Jersey Competition Regulatory Authority ("JCRA")

Decision M547/10

Proposed Acquisition

of

Cadbury plc

by

Kraft Foods Inc

The Notified Transaction

1. On 28 January 2010, the JCRA received an application (the "**Application**") for approval under Articles 20 and 21 of the Competition (Jersey) Law 2005 (the "**Law**") concerning the proposed acquisition of the entire share capital of Cadbury plc ("**Cadbury**") by Kraft Foods Inc ("**Kraft**").

2. The JCRA registered a notice of its receipt of the Application in the Jersey Gazette on 30 January 2010 and on its website on 1 February 2010, inviting comments on the proposed acquisition by 15 February 2010. No comments were received.

3. In addition to Jersey, the parties stated that the proposed acquisition required the approval in many jurisdictions, including the European Union, and that the required filings had been made with the authorities in these jurisdictions. The JCRA has had contact with the European Commission regarding the proposed acquisition.

The Parties

(a) Cadbury

4. According to the Application, Cadbury is primarily active in the manufacture and sale of chocolate confectionary, sugar confectionary and chewing gum. Cadbury is active in over 60 countries worldwide. Within the European Economic Area ("**EEA**"), the chocolate confectionary activities are focused on a few countries. Its main chocolate brand is Cadbury Dairy Milk, which is sold primarily the United Kingdom and Ireland.

(b) Kraft

5. Kraft is active in the manufacture and sale of in particular snacks, beverages, dairy and cheese, grocery and convenient meals. Kraft is active in more than 150 countries worldwide. In the EEA, Kraft's main chocolate brands include Milka, Toblerone and Côte d'Or. Other brands of products supplied by Kraft include Dairylea cheese, Jacobs coffee and Oreo cookies.

The Requirement for JCRA Approval

6. According to Article 20(1) of the Law, a person must not execute certain mergers or acquisitions except with and in accordance with the approval of the JCRA. According to Article 2(1)(b) of the Law, a merger or acquisition occurs for the purpose of the Law if a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking.

7. Kraft applied for JCRA approval under Article 1(1) of the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the "**Order**"), which requires JCRA approval under Article 20(1) of the Law where the merger or acquisition would create under undertaking with a share of 25% or more of the supply of purchase of goods or services of any description supplied to or purchased from persons in Jersey or enhance such a share held by an undertaking. According to the application the execution of the proposed acquisition would create an undertaking with share of 25% or more of the supply or purchase of chocolate supplied to or purchased from persons in Jersey. Therefore, pursuant to the Order, the JCRA's approval is required under Article 20(1) of the Law before the proposed acquisition may be executed.

8. On 29 January 2010, Kraft informed the JCRA that Kraft was expected to take control over Cadbury on 2 February 2010 in accordance with the UK Takeover Code. To comply with the Law concerning the proposed acquisition, Kraft provided a written undertaking to the JCRA, in which it committed not to complete the proposed acquisition in Jersey until after the JCRA's review and approval. Specifically, Kraft would refrain from integrating the business of Cadbury associated with Jersey, including the direct and indirect means of distribution that Cadbury uses to supply its products in Jersey, until after the JCRA issues its final decision and any and all appeals by Kraft under the Law have been exhausted. Kraft also agreed to supply the JCRA with all information necessary to complete its analysis, and to agree with any remedies the JCRA may seek to impose on the proposed acquisition to prevent a substantial lessening of

competition in Jersey or any part of Jersey, subject to the legal procedures set out in the Law.

Assessment

9. 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 JCRA Merger Guideline.[1] As detailed below, the JCRA concludes that this would not be the case.

Defining the Affected Relevant Market(s)

(i) The Relevant Product Market(s)

10. "*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*"[2]

11. According to the Application, the parties only have an overlap in the production and sale of chocolate confectionary. Whereas Kraft view the sector within which chocolate confectionary operates as being one for snacking products, Kraft recognizes that for the purpose of assessing the competitive impact of the proposed acquisition, the relevant product market is that of chocolate confectionary products.

12. In its Decision concerning the proposed acquisition, the European Commission reiterated that in its previous decisions, it had considered but not concluded that that chocolate confectionary might constitute a separate market within the snacking market.[3] Within the chocolate confectionary category, separate markets for "chocolate tablets", "countlines" and "pralines" were identified for the

[1] JCRA Guideline, *Mergers and Acquisitions* at 6.
[2] *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. C 372 at 2 (9 December 1997).
[3] European Commission Decision M.5644 Kraft Foods/Cadbury of 6 January 2010, section 13.

purpose of the Decision.[4] In addition, for the UK market, the European Commission found evidence to distinguish between British heritage chocolate and continental chocolate.

13. For the purpose of this Decision, in line with the European Commission, the JCRA will assume that there are separate markets for countlines, tablets and pralines.

(ii) <u>The Relevant Geographic Market</u>

14. The geographic market is the area in which competition takes place.

15. For the purpose of its application with the European Commission, Kraft, in line with previous decision by the European Commission, concluded that the geographic markets are national in scope. The market investigation confirmed the importance of national brands, the divergence in market shares in different EU Member States and national pricing.

16. For the purpose of the application with the JCRA, according to Kraft, the relevant geographic market cannot be considered more narrowly than comprising Jersey and the UK. In Kraft's opinion, the market evidences strong similarities between Jersey and the UK.

17. According to the JCRA, there is no evidence that the market comprises Jersey and the UK. The supply side in Jersey differs significantly from that in the UK; for example, in Jersey there are only two supermarket chains compared to many in the UK, which results in retail prices that are generally different in Jersey compared to the UK.[5] The range of products on offer also appears to be slightly

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[4] The European Commission found that countlines form a separate market from other types of chocolate confectionary on the basis of differences in consumption and purchasing patterns (Decision M.4824 Kraft/Danone Biscuits).

[5] *Comparison of Food Prices in Jersey and the United Kingdom*, JCRA Response to a Request Received from the Economic Development Committee under Article 6(4) of the Competition Regulatory Authority (Jersey) Law 2001, JCRA, 11 October 2005. Chocolate prices were exceptional during this period, with prices on average less than two percent higher.

different where it concerns small local producers, but this difference only affects a very small part of the overall quantities sold within the respective jurisdictions.

18. Consumer preferences do appear to be comparable, as indicated below. But whereas the demand side in Jersey and the UK respectively may evidence strong similarities, this does not imply that consumers see chocolate confectionary offered in the UK as a close substitute for chocolate confectionary offered within Jersey, and that these jurisdictions constitute one relevant market for the purpose of the Decision. The average weekly household expenditure on chocolate in Jersey was £1.70 according to the Report on the Jersey Household Expenditure Survey 2004/05, and this low value in itself indicates that consumer may have very limited incentives to search for alternative suppliers of chocolate confectionary in other jurisdictions such as the United Kingdom.

19. Therefore, for the purpose of this Decision, the JCRA will assume that the relevant geographical market is Jersey.

Effect on Competition

20. According to the Application, the acquisition would have no adverse effect on competition in Jersey even if the geographical market was Jersey alone.

21. The European Commission issued its Decision regarding the proposed acquisition on 6 January 2010. The European Commission concluded in relation to the United Kingdom market that:

- Cadbury, a producer of British heritage type of chocolate, has the highest market share in the UK.

- Kraft, a producer of mainly continental type of chocolate, has the fourth largest, market share, which is very much smaller that that of the number two and three suppliers Mars and Nestlé/Rowntree.

- Kraft and Cadbury's activities do not overlap in the market for countlines.

- For both tablets and pralines, Kraft chocolate brands are not seen as the closest competitors to any of Cadbury's chocolate brands and there is no indication that the Kraft brands Toblerone, Milka or Côte d'Or exert a significant competitive constraint on Cadbury's tablet brands.

- Merger simulation analysis suggests that the proposed acquisition is unlikely to result in significant price increases for chocolate tablets in the United Kingdom.

- Taken all these elements into account, the proposed concentration does not raise serious doubts as to its compatibility with the common market with respect to the market for chocolate pralines and chocolate tablets in the United Kingdom.

22. In order to assess to what extent the conclusions drawn by the European Commission in relation to the UK market are applicable to Jersey, the JCRA assessed the market shares for the various producers in Jersey. The assumption is that similar market shares in UK and Jersey are a strong indication that preferences and market conditions are similar in these jurisdictions.

23. The JCRA assessed the wholesale market shares for chocolate in Jersey on the basis of information provided by the main retail chains in Jersey.[6] The results, and the market shares at wholesale level for the UK as listed in the EC Decision, are in Table 1 below:

[6] The distribution of the wholesale market shares is very similar to the retail market shares.

Producer	Market share for chocolate confectionary in the UK	Market share for chocolate confectionary in Jersey
Cadbury	[30-40]%	[30-40]%
Mars	[20-30]%	[20-30]%
Nestlé/Rowntree	[10-20]%	[10-20]%
Ferrero	[0-5]%	[0-5]%
Lindt	[0-5]%	[0-5]%
Kraft	[0-5]%	[0-5]%
Thorntons	[0-5]%	[0-5]%

Table 1: The market shares for the main suppliers of chocolate confectionary in the United Kingdom and Jersey at the wholesale level.

24. In Jersey, there is a wide offer of chocolate confectionary from many different producers. Table 1 indicates that the market shares for the main suppliers of chocolate confectionary on the wholesale level in Jersey are almost identical to the corresponding market shares in the UK. In particular, the ratio of the total retail sales for the main producers of British heritage and European continental chocolate are near identical. This is a strong indication that Jersey consumers' preferences are fairly similar to those preferences in the UK.

25. Also considering the similarities of the legal framework for assessing mergers in acquisitions in the European Union and Jersey respectively, this in turn implies that the conclusion by the European Commission that there are no serious competition concerns in the UK appears to be applicable equally in Jersey.

<u>Other Potential Competition Concerns</u>

26. To the extent that Kraft and Cadbury use similar distributors, the acquisition could result in a lessening of competition on the market for distribution of Cadbury and Kraft products, including chocolate confectionary.

27. Both Kraft and Cadbury have only limited direct sales to retailers with a presence in Jersey. The exceptions are Kraft sales to [REDACTED] and Cadbury sales to [REDACTED]. In both cases, the retailers are present both in the UK and in Jersey. In addition to direct sales, Kraft and Cadbury supply to wholesalers. Kraft

products are supplied in Jersey via [REDACTED]. Cadbury products are supplied in Jersey via [REDACTED]. On the basis of the number of wholesalers used, [REDACTED] by the acquirer and [REDACTED] by the target, the distribution of Kraft products appears to be more concentrated than the distribution of Cadbury products. According to Kraft, it has not discussed nor established any policy relating to the distribution of Kraft and Cadbury products into Jersey following the acquisition.

28. The JCRA has no evidence that suggests that the proposed acquisition will result in a substantial lessening of competition in a distribution market irrespective of how such a distribution market is defined. Therefore, the JCRA concludes that the proposed acquisition does not result in a substantial lessening of competition in Jersey or any part of Jersey. In addition, the JCRA notes that, to the extent that any future arrangements between Kraft and its distributors have the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey, such arrangements would be captured by the prohibition of Article 8 of the Law.

Conclusion

29. Based on the preceding analysis, the JCRA hereby approves the proposed acquisition under Article 20(1) of the Law.

24 February 2010 **By Order of the JCRA Board**