

# DETERMINATION OF MERGER NOTIFICATION M/22/027 – FERRERO INTERNATIONAL / FULFIL (BARTONI)

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## Section 21 of the Competition Act 2002

**Proposed acquisition by Ferrero International S.A. of the entire issued share capital, and thus sole control, of Bartoni Limited, together with its wholly-owned subsidiary Fulfil Nutrition GB Limited**

**Dated: 09 June 2022**

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### Introduction

1. On 9 May 2022, in accordance with section 18(1)(a) of the Competition Act 2002, as amended (“the Act”), the Competition and Consumer Protection Commission (“the Commission”) received a notification of a proposed acquisition whereby Ferrero International S.A. (“Ferrero”) would acquire the entire issued share capital, and thus sole control, of Bartoni Limited, together with its wholly-owned subsidiary Fulfil Nutrition GB Limited (“Fulfil”) (together, with Ferrero, the “Parties”) from Fulfil Holdings Limited (the “Seller”) (“the Proposed Transaction”).

### The Proposed Transaction

2. The Proposed Transaction will be effected by means of a Share Purchase Agreement (“SPA”) between Ferrero, [...],<sup>1</sup> [...]<sup>2</sup> and the Seller dated 23 April 2022, pursuant to which Ferrero will acquire the entire issued share capital of Fulfil from the Seller.

### The Undertakings Involved

#### *The Purchaser – Ferrero*

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<sup>1</sup> The notification lists [...] as a Director of Fulfil. Schedule 1 of the SPA lists him as a Director and Company Secretary of Bartoni Limited, and Schedule 2 of the SPA lists him as a Director of Fulfil.

<sup>2</sup> Schedule 1 of the SPA lists [...] as a Director of Bartoni Limited, and Schedule 2 of the SPA lists him as a Director of Fulfil.

3. Ferrero is a public limited company incorporated under the laws of the Grand Duchy of Luxembourg. Ferrero is a holding company of the Ferrero group of companies (“Ferrero Group”), which is a producer of foodstuffs, active in the manufacturing and sale of confectionery and other sweet products (e.g. chocolate confectionery, candies, snacks, sweet spreads, biscuits and ice-creams). Since 2013 the Ferrero Group has also been active in the procurement and supply of edible nuts, particularly hazelnuts. Since 2020, Ferrero has also been active in the manufacturing and sale of breakfast cereals and cereal-based bars through its acquisition of Eat Natural. Ferrero is an international manufacturer of branded chocolate and confectionery products.
4. Ferrero products are sold, directly or through authorised retailers, in more than 170 countries, including in all EU Member States. *Ferrero*-branded products sold in the State include *Ferrero Rocher*, *Nutella*, *Tic Tac*, *Raffaello* and *Kinder*.
5. Ferrero is active in the supply of snack products in the State, including snack bars, through the *Eat Natural* brand. *Eat Natural*-branded products represent [0-10]% of Ferrero’s sales in the State.
6. For the financial year ended 31 August 2021, Ferrero Group’s worldwide turnover was approximately €[...] of which approximately €[...] was generated in the State.

#### ***The Target – Fulfil***

7. Fulfil currently trades under the business name "Fulfil Nutrition". The principal activity of the company is the marketing and sale of protein bars. Fulfil is active in the snack products industry in the State through the sale of energy bars.
8. Fulfil does not manufacture the products it markets and sells. The manufacturing process for Fulfil products is entirely allocated to two third party co-manufacturers which purchase all raw material and produce the products.
9. The Proposed Transaction involves the purchase by Ferrero of the appointed marketer and distributor of Fulfil products from the Seller. Pursuant to the Proposed Transaction, Ferrero will not purchase the manufacturing capacity of the products marketed and sold by Fulfil in the State.

10. For the financial year ended December 2021, Fulfil's worldwide turnover was approximately €[...] of which €[...] was generated in the State.

### Rationale for the Proposed Transaction

11. The Parties state the following in the notification:

*“For Ferrero, the Proposed Transaction represents an opportunity to invest in the snacks segment, which shows attractive characteristics and high potential for long term value creation. The Proposed Transaction is in line with Ferrero's strategy, which consists in making investments in companies which are active in sectors that have growth and development potential. Ferrero sees the Proposed Transaction as an interesting investment opportunity that fits well with its investment policy and goals.”<sup>3</sup>*

### Third Party Submissions

12. No third party submission was received.

### Competitive Analysis

#### Horizontal Overlap

13. The Parties are both active in the supply of snack products in the State, specifically the supply of snack bars. Euromonitor reports note that, within the overall segment of snack bars, there are three sub-segments consisting of (i) cereal bars; (ii) protein/energy bars; and (iii) fruit and nut bars.<sup>4</sup> According to the Parties, there may be a further segmentation within the protein/energy bar segment between sports energy bars and lifestyle energy bars. Lifestyle energy bars are described in the notification as being *“targeted as an energy boosting and nutritious snack for any individual”<sup>5</sup>*, while sports bars are described as *“having a higher protein content”<sup>6</sup>* and *“target more active individuals both in terms of marketing and composition”<sup>7</sup>*.

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<sup>3</sup> Merger Notification, para 2.7.1.

<sup>4</sup> Euromonitor, *‘Snacks in Ireland’* (July 2021)

<sup>5</sup> Merger Notification, para 5.1.13.

<sup>6</sup> Merger Notification, para 5.1.13.

<sup>7</sup> Merger Notification, para 5.1.13.

14. Ferrero's presence in the snack bar sector, with the *Eat Natural* brand, is through the fruit and nut bars and lifestyle energy bars segments. Fulfil sells the following 15 energy bar products (with their weight) in the State: Crispy Caramel (37g), Crispy Peanut (37g), Chocolate and Caramel Cookie Dough (55g), Chocolate Brownie (55g), Chocolate Caramel (55g), Chocolate Deluxe (55g), Chocolate Hazelnut (55g), Chocolate Orange (55g), Chocolate Peanut Butter (55g), Chocolate Salted Caramel (55g), Milk Chocolate Mint (55g), Peanut & Caramel (55g), White Chocolate and Cookie Dough (55g), Dark Chocolate Salted Carmel (55g), and White Chocolate Peanut and Caramel (55g).
15. According to the Parties, of these 15 products, 13 of them can be classified as sports energy bars, while 2 of them (crispy caramel and crispy peanut) can be classified as both lifestyle and sports energy bars. The Parties state that the crispy caramel and crispy peanut bars could be considered both energy sports bars and lifestyle energy bars, as they have the same protein percentage (grams of protein/size) as a sports energy bar, and the same protein amount (grams of protein notwithstanding bar size) as a lifestyle energy bar. The Parties further submit that the two products could also be categorised under the sports energy bar segment due to Fulfil's brand identity. Following an analysis of the energy bar products offered by the main competitors identified in the notification, on balance, the Commission considers that the crispy caramel and crispy peanut bars are more likely to fall within the category of lifestyle energy bars over sports energy bars.
16. On this basis, there is a hierarchy by which products may be segmented and through which four potential horizontal overlaps may be identified between the activities of the Parties in the State:
  - a. The sale of snacks;
  - b. The sale of snack bars;
  - c. The sale of protein/energy bars; and
  - d. The sale of lifestyle energy bars.
17. The Commission defines markets to the extent necessary depending on the particular circumstances of a given case. In this instance, it is not necessary for the Commission to define the precise relevant product markets because the Commission's assessment of the likely competitive effects of the Proposed Transaction in the State would be the same however those markets were defined. Nonetheless, the Commission has assessed the likely impact of the

Proposed Transaction in respect of the four product segmentations in which the activities of the Parties overlap in the State as described in paragraph 16 above.

18. Similarly, it is not necessary for the Commission to define the precise relevant geographic markets because the Commission's assessment of the likely competitive effects of the Proposed Transaction in the State would be the same however those markets were defined. However, for the purpose of its assessment, the Commission has assessed the likely impact of the Proposed Transaction with respect to the State.

#### The sale of snacks in the State

19. There is a horizontal overlap in the activities of the Parties in relation to the sale of snacks in the State. The Commission's predecessor, the Competition Authority ("Authority"), has previously considered whether the relevant market should be defined as (i) a national market for the supply of all savoury snacks, or (ii) a national market for the supply of crisps and snacks in *M/12/031 – Top Snacks / KP Snacks*.<sup>8</sup> In that case, in relation to the savoury snacks sector, the Commission described the snacks sector as including "*various types of products including potato crisps, corn snacks, extruded snacks, popcorn, baked snacks and nuts.*"<sup>9</sup> The Commission did not reach a definitive conclusion as to the scope of the relevant product market in that instance.
20. The Parties submit that the decisional practice of the European Commission suggests that snack bars can be regarded as a part of a snacks product market, consisting of various products generally consumed between meals, such as cake bars, chocolate bars, bread substitutes, yoghurt and fruits.<sup>10</sup> The Parties further submit that the appropriate horizontal overlap for consideration in the context of the Proposed Transaction is the sale of snack bars, or, at the narrowest, the sale of energy bars.
21. In line with the decisional practice of the European Commission, the Commission first considered the overlap in the Parties' activities in the supply of snack products in the State.

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<sup>8</sup> *M/12/031 – Top Snacks / KP Products*, dated 22 April 2013 <https://www.ccpc.ie/business/mergers-acquisitions/merger-notifications/m12031-top-snacks-kp-snacks/>

<sup>9</sup> *M/12/031 – Top Snacks / KP Products*, page 9, paragraph 2.4.

<sup>10</sup> In footnote 8 of the notification, the Parties cite paragraph 17 of *M.4738 – OEP / MSP-Stiftung / DVG / Dailycer Group*, where the parties to that transaction submitted that "*cereal bars belong to the category of snack products that are generally consumed between meals, such as cake bars, chocolate bars, bread substitutes, yogurt and fruit.*" The Parties also cite paragraphs 17-23 of *M.7709 - Bright Food Group / Invermik*, which again examined cereal bars.

Table 1 below shows estimated market shares of the main suppliers in the potential market for the sale of snacks in the State, with the Parties' estimated market shares shown in bold.

*Table 1 Supply of snack products in the State by value in 2021*

The Parties and main competitors	Estimated shares (by value)
Mondelez International, Inc.	[10-20]%
Mars, Incorporated	[10-20]%
Private Label <sup>11</sup>	[10-20]%
Intersnack Group GmbH & Co KG	[0-10]%
Société des Produits Nestlé S.A.	[0-10]%
Valeo Foods Group	[0-10]%
<b>Ferrero</b>	<b>[0-10]%</b>
Unilever plc	[0-10]%
PepsiCo Inc	[0-10]%
The Kellogg Company	[0-10]%
Haribo GmbH & Co KG	[0-10]%
<b>Fulfil</b>	<b>[0-10]%</b>
Other	[20-30]%

Source: The Parties, using Euromonitor – 25/04/2022<sup>12</sup>

22. As shown by Table 1 above, the estimated shares of Ferrero and Fulfil in the supply of snack products in the State in 2021 were [0-10]% and [0-10]% respectively. Accordingly, the combined share of supply of the merged entity would be a total of [0-10]% by value in the overall potential market for the sale of snacks in the State following the implementation of the Proposed Transaction. Therefore, the Proposed Transaction would lead to a relatively small increase in total market share for Ferrero. In addition, the combined entity will continue to face competitive pressure from other sellers of snack products in the State, including from Mondelez International, Inc., Mars, Incorporated, and Private Label products, all of which would have a higher market share than the combined entity.

<sup>11</sup> A private-label product is created exclusively for a client, typically a retailer, who sets specific demands on what the product or service must contain.

<sup>12</sup> Note that the figures presented in Table 1 are rounded to the nearest decimal place.

23. For the reasons outlined above, the Commission considers that the result of the Proposed Transaction is unlikely to lead to a substantial lessening of competition in the potential market for the sale of snack products in the State.

The sale of snack bars in the State

24. The Commission next considered the horizontal overlap between the activities of the Parties in a narrower potential market, that for the supply of snack bars in the State. The Parties describe snack bars in the notification as follows: *“Snack bars are snack foods containing cereals, fruits, nuts, and/or flavour ingredients, among others intended to supply quick energy and proteins.”*<sup>13</sup> Based on figures submitted by the Parties for 2021, the Commission estimates that snack bars constitute [0-10]% of the overall sale of snack products in the State.

25. Table 2 below shows estimated market shares by value of the main suppliers in the potential market for the supply of snack bars in the State, with the Parties’ estimated market shares shown in bold.

*Table 2 Supply of snack bars in the State by value in 2021*

The Parties and main competitors	Estimated shares (by value)
<b>Fulfil</b>	<b>[30-40]%</b>
The Kellogg Company	[10-20]%
General Mills, Inc.	[10-20]%
Mars, Incorporated	[0-10]%
E. Flahavan & Sons Limited	[0-10]%
Mondelez International, Inc.	[0-10]%
Natural Balance Foods Limited	[0-10]%
Glanbia Co-operative Society Limited	[0-10]%
Unilever plc ( <i>Graze</i> )	[0-10]%
<b>Ferrero</b>	<b>[0-10]%</b>
Private Label	[0-10]%
Other	[0-10]%

Source: Ferrero estimates based on Nielsen data and MAT data of December 2021

<sup>13</sup> Merger Notification, para 5.1.5.

26. As shown in Table 2 above, the estimated shares of supply of Ferrero and Fulfil in the supply of snack bars in the State in 2021 were [0-10]% and [30-40]%, respectively. Following the implementation of the Proposed Transaction, the merged entity would have a share of supply in the potential market for the sale of snack bars in the State of [30-40]%. The Commission considers that the addition of Ferrero’s share of [0-10]% to Fulfil’s share of [30-40]%, as a result of the implementation of the Proposed Transaction, represents a relatively small increment. In addition, the combined entity will continue to face competitive pressure from other significant competitors, including The Kellogg Company, General Mills, Inc., and Mars, Incorporated.
27. For the reasons outlined above, the Commission considers that the result of the Proposed Transaction is unlikely to lead to a substantial lessening of competition in the potential market for the supply of snack bars in the State.

The sale of energy bars in the State

28. The Parties submit that there are three potential sub-segments within the supply of snack bars: (i) cereal bars; (ii) fruit and nut bars; and (iii) energy bars. Within these potential sub-segments, the Parties’ activities only overlap in the potential sub-segment of the supply of energy bars. The Parties describe energy bars as *“everyday bars that are nutritionally fortified with protein and/or vitamins to provide quick boosts of energy.”*<sup>14</sup> While Ferrero also produces fruit and nut bars, Fulfil does not. Neither of the parties supply cereal bars in the State. Based on figures submitted by the Parties for 2021, the Commission estimates that sales of energy bars constitute approximately [50-60]% of the overall sale of snack bars in the State.
29. The Commission considered the horizontal overlap between the activities of the Parties in a possible, narrower, potential product market for the supply of energy snack bars in the State. Table 3 below shows the estimated market shares by value of the main suppliers in the potential market for the supply of energy bars in the State, with the Parties’ estimated market shares highlighted in bold.

*Table 3 Supply of energy bars in the State by value in 2021*

The Parties and main competitors	Estimated shares (by value)
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<sup>14</sup> Merger Notification, para 5.1.11.



<b>Fulfil</b>	<b>[70-80]%</b>
General Mills, Inc.	[0-10]%
Mars, Incorporated	[0-10]%
Mondelez International, Inc.	[0-10]%
Glanbia Co-operative Society Limited	[0-10]%
Carbery Creameries Limited ( <i>Kinetica</i> )	[0-10]%
Unilever plc ( <i>Graze</i> )	[0-10]%
Science in Sports plc ( <i>Phd Nutrition</i> )	[0-10]%
Clif Bar & Company	[0-10]%
Cali Cali Foods Limited	[0-10]%
Natural Balance Foods Limited	[0-10]%
The Kellogg Company	[0-10]%
<b>Ferrero</b>	<b>[0-10]%</b>
Other	[0-10]%

Source: Ferrero estimates based on Nielsen data and MAT data of December 2021

30. As shown in Table 3 above, the estimated shares of supply of Ferrero and Fulfil in the supply of energy bars in the State in 2021 were [0-10]% and [70-80]%, respectively. Therefore, following the implementation of the Proposed Transaction, the merged entity would have a market share in the potential market for the supply of energy bars in the State of approximately [70-80]%. The Commission considers that the addition of Ferrero's share of [0-10]% to Fulfil's share of [70-80]%, as a result of the implementation of the Proposed Transaction, represents a relatively small increment. In addition, the combined entity will continue to face some competitive pressure from other significant competitors, including General Mills, Inc., Mars, Incorporated, and Mondelez International, Inc.
31. For the reasons outlined above, the Commission considers that the result of the Proposed Transaction is unlikely to lead to a substantial lessening of competition in the potential market for the supply of energy bars in the State.

The sale of lifestyle energy bars in the State

32. The Parties note that the potential market for the supply of energy bars consists of the supply of two types of products, (i) lifestyle energy bars; and, (ii) sports energy bars.
33. As noted in paragraph 15 above, two of Fulfil’s products sold in the State could potentially be considered as both lifestyle energy bars and sports energy bars. The Parties submit that, depending on whether two of Fulfil’s products are considered to be either lifestyle energy bars or sports energy bars, the sale of lifestyle energy bars represents either [10-20]% or [10-20]% of the total value of the sale of energy bars in the State.
34. Within the overall energy bar segment, Ferrero is only active in the lifestyle energy bar segment, i.e. Ferrero does not supply any sports energy bars in the State. Therefore, taking a conservative approach, the Commission has considered a potential narrower segmentation between lifestyle energy bars and sports bars, and has assessed the overlap between the Parties’ activities in the supply of lifestyle energy bars in the State. In line with paragraph 15 above, for the purposes of its assessment, the Commission on balance considers the two Fulfil products (crispy caramel and crispy peanut), which could be categorised as either sports energy bars and lifestyle energy bars, to be lifestyle energy bars.
35. Table 4 below shows the estimated market shares by value of the main suppliers in the potential market for the supply of lifestyle energy bars in the State, with the Parties’ estimated market shares highlighted in bold.

*Table 4 Supply of lifestyle energy bars in the State by value in 2021*

The Parties and main competitors	Estimated shares (by value)
<b>Fulfil</b>	<b>[10-20]%</b>
General Mills, Inc.	[30-40]%
Mars, Incorporated	[20-30]%
Carbery Creameries Limited ( <i>Kinetica</i> )	[0-10]%
Unilever plc ( <i>Graze</i> )	[0-10]%
Clif Bar & Company	[0-10]%
Calli Calli Foods Limited	[0-10]%
Natural Balance Foods Limited	[0-10]%
The Kellogg Company	[0-10]%

Ferrero	[0-10]%
Other	[0-10]%

Source: Ferrero estimates based on Nielsen data and MAT data of December 2021

36. As shown in Table 4 above, the estimated market shares of Ferrero and Fulfil in the supply of lifestyle energy bars in the State in 2021 were [0-10]% and [10-20]%, respectively. Therefore, following the implementation of the Proposed Transaction, the combined entity would have a market share in the potential market for the supply of lifestyle energy bars in the State of approximately [10-20]%. The Commission considers that the addition of Ferrero’s share of [0-10]% to Fulfil’s share of [10-20]%, as a result of the implementation of the Proposed Transaction, represents a relatively small increment. In addition, the combined entity will continue to face competitive pressure from other significant sellers of snack products in the State, including Mars, Incorporated, and General Mills, Inc., both of which would have a higher share of supply than the combined entity.
37. For the reasons outlined above, the Commission considers that the result of the Proposed Transaction is unlikely to lead to a substantial lessening of competition in the potential market for the supply of lifestyle energy bars in the State.

#### *Vertical Relationship*

38. There is no existing vertical relationship between the Parties in the State. There is a potential vertical relationship between the Parties as Ferrero is active in the upstream input supply of hazelnuts, and Fulfil incorporates a “very small”<sup>15</sup> amount of hazelnuts in its products.
39. The Parties submit that:

*“Even if Ferrero were to supply all of the [Fulfil]’s requirements of hazelnuts through its business, there would be no material impact (if any) on the ability of third parties to source hazelnuts from Ferrero or third parties post-Transaction.”*

<sup>15</sup> Merger Notification, para 4.2.3.

40. As noted above in paragraph 8, raw materials (including hazelnuts) required for the manufacturing of snack bars are not purchased by Fulfil itself, which is only active in the marketing and sale of snack bar products, but by the manufacturers which are contracted by Fulfil to produce its own recipes. The Commission notes that these manufacturers, based in the Netherlands and Croatia, also manufacture snack bars for the competitors of the Parties, such as *Grenade*-branded products (Mondelez International, Inc.).<sup>16</sup>
41. For these reasons, the Commission considers in this instance that the result of the Proposed Transaction is unlikely to lead a substantial lessening of competition in relation to the upstream market for the procurement and supply of edible nuts to snack bar manufacturers.

#### *Conclusion*

42. In light of the above, the Commission considers that the Proposed Transaction will not substantially lessen competition in any market for goods or services in the State.

#### **Ancillary Restraints**

43. The SPA contains non-compete and non-solicitation obligations on Fulfil Holdings Limited, [...], and [...] at Clause 7.1. The duration of these restrictive covenants does not exceed the maximum duration acceptable to the Commission. The Commission notes that the geographic scope of these restrictive covenants applies to [...].<sup>17</sup> The Commission considers these restrictive covenants to be directly related and necessary to the implementation of the Proposed Transaction insofar as they relate to the State.

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<sup>16</sup> Merger Notification, para 3.3.10.

<sup>17</sup> SPA, Page 11.

### **Determination**

The Competition and Consumer Protection Commission, in accordance with section 21(2)(a) of the Competition Act 2002, as amended, has determined that, in its opinion, the result of the proposed acquisition, whereby Ferrero International S.A. would acquire the entire issued share capital, and thus sole control, of Bartoni Limited, together with its wholly-owned subsidiary Fulfil Nutrition GB Limited, will not be to substantially lessen competition in any market for goods or services in the State, and, accordingly, that the acquisition may be put into effect.

For the Competition and Consumer Protection Commission

**Brian McHugh**

**Member**

**Competition and Consumer Protection Commission**