



Case M1336GJ

Proposed Acquisition by the Co-operative Group Limited of
Nisa Retail Limited

Decision

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Summary

1. The Co-operative Group Limited (**CGL**) proposes to acquire Nisa Retail Limited (**Nisa**). As a result of the transaction, Nisa will become a wholly owned subsidiary of CGL.
2. The transaction has been notified to the Jersey Competition Regulatory Authority (**JCRA**) for approval pursuant to Article 21 of the Competition (Jersey) Law 2005 (the **2005 Law**), and the Guernsey Competition and Regulatory Authority (**GCRA**) pursuant to Section 16(1) of the Competition (Guernsey) Ordinance 2012 (the **2012 Ordinance**).
3. The JCRA and GCRA have determined that the proposed acquisition will not lead to a substantial lessening of competition in any relevant market and hereby approve the notified transaction.

The Notified Transaction

4. On 27 February 2018, the Channel Islands Competition and Regulatory Authorities¹ (**CICRA**) received a joint application from CGL (the **Purchaser**) and Nisa (the **Seller**) for the proposed acquisition. The proposed transaction was approved by over 75% of Nisa's shareholders on 10 November 2017.
5. CGL intends to acquire 100% of the shares in Nisa indirectly through its wholly owned subsidiary CGL2011. Completion is also subject to approval by the Competition and Markets Authority in the UK and an order from the High Court of Justice in England and Wales sanctioning the proposed transaction.
6. CICRA registered the application on its website with a deadline for comments of 14 March 2018. One submission, which was supportive of the transaction, was received.

The Parties

7. Co-operative Group Limited is based in Manchester and incorporated in England and Wales (Company Number IP00525R). It provides wholesale grocery supplies to the Channel Islands Co-operative Society (**CICS**) through a buying group arrangement known as Federal Retail Trading Services (**FRTS**) with 14 other independent co-operatives in the UK.
8. CGL is a registered society owned by approximately 8 million members. CGL is active in a range of activities including grocery retailing, insurance, funeral care and legal services. Of particular relevance to this application and CGL's activities in the Channel Islands:

¹ The JCRA and GCRA co-ordinate their activities with respect to competition law enforcement in the Channel Islands. For the purposes of this document, the JCRA and GCRA are together referred to as CICRA, and all references to CICRA should therefore be read as references to each of the JCRA and GCRA unless the context otherwise requires.

- a. Grocery (Retail): CGL and its wholly owned subsidiaries own and operate approximately 2,637 grocery retail stores across the UK under the Co-Op fascia. However, it does not own or operate any grocery retail stores in the Channel Islands;
 - b. Grocery (Wholesale): CGL is a member of the buying group Federal Retail Trading Services (**FRTS**). FRTS is owned by CGL [X] and [X] other independent co-operatives societies, including the Channel Islands Co-operative Society [**CICS**]².
9. In the Channel Islands, CGL provides grocery products to the CICS under the FRTS agreement. Whilst both are party to the FRTS agreement, CGL and the CICS are independent organisations³.
10. Membership of the FRTS is limited [X]. This means that, other than CICS, grocery retailers in the Channel Islands cannot purchase grocery products from CGL.
11. Nisa is based in Scunthorpe, North Lincolnshire, and incorporated in England and Wales. (Company Number 00980790). It is a mutual company owned by approximately 1,186 shareholders. Its principal activities are the wholesale supply of grocery products and the provision of symbol group services to its shareholders throughout the UK. It is not itself a retailer.
12. In the Channel Islands, Nisa currently has a wholesale grocery supply agreement with SandpiperCI and other businesses, both retail and wholesale⁴. Nisa does not have any symbol stores in the Channel Islands.

Jersey: Requirement for JCRA Approval

13. Under Article 2(1)(b) of the 2005 Law, a merger⁵ occurs where a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking. On completion of the notified transaction, CGL will acquire 100% of the shares in Nisa. The notified transaction therefore constitutes a merger as defined by the 2005 Law
14. According to Article 20(1) of the 2005 Law, a person must not execute certain mergers or acquisitions except with and in accordance with the approval of the JCRA. Article 2 of the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the **Order**) provides if the merger or acquisition would create an undertaking with a share of 25% or more of the supply or 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, then the merger must be notified to the JCRA for approval under Article 20(1) of the 2005 Law.

² Within this structure, [X]. This arrangement is not available to other retailers in the Channel Islands as membership of FRTS is limited [X].

³ According to the information provided by the notifying parties, there are [X] Independent Society Members of CGL. CICS is a corporate member of CGL and owns [X] shares at [X] each in CGL. CGL has circa [X] members.

⁴ SandpiperCI has recently announced a new wholesale and franchise agreement with Morrisons and given Nisa formal notice to terminate its contract.

⁵ For brevity, mergers and acquisitions are referred to as 'mergers' in this document.

15. The parties are both active in the wholesale supply of groceries to Jersey and estimate that they together have a 25% share of the supply of grocery wholesaling in Jersey. The notified transaction therefore requires the approval of the JCRA prior to its execution.

Guernsey: Requirement for GCRA Approval

16. Pursuant to s.61(1)(b)(i) of the Competition (Guernsey) Ordinance, 2012 (the **2012 Ordinance**), a merger or acquisition occurs for the purposes of that Ordinance when: *“an undertaking [...] directly or indirectly acquires or establishes control of another undertaking”*. An acquisition by one undertaking of the entire issued share capital of another undertaking amounts to an acquisition of control for the purposes of the 2012 Ordinance. The notification transaction is therefore a merger, as defined by the 2012 Ordinance.
17. Under Regulation 2(a) and (b) of the Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations 2012 (the **Regulations**), an undertaking is involved in a merger or acquisition if it is acquiring, or being acquired by, another undertaking. On completion of the notified transaction, CGL (through its subsidiary CGL2011) will acquire 100% of the shares in Nisa. Both are therefore involved in a merger for the purposes of the Regulations.
18. Under s.13(1) of the 2012 Ordinance, certain mergers must be notified to, and approved by the GCRA before they can be put into effect. Regulation 1 of the Regulations provides that mergers must be notified to the GCRA for clearance if:
- a. The combined Channel Islands turnover of the undertakings involved in the merger exceeds £5 million, and
 - b. Two or more of the undertakings involved in the merger have Guernsey turnover exceeding £2 million.
19. According to information provided by the notifying parties, the combined and individual applicable turnover of the Parties in the Channel Islands and Guernsey exceed these thresholds⁶. On this basis, the GCRA’s approval is required before the acquisition is executed.

Market Definition

20. Under Article 22(4) of the 2005 Law, the JCRA must determine if the merger would substantially lessen competition in Jersey or in any part of Jersey. Under s.13 of the 2012 Ordinance, the GCRA must determine if the merger would substantially lessen competition within any market in Guernsey for goods or services. To this end, CICRA will identify the markets which are likely to be

⁶ According to information provided, in the prior financial year, CGL had sales in Guernsey of [X] and Nisa [Y].

affected by the merger and then assess whether competition in these markets will be substantially lessened⁷.

Views of the Parties

Product Market

21. The parties have proposed that the relevant product market is the *wholesale supply of groceries*. They do not consider there is a need to differentiate between grocery products (i.e. meat, canned goods and alcoholic drinks) and non-grocery products, or by supply channel (e.g. cash and carry wholesale, delivered wholesale, specialist wholesale). They also propose that the market should not be sub-divided by customer type as they do not differentiate between customers in the Channel Islands.

Geographic Market

22. The parties consider that there is likely to be constraint from wholesalers operating in the UK who could import products from ports on the south coast of the UK into the Channel Islands and wholesalers with operating depots within the catchment areas of those ports could enter the market.

23. The parties therefore submitted that the relevant geographic market should be a single market of Jersey and Guernsey together, recognising the constraint and possible entry of other wholesalers based in the UK. Customers are likely to look outside the Channel Islands if they want to change wholesaler and, as such, the market may be as wide as the UK.

CICRA Consideration

Product Market

24. The relevant product market is defined primarily by reference to the likely response of consumers and competitors⁸. It will comprise products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the product's characteristics, prices and intended use. An undertaking cannot have a significant impact on the prevailing conditions of a market if customers can easily switch to other service providers.

25. For the reasons set out below, it is not necessary to come to a conclusion on whether the relevant product market is as wide as the wholesale supply of groceries or is narrower⁹, since concerns would not arise on either basis. The precise product market definition can therefore be left open for the purposes of this decision.

⁷ In many cases, a market may already have been investigated and defined by CICRA or another competition authority. CICRA may take note of market definitions adopted in European competition law cases, although departure from that decision may be justified by circumstances specific to the Channel Islands. Sometimes earlier definitions can provide useful shortcuts, but competition conditions may change over time, changing the market definition. Market definition will always depend on the prevailing facts.

⁸ CICRA Guideline 7 – Market Definition.

⁹ [CMA 2016 report into Tesco and Booker](#) considered a series of narrower markets.

Geographic Market

26. Groceries are imported into Jersey and Guernsey by sea, mainly from the UK. If a grocery retailer in the Channel Islands wanted to change wholesale supplier, they would be likely to look to at least the south coast of the UK, and possibly even wider to the whole of the UK or even European suppliers. However, the precise geographic market definition can be left open, since concerns would not arise on any reasonable basis.

Relevant Market Conclusion

27. For the reasons set out above, the precise market definition can be left open in this case.

Effect on Competition

Horizontal Effects

28. Horizontal mergers are those where both parties are actual or potential competitors in the same relevant market¹⁰.
29. In this case, there is currently no meaningful competition between the parties in respect of any grocery wholesaling activity¹¹. This is because CGS does not supply to the market at large; its supplies are [X] in that it supplies only [X], all of whom are [X]. This means that grocery retailers in the Channel Islands do not currently have the ability to choose between Nisa and CGS for the wholesale supply of groceries¹²; [X]. Since there is no current competitive rivalry between Nisa and CGS at the wholesale level, the merger cannot lead to a lessening of competition between them at the wholesale level.
30. It is also relevant to note that at least some grocery retailers are likely to be able to switch wholesale supplier, as demonstrated very recently by SandpiperCI switching from Nisa to Morrisons. There are also other UK wholesale suppliers which might reasonably be able to enter the market to supply the Channel Islands.

Vertical Effects

31. Neither CGL nor Nisa are active in grocery retailing in either Jersey or Guernsey and CGL and CICS are independent companies¹³. The merger will therefore be unlikely to lead to anti-competitive vertical foreclosure.

Decision

32. Based on the preceding analysis:

¹⁰ The parties have submitted that the post merger share anticipated as a result of this transaction for CGL (which takes into account sales made by CGL to CICS, but excludes Nisa's share of the market accounted for by its contract with Sandpiper) will be between [X] and [X], however it has not been possible to verify these figures.

¹¹ [X].

¹² Or any narrower subset thereof.

¹³ For the reasons explained at footnotes 2 and 3 above.

(a) the JCRA concludes that the acquisition will not substantially lessen competition in Jersey or any part of Jersey;

(b) the GCRA concludes that the acquisition will not substantially lessen competition within any market in Guernsey for goods or services.

33. The GCRA is also satisfied that the merger would not be to the prejudice of:

(a) consumers or any class or description thereof;

(b) the economic development and well-being of the Bailiwick; or

(c) the public interest.

53. The merger is therefore approved under Article 22(1) of the 2005 Law and s.13 of the 2012 Ordinance.

9 April 2018

By Order of the Boards of the JCRA and the GCRA