect the viability of the independent retail outlets and ultimately could result in less choice and higher prices for consumers.

45. The central question to be answered by the JCRA is whether CIWG is or will become dominant on the wholesale markets and whether it would be possible for retailers in general to source products from wholesalers other than CIWG. As detailed above, the JCRA has analyzed this question with respect to product groups taken individually, and a range of products that a wholesaler like CIWG may supply to convenience stores.

(ii) *Individual Wholesale Product Groups*

46. The JCRA concludes that, when looking at the individual product categories, CIWG is not dominant in the wholesale supply of any product group. This is because, as detailed in the following table, for each product group identified by CIWG, alternative sources of supply exist.

<b>Table 3: Competitors in individual product categories</b>										
	Tobacco	Beers, wines & spirits	Soft Drinks	Ambient grocery	Chilled & frozen grocery	Ice Cream	Confectionary	Crisps & Snacks	Non-food toiletries	Non-Food household
CIWG	X	X	X	X	X	X	X	X	X	X
AC GAllie	X	X	X							
Carob			X					X		
Cimandis/Victor Hugo	X	X	X				X	X	X	
Easenmyne				X	X					
La Collette Cold Store				X	X					
Randall's Vautier		X	X							
Valley Foods			X	X	X	X	X	X	X	X
Wilkinson's			X				X	X	X	

The contents of Table 4 show that there are alternatives to CIWG for all product



groups.

47. In addition, CIWG supplied a list of UK wholesale companies, the majority of which will supply to Jersey based business: Palmer & Harvey, Batley's, Hancock's Cash & Carry, M&S Toiletries, DCS UK, Winerite, News and Food Wholesale, Hoss Supplies, Bestway and Booker.<sup>12</sup> The JCRA has evidence that there is at least one UK based wholesaler providing goods to Jersey based retail outlets in the relevant product market. UK based wholesalers are not taken into account in Table 3 but should be taken into account when assessing the competition in the wholesale sector as other retail outlets can also, alone or in combination, purchase from UK based wholesale companies.
48. Furthermore, some of the larger competitors at the retail level supply their own outlets. These self-supplying competitors at the retail level will generally not be taken into account any further.<sup>13</sup> However, in the Jersey context, the possibility that undertakings that distribute and supply to their own shops may pose a competitive constraint on wholesalers cannot be ruled out.

(ii) *Range of Wholesale Product Groups*

49. Despite this, for some retail outlets, especially smaller convenience stores in Jersey, sourcing different product groups from different wholesale suppliers may not be the preferred or even a viable option. The small purchasing volumes and other circumstances specific to such retailers may require that they purchase a range of products from a single source, instead of relying on different wholesales to supply different products.
50. Evidence suggests that many smaller convenience stores in Jersey source the range of their wholesale supplies from CIWG. For these stores, CIWG may

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<sup>12</sup> Information from CIWG received on 26 July 2007.

<sup>13</sup> See the Musgrave–Londis decision of 30 September 2004 in which the OFT determined that there is little possibility of actual direct competition from an undertaking that only distributes and supplies retail shops that are owned or that are members

already be in a dominant position on the wholesale level. However, this situation does not change as a result of the proposed acquisition. Both CIWG's vertical link with Spar and CIWG position on the wholesale market pre-existed the proposed acquisition. Furthermore, CIWG already supplied rStores before the proposed acquisition, meaning that this relationship also does not change as a result of the proposed acquisition.

51. In its analysis of proposed mergers and acquisitions, the Law only provides the JCRA with the ability to refuse approval or impose conditions on a proposed merger or acquisition that would *result* in a substantial lessening of competition. Market circumstances that are not affected by the proposed merger or acquisition, even if less than ideal, are not subject to merger review and cannot be the object of remedies.
52. Thus, the JCRA concludes that with respect to the wholesale supply of a range of products, the proposed acquisition does not change the existing market circumstances, meaning that the proposed acquisition would not result in a substantial lessening of competition.

## **VIII. NON-COMPETE CLAUSE**

53. According to the letter of intent, the agreement between the seller and the buyer shall contain warranties preventing CIN or Guiton from trading in competition to the convenience stores business, as defined by the Parties. The precise terms of this non-compete clause are yet to be defined.<sup>14</sup>
54. Under competition law as defined in the European Union, non-compete clauses are subject to analysis in merger review.<sup>15</sup> The JCRA considered the potential

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<sup>14</sup> This does not include the retained premises for the balance of the term of the current lease held by CIN in respect of these retained premises (letter of intent, item 9)

<sup>15</sup> See *Commission Notice on restrictions directly related and necessary to concentrations*, O.J. C 56/03 ¶¶ 1, 10 (5 March 2005). Article 60 of the Law requires that, so far as possible, matters arising under

effects on competition arising from this constraint. In order to determine whether or not a clause of this kind is justified by the legitimate objective of implementing the concentration, it is necessary to consider whether their duration, their geographical field of application, their subject matter and the persons subject to them do not exceed what is reasonably necessary. This in turn, makes it necessary to examine what would be the state of competition if the clause did not exist.<sup>16</sup>

55. Whereas the exact non-compete clause to be agreed upon is not detailed, the letter of intent lists the outline. The first limit listed is that these additional warranties, which are to be 'of a nature and extent typically expected in an acquisition commensurate with the Acquisition', will be limited to one year following the completion date.<sup>17</sup>
56. If the non-compete clause were to extend to a period of over one year, this would affect one of the potential sources of competition to Spar on at least the wholesale market. This implies that the inclusion of a non-compete clause covering a period of over one year could potentially results in a substantial lessening of competition in Jersey or any part of Jersey.
57. If the non-compete clause were to be limited to the scope stated in the letter of intent, the JCRA concludes that the restrictions on the to be agreed upon non-compete clause, in particular the one year time limit, comply with the guidance given by the European Commission on non-competition clauses, and we see no justification for departure from this guidance in this matter.

## **IX. CONCLUSIONS CONCERNING EFFECTS ON COMPETITION**

58. As detailed above, as a result of its analysis, the JCRA concludes that the

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competition law in Jersey are treated in a manner that is consistent with the treatment of corresponding questions arising under competition law in the European Union.

<sup>16</sup> See ECJ Case 42/84 *Remia*, par.18-20 and CFI Case T-112/99 *Métropole Télévision*, par.109.

<sup>17</sup> Letter of intent, item 9.2.1.

proposed acquisition, if implemented as originally intended by the parties, results in two risks of a substantially lessening of competition:

- A reduction of horizontal competition on the retail market in a part of Jersey roughly delineated by the northern parts of the A10 (La Grande Route de St Laurent) and the A8 (La Route de la Trinité); and
- The possibility of an unjustified reduction in potential competition if the non-compete clause was to extend to a period of over one year.

59. The JCRA has no grounds to conclude that markets conditions such as entry or buying power would themselves be sufficient to remedy the potential for a substantial lessening of competition. The parties also have not provided substantial evidence concerning potential efficiencies arising from the proposed acquisition.

#### **X. REMEDIES ADDRESSING THE POTENTIAL SUBSTANTIAL LESSENING OF COMPETITION**

60. In line with its prior decisions and EU precedent, the JCRA will consider whether remedies, in the form of conditions to its decision under Article 22(1), would eliminate the risk of a substantial lessening of competition that may arise from a proposed merger or acquisition.<sup>18</sup>

61. The parties have proposed remedies here, both with respect to the concern on the retail market and with respect to the ancillary restraint. These are the following:

- With respect to potential concerns on the retail level, Spar has told the JCRA that it would not object to conditions that would make its current policy of Island-wide pricing a legal obligation under the Law; and
- With respect to ancillary restraints, the parties' letter of intent indicates that

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<sup>18</sup> See, for example, the JCRA decision in *Ferryspeed (C.I.) Limited/Channel Express (C.I.) Limited* (3 July 2006).

this will be limited to one year.

62. The JCRA concludes that these conditions would substantially eliminate the risks of a substantial lessening of competition identified above:

- As detailed above, while adequate alternative sources of supply may exist most of Jersey, to the extent that Spar could not profitably, after the acquisition, increase prices given the expected responses by customers and competitors, such would not be the case in the geographical area outlined in Paragraph 42, outlined above. However, by making Island-wide pricing a requirement (as opposed to a policy that Spar simply chooses to follow voluntarily), the JCRA can assure that prices set in competitive markets such as St Helier are applied Island-wide.
- With respect to the ancillary restraints, limiting the parties non-compete clause to one year would be consistent with the relevant EU guidelines concerning this type of ancillary restraint, to which the JCRA must have regards under Article 60 of the Law.

63. The Decision also provides the JCRA with the means to monitor the Parties' compliance with the conditions by requiring the submission of information. In addition, the JCRA also expects to monitor market conditions from public sources, as well as any information it may receive from consumers.

64. The uniform pricing condition set forth herein is limited to 3 years. A 3 year limitation is consistent with prior cases from EU member states on the limitations of behavioural remedies applied in merger review.<sup>19</sup> During this time, Spar may apply to the JCRA to vary, amend, or exclude this obligation in particular circumstances. The determination of any such application will be a matter within the JCRA's sole discretion.

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<sup>19</sup> See, for example, for decisions of the UK Competition Commission in *Dräger/Air-Shields* and the Portuguese Competition Authority in *Dräger Medical/Hillenbrand*.

65. The JCRA therefore concludes that it would be proportionate in this matter to approve the proposed acquisition, subject to the conditions listed below.

## **XI. DECISION ATTACHING CONDITIONS**

66. Under Article 22 of the Law, the JCRA approves Spar's acquisition registered on 17 April 2007. This approval is subject to compliance by the Parties with the following conditions:

- For a period of 3 years following the acquisition, Spar shall be obliged to follow an Island-wide pricing policy with respect to its convenience stores in Jersey, i.e. prices should be uniform for products irrespective of which convenience store it is offered in.
- The Parties shall strictly adhere to the outline of the non-compete clause listed in the letter of intent by the Parties and limit any non-compete clause to a period of one year following the acquisition. The Parties shall provide the JCRA of a copy of the non-compete clause at least three working days before consummation of the acquisition so that the JCRA can assure itself that this condition is being met.
- In addition, CIN and/or Spar 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 compliance with this Decision and the conditions attached thereto.

67. The JCRA may, where appropriate, in response to a written request from Spar showing good cause, modify, vary 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.

68. Compliance with the conditions set forth in Paragraph 68 is binding on both CIN and Lodestar, as well as on any of their assignees or successors, under Article 22(3)(a) of the Law.

**19 September 2007**

**By Order of the JCRA Board**