



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

**Decision M569/10**

**Proposed Acquisition**

**of**

**the Air Care Business of the Sara Lee Corporation**

**by**

**The Procter & Gamble Company**

### **The Notified Transaction**

1. On 30 April 2010, the JCRA received an application (the “**Application**”) for approval under Articles 20 and 21 of the Competition (Jersey) Law 2005 (the “**Law**”) concerning a proposed acquisition of the Worldwide Air Care Business of the Sara Lee Corporation (“**Sara Lee**”) by The Procter & Gamble Company (“**P&G**”).
2. The JCRA published a notice of its receipt of the Application in the Jersey Gazette and on its website on 5 May 2010, inviting comments on the proposed acquisition by 19 May 2010. The consultation period was later extended to 2 June 2010. During the consultation, the JCRA received one submission concerning the proposed acquisition from a third party. In addition to public consultation, the JCRA conducted its own market enquiries concerning the proposed merger.
3. In addition to Jersey, the Parties stated that the proposed acquisition required approval in many jurisdictions and that the required filings had been made with the relevant authorities in these jurisdictions. The JCRA has had contact with the European Commission regarding the proposed acquisition.

### **The Parties**

*(a) P&G*

3. P&G is a global company incorporated in Ohio in the United States with its corporate headquarters in Cincinnati, Ohio. The worldwide turnover in the fiscal year 2009 was about US \$80 billion.
4. P&G develops, manufactures and distributes worldwide household care, beauty care, health care and wellbeing, baby and family products. P&G supplies air fresheners and fabric fresheners under the Febreze brand. P&G began supplying home air fresheners in Jersey in September 2009.

(b) *Sara Lee*

5. Sara Lee is a company incorporated in Maryland in the United States with its headquarters in Dowers Grove, Illinois. The worldwide turnover in the financial year 2009 was about US \$13 billion.
6. The air care business of Sara Lee supplies air care products worldwide under the Ambi Pur brand. The worldwide turnover of the Sara Lee air care business in 2009 was about [REDACTED].

The Requirement for JCRA Approval

7. 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)(a) of the Law, a merger or acquisition occurs for the purpose of the Law if two or more undertakings that were previously independent of each other merge.
8. P&G supplies a range of products into Jersey, [REDACTED] at least one of these can be expected to be in excess of 40%. On this basis, pursuant to the Order, the JCRA's approval is required under Article 20(1) of the Law before the proposed merger is executed.

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.<sup>1</sup> As detailed below, the JCRA concludes that this would not be the case.

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

## **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.”<sup>2</sup>
11. According to the Parties, the relevant product market is the air care market, which includes all air care products for masking or removing unpleasant odours by delivering a fragrance compound and other ingredients to counteract odour. The Parties base this conclusion on both demand-side and supply-side substitutability. The Parties submit that the relevant product market could alternatively be segmented into air products for use at home, in cars, in toilets or on fabric, if only demand side substitution is taken into account. Using these relevant product markets, the Parties overlap only in respect of home air fresheners.
12. Regarding the demand side, the Parties assess that there is a high degree of demand substitutability between the various air care products and the marketing strategies for the main branded air care products focus on the effectiveness of the product in combating odour and the “signature scent” rather than the format of delivery technology.<sup>3</sup> This appears to be based primarily on [REDACTED]. The JCRA does not consider the evidence presented as conclusive. The Parties accept that it might be argued that one would not expect much direct substitution between car air fresheners and, for example candles or plug-ins, but would expect to see substitution between [REDACTED].<sup>4</sup> The conclusion appears to be that the [REDACTED] is used selectively to evidence a high level of demand substitutability between selected air care products but disregarded where the data

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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).

<sup>3</sup> Application, p.17.

<sup>4</sup> Parties’ Response of 25 May 2010 to questions from the JCRA of 19 May 2010.

would be counterintuitive according to the Parties. In addition, aspects such as the durability of the product and possible obsolescence or changes in consumer preferences do not appear to have been taken into account explicitly. Finally, the [REDACTED] does not incorporate the changes in, for example, relative prices and relative marketing expenditure.

13. Regarding the supply side, the Parties argue that there is a high level of supply-side substitution amongst the various air care products. More in particular, according to the Application, major air care manufacturers are present across all or most segments and a company active in one category could easily switch to another category without incurring significant costs because there is a high supply-side substitutability for such products. The JCRA does not consider this evidence conclusive. Indeed, the fact that the major air care suppliers are present across many or all segments could indicate that consumers do not see the various segments as substitutes and that producers are effectively required to offer a full range of products in order to provide air care in the various segments. However, the JCRA notes that the total number of suppliers for the different segments is different and that the number of suppliers of for example, continuous non-energised products appears to be much higher than the number of suppliers of continuous energised products.
14. On the basis that the JCRA considers the evidence defining the relevant market(s) inconclusive, the JCRA will assess the effects on competition in the most narrowly defined relevant market. If there are no competition concerns in the most narrowly defined market, generally there will also be no competition concerns if the market includes more products.
15. On the basis that the Parties' activities only overlap in respect of home air fresheners, the JCRA will focus on this category. One possible distinction within home air care products is based on the delivery format. [REDACTED] segments home air fresheners based on differences in format and fragrance delivery under the following categories; sprays (instant action products), continuous energised

products (either battery or plug-in powered) and continuous non-energised products (e.g. oils, liquids and candles). As the number of locations in the home where plug-in powered products can be used is more limited or at least different to the set of locations where battery powered products can be used - for example there is no scope for plug-in powered products in the bathroom - there may be an argument for making a distinction within the continuous energised products for the purpose of the competitive assessment of the proposed acquisition. For the purpose of this Decision, the JCRA will assume the following relevant product markets.

- instant action products
- continuous battery powered products
- continuous plug-in powered products
- continuous non-energised products

(ii) The Relevant Geographic Market

16. 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 the products or services, in which the conditions are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.<sup>5</sup>
17. The Parties submit that there is evidence for the relevant geographical market being either national or wider than national.
18. There is evidence that the relevant geographical market is limited to Jersey<sup>6</sup>, and therefore, for the purpose of this decision, the JCRA will assume that the relevant geographical market is limited to Jersey. If there are no competition concerns in

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<sup>6</sup> See for example paragraph 26 below.

the most narrowly defined market, there will generally be no competition concerns if the geographical market includes jurisdictions other than Jersey.

### **Effect on Competition**

19. The JCRA may refuse to approve an acquisition if it is satisfied that the merger or acquisition would substantially lessen competition in Jersey or any part of Jersey.
20. According to the Parties, the proposed acquisition will not result in a substantial lessening of competition in the relevant market.
21. Based on the information obtained from selected Jersey retailers, the combined market shares following the proposed acquisition would be relatively small for both continuous battery powered products and continuous non-energised products. The remainder of this Decision will therefore focus on the other two segments.

### **Instant action products**

22. Whereas it was not possible to assess overall market shares for instant action products in Jersey, some retailers reported a combined market share for the Parties of around 50%. However, high market shares do not automatically indicate significant market power. The Parties list existing and potential competition, countervailing buyer power from retailers and low barriers to entry as relevant factors for the JCRA to take into account in its assessment.
23. According to the Parties, the market leaders Reckitt Benckiser and SC Johnson account for [REDACTED] of the total supply of both air fresheners and home air fresheners in the UK and following the proposed acquisition, the new entity will continue to be constrained by these two market leaders. Both of these are large multinationals offering a range of products. Reckitt Benckiser had a net revenue of almost £8 billion and is the second largest supplier for air care products

worldwide with the Air Wick brand.<sup>7</sup> SC Johnson had estimated total sales of over US \$8 billion and offers the Glade and Oust brands.<sup>8</sup>

24. Both Reckitt Benckiser and SC Johnson currently sell instant action air care products in Jersey. In addition there are other suppliers currently available in Jersey, such as Thornton & Ross and private-label store brands. Thus, even if the proposed acquisition results in a relatively high combined market share for the Parties, Jersey retailers would appear to be able to source their products from many different suppliers.
25. We also note that there is evidence for low barriers to entry into the market for instant action products spays in Jersey. As mentioned above, P&G themselves only entered the Jersey market in September 2009. Given this and the variety of suppliers that would remain after the proposed acquisition, the JCRA concludes that the proposed acquisition will not result in a substantial lessening of competition in Jersey in the market for instant action products.

### **Continuous plug-in powered products**

26. Many retailers reported a combined market share for the Parties of sales for continuous plug-in powered products of [REDACTED] over 50%. Whereas it is not possible to assess the total market share for the Parties in Jersey as a whole, this is likely to be [REDACTED] over 50% given the assumed market shares of the retailers that provided information to the JCRA [REDACTED].
27. The JCRA notes that these market shares are very much higher than the overall air care market shares for the UK as reported by the Parties. In a small jurisdiction like Jersey, one would expect the number of suppliers to be lower than in a larger jurisdiction such as the UK. This implies that the respective market shares for various suppliers in a relevant market in Jersey are correspondingly significantly higher or lower compared to the respective market shares for these suppliers in

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<sup>7</sup> Reckitt Benckiser 2009 Annual Report and Financial Statements.

<sup>8</sup> SC Johnson 2009 Public Report.



the UK. Given that retailers generally offer a limited number of competing products and that the number of retailers is relatively limited in Jersey, market shares for suppliers may fluctuate much more widely in Jersey based on the purchasing decisions of any single retailer. The expected and observed higher market shares for some suppliers therefore do not automatically indicate greater market power for these suppliers in the presence of other suppliers.

28. One of the other factors that needs to be taken into account in determining to what extent market shares indicate market power is whether consumers are to some extent locked in.<sup>9</sup> The JCRA notes that, even though the continuous plug-in powered products do to some extent lock-in customers who have purchased the electronic device and in turn require the associated refills, the price of the electronic devices is small both in an absolute sense and in comparison to the price of refills and hence this lock-in effect appears to be negligible. There is also no evidence that there any other factors that would imply that there are high barriers preventing other suppliers entering Jersey, other than availability of shelf space.
29. Another factor to be assessed is the size of the main competitors compared to the new combined company. Similar to instant action spray products, Reckitt Benckiser and SC Johnson, the other major suppliers of continuous plug-in powered products, already offer their products in Jersey. As noted in Paragraph 23 above, both of these are large multinationals offering a range of products, and thus would be in a position to exert competitive pressure on the Parties even following the proposed acquisition. Thus, even if, as it appears, the proposed acquisition would reduce the existing number of suppliers of continuous plug-in powered products from four to three, with the new combined company being the single largest supplier, retailers in Jersey would still have a choice of three major suppliers of the product in question. There is no indication that the level of competition among the major suppliers of air care products is anything less than

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<sup>9</sup> Compare paragraphs 40-50 of JCRA Decision M171/08 regarding the proposed acquisition of E.C. Le Feuvre Agricultural Machinery Limited by Jersey Royal (potato marketing) Limited of 16 September 2008, where the JCRA concluded that customers were locked-in.

intense. In such a situation, an acquisition that results in a concentration from four to three suppliers does not result in a substantial lessening of competition.

30. A final factor that needs to be taken into account in determining to what extent market shares indicate market power is whether there are barriers to entry. According to the submission of a third party, there are extremely high statistics for the failure (or very minimal success) of new brands attempting to enter the UK market. The specific barriers to entry include the high cost of secondary placement<sup>10</sup> and the fact that a wide range of products is required to capture a customer base. However, the JCRA investigation in Jersey indicates that even when a retailer offers one product in each of the four most narrowly defined product markets identified, the retailer may source products from different suppliers, even though it would be possible to source them from only one supplier. This indicates that successful entry in one air care segment does not appear to require entry in all segments. Finally, given that some of the Parties' main competitors are not currently active in the supply of electronic air care products at this time, the JCRA agrees with the Parties that there appears to be at least some undertakings that would be able to successfully enter the European markets and overcome the alleged barriers to entry. In conclusion, the evidence for the alleged barriers to entry appears to be mixed but cannot be excluded.
31. Given the above, the JCRA concludes that the proposed acquisition will not result in a substantial lessening of competition in Jersey in the market for continuous plug-in products.

#### **Other potential competition concerns**

32. The JCRA has no other competition concerns regarding the proposed acquisition.

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<sup>10</sup> Which is defined as the costs of placement on the shelves at retailers for products that are not must-have brands.

## **Conclusion**

33. In light of the analysis set forth above, the JCRA concludes that the proposed merger is not likely to lessen competition in Jersey or in any part of Jersey. Based on this conclusion, it is not necessary for the JCRA to consider other factors such as barriers to entry or pro-competitive effects or efficiencies.
34. Given this conclusion, the JCRA hereby approves the proposed merger under Article 22(1) of the Law

**10 June 2010**

**By Order of the JCRA Board**