

DETERMINATION OF MERGER NOTIFICATION M/22/034 – M&S/GIST

Section 21 of the Competition Act 2002

Proposed acquisition by Marks and Spencer Group plc of sole control of Gist Limited.

Dated: 8 September 2022

Introduction

1. On 29 July 2022, in accordance with section 18(1)(a) of the Competition Act 2002, as amended (the “Act”), the Competition and Consumer Protection Commission (the “Commission”) received a notification of a proposed acquisition whereby Marks and Spencer Group plc (“M&S”) would acquire the entire issued share capital, and thus sole control, of Gist Limited (“Gist”) (the “Proposed Transaction”).

The Proposed Transaction

2. The Proposed Transaction will be implemented pursuant to a share purchase agreement dated 21 July 2022, whereby Storeshield Limited (the “Seller”) and Marks and Spencer (A2B) Limited (the “Acquirer”), a wholly owned subsidiary of M&S, have together agreed an irrevocable “put and call” option that will ultimately enable M&S, subject to the satisfaction of certain conditions precedent, to acquire the entire issued share capital of Gist (the “SPA”).¹
3. Pursuant to the SPA, M&S will acquire the entire issued share capital of Gist from the Seller. Following completion of the Proposed Transaction, M&S will have sole control of Gist.

The Undertakings Involved

M&S

4. The Acquirer is a wholly-owned subsidiary of M&S, a public company listed on the London Stock Exchange.

¹ Page 5 of the SPA.

5. M&S is active in the retail supply of groceries, clothing and home products in the State, the United Kingdom and internationally.
6. For the financial year ending 31 December 2021, M&S's worldwide turnover was approximately €10,695,000,000, of which approximately €[...] was generated in the State.

The Target - Gist

7. Gist, which is owned by the Seller, is a private limited company incorporated in England and Wales.
8. Gist provides third-party contract logistics services in the United Kingdom and in the State. Gist has five business divisions, the following four of which will be acquired by M&S pursuant to the Proposed Transaction:
 - (a) Primary warehousing and distribution of food products, including temperature-controlled logistics, from chilled goods manufacturers to M&S or to third party warehouse and regional distribution centres ("RDCs");
 - (b) Secondary warehousing and distribution of food products from RDCs to customer stores and retail points;
 - (c) International export services and freight management services; and,
 - (d) Food Services, from manufacturers or client RDCs to retail outlets.
9. The fifth business division of Gist, which involves the operation of daily transportation to retail outlets in continental Europe, will be carved out of Gist prior to the implementation of the Proposed Transaction, meaning this division will not be acquired by M&S.²
10. For the financial year ending 31 December 2021, Gist's worldwide turnover was €[...], of which approximately €[...] was generated in the State.

Rationale for the Proposed Transaction

11. The parties state the following in the notification:

"The rationale for the Proposed Transaction is to allow M&S to bring in-house its logistics operations so that it can rationalise its grocery supply chain by taking ownership of a long-term trading partner and removing the potential for price

² [...].

volatility in its contract for third party logistics with Gist. This will achieve efficiencies for M&S and thereby improve availability of its products, improve food freshness and reduce waste.”³

Third Party-Submissions

12. No third-party submissions were received.

Competitive Analysis

Relevant Markets

13. The Commission defines markets to the extent necessary depending on the particular circumstances of a given case. In this instance, it is not necessary for the Commission to define the precise relevant product and geographic markets since its conclusion on the competitive impact of the Proposed Transaction will be unaffected regardless of the market definition adopted. For the purpose of its assessment of the likely competitive impact of the Proposed Transaction, the Commission has considered the potential product and geographic markets described below.

Product Market

The Supply of Third-party Contract Logistics Services

14. The parties state in the notification that Gist is active in “*the provision of third-party contract logistics services to grocery multiples in the UK and Ireland*”.⁴

15. The European Commission has previously defined contract logistics services as “*the part of the supply chain process that plans, implements and controls the efficient, effective flow and storage of goods, services and related information from the point of origin to the point of consumption in order to meet customers' requirements*”.⁵ The Commission, in this instance, sees no reason to depart from this view.

³ See paragraph 2.7.2 of the notification.

⁴ See paragraph 5.1.3 of the notification.

⁵ See paragraph 9 of the European Commission’s decision in Case M.6059 Norbert Dentressangle / Laxey Logistics (“Norbert Dentressangle / Laxey Logistics”), quoting paragraph 15 of the European Commission’s decision in Case M.2411 – Autologic/TNT/Walleniust/CAT JV, available at:

https://ec.europa.eu/competition/mergers/cases/decisions/m6059_755_2.pdf.

16. In its determination in *M/14/033 - Musgrave/Allied & Tallaght Cold Store*, the Commission did not come to a definitive view on the precise relevant product market in relation to the provision of third-party contract logistics services.⁶
17. The Commission defines markets to the extent necessary depending on the particular circumstance of a given case. For the purposes of assessing whether the Proposed Transaction might result in a substantial lessening of competition, the Commission has analysed its impact in respect of the supply of third-party contract logistics services.

The Retail Supply of Groceries

18. The parties state in the notification that M&S is active in "*the retail supply of groceries, clothing and home products*".⁷
19. In its determination in *M/11/022 – Musgrave/SuperQuinn* ("Musgrave/SuperQuinn"), the Commission defined grocery goods as "*food and drink for human consumption and household necessities*".⁸ In that case, the Commission considered the product market for the retail sale of grocery goods.
20. In its determination in *M/21/071 – Tesco Ireland/Joyce's Supermarkets* ("Tesco/Joyce's"), the Commission defined the following product market: "*[t]he retail sale of grocery goods and general merchandise in Large and Small supermarkets*".⁹
21. The Commission defines markets to the extent necessary depending on the particular circumstance of a given case. For the purposes of assessing whether the Proposed Transaction might result in a substantial lessening of competition, the Commission has analysed its impact in respect of the retail sale of grocery goods and general merchandise in large and small supermarkets.

Geographic Market

The Supply of Third-party Contract Logistics Services in the State

⁶ The Commission's determination is available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/M-14-033-Merger-Determination-Musgrave-Allied-TCS.pdf>.

⁷ See paragraph 5.1.3 of the notification.

⁸ The Commission's determination is available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/M-11-022-Musgrave-Superquinn.pdf>.

⁹ The Commission's determination is available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2021/12/2022.08.27-M.21.071-Tesco-Joyces-DET-Non-confidential.pdf>.



22. The parties state the following in the notification: “[Gist] provides services throughout the State. The provision of delivery and distribution services by its nature operates at the level of a national geographic market. Primarily, [Gist] services 18 M&S retail locations in Ireland from one distribution centre located in Dublin”^{10,11}. The Commission has therefore assessed the likely competitive impact of the Proposed Transaction by reference to the potential market for the provision of third-party contract logistics services in the State.

The Retail Supply of Groceries in the State

23. The parties state in the notification: “Since there are no local conditions that would define a regional geographic market, M&S’s services operate in a national geographic market”.¹²

24. In Musgrave/SuperQuinn, the Commission did not reach a definitive conclusion on the relevant geographic market in relation to the retail sale of grocery goods, but considered (i) a national potential market; (ii) a potential market in relation to the Dublin region, and (iii) potential markets in local areas surrounding each SuperQuinn store by a 10 minute drive time and/or a ten kilometre distance.¹³

25. In this instance, it is not necessary for the Commission to define the precise relevant geographic markets since its conclusion on the competitive impact of the Proposed Transaction will be unaffected whether the relevant market is defined narrowly (i.e., local areas) or more broadly (i.e., the State). For the purpose of assessing whether the Proposed Transaction might result in a substantial lessening of competition, the Commission has analysed its impact by reference to a national market, as the Proposed Transaction is not specific to individual M&S retail stores.

Horizontal Overlap

¹⁰ See paragraph 5.1.2 of the notification.

¹¹ These retail locations are located in: Dublin (Blackrock, Blanchardstown, Excise Walk, Dublin 1, Dundrum, Grafton St, Liffey Valley, Mary St); Cork (St Patrick’s Street; Douglas); Tipperary (Clonmel); Kerry (Killarney); Galway (Corrib Centre); Westmeath (Athlone); Meath (Navan); Louth (Drogheda); Donegal (Letterkenny) and Kildare (Newbridge).

¹² See paragraph 4.3.1 of the notification.

¹³ The Commission’s determination is available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/M-11-022-Musgrave-Superquinn.pdf>.

26. In the State, there is no horizontal overlap between the activities of the parties in any potential product market. Gist is only active in the provision of third-party contract logistics services, and M&S is not active in this sector.
27. In light of the above, the Commission considers that the Proposed Transaction will not raise any horizontal competition concerns in any market for goods or services in the State.

Vertical Overlap

The Supply of Third-Party Contract Logistics Services

28. There is an existing vertical relationship between M&S and Gist in the State. Specifically, M&S contracts with Gist for all third-party contract logistics services to M&S' grocery retail stores in the State.
29. Approximately [...]% of M&S's third-party contract logistics services in the State are currently provided by Gist. The remaining third-party logistics services are provided to M&S by [...].¹⁴ The third-party logistics services provided by [...] to M&S comprise only a small proportion (approximately [...]%) of [...]’s overall third-party logistics operations in the State. [...] also supplies third-party logistics services to many of M&S’ competitors in the State, including Ocado Retail Limited, Tesco Ireland Limited, Lidl Ireland GmbH, Aldi Stores (Ireland) Limited, and Iceland Foods Ltd.
30. The Commission is of the view that M&S is unlikely to engage in the foreclosure of other providers of third-party contract logistics services in the State for the following reasons:
 - (a) The Proposed Transaction has a minimal competitive impact, as it internalises a pre-existing relationship and supply agreement between the parties, and as such is unlikely to significantly alter the existing structure of the market;
 - (b) The parties state in the notification that Gist holds a *de minimis* share in the supply of third-party contract logistics services to the grocery sector in the State, and that there are many other players active in the State, such as AGRO Merchants Group, DB Schenker AG, DHL, Michael Dixon International Transport Limited, Manfreight Limited, Morgan McLernon, O’Toole Transport Limited, Sam Dennigan & Co Ltd., and Sysco Limited;

¹⁴ DHL provides third party contract logistics to M&S in relation to its clothing and home business.

- (c) Gist does not currently supply any services to M&S' competitors in the State;¹⁵ and,
- (d) Many of M&S' competitors are currently vertically integrated and provide their own logistics services, with those who still avail of third-party contract logistics services providers being able to switch relatively easily due to low switching costs.

31. In light of the above, the Commission considers that the Proposed Transaction will not lead to any vertical foreclosure concerns in the supply of third-party contract logistics services in the State.
32. For the sake of completeness, the Commission notes that Gist is also active in the supply of global freight management services, although no vertical relationship exists between the parties in this market as M&S does not avail of these services from Gist or any other provider.
33. The Commission also notes that Gist is active in the supply of third-party contact logistics services to the foodservice sector. The Commission notes, however, that the Proposed Transaction is unlikely to give rise to any vertical foreclosure concerns in relation to this market, as: (a) M&S is not primarily active in the foodservice industry;¹⁶ (b) M&S has no ability or incentive to engage in foreclosure of other foodservice providers in the State, as this market accounts for a minimal proportion of M&S' turnover in the State and the supply of third-party contract logistics services is a minor part of Gist's activities in the State; and, (c) there are many other third party contract logistics services providers operating in the State to which foodservice providers can switch, as listed at paragraph 30.¹⁷

Conclusion on vertical assessment

34. In light of the above, the Commission considers that the Proposed Transaction will not lead to any vertical foreclosure concerns in any market for goods or services in the State.

¹⁵ For the sake of completeness, the Commission notes that Gist has previously provided a small amount of logistics services in terms of primary transportation services to Booker Group Limited ("Booker"), a wholly owned subsidiary of Tesco plc, although Gist has not provided any logistics services to Booker in respect of Tesco plc's retail stores. This contract was formed because "M&S was purchasing certain goods from Booker on a wholesale basis to supplement the product stock and range in M&S's own retail outlets". [...].

¹⁶ M&S provides a café/ restaurant in thirteen of its eighteen stores nationally, although these services (i) account for a *de minimis* proportion of M&S' revenue, (ii) are targeted at M&S customers shopping in-store; and, (iii) M&S avails of the same logistics process and supplier for these services and its grocery stores.

¹⁷ See paragraph 4.2.7 of the notification.



Conclusion

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

Ancillary Restraints

36. The parties state in the notification that Schedule 8 Part 1 of the SPA imposes a number of restrictive covenants on the Seller, including non-compete and non-solicitation obligations which the parties believe are directly related to and necessary for the implementation of the Proposed Transaction. The duration of these non-compete and non-solicitation obligations does not exceed the maximum duration acceptable to the Commission.¹⁸ The Commission considers these non-compete and non-solicitation obligations to be directly related to and necessary for the implementation of the Proposed Transaction insofar as they relate to the State.

¹⁸ In this respect, the Commission follows the approach adopted by the European Commission in paragraphs 20 and 26 of its Notice on restrictions directly related and necessary to concentrations [2005] OJ C56/24 (the “European Commission Notice”), available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005XC0305%2802%29>

Determination

The Competition and Consumer Protection Commission, in accordance with section 21(2)(a) of the Competition Act 2002, as amended, has determined that, in its opinion, the result of the proposed acquisition whereby Marks and Spencer Group plc would acquire the entire issued share capital, and thus sole control, of Gist Limited, will not be to substantially lessen competition in any market for goods or services in the State, and, accordingly, that the acquisition may be put into effect.

For the Competition and Consumer Protection Commission.

Brian McHugh

Member

Competition and Consumer Protection Commission