



# DETERMINATION OF MERGER NOTIFICATION

**M/21/071 - Tesco / Joyces**

02 June 2022



Coimisiún um  
Iomaíocht agus  
Cosaint Tomhaltóirí

Competition and  
Consumer Protection  
Commission

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## CONTENTS

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<b>Contents</b> .....	<b>2</b>
<b>1. INTRODUCTION</b> .....	<b>4</b>
Introduction.....	4
The Proposed Transaction.....	4
The Undertakings Involved.....	4
Rationale for the Proposed Transaction.....	7
Preliminary Investigation (“Phase 1”).....	8
Contacts with the notifying parties.....	8
Third Party Submissions.....	9
Market Enquiries.....	9
Phase 1 Proposals .....	9
Phase 1 Determination .....	10
Full Investigation (“Phase 2”) .....	11
Third Party Submissions.....	11
Phase 2 Proposals .....	11
<b>2. INDUSTRY BACKGROUND – Grocery Retail Sector</b> .....	<b>12</b>
Definition of groceries.....	12
Retail supply of groceries .....	15
Nature of Competition.....	22
Local flexing.....	22
<b>3. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS</b> .....	<b>25</b>
Introduction.....	25
Vertical Overlaps.....	25
Horizontal Overlaps .....	26
Relevant Principles.....	26
Relevant Product Markets.....	28
Previous decisions.....	28
Conclusion on relevant product market .....	34



Relevant Geographic Markets .....	35
Conclusion on relevant geographic market .....	39
<b>4. RELEVANT COUNTERFACTUAL.....</b>	<b>40</b>
<b>5. COMPETITIVE ASSESSMENT .....</b>	<b>43</b>
Introduction.....	43
Potential Markets in which the Proposed Transaction Raises No Competition Concerns .....	46
Conclusion on competitive assessment .....	60
<b>6. PROPOSALS TO ADDRESS COMPETITION CONCERNS .....</b>	<b>62</b>
Introduction.....	62
Competition Concerns.....	62
Conclusion .....	63
<b>7. CONCLUSION .....</b>	<b>65</b>
<b>8. ANCILLARY RESTRAINTS.....</b>	<b>66</b>
<b>9. DETERMINATION .....</b>	<b>68</b>
<b>1. Annex 1 – Phase 2 Proposals .....</b>	<b>58</b>



## 1. INTRODUCTION

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### Introduction

- 1.1 On 8 December 2021, 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 (the “Merger Notification Form”) of a proposed acquisition by Tesco Ireland Limited (“Tesco Ireland”), an indirect, wholly-owned subsidiary of Tesco plc, of 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”).

### The Proposed Transaction

- 1.2 The Proposed Transaction will be implemented pursuant to a single share purchase agreement dated 29 November 2021, between Tesco Ireland, Solus and the private individuals who are the current shareholders of Solus, namely Patrick and Breda Joyce (“the Covenantors”) (“the SPA”). Under the terms of the SPA, Tesco Ireland will acquire the entire issued share capital, and thus sole control, of Joyce’s.
- 1.3 Joyce’s is the parent company of 10 subsidiaries, which correspond to each of their retail grocery outlets operating under the Joyce’s brand (together the “Target Outlets”, and each a “Target Outlet”). Two of those Target Outlets operate motor fuel service stations (i.e., Joyce’s Inverin and Joyce’s Headford).<sup>1</sup>

### The Undertakings Involved

The Acquirer - Tesco Ireland

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<sup>1</sup> Please see paragraph 1.8 of this determination for a list of the Target Supermarkets.



- 1.4 Tesco Ireland is a private company limited by shares incorporated in the State. Tesco Ireland is active in the retail sale of grocery and general merchandise. It also provides mobile telecommunications services in the State. Tesco Ireland is an indirect, wholly-owned and controlled subsidiary of Tesco plc, a multinational grocery and general merchandise retailer.
- 1.5 As of 10 May 2022, Tesco Ireland operates 150 retail outlets in the State,<sup>2</sup> of which 4 are located in Co. Galway.
- 1.6 For the financial year ending 28 February 2021, the total worldwide turnover of Tesco plc was [...]. For the same financial year, Tesco plc generated [...] within the State, of which [...] was generated via its retail outlets in the State.

#### The Target – Joyce's

- 1.7 Joyce's is a regional grocery and general merchandise retailer active in Co. Galway. Joyce's is a wholly-owned subsidiary of Solus, which in turn is wholly-owned by the Covenantors. Joyce's is the parent company of 10 subsidiaries each of which operates one of the 10 Target Outlets.
- 1.8 The 10 Target Outlets are in the following locations in Co. Galway:

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<sup>2</sup> Excluding service stations and pharmacies.

- (i) Inverin<sup>3</sup>
- (ii) Oughterard<sup>4</sup>
- (iii) Headford<sup>5</sup>
- (iv) Tuam<sup>6</sup>
- (v) Atherny<sup>7</sup>
- (vi) Ballybane<sup>8</sup>
- (vii) Doughiska<sup>9</sup>
- (viii) Father Griffin Road<sup>10</sup>
- (ix) Knocknacarra<sup>11</sup>
- (x) Oranmore<sup>12</sup>

1.9 The acquisition of the Joyce's retail outlets located in Inverin and Headford pursuant to the Proposed Transaction also includes those outlets' associated motor fuel service stations.

1.10 Joyce's also owns and operates one central distribution centre located in Claregalway. This distribution centre will not be acquired by Tesco Ireland pursuant to the Proposed Transaction.

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<sup>3</sup> Joyce's Supermarket (Inverin) Unlimited Company, Siopa an Phiobal, Coill Rua, Inverin, Co. Galway, H91 TYY2.

<sup>4</sup> Joyce's Supermarkets (Oughterard) Unlimited Company, Main Street, Fough West, Oughterard, Co. Galway, H91 Y201.

<sup>5</sup> Patrick C. Joyce Supermarket (Headford) Unlimited Company, Church Ln, Headford, Galway, H91 AH3K.

<sup>6</sup> Joyce's Supermarket (Tuam) Unlimited Company, Tuam Shopping Centre, Abbey Trinity Rd, Tuam, Co. Galway, H54 F897.

<sup>7</sup> Joyce's Supermarket (Atheryn) Unlimited Company, Atheryn Shopping Centre, Prospect, Atheryn, Co. Galway, H65 X084.

<sup>8</sup> Joyce's Supermarket (Ballybane) Unlimited Company, Ballybane Shopping Centre, Ballybane Road, Galway, H91 C862.

<sup>9</sup> Joyce's Supermarket (Doughiska) Unlimited Company, Doughiska Shopping Centre, Doughiska Road, Galway, H91 NPW2.

<sup>10</sup> Joyce's Supermarket (Fr Griffin Road) Unlimited Company, Father, Griffin Road, Galway, H91 KRC5.

<sup>11</sup> Joyce's Supermarket (Knocknacarra) Unlimited Company, Shangort Road, Knocknacarra, Galway, H91 Y72R.

<sup>12</sup> Joyce's Supermarket (Oranmore) Unlimited Company, Oran Town Centre, Millplot, Oranmore, Co. Galway, H91 XTT3.

- 1.11 For the financial year ending 31 December 2020, the total worldwide turnover of Joyce's was [...] all of which was generated in the State.

## Rationale for the Proposed Transaction

- 1.12 The notifying parties state the following in the notification:

*“The commercial objective of the Proposed Transaction is to improve Tesco’s reach in the west of Ireland, including Co. Galway, to allow it to better serve a wider group of customers, including customers that are not within easy access of a Tesco store today. The Target Outlets are ideally suited to this objective, as they complement Tesco’s current store footprint in the area.*

*Tesco’s mission is to serve customers a little better every day, by offering great value in terms of price, product range and quality, and convenience through its range of store formats and its grocery home delivery service. The Parties believe that the Proposed Transaction will therefore benefit customers in Co. Galway by improving the offer and choice available to them in their local area. More customers in the area will be able to avail of the pricing, service and offering which Tesco provide elsewhere in the State (e.g., Tesco’s national policy of low prices).*

*Tesco intends to work closely with Joyce’s existing network of suppliers to deliver on this, including the potential for product innovation and creating new opportunities for those suppliers to reach a wider group of customers. Tesco has an established track record of working with Irish suppliers and giving them opportunities which they might not otherwise have secured.”<sup>13</sup>*

- 1.13 In an internal email from [...], [former] Finance Director at Tesco Ireland, dated 05 August 2020, submitted to the Commission in response to the Request for Further Information (the “RFI”), he stated:

*“[Joyce’s] are the market leader in and around Galway with Dunnes at 2<sup>nd</sup> . Galway and the west side of Ireland by far is our weakest coverage area. In whole [sic] of Galway county we have only 1 store. Joyce has 6 stores and Dunnes have 5 stores. One of the reason [sic] Joyce was interesting for us as [sic] because if we were to get this business – we would have tried to make one of their stores as our hub to aggressively grow GHS in the west*

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<sup>13</sup> Merger Notification Form, paragraph 2.7.

*part of Ireland (which none of our competitors can do in the same way we can) ...*

*If Dunnes were to acquire them , it will make them undisputed [sic] leader of that side of the country. We may still have an window of opportunity to make an enquiry on a speculative and non -binding basis with NDA.”<sup>14</sup>*

## Preliminary Investigation (“Phase 1”)

### Contacts with the notifying parties

- 1.14 On 17 January 2022, the Commission served a Requirement for Further Information (“RFI”) on both Tesco Ireland, and Joyce’s, pursuant to section 20(2) of the Act. The service of these RFIs adjusted the deadline within which the Commission was required to conclude its assessment of the Proposed Transaction in Phase 1.
- 1.15 Upon receipt of a full response to the RFIs from both Tesco Ireland and Joyce’s, the “appropriate date” (as defined in Section 19(6)(b)(i) of the Act) became 04 February 2022.<sup>15</sup>
- 1.16 During the Phase 1 investigation, the Commission requested and received further information and clarifications from the notifying parties on an ongoing basis.
- 1.17 On 21 February 2022, the Commission held a state-of-play meeting with Tesco Ireland and their legal representatives (the “State of Play Meeting”). The Commission informed the parties present that, following its Phase 1 review of the Proposed Transaction, the Commission had identified a preliminary competition concern. The Commission informed the parties present that it was likely that the Commission would be unable to form the view, at the conclusion of the Phase 1

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<sup>14</sup> Tesco Ireland Response to RFI, “2020.08.05 email from [...] to [...] Update.MSG”.

<sup>15</sup> The “appropriate date” is the date from which the time limits for making Phase 1 or Phase 2 determinations begin to run.



investigation, that the result of the Proposed Transaction would not be to substantially lessen competition in any market for goods or services in the State.

- 1.18 On 07 March 2022, Tesco Ireland made a submission (the “First Submission”) to the Commission addressing the preliminary competition concern discussed with Tesco Ireland at the State of Play Meeting. After carefully assessing the information set out in the First Submission, the Commission informed Tesco Ireland that it was likely that it would still be unable to form the view, at the conclusion of the Phase 1 investigation, that the result of the Proposed Transaction would not be to substantially lessen competition in any market for goods or services in the State.

### **Third Party Submissions**

- 1.19 Two submissions were received from third parties during the Phase 1 investigation. The competition concerns expressed in these submissions were assessed by the Commission during the investigation as part of its review of the likely competitive impact of the Proposed Transaction in a number of potential markets for goods or services in the State.

### **Market Enquiries**

- 1.20 During the Phase 1 investigation the Commission conducted market enquiries which included site visits, and engagement with consumers and competitors of the notifying parties. In some cases, the Commission also contacted third parties by telephone and/or e-mail to seek further information or clarification regarding their responses.

### **Phase 1 Proposals**

- 1.21 During the Phase 1 investigation, the Commission identified a potential competition concern related to a risk that the Proposed Transaction could result in a significant loss of competition (i.e., loss of quality, choice, services, and/or a

likely increase in prices) for consumers in Oranmore, Co. Galway (the “Preliminary Competition Concern”). The Commission’s Preliminary Competition Concern arose from the fact that the Proposed Transaction would result in a reduction of the number of grocery retailers offering a full range of products in Oranmore, particularly branded products, and additional amenities and services (for example: a butcher, fish monger, bakery, delicatessen counter, fresh coffee counter, and customer toilets). Tesco Ireland disagreed with this Preliminary Competition Concern identified by the Commission.

1.22 Notwithstanding Tesco Ireland’s disagreement with the Commission’s Preliminary Competition Concern, on 16 March 2022, pursuant to section 20(3) of the Act, Tesco Ireland provided a submission to the Commission containing proposals (the “Phase 1 Proposals”) which Tesco Ireland claimed were aimed at ameliorating any effects of the Proposed Transaction on competition in markets for goods or services in the State.

1.23 During the Phase 1 investigation, the Commission engaged with Tesco Ireland and their legal advisors to discuss whether the Phase 1 Proposals submitted would ameliorate the Preliminary Competition Concern identified by the Commission.

### **Phase 1 Determination**

1.24 Having considered all the available information in its possession at the time, including the Phase 1 Proposals, the Commission was unable to form the view at the conclusion of the Phase 1 investigation that the result of the Proposed Transaction would not be to substantially lessen competition in any market for goods or services in the State.

1.25 Consequently, on 07 April 2022 the Commission determined, in accordance with section 21(2)(b) of the Act, to carry out a full investigation under section 22 of the Act in relation to the Proposed Transaction.

## Full Investigation (“Phase 2”)

1.26 During the Phase 2 investigation, the Commission engaged with Tesco Ireland on an ongoing basis. The Commission also engaged further with Tesco Ireland and their legal advisors concerning the Phase 1 Proposals, and whether alternative proposals could be provided that would ameliorate the Preliminary Competition Concern.

### Third Party Submissions

1.27 Three submissions were received from third parties during the Phase 2 investigation. Where competition concerns were expressed in these submissions, they were assessed by the Commission during the Phase 2 investigation as part of its review of the likely competitive impact of the Proposed Transaction in a number of potential markets for goods or services in the State.

### Phase 2 Proposals

1.28 On 29 April 2022, Tesco Ireland submitted revised draft proposals to the Commission in accordance with section 20(3) of the Act with a view to ameliorating the Commission’s preliminary competition concern. The Commission engaged further with Tesco Ireland and its legal advisors concerning the revised draft proposals. On 01 June 2022, Tesco Ireland submitted to the Commission final proposals under section 20(3) of the Act (the “Phase 2 Proposals”). The Phase 2 Proposals are discussed further in Section 6 below.

## 2. INDUSTRY BACKGROUND – GROCERY RETAIL SECTOR

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- 2.1. Both Tesco Ireland and Joyce’s are active in the grocery retail sector in the State. This section provides an industry overview and describes the characteristics of the sector together with further information on the nature of competition in this sector in the State.

### Definition of groceries

- 2.2. For the purposes of this determination, “groceries” refers to food, pet food, drinks (alcoholic and non-alcoholic), toiletries, cleaning products, and other household goods. Other non-food items, such as clothing, kitchenware, electricals, DIY, furniture, CDs and DVDs which are also provided by some grocery retailers are included within the definition of “general merchandise”.

### Characteristics of the sector

- 2.3. Consumers who wish to purchase groceries and general merchandise have a variety of grocery retailer outlet sizes and formats from which to choose from, which vary based on the relevant location. The Commission Grocery Monitor: Report No. 1 examined the structure and operation of grocery retailing in the State and found that:

*“[t]he principle driving factor behind grocery retailing is population density. The population density required to support a typical outlet of a vertically integrated retailer is greater than that required to support a smaller outlet of an affiliated retailers...”<sup>16</sup>*

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<sup>16</sup> [A Description of the Structure and Operation of Grocery Retailing and Wholesaling in Ireland: 2001 to 2006](#), p.xvii.

2.4. Vertically integrated retailers “own and operate multiple retail outlets across the State (and in effect, carry on their own wholesaling).”<sup>17</sup> In the State, wholesale franchisors include, Barry Group,<sup>18</sup> BWG Foods Unlimited Company (“BWG”),<sup>19</sup> and Musgrave Group Public Limited Company (the “Musgrave Group”).<sup>20</sup> Vertically integrated retailers include Aldi, Dunnes Stores (“Dunnes”), Marks & Spencer (“M&S”), Lidl and Tesco Ireland.<sup>21</sup>

#### *Size and location*

2.5. In the State, grocery retail outlets can be broadly categorised into hypermarkets, large supermarkets, small supermarkets, and convenience shops in the following way:

- (a) “Hypermarkets” (greater than 2,500 square metres);
- (b) “Large supermarkets” (1,000 to 2,500 square metres);
- (c) “Small supermarkets” (400 to 1000 square metres); and
- (d) “Convenience shops” (up to 400 square metres).<sup>22</sup>

2.6. Convenience shops sell a limited range of groceries. They are often situated in locations that minimise the time and distance which customers have to travel to and from the stores.

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<sup>17</sup> Ibid.

<sup>18</sup> The Barry Group own the following brands: Costcutter, Carry Out off license, Quik Pick, Urban Sips, and Freezi Irish Ice Cream.

<sup>19</sup> BWG own the following brands: Fresh Opportunities, 4 Aces Wholesale, Londis, Heaney Meats Catering Copany, Spar (Ireland), Eurospar, XL.

<sup>20</sup> The Musgrave Group own the following brands: SuperValu, Centra, Daybreak, Mace, Donnybrook Fair, Dialprix, Musgrave Market Place, Dialsur, La Rousse Foods, Frank and Honest Gourmet Coffee Company, Drinks Inc.

<sup>21</sup> Ibid.

<sup>22</sup> Grocery Monitoring Report 1, Table 22, page 76.

- 2.7. Large supermarkets provide a much wider range of groceries and general merchandise than Convenience shops, and accordingly, are sometimes referred to as “one-stop shops.” Whilst the size of these outlets varies, one consistent characteristic of Large supermarkets is that a broad range of grocery and general merchandise products are available. Large supermarkets are often located outside towns and cities. As a result, they are able to utilise larger sites and provide additional amenities, including customer parking and often, motor fuel service stations.
- 2.8. Small supermarkets fall in between Convenience and Large supermarkets. They have a larger choice of groceries and general merchandise than Convenience shops but less choice than Large supermarkets. There is also more variation observed amongst Small supermarkets in terms of product range, location and additional amenities which are made available to customers at their locations.

*Format*

- 2.9. Large supermarkets often have in-store amenities such as a bakery, butcher, fishmonger, delicatessen, and cafés. More recently Large supermarkets also have speciality fresh food counters, such as pizza or sushi, and the ability for customers to make fresh coffee or freshly squeezed juices.
- 2.10. In addition to the above in-store amenities, Large supermarkets are often located in shopping centres that accommodate a variety of other shops, for example, pharmacies, post offices, and medical practices.

### *Aldi and Lidl*

2.11. Aldi and Lidl can be differentiated because of their “low cost”<sup>23</sup> operating model, which features, inter alia, fewer (or no) additional in-store amenities and lower staffing levels. The Grocery Retail Report found that they differ

*“from other vertically-integrated retailers by offering a narrower range of product categories, with fewer product lines within each product category, and selling relatively few ‘branded’ grocery goods. Instead they offer an extensive range of ‘exclusive’ branded grocery goods (sometimes referred to as non-brands). They are similar to own-label goods because the brand is available exclusively to the retailer. Unlike own-label goods, the purpose of the exclusive branded produces is not intended to create a permanent association between the brand and the retailer in the eyes of the consumer.”<sup>24</sup>*

2.12. Aldi and Lidl have traditionally been considered the principle discounters. Following an in-depth analysis in the UK by the competition regulator, the Competition and Markets Authority (the “CMA”) in a recent Phase 2 merger inquiry, this differentiation was found to still be “broadly correct” in the UK.<sup>25</sup>

## **Retail supply of groceries**

### *Grocery Retailers*

2.13. Tesco Ireland, Dunnes and SuperValu are the three largest grocery retailers in the State. On the basis of information available to the CCPC on 01 July 2022,<sup>26</sup>

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<sup>23</sup> Merger Notification Form, paragraph 4.4.4.

<sup>24</sup> Grocery Retail report 1, paragraph 2.29.

<sup>25</sup> CMA, Sainsbury/Asda merger inquiry [2019]: [Final Report](#), paragraph 4.22.

<sup>26</sup> <https://www.kantarworldpanel.com/en/grocery-market-share/ireland/snapshot/12.06.22/>. Correct as of 01 July 2022.

collectively they account for a grocery retail share of 66.9%.<sup>27</sup> The other grocery retailers active throughout the State include Marks & Spencer, Iceland, as well as small independent retailers. Aldi and Lidl have increased their shares and now collectively have 25.5% share of grocery retail in Ireland.<sup>28</sup> There are a very large number of smaller grocery stores (including Convenience shops), whether independent, or more commonly, operating as part of a Symbol group (for example, Mace, Spar, Costcutter).

- 2.14. The Proposed Transaction concerns the anticipated merger between the joint largest grocery retailer in the State,<sup>29</sup> Tesco Ireland, and a regional grocery retailer operating in Co. Galway, Joyce's. Within Co. Galway, Tesco Ireland is the fifth largest grocery retailer, and Joyce's is the fourth largest.<sup>30</sup> Following implementation of the Proposed Transaction, Tesco Ireland would become the largest grocery retailer in Co. Galway. Alongside groceries, in their larger stores, Tesco Ireland also sell items of general merchandise.

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<sup>27</sup> [Ireland: Grocery market share 2022 | Statista](#)

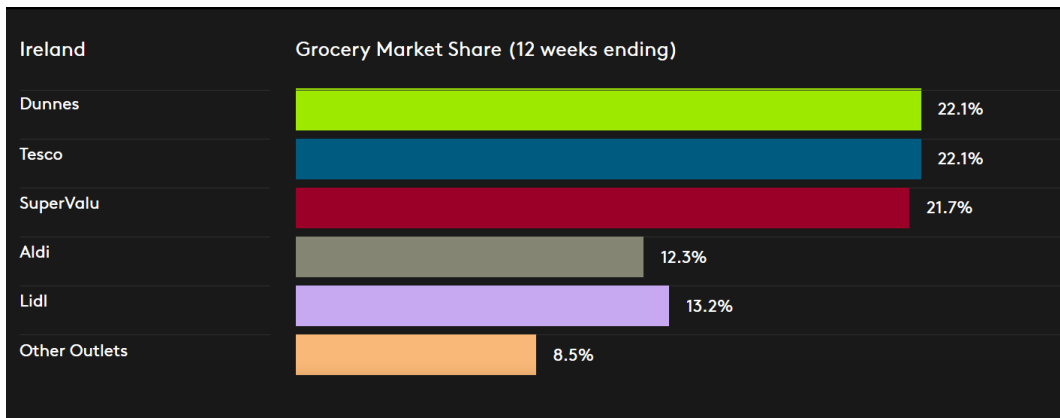
<sup>28</sup> Ibid.

<sup>29</sup> Alongside Dunnes, see Figure 1 below.

<sup>30</sup> Tesco Response to RFI, Table 2, p. 11. According to the market share estimates provided by Joyce's, Joyce's and Tesco were the fifth and sixth largest grocery retailers in Galway.



**Figure 1: Share of grocery retail in Ireland for the 12 weeks ending 12 June 2022.**



Source: Kantar<sup>31</sup>

### *Dunnes*

2.15. On the basis of the information available to the Commission, Dunnes is currently the joint largest grocery retailer in the State (alongside Tesco Ireland) with a network of 111 grocery stores in the State. It is a wholly-owned subsidiary of Dunnes Store (George Street) Unlimited Company. Dunnes sells various categories of grocery and general merchandise products in its grocery stores and on its website online.

### *SuperValu*

2.16. SuperValu is a brand owned by the Musgrave Group<sup>32</sup> and is currently the third largest grocery retailer in the State. It currently operates a network of almost 190

<sup>31</sup> <https://www.kantarworldpanel.com/en/grocery-market-share/ireland/snapshot/12.06.22/>. Correct as of 01 July 2022.

<sup>32</sup> Musgrave Limited is a private company limited by shares, incorporated in the State. It is a member of the Musgrave Group.

grocery stores in the State,<sup>33</sup> the majority of which are operated as franchises under the SuperValu brand.<sup>34</sup>

#### *Tesco Ireland*

2.17. Prior to 02 June 2022, Tesco Ireland was the third largest grocery retailer in the State, but is now joint largest alongside Dunnes. It operates a network of 173 grocery stores, which include its Convenience shops which operate under the fascia Tesco Express. Tesco Ireland sells groceries and various categories of general merchandise in its grocery stores and from its website online. There are motor fuel service stations at some of its larger stores in the State.<sup>35</sup>

#### *M&S*

2.18. Marks and Spencer (Ireland) Limited is a subsidiary of the Marks and Spencer Group, and operates 18 stores in the State offering groceries, and general merchandise including clothing and home products. Similar to Aldi and Lidl, M&S' grocery offering is predominantly own-branded products.

#### *Iceland*

2.19. Iceland is a subsidiary of WD FF Limited, and operates 27 stores in the State, and specialises in frozen food. Iceland also offer a small range of chilled and fresh grocery products.

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<sup>33</sup> [Retailer Services - SuperValu](#)

<sup>34</sup> Grocery Report 2008; [Franchise Europe Top 500: SuperValu - FranchiseDirect.ie](#)

<sup>35</sup> Tesco motor fuel service stations in the State are controlled and operated by DCC plc, through Certas Energy Ireland Limited, see: [M/19/047 DCC \(Certas Energy\)/Motor Fuel Service Stations of Tesco.](#)

### *Key Developments*

- 2.20. One of the key developments in the grocery retail sector in the State in recent years has been the growth of the “discounters”, Aldi and Lidl. Since entering the sector in the State, Aldi in 1999, and Lidl in 2000, their market share has grown to 12.3% and 13.2% respectively.<sup>36</sup> According to a recent announcement by Aldi, this growth is set to continue, with the addition of 30 new Aldi stores, over the next 3 years.<sup>37</sup>
- 2.21. During the course of a recent merger investigation in the UK relating to the proposed acquisition by J Sainsbury Plc of Asda Group Ltd.,<sup>38</sup> the CMA received some evidence that, in the previous decade, the perception of consumers in relation to the quality of the products of Aldi and Lidl had changed. The following figure, provided to the CMA by the parties to that proposed acquisition, illustrates how consumers’ views on quality and price at different grocery retailers, have changed between 2010 and 2017.

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<sup>36</sup> See Figure 1 above.

<sup>37</sup> [Aldi announces plans to open three new stores in Cork \(echolive.ie\)](https://www.echolive.ie/news/aldis-new-stores-cork)

<sup>38</sup> *Supra*, 25.



### *Lidl*

2.23. Lidl is owned by Schwarz Gruppe<sup>41</sup> and currently operates approximately 174 stores throughout the State.<sup>42</sup> Lidl also operates a “low cost” operating model that differentiates it from the traditional grocery retailers. Lidl does not sell certain products, such as tobacco, and it carries a much smaller range of well-known brands, and has lower levels of stock on-site.

### *Prior market studies*

2.24. The Commission’s predecessor, the Competition Authority (the “Authority”), published three reports examining how the grocery retail (and wholesale trade) responded to the removal of the Groceries Order.<sup>43</sup> The first report, published in April 2008, examined the structure and operation of grocery retailing (and wholesaling) in the State.<sup>44</sup> The second report, also published in April 2008, examined price trends in the grocery sector over the period 2001-2007.<sup>45</sup> The third report, published in September 2008, examined the retail planning system in Ireland.<sup>46</sup>

2.25. The Authority made seven recommendations to the Department of the Environment, Heritage and Local Government to promote competition in grocery retailing in Ireland.<sup>47</sup>

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<sup>41</sup> The Schwarz Gruppe is headquartered in Germany.

<sup>42</sup> [Advertiser.ie - 100-job boost for Claregalway as Lidl announce plans for new store](https://www.advertiser.ie/news/100-job-boost-for-claregalway-as-lidl-announce-plans-for-new-store)

<sup>43</sup> [S.I. No. 142/1987 - Restrictive Practices \(Groceries\) Order, 1987. \(irishstatutebook.ie\)](https://www.irishstatutebook.ie/eli/si/1987/142)

<sup>44</sup> [Grocery Monitor: Report No. 1](#)

<sup>45</sup> [Grocery Monitor: Report No. 2](#)

<sup>46</sup> [Grocery Monitor: Report No. 3](#)

<sup>47</sup> [Monitoring the Irish Groceries Market - CCPC Business](#)

- 2.26. In May 2012, the then Minister for the Environment, Community and Local Government, Mr. Phil Hogan, T.D., published new Retail Planning Guidelines which fully implemented the majority of the Authority's recommendations.<sup>48</sup>

## Nature of Competition

- 2.27. Tesco Ireland informed the Commission that it operates a national pricing policy that is unresponsive to market conditions in local markets. Tesco Ireland stated that:

*“Tesco adopts a centrally set national pricing and promotions policy. Prices and promotions are uniform across its entire supermarket store estate, regardless of location, local competition or trading performance.”<sup>49</sup>*

- 2.28. Price is one of the primary ways in which competitors traditionally compete for customers. However, there are other ways in which grocery retailers can compete locally and respond to local market conditions. This is referred to as “local flexing.”
- 2.29. The following sub-section outlines the ways in which grocery retailers compete to attract customers in local markets.

### Local flexing

- 2.30. Grocery retailers can alter various elements of price, service, range and/or quality (“PSQR”) locally in order to respond to local market conditions. For example, a retailer may offer higher margin versions of a product in local areas where competition is weaker or consumers are less responsive to price. Retailers may

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<sup>48</sup> [Guidelines for Planning Authorities: Retail Planning Guidelines \(2012\)](#)

<sup>49</sup> Tesco Ireland Response to RFI, paragraph 12.1.

also alter the number and type of additional amenities they offer in their stores in response to the number and type of competitors in that location.<sup>50</sup>

- 2.31. The impact of local flexing is that it is unlikely that two outlets of any grocery retailer will be identical, in terms of product range and/or amenities as these choices reflect the competitive dynamics of each store's location.<sup>51</sup> Tesco Ireland informed the Commission that:

*"The central teams define the most appropriate range for each store size class by category. Stores with the least available space will stock only a subset of products... The largest stores have the fullest range of products, which will include a broader choice of products with categories as well as products in more niche categories."*<sup>52</sup>

- 2.32. Other examples of local flexing include altering staffing levels, opening hours, or the way in which products are presented in stores.<sup>53</sup>

- 2.33. In the Groceries market investigation in the UK,<sup>54</sup> the Competition Commission conducted an econometric analysis of local competition and store profit margins. Its analysis found that:

*"grocery retailers amend some aspects of their offering (PQRS) depending on the performance of the store, and these strategic decisions have an effect on consumer expenditure or store costs.*

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<sup>50</sup> Supra 25, paragraph 7.102.

<sup>51</sup> Ibid, paragraph 7.101. Retailers may also alter various aspects of PQRS for reasons not directly related to competition, such as customer demographics.

<sup>52</sup> Tesco Ireland Response to RFI, paragraph 9.3.

<sup>53</sup> Supra 25, paragraph 7.100.

<sup>54</sup> [Groceries market investigation \(CC\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/groceries-market-investigation)

...

*The [Competition Commission] noted that, once a retailer is present in a local area, it competes on price but also on non-price aspects (QRS), and any change in these variables will contribute to a store attracting or losing customers (and as such margins will be higher or lower). For instance, the [Competition Commission] mentioned that in case of supply shortages, some retailers only stocked the products in stores located in the most competitive environment.”<sup>55</sup>*

- 2.34. Tesco Ireland informed the Commission that in response to local competitor events, for example, it may:

*“decide to run targeted, short-term and time-bound local direct local marketing campaigns with coupons in response to competitor store openings.”(sic)<sup>56</sup>*

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<sup>55</sup> Supra 25, paragraph 7.105.

<sup>56</sup> Tesco Ireland Response to RFI, paragraph 12.6.



### 3. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

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#### Introduction

- 3.1. In this Section, the Commission identifies the potential product and geographic markets that are relevant for the assessment of the likely effects of the Proposed Transaction in the State. It summarises the general principles that apply to market definition, the activities of the notifying parties, the views of the notifying parties and third parties and then sets out the Commission’s view of the potential relevant product and geographic markets.
- 3.2. Market definition provides a framework for assessing the competitive effects of a merger, and so it is a means to an end. The boundaries of a market do not determine the outcome of the analysis of the competitive effects of the merger. There can be constraints on the merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints will be more significant than others.<sup>57</sup> The Commission expects to take such factors into account in its assessment of competitive effects.

#### Vertical Overlaps

- 3.3. The Parties have stated in the notification that there is no vertical relationship between Tesco Ireland and Joyce’s. The Commission has not identified any vertical relationship between the notifying parties. On this basis, the Commission considers that the Proposed Transaction does not raise any vertical competition concerns in the State.

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<sup>57</sup> See paragraph 2.3 of the [Guidelines for Merger Analysis](#), adopted by the Commission on 31 October 2014 (the “Merger Guidelines”).

## Horizontal Overlaps

- 3.4. In the Merger Notification Form, the parties have submitted that there is a horizontal overlap between Tesco Ireland and Joyce's in the State with respect to the retail sale of grocery goods<sup>58</sup>
- 3.5. The Commission has not identified any additional horizontal overlaps between the activities of the notifying parties. Accordingly, the analysis of other product markets is not considered further in this determination.

## Relevant Principles

- 3.6. The role of market definition is explained in the Commission's Merger Guidelines. Market definition is a conceptual framework within which relevant information can be organised for the purpose of assessing the competitive effects of a merger.<sup>59</sup>

- 3.7. According to the Merger Guidelines:

*"The relevant product market is defined in terms of products rather than producers. It is the set of products that customers consider to be close substitutes. In identifying the relevant product market, the Commission will pay particular attention to the behaviour of customers, i.e., demand-side substitution. Supply-side substitution (i.e., the behaviour of existing and/or potential suppliers in the short term) may also be considered".<sup>60</sup>*

- 3.8. The relevant market contains the most significant alternatives available to the customers or consumers of the merging parties. Identifying the precise relevant

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<sup>58</sup> Merger Notification Form, paragraph 1.1.19 and 4.1.1.

<sup>59</sup> Supra 57, paragraph 2.1.

<sup>60</sup> Ibid, paragraph 2.8.

market involves an element of judgement, with appropriate weight being given to factors on both the demand and supply side.<sup>61</sup>

3.9. The Merger Guidelines note that:

*“Whether or not a product is a close substitute of a product supplied by one or more of the merging parties will depend on the willingness of customers to switch from one product to the other in response to a small but significant and non-transitory increase in price (or an equivalent decrease in quality). This will involve an assessment of the characteristics and functions of the products in question”.*<sup>62</sup>

3.10. The standard economic test for defining the relevant market is the small but significant non-transitory increase in price (“SSNIP”) test. The SSNIP test seeks to identify the smallest group of products and geographic areas within which a hypothetical monopolist could profitably impose a SSNIP without a sufficient number of consumers/service purchasers switching to alternative products to render the price increase non-profitable. However, the Commission notes that the SSNIP test is just one of the tools used in defining the relevant product market. A substantial emphasis should also be placed on product characteristics, price and intended use as well as observed substitution patterns between various products that can potentially be included in the same product market.

3.11. It may not be possible to draw a clear line around the fields of rivalry. That being so, it is fallacious to regard as relevant to the competition analysis only those products defined as falling within the relevant market and to disregard any competitive pressure from those products defined as falling outside it. The Commission may therefore consider segmentation within the relevant market or

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<sup>61</sup> Ibid, paragraph 2.2.

<sup>62</sup> Ibid, paragraph 2.9.

factors outside the relevant market that impose competitive constraints on firms in the relevant market.<sup>63</sup>

- 3.12. Ultimately, the Commission’s definition of the relevant market or markets depends on the specific facts, circumstances, and evidence of the merger under investigation.<sup>64</sup>

## Relevant Product Markets

### Previous decisions

#### *The Commission*

- 3.13. The Commission and the Authority have previously taken the view that the appropriate product definition for groceries is the retail sale of grocery goods, i.e., the retail sale of “*food and drink for human consumption and household necessities*.”<sup>65</sup> The Commission defines the market to the extent necessary in any given case. Where the conclusions would be unaffected by whether the market is defined broadly or more narrowly, a precise product market definition is not required.

#### *The European Commission*

- 3.14. In *Tesco/ABF*<sup>66</sup> the European Commission stated that:

*“[i]n previous cases the Commission has distinguished between various categories of retail outlet, e.g. hypermarket, supermarket etc., and also in terms of floor area. In the most recent Commission decision in this sector,*

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<sup>63</sup> Ibid, paragraph 2.1.

<sup>64</sup> Ibid, paragraph 2.6.

<sup>65</sup> For more, see: M/11/022 Musgrave/Superquinn; <https://www.ccpc.ie/business/mergers-acquisitions/merger-notifications/m11022-musgrave-superquinn/>

<sup>66</sup> [Case No IV/M.914 – Tesco/ABF](#)

*Kesko/Tuko (Case No IV/M.784, OJ L110, 26 April 1997), the Commission defined, in relation to Finland, a market for ‘a basket of daily consumer goods sold in a supermarket environment’... It would cover the multiples and perhaps some of the larger symbol stores, but not smaller stores or more specialist retail outlets.”*

#### *The CMA*

3.15. The CMA has considered several mergers in the grocery retail sector. Most recently in *J Sainsbury PLC/Asda Group Ltd*,<sup>67</sup> the CMA considered the definition of the relevant product market and in that case explained that the market definition was used,

*“primarily to determine the framework and parameters of the WSS model that [they] used to conduct [their] local assessment.”<sup>68</sup>*

3.16. In that case therefore, the CMA stated:

*“that the product market definition includes all Large stores and Medium stores of the Parties, Tesco, Morrisons, Waitrose, M&S, Aldi, Lidl, Co-op and Iceland. We take account of the variation in the strength of constraint provided by different stores, due to distance, store size and brand, within our competitive assessment.*

*Online retailers, bargain stores, specialist stores, convenience stores and a range of other grocery retail chains that operate a smaller number of stores nationally have been excluded from the product market definition.*

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<sup>67</sup> Supra, 25.

<sup>68</sup> Ibid, paragraph 7.36.

*However, these other players are considered within the competitive assessment as out-of-market constraints.”<sup>69</sup>*

3.17. The approach adopted by the CMA is referred to in more detail below.

#### *Views of the Parties*

3.18. In the Merger Notification Form the parties submitted the following with respect to product markets:

*“The CCPC has previously taken the view that the appropriate product definition for groceries was the retail sale of grocery goods, i.e., the retail sale of ‘food and drink for human consumption and household necessities’.<sup>70</sup>*

*In its previous Determinations, the CCPC has assessed the product market for grocery retail broadly. The CCPC has assessed that the sector encompasses a wide spectrum outlet formats. This includes supermarkets (e.g., Dunnes Stores, SuperValu, Tesco, Aldi, and Lidl), medium-sized shops (e.g. Centra, Londis and Spar) and smaller “convenience” stores (e.g., Daybreak, MACE and smaller Londis and Spar stores and independent retailers). In addition, the then Competition Authority in M/11/022 - Musgrave/Superquinn and later the CCPC in M/15/09 - BMG/Londis did not define product markets either in terms of types of shopping behaviour (e.g., “one stop”, “top-up” or “convenience”) or in terms of business models (e.g., independent, franchise or vertically integrated).*

*“The Parties consider that it is appropriate to consider the product market in a broad sense for the purposes of assessing the Proposed Transaction*

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<sup>69</sup> Ibid, para 7.68-9

<sup>70</sup> Supra, 66.

*given the level of competition between different retailers, store formats and business models.”<sup>71</sup>*

- 3.19. However, the parties further informed the Commission that Tesco’s “major”<sup>72</sup> competitors in the State are Dunnes, SuperValu, Aldi and Lidl, adding that:

*“Tesco sets its prices with reference to a national set of competitors ... by maintaining a weekly price index for competitors Dunnes Stores, Supervalu, Aldi and Lidl.”<sup>73</sup>*

#### *Views of the Commission*

- 3.20. The Commission has taken the parties’ core overlap in the retail sale of grocery goods as a starting point for its assessment of the relevant product market(s) and then considered whether this definition should be narrower, differentiating between:

- (a) Store formats (hypermarkets, large, and small supermarkets, or convenience); or,
- (b) Traditional grocery retailers and the discounters.

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<sup>71</sup> Merger Notification Form, paragraph 5.1.2 – 5.1.4.

<sup>72</sup> Merger Notification Form, paragraph 4.4.9.

<sup>73</sup> Merger Notification Form, paragraph 4.4.9.

Should the market be **narrower** than the retail sale of grocery goods?

(a) Format

3.21. In the recent Phase 2 merger inquiry in the UK, *Sainsbury/Asda*<sup>74</sup> the CMA analysed the competitive constraints between retail grocery outlets according to the size of their net sales areas and has distinguished between three store sizes:

- (a) *“Large stores” are those which are greater than 1,400 square metres;*
- (b) *“Medium stores” are those which are between 500 and 1,400 square metres; and,*
- (c) *“Convenience stores” are those which are under 280 square metres.*<sup>75</sup>

3.22. The CMA had previously found that *“the competitive constraints faced by such stores is asymmetric, in that Large stores will constrain a smaller store (i.e. Medium or convenience stores) but not vice versa.”*<sup>76</sup>

3.23. The reason the CMA provides for the above delineation by store size is that it is of the view that consumers:

*“may not consider smaller stores to be good substitutes for larger stores, on the basis that they may not supply the full range of products or associated amenities (e.g. car parking, toilets, ATMs, cafes or [petrol filling stations] which a larger store is able to offer, and therefore may be unable to cater for shopping missions that involve a wider range of products.”*<sup>77</sup>

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<sup>74</sup> Supra, 25.

<sup>75</sup> Ibid, paragraph 7.7.

<sup>76</sup> Ibid, paragraph 7.8.

<sup>77</sup> Ibid, paragraph 7.9.



3.24. The CMA ultimately concluded in that case that the:

*“strongest constraints on the Parties’ Large and Medium stores are the Large and Medium stores of other traditional grocery retailers... [including] discounters (Aldi and Lidl) ”<sup>78</sup>...*”

*“However, within the broad category of Large and Medium stores, the strength of constraint varies considerably by size (Large versus Medium) and across different brands.”<sup>79</sup>*

3.25. In respect of convenience stores, the CMA found that diversion from Large and Medium stores was only 5-10%, but noted that:

*“this group of retailers includes a wide range of different fascia and different types of store offering considered in aggregate; as such, the diversion to each of these stores on an individual basis would be much lower...”<sup>80</sup>*

3.26. On that basis, convenience stores were excluded from the relevant product market definition in the UK by the CMA.

3.27. Based on a review of the above merger decisions, the Commission considers that the competitive dynamics between larger and smaller outlets are also likely to be asymmetric in the State, with larger stores posing a greater constraint upon smaller stores, than vice versa. Specialist stores, with a materially different offering, including Convenience shops, kiosks and motor fuel service station associated stores, are unlikely to pose an appreciable competitive constraint on the Large and Small supermarkets. This view is consistent with the evidence

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<sup>78</sup> Ibid, paragraph 7.38

<sup>79</sup> Ibid, paragraph 7.39

<sup>80</sup> Supra 25, paragraph 7.63.

submitted by Tesco Ireland discussed above, the Commission's previous decisions, and the CMA's analysis in *Sainsbury's/Asda*.

*(b) Traditional grocery retailers and Aldi and Lidl?*

3.28. Aldi and Lidl differentiate themselves from traditional grocery retailers in order to ensure that they can offer the lowest prices to customers. They do so by operating a low-cost model which includes lower staffing levels, a smaller product range, more limited branded products, smaller stock size, and little (or no) additional amenities.

3.29. However, as noted in paragraph 2.20 above, their growth in the State has been a key development in the retail sector in recent years. In addition, Tesco Ireland informed the Commission that,

*"Tesco tracks the offering and performance of Aldi and Lidl on a day-to-day basis, and ... Tesco benchmarks its prices and range against them;*

*National advertising campaigns from both Tesco and Aldi/Lidl ... clearly demonstrate how they target retaining/winning customers from each other."<sup>81</sup>*

3.30. This indicates that Aldi and Lidl do pose a degree of competitive constraint on Tesco Ireland for products within their range offering.

### **Conclusion on relevant product market**

3.31. The Commission considers all the evidence available to it and defines the market to the extent necessary in a given case. For the purpose of assessing the likely

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<sup>81</sup> Submission to the Commission, 07 March 2022, paragraph 2.8(a).

effects of the Proposed Transaction, and based upon the information available to it, the Commission has identified the following relevant product market:

The retail sale of grocery goods and general merchandise in Large and Small supermarkets.

- 3.32. As the Proposed Transaction does not raise competition concerns in respect of the Target Outlets which are classified as Convenience shops, it was not necessary for the Commission to come to a firm conclusion on the relevant product market for Convenience shops.<sup>82</sup>

### Relevant Geographic Markets

- 3.33. Where competition occurs at a local level, the Commission assesses the competitive effect of the Proposed Transaction in the local markets.

#### Previous decisions

##### *The Commission*

- 3.34. In previous Phase 1 merger determinations, the Commission has identified possible local markets based on a 10 kilometre distance or a 10 minute drive time,<sup>83</sup> from the relevant target location for the purposes of assessing the competitive effects in local markets.<sup>84</sup>

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<sup>82</sup> When assessing the competitive effect of the Proposed Transaction on Target Outlets classified as Convenience stores, the Commission identified a local area catchment on the basis of a 5 minute drive time from the Target outlet, and counted the number of Large and Small supermarkets, as well as Convenience stores, within that catchment. The Commission concluded that there were no additional competition concerns in relation to these outlets.

<sup>83</sup> For more, see: M/11/022 – Musgrave/Superquinn; M/17/050 – Joyce’s/Nestors.

<sup>84</sup> For more, see: [M/18/079 Musgrave / Donnybrook Fair](#), M/17/050 - Joyces/Nestors and M/17/052 - Cedarglade (Musgrave) / Ballybrit Centra & Service Station.

### *The CMA*

3.35. In a guidance document published by the CMA, the CMA stated that:

*“The choice of measure [for a catchment area] depends on what data is available as well as the number of overlaps and the characteristics of the market. Where relevant and appropriate, the CMA will also draw on experience from previous cases in the sector.”<sup>85</sup>*

3.36. The CMA have used a variety of methods for determining catchment areas, which include drive-time or walk-time,<sup>86</sup> postcode areas,<sup>87</sup> 80% catchment areas,<sup>88</sup> as well as individual or average catchment areas,<sup>89</sup> and asymmetric catchment areas.<sup>90</sup>

### *Views of the Parties*

3.37. The Parties submitted to the Commission that they,

*“consider that, if the geographic market is to be assessed narrowly and on a conservative basis, it is appropriate to assess the competitive effects of that transaction on the local areas surrounding each Target Outlet by reference to a 10-minute drive time and/or a ten-kilometre distance.”<sup>91</sup>*

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<sup>85</sup> CMA, [“Retail mergers commentary”](#) 10 April 2017, paragraph 2.9.

<sup>86</sup> Ibid, paragraphs 2.14 – 2.17.

<sup>87</sup> Ibid, paragraphs 2.18 – 2.19.

<sup>88</sup> Ibid, paragraph 2.20.

<sup>89</sup> Ibid, paragraphs 2.21 – 2.22.

<sup>90</sup> Ibid, paragraphs 2.23 – 2.24.

<sup>91</sup> Merger Notification Form, paragraph 5.1.6.

### *Third party views*

3.38. The Commission received evidence from a third party that the appropriate catchment for the Oranmore area was not the standard 10 kilometre/10 minute-drive time catchment used by the Commission in previous determinations. The third party, [REDACTED].

Figure 3: [REDACTED]

Source: Third party submission

3.39. In addition, in an email to the Commission dated 01 April 2022, the third party confirmed that, [REDACTED].

### *Views of the Commission*

3.40. In the grocery retail sector, the amount of time a consumer may be willing to travel is affected by the size of the grocery retail outlet or the type of shopping mission. For example, consumers are more likely to travel for longer to fulfil their one stop shop at a Large store, than they will to fulfil a top-up shop at a Convenience shop.

3.41. Accordingly, the Commission found that it was appropriate to use different catchment area sizes for different store formats.

3.42. As the first-stage overlap analysis, the Commission used a 10 minute drive time for the Target Outlets which are classified as Large and Small supermarkets, and up to 5 minutes for the Target Outlets which classified as Convenience shops.

3.43. In this case, the Commission has followed its approach taken in previous merger determinations as a starting point for its assessment of the relevant local geographic market of 10-minute drive time from the Target Outlet.<sup>92</sup> The

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<sup>92</sup> For more see: M/11/022 Musgrave/Superquinn; M/16/02 Dunnes/Whelan/Tipperary; M/17/050 Joyce's/Nestor's

Commission then considered whether this definition should be narrower, taking into account the information provided by the parties, gathered by the Commission, and provided by third-parties to the Commission.

- 3.44. Where the Commission receives reliable evidence that the standard 10 minute drive time catchment may not accurately reflect the consumer behaviour for a particular shop, for example because of the geographic reality of the location, or the competitive dynamics of the local area, it will closely consider the impact of that evidence on geographic market definition.
- 3.45. In this case, the Commission received evidence from a third party regarding the catchment assessment applied to the Joyce's Oranmore store, which supports a different conclusion to that which Tesco Ireland put forward to the Commission.
- 3.46. The Commission considered that any of the following approaches could be adopted:
- (a) Evaluate the competitive constraint posed by competitors located within the contested area of the 10 minute drive-time catchment; or
  - (b) Adopt a fixed number of catchment area categories based on store size bands; or
  - (c) Identify a bespoke catchment area for each Target Outlet.
- 3.47. The parties view of the local market definition in Oranmore supports a more inclusive approach than that of the third party submission. As compared to that third party submission, this would increase the fascia count by one, but more importantly, would include a traditional grocery retailer offering a broad range of products and services. The parties' approach creates a view of the competitive dynamics of the Oranmore area that is materially different from that which is created based upon the third-party evidence.

3.48. The Commission considers that the outlets most closely located to the Joyce's Oranmore store, will pose a greater competitive constraint upon that store than those located further away.

3.49. In the *Sainsbury/Asda* merger the CMA found that:

*"both the CMA store exit survey and the entry-exit analysis indicate that the strength of constraint decreases the further away the store... [declining] to close to zero after approximately 15 minutes' drive-time."*<sup>93</sup>

3.50. In that case the CMA chose to reduce the "weight given to competitors at further distances within" the defined catchments.<sup>94</sup>

3.51. Adopting a simple competitor count of outlets within the relevant catchment therefore, will most likely underestimate the competitive impact of the Proposed Transaction.

### **Conclusion on relevant geographic market**

3.52. The Commission considers all the evidence available to it and defines the markets to the extent necessary depending on the particular circumstances of a given case. As the Phase 2 Proposals were sufficient to ameliorate the Preliminary Competition Concern identified by the Commission, it was not necessary for the Commission to come to a firm conclusion as to the relevant geographic market(s) in this case.

3.53. However, for the purposes of assessing the Proposed Transaction, the Commission used a drive-time catchment of 10 minutes for the Target Outlets.

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<sup>93</sup> Supra 25, paragraph 7.78.

<sup>94</sup> Ibid, paragraph 7.80.

## 4. RELEVANT COUNTERFACTUAL

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1.1 Under section 22(3) of the Act, the Commission must consider whether a merger or acquisition gives rise to a substantial lessening of competition (“SLC”). The SLC test requires an assessment of the effects of a merger or acquisition on the state of competition in a relevant market. In assessing the likely effects of a merger on competition, the Commission, as in the present case, typically compares the situation that may be expected to arise following the merger with that which would have prevailed without the merger. The market situation without the merger is often referred to as the “counterfactual”.

4.1. The Merger Guidelines state that:

*“the term ‘counterfactual’ refers to the state of competition without the merger or acquisition. In other words the “actual” situation is the merger being put into effect and the “counterfactual” is the situation in the absence of the merger being put into effect. The counterfactual provides the reference point, or the point of comparison, for assessing competitive effects arising from a merger.”<sup>95</sup>*

4.2. In other words, a counterfactual is a hypothesis as regards the facts by reference to which an alleged effect on competition is to be tested. It involves considering what would have happened if the proposed merger had not taken place.

4.3. Paragraph 1.15 of the Merger Guidelines states the following:

*4.1 “the Commission will expect the merging parties to substantiate any counterfactual they propose with objective evidence supported, where necessary, by independent expert analysis. Such evidence and analysis should*

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<sup>95</sup> Supra, 57, paragraph 1.12.



*obviously be consistent with the parties' own internal pre-merger assessments of the likely counterfactual."*

- 4.4. Inevitably, there is a degree of uncertainty as regards hypothetical future events, and the Commission will consider all the evidence adduced by the parties as to whether there is likely to be an SLC in the future.<sup>96</sup> The Commission must ultimately ask itself whether it is satisfied on the balance of probabilities that there will be an SLC caused by the merger. The Commission is, however, not under an obligation to make findings of fact (whether on a balance of probabilities or otherwise) in respect of each item of evidence. Nor is it obliged to find that any particular potential event is more likely than not to occur before it can take it into account in its overall assessment of the probability of an SLC.
- 4.5. Paragraph 9.8 of the Commission's Merger Guidelines states "[i]n particular, documents prepared prior to, or unrelated to, the proposed transaction will provide useful evidence of intentions to exit." That is, the Commission places more weight on documents produced prior to the merger being in contemplation. This is because such documents could indicate an intention to exit regardless of any particular asset sale being achieved. However, once the merger or a proposed transaction is under contemplation, it becomes very difficult for the Commission to separate out an intention to exit in the absence of the merger from an intention to exit due to the merger.
- 4.6. No formal submission was made by the notifying parties to the Commission in the Merger Notification Form or subsequent submissions, concerning the relevant counterfactual. However, during engagements with the parties, Tesco Ireland appeared to make the argument that the relevant counterfactual is the Proposed Transaction being put into effect. The Commission expressed its disagreement

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<sup>96</sup> Supra, 57, paragraph 1.14.

with Tesco Ireland's view, as the relevant counterfactual is the situation absent the merger or acquisition.

- 4.7. In coming to its view of the appropriate counterfactual in this case, the Commission has fully considered the available evidence. The Commission has not been provided with any evidence to suggest that Joyce's has given detailed consideration to selling the Target Outlets to any undertaking other than Tesco Ireland.
- 4.8. In the Commission's view, and based on the information available to it, the most plausible counterfactual is that absent the Proposed Transaction, Joyce's would continue to own and operate the Target Outlets – i.e., that Joyce's would remain an independent undertaking active in the potential relevant market(s) identified above.

## 5. COMPETITIVE ASSESSMENT

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### Introduction

- 5.1. In this section, the Commission sets out its analysis of the likely competitive effect of the Proposed Transaction in each of the potential relevant markets identified in paragraphs 3.31 and 3.53 above.
- 5.2. Assessing the competitive effects of the Proposed Transaction requires the identification of any relevant theories of harm (i.e. how the Proposed Transaction could result in a substantial lessening of competition) and an analysis of those theories of harm through an evaluation of the available evidence.
- 5.3. As explained in paragraph 4.2 of the Commission’s Merger Guidelines, harm may result from horizontal mergers in the form of *“increased prices and/or adverse non-price effects, e.g., reductions in product quality, reduced range of products, less innovation, poorer product distribution, reduced after-sales service, etc.”*
- 5.4. In examining potential unilateral effects, the Commission sets out its concerns about the likely competitive impact of the Proposed Transaction following its assessment of the arguments put forward by the notifying parties and the evidence collected from the notifying parties and third parties. The Commission considered that the loss of a close competitor grocery retailer brought about by the Proposed Transaction could result in adverse competition effects on: (i) consumer choice; (ii) product quality; (iii) services offered to consumers; and/or (iv) price.

### *Remaining Competitors*

- 5.5. The Commission has used the information provided by the notifying parties, together with the information independently gathered by the Commission, to

identify the main competitors of each of the Target Outlets within a local catchment area. This helps to identify local areas where competition concerns are likely and unlikely to arise, and provides a useful framework for the Commission to conduct the competitive analysis.

- 5.6. On the basis of the information available to it, the Commission considers that in this case the discounters do pose a competitive constraint on both Tesco Ireland and Joyce's, they should be included within this competitor set. However, the magnitude of their competitive constraint would be considered in the competitive assessment.
- 5.7. Tesco Ireland submitted to the Commission that its "major competitors" within the State are Dunnes, SuperValu, Aldi and Lidl.<sup>97</sup> This was supported by their submission that Tesco Ireland "sets its prices with reference to a national set of competitors... Dunnes Stores, SuperValu, Aldi and Lidl."<sup>98</sup>
- 5.8. The notifying parties do however, submit that the Target Outlets also face competition from "smaller competitors such as Iceland, Marks and Spencer and others..."<sup>99</sup> The Commission concluded however, that as a result of the materially different offering available at Iceland, it should not be included as an effective competitor of the parties. This is in line with the jurisprudence of the European Commission discussed in paragraph 3.14.
- 5.9. The Commission found that there is only one M&S located in Co. Galway. This store is located in the Corrib Centre, H91 DP6R and falls within the catchments of Joyce's Father Griffin Road and Joyce's Ballybane only. As the Commission concluded that the Proposed Transaction did not raise competition concerns in

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<sup>97</sup> Tesco Ireland Submission to the CCPC, 07 March 2022, Paragraph 3.4.

<sup>98</sup> Merger Notification Form, paragraph 4.4.9.

<sup>99</sup> Merger Notification Form, paragraph 5.3.8.

respect of either of these Target Outlets, it was not necessary to come to a conclusion as to whether M&S should be included as an effective competitor of the parties in these catchment areas.

- 5.10. Therefore, for the purpose of this competitive assessment of the Proposed Transaction, the effective competitors for the Proposed Transaction, include Tesco Ireland, Joyce's, Dunnes, SuperValu, Aldi and Lidl.

#### *Tesco Ireland*

- 5.11. The Commission assessed the competitive effects of the Proposed Transaction on existing Tesco Ireland outlets, and concluded that no additional competition concerns were raised on the basis that post-transaction there would not be a material change in the competitive conditions within each of the respective local catchments. Therefore, the competitive effects of each of these outlets are not discussed in any further detail in this determination.

#### *Target Outlets*

- 5.12. The Target Outlets vary in size. The Commission has used the size classifications mentioned in paragraph 2.5 above as a starting point for classifying each of them for the purpose of understanding the competitive dynamics of the each of the local catchment areas.

**Table 1: Target Outlets**

Target Outlet	Size (square metres)	Size classification	No. of car parking spaces
Headford	2662	Hypermarket	238
Athenry	2159	Large supermarket	220
Knocknacarra	1748	Large supermarket	195
Tuam	1547	Large Supermarket	300
Oranmore	1171	Large Supermarket	209
Father Griffin Road	1048	Large Supermarket	100
Ballybane	693	Small Supermarket	85
Inverin	683	Small Supermarket	22
Oughterard	461	Small Supermarket	60
Doughiska	315	Convenience shop	69

**Source: Commission based upon information provided by the Parties**

5.13. The Commission used a 10-minute drive time from each of the Target Outlets which are Large and Small supermarkets, in order to identify whether any geographic overlap exists with an existing Tesco Ireland supermarket.<sup>100</sup>

### **Potential Markets in which the Proposed Transaction Raises No Competition Concerns**

#### *(i) Stores with no geographic overlap*

5.14. There is a horizontal overlap between the activities of Tesco Ireland and Joyce's in respect of the relevant product market in the State. However, when a 10 minute

<sup>100</sup> For the Target Outlets classified as Convenience stores a 5 minute drive time catchment area was used. As no competition concerns were identified, the Target Convenience stores are not discussed in detail in this determination.

drive time radius from the Target Outlets is applied by the Commission in the following locations, there is no geographic overlap between the existing Tesco Ireland stores and any of the Target Outlets:

- (a) Athenry;
- (b) Headford;
- (c) Inverin;
- (d) Knocknacarra;
- (e) Oughterard; and
- (f) Tuam.

5.15. In the absence of geographic overlap between Tesco Ireland and these 6 Target Outlets, the Commission concluded that the Proposed Transaction is unlikely to give rise to a SLC in those potential local markets.

*(ii) Stores with geographic overlap*

5.16. In the following locations, there is a geographic overlap between an existing Large Tesco Ireland store and a Target Outlet:<sup>101</sup>

- (a) Ballybane
- (b) Father Griffin Road
- (c) Oranmore

5.17. Table 2 below represents details of the retail stores located within a 10 minute drive from each of these three Target Outlets.

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<sup>101</sup> Tesco Ireland do not operate any small supermarkets in Co. Galway, and the two Tesco Express stores have been excluded on the basis that Convenience shops do not pose a material constraint on Large stores.

**Table 2: Effective competitors within 10 minute drive time radius from the Target Outlets**

	Tesco	Aldi	Dunnes	Lidl	Joyce's	SuperValu	M&S	Total
<b>Joyce's Ballybane</b>	1	2	3	3	3	0	0	<b>12</b>
<b>Joyce's Father Griffin</b>	1	3	4	2	1	0	1	<b>12</b>
<b>Joyce's Oranmore</b>	1	1	1	2	0	0	0	<b>5</b>

Source: The Commission<sup>102</sup>

- 5.18. Table 2 above indicates that on the basis of a 10 minute drive radius, following completion of the Proposed Transaction, there will remain a sufficient number of competitors to Tesco Ireland in respect of the retail sale of grocery goods in each of the local areas (i.e. within a 10 minute drive time) of the Joyce's retail outlets at Ballybane and Father Griffin Road. Therefore, the Commission considers that the acquisition by Tesco Ireland of the Joyce's retail outlets at Ballybane, and Father Griffin Road is unlikely to give rise to any SLC in the those potential local markets.
- 5.19. When using a geographic radius of a 10-minute drive time, the Commission concluded that Tesco Ireland would continue to face sufficient competition in Ballybane and Father Griffin Road. Further, the Commission did not receive any evidence that the approach to fascia as set out above was not representative of the competitive market conditions in these locations.
- 5.20. The Commission therefore concluded that the effect of the Proposed Transaction was not likely to be a SLC in the local markets relating to the majority of the Target Outlets with the exception of the Joyce's retail outlet at Oranmore which is discussed below.

<sup>102</sup> Based on drive time data provided by Google maps.



*Oranmore*

- 5.21. As illustrated in Table 2 above, following implementation of the Proposed Transaction, Tesco Ireland will likely face the weakest competitive constraint in the Oranmore area.
- 5.22. In addition, the Commission received third-party evidence, which is consistent with the findings in other jurisdictions, that a simple competitor count could likely underestimate the competitive effect of the Proposed Transaction. Accordingly, the Commission therefore, sought to:
- a. Verify existing information by obtaining additional drive time data relating to Joyce's Oranmore and Dunnes Briarhill, at different times of the day, and days of the week in order to better understand the degree of constraint that Dunnes Briarhill poses on Tesco and Joyce's retail outlets in Oranmore; and,
  - b. Identify the characteristics, likely to influence competitive constraint, of each of the stores within the catchment.
- 5.23. The additional drive time data obtained by the Commission showed that off-peak drive-time between Joyce's Oranmore and Dunnes Briarhill was on average between 7 – 12 minutes, and that at certain peak travel times during the week, that could increase to as much as 28 minutes. Upon consideration of the information available to it, the Commission is of the view that it is likely that the Dunnes retail outlet at Briarhill poses a materially weaker competitive constraint on both Tesco Ireland Oranmore and Joyce's Oranmore store.
- 5.24. As Table 2 above shows, the Oranmore location is unique within the context of the Proposed Transaction. Tesco Ireland Oranmore is a Large store and poses a strong competitive constraint upon the Joyce's Oranmore store, Aldi and Lidl retail

outlets in Oranmore, which are all closely located together, as demonstrated in the table below:

**Table 3: Distances from Joyce’s Oranmore to effective competitors in Oranmore**

	Tesco Oranmore	Aldi Oranmore	Lidl Oranmore
Joyce's Oranmore	400m	850m	1400m

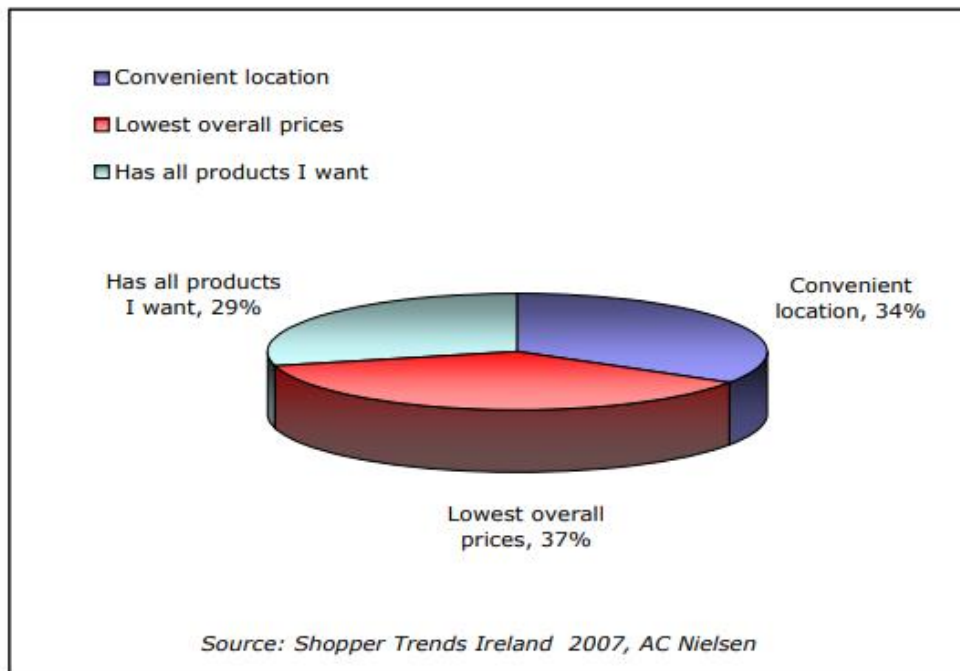
**Source: The Commission, based on information provided by the Parties**

5.25. Following the implementation of the Proposed Transaction, the only remaining grocery retailers within the 10 minute drive time of the Joyce’s Oranmore store irrespective of driving conditions, will be Aldi and Lidl. As discussed above, at present Aldi and Lidl do pose a material price constraint on traditional grocery retailers, but as a result of their smaller product range, their focus on own branded goods, and their lack of in-store amenities, it is likely the case that they pose an appreciably weaker constraint on large traditional grocery retailers.

5.26. The Grocery Monitor: Report No. 1 found that product range was an important factor for Irish consumers, stating that, behind price and location,

*“product range is the third most important factor for Irish shoppers when selecting a regular place of grocery shopping.”*

**Figure 4: Shopper Trends Ireland 2007**



Source: Grocery Monitor: Report No. 1, Figure 20, p. 119.

5.27. For the above reasons, The Commission identified a potential competition concern arising from the proposed acquisition by Tesco Ireland of the Joyce's Oranmore store.

*Potential Competition Concern in Oranmore*

5.28. The Commission identified a competition concern arising in the Oranmore location as a result of the Proposed Transaction for the following reasons:

- (a) The Commission received third party evidence that the number of current effective competitors in that location was in fact four, rather than five;
- (b) The reduced competitive constraint posed by Aldi and Lidl;
- (c) The proximity of the existing Tesco Ireland store and the target Joyce's store;

- (d) Internal Tesco Ireland documents received in response to the Commission's Phase 1 Request for Further Information (the "Internal Documents").

*Third party evidence*

- 5.29. As discussed in paragraph 3.38 above, the Commission received third party evidence that indicated that the number of fascia in the Oranmore area was four rather than five. The evidence provided stated that the Dunnes in Briarhill was not part of the catchment area for the Joyce's Oranmore, and so would it not pose a competitive constraint upon the merged entity following the implementation of the Proposed Transaction. Importantly therefore, the only competitors that would remain following implementation of the Proposed Transaction would be the Aldi and Lidl.
- 5.30. As discussed above, the Commission considered that the grocery retail outlets located in Oranmore, namely Tesco, Aldi and Lidl, were, by the very nature of being so closely located to the Joyce's retail outlet in Oranmore, stronger competitive constraints than the Dunnes in Briarhill. In addition, the Commission was informed, on a site visit dated 21 March 2022, that for some customer groups, [X] Together these characteristics suggest that whilst Dunnes could be included within the local catchment for the Joyce's Oranmore store, it was likely to be a materially weaker competitive constraint.

*Views of the Parties*

- 5.31. The notifying parties informed the Commission that:

*"Tesco submits that Aldi and Lidl are a strong competitive constraint on Joyce's Oranmore:*

...

*Kantar switching data shows that Aldi and Lidl have been winning customers from across the market – including Dunnes, symbol operators and “other” retailers;*

*Aldi and Lidl are price leaders in the market.”<sup>103</sup>*

However, according to the recent *Sainsbury/Asda* merger inquiry, Tesco had previously submitted to the CMA:

*“that discounters compete with traditional retailers but ... there are some differences in terms of store environment, breadth of range and level of customer service, and as such they are not full effective competitors ... Tesco submitted that the discounters only compete with traditional retailers over a small share of the range, meaning that ‘they are not yet a full substitute’ for customers.”<sup>104</sup>*

#### *Competitive constraint posed by the Aldi and Lidl*

5.32. The Commission recognises that Aldi and Lidl have grown in recent years, and pose a degree of competitive constraint on traditional grocery retailers. Nevertheless, during site visits conducted by the Commission,<sup>105</sup> and based upon evidence provided by the parties, the Commission sought to consider the degree of competitive constraint posed by Aldi and Lidl, to determine the extent of the competitive constraint they do, in fact, pose.

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<sup>103</sup> Tesco Submission to the Commission, March 7 2022, paragraph 2.9.

<sup>104</sup> *Supra*, 25, paragraph 7.27.

<sup>105</sup> The Commission conducted site visits on 04 January 2022, 28 February 2022, and 21 March 2022.

5.33. The Commission therefore, sought to determine the degree of competitive constraint posed by the Aldi and Lidl in respect of (i) price; (ii) quality, range and service; and (iii) proximity to Tesco Oranmore and the Target Outlet.

*Price*

5.34. Tesco Ireland informed the Commission that it monitors, and takes into account, the pricing of its competitors when determining its national pricing. In addition, Tesco Ireland informed the Commission that:

*“Tesco tracks the offering and performance of Aldi and Lidl on a day-to-day basis, and ... Tesco benchmarks its prices and range against them.”<sup>106</sup>*

5.35. Further, Tesco Ireland informed the Commission that Aldi and Lidl:

*“offer the lowest prices in the market ... supported by their simplified, low cost operating model which focusses on a smaller product range...”<sup>107</sup>*

5.36. In respect of its own pricing policy, Tesco submitted that:

*“Tesco operates a centrally-set national offer covering price, range, and service standards...”<sup>108</sup>*

5.37. On the basis of the information available to it, the Commission considers that Aldi and Lidl pose a material price constraint on the Parties for products within their range.

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<sup>106</sup> Tesco Submission to the Commission, March 7 2022, paragraph 2.8.

<sup>107</sup> Ibid, paragraph 5.16.

<sup>108</sup> Ibid, paragraph 2.12.

### *Quality, Range and Service*

5.38. The competitive constraint posed by a grocery retailer can be affected by the particular characteristics, including size of the store, and distance from their competitors, but also in terms of their instore offerings.

5.39. Where a competitor has an inferior offering, whether that be size of product range, availability of branded products or instore amenities (such as butchers, fishmongers, bakeries, consumer toilets, ATMs, fresh food and drinks counters) the Commission considered that they are less likely to be considered a substitute for a larger store in which customers can expect a broader range and variety of additional amenities.

5.40. Tesco Ireland further stated that:

5.41. *“Tesco monitors the **branded product range** of Aldi and Lidl (and Dunnes and Supervalu) on a weekly basis, as the excerpt from Tesco’s weekly price tracking below shows. **This monitoring directly feeds into the decisions Tesco takes with regard to product ranging and pricing** ... Tesco considers Aldi and Lidl to exert a competitive constraint with regard to **branded products**.”<sup>109</sup> (emphasis added).*

5.42. During a site visit to Oranmore on 21 March 2022, the manager of the Aldi in Oranmore informed the Commission that Aldi stock only 10 of the top 100 branded products. The Commission concluded therefore, that the competitive constraint posed by Aldi and Lidl, both in terms of product range and price, is appreciably reduced as a result of their branded product range being substantially less than that offered by Tesco Ireland.

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<sup>109</sup> Ibid, paragraph 5.23.

5.43. Both Tesco Oranmore and Joyce’s Oranmore offer a variety of additional amenities instore, which include, *inter alia*, a fresh bakery, a butcher, fresh food counters, a large selection of alcoholic drinks, and a tobacconist. This information is set out in Table 4 below.

**Table 4: Instore amenities**

	Tesco Oranmore	Joyce’s	Aldi Oranmore	Lidl Oranmore
<b>Fresh</b>	✓	✓	?	X
<b>Butcher/butchers</b>	✓	✓	X	X
<b>Delicatessen</b>	✓	✓	X	X
<b>Fish monger/fish</b>	✓	✓	X	X
<b>Fresh coffee</b>	✓	✓	X	X
<b>Self service fresh</b>	?	✓	X	X
<b>Speciality fresh</b>	?	✓	X	X
<b>Tobacconist</b>	✓	?	X	X
<b>ATMs</b>	✓	?	X	X
<b>Customer toilets</b>	✓	✓	X	X

**Source: The Commission based on information from the Parties**

5.44. The parties informed the Commission that Tesco Oranmore carries just over 20,000 products,<sup>110</sup> and Joyce’s Oranmore carries just over 19,000.<sup>111</sup>

5.45. Further, the Commission noted that neither the Aldi nor the Lidl in Oranmore offered the same, or indeed a similar, variety of onsite amenities to those offered

<sup>110</sup> Tesco Ireland Response to RFI, paragraph 8.2.

<sup>111</sup> Joyce’s Response to RFI, “Product sales report Oranmore 2021”.



by Joyce’s retail outlet in Oranmore or the Tesco Ireland retail outlet in Oranmore. This is consistent with their low-cost operating model.

- 5.46. For the above reasons, the Commission considers that in relation to the Joyce’s Oranmore store that a simple fascia count would likely underestimate the impact on competition following implementation of the Proposed Transaction, as the competitive constraint posed upon Tesco Ireland and Joyce’s by Aldi and Lidl, was likely to be materially less than the constraint that Tesco Ireland and Joyce’s posed upon each other in respect of quality, range and service.<sup>112</sup>

*Proximity of the stores*

- 5.47. The following table provides the distances from the Joyce’s Oranmore store and the existing Tesco Ireland stores:

**Figure 5: Distances from Joyce’s Oranmore to effective competitors in Oranmore**

	Tesco Oranmore	Aldi Oranmore	Lidl Oranmore
Joyce's Oranmore	400m	850m	1400m

**Source: The Commission, based on information provided by the Parties**

- 5.48. During the course of the Phase 1 investigation, the Commission received internal documentation of Tesco Ireland in response to the RFI. Amongst that documentation was an internal presentation, and emails considering what Tesco

<sup>112</sup> Supra, 25, at paragraph 8.202: “...for both [Sainsbury and Asda], the weights [for determining degree of constraint] for Aldi and Lidl remain smaller than those for Large Tesco, Large Sainsbury’s, Large Asda and Morrisons stores.”

Ireland may do with the Joyce's Oranmore store following implementation of the Proposed Transaction set out below.

- 5.49. The internal documentation provided to the Commission, referenced below, indicated that as a result of its very close proximity to the existing Tesco outlet in Oranmore, Tesco Ireland intended to close or dispose of the Joyce's Oranmore.
- 5.50. In a PowerPoint presentation entitled, "Project Cairo: Acquisition Opportunity"<sup>113</sup> prepared in May 2021, Tesco Ireland state:

*"Joyce's Oranmore store is very close in proximity to a Tesco Superstore - less than 700 metre apart. As part of the proposed transaction, Joyce's Oranmore store needs to be purchased. However, it is assumed that Tesco will discard this store post acquisition with a valuation of €7m applied to the store."*

- 5.51. [...] for Tesco Ireland, in an email dated 9 September 2021, stated [in relation to the Joyce's Oranmore store]:

*"...Would we consider leasing part to a competitor, so instead of restricting the full 14k sq ft, limit it to 7,000 sq ft or below. That way they can still attract a convenience operator but it limits the potential impact on our own store ...*

*Options:*

- 1. Close the store and fight the keep open clause- try to negotiate exit with landlord.- cost unknown but lease of part does expire in 2028 – so partial cap on liability.*

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<sup>113</sup> Merger Notification Form, Annex 08.

2. *Down size and trade part as Express store, re let remainder to use that is not restricted in the center.*<sup>114</sup>

5.52. In an email dated 19 November 2021, the [...] of Tesco Ireland, [...] stated that:

*“My view is because we plan to sell oranmore and exit that centre there is no good reason for us to own a unit in it.”* (sic)<sup>115</sup>

5.53. Tesco Ireland subsequently informed the Commission that these comments were made “in the heat of negotiations” and did not represent the thinking of Tesco Ireland when they entered into the SPA on 29 November 2021.

5.54. Tesco further informed the Commission that it intended to operate the Joyce’s Oranmore store as a “full range” supermarket despite its close proximity to the existing Tesco Ireland supermarket.

5.55. There is some evidence to suggest that grocery retailers act strategically in order to prevent competitors from securing locations for rival stores. For example, in 2020 Tesco UK was found by the CMA to have unlawfully prevented rivals from opening shops near their stores.<sup>116</sup> Additionally, in 2021, the media suggested that Dunnes opened a convenience size store close to its flagship store, Cornelscourt centre, in order to block a rival from opening a store there.<sup>117</sup>

5.56. As the Commission considered that the Phase 2 Proposals were sufficient to ameliorate the Commission’s preliminary competition concern, it was not

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<sup>114</sup> [Tesco Response to RFI, “2022.09.21 email from [...]”.]

<sup>115</sup> Tesco Response to RFI, “2022.01.26 email from[...] (a).MSG”

<sup>116</sup> <https://www.gov.uk/government/news/cma-demands-action-after-tesco-blocks-rival-supermarkets>

<sup>117</sup> <https://www.irishtimes.com/business/commercial-property/dunnes-stores-ramps-up-rollout-of-smaller-suburban-shops-1.4741946>

necessary to further consider Tesco Ireland's intention for the Joyce's Oranmore store.

#### *Proposals Submitted by the Parties*

5.57. On 29 April 2022 Tesco Ireland submitted draft proposals to the Commission pursuant to section 20(3) of the Act, with the aim of ameliorating the preliminary competition concern identified by the Commission in the course of its investigation.

#### **Conclusion**

5.58. The Commission is of the view that the Phase 2 Proposals are sufficient to address the Preliminary Competition Concern identified by the Commission in the grocery retail sector in the State.

5.59. Before making a determination relating the Proposed Transaction, 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.

5.60. In accordance with section 20(3), section 22(3)(a), section 26(1) and section 26(4) of the Act, the Commission has taken the Phase 2 Proposals into account and the Phase 2 Proposals form part of the basis for its determination of 2 June 2022. Consequently, the Phase 2 Proposals have become commitments binding upon the parties.

#### **Conclusion on competitive assessment**

5.61. In light of the above, and having taken the Phase 2 Proposals into account (which form the basis or part of the basis for its determination) the Commission considers that the result of the proposed acquisition whereby Tesco Ireland would acquire



sole control of Joyce's will not be to substantially lessen competition in any market for goods or services in the State.

## 6. PROPOSALS TO ADDRESS COMPETITION CONCERNS

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### Introduction

- 6.1. On 21 February 2022, during the preliminary (Phase 1) investigation, the Commission informed the parties of its potential competition concern. On 16 March 2022, Tesco Ireland submitted draft proposals intended to address the Commission’s Preliminary Competition Concern (the “Phase 1 Proposals”).
- 6.2. Following detailed consideration of the Phase 1 Proposals, the Commission could not conclude that the Phase 1 Proposals would ameliorate the Preliminary Competition Concern identified by the Commission during the preliminary (Phase 1) investigation.
- 6.3. During the full (Phase 2) investigation, the Commission engaged further with Tesco Ireland and their legal advisors. Following engagement with the Commission, on 29 April 2022 Tesco Ireland submitted new draft proposals aimed at fully ameliorating the Preliminary Competition Concern identified by the Commission (the “Phase 2 Proposals”).

### Competition Concerns

- 6.4. As set out in paragraph 1.21 above, the Commission identified a Preliminary Competition Concern arising from the Proposed Transaction in relation to loss of an effective competitor to the Oranmore catchment area. The Commission considered that the loss of a traditional grocery retailer could have adverse effects on: (i) consumer choice; (ii) product quality; (iii) services offered to consumers; and/or (iv) price.
- 6.5. On 29 April 2022, Tesco Ireland submitted the Phase 2 Proposals to the Commission under section 20(3) of the Act intended to address the Commission’s Preliminary Competition Concern.

- 6.6. The Phase 2 Proposals provide, *inter alia*, that Tesco Ireland would:
- acquire all 10 Target Outlets, but “hold separate” the Joyce’s Oranmore store and divest the Joyce’s Oranmore store to a Suitable Purchaser (as defined in the finalised Phase 2 Proposals) within [6 months];
  - not to carry out any act that could reasonably be expected to have a significant adverse impact on the economic value, the management or the competitiveness of the Joyce’s Oranmore store until its sale;
  - not undertake to purchase the Joyce’s Oranmore store within 10 years following the sale to a suitable purchaser;
  - submit to the oversight of a monitoring trustee (as defined in the finalised Phase 2 Proposals), within the terms of a Trust Mandate (as defined in the finalised Phase 2 Proposals), as agreed by The Commission.
- 6.7. The Commission is of the view that the Phase 2 Proposals submitted by Tesco Ireland on 29 April 2022 are sufficient to address the Preliminary Competition Concern identified by the Commission during its Phase 1 and Phase 2 investigations as they ensure the divestment of the Joyce’s Oranmore, to a suitable alternative purchaser, ensuring that the implementation of the Proposed Transaction does not result in an SLC in that local area.

## Conclusion

- 6.8. In light of the Phase 2 Proposals (which form part of the basis of the Commission determination), and in light of the competition analysis as set out in this determination, the Commission has determined in accordance with section 22(3)(a) of the Act that the proposed acquisition whereby Tesco Ireland would acquire sole control of Joyce’s will not be to substantially lessen competition in any market for goods or services in the State.

6.9. In accordance with section 20(3) and section 26(1) and section 26(4) of the Act, the Phase 2 Proposals submitted by Tesco Ireland, have become commitments binding upon the Parties. The Phase 2 Proposals are appended to this determination below.



## 7. CONCLUSION

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- 7.1. In light of the binding proposals submitted by Tesco Ireland and in light of its analysis as set out in this determination, the Commission has determined that the Proposed Transaction will not substantially lessen competition in any market for goods or services in the State.

## 8. ANCILLARY RESTRAINTS

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- 8.1. The Parties submit that Clause 9 of the SPA contains a non-compete and non-solicitation obligations which the parties consider to be directly related and necessary to the implementation of the Proposed Transaction. The obligations are placed on Solus, and each of the Covenantors.
- 8.2. The Commission notes that Clause 9.1.1 – 9.1.3, inclusive, contain restrictive obligations upon Solus and the Covenantors, including non-compete and non-solicitation obligations. The duration of these restrictive covenants does not exceed the maximum duration acceptable to the Commission.<sup>118</sup> The Commission considers these non-compete and non-solicitation obligations to be directly related to and necessary for the implementation of the Proposed Transaction.
- 8.3. The Commission notes that Clause 9.1.4 contains an obligation upon Solus and the Covenantors not to, at any time after completion, *“directly or indirectly use or attempt to use in the course of any business or otherwise on its own account or in connection with or on behalf of any person any Intellectual Property Rights owned by any Group Company.”* In addition, Clause 9.1.4 contains an obligation upon Solus and the Covenantors not to, *directly or indirectly use, in the course of any business or otherwise on its own account:*
- (i) *any Intellectual Property Rights owned by any Group Company; or*
  - (ii) *any name, combination of words or abbreviation used or owned by any Group Company including the name Joyce’s Supermarkets or any other name, combination of words or abbreviations which is likely to be confused with any such name, combination of words*

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<sup>118</sup> In this respect, the CCPC follows the approach adopted by the EU Commission in paragraphs 20 and 26 of its “Commission Notice on restrictions directly related and necessary to concentrations” [2005] OJ C56/03 (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005XC0305%2802%29>).

*or abbreviations (whether or not such a name, combination of words of abbreviations is used in conjunction with any other name, place or description).*

The scope of the obligation extends to the Province of Connacht. The Commission considers this scope to be wider than necessary for the implementation of the Proposed Transaction. Therefore, Clause 9.1.4 of the SPA will not benefit from the protections offered by sections 4(8) and 5(3) of the Act.

## 9. DETERMINATION

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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 or 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, will not be to substantially lessen competition in any market for goods or services in the State, and, accordingly, that the transaction 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**

## MERGER NOTIFICATION M/21/071 – TESCO/JOYCES

### PHASE 2 PROPOSALS: 29 April 2022

#### Phase 2 Proposals submitted by Tesco Ireland Limited to the Competition and Consumer Protection Commission (“Proposals”)

#### 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).
  - 1.

#### 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.
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 divesture 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

