



**DETERMINATION OF MERGER NOTIFICATION M/12/031 –
TOP SNACKS / KP SNACKS**

Section 22 of the Competition Act 2002

**Proposed acquisition by Top Snacks Limited of the KP Snacks
business from United Biscuits (UK) Limited**

Dated 22 April 2013



The Competition Authority
An tÚdarás Iomáíochta

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1. INTRODUCTION

The Notification

- 1.1 On 18 December 2012, in accordance with section 18 of the Competition Act 2002 ("the Act"), the Competition Authority ("the Authority") received a notification of a proposed transaction whereby Intersnack International B.V. ("Intersnack BV"), through its subsidiary Top Snacks Limited ("Top Snacks"), would acquire certain assets, comprising the business known as KP Snacks, from United Biscuits (UK) Limited ("United Biscuits UK").

The Undertakings Involved

The Acquirer

- 1.2 Intersnack BV, headquartered in Lelystad, The Netherlands, is part of Intersnack Group GmbH & Co. KG ("Intersnack Group"),¹ a major European manufacturer of branded and non-branded crisps (potato chips) and other savoury snacks products. These products include crisps, nuts, baked products and other specialty snack products. Intersnack Group brands sold in the UK and Ireland include Pom-Bear and Penn State. Top Snacks (formerly IS Brazil Limited), headquartered in Stanley, County Durham, UK, is a wholly owned subsidiary of Intersnack BV.
- 1.3 Within the State Top Snacks has a controlling interest in Largo Foods ("Largo").² Largo, headquartered in Ashbourne, County Meath, manufactures and supplies branded and own brand crisps and snacks within the State and also the UK. Largo brands include Tayto, King, Hunky Dorys, Perri and Sam Spudz. Largo has manufacturing facilities within the State in Asbourne, County Meath and Gweedore, County Donegal and also in the UK at Barnsley.³
- 1.4 For the year ended 31 December 2011 Intersnack Group's worldwide turnover was approximately € [...] million of which approximately € [...] million was generated in the State.⁴

The Vendor

- 1.5 United Biscuits UK, headquartered in Hayes, Middlesex, UK, is a trading company of the United Biscuits Group of companies.⁵ United

¹ Intersnack Group is ultimately controlled by Pfeifer & Langen Industrie-und Handels-KG ("IHKG"), a privately owned management holding company with no commercial or operational activities, headquartered in Cologne, Germany. IHKG controls Intersnack Group which in turn controls Intersnack International B.V (through Intersnack Holding Gesellschaft für Auslandsbeteiligungen mbH).

² Intersnack has sole control of Largo by way of its 51% shareholding.

³ For further information on Largo see <www.largofoods.ie>.

⁴ The worldwide turnover is for Pfeifer & Langen Industrie-und Handels-KG (IHKG) and the ultimate parent or Intersnack Group. The turnover in the State figure includes (but is not limited to) the turnover for Largo foods for the period August to December 2011, i.e. subsequent to Largo being acquired by Intersnack Group in August 2011.

⁵ United Biscuits Group is ultimately jointly controlled by Blackstone Group and PAI Partners through their holding company United Biscuits LuxCo SCA.

Biscuits UK is involved in the manufacture, distribution and marketing of a wide range of crisps and savoury snacks products in Western Europe, including the UK and Ireland.

The Target

- 1.6 KP Snacks, headquartered in Hayes, Middlesex, UK, comprises the crisps and other savoury snacks business of United Biscuits UK. Within the State, KP Snacks' brands include KP Nuts, Hula Hoops, McCoy's, Meanies, Rancheros and Skips.
- 1.7 Within the State KP Snacks supplies KP Snacks products directly to [...] (the "Direct Supply Agreements").⁶ Also within the State, Robert Roberts Ireland Ltd ("Robert Roberts"), a wholly owned subsidiary of DCC plc, is involved in the manufacture and distribution of KP Snacks products arising from [...] commercial relationships (the "RR Arrangements"), i.e.: [...].
- 1.8 [...].
- 1.9 For the year ended 31 December 2011 KP Snacks' worldwide turnover was approximately € [...] million of which approximately € [...] million was generated in the State by the Direct Supply Agreements.⁷

The Notified Transaction

- 1.10 The parties argue that within the State the notified transaction comprises only the transfer of the existing direct supply arrangements with [...]. Accordingly the market share data for Ireland, as supplied by the parties, distinguished between the sales of KP products directly to [...] and sales though the RR Arrangements.
- 1.11 Furthermore, with reference to the RR Arrangements, the parties state as follows:

*"... it is important to note that the RR Arrangements do not form part of the Proposed Transaction and will not transfer to the Purchaser. [...]."*⁸

"[...]."⁹

"[...]."¹⁰
- 1.12 [...].
- 1.13 Accordingly, the Authority's analysis proceeds on the basis that the notified transaction includes not only the acquisition of the Direct Supply Agreements with [...], but also the brands covered at present by the RR Arrangements.

⁶ For [...] the supply is of KP Snacks branded products. For [...] the direct supply is of own label products. Notification, page 12.

⁷ This figure does not include turnover generated through the operation of the RR Arrangements.

⁸ [...].

⁹ [...].

¹⁰ [...].

Rationale for the Transaction

- 1.14 Intersnack states that Intersnack Group has been active in seeking to expand its business across Europe, for example:

"We [Intersnack] appreciate the significance of acquiring a part of British heritage and the proposed transaction reflects our goal to accelerate the transformation of Intersnack's strategic position in the UK."¹¹

- 1.15 United Biscuits states:

"The deal ensures that the KP brands continue as part of a major European Snacks business, It also allows [United Biscuits] to concentrate its attention solely on continuing to develop and grow its baked biscuit and snack product range."¹²

Implementation Prior to Authority Clearance

- 1.16 Section 19(1) of the Act prohibits the putting into effect of a merger or acquisition until either the Authority has made a determination that it may be put into effect (with or without conditions) or the Authority, within the specified time, has failed to make any determination or failed to inform the parties of a determination which it has made. Section 19(2) provides that any merger which purports to be put into effect in breach of section 19(1) is void.
- 1.17 During the course of its investigation, the Authority learned that the proposed transaction had been put into effect subject to a hold-separate arrangement for the direct supply arrangements pursuant to which UB supplies products to [...].
- 1.18 It is the Authority's view, which was communicated to the parties, that the transaction had been unlawfully implemented and, as a consequence, was void. The transaction related not just to the direct supply arrangements but also to (among other things) perpetual rights to important brands. Moreover, the Act does not permit partial implementation of a merger or acquisition even where a "framework agreement" or other kind of hold-separate arrangement is put in place with regard to certain parts of the business within the State.
- 1.19 Since the transaction was void, the Authority proceeded to evaluate it as if it were a proposed transaction.

¹¹ See <<http://www.blackstone.com/news-views/details/kp-snacks-to-become-part-of-european-intersnack-group>>.

¹² *ibid.*

The Procedure

Preliminary Investigation (“Phase 1”)

Third Party Submissions

- 1.20 One submission was received from [...]. The submission raised a number of competition concerns. [...] described Largo as the leading brand group in the State and said that the acquisition would make it even more dominant. [...]. [...] said that the acquisition would remove as an independent force one of the three leading brand groups in the State. This was particularly problematic, it said, because competition from Kellogg’s and from own brand/private label would not be strong and because it viewed entry as difficult.

Market Enquiries

- 1.21 During the preliminary investigation, the Authority sought the views of a number of third parties, including competitors and customers of both Intersnack/Largo and KP Snacks. This process continued into the subsequent Phase 2 investigation process. The views of third parties contacted in both the Phase 1 and Phase 2 investigation are included below in the description of the Phase 2 investigation.

Requirement for Information

- 1.22 On 16 January 2013 the Authority served a Requirement for Further Information (“RFI”) pursuant to section 20(2) of the Act on each of Top Snacks and KP Snacks. Issuing the RFIs automatically suspended the procedure for the Authority’s Phase 1 assessment.
- 1.23 Upon receipt of the responses to the RFIs, the “appropriate date” (as defined in section 19(6) of the Act) became 30 January 2013 and the new Phase 1 deadline became 28 February 2013.
- 1.24 The Authority also requested and received, on an on-going basis, further information and clarifications from the notifying parties.

Phase 1 Determination

- 1.25 Having considered all the available information in its possession at the time, the Authority was unable to form the view at the conclusion of the Phase 1 investigation that the result of the notified acquisition would not be to substantially lessen competition in any markets for goods or services in the State and pursuant to section 21(2)(b) of the Act the Authority decided to undertake a full investigation.¹³

Full Investigation (“Phase 2”)

Third party Submissions

- 1.26 No additional third party submission was received by the Authority during the Phase 2 investigation. However the Authority continued its

¹³ See <<http://www.tca.ie/images/uploaded/documents/M-12-031%20-%20TopSnacks%20-%20KP%20Snacks.pdf>>.

correspondence with the third party that made a submission during the Phase 1 investigation.

Market Enquiries

- 1.27 During Phase 2 the Authority continued the process, initiated during Phase 1, of seeking the views of a number of third parties, including competitors and customers of both Intersnack/Largo and KP Snacks.
- 1.28 Comments obtained through the Authority's market enquiries are summarised below. The clear consensus of these third party views supported the notified transaction.
- 1.29 Most third parties contacted grouped all of crisps, snacks,¹⁴ nuts and popcorn together but also indicated that within that group there would not be uniform substitutability. For example a number of respondents did not consider that nuts would be a substitute for crisps or snacks.
- 1.30 Some third parties distinguished clearly between different savoury snacks products – in particular, some identified a separate crisps and snacks (combined) market.
- 1.31 Market enquiries indicated that packaging is also an important characteristic of savoury snacks products. Three main types of packaging were identified:
- Individual packages - typically purchased for consumption by one individual,
 - Multipack – a number of individual packages sold together inside a larger package, and
 - Sharing – a package of snacks typically for consumption by more than one individual.
- 1.32 Market enquiries indicated that there is a difference in consumer preferences in Ireland in comparison to the United Kingdom. Some respondents also suggested differences in tastes between Northern Ireland and the State.
- 1.33 Market enquiries indicated the value – to both supplier and retailer - of a Direct to Store ("DTS") distribution system (such as Tayto and also KP via Robert Roberts) where vans deliver direct to retailers and van drivers provide merchandising services. Market enquiries also indicated that the DTS model is in tension with the current general trend towards central warehousing and distribution known as the National Distribution Centre ("NDC") model. Van delivery can be a costly model because savoury snacks products are generally bulky, low density items that take up storage space that could otherwise be allocated to other products.
- 1.34 Market enquiries indicated that within the State Largo is the largest supplier of savoury snacks products and that the Tayto brand is the

¹⁴ Crisps are made from potatoes. Other savoury snacks products are made from potatoes or more commonly from corn.

largest by volume within the State. Walkers¹⁵ was identified as the most significant competitor to Largo especially in relation to crisps.

- 1.35 Kellogg Co. (Kellogg's")¹⁶ recently acquired the Pringles brand from Procter & Gamble. Market inquiries revealed that Pringles' market share had declined in the run-up to its sale to Kelloggs. There is reason, however, to be optimistic about future sales of Pringles under Kelloggs in the State: the company's representatives regularly visit retailers and promote the full line of products; Pringles is performing well both in the sharing sector and the impulse sector (with small canisters). It is understood that Kellogg's plans to rebuild the Pringles brand and, as an innovative food company, expects to grow its business substantially. (Kellogg's recently expanded its range of these products by introducing Special K Crisps).
- 1.36 Several retailers told the Authority that they believe they would be able to resist a post-acquisition price increase. Some mentioned, in particular, the ability to purchase branded goods on the "grey market" goods (i.e., importing the same or similar products from distributors in the UK) as a means of countering any increase in prices within the State.
- 1.37 Market enquiries indicated that while Walkers was the only entrant to have established a double digit market share, there has been entry on a smaller scale in recent years, e.g., Keoghs, Bill and Micks and others.
- 1.38 Market enquiries indicated that while there is considerable brand loyalty within the State, promotions are commonplace, particularly but not only in the larger multiple retailers.¹⁷
- 1.39 Market enquiries indicated that the own brand category is increasing in significance particularly within the larger multiple retailers although the growth in own label is from a low base, particularly in comparison to other products. AC Nielsen data show that the sharing crisps segment grew by 13.6% in value terms in the 12 months to October 2012 and sharing snacks grew by 9.4% in the same period. This compares to an overall growth rate of 2.8% for crisps and snacks over the same period.

External Experts

- 1.40 The Authority engaged the services of two consulting economists for assistance in the economic and econometric analysis of the notified transaction: Professor Stephen Davies of the University of East Anglia ("UEA") and Professor Patrick Paul Walsh of University College Dublin ("UCD"). The Authority also engaged Ipsos MRBI to undertake a consumer survey. Although the Authority benefitted from expert advice, it is the Authority alone that made and is responsible for the views expressed in this Determination.

¹⁵ For more information about the Walkers brand see <<http://www.walkers.co.uk>> and <<http://www.pepsico.co.uk/walkers-crisps>>.

¹⁶ For more information on Kellogg's see <http://www.kelloggs.ie/en_IE/home.html>.

¹⁷ In this context a "multiple" retailer is one that sells products under the same retail brands (e.g., Tesco, Superquinn, and Supervalu) in multiple locations.

On-going Contacts between the Authority and the Parties

- 1.41 The Authority requested, on an on-going basis, further information and clarifications from the notifying parties. This included AC Nielsen data necessary for the econometric analysis undertaken by Professor Walsh.
- 1.42 The parties also made further submissions to the Authority concerning, among other things, the RR Arrangements.

2. BACKGROUND: SAVOURY SNACKS PRODUCTS IN IRELAND

Introduction

- 2.1 Suppliers of savoury snacks products in Ireland include both domestic suppliers such as Largo (Tayto), Keoghs, Bill and Micks and others and international suppliers such as Frito-Lay (Walkers), United Biscuits (KP Snacks), Kellogg's (Pringles and Special K Crisps) and Diamond Foods, Inc.¹⁸ (nuts and Kettle Crisps).
- 2.2 There are various features of the savoury snacks sector both in the State and in other countries. These features include:
- Snack product type,
 - Snack packaging and package size,
 - Retailer types, and
 - Routes to market.
- 2.3 These features are described further below. Also summarised below are some features of the costs of production for savoury snacks products and trends in snacks prices.

Snack Product Type

- 2.4 The snacks sector includes various types of products including potato crisps, corn snacks, extruded snacks, popcorn, baked snacks and nuts. AC Nielsen¹⁹ identifies separate categories for crisps, snacks, nuts and popcorn:
- Potato crisps are thin slices of potato fried in oil and typically sold in packets made from packaging film,
 - Extruded snacks are typically corn or potato based. Corn or potato in a powdered form is usually extruded through a die plate and cut into small (single bite) portions and then fried or baked,
 - Processed nuts, mainly peanuts, are roasted or fried and then either oiled, salted or otherwise flavoured, and
 - Popcorn is created by heating maize kernels until they effectively turn inside out.

¹⁸ For more information on Diamond Foods, Inc see <<http://www.diamondfoods.com/index2.php>>

¹⁹ AC Nielsen Market Track data.

Snacks Products Packaging

- 2.5 As noted in paragraph 1.31 savoury snacks are generally packaged in three different ways (each of which has a separate AC Nielsen category):
- Individual,
 - Multipacks, and
 - Sharing.
- 2.6 The different packaging types reflect the different consumer purchasing decisions. For example, an impulse purchase is more likely to be an individual package, whereas a multipack (of individual packages) will more likely be a planned purchase (e.g. as part of a weekly shop) for consumption on different occasions and/or by different people over time. As the name suggests a sharing package is suitable for sharing with a group of people as might occur at family or social occasions at home.
- 2.7 AC Nielsen also identifies a tubular category which is supplied in both individual and sharing formats.

Retailers

- 2.8 Savoury snacks products are sold in a wide variety of retail and food service settings.²⁰ The principal type of retailers that sell these products include large supermarkets known as "multiples", medium-sized shops which are usually part of a "symbol" group and smaller convenience shops and independent retailers.

Routes to Market

- 2.9 The route to market for savoury snacks can be generally divided into three stages: (1) manufacturing, (2) marketing and (3) distribution. Information from the parties and also market enquiries indicate a variety of business models, as illustrated by the merging parties. For example, Largo is a vertically integrated business (manufacturing, marketing and distribution) whereas KP products follow two routes to market within the state: the Direct Supply Agreements with [...] and indirectly through the RR Arrangements.
- 2.10 Within the State as indicated by market enquiries Largo is the most significant manufacturer of savoury snacks products. Largo manufactures its own brands of savoury snacks products. Largo also

²⁰ The submissions of the parties, market enquiries and the Authority's analysis all focused on competition for snack products in a retail, rather than a food service, environment. Some effects in the food service sector are, however, captured in this instance to the extent that snack product wholesalers supply both the retail and food service sectors. As noted in M/12/010 – Pallas/Crossgar, especially at paragraph 42, it is difficult to obtain price and volume data in the food service sector. See <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Pallas--Crossgar.aspx>.

manufactures some retailer own brands, but own brand products can also be sourced from outside of the State.

Costs and Prices

- 2.11 The main input costs in the production of savoury snacks are the cost of ingredients such as potatoes, maize, sunflower oil and nuts. One of the most notable characteristics of savoury snacks is the strong identity of the leading brands. This strong brand loyalty has helped the leading brands to maintain their volume sales despite recent apparently cost related price rises.
- 2.12 The relatively low price elasticity of the top savoury snacks brands has allowed manufacturers to pass rising commodity and fuel costs through to consumers although there is considerable time lag between the rise in input costs and price rises at the retail level.
- 2.13 Consumers have reacted to rising food inflation by becoming more sensitive to price. Market enquiries have confirmed that price promotions of savoury snacks are commonplace and have become an increasingly important driver of sales volumes, particularly within multipack products in the large retail multiple stores.

3. RELEVANT PRODUCT AND GEOGRAPHICAL MARKETS

Introduction

- 3.1 In this section, the key relevant markets that are likely to be affected by the notified transaction are defined in terms of product and geographical dimensions. The views of the undertakings involved are summarised and the Authority's views and conclusions set out.

Relevant Product Market

- 3.2 The key issue to be addressed in relation to the product market is whether there is:
- i. A single relevant market including all of potato crisps, corn snacks, nuts, popcorn and other savoury snacks products, or
 - ii. Relevant markets involving any or some of crisps, snacks, nuts, popcorn and other savoury snacks products.

Views of the Undertakings Involved

- 3.3 The parties argue that the relevant product market is the supply of savoury snacks.²¹ The parties argue that a broad savoury snacks product market including all of potato crisps, corn snacks, extruded snacks, popcorn, baked snacks and nuts exists and that the arguments in support of a narrower product market definition are not persuasive. For example, the parties state as follows:

*"In particular, Intersnack notes that the Authority in Tayto/Largo considered the savoury snacks market. The Authority also defined the range of products that fall within the definition of savoury snacks as including potato crisps, corn snacks, extruded snacks, popcorn, baked snacks and nuts."*²²

- 3.4 In further support of a broad savoury snacks product market, the parties cite similar retail price movements for the period 2007 – 2011 for Largo multipack crisps and Largo multipack offerings of other savoury snacks products.²³
- 3.5 Also in support of this market definition the parties cite previous decisions of the European Commission²⁴, decisions of the Authority²⁵ and internal documents supplied by the parties to the Authority.

²¹ Notification Form page 20 and accompanying Compecon Report *op. cit.* note 9, Sections 3.2 and 3.4 and reiterated in a Compecon Supplemental Economic Report, date 14 January 2013, page 3.

²² Notification Form page 20.

²³ Compecon Report, *op. cit.* note 9, pp. 15-16.

²⁴ For example, and by analogy, Case No IV/M.623 Kimberly- Clark/Scott 1996.

²⁵ For example, M/06/051 – Largo/Tayto. See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M06051--Largo--Tayto.aspx>>.

Views of the Competition Authority

3.6 With reference to M/06/051 – Largo/Tayto the Authority did not in that instance, nor has it subsequently, defined a savoury snacks market. Rather, the Authority referred to the general product category description “savoury snacks” in the following terms:

“Savoury snacks can be understood as including potato crisps, corn snacks, extruded snacks [i.e., Extruded or granular snacks have a cereal or potato base], popcorn, baked snacks and nuts.”²⁶

3.7 The Authority defines markets to the extent necessary depending on the particular circumstances of a given case. Accordingly, caution is advised when drawing any inference drawn from previous cases. The Authority’s conclusion on a product market may differ over time, even within the same sector, depending on the relevant facts and circumstances.

3.8 The Authority considers that in this instance there is evidence to support relevant product markets narrower than a savoury snacks market comprising all of potato crisps, corn snacks, extruded snacks, popcorn, baked snacks and nuts.

3.9 Regarding the evidence supplied by the parties on the correlation of retail prices across various snacks products the Authority considers the price movements to be supportive, but not conclusively so, of a broader product market.

3.10 Market enquiries and also internal documents supplied by the parties and examined by the Authority suggest the existence of a market limited to crisps and snacks, i.e., excluding popcorn and nuts. In addition several third parties involved in the sector told the Authority that consumers do not view popcorn or nuts as substitutes for crisps/snacks.

3.11 The Authority considers the price movements, identified by the parties and referred to in paragraph 3.4, to be supportive, but not conclusively so, of a broader product market.

Geographical Market

3.12 The key issue to be addressed is whether the relevant geographical market comprises:

- Ireland and UK, or
- A distinct market in Ireland.

²⁶ M/06/051 – Largo/Tayto page 2.

Views of the Undertakings Involved

- 3.13 The parties argue that the relevant geographical market comprises both Ireland and UK.²⁷ In support of this position the parties state:

*"Transport costs would not appear to constitute a barrier for any UK based producer that wished to start selling into Ireland. Snack products such as nuts are easy to transport in bulk. In fact transport costs to certain parts of the UK would be greater than those between the UK and Ireland. It would therefore appear that the main retail and wholesale groups, who are the customers in this instance, could easily switch their purchases to other suppliers of snack foods which do not currently supply within the State."*²⁸

- 3.14 In support of a geographical market comprising at least Ireland and the UK the parties note that some customers of savoury snacks suppliers within the State are Irish based subsidiaries of retail groups operating elsewhere in UK and/or elsewhere in Europe. The parties further state that in many instances negotiations between customers and suppliers are concluded on the basis of a single price (e.g., common to both Ireland and the UK and/or subject only to exchange rate adjustments).²⁹

- 3.15 In summary, the parties conclude that:

*"The relevant geographic market would therefore appear to comprise both Ireland and the UK."*³⁰

- 3.16 The parties also note that:

*"In its two previous merger determinations in the savoury snacks sector, the Authority did not come to a definitive conclusion regarding relevant geographic market definition. However, it is further submitted that a State and UK geographic market definition is consistent with the Authority's analysis in those determinations."*³¹ and

*"It is submitted that the above core characteristics of the savoury snacks market have remained unchanged since the Authority's determinations referenced above. Indeed, competition from non-domestic savoury snack suppliers has increased in the intervening period."*³²

²⁷ Notification Form pages 20-21 and Economist Report Sections, *op cit.* note 9, 3.3 and 3.4. The parties also cite previous decisions M/06/051 – Largo/Tayto and M/11/021 - Intersnack /Largo in support of an Ireland and UK geographic market.

²⁸ Compecon Report, *op. cit.* note 9, page 17.

²⁹ *ibid.* Page 17. The report states on page 18 that *"Intersnack have confirmed that they supply products to [...] in both Ireland and the UK on the same terms"*.

³⁰ *ibid.* Page 20.

³¹ Notification Form page 20.

³² Notification Form page 21.

Views of the Competition Authority

- 3.17 The Authority does not consider that the geographical market comprises the UK and Ireland. While supply side factors identified by the parties are consistent with a UK and Ireland market this is not in itself conclusive. Rather, particularly in this instance, demand factors such as differences in national consumer preference, are particularly important.³³
- 3.18 The Authority's analysis and market enquiries indicate that there are differences between the Ireland and the UK markets. Few Irish brands are successful in the UK, and notwithstanding the presence of UK brands in the Irish market there are significant differences in the Irish and UK markets with respect to consumer preferences for flavours and other product characteristics.
- 3.19 Market enquiries do not support a geographical market broader than the State and internal documents supplied by the parties and examined by the Authority imply the possibility of geographical market smaller than the UK and Ireland. Internal United Biscuit documents [...]. Similarly, the evidence from market enquiries demonstrates differences in consumer preferences between Ireland and the UK in terms of flavours and product characteristics. This would appear to be particularly so for crisps where there are significant differences in terms of flavours and type of crisp.
- 3.20 Smaller or newer brands will likely be more severely affected by a lack of brand recognition and hence are more likely to focus on a smaller geographical area and/or focus on particular packaging and retail types, e.g., selling sharing packs in the multiple retailers.
- 3.21 Market enquiries suggest that transport and distribution costs, in particular space and product perishability, can be significant. For example, crisps and snacks, particularly in comparison to nuts and products in other categories, are bulky and generate low average revenue per kilo relative to other products. Hence transporting of crisps and snacks will necessarily involve the opportunity costs of not transporting products with a greater density (e.g. canned goods, liquids, dried goods etc.).

Conclusion on the Relevant Product and Geographical Market

- 3.22 The Authority's analysis and market enquiries indicate that there are differences in the characteristics of savoury snacks products, particularly in terms of (i) product type (particularly crisps/snacks vs. nuts and popcorn), (ii) packaging and (iii) point of sale (e.g. type of retailer and/or food service provider.) It is not, however, clear that these differences in characteristics necessarily imply distinctly separate product markets. There are substantial arguments for defining a relevant market smaller than all savoury snacks and the Authority has examined the notified transaction by reference to its likely impact on those narrower product markets. However, because the Authority's

³³ European Commission Notice on the definition of relevant markets for the purposes of competition law (97/C 372/03). See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1997:372:0005:0013:EN:PDF>.

conclusion in relation to the notified transaction would be the same whether or not it defined a narrower market, it is not necessary to define a product market with precision.³⁴

- 3.23 For the purposes of reviewing the notified transaction, the Authority considers the relevant geographical market is a national market, i.e., the State.

³⁴ Moreover, even within a broadly defined market the Authority would still analyse competitive effects on the basis of closeness of competition and/or market segments.

4. COMPETITIVE EFFECTS

Introduction

- 4.1 This section sets out the Authority's analysis of the competitive effects of the notified transaction. The Authority's merger review function is to determine whether or not a notified merger or acquisition will or will not substantially lessen competition in markets for goods or services in the State.
- 4.2 The Authority's analysis of the notified transaction involves assessing the following:
- i. The relevant counterfactual – i.e., the likely state of competition in the relevant market or markets in the absence of the notified transaction,³⁵ and
 - ii. The likely competitive effects, in comparison to the relevant counterfactual, within the State from the notified transaction.
- 4.3 The Authority's analysis also includes an assessment of all relevant evidence, including assessing the relative closeness of competitors as evidenced, for example, by switching data, the parties' internal documents and the Authority's knowledge from previous investigations. Close competitors exert a more significant competitive constraint than do distant competitors and consequently a merger involving close competitors is more likely to raise competition concerns than a merger with distant competitors.
- 4.4 In addition, the Authority considers factors that would mitigate any competition concerns, such as ease of entry and the possibility of countervailing buyer power.
- 4.5 In this instance a further issue for the Authority to consider is the effect of the RR Arrangements [...]. The parties submit market shares (set out below in Tables 4.1 and 4.2) that distinguish between KP Snacks products supplied directly to [...] and by means of the RR Arrangements. In contrast, the Authority believes that market shares calculated on a brand basis appear more appropriate [...].

Views of the Undertakings Involved

Counterfactual

- 4.6 The parties identify the relevant counterfactual as follows:

"In the present case [United Biscuits UK] has taken a decision to dispose of its savoury snacks business and effectively withdraw from the market. The alternative to an acquisition by Intersnack is that the [United Biscuits UK] savoury snack foods business would be acquired by a third party most likely a private equity firm. In effect the latter scenario would involve a continuation of the status quo from a competition

³⁵ Frequently, but not always, this involves comparing the merger to the status quo.

perspective as all that would happen is that KP Snacks would have changed owners.”³⁶

4.7 Furthermore, with reference to the RR Arrangements, the parties argue as follows:

“[...]”³⁷

Competitive Effects

Horizontal Overlap - UK and Ireland

4.8 As discussed in paragraphs 3.3-3.5 and 3.13-3.16, the parties favour a broad savoury snacks product market and a geographical market comprising Ireland and the UK. Table 1 below shows market shares for a savoury snacks product market comprising all of crisps, snacks, nuts, popcorn and other savoury snacks within a geographical market comprising Ireland and the UK.

Table 4.1: Market Share By Value - All Snacks - UK and Ireland

	2011 (%)	2012 (%)
Walkers	[40-50]%	[40-50]%
United Biscuits	[10-20]%	[10-20]%
KP Snacks	[5-15]%	[5-15]%
UB Baked Snacks ³⁸	[0-5]%	[0-5]%
Kellogg’s	[0-10]%	[0-10]%
Top Snacks	[0-5]%	[0-5]%
Diamond Foods	[0-5]%	[0-5]%
Tayto Group	[0-5]%	[0-5]%
Seabrook	[0-5]%	[0-5]%
Manhattan	[0-5]%	[0-5]%
Others	[0-10]%	[0-10]%
Private/Own Label	[10-20]%	[10-20]%

Source: Information supplied by the parties.

4.9 Herfindahl–Hirschman Index (“HHI”) calculations indicate that the notified transaction is a Zone C merger for a geographical market comprising the UK and Ireland.³⁹ As stated in the Authority’s Merger Guidelines:

³⁶ Compecon Report *op. cit.* note 9, page 22.

³⁷ [...].

³⁸ This includes both crisps and snacks. See <<http://www.ubperfectstore.com/baked-snacks-and-crisps>>. This is not part of the notified transaction.

³⁹ Competition Authority *Notice in Respect of Guidelines for Merger Analysis* (N/02/004) page 11 and Annex A. See

<http://www.tca.ie/images/uploaded/documents/n_02_004%20Merger%20Analysis%20Guidelines.PDF>. Using 2012 data, the increase in the HHI would be 104.8, compared to the increase of greater than 100 needed to be in zone C.

*"Zone C mergers occur in already highly concentrated markets and more usually be those that raise competitive concerns."*⁴⁰

4.10 The parties argue that within a UK and Ireland geographical market the high HHI derives largely from the large market share of Walkers in the UK.⁴¹ Further the parties state that:

*"The proposed transaction would appear highly unlikely to give rise to any competition concerns if the market is defined as comprising Ireland and the UK."*⁴²

Horizontal Overlap Ireland

4.11 Set out below in Tables 4.2 and 4.3 are market shares within the State for a savoury snacks product market including all crisps, snacks, nuts and popcorn, on the one hand, and for a combined crisps/snacks market (excluding nuts and popcorn), on the other.

Table 4.2: Market Share By Value - All Snacks - Ireland

	2011 (%)	2012 (%)
Top Snacks/Largo	[40-50]%	[40-50]%
Walkers	[10-20]%	[10-20]%
Kellogg's (Pringles)	[0-10]%	[0-10]%
KP - Robert Roberts	[0-10]%	[0-10]%
KP Snacks - Direct	[0-10]%	[0-10]%
Diamond Foods	[0-5]%	[0-5]%
Manhattan	[0-5]%	[0-5]%
Private/Own Label	[5-15]%	[5-15]%
Others	[0-10]%	[0-10]%

Source: Information supplied by the parties.

⁴⁰ *Ibid.*

⁴¹ Compecon Report *op. cit.* note 9, pp. 22-26.

⁴² *Ibid.* page 23.

Table 4.3: Market Share - Crisps and Snacks – Ireland

	2012 (%) Value	2012 (%) Volume
Largo	[45-55]%	[40-50]%
Walkers	[15-25]%	[20-30]%
KP ⁴³	[5-15]%	[5-15]%
Pringles	[5-15]%	[5-15]%
Private label	[0-10]%	[0-10]%
Others	[0-5]%	[0-5]%

Source: Information supplied by the parties.

- 4.12 As noted by the parties, HHI calculations indicate that the notified transaction is a Zone C merger in a geographical market limited to the State.
- 4.13 The parties state that the high HHI within a geographical market limited to the State derives primarily from the high pre-merger market share of Tayto. Consequently, the parties argue that the increased market share of the combined entity does not signal likely adverse competitive effects.
- 4.14 The parties state further that a large market share is not of itself necessarily harmful to consumers.

"At the retail level, the position of Tayto as the largest single supplier at the local level is in reality simply a reflection of a strong local brand in a broader market. Parallels exist within Ireland; the draught beer market is an obvious example, with the shares of Murphy and Beamish products being larger in Munster, while the geographical market for draught beer is at least the State."⁴⁴

- 4.15 The parties also argue that Walkers currently exercises a strong competitive constraint and will do so subsequent to the notified transaction. The parties further argue that, given its position as a market leader in UK, Walkers has the capacity to expand its supply of savoury snacks products into Ireland thereby enhancing its competitive constraint on the merged entity.

⁴³ This figure comprises both the Direct Supply Agreements and the RR Arrangements.

⁴⁴ Compecon Supplemental Report dated 14 January 2013, page 7. The Authority has analysed the draught beer market in M/08/011 – Heineken/Scottish & Newcastle. See <<http://www.tca.ie/images/uploaded/documents/M08011%20Heineken-S&N%20Determination%20public.pdf>>.

Theories of Harm

- 4.16 The parties argue that a unilateral effects theory of harm is the most applicable for a competitive effects analysis of the notified transaction on the grounds of significant product differentiation within a market for all savoury snacks products. The parties state that closeness of competition within the market is important in such an analysis.
- 4.17 The parties also argue, on the grounds of product differentiation and asymmetric market shares, that a coordinated effects theory of harm is not applicable to the notified transaction.⁴⁵

Entry

- 4.18 The parties submit that barriers to entry and expansion are low due in part to the lack of significant sunk costs. The parties illustrate the point by saying that:

"This is particularly true in the case of crisps, where all that is required is a kettle fryer and flavour and packaging equipment."⁴⁶

- 4.19 The parties also submit that the variability of vertical integration and variety in retail environments provides a degree of flexibility as to how firms may wish to enter the market or expand an existing presence in the market. Identifying various entrants to the snacks products market, the parties state that:

"Competition in the sector has been enhanced by entry into the State of both Walkers and Pringles and by the entry of Golden Wonder and Real Crisps. Keogh's Crisps, Tyrrell's Crisps and Mackie's of Scotland have also been recent entrants into the market and are gaining market share." and

"Own label, mirroring the position in other jurisdictions, has also continued to gain share at the expense of the established brands."⁴⁷

Countervailing Buyer Power

- 4.20 The parties argue that their retail and wholesale customers are sophisticated buyers well able to negotiate with snack food manufacturers in the State as well as worldwide. The parties also argue that there are credible alternatives to Top Snacks and KP brands (including a growing private label segment) and that switching costs for retail and wholesale customers are low, all of which strengthen the position of the parties' customers.

- 4.21 In summary, the parties state that:

"Further, the main customers, who are the large retail and wholesale groups in the State, have considerable countervailing buyer power."⁴⁸

⁴⁵ Compecon Report, op cit. note 9, page 26.

⁴⁶ *ibid.* page 27.

⁴⁷ Notification page 16.

⁴⁸ Notification page 24.

RR Arrangements

- 4.22 The parties argue that the horizontal overlap within the State is limited to the supply rather than the manufacture of savoury snacks, primarily on the grounds that the notified transaction does not include the RR Arrangements.

*"The Purchaser (through its majority ownership of Largo) manufactures savoury snacks in the island of Ireland. ... The Seller, through its manufacturing joint venture with [Robert Roberts] also manufactures savoury snacks in the island of Ireland. The Target does not manufacture savoury snacks on the island of Ireland Accordingly, there is no horizontal overlap between the Parties at the manufacturing level in the island of Ireland."*⁴⁹

- 4.23 The parties state further that:

*"The Purchaser is engaged in the supply of savoury snacks to customers in the State. In particular, the Purchaser supplies its own products directly to the trade, but not those of third parties. As noted above, the Target comprises the Direct Supply Agreements with [...], but does not involve the supply of third party products. Accordingly, there is a minor horizontal overlap (but no competitive overlap) between the Purchaser and the Target in the supply of savoury snacks in the island of Ireland."*⁵⁰

- 4.24 The parties also submit that [...].

- 4.25 Specifically in relation to the manufacturing joint venture (between United Biscuits and Robert Roberts), the parties argue that [...]. The parties state:

*"[...]."*⁵¹

Vertical Effects

- 4.26 The parties state that there is no current vertical relationship between the Purchaser and the Target on the island of Ireland.

Views of the Competition Authority

Counterfactual

- 4.27 The Authority agrees with the parties that the RR Arrangements [...], complicates the process of identifying the relevant counterfactual. The Authority cannot be certain about [...]. Whether or not the proposed transaction occurred it is possible that [...]. Alternatively, the parties to the [...].

⁴⁹ Notification page 13.

⁵⁰ *ibid.*

⁵¹ [...].

4.28 The acquisition means [...]. In contrast, were there no acquisition, United Biscuits UK presumably would have continued providing Irish consumers with KP products, [...]. This establishes the relevant counter-factual, i.e., that in the absence of the transaction there would be a continuing United Biscuits UK presence in the State supplying KP branded savoury snacks products.

Competitive Effects

Horizontal Overlap

4.29 The Authority agrees with the parties that the notified transaction is a merger falling within Zone C as defined by the Authority's Merger Guidelines. The fact that a merger falls into Zone C does not necessarily mean that it will substantially lessen competition. As the Authority's Merger Guidelines point out, factors that affect whether a merger in Zone C will raise competition concerns include "[c]lear indications, from the market definition stage, of low barriers to entry" and "[t]he existence of an entrant already committed to production but not yet selling in the market."⁵² The Authority reviews all relevant facts to assess competitive effect. One such factor is closeness of competition, which refers to the:

- Degree to which the undertakings involved competed with each other pre-merger, and,
- Extent to which non-merging undertakings constrain the merged entity's ability to raise price.

4.30 In its analysis of the competitive effects of the notified transaction the Authority has focused on competition between brands. In addition to information supplied by the parties the Authority's analysis includes the evaluation of evidence from (i) market enquiries, (ii) an independent consumer survey undertaken by Ipsos MRBI on behalf of the Authority and (iii) the econometric analysis of AC Nielsen data, both of which are discussed below.

4.31 The Authority's analysis also considers factors that might ameliorate any competition concerns attributable to the notified transaction. These factors include ease of entry and countervailing buyer power (both discussed below).

4.32 Given the [...] and highly branded nature of the snacks sector, an argument can be made for focusing purely on brand market shares. This would imply for KP Snacks combining, rather than distinguishing between, (i) products manufactured and/or distributed under the RR Arrangements and (ii) products supplied directly to [...]. However, as stated by the parties in the case of [...], the products directly supplied [...].⁵³ Since calculating market shares and HHIs on the basis of brands would also imply a Zone C merger, the comments in paragraph 4.29 would also still apply.

⁵² *op cit.* note 39 pp 11-12.

⁵³ Notification page 12.

Theories of Harm

- 4.33 The Authority agrees with the parties' comments that a unilateral effects theory of harm is the more applicable theory of harm for the notified transaction.
- 4.34 The Authority takes the view that the conditions conducive to a coordinated effects theory of harm as set out in the Authority's guidelines and also in M/08/011-Heineken/S&N and reiterated in M/11/022-Musgrave/Superquinn,⁵⁴ do not appear to be present in this instance.
- 4.35 The Authority has not found evidence, either from market enquiries or internal documents supplied by the parties and examined by the Authority, to support a coordinated effects theory of harm. The Authority notes also that any coordinated effects theory of harm would have to show that the coordinating parties' market behaviour would be likely to have a focus on tacit coordination in the State, which seems less likely given that: (i) the primary focus of the notified transaction is the market in the UK, (ii) turnover within the state is a very small part of the parties' worldwide turnover, and (iii) [...] combined UK-Ireland basis.
- 4.36 The Authority does not, however take the view that anticompetitive coordinated effects necessarily cannot result from mergers of firms selling branded products. For example if the notified transaction was in fact a three-to-two merger, concern about coordinated effects could be particularly pronounced. In this regard it is important that Kellogg's will remain a significant competitor post-merger and that retailers and consumer will have a number of alternatives.

Consumer Survey

- 4.37 The Authority decided that it could better understand the functioning of the markets by conducting a survey of consumer preferences (e.g., between brands and between savoury snack products). The Authority commissioned Ipsos MRBI to undertake this research.⁵⁵ Key survey results are summarised below.
- 4.38 When asked whether crisps and nuts were substitutes, 59% of respondents said no and 38% said yes.
- 4.39 The survey also asked about potential responses to hypothetical price increases for each of the two of the most recognisable Largo brands, namely, Tayto and Hunky Dorys.
- 4.40 When asked about switching brands in response to a hypothetical 10% price increase for Tayto crisps the response was:

⁵⁴ *op. cit.* note 44 paragraphs 4.17-25. See also the discussion of coordinated effects in: <<http://www.tca.ie/images/uploaded/documents/M08011%20Heineken-S&N%20Determination%20public.pdf>>. and <<http://www.tca.ie/images/uploaded/documents/M-11-022%20Musgrave-Superquinn.pdf>>.

⁵⁵ *Snack OmniPoll Report Ipsos MRBI*. 3 April 2012. A telephone survey of adults (aged 15 and over) was conducted from 14th – 27th March 2013. The sample was RDD (random digit dialling) to ensure that both listed and unlisted phone numbers have the same probability of being contacted. Interviews are conducted with people via their landline and mobile phone.

- 58% would not switch,
- 34% would switch to another brand, and
- 8% would exit – i.e., not buy any brand of crisps.

4.41 When prompted to identify brands they would consider switching to the response was:

- Walkers – 69%,
- Hunky Dorys – 68%,
- King – 64%,
- Pringles – 61%,
- Hula Hoops – 50%,
- McCoys – 38%,
- KP Nuts – 37%,
- Supermarket Own Label crisps – 36%, and
- Manhattan Nuts – 26%.

4.42 When asked about switching brands in response to a hypothetical 10% price increase in Hunky Dorys crisps the response was generally similar:

- 52% would not switch,
- 39% would switch to another brand, and
- 9% would exit – i.e., not buy any brand of crisps.

4.43 When prompted to identify brands they would consider switching to the response was:

- Tayto – 76%,
- Walkers – 69%,
- King – 60%,
- Pringles – 56%,
- Hula Hoops – 54%,
- McCoys – 46%,
- KP Nuts – 44%,
- Supermarket Own Label crisps – 34%, and
- Manhattan Nuts – 29%.

4.44 The consumer survey results summarised above provide useful, albeit not conclusive, insights into each of (i) consumer preferences, (ii) product market definition, and (iii) closeness of competition and hence the strength of competitive constraints. Such insights include that:

- There appears to be some limited degree of substitutability between crisps and nuts,
- For both Tayto and Hunky Dorys the survey data indicates that there is significant brand loyalty, but also significant willingness to switch or abandon the product in response to a price increase,
- For both Tayto and Hunky Dory the four most frequently selected alternative brands were two Largo brands (King and Hunky Dory or Tayto respectively) and two brands of third party competitors (Walkers and Pringles),
- The relatively high ranking of Pringles is especially noteworthy, since it supports the view that Kellogg's would provide important competition post-acquisition, and
- Also important is the showing of the three KP brands. Especially to the extent it would be fair to aggregate the KP brands, the survey suggests that KP brands do compete with Intersnack/Largo products. On the other hand, the survey indicates that no KP brand was viewed by respondents as a leading alternative to Tayto or Hunky Dorys.

Econometric Analysis

4.45 The Authority engaged Professor Paul Walsh, UCD, to undertake an econometric analysis of AC Nielsen price and volume data compiled at a disaggregated Stock Keeping Unit ("SKU") level.⁵⁶ The SKUs were defined in terms of product type and packaging as described in paragraphs 2.4 and 2.5.

4.46 It is important to note that this analysis of SKU price and sales volume data while informative is not conclusive since there are some limitations on the Nielsen data that suggest caution when interpreting the results of the econometric analysis:

- The data is incomplete as it does not include all retail sales of savoury snacks products with the State (e.g., Dunnes Stores are not included) and does not include food service sales,
- The data does not distinguish between sales of Largo products (which are brands of the merging parties) and Tayto NI products (which are not brands of the merging parties), and
- The separate categorisation of tubular packaged snacks also complicates the analysis and underestimates the competitive constraint of Pringles on Tayto and/or KP Snacks both prior to after the notified transaction.

⁵⁶ The analysis undertaken was a Nested Logit analysis to identify the closest competitors by brands and product characteristics on the basis of cross-price elasticities for snack product SKUs within the State.

- 4.47 The econometric analysis of the price and volume data that was undertaken indicates that within the State, the merging parties are currently both most active in [...].
- 4.48 This result is not surprising given that [...].
- 4.49 The econometric analysis also indicates that:
- Given the current market share of Largo in the crisps-only segment of the market (i.e., the share of the Tayto, King and Hunky Dory brands) this segment is already highly concentrated. The transaction will not give rise to a significant change in the competitive conditions in the segment for crisps-only, and
 - The snacks-only segment is currently competitive and appears likely to remain so post-merger.
- 4.50 Consequently, the overlap in either a crisps-only or snacks-only market is not competitively significant and there is a low likelihood of competition concerns in either a crisps-only or snacks-only market.
- 4.51 The econometric analysis then went on to examine the impact of the merger on a combined hypothetical crisps and snacks segment within the State for each of the impulse, multipack and sharing segments. The econometric analysis provided no basis for concern with respect to the sharing segment. On the other hand, the econometric evidence suggests that the merging parties' brands are close competitors in the impulse and multipack parts of a crisps/snacks segment. The result for this combined segment is significantly skewed by: (i) the sheer scale of Largo in the crisps only segment; and, (ii) the relative size of the crisps only segment compared with the snacks-only segment.
- 4.52 The analysis of SKU price and sales volume data indicates that Walkers is also a close competitor to the merging parties, particularly in crisps across all packaging types. Also the effect of other smaller brands and also own label, particularly in multiple supermarkets, cannot be entirely discounted.
- 4.53 The analysis of SKU price and sales volume data indicates that Walkers and Hula Hoops are significant brands in the Irish market even though they are produced in the UK and sold in both countries unchanged. To the extent that Walkers and Hula Hoops exercise an effective competitive constraint pre-merger on Largo/Tayto, this emphasizes the importance of UK-based constraints. Market shares based on a combined UK-Ireland market would suggest much less basis for competitive concern than shares based on a national market.
- 4.54 In summary the econometric analysis, while very important, has not in this case proved, by itself, to be conclusive with respect to the competitive impact of the merger.

Entry

- 4.55 Market enquiries indicate that barriers to entry are not limited to the physical production of snacks products. In addition to direct production costs there are also distribution costs and the costs of marketing to establish brand recognition.

- 4.56 Market enquiries highlighted the perishable nature of savoury snacks products, albeit to different degrees, and the implications for entry into the market. For example, for crisps there is typically a 12 week period to produce, package, distribute and sell a product. Furthermore, that period of time is effectively reduced depending on:
- i. how long it takes to get products on the shelves to retail customers, and
 - ii. how far from the "best before" or "use by" date a product must be before it will be placed on a shelf for sale to retail customers.
- 4.57 A new entrant also faces the cost of unsold products, especially if the retailer has purchased them on the basis of sale or return and being refunded for unsold stock. In highly branded sectors such as here, a new entrant must incur the cost of establishing brand awareness in addition to costs of manufacturing and distribution. Established brands also face ongoing marketing costs within a highly branded market, but it is easier to maintain brand awareness than to establish it.
- 4.58 Consequently, while there has been entry, establishing a significant market presence is challenging. The Authority notes that there has been no recent entry comparable to Walkers, which is an exception having established and subsequently maintained a market share over 15% (i.e., approaching the Walkers market share within the State for an all-snacks market) within a ten to fifteen year period.
- 4.59 Market enquiries also indicate that Largo is the only substantial manufacturer in the State.
- 4.60 Notwithstanding these challenges, entry is possible and, within the State, there are recent examples of entry at least at modest scale. For example, both Keogh's and Bill and Micks are examples of entry primarily targeting sales through multiples and in sharing sized packages.
- 4.61 Recent entrants with whom the Authority consulted did not view entry as having been particularly difficult.
- 4.62 Moreover, the Authority notes that the comparative advantages of direct-store delivery may be declining, as increasing numbers of retailers use central warehouse delivery.
- 4.63 Finally, the Authority notes the parties' argument that Robert Roberts is currently engaged in direct-store delivery of a variety of products not affected by the acquisition. This will not be affected by the notified transaction and [...].
- 4.64 There is thus a significant argument that entry would constrain anticompetitive conduct post-acquisition.

Countervailing Buyer Power

- 4.65 Market enquiries indicate that there is a degree of countervailing buyer power, particularly with respect to the larger retail and wholesale buyers. Post-acquisition, Intersnack/Largo would face a reasonably concentrated retail environment, in which snacks products represent

only a small percentage (typically 2-5%) of turnover in a retail environment.

- 4.66 Several retailers indicated they would be able to resist unjustified post-acquisition price increases. Retailers also stated that price increases might be resisted by increased reliance on parallel imports, the so-called "grey market" of goods from outside the State.
- 4.67 Although the matter is not free from doubt, market inquiries in this case indicate widespread (although not unanimous) lack of concern about this transaction among the wide range of retailers with which we spoke. This is not just a matter of selected retailers being unconcerned (such that the Authority might worry that there could be post-merger discrimination against other retailers). Retailers of varying sizes pointed to different ways and reasons that they could and would resist price increases, and no evidence suggests that retailer and consumer interests would not be aligned in this regard. Some of the factors mentioned by retailers, moreover - such as the availability of grey market goods and the importance of promotions and the growing role of own brand products - echo points of relevance to the competitive effects analysis more generally. Under all the relevant circumstances, the Authority counts buyer power as a factor supporting the clearance of the acquisition.

RR Arrangements

4.68 [...].

4.69 [...].

Vertical Effects

- 4.70 There are no current vertical arrangements between the parties with respect to the direct service agreements with [...]. Moreover, neither party is engaged in purchasing products supplied by the other party, or supplying products purchased by the other party. There are no vertical issues of concern. The Authority's market enquiries have found no evidence of concerns about any kind of foreclosure.

Conclusion

- 4.71 The Authority has not, in the course of its investigation, found sufficiently robust or consistent evidence that supports a substantial lessening of competition as a result of the notified transaction.
- 4.72 Although there is evidence from the Authority's analysis and market enquiries that the merging parties are not insignificant competitors and that entry at a substantial scale could be challenging, there is also evidence from the parties and from market enquiries that other brands, particularly Walkers and also Pringles, are close competitors and will be able to provide a competitive constraint post-acquisition. There is also evidence in support of some of the parties' arguments about ease of entry, countervailing buyer power and availability of certain products from outside the State. The consumer survey was supportive of nuts as a possible alternative product to crisps and of Pringles as a strong competitive option.

- 4.73 While the econometric analysis provided reason for concern about competition in certain market segments, there were limitations in the data and the results were not unambiguous. The econometric analysis does not by itself enable the Authority to conclude that the merger would substantially lessen competition, particularly where concerns raised by the econometric analysis are not supported by other evidence such as the examination of internal documents and market enquiries. The consensus from market enquiries was supportive of the notified transaction and the parties' internal documents did not support a theory of harm in the State.
- 4.74 In light of the above the Authority considers that the notified transaction will not substantially lessen competition within the State.

5. ANCILLARY RESTRAINTS

- 5.1 As part of the notified transaction the Sale and Purchase Agreement contains non-compete and non-solicitation covenants for durations of [...]. The Authority considers these restrictions to be directly related and in the circumstances of this particular case likely to be necessary to the implementation of the notified transaction.

- 5.2 [...] as described, and under all the facts and circumstances, the Authority considers that Agreement to be directly related and necessary to the implementation of the notified transaction.

