

DETERMINATION OF MERGER NOTIFICATION M/21/071 – TESCO/JOYCE’S

Section 22 of the Competition Act 2002

Acquisition by Tesco Ireland Limited of Patrick C. Joyce Supermarket (Headford) Unlimited Company.

Dated 02 June 2022

Determination

Pursuant to section 20(3) of the Competition Act 2002, as amended (the “Act”), Tesco Ireland Limited (“Tesco Ireland”) has submitted to the Competition and Consumer Protection Commission (the “Commission”) the proposals set out below regarding measures to be taken to ameliorate any effects of the proposed acquisition on competition in markets for goods and services in the State, with a view to the said proposals becoming binding on Tesco Ireland.

The Commission has taken the proposals into account and, in light of the said proposals (which form part of the basis of its determination), has determined, in accordance with section 22(3)(a) of the Act that the result of the proposed acquisition whereby Tesco Ireland would acquire sole control of Patrick C. Joyce Supermarket (Headford) Unlimited Company (“Joyce’s”), a wholly-owned subsidiary of Solus Junction Unlimited Company (“Solus”) (the “Proposed Transaction”), 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. Before making a determination in this matter, the Commission, in accordance with section 22(8) of the Act, had regard to any relevant international obligations of the State, and concluded that there were none.

For the Competition and Consumer Protection Commission

Jeremy Godfrey
Chairperson
Competition and Consumer Protection Commission

Appendix A: Proposals

M/21/071 – Tesco/Joyce's

Proposals by Tesco Ireland Limited to the Competition and Consumer Protection Commission

02 June 2022

Recitals

- A. On 8 December 2021, Tesco notified the CCPC under Part 3 of the Act of a proposed acquisition whereby Tesco would acquire Patrick C. Joyce Supermarket (Headford) Unlimited Company including the Business (as hereinafter defined) (the “**Proposed Transaction**”).
- B. On 7 April 2022, the CCPC made a determination that it intended to carry out a full investigation under Section 22 of the Act in relation to the Proposed Transaction.
- C. Tesco has submitted the following Proposals pursuant to Section 20(3) of the Act, for the purposes of ameliorating any effect of the Proposed Transaction on competition in markets for goods or services in the State with a view to the Proposals becoming binding on Tesco if the CCPC takes the Proposals into account and states in writing that the Proposals form the basis or part of the basis of a Determination (as hereinafter defined).

Definitions

For the purpose of these Proposals, the following terms shall have the following meaning:
“**Act**” means the Competition Act 2002, as amended;

“**Business**” means Joyce's interest, rights and obligations in respect of the Joyce's grocery goods supermarket as currently trading out of Oran Town Centre, Millplot, Oranmore, Co. Galway, H91 XTT3 (i.e., the operation of a retail grocery goods supermarket including ancillary services at that premises), which is to be sold by Tesco, after having acquired it as part of the Proposed Transaction, under the terms of these Proposals (whether effected by means of an asset sale or a sale of the shares in Joyce's Oranmore);

“**CCPC**” means the Competition and Consumer Protection Commission;

“**Determination**” means the Determination of the CCPC pursuant to Section 22(3)(a) of the Act that the Proposed Transaction may be put into effect, taking into account the Proposals, which form part of the basis of the Determination;

“**Divestment Period**” has the meaning ascribed to it in paragraph 2 of these Proposals;

“**Existing Supplier**” means any of the suppliers of the Business the day prior to the date of the Determination;

“**Hold Separate Manager**” has the meaning ascribed to it in paragraph 33 of these Proposals;

“**Joyce's**” means Patrick C. Joyce Supermarket (Headford) Unlimited Company, a company incorporated in Ireland under registration number 99879, and its subsidiaries, representatives, franchisees and agents and all the undertakings they control either directly or indirectly, solely or jointly. For the purposes of this definition, “control” and its variants have the meaning ascribed by section 16(2) of the Act;

“**Joyce's Oranmore**” means Joyce's Supermarket (Oranmore) Unlimited Company, a company incorporated in Ireland under registration number 609031, being a wholly owned direct subsidiary of Joyce's which owns and operates the Business;

“**Mandate**” means the mandate agreement to be entered into between Tesco and the Trustee in accordance with paragraph 18 of these Proposals, the terms of which have been agreed with the CCPC;

“**Proposed Transaction**” means the proposed acquisition by Tesco of sole control of Joyce’s as notified to the CCPC on 8 December 2021;

“**Proposed Trustee**” has the meaning ascribed to it in paragraph 15 of these Proposals;

“**Suitable Purchaser**” means a purchaser who meets all of the following criteria:

- a) whose acquisition of the Business would not be likely to create *prima facie* competition concerns;
- b) whose acquisition of the Business would be on terms and conditions which would not be likely to create *prima facie* competition concerns;
- c) the purchaser is unconnected to, and independent of, Tesco and Joyce’s;
- d) the purchaser is able to continue to operate the Business on a financially viable basis; and
- e) the purchaser is a seller of grocery goods;

“**Tesco**” means Tesco Ireland Limited, a company incorporated in Ireland under registration number 19542, and its subsidiaries, representatives, franchisees and agents and all the undertakings they control either directly or indirectly, solely or jointly from time to time. For the purposes of this definition, “control” and its variants have the meaning ascribed by section 16(2) of the Act;

“**Trustee**” means the trustee approved, or deemed to have been approved, by the CCPC with whom Tesco shall enter into the Mandate in accordance with paragraph 18 of these Proposals;

“**Trustee Reports**” has the meaning ascribed to it in paragraph 20(a) of these Proposals.

A. Proposal to divest Joyce's Oranmore following the completion of the Proposed Transaction

1. Pursuant to section 20(3) of the Act, Tesco submits to the CCPC the following Proposals relating to the Business for the purpose of ameliorating any effects of the Proposed Transaction on competition in markets for goods or services, with a view to the Proposals becoming binding on Tesco following agreement between the CCPC and Tesco.
2. Tesco undertakes, subject to the provisions set out herein, to effect the sale of the Business within [...] of the Determination (the “**Divestment Period**”) (or such longer period as may be allowed by the CCPC, acting reasonably) to a Suitable Purchaser approved by the CCPC (which approval shall not be unreasonably withheld or delayed by the CCPC). For the purpose of these Proposals, any reference to a sale, disposal or transfer by Tesco of the Business (or similar expressions) shall be deemed to include, but is not limited to, an asset sale, a sale, disposal or transfer by Tesco of the entire issued share capital of Joyce's Oranmore (being the entity that owns and operates the Business).
3. Tesco recognises that the sale of the Business shall be upon such conditions as agreed between the CCPC and Tesco under these Proposals and that the acquisition of the Business by a prospective purchaser must not be likely to create, in light of information available to the CCPC, *prima facie* competition concerns.
4. Tesco recognises that for a prospective purchaser to meet with the CCPC’s approval, such purchaser shall be unconnected to and independent of Tesco and Joyce's and shall be a Suitable Purchaser.
5. Tesco further recognises that for a prospective purchaser to meet with the CCPC’s approval, that purchaser must be deemed reasonably likely to obtain all authorisations and consents required to effect a transfer of the Business.
6. Tesco shall be deemed to have complied with paragraph 2 of these Proposals if, within [...] from the Determination (or such longer period as may be allowed by the CCPC, acting



reasonably), it has entered into a binding letter of intent or a binding contract for the sale of the Business, provided that such sale is completed within a [...] period from the date of the relevant letter of intent or contract (or such longer period as may be allowed by the CCPC, acting reasonably).

7. Tesco shall:
 - i. promptly inform the CCPC in writing, with a fully documented and reasoned proposal, of any prospective purchaser who indicates a serious desire to purchase the Business and to whom Tesco is considering the sale of the Business, enabling the CCPC to verify the suitability of the prospective purchaser; and
 - ii. when the parties have entered into a binding letter of intent or a binding contract for the sale of the Business, submit a fully documented and reasoned proposal enabling the CCPC to verify that the conditions laid down in these Proposals are fulfilled and that there has been no material change in the status of the purchaser not reasonably foreseeable at the time the CCPC assessed the purchaser's suitability under paragraph 7(i) subject to the CCPC agreeing to keep confidential all such information received.
8. The CCPC shall communicate in writing its approval or non-approval of a prospective purchaser of the Business within two (2) weeks of receipt of a full documented and reasoned proposal identifying a prospective purchaser. Separately, within two (2) weeks of receipt of a binding letter of intent or a binding contract for sale and accompanying fully documented and reasoned proposal in accordance with paragraph 7(ii), the CCPC shall communicate in writing its view as to whether the conditions laid down in these Proposals have been fulfilled and as to whether there has been any material change in the status of the purchaser as provided for in paragraph 7(ii).
9. Failure of the CCPC to communicate its approval or non-approval of a prospective purchaser within two (2) weeks of receipt of a fully documented and reasoned proposal identifying such a purchaser in accordance with paragraph 7(i) shall delay the running or expiration of the [...] period established above until the CCPC communicates its approval or non-approval. However, if the CCPC does not communicate its approval or non-approval within thirty (30) calendar days of receipt as aforesaid, such approval shall be deemed to have been given unconditionally. In the case of multiple offers from prospective purchasers whom the CCPC considers suitable, Tesco shall be free to accept any offer of its choosing.
10. The CCPC and Tesco shall act at all times in a reasonable manner with a view to achieving the effective and efficient implementation of these Proposals.

B. The Business to be Divested

11. Tesco undertakes to dispose of the entirety of the Business, to include all tangible and non-tangible assets, licences and contracts.
12. Tesco undertakes to sell the Business as a going concern, including, where necessary, a transfer of all relevant staff in accordance with all applicable employment laws.
13. Tesco undertakes not to carry out any act upon its own authority which may reasonably be expected to have a significant adverse impact on the economic value, the management, or the competitiveness of the Business until the date of its disposal. In particular Tesco shall ensure that it does not change or attempt to change the pricing structure of goods in the Business, other than with the prior approval of the Hold Separate Manager.
14. Tesco undertakes not to purchase the Business (or otherwise to acquire an interest in the Business) for a period of ten (10) years following the date of completion of the sale of the Business to a Suitable Purchaser pursuant to these Proposals. If Tesco enters into a binding agreement to acquire the Business after the expiry of the ten-year period referred to in this paragraph, Tesco shall submit a written notification of such agreement to the CCPC within five (5) working days of the signing of such agreement and will, if required to do so by the CCPC, notify any such proposed acquisition in accordance with Section 18(3) of the Act (or its successor provision, if applicable) if such proposed acquisition is not required to be notified under Section 18(1) of the Act (or its successor provision, if applicable).

C. Appointment of a Trustee

15. Within ten (10) working days after the Determination, Tesco will propose to the CCPC a trustee, who is independent of Tesco and Joyce's (the "**Proposed Trustee**"). The appointment of the Proposed Trustee is subject to the approval of the CCPC. If the CCPC does not reject the Proposed Trustee by notice in writing within five (5) working days of the proposal, the Proposed Trustee shall be deemed to have been approved.
16. If the Proposed Trustee is rejected, Tesco will propose the name of a new trustee (the "**New Trustee**") within ten (10) working days of being informed of the rejection. If the CCPC does not reject the New Trustee by notice in writing to Tesco within five (5) working days of the new proposal, the New Trustee shall be deemed to have been approved.
17. If the New Trustee, proposed under paragraph 16, is rejected by the CCPC, the CCPC shall, acting reasonably, nominate a suitable trustee (the "**CCPC Trustee**") which Tesco will appoint or cause to be appointed.

D. Trustee's Mandate

18. Within ten (10) working days of the date on which the CCPC has approved or is deemed to have approved either the Proposed Trustee, the New Trustee or the CCPC Trustee, Tesco shall enter into a mandate agreement (the "**Mandate**") with the approved trustee (the "**Trustee**"), the terms of which have been agreed with the CCPC, which confers on the Trustee all the rights and powers necessary to permit the Trustee to monitor Tesco's compliance with the terms of these Proposals.
19. The Trustee shall be independent of Tesco and Joyce's, possess the necessary qualifications and experience to carry out its mandate, and shall neither have nor become exposed to a conflict of interest.
20. Throughout the duration of the Trustee's appointment, the Trustee shall:
 - a) provide written reports ("**Trustee Reports**") to the CCPC on the progress of the discharge of its duties under the Mandate, identifying any respects in which the Trustee has been unable to discharge such duties. The Trustee Reports shall be provided at monthly intervals, commencing one month after the date of the appointment of the Trustee, or at such other times or time periods as the CCPC may specify and are notified in writing to Tesco. Tesco shall receive a non-confidential copy of such Trustee Reports.
 - b) monitor and advise the CCPC as to the development of the procedure for selecting a purchaser for the Business and as to the conduct of the negotiations;
 - c) monitor and advise the CCPC as to whether the prospective purchaser(s) with whom Tesco intends to negotiate are likely to satisfy the CCPC's requirements as to suitability; and
 - d) monitor the maintenance of the viability and marketability of the Business and ensure that it is managed in the ordinary course of business, pursuant to good business practice.
21. The Trustee's duties and functions as set out above shall not be extended or varied in any way by Tesco, save with the express consent of the CCPC. Any instruction or request to the Trustee from Tesco which conflicts with the terms of the Mandate, and the duties and functions as set out above, will be considered null and void.
22. The CCPC may, on its own initiative or at the request of the Trustee, give any orders or instructions to the Trustee that are required in order to ensure compliance with the conditions and obligations attached to the Determination so long as Tesco is first given an opportunity to comment on any such orders or instructions in advance.
23. After [...] have lapsed from the Determination (or [...] such longer period as may be allowed by the CCPC in accordance with paragraph 6 above), without Tesco having entered into a binding letter of intent or a binding contract for the disposal of the Business, the Trustee shall be given an irrevocable mandate to negotiate and conclude arrangements for the sale of the

Business in relation to which a binding letter of intent or a binding contract remains to be concluded within [...] at no minimum price and upon such terms and conditions as it considers appropriate for an expedient sale, to a viable and independent third party (subject to the CCPC having approved both the purchaser(s) and, following entry into a binding letter(s) of intent or binding contract(s) for the sale of the Business, the CCPC having verified that there has been no material change in the status of the purchaser, in accordance with paragraphs 7, 8 and 9 above). For the avoidance of doubt, Tesco shall not be obliged to remunerate the purchaser in order to ensure the sale of the Business. In this context, all references in paragraphs 7 and 9 to "Tesco" shall be substituted with "the Trustee". The Trustee shall, however, have regard to the legitimate financial interests of Tesco in respect of any such sale, subject to Tesco's unconditional obligation to divest the Business at no minimum price.

24. The CCPC and Tesco shall endeavour to ensure that the Trustee shall act reasonably and responsibly.

E. Miscellaneous

25. Tesco will provide the Trustee with all reasonable assistance and will procure (so far as it is able) that all relevant third parties provide such assistance required to ensure compliance with these Proposals. Tesco will provide or cause to be provided to the Trustee all such assistance and information, including copies of all relevant documents accessible by Tesco as the Trustee may require in carrying out its Mandate, and will pay reasonable remuneration for the Trustee's services.
26. In addition, at the expense of Tesco, the Trustee may appoint advisors (in particular for corporate finance and / or legal advice), subject to Tesco's approval, such approval not to be unreasonably withheld or delayed, if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable, necessary and appropriate. Should Tesco refuse to approve the advisors proposed by the Trustee, the CCPC may approve the appointment of such advisors instead, after first having heard Tesco. Only the Trustee shall be entitled to issue instructions to the advisors.
27. Notwithstanding the Trustee's overall responsibility to discharge its functions and in particular notwithstanding the Trustee's position as an independent unrelated third party, the Trustee (who shall undertake in the Mandate to do so) shall have to the extent possible given the nature of its tasks due regard to the commercial interests of Tesco. The Trustee shall have access on an unrestricted, working basis to the Hold Separate Manager (as defined below), and any other employees of the Business in order to ensure compliance by Tesco with these Proposals.
28. The Trustee shall have full and complete access to the Hold Separate Manager and any other employees of the Business, in order to ensure compliance by Tesco with its obligation to maintain the financial and competitive viability of the Business.
29. Tesco shall indemnify the Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Tesco for any liabilities arising out of the performance of the Trustee's duties under the Proposals and the Mandate, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors. The Trustee and all other relevant third parties' powers of attorney and appointment shall be irrevocable.

F. Interim Position of the Business

30. Following the Determination and pending the onward sale of the Business, Tesco undertakes to hold separate the Business and to preserve the economic viability, marketability, and competitiveness of the Business until the date of disposal in accordance with good commercial practice, and to ensure that the Business is managed separately by the Hold Separate Manager in the best interests of the Business as a distinct economic entity.

31. Tesco shall implement verifiable measures to ensure that it does not obtain any competitively sensitive information relating to the Business during the period from the date of the Determination until the date of the sale of the Business (save, by agreement with the Trustee under the terms of the Mandate), where such information is required for the operation of the Business in accordance with good commercial practice or for the purpose of assisting the divestiture by Tesco of the Business to a prospective purchaser).
32. Following the Determination and pending the sale of the Business, Tesco undertakes not to carry out any act upon its own authority which may reasonably be expected to have a significant adverse impact on the economic value, the management, or the competitiveness of the Business until the date of its disposal. Furthermore, Tesco undertakes not to carry out upon its own authority any act which may be of such a nature as to alter the nature or the scope of activity, or the industrial or commercial strategy, or the investment policy of any of the Business. In particular, Tesco shall procure and ensure that the Business continues to engage with the Existing Suppliers to the Business in good faith, and to terminate contracts, whether written or unwritten, with Existing Suppliers only for material breach of contract.
33. Tesco further undertakes to appoint a manager for the Business (who may be the existing store manager of the Business or such similar person, who is unconnected to, and independent of, Tesco) who shall be responsible for the day-to-day management of all operations in relation to the Business (the "**Hold Separate Manager**").
34. The Hold Separate Manager shall manage the Business independently of Tesco and in the best interest of the Business with a view to ensuring its continued economic viability, marketability, and competitiveness. Further, the Hold Separate Manager shall be responsible for ensuring that no competitively sensitive information relating to the Business and its operation is provided to Tesco during the period from the date of the Determination until the date of the sale of the Business, save with the agreement of the Trustee under the terms of the Mandate and where one of the following conditions are satisfied:
 - a) such information is necessary to ensure the efficient transfer of the ten stores forming part of Joyce's to Tesco, and the continued operation of Joyce's (including the Business) throughout this period (during which the parties will work together to ensure that the transition has been successful), or
 - b) such information is required for the operation of the Business in accordance with good commercial practice, to enable compliance with legal or regulatory obligations by Tesco; and/or the Business, or
 - c) such information is required for the purpose of assisting the divestiture by Tesco of the Business to a prospective purchaser.

G. Review clause

35. The CCPC may at its sole discretion, acting reasonably, extend any of the time periods provided for in these Proposals in response to a reasoned request from Tesco or the Trustee. The CCPC may further, at its sole discretion waive, modify or substitute any provision in these Proposals in response to a reasoned request from Tesco or the Trustee showing good cause.