Jersey Competition Regulatory Authority ("JCRA")

Decision M601/10

Proposed Acquisition

of

various assets and properties of Sandpiper Topco Limited

by

Waitrose (Jersey) Limited

The Notified Transaction

1. On 25 June 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 in Jersey by Waitrose Limited ("**Waitrose**") from Sandpiper Topco Limited ("**Sandpiper**") of various subsidiaries, properties and assets together comprising the supermarket business at Checkers St Saviour, Checkers Red Houses and Safeway (the "**Target Business**").

2. The JCRA registered a notice of its receipt of the Application in the Jersey Gazette and on its website, both on 29 June 2010, inviting comments on the proposed acquisition by 13 July 2010. No comments were received.

The Parties

(a) Waitrose

3. Waitrose is a wholly owned subsidiary of a group of companies incorporated in the United Kingdom and elsewhere, the ultimate parent company of which is John Lewis Partnership plc ("**John Lewis**"). John Lewis is incorporated in the United Kingdom and comprises of, amongst others, department stores and 228 Waitrose supermarkets.

4. John Lewis currently supplies Sandpiper with ambient, chilled and frozen food products and non-edible household items. In addition, there are direct sales to customers in Jersey of furniture and other non-grocery items sold by John Lewis department stores via its website.

5. The proposed acquisition is effected via Criolla Limited, a wholly owned subsidiary of Waitrose incorporated in Jersey. Any reference to Waitrose or John Lewis includes reference to their respective subsidiaries.

(b) Sandpiper

6. Sandpiper is a Jersey registered company and is the ultimate parent company of a group of companies incorporated in Jersey and elsewhere. Sandpiper's activities in Jersey include the Target Business, the Checkers Express stores, the Wine Warehouse, the Marks and Spencer's stores and Iceland.[1]

7. Sandpiper is ultimately jointly controlled by Duke Street Holdings Limited (incorporated in Guernsey) and by Europa Fund II LP and Europa Fund II US LP, both acting for their general partner Europa Capital LLP.

8. Any reference to Sandpiper includes reference to any of its subsidiaries.

The Requirement for JCRA Approval

9. 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(4) of the Law, a merger or acquisition occurs for the purpose of the Law if an undertaking acquires the whole or a substantial part of the assets of another undertaking.

10. The Parties applied for JCRA approval under Article 4 of the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the "**Order**"), on the basis that Sandpiper holds an existing share of 40% or more of the supply of the retail grocery segment in Jersey. 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.

Assessment

11. 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,

[1] See JCRA Decisions M133/07 regarding the Proposed Acquisition of C.I. Traders Limited by Sandpiper Bidco Limited of 27 July 2007 and Decision M178/08 regarding the Proposed Acquisition of Various SandpiperCI Limited Subsidiaries by Juland Limited of 2 July 2008.

pursuant to the procedures set forth in the JCRA Merger Guideline.[2] As detailed below, the JCRA concludes that this would not be the case.

<u>Defining the affected relevant market(s)</u>

12. The JCRA identifies two different levels where potential effects on competition may arise. The first is the market at the retail level and the second is the market at the wholesale level. Whereas Waitrose is a wholesale supplier in the UK and currently supplies Sandpiper with some of its products, [REDACTED]. In the absence of any potential competition concerns from the wholesale market, the remainder of this Decision will concentrate on the retail market.

(i) <u>The Relevant Product Market(s)</u>

13. "*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*"[3]

14. The Parties consider the relevant market to be the grocery retail market in Jersey. The Parties submit that the JCRA considered distinguishing between retail outlets based on floor space and opening hours inappropriate in a Jersey context.[4] This conclusion is not completely accurate.

15. The JCRA previously assessed the grocery retail sector in its Decision M114/07 in 2007.[5] Decision M114/07 concerned a proposed acquisition of convenience shops whereas the current Application concerns supermarkets. For the purpose of that Decision, the JCRA considered that there was no need to make a distinction on the basis of floor space. However, this does not imply that such a distinction is not relevant in relation to a proposed acquisition of a supermarket. In line with international precedent, there appear to be valid arguments to distinguish between

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[2] JCRA Guideline, *Mergers and Acquisitions* at 6.
[3] *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).
[4] Application, item 4.4.
[5] JCRA Decision M114/07 regarding the proposed acquisition by Spar (Channel Islands) Limited of several stores from C.I. Newsagents Limited of 19 September 2007.

one-stop supermarkets that can provide all required groceries for a certain period of time and top-up convenience stores that provide a selection of the choice available at the supermarkets.

16. Whereas it is hard to draw the dividing line between convenience shops and supermarkets, the criterion is usually based on either floor space or the number of lines (of products) offered or a combination of both. Supermarkets will offer more floor space and a greater number of lines. Thus, whereas supermarkets provide the range of products normally found in convenience shops, the converse is not true. This implies that competition between supermarkets and convenience shops is not symmetric, or, in the words of the UK Competition Commission, "larger stores place a greater competitive constraint on smaller stores than vice versa".[6]

17. In its 2008 study "*Economic Impact of New Entry in the Retail Sector by a Large Supermarket Competitor"*, the JCRA also distinguishes between supermarkets and convenience stores, with a third category of M&S stores that, similarly to convenience stores, offer a sub-set of products that are on offer by supermarkets.[7] The JCRA will for the purpose of this Decision assume that the relevant product market comprises all retail outlets that provide the range of products normally found in supermarkets, i.e. large grocery retail outlets that provide a one-stop solution for groceries.

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

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

19. The Parties submit that the relevant geographical market for retail groceries is Jersey. The underlying argument is that the three supermarkets that are the object of the proposed acquisition are located in the "West, East and middle (St. Helier) of the Island".

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[6] Competition Commission Working paper on market definition (May 2007), www.competition-commission.org.uk/inquiries/ref2007/tesco/pdf/working_paper_market_definition.pdf
[7] Available on www.jcra.je.

20. In 2008, the UK Competition Commission concluded in its market investigation on the supply of groceries in the UK that the geographic scope of competition in grocery retailing is fundamentally local.[8] In particular:

- Larger grocery stores (i.e. stores larger than 1,000 to 2,000 square metres) will, in general, be constrained by other larger grocery stores within a 10 to 15 minute drive-time.

- Mid-sized grocery stores (i.e. stores larger than 280 sq metres) will, in general, be constrained by other mid-size stores within a 5 to 10 minute drive-time and by larger grocery stores within a 10 to 15 minute drive-time.

- Convenience stores will, in general, be constrained by other convenience stores within a 5 minute drive-time, by mid-size stores within a 5 to 10 minute drive-time and by larger grocery stores within a 10 to 15 minute drive-time.[9]

21. In a Jersey context, these boundaries may be slightly different for various reasons. Jersey grocery retail outlets will on average be smaller than those in the UK as a result of the absence of large supermarkets that are located outside towns. This is an argument to apply a more simple distinction between one-stop supermarkets and other top-up convenience stores in Jersey. A second distinction may be that the perception of distances within Jersey may be different.

22. In a Jersey context, there are two supermarkets in the West of the Island, one of which is part of the proposed acquisition, and there are three supermarkets in or around St Helier, two of which are part of the proposed acquisition. For the purpose of this Decision, it is not necessary to define the precise geographic market as this would not affect the conclusions of the analysis.

[8] The supply of groceries in the UK market investigation, Competition Commission, 30 April 2008, section 4.134.
[9] Ibid, sections 4.135 and 4.145.

Effect on Competition

23. According to the Parties, the acquisition itself involves the disposal by Sandpiper of part of its supermarket business to a new entrant in the market, which will lead to an increase in competition in the retail grocery market in Jersey.

24. In Jersey, there are four large grocery outlets that fall within the relevant product market of large retail outlets that provide the range of products associated with one-stop supermarkets. If the relevant market is restricted to these four supermarkets in Jersey only, the proposed acquisition would not result in a direct effect on competition. The proposed acquisition would change the identity of three of the supermarkets, however the competition continues to be between two suppliers. To the extent that convenience shops exert a competitive pressure on supermarkets, competition could be increased as a result of the proposed acquisition.

25. However, for a competitive analysis, it is not sufficient merely to count the number of competitors and identify their key competitive characteristics before and after the proposed acquisition. As explained in the JCRA Guideline 6 on Mergers and Acquisitions, in reaching a conclusion about whether a merger is likely to lead to a substantial lessening of competition, the JCRA makes a "with and without" comparison rather than a "before and after" comparison. The comparison is between two hypothetical future situations, one with the merger (the "**factual**") and one without (the "**counterfactual**"). The difference in competition between these two scenarios is then able to be attributed to the impact of the merger.

26. Therefore, a central issue in the JCRA's analysis concerned the counterfactual: would Waitrose have entered the Jersey market in the absence of the proposed acquisition or an acquisition of the Target Business by another supplier?

27. [REDACTED]

28. Also relevant to the potential counterfactual are barriers to entry in Jersey within the relevant product market of large retail outlets that provide the range of products associated with one-stop supermarkets. These barriers to entry include finding a suitable location for development and planning restrictions. There would therefore be significant barriers to entry for a third supermarket in the absence of the proposed acquisition.

29. Based on the forgoing analysis, the JCRA concludes that the proposed acquisition does not result in a substantial lessening of competition in Jersey of any part of Jersey.

<u>Ancillary Constraints</u>

30. According to the Application, it is proposed that Waitrose and Sandpiper enter into several complementary arrangements including:

- the Transitional Operational Agreement,
- the Supply Agreement,
- Bakery Supply Arrangements, and
- The Checkers St Saviour Development Arrangements. This arrangement in turn comprises of the Call Option Agreement, the Put and Call Option Agreement and the Conveyance Document in relation to a specific piece of land.

31. The JCRA has reviewed these complementary arrangements in light of relevant EC guidance on so-called ancillary restraints, which are agreements that do not form part of the asset or share transfer but are considered to be "directly related and necessary to the implementation of the concentration."[10] The JCRA considers the complementary arrangements listed in the preceding paragraph are ancillary to

[10] 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 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.

the proposed acquisition for a period of up to two years from their effective date. Any restrictions lasting beyond that period are potentially subject to Articles 8 and 9 of the Law, and could be considered separately by the JCRA in due course.

Conclusion

32. Based on the assessment above, the JCRA concludes that the proposed acquisition is not likely to substantially lessen competition in Jersey or any part of Jersey. Given this conclusion, the JCRA hereby approves the proposed acquisition under Article 20(1) of the Law.

30 July 2010 **By Order of the JCRA Board**