



**DETERMINATION OF MERGER  
NOTIFICATION**

**M/23/008**

15 September 2023



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## 1. INTRODUCTION

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### Introduction

1.1 On 15 February 2023, 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 merger notification form (the “Merger Notification Form”) concerning a proposed acquisition of certain assets (“Target Assets”) of Arrabawn Co-Operative Society Limited (“Arrabawn”) by Aurivo Consumer Foods Limited (“Aurivo Consumer Foods”), a wholly-owned subsidiary of Aurivo Co-operative Society Limited (“Aurivo Co-Op”) (the “Proposed Transaction”).

### The Proposed Transaction

1.2 The Proposed Transaction is to be implemented pursuant to a Business Transfer Agreement (“BTA”) dated 3 February 2023 between Arrabawn and Aurivo Consumer Foods. Under the terms of the BTA, Aurivo Consumer Foods will acquire the Target Assets from Arrabawn. For the purposes of this Determination, Arrabawn and Aurivo Group, as referred to below at paragraph 1.3, shall be together referred to as “the Parties”.

### The Undertakings Involved

#### The Acquirer – Aurivo Co-Op

1.3 Aurivo Co-Op is an industrial and provident society, which is registered on the Register of Friendly Societies and is owned by approximately 14,000 members.<sup>1</sup> Aurivo Co-Op, together with all of Aurivo Co-Op’s subsidiaries, including Aurivo Consumer Foods, are referred to in this Determination as “Aurivo Group”.

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<sup>1</sup> No individual shareholder owns more than 1% of the shares in Aurivo Co-Op. The members are mostly farmers who trade with Aurivo Co-Op.

1.4 Aurivo Group is a diversified agri-business co-operative that is active across four main areas: (i) Consumer Foods; (ii) Dairy Ingredients;<sup>2</sup> (iii) Agri-Business; and (iv) Marts.

#### *Consumer Foods*

1.5 Aurivo Group, through Aurivo Consumer Foods, sells both branded and unbranded retail food products – predominantly liquid milk, cream, and butter – to retailers, food-service operators, and food wholesalers/distributors in the State. Furthermore, in 2022, Aurivo Group supplied:

- (i) branded liquid milk directly to [REDACTED] end-consumers in the State ([REDACTED] consumers in County Donegal, [REDACTED] consumers in County Sligo, [REDACTED] in County Roscommon);
- (ii) unbranded liquid milk directly to [REDACTED] end-consumers in the State ([REDACTED] consumers in County Donegal, [REDACTED] in County Sligo); and
- (iii) branded cream directly to [REDACTED] end-consumers in the State ([REDACTED]).

1.6 Aurivo Group sells branded products to retailers, food-service operators, and food wholesalers/distributors in the State under four brand names:

- *Connacht Gold* – branded liquid milk and cream that are sold predominantly in the west/north-west of the State;<sup>3</sup> branded butter that is sold in both the State and Northern Ireland;

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<sup>2</sup> In paragraph 4.4 of the Merger Notification Form, the Parties stated that dairy ingredients are used in further food processing and the wider food-service sector. According to Aurivo Group's [website](#) Aurivo Group's Dairy Ingredients division produces its range of "enriched milk powders, growing-up milk powders, senior milk powders and butters" for export to markets in Africa, the Middle East, Europe, South East Asia, Central America and North America.

<sup>3</sup> In paragraph 4.3 of the Merger Notification Form, [REDACTED]

- *Donegal Creameries* – branded liquid milk and cream that are sold primarily in County Donegal;
- *Organic For Us* – branded organic milks, aimed at high-end hospitality sector, that are sold throughout the State; and,
- *For Goodness Shakes* – UK-based brand of health and nutrition ready-to-go shakes that are sold in both the State and the UK.

1.7 Aurivo Group supplies unbranded milk to Aldi, Centra, Costcutter, Dunnes Stores, Gala, Lidl, Londis, Mace, Spar, SuperValu, and Tesco. It supplies unbranded butter to Aldi and Lidl.

1.8 Aurivo Group also supplies unbranded butter to Ornu Limited (“Ornu”). Ornu is a milk co-operative which is owned by eight milk co-operatives in the State: Aurivo Group, Arrabawn, Carbery Food Ingredients Limited, Dairygold Co-Operative Society Limited (“Dairygold”); Lakeland Dairies Co-Operative Society Limited (“Lakeland”); North Cork Co-Operative Creameries Limited (“North Cork Co-Op”); Tipperary Co-Operative Creamery Limited (“Tipperary Co-Op”); and Tirlán Co-Operative Society Limited (“Tirán”). Ornu supplies the Kerrygold brand of butter both in the State and worldwide. Although the Parties are shareholders in Ornu, they do not have control of it.

### *Dairy Ingredients*

1.9 Aurivo Group’s dairy ingredients division processes between 300 million and 400 million litres of manufacturing milk annually into a wide array of milk powder/dairy ingredient and butter products for export to over 50 countries.<sup>4</sup>

### *Agri-Business*

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<sup>4</sup> Once a dairy co-operative receives raw milk from its farmer members, it can convert this raw milk into either: (i) liquid milk; or (ii) manufacturing milk. In *M/13/036 – Glanbia / Wexford Creamery*, the Commission’s predecessor, the Competition Authority (the “Authority”), defined liquid milk as “[m]ilk that is sold for liquid consumption ... suitable for human consumption in liquid form”. In the same determination, the Authority defined manufacturing milk as “an input in the production of other dairy products such as butter, skimmed milk powder, cheese, and whey”.

1.10 In relation to its agri-business division, Aurivo Group owns 34 retail stores which includes 21 Homeland Agri stores, 11 Homeland stores and 2 Homeland Plus stores.<sup>5</sup> It also operates through homeland.ie, an online store which delivers on an all-island basis.

#### *Marts*

1.11 Aurivo Group's marts division operates four livestock marts.

1.12 For the financial year ending 31 December 2021, the total worldwide consolidated turnover of Aurivo Group was approximately €570.3 million, approximately [REDACTED] of which was generated in the State.

#### **The Target – Certain Assets of Arrabawn**

1.13 The Target Assets comprise certain specified assets of Arrabawn's branded and unbranded liquid milk, cream and branded butter production and supply business (the "Business").<sup>6</sup> The Target Assets are currently used in connection with Arrabawn's liquid milk processing facility at Kilconnell, Ballinasloe, Co. Galway (the "Kilconnell Facility"). Aurivo Group will not acquire the Kilconnell Facility itself. Aurivo Group will however acquire certain processing, packaging, storage and distribution equipment currently used at the Kilconnell Facility and will install and use this equipment at its liquid milk processing facility in Killygordon, Co. Donegal (the "Killygordon Facility"). Aurivo Group will also acquire several delivery vans, as well as approximately [REDACTED] drivers of those vans (as transferring employees) who typically deliver Arrabawn products along particular routes.

1.14 More specifically, the Target Assets include the following to enable Aurivo Group to carry on the Business following the completion of the Proposed Transaction:

- The goodwill and customer relationships of the Business;

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<sup>5</sup> Homeland Agri also offers DIY, fuel, paint, electrical and household products, as well as clothing, footwear and pet products – including a range of animal feed under Aurivo Group's Nutrias brand.

<sup>6</sup> Merger Notification Form, Paragraph 1.1.

- The supplier contracts of the Business (excluding contracts/arrangements for the procurement of raw milk);
- Information concerning, among other things, customers, suppliers, sales and technical literature, title documents and other documentation relating to the Business;
- Certain intellectual property rights relating to the Business;
- Storage, processing, packaging and transportation equipment;
- Delivery vans and approximately [REDACTED] drivers of these vans; and
- Stock in trade (including liquid milk and butter products).

1.15 Under the terms of the BTA, Aurivo Group will not acquire any of Arrabawn's contracts for the procurement of raw milk from dairy farmers. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>7</sup>

1.16 In the Merger Notification Form, the Parties stated that Aurivo Group will not be acquiring formal customer contracts from Arrabawn as part of the Proposed Transaction but anticipates that Arrabawn's current customers will continue to purchase Arrabawn's branded products following implementation of the Proposed Transaction.<sup>8</sup> Therefore, this suggests that, while Aurivo Group will not acquire Arrabawn's customers, Aurivo Group anticipates it will negotiate formal customer contracts of its own with Arrabawn's current customers in respect of Arrabawn's branded products. In response to the Requirement for Further Information ("RFI") issued by the Commission to Aurivo Group on 10 August 2023

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<sup>7</sup> Merger Notification Form, Paragraph 1.1.

<sup>8</sup> As stated in Paragraph 1.22 below, Arrabawn supplies two brands of products: 'Arrabawn' and 'Dawn'.



(the “Aurivo Phase 2 RFI”), it clarified that Aurivo Group will not acquire any of Arrabawn’s unbranded liquid milk or cream customers. The Commission notes that supply contracts are typically tendered annually.

- 1.17 For the financial year ending 31 December 2021, the Target Assets’ worldwide turnover was approximately €[REDACTED], all of which was generated in the State.

### The Seller – Arrabawn

- 1.18 Arrabawn is an agri-based organisation headquartered in Nenagh, Co. Tipperary. Separate to the Target Assets, Arrabawn has other business divisions, namely its: (i) ingredients division;<sup>9</sup> and (ii) agri-business division.

- 1.19 Arrabawn’s ingredients business includes the production and sale of approximately [REDACTED] tonnes of butter for export. Arrabawn’s ingredients business processes approximately [REDACTED] litres of milk into milk powder products, [REDACTED] for export.

- 1.20 Arrabawn’s agri-business division supplies animal feed products through its *Dan O’Connor Feeds* and *Greenvale Animal Feeds* brands.<sup>10</sup> Arrabawn, [REDACTED], also operates retail stores selling agricultural and hardware products at 13 locations across the west of Ireland.

- 1.21 Neither Arrabawn’s ingredients division nor its agri-business division form part of the Proposed Transaction.

- 1.22 Arrabawn supplies the ‘Arrabawn’ and ‘Dawn’ brands of dairy products, and supplies unbranded milk to Centra, Costcutter, Gala, Lonsis, Mace, Spar and SuperValu.<sup>11</sup>

## Rationale for the Proposed Transaction

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<sup>9</sup> According to [Arrabawn’s website](#), Arrabawn’s ingredients division “produces a wide array of products such as casein, caseinate, skim milk powder and whey to the highest standards.” These products are exported to “over 30 countries for further processing and end up in final products distributed across 150 plus countries”.

<sup>10</sup> <https://arrabawn.ie/our-divisions/agri-business/>.

<sup>11</sup> As discussed in paragraph 1.8 above, Arrabawn is one of eight milk co-operatives that has a shareholding in Ornua.



- 1.25 On 28 March 2023, the Commission served an RFI on Aurivo Co-Op (the “Aurivo Phase 1 RFI”). The service of this RFI adjusted the deadline within which the Commission had to conclude its assessment of the Proposed Transaction in Phase 1. Aurivo Group submitted a full response to the Aurivo Phase 1 RFI on 1 June 2023. Upon receipt of a full response to the Aurivo Phase 1 RFI, the “appropriate date” (as defined in section 19(6)(b)(i) of the Act) became 1 June 2023.<sup>14</sup>
- 1.26 On 28 March 2023, the Commission issued an information request to Arrabawn (the “Arrabawn Phase 1 Information Request”). Arrabawn submitted a full response to the Arrabawn Phase 1 Information Request on 24 May 2023.
- 1.27 During the Phase 1 investigation, the Commission requested and received further information and clarifications from the Parties.

### Third Party Submissions

- 1.28 No third party submission was received during the Phase 1 investigation.

### Market Enquiries

- 1.29 During the Phase 1 investigation the Commission issued a third party questionnaire to 12 competitors of the Parties (the “Competitor Questionnaire”).<sup>15</sup> 7 of the 12 recipients responded to the Competitor Questionnaire in Phase 1, with a subsequent response from one of the 12 recipients submitted during the Phase 2 merger review.
- 1.30 As the Commission did not receive all responses to the original Competitor Questionnaire, in order to facilitate more responses, the Commission issued a shortened version of the Competitor Questionnaire to four of the 12 recipients of the original Competitor Questionnaire (the “Shortened Competitor

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<sup>14</sup> The “appropriate date” is the date from which the time limits for making both Phase 1 and Phase 2 determinations begin to run.

<sup>15</sup> These are: Bandon Co-Operative Agricultural & Dairy Society Limited (“Bandon”); Centenary Thurles Co-Operative Society Limited (“Centenary Thurles”); Clóna Dairy Products Limited (“Clóna”); Dairygold; Dale Farm Limited (“Dale Farm”); Lakeland; Lee Strand Co-Operative Creamery Limited (“Lee Strand”); Natural Dairies Unlimited Company (“Natural Dairies”); North Cork Co-Op; Strathroy Dairy Unlimited Company (“Strathroy”); Tipperary Co-Op, and Tirlán.

Questionnaire”).<sup>16</sup> Three recipients responded to the Shortened Competitor Questionnaire.

1.31 In total, the Commission received 11 responses from a total of 12 competitors who were sent questionnaires.

1.32 The Commission engaged further with some of these third parties, where appropriate, to seek clarification or further explore issues raised in their responses to the questionnaire.

1.33 The Commission conducted calls with the following two entities:

- Lynas Foodservice Ireland Limited (“Lynas”), a wholesaler of liquid milk, cream and butter in the State;<sup>17</sup> and
- Ornu.

### **The Phase 1 Investigation**

1.34 Having considered all the available information in its possession at the time, the Commission was unable to form the view, at the conclusion of its 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.

1.35 Therefore, on 12 July 2023, 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.

## **Full Investigation (“Phase 2”)**

### **Contact with the Undertakings Involved**

1.36 On 10 August 2023, the Commission served an RFI on Aurivo Co-Op pursuant to section 20(2) of the Act (the “Aurivo Phase 2 RFI”). The issuance of the Phase 2 RFI had the effect of adjusting the deadline by which the Commission was required to

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<sup>16</sup> These are: Bandon, Clona, Lee Strand and Natural Dairies.

<sup>17</sup> These are: Lynas Foodservice Ireland Limited and Ornu.

issue its determination in relation to the Proposed Transaction in Phase 2. Aurivo Group submitted a full response to the Aurivo Phase 2 RFI on 22 August 2023.

- 1.37 On 10 August 2023, the Commission issued an information request to Arrabawn (the “Arrabawn Phase 2 Information Request”). Arrabawn submitted a full response to the Arrabawn Phase 2 Information Request on 20 August 2023.
- 1.38 On 21 July 2023, the Parties and their legal representatives attended an in-person meeting with members of the Commission’s case team (the “In-Person Presentation Meeting”). This meeting provided the members of the Commission’s case team an opportunity to better understand the industry, and the Parties made presentations on competition within local markets.
- 1.39 During the Phase 2 investigation, the Commission requested and received further information and clarifications from the Parties.

### **Third Party Submissions**

- 1.40 One third party submission was received during the Phase 2 investigation. The Commission considers that this third-party submission was unrelated to the markets which are impacted by the Proposed Transaction.<sup>18</sup>

### **Market Enquiries**

- 1.41 During the Phase 2 investigation, the Commission continued the process initiated during the Phase 1 investigation of seeking the views of and engaging with third parties in relation to the potential competitive effects of the Proposed Transaction.
- 1.42 The Commission had further engagement with respondents to the Competitor Questionnaire and the Shortened Competitor Questionnaire.
- 1.43 The Commission held calls with retail customers of the Parties.<sup>19</sup>

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<sup>18</sup> This third-party submission was from an individual wanting to enter the dairy farming business. The market for the procurement of raw milk from farmers is unaffected by this Proposed Transaction, and farmers will still have the same number of co-operatives to choose from following the implementation of the Proposed Transaction.

<sup>19</sup> These were Aldi; Musgrave Group and Tesco Ireland.

### **Information Sources Relied Upon**

1.44 In forming its views on the Proposed Transaction, as set out in this Determination, the Commission has considered all the relevant information available to it and in particular information provided by the Parties in response to the Commission's RFIs and information requests, information obtained from third parties, and other information available in the public domain.

## 2. INDUSTRY BACKGROUND

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2.1 This section provides an overview of the industry for milk, cream and butter, with a specific focus on:

- (a) The production of milk, cream, and butter;
- (b) The supply of milk, cream, and butter; and
- (c) Industry participants.

### Production of milk, cream, and butter

2.2 Once a dairy co-operative receives raw milk from its farmer members, it can convert this raw milk into either: (i) liquid milk; or (ii) manufacturing milk.<sup>20</sup> In *M/13/036 – Glanbia / Wexford Creamery*, the Commission’s predecessor, the Competition Authority (the “Authority”), defined liquid milk as “[m]ilk that is sold for liquid consumption ... suitable for human consumption in liquid form”. In the same determination, the Authority defined manufacturing milk as “an input in the production of other dairy products such as butter, skimmed milk powder, cheese, and whey”.

2.3 In 2022, 8.82 billion litres of milk were produced in the State for consumption, with an estimated retail value of €595 million.<sup>21</sup> Approximately 90% of this Irish milk supply is exported, while less than 10% is consumed on the domestic market as liquid milk or manufactured dairy products.

2.4 Milk can be processed into a range of liquid products including whole, skimmed, low-fat, flavoured, and fortified milk. It can also be processed into various powder products such as full cream milk powder, whole milk powder, buttermilk powder, skimmed milk powder and whey.

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<sup>20</sup> Dairy co-operatives are discussed in greater detail in paragraphs 2.22-2.25 below.

<sup>21</sup> [National Milk Agency Annual Report 2022 page 3.](#)

- 2.5 The registration of liquid milk contracts between milk producers (i.e. farmers) and milk processors is required by the Milk (Regulation of Supply) Act 1994. In the year 2021-2022 there were 1,286 active milk supply agreements in place in the State, which accounted for the supply of 453 million litres of milk. The vast majority of these agreements consisted of ‘All Year Round’ contracts, with the remainder being ‘Winter Months Only’ contracts.
- 2.6 Dairy producers produce various types of cream including single cream, double cream, crème fraîche, sour cream, and whipped cream.
- 2.7 Various butters are also produced by dairy producers such as salted and unsalted, low fat and spreads. According to the Annual Report of the National Milk Agency, butter and cheese exports represented 38% of the value of all dairy exports in 2022.<sup>22</sup>

### Supply of liquid milk, cream, and butter

- 2.8 Liquid milk, cream and butter are supplied by dairy co-operatives. The prices dairy co-operatives set for liquid milk, cream and butter are largely influenced by: (i) the farm gate price (the price a dairy co-operative pays dairy farmers for raw milk); (ii) costs of transporting the milk and processing it; (iii) export markets; and (iv) customer strength in setting prices. There are approximately 18,000 dairy farms in the State, of which 1,200 produce raw milk for the fresh liquid milk industry.<sup>23</sup>
- 2.9 From October to March, dairy farmers that supply raw milk for the fresh liquid milk market are paid the price of manufacturing milk plus a premium. From April to September, dairy farmers that produce raw milk for the fresh liquid milk market are paid the price of manufacturing milk. In response to the Aurivo Phase 2 RFI, Aurivo Group stated the following:

*“It is the gross return from these exported products that determines the price Irish dairy farmers get paid for their manufacturing milk.”*

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<sup>22</sup> [National Milk Agency Annual Report 2022 page 2.](#)

<sup>23</sup> Aurivo Group’s response to Question 16 of the Aurivo Phase 2 RFI.



*Gross return from exported products, less*

- *Milk collection costs*
- *Processing costs*
- *Route to market costs*
- *Processors margin*

*= the milk price Irish dairy farmers receive which is known as the manufacturing price [or the farm gate price]. Certain farmers who produce milk all year round receive a premium from October to March”.<sup>24</sup>*

- 2.10 Aurivo Group estimates that “just short of 90% of the milk produced in the Republic of Ireland (ROI) is exported to markets outside the ROI in the form of butter, cheese, infant formula and other milk powders.”<sup>25</sup> Therefore, the prices of liquid milk, cream and butter are often dictated by international demands for dairy commodities. When setting the prices of liquid milk, cream and butter, a dairy co-operative will often consider how much return it could have generated had it processed the raw milk into ingredients for export.
- 2.11 Dairy co-operatives may supply dairy products which are already packaged and branded directly to retailers. Retailers also procure unbranded dairy products which have their own private label branding applied by the co-operative and supplied to central distribution centres (“CDC”). Retailers then supply all of their stores with their own-branded products directly from their CDCs. According to the National Milk Agency’s ‘Annual Report & Accounts 2022’, retailers’ own-brand liquid milk sales accounted for around 70% of all liquid milk sales in the State.<sup>26</sup>
- 2.12 The five largest retailers in the State (Aldi, Musgrave, Tesco, Lidl and Dunnes Stores) [REDACTED] for the supply of branded and unbranded liquid milk, cream, and butter. The prices charged by dairy co-operatives for their branded products are negotiated with the retailers’ head offices.<sup>27</sup> In response to the

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<sup>24</sup> Response to follow-up question, received on 1 September 2023, in relation to Question 16 of the Aurivo Phase 2 RFI.

<sup>25</sup> Aurivo Group’s response to Question 16 of the Aurivo Phase 2 RFI.

<sup>26</sup> Unbranded dairy products are also known as “own brand” or “private label”.

<sup>27</sup> Arrabawn’s Response to the Arrabawn Phase 1 Information Request.

Aurivo Phase 1 RFI, Aurivo Group stated that “[p]rocessors are price-takers, not price makers”, as a dairy co-operative’s ability to increase wholesale prices is constrained by the retailers’ strong negotiating power. Aurivo Group also stated that it considered retailers to be “ [REDACTED] [REDACTED] ”.<sup>28</sup>

2.13 In response to the Aurivo Phase 1 RFI, Aurivo Group stated that negotiations between dairy co-operatives and larger wholesalers typically go through the wholesalers’ dairy buyers, while the owners of smaller wholesalers/food service operators typically negotiate directly with the dairy co-operatives.<sup>29</sup>

2.14 According to the Parties, when setting the prices of branded liquid milk, a dairy co-operative will consider the price of unbranded liquid milk because a large price discrepancy between branded liquid milk and unbranded liquid milk will negatively impact upon branded liquid milk sales. Aurivo Group stated that the price of branded liquid milk is usually between [REDACTED] higher than that of unbranded liquid milk.<sup>30</sup> In response to the Aurivo Phase 2 RFI, Aurivo Group stated the following:

“ [REDACTED] [REDACTED] [REDACTED] [REDACTED] . Retailers will also leverage their buying power based on the volumes of milk they offer in unbranded contracts. This makes unbranded milk more competitive and can result in it being sold at a much lower price.” Furthermore, in ‘Annual Report & Accounts 2022’, the National Milk Agency stated the following:

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<sup>28</sup> Aurivo Group’s response to Question 5 of the Aurivo Phase 1 RFI.

<sup>29</sup> Aurivo Group’s response to Question 9 of the Aurivo Phase 1 RFI.

<sup>30</sup> Arrabawn’s response to Question 9 of the Arrabawn Phase 2 Information Request.

*“Retailers’ own label milk sales gained market share as consumers, squeezed by inflation, curbed their spending on branded milks, which did not retain their price premium.”<sup>31</sup>*

2.15 Aurivo Group stated that, until 2022, the price of unbranded liquid milk in the State had been the same for approximately thirteen years; however, increased revenue on global dairy markets and increased input costs led to a large increase in farm gate prices.<sup>32</sup> As a result, due to the fact that most of the contracts for the supply of unbranded liquid milk are index linked, the prices that dairy co-operatives charge their customers for unbranded milk have increased. As each supply contract is negotiated individually, this price increase has not been applied uniformly across all products and/or customers. [REDACTED]

[REDACTED].<sup>34</sup> According to Aurivo Group’s response to the Aurivo Phase 2 RFI, *“customers will always pass [price] increases on to consumers”*.<sup>35</sup> This was demonstrated by retailers increasing the prices they charge for own-brand liquid milk shortly after dairy co-operatives increased the price they charge for own-brand liquid milk. However, Aurivo Group stated during the In-Person Presentation Meeting that the prices retailers are charging for own-brand liquid milk had decreased twice between April<sup>36</sup> and July 2023.<sup>37</sup> All five of the major

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<sup>31</sup> Aurivo Group’s response to Question 11 of the Aurivo Phase 2 RFI.

<sup>32</sup> Aurivo Group presentation to the members of the Commission’s case team during the In-Person Presentation Meeting.

<sup>33</sup> [REDACTED]

<sup>34</sup> Calculated by the Commission using internal documents submitted by Aurivo Group in response to the Aurivo Phase 1 RFI.

<sup>35</sup> Aurivo Group’s response to Question 12 of the Aurivo Phase 2 RFI.

<sup>36</sup> See: The Irish Examiner – [‘Supermarket price wars continue as milk prices fall by another 10c’](#); and The Journal – [‘Milk prices cut by four supermarkets within hours of each other’](#).

<sup>37</sup> See the Parties’ presentation to the members of the Commission’s case team. Following this presentation, Aurivo furnished the Commission with copies of several articles reporting on retailers reducing the prices they charge for own-brand liquid milk and own-brand butter. These articles included:

RTÉ – [‘Supermarkets announce more milk price cuts’](#);  
The Irish Times – [‘Aldi and Tesco follow Lidl in dropping the price of own-brand milk products by 10 cents’](#);  
The Irish Examiner – [‘Supermarkets announce cuts in butter prices’](#); and  
The Irish Times – [‘Supermarkets cut cost of butter as dairy price wars heat up’](#).

retailers currently charge the same price as each other for unbranded liquid milk on a State-wide basis. In 'Annual Report & Accounts 2022', the National Milk Agency stated the following:

*“Retailers are the price setters for own label sales and determine not only the retail price of milk to consumers but also the wholesale price of milk and ultimately the price paid to producers. Retailers can create or destroy value for all stakeholders in the Fresh Milk Supply Chain.”*<sup>38</sup>

2.16 In response to the Phase 1 RFI, Aurivo Group stated that, in a situation where a dairy co-operative has successfully bid for the supply of unbranded liquid milk to a retailer:

*“[t]he successful bidder has no ability to set its prices. During the negotiation process, there are many attempts by the buyer to reduce prices to get the best possible deal for itself. The negotiation process is more akin to an “auction” where the buyer pushes prices down at every possible opportunity until only one bidder remains.”*<sup>39</sup>

2.17 In 2022, commodity prices in the production of dairy products increased. This led to increased farm gate prices, and in turn, higher prices to end consumers. This included a 33% increase in the retail price of liquid milk, and a 23% increase in the retail price of butter.<sup>40</sup> However, these prices have reduced somewhat in 2023. It was reported that in June 2023, raw milk prices were 23% below the peak prices in December 2022.<sup>41</sup>

2.18 In the past decade there has also been a significant decrease in milk suppliers. 658 producers have ceased producing milk, representing a reduction of 35%.<sup>42</sup>

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<sup>38</sup> [National Milk Agency Annual Report 2022](#), Page 3.

<sup>39</sup> Aurivo Group's response to Question 11 of the Aurivo Phase 1 RFI.

<sup>40</sup> <https://www.agriland.ie/farming-news/price-of-milk-soared-by-33-in-2022-cso/>.

<sup>41</sup> <https://www.agriland.ie/farming-news/ireland-had-highest-eu-drop-in-raw-milk-prices-in-2023/>.

<sup>42</sup> <https://nationalmilkagency.ie/wp-content/uploads/2023/07/NMA-Annual-Report-2022.pdf>.

## Industry participants

2.19 This section describes key participants in the supply chain, namely:

- a) Farmers;
- b) Dairy co-operatives; and
- c) Customers.

### Farmers

2.20 Dairy farmers in the State produce raw milk,<sup>43</sup> which they sell to dairy processors for processing into milk or other dairy products. The majority of dairy processors in the State are local co-operatives which are formed and owned by dairy farmers. This raw milk may then be manufactured into liquid milk, butter, cream, and other dairy products by the dairy cooperative. There are around 17,000 farms producing dairy products in the State.<sup>44</sup>

2.21 The price that a dairy cooperative pays a dairy farmer for raw milk is called the farm gate price. Ornu, a large cooperative which produces the *Kerrygold* brand of butter, publishes a Purchase Price Index (PPI) monthly which indicates the revenue Ornu has achieved on export markets for the most common dairy commodities in the month previous. As approximately 90% of Ireland's dairy products are exports, this becomes the main price index for the price of raw milk. The farm gate price of each cooperative is published in the Farmers Journal 'league tables' every month.<sup>45</sup>

### Dairy Co-operatives

2.22 Dairy co-operatives are involved in converting raw milk into manufacturing milk to produce dairy ingredients, or dairy products such as liquid milk, cream, and butter. These co-operatives are formed by farmers, who supply the co-operatives with the raw milk that they produce.

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<sup>43</sup> Raw milk is milk which has not been subject to any processing or pasteurisation.

<sup>44</sup> [Dairy Sector Profile | Bord Bia | Irish Food Board](#).

<sup>45</sup> Aurivo's response to Question 5 of the Aurivo Phase 1 RFI.

- 2.23 The majority of dairy co-operatives require dairy farmers to have a minimum shareholding in the co-operative. This means that, in practice, dairy farmers supply the co-operative in which they have a shareholding which means that they would be unlikely to switch to supply raw milk to a different co-operative in which they do not have a shareholding. Dairy co-operatives produce and supply dairy products to retailers, food-service operators, and wholesalers/distributors, within the State and for export. Dairy co-operatives also supply directly to individual customers, although these sales have decreased significantly in recent years.<sup>46</sup>
- 2.24 Not all dairy co-operatives produce each of liquid milk, cream and butter. For instance, Bandon only supplies butter, and Ornuia purchases cream from other dairy co-operatives to produce butter. Therefore, the product offering of each dairy co-operative varies.
- 2.25 Dairy co-operatives active in the State include: Aurivo Co-Op, Arrabawn, Tirlán, Strathroy, Clóna, Lee Strand, Natural Dairies, Lakeland, North Cork Co-Op, Centenary Thurles, Ornuia, Bandon, and Dale Farm, each of whom are discussed below.

#### *Aurivo Group*

- 2.26 The activities of Aurivo Group are detailed in paragraphs 1.3 to 1.12 above.

#### *Arrabawn*

- 2.27 The activities of Arrabawn are detailed in paragraphs 1.18 to 1.22 above.

#### *Tirlán*

- 2.28 Tirlán (which previously traded as Glanbia) is a co-operative society composed of around 11,200 members as of 2022.<sup>47</sup> It operates a division for each of: (i) agribusiness; (ii) consumer; and (iii) ingredients.

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<sup>46</sup> According to the [National Milk Agency Annual Report 2022](#), sales to “doorstep” customers accounted for 4% of fresh milk sales in the State in 2022, a 23% decrease from 2021.

<sup>47</sup> See Commission Determination [M/22/006 Glanbia Co-Op/Glanbia Ireland](#).

- 2.29 Tirlán's agribusiness division is the largest supplier of inputs to the Irish farming sector. It operates the *Countrylife*, *GAIN* and *Tirlán FarmLife* brands in this sector. These brands offer a range of products for farmers including animal feed, farm and dairy equipment, animal health products, pasture growth and maintenance products and fencing. It also offers clothing, footwear, homeware, DIY and hardware tools, home and garden furniture and accessories and pet and equine accessories and food.
- 2.30 Tirlán operates its consumer division through its *Avonmore*, *Kilmeaden*, *MyMilkMan*, *Premier Dairies*, *Snowcream*, *Truly Grass Fed*, and *Wexford Creamery* brands. Through these brands it provides a range of liquid milk, cheese, cream, soup, rice & custard, butter and spreads and porridge products.
- 2.31 Tirlán also produces and supplies food products in its ingredients division, offering a variety of cheese, butter, curds, casein, protein and nutritional powders, dairy powders, grains, and affordable nutrition products to substitute for dairy products. This division operates the *CheddMax*, *Millac*, *Oat-Standing*, *Solmiko* and *Truly Grass Fed* brands.

### *Strathroy*

- 2.32 Strathroy operates nationally. Its main depot is in Omagh, and it has depots in Dublin, Wexford, Sligo, Galway, Cavan, and Donegal.<sup>48</sup> It procures raw milk from farmers in the State and Northern Ireland, and produces and supplies liquid milk and cream products under the *Bainne Úr* and *Strathroy* brands, and unbranded liquid milk to Aldi, Centra, Circle K, Costcutter, Lidl, Londis, Mace, Spar and SuperValu.

### *Clóna*

- 2.33 Clóna is based in Cork, and produces and supplies a variety of liquid milk, buttermilk, and cream products. It also operates the *Clóna*, *Bandon Butter*, *Irish Yogurts*, *Carberry Cheese*, and *Riverview Eggs* brands.

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<sup>48</sup> [Our Farms \(strathroydairy.com\)](http://OurFarms(strathroydairy.com)).

- 2.34 Clóna supplies unbranded liquid milk to Centra, Costcutter, Gala, Londis, Mace, Spar and Supervalu.

#### *Lee Strand*

- 2.35 Lee Strand primarily processes and distributes liquid milk in the Kerry, West Limerick & North Cork regions.<sup>49</sup> It supplies liquid milk under the *Lee Strand* brand, and supplies unbranded liquid milk to Aldi, Centra, Costcutter, Gala, Londis, Mace, Spar and SuperValu.
- 2.36 It has recently expanded into the property market, owning, and operating a multi-storey car park, and operating the *Brownes Agri, Steel & Builder Providers* brand.

#### *Natural Dairies*

- 2.37 Natural Dairies produces and supplies unbranded liquid milk, cream, and buttermilk products to Dunnes and supplies branded products under its 'Cool' brand.
- 2.38 Natural Dairies also supplies liquid milk and cream to its sister companies *Green Pastures Donegal* and *Yeats Country Foods* to process cheese products.

#### *Lakeland*

- 2.39 Lakeland operates the following divisions: (i) food ingredients; (ii) foodservice; (iii) agribusiness; and (iv) consumer.
- 2.40 Its food ingredients division processes milk into various products such as milk powders, milk proteins and butter. Its foodservice division provides liquid milk, butter, cream, milk powder and ice cream and frozen yoghurt products to foodservice customers. Its agribusiness division manufactures feed for farmers and provides agricultural inputs to dairy, beef and sheep farmers on the island of Ireland.

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<sup>49</sup> [Our Company - Lee Strand](#)



- 2.41 Lakeland's consumer division also supplies branded liquid milk, cream and butter products under its *Champion* and *Ballyrashane* brands. It supplies products under its *Champion* brand in the midlands, border counties and north-east of Ireland. It supplies products under the *Ballyrashane* brand in Northern Ireland.
- 2.42 Lakeland supplies unbranded liquid milk to Aldi, Centra, Gala, Londis, Mace, Marks & Spencer, Spar and SuperValu and unbranded butter to Aldi, Arrabawn, Dunnes, Lidl and Ornuu in the State. It also supplies yoghurt, cheese and buttermilk products to retailers in the State.
- 2.43 In 2003, Lakeland acquired L.E. Pritchitt & Company Limited, a UK based company which operated a dairy processing facility in Northern Ireland, producing products such as UHT products, mini-pots, dairy and non-dairy creams and milk powders.<sup>50</sup>
- 2.44 In 2015, Fane Valley Cooperative Society Limited acquired certain agri-business assets of Lakeland.<sup>51</sup> These assets included those used for feed manufacturing and for the supply of agricultural inputs to dairy, beef and sheep farmers.
- 2.45 In 2018, Lakeland acquired LacPatrick Co-Operative Society, which primarily supplied bulk milk powder and bulk butter.<sup>52</sup> It operated the *Champion* brand; supplied unbranded liquid milk and cream to Marks & Spencer, Aldi, and Lidl, and supplied unbranded private label packet butter for Aldi, Lidl, and Dunnes Stores.

#### *North Cork Co-Op*

- 2.46 North Cork Co-Op produces and supplies dairy products via its food ingredients and retail divisions. Its food ingredients division supplies milk powder, casein, and butter products. Its retail division supplies branded liquid milk and butter products under the *Kanturk Dairy* and *North Cork Creameries* brands. It supplies unbranded liquid milk to Centra, Mace, Spar and Supervalu, and unbranded butter to

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<sup>50</sup> See Competition Authority Determination [M/03/021 L.E. Pritchitt & Co. Limited / Lakelands Dairies Co-Operative Society](#).

<sup>51</sup> See Commission Determination [M/15/058 Fayne Valley Lakeland Dairies](#).

<sup>52</sup> See Commission Determination [M/18/089 Lakeland/ LacPatrick](#).

Arrabawn, Centra, Ornuu and Supervalu. It also supplies unbranded cream products and butter for the *Kerrygold* brand.

- 2.47 In 2019, North Cork Co-Op acquired Newtownsandess Co-operative Dairy Society (“Newtownsandess Co-Op”).<sup>53</sup> Newtownsandess Co-Op was primarily active in the sale of raw milk, and also had a small agri-store which supplied animal feed, hardware and other farm inputs.
- 2.48 In 2018, North Cork Co-Op acquired Feale Bridge and Headley’s Bridge Co-Operative Dairy Society (“Feale Bridge Co-Op”). Feale Bridge Co-Op’s main activity was the sale of raw milk, and it was primarily active in North Cork. Feale Bridge Co-Op also operated two agri-retail outlets selling animal feed, hardware and other farm inputs.

#### *Centenary Thurles*

- 2.49 Centenary Thurles operates through three business divisions: (i) Agri; (ii) Dairy; and (iii) Home & Garden. Its Agri business includes the provision of feed and grain, fencing and the operation of 8 farm stores across Tipperary. Its dairy division produces and supplies liquid milk and cream products under the *Thurles* brand. It also supplies unbranded liquid milk to Dunnes. Its Home & Garden division operates five stores across Tipperary, and an online store.

#### *Ornuu*

- 2.50 As discussed in paragraph 1.8 above, Ornuu is a co-operative which is owned by eight milk co-operatives in the State, including the Parties. Ornuu produces and supplies branded dairy products including *Kerrygold* branded butter, *Pilgrims Choice* branded cheese, *Beo* branded milk and *Forto* branded milk powder products.
- 2.51 Its ingredients division also supplies a range of products for use as ingredients in different food products such as cheese, butter, milk and yoghurt powders. This division also supplies various branded cheese products under its *Palatina*,

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<sup>53</sup> See Commission Determination [M/18/094 North Cork/ Newtownsandess](#).

*Spinneyfields* and *Consistent Shred* brands, and plant-based cheese products under the *PlantNation* brand.

### *Bandon*

2.52 Bandon is a co-operative which supplies branded butter under the ‘Bandon Butter’ brand, and unbranded butter to Ornuu. It also supplies cheese products under the *Bandon Vale* brand to customers in the retail, foodservice and food ingredients sectors.

### *Dale Farm*

2.53 Dale Farm is a cooperative active in Northern Ireland that supplies dairy products under the *Dale Farm* and *Dromona* brands. It also supplies unbranded butter to Arrabawn and offers foodservice and food ingredients products in Northern Ireland, England and Scotland.

## **Customers**

### *Retailers*

#### Musgrave

2.54 Musgrave is a food retail, wholesale and food-service group active on the island of Ireland and in Spain. Musgrave is principally a wholesaler-franchisor and operates through franchise agreements with independently-owned retail stores.

2.55 Musgrave owns several brands across the food retail, wholesale, and foodservice sectors in the State, including *SuperValu*, *Centra*, *Donnybrook Fair*, *La Rousse Foods*, *Musgrave Marketplace*, and *Daybreak*. Musgrave provides own-brand liquid milk, butter, and cream products. Musgrave also supplies a range of branded dairy products, such as *Avonmore*, *Premier Milk*, *Kerrygold*, *Connacht Gold*, *Glenstal* and *Ór* products, to its retail franchisees for sale in their stores.

#### Tesco

2.56 Tesco is a food retail group with 164 stores in the State. It sells various categories of grocery and general merchandise products in its grocery stores and on its website online. It sells own-brand dairy products, as well as branded dairy

products under various brands including *Avonmore*, *Premier Milk*, *Dairygold*, *Kerrygold*, *Connacht Gold*, and *Glenisk*.

#### Aldi

2.57 Aldi is a discount retail food provider with 158 stores in the State. It sells own-brand liquid milk and cream under its *Clonbawn* brand. It also sells own-brand butter under its *Kilkeely* brand, and branded butter including the *Kerrygold*, *Connacht Gold* and *Dairygold* brands.

#### Lidl

2.58 Lidl is a discount retail food provider with over 180 stores in the State. It sells own-brand liquid milk and cream under its *Coolree Creamery* brand. It also sells own-brand butter under its *Dairy Manor* brand, and branded butter including the *Kerrygold*, *Connacht Gold* and *Dairygold* brands.

#### Dunnes

2.59 Dunnes sells grocery and general merchandise products in its 111 grocery stores in the State, and on its website online. It sells own-brand liquid milk, cream and butter, as well as branded dairy products including products under the *Dairygold*, *Kerrygold*, *Avonmore*, *Connacht Gold* and *Premier Dairies* brands.

#### *Foodservice Operators*

#### Lynas

2.60 Lynas is a foodservice provider and wholesaler active in the State. It supplies branded liquid milk, cream and butter to customers active in the foodservice industry including restaurants, hotels, groups and chains, fast food chains, healthcare and education providers and sandwich bars.

#### Sysco

2.61 Sysco is a large supplier to foodservice operators in the State. It provides a range of brands to its customers including the *Lakeland*, *Wholesome Farms*, *Organic for Us*, *Strathroy* and *Millac* liquid milk brands; the *Wholesome Farms*, *Debic*, *Meadowland*, *Millac*, *Kerrymaid*, *Strathroy* and *Lakeland* cream brands and the



*Kerrymaid, Dairygold, Dromona, North Cork, Kerrygold, and Flora* butter brands.

It also supplies unbranded butter products.

### 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 competitive impact of the Proposed Transaction. This section sets out the general principles that apply to market definition, the overlaps in the activities of the Parties, the views of the 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; it is a means to an end. The boundaries of a market do not in themselves determine the range of competitive effects to be assessed by the Commission in its merger review, as there may be competitive constraints on the merging parties from outside the relevant market or segmentation within the relevant market.<sup>54</sup> The Commission has taken such factors into account in its assessment of competitive effects of the Proposed Transaction, where relevant.

#### Relevant principles

- 3.3 The role of market definition is explained in the Commission’s Merger Guidelines as follows:

*“Market definition is a conceptual framework within which relevant information can be organised for the purposes of assessing the competitive effect of a merger. Identifying the precise relevant market involves an element of judgement. It is often not possible or even necessary to draw a clear line around the fields of rivalry. Indeed, it is often possible to determine a merger’s likely impact on competition without precisely defining the boundaries of the relevant market.”<sup>55</sup>*

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<sup>54</sup> Guidelines for Merger Analysis, adopted by the Commission on 31 October 2014 (the “Merger Guidelines”), paragraphs 2.1 and 2.3.

<sup>55</sup> Merger Guidelines, paragraph 2.3.

*“Market definition depends on the specific facts, circumstances, and evidence of the particular merger under investigation. Decisions relating to market definition in previous merger investigations by the Commission may provide only limited guidance.”<sup>56</sup>*

3.4 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>57</sup>*

3.5 The relevant market contains the most significant alternatives available to the customers of the merging parties. Identifying the precise relevant market involves an element of judgement, with appropriate weight being given to factors on both the demand- and supply-side.<sup>58</sup>

3.6 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>59</sup>*

3.7 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

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<sup>56</sup> Merger Guidelines, paragraph 2.6.

<sup>57</sup> Merger Guidelines, paragraph 2.8.

<sup>58</sup> Merger Guidelines, paragraph 2.3.

<sup>59</sup> Merger Guidelines, paragraph 2.9.

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, and its applicability varies depending on pricing practices in the sector. 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.

3.8 The Merger Guidelines also note that:

*“Market definition should not restrict the range of competitive effects to be assessed by the Commission in its merger review. The Commission may consider segmentation within the relevant product or geographic market or factors outside the relevant market which impose competitive constraints on firms in the relevant market.”<sup>60</sup>*

3.9 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>61</sup>

3.10 In relation to geographic market definition, the Merger Guidelines state:

*“The product market(s) affected by a merger may be geographically bounded if geography limits some customers’ willingness or ability to switch products or some suppliers’ willingness or ability to supply to customers. The relevant geographic market is usually defined in terms of the location of suppliers and it includes those suppliers that customers consider to be feasible substitutes. The relevant geographic market may be local, regional, national or wider.*

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<sup>60</sup> Merger Guidelines, paragraph 2.1.

<sup>61</sup> Merger Guidelines, paragraph 2.6.



*The approach to defining the relevant geographic market is similar to that of product market definition. Both can use the SSNIP test as an analytical tool.*

*The relevant geographic market consists of all supply locations that would have to be included for the hypothetical monopolist to find it profitable to impose a small but significant non-transitory increase in price. Beginning with the location of each of the merging parties, the SSNIP test is applied by considering what would happen if a hypothetical monopolist of the relevant product at that location imposed a small but significant non-transitory increase in price. If a sufficient number of customers switch to suppliers in other locations, the next closest location where customers can purchase the relevant product is included. The SSNIP test is thus iteratively applied until a hypothetical monopolist could profitably increase the price of the relevant product in a location or group of locations by a small but significant non-transitory amount. This location or group of locations is thus defined as the relevant geographic market.”<sup>62</sup>*

## Horizontal and Vertical Overlap

3.11 In the Merger Notification Form, the Parties identified the horizontal overlaps between the activities of the Aurivo Group and the Target Assets as follows:

- production and supply of liquid milk and cream; and
- supply of branded butter.<sup>63</sup>

3.12 Although Arrabawn does not produce branded butter itself, or produce or supply unbranded butter, it buys in butter from other dairy co-operatives, such as North Cork Creameries, Dale Farm and Lakeland Dairies, and packages and supplies it to retailers, food-service operators, and distributors as *Arrabawn* butter.

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<sup>62</sup> Merger Guidelines, paragraphs 2.19 – 2.21.

<sup>63</sup> Merger Notification Form, section 4.1

3.13 There is no horizontal overlap between Aurivo Group and the Target Assets in the procurement of raw milk from farmers. Arrabawn will continue to procure raw milk from its farmers following the Proposed Transaction, and this element of Arrabawn’s business will not be acquired by Aurivo Group.<sup>64</sup>

3.14 In response to the Phase 1 Information Request, Arrabawn stated the following:

*“If the proposed sale of the liquid milk sales book to Aurivo proceeds, 4.8m litres of the current allocation of liquid milk will be sold to Aurivo in line with the Milk Supply Agreement (see question 35 above) and the remaining 37.7m litres currently allocated to liquid milk will be allocated to Ingredients and processed at Arrabawn’s Ingredients site in Nenagh, Co. Tipperary.”<sup>65</sup>*

3.15 In the Merger Notification Form, the Parties identified the vertical overlaps between the activities of Aurivo Group and the Target Assets as being Aurivo Group’s procurement of raw milk and Arrabawn’s production of liquid milk and cream.<sup>66</sup>

3.16 The Commission agrees with the Parties’ views of horizontal and vertical overlaps. There are three horizontal overlaps between the activities of Aurivo and the Target Assets: (i) the production and supply of liquid milk; (ii) the production and supply of cream; and (iii) the supply of branded butter. There are two vertical overlaps between Aurivo and the Target Assets: (i) Aurivo Group procures raw milk, and the Target Assets produce liquid milk and cream; and (ii) Arrabawn procures butter from third parties to supply to customers, and Aurivo Group produces butter.

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<sup>64</sup> [REDACTED]

<sup>65</sup> Arrabawn’s response to Question 39 of the Arrabawn Phase 1 Information Request.

<sup>66</sup> Merger Notification Form, section 4.2

## Relevant Product Markets

### Previous decisions

3.17 The Commission has not previously considered any mergers which featured an overlap between the merging parties in the production and supply of liquid milk and cream, and the supply of butter. However, the Commission’s predecessor, the Competition Authority (the “Authority”) considered several mergers that are of some relevance to the assessment of the Proposed Transaction. The following are included as background to the current assessment.

3.18 In *M/13/036 – Glanbia/Wexford Creamery*, while the Authority did not come to a definitive view on the precise relevant product market, it concluded that the narrowest possible relevant product markets with respect to liquid milk and cream were:

- “... liquid milk for sale to retailers”; and
- “... cream for sale to retailers”.<sup>67</sup>

3.19 Additionally, the Authority concluded that the narrowest relevant product market with respect to raw milk was the procurement by dairy processors from dairy farmers of raw milk. The Authority also noted that it was not necessary to define precise markets for the production and supply of liquid milk and cream and the production and supply of other dairy products.

3.20 In *M/11/037– Connacht Gold/Donegal Creameries*,<sup>68</sup> for the purpose of examining the competitive effects of the proposed transaction, the Authority identified the following product markets:

- the procurement of raw milk (without precisely defining the product market and while also looking at the production and sale of raw milk);

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<sup>67</sup> [M/13/036 – Glanbia / Wexford Creamery](#), paragraph 3.6. At paragraph 4.11 of the determination, having noted that the narrowest possible relevant product markets were as quoted above in paragraph 3.18, the Authority stated that “[b]oth parties are involved in the procurement of raw milk and in the production and supply of liquid milk for human consumption and other dairy products”.

<sup>68</sup> [M/11/037 – Connacht Gold/Donegal Creameries](#), paragraph 50.

- the production and sale of liquid milk and cream (while also examining the retail sale of liquid milk and cream); and,
- the retail supply of agricultural inputs to farmers.<sup>69</sup>

3.21 In *M/11/004 – Glanbia / Dawn Dairies and Golden Vale Dairies*, the Authority did not consider it necessary to precisely define separate product markets for the retail sale of liquid milk and cream for the purpose of assessing the proposed transaction. Despite this, the Authority examined the competitive effects of the proposed transaction by considering the following product markets:

- the production and sale of raw milk;
- the production and supply of liquid milk to retailers;
- the retail sale of milk; and,
- the retail sale of cream.<sup>70</sup>

3.22 In each of the above cases, the Authority considered branded and unbranded liquid milk to be in the same product market. Furthermore, in *M/13/036 – Glanbia/Wexford Creamery* and *M/11/037 – Connacht Gold/Donegal Creameries*, the Authority considered branded and unbranded cream to be in the same product market. In *M/13/036 – Glanbia/Wexford Creamery*, the Authority considered that “*the major source of competitive pressure on Glanbia, in national provincial or regional markets, is from retailers’ own-brand products*”.<sup>71</sup>

### Views of the Parties

3.23 In the Merger Notification Form, the Parties submitted that the Commission does not need to come to a definitive view on a relevant product market. However, the Parties proposed a number of potential markets:

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<sup>69</sup> The Authority notes in paragraph 49 of the *M/11/037 – Connacht Gold/Donegal Creameries* determination that it does not need to come to a definitive view on the precise relevant product market in respect of the retail supply of agricultural inputs to farmers.

<sup>70</sup> [M/11/004 – Glanbia / Dawn Dairies and Golden Vale Dairies paragraph 43.](#)

<sup>71</sup> [M/13/036 – Glanbia / Wexford Creamery paragraph 4.25.](#)

- *Production and supply of branded and unbranded liquid milk and cream and the supply of branded and unbranded butter (broad);*
- *Production and supply of branded and unbranded liquid milk (narrow);*
- *Production and supply of branded and unbranded liquid cream (narrow); and*
- *Supply of branded and unbranded butter (narrow).<sup>72</sup>*

### Views of the Commission

3.24 Taking account of the Authority's past findings, and the views of the Parties, and considering all information available to the Commission, in order to define the relevant product market(s), the Commission has considered the following:

- Are the production and supply of: (i) liquid milk, (ii) cream; and (iii) butter, within the same relevant product market?
- Are branded and unbranded versions of: (i) liquid milk; (ii) cream; and (iii) butter, within the same relevant product market? and
- Would a potential market for branded and/or unbranded butter include spreads?

*Are the production and supply of: (i) liquid milk; (ii) cream; and (iii) butter, within the same relevant product market?*

#### Demand-side substitution

3.25 From a demand-side perspective, the Commission does not consider liquid milk, cream and butter to be functional substitutes. End consumers of liquid milk, cream and butter would not find these products to be substitutes and so the co-operative's customers of liquid milk, such as wholesalers, food service operators and retailers, would not switch to purchasing cream or butter following an

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<sup>72</sup> Merger Notification Form, section 5.1

increase in the price of liquid milk because end consumers demand separate products. Food service operators who may either use these products as ingredients, or serve these products in their establishments, would not choose to switch between these products following an increase in the price of one product, as each product serves a different purpose. Furthermore, a customer of liquid milk cannot use liquid milk to produce cream or butter for resale onto its customers. Although cream is a by-product of milk, the co-operatives supply cream to their customers packaged and ready for resale, and customers of the Parties do not have the infrastructure in place to convert milk to cream, and package it for sale.

### Supply-side substitution

- 3.26 While the boundaries of the relevant product market are generally determined by reference to demand-substitution alone, for completeness the Commission has also considered the extent to which an undertaking not currently producing liquid milk, cream or butter would switch production to liquid milk, cream or butter in response to a small price increase. A product is a supply-side substitute for another in cases where the capacity for producing that product could profitably be switched to supply the other product quickly and without significant investment in response to a small price increase.
- 3.27 The Commission does not consider it likely that an existing supplier of some or all of these products would be able or willing to switch its production capacity quickly. This view takes into account the fact that most co-operatives already supply liquid milk, cream, and butter. Such a switch, in response to a hypothetical increase in the price of 'product A' would require one of two things to happen:
- (a) **The supplier has excess production capacity for product A.** In this scenario, it is more likely that the supplier would increase its production of product A by purchasing extra raw milk while maintaining its profitable production of other products.
  - (b) **The supplier has no excess production capacity for product A.** This would entail significant investment to supply an increased quantity of product A. For example, in response to the Aurivo Phase 1 RFI, Aurivo Group



- 3.31 The main differences between branded liquid milk and unbranded liquid milk are [REDACTED]. Branded liquid milk is packaged by the dairy co-operative, with a brand label, and distributed to the retailer, wholesaler, or food service operator ready for sale to the consumer. Unbranded liquid milk is packaged by the dairy co-operative in a label of the retailer's own-brand and is supplied by the dairy co-operative to a retailer's CDC.
- 3.32 Branded liquid milk is more expensive than unbranded liquid milk, with a price difference in the sale of liquid milk from the dairy co-operative to the retailer, which is then passed on and contributes to the premium price charged to end consumers. Most retailers<sup>75</sup> and wholesale distributors typically buy both branded and unbranded liquid milk for onward sale to end consumers.<sup>76</sup> Most retailers choose to purchase branded versions from a number of dairy co-operatives which will compete against the retailer's own-brand version. This suggests that a category of end consumer is prepared to pay a premium for a branded liquid milk product, [REDACTED]. The retailer facilitates that consumer choice.
- 3.33 While the price difference between branded and unbranded liquid milk may suggest differentiation, information from the Parties indicates that both retailers and co-operatives link [REDACTED] in order to maintain an [REDACTED]. In response to the Aurivo Phase 2 RFI, Aurivo Group stated that "[t]he main difference [between the price of branded liquid milk and the price of unbranded liquid milk] from a processing cost perspective is the need to [REDACTED] for their branded liquid milk products."<sup>77</sup> The money spent on [REDACTED] is, therefore, factored into the price charged by co-operatives for branded liquid milk.
- 3.34 In *M/13/036 – Glanbia/Wexford Creamery*, the Authority considered that unbranded liquid milk and cream exerted a competitive pressure on their branded

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<sup>75</sup> Notable exceptions are Lidl and Aldi, who only purchase unbranded liquid milk.

<sup>76</sup> In *M/13/036 – Glanbia / Wexford Creamery*, the Authority considered that unbranded liquid milk and unbranded cream exerted a major competitive pressure on their branded counterparts.

<sup>77</sup> Aurivo Group's response to Question 9 of the Aurivo Phase 2 RFI.



counterparts. The Authority found that *“the major source of competitive pressure on Glanbia, in national provincial or regional markets, is from retailers’ own-brand products.”*

- 3.35 Having concluded that branded and unbranded milk are likely to be within the same relevant potential product market, the Commission has considered whether the product market should be narrower than all liquid milk by, for example, differentiating between full-fat, low-fat, or enriched liquid milks. In response to the Aurivo Phase 2 RFI, Aurivo Group stated that *“[t]he same product range is also available in unbranded milk as in branded milk.”*<sup>78</sup>
- 3.36 The Commission’s view is that, while some consumers would be unlikely to switch from full-fat to low-fat milk or vice versa in response to a SSNIP, the Commission does not need to come to a definitive view on narrower markets. As Aurivo Group has noted, the co-operatives produce a range of liquid milk products, and each type is available as branded and unbranded. In any case, the analysis of competitive effects is not likely to be affected by defining narrower product markets.
- 3.37 Liquid milk products are all produced by the same co-operatives and bought by the same retailers, and the prices of branded and unbranded milk are not set independently of each other. According to the Parties, when setting the prices of branded liquid milk, a dairy co-operative will consider [REDACTED] because a [REDACTED] will negatively impact upon branded liquid milk sales. In response to the Arrabawn Phase 2 Information Request, Arrabawn stated that *“the price the consumer is willing to pay for branded milk has historically only been between [REDACTED] than the unbranded own label price.”*<sup>79</sup> While in some instances, this level of price differentiation may be a factor suggesting different markets, this does not apply in this case because prices for branded and unbranded milk are not set independently.

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<sup>78</sup> Aurivo Group’s response to Question 12 of the Aurivo Phase 2 RFI.

<sup>79</sup> Arrabawn’s response to Question 9 of the Arrabawn Phase 2 Information Request.

### Supply side substitution:

3.38 While the boundaries of the relevant product market are generally determined by reference to demand-substitution alone, for completeness the Commission has also considered the extent to which an undertaking not currently producing branded liquid milk would switch production from unbranded liquid milk (or vice versa) in response to a small price increase. Dairy co-operatives already supply both branded and unbranded liquid milk products to retailers, food-service operators, and wholesalers/distributors. This means that they can readily produce both branded and unbranded liquid milk and can switch production between the two in response to any increase or decrease in demand or price from one or the other. Taking this, and the demand-side factors discussed above into account, the Commission does not consider it necessary to further examine supply-side substitutability.

### Conclusion

3.39 Taking into account all of the evidence and information in its possession, the Commission has concluded that the production and supply of branded and unbranded liquid milk are likely to be within the same relevant product market.

### *Are branded cream and unbranded cream within the same relevant product market?*

3.40 As discussed above, cream is a by-product of converting raw milk into liquid milk. According to the Parties, most dairy co-operatives view the production and supply of cream as ancillary to the production and supply of liquid milk. In response to the Aurivo Phase 1 RFI, Aurivo Group stated that “[i]n terms of volume, Aurivo’s liquid milk outsells cream by an estimated 50:1 ratio.”<sup>80</sup> Furthermore, in response to the Aurivo Phase 2 RFI, Aurivo Group stated that “[l]iquid milk and Cream always go hand in hand as both are processed in the same facility and delivered in the same fashion.”<sup>81</sup> This means that a dairy co-operative will often supply both

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<sup>80</sup> Aurivo Group’s response to Question 16 of the Aurivo Phase 1 RFI.

<sup>81</sup> Aurivo Group’s response to Question 19 of the Aurivo Phase 2 RFI.

liquid milk and cream to the same customer, as opposed to supplying cream independently of liquid milk.<sup>82</sup>

### Demand side substitution

- 3.41 Branded cream and unbranded cream are functionally substitutable for each other because they are [REDACTED] the same product. In response to the Aurivo Phase 2 RFI, Aurivo Group stated that “[t]he same product range is available in unbranded cream as in branded cream.”<sup>83</sup> This product range comprises double cream as well as fresh cream products. In response to the Aurivo Phase 2 RFI, Aurivo Group stated that “unbranded cream competes with branded cream due to the fact that it [REDACTED] [REDACTED].”<sup>84</sup> Furthermore, in response to the Arrabawn Phase 2 Information Request, Arrabawn stated that “[u]nbranded cream does act as a competitive constraint on branded cream as the [REDACTED].”<sup>85</sup>
- 3.42 The main differences between branded cream and unbranded cream [REDACTED] [REDACTED]. Branded cream is packaged by the dairy co-operative, with a brand label, and distributed to the retailer, wholesaler, or food service operator ready for sale to the consumer. Unbranded cream is packaged by the dairy co-operative in a label of the retailer’s own-brand and is supplied by the dairy co-operative to a retailer’s CDC.
- 3.43 Branded cream is more expensive than unbranded cream, with a price difference in the sale of cream from the dairy co-operative to the retailer which is then passed on and contributes to the premium price charged to end consumers. Most retailers<sup>86</sup> and wholesale distributors typically buy both branded and unbranded

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<sup>82</sup> Based upon documents submitted by the Parties to the Commission in response to the Aurivo Phase 1 RFI and the Arrabawn Phase 1 Information Request, it is also clear that the major retailers in the State will invite dairy co-operatives to tender for the supply of both liquid milk and cream in the same tender document, as opposed to running separate tenders for the supply of liquid milk and the supply of cream.

<sup>83</sup> See Aurivo Group’s response to Question 26 of the Aurivo Phase 2 RFI.

<sup>84</sup> See Aurivo Group’s response to Question 26 of the Aurivo Phase 2 RFI.

<sup>85</sup> See Arrabawn’s response to Question 10 of the Arrabawn Phase 2 Information Request.

<sup>86</sup> Notable exceptions are Lidl and Aldi, who only purchase unbranded cream.

cream for onward sale to end consumers.<sup>87</sup> As discussed in respect of liquid milk above, most retailers choose to purchase branded versions from a number of dairy co-operatives which will compete against the retailer's own-brand version. This suggests that a category of end consumer is prepared to pay a premium for a branded cream product, [REDACTED]. The retailer facilitates that consumer choice.

- 3.44 As with liquid milk, while the price difference between branded and unbranded cream may suggest differentiation, information from the Parties indicates that both retailers and co-operatives link [REDACTED] in order to maintain an [REDACTED]. In response to the Aurivo Phase 2 RFI, Aurivo Group stated that “[t]he main difference [between the price of branded cream and the price of unbranded cream] from a processing cost perspective is the need to [REDACTED] [REDACTED].”<sup>88</sup> The money spent on [REDACTED] is, therefore, factored into the price charged for branded cream.
- 3.45 The Commission has considered whether the product market should be narrower than all cream products by, for example, differentiating between full-fat and reduced fat cream, or regular cream and sour cream.
- 3.46 The Commission's view is that, while some consumers would be unlikely to switch from one type of cream to another in response to a SSNIP, the Commission does not need to come to a definitive view on narrower markets. The co-operatives produce a range of cream products, and each type is available as branded and unbranded. In any case, the analysis of competitive effects is not likely to be affected by defining narrower product markets.
- 3.47 Again, as previously discussed in respect of liquid milk, the cream products are all produced by the same co-operatives and bought by the same retailers, and the prices of branded and unbranded cream are not set independently of each other.

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<sup>87</sup> As described in paragraph 56 above, in *M/13/036 – Glanbia / Wexford Creamery*, the Authority considered that unbranded liquid milk and unbranded cream exerted a major competitive pressure on their branded counterparts.

<sup>88</sup> Aurivo Group's response to Question 25 of the Aurivo Phase 2 RFI.

According to the Parties, when setting the prices of branded cream, a dairy co-operative will consider [REDACTED] because a [REDACTED] [REDACTED] will negatively impact upon branded cream sales. In response to the Arrabawn Phase 2 Information Request, Arrabawn stated that *“the price the consumer is willing to pay for branded cream has historically only been between [REDACTED] than the unbranded own label price.”*<sup>89</sup>

#### Supply side substitution:

3.48 While the boundaries of the relevant product market are generally determined by reference to demand-substitution alone, for completeness the Commission has also considered the extent to which an undertaking not currently producing branded cream would switch production from unbranded cream (or vice versa) in response to a small price increase. Dairy co-operatives already supply both branded and unbranded cream products to retailers, food-service operators, and wholesalers/distributors. This means that they can readily produce both branded and unbranded cream and can switch production between the two in response to any increase or decrease in demand or price from one or the other. Taking this, and the demand-side factors discussed above into account, the Commission does not consider it necessary to further examine supply-side substitutability.

#### Conclusion

3.49 Taking into account all of the evidence and information in its possession, the Commission has concluded that the production and supply of branded and unbranded cream are likely to be within the same relevant product market.

*Is butter in the same market as spreads?*

#### Demand side substitution

3.50 The Commission has not concluded whether a potential market for branded and/or unbranded butter would include spreads. While butter is a standard

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<sup>89</sup> Arrabawn’s response to Question 23 of the Arrabawn Phase 2 Information Request.

product,<sup>90</sup> spreads include a range of products with different ingredients and different characteristics. Indeed, spreads may potentially include spreads with a high butter content and spreads that are not dairy-based.

3.51 For example, in response to the Aurivo Phase 2 RFI, Aurivo Group stated the following:

*“In relation to butter spreads (butter blended with vegetable oil typically sold in a tub) there is a wide variation between the different types of products available to consumers. Some spreads contain different levels of butter fat and ingredients. This can lead to consumers preferring certain brands and therefore* [REDACTED]

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3.52 For the purposes of this review, the Commission is not considering spreads that are not dairy-based because none of the co-operatives (including the Parties) produce or supply such spreads.<sup>92</sup> The consideration of spreads below is therefore limited to spreads that are butter-based and blended with oil.

3.53 In considering the functional substitutability of butter and spreads, the Commission notes that there are instances where butter and spreads may be substitutable and instances where they may not be. For example, both butter and spreads may be spread on toast, but butter may be used for cooking and baking in a way in which many spreads may not. This suggests that there is some differentiation between butter and spreads in terms of their use and that the products may not be close substitutes.

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<sup>90</sup> In the Aurivo Phase 2 RFI, Aurivo Group distinguishes between butter and spreads by referring to “foil butter” and defines “foil butter” as “a rectangular shaped butter wrapped in either foil or parchment paper and usually comes in either 454 gram, 227 gram or 6 gram (catering) sized packs”. For the avoidance of doubt, when the Commission refers to butter, it is referring to the product that Aurivo Group considers to be “foil butter”.

<sup>91</sup> Aurivo Group’s response to Question 38 of the Aurivo Phase 2 RFI.

<sup>92</sup> Spreads which are not dairy-based include margarines and dairy free spreads. Popular brands of such products include Flora, Pure, Vitalite, Naturli’ and Stork.

3.54 The information obtained by the Commission over the course of its review suggests that in some circumstances various third parties consider butter and spreads to be part of the same product market, although this is not always consistent. In response to the Aurivo Phase 1 RFI, Aurivo Group stated that *“Kerrygold and Dairygold are the brand leaders in the butter, spread and margarine (“BSM”) market<sup>93</sup> after unbranded products.”<sup>94</sup>* This view of the market is also evident in a report conducted by Mintel Group Limited in August 2015 which analyses the *“butter and spreads market”*.<sup>95</sup> Furthermore, in response to the Aurivo Phase 1 RFI, Aurivo Group submitted documents to the Commission in which it uses the terms *“butter market”* and *“yellow fats market”* interchangeably. For instance, an internal email chain comprising correspondence between Aurivo Group employees bears the subject line *“FW: Yellow fats market data”*, yet the email chain refers to *“butter market data”*.<sup>96</sup> This suggests that Aurivo Group considers butter and spreads to be part of the same product market.

3.55 A presentation made during an Aurivo Group *“sub committee meeting”* in October 2022 suggests that Aurivo Group considers the butter market to also contain spreads.<sup>97</sup> The second slide of this presentation is entitled *“Butter Market Data – CG brand the biggest winner”*, yet the tables on this slide refer to *“Yellow Fats Performance.”* On slide three of the same presentation, which bears the title *“Retail butter Sales Analysis 2022”*, a pie chart representing a breakdown of Connacht Gold’s butter range comprises both spread products - such as *Connacht Gold Half Fat, Connacht Gold Softer Butter* and *Connacht Gold Spreadable* – as well as butter products including *Connacht Gold Garlic & Herb Butter* and *Connacht Gold Unsalted Butter*. This presentation shows that, in analysing the performance

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<sup>93</sup> As discussed above, for the purposes of this review, the Commission is not considering spreads that are not dairy-based, such as margarine, because none of the co-operatives (including the Parties) produce or supply such spreads.

<sup>94</sup> Aurivo Group’s response to Question 24 of the Aurivo Phase 1 RFI.

<sup>95</sup> File submitted by Aurivo Group in response to Question 24 of the Aurivo Phase 1 RFI bearing the filename ‘Prod00498.MSG’.

<sup>96</sup> File, submitted by Aurivo Group in response to Question 24 of the Aurivo Phase 1 RFI, bearing the filename ‘Prod00510.MSG’.

<sup>97</sup> File, submitted by Aurivo Group in response to Question 24 of the Aurivo Phase 1 RFI, bearing the filename ‘Prod00502.PPTX’.

of its butter products, Aurivo Group also considered the performance of its spreads.

3.56 While there are examples of the Parties considering the commercial performance of spreads alongside their consideration of butter, this does not necessarily mean that the products are demand side substitutes. To be a demand side substitute, a purchaser of foil butter products would be likely to switch to purchase spreads in response to a SSNIP in the price of butter. The Commission's view is that, on balance, the range of products described as spreads means that some may be substitutable for butter but that some may not, or that this may depend on end use, and that evidence of substitutability is not conclusive. Data provided by the Parties on market shares for various products reflects this uncertainty, as sometimes certain spreads are included with foil butter but sometimes, they are not.<sup>98</sup>

3.57 Taking into account all the evidence and information in its possession, the Commission considers that its conclusions concerning the competitive effects of the Proposed Transaction will be unaffected regardless of whether it considers a wider market encompassing both butter and spreads or two separate product markets. Further, there is no overlap between the Parties in the production and supply of spreads; the overlap is limited to the supply of branded butter. For these reasons, the Commission has not conclusively determined whether spreads are included in the potential markets considered in its analysis of competitive effects.

*Are branded butter and unbranded butter within the same relevant product market?*

#### Demand side substitution

3.58 Aurivo Group has stated that branded foil butter and unbranded foil butter are functionally substitutable for each other because they are the [REDACTED]. In response to the Aurivo Phase 2 RFI, Aurivo Group stated that "[REDACTED]"

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<sup>98</sup> These market share data were provided by the Parties in the Merger Notification Form, as well as in their respective responses to the Aurivo Phase 1 RFI, the Aurivo Phase 2 RFI, the Arrabawn Phase 1 Information Request and the Arrabawn Phase 2 Information Request.





*butter products.*<sup>101</sup> The money spent on [REDACTED] is, therefore, factored into the price charged for branded butter.

3.62 Again, as previously discussed in respect of liquid milk and cream, butter products are all produced by the same co-operatives and bought by the same retailers, and the prices of branded and unbranded foil butter are not set independently of each other. In response to the Aurivo Phase 2 RFI, Aurivo Group stated that “[u]nbranded butter retails at a lower price to branded butter. This factor needs to be taken into consideration when pricing butter because if the [REDACTED]

[REDACTED].”<sup>102</sup>

3.63 The Commission notes that while some significant retailers (for example, Aldi and Lidl) do not sell branded milk or cream, all large retailers do sell branded butter. This suggests that end-users may inherently value branded butter to a greater extent than they value brands of liquid milk or cream.

#### Supply side substitution

3.64 While the boundaries of the relevant product market are generally determined by reference to demand-substitution alone, for completeness the Commission has also considered the extent to which an undertaking not currently producing branded butter would switch production from unbranded butter (or vice versa) in response to a small price increase. Dairy co-operatives already supply both branded and unbranded butter products to retailers, food-service operators, and wholesalers/distributors. Aurivo Group explained in the In-Person Presentation Meeting with the members of the Commission’s case team that it was able to successfully launch its nationwide Connacht Gold butter because branded butter is typically supplied to various retailers through their CDCs. This makes it straightforward for a supplier who is already supplying retailers with unbranded

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<sup>101</sup> Aurivo Group’s response to Question 37 of the Aurivo Phase 2 RFI.

<sup>102</sup> Aurivo Group’s response to Question 37 of the Aurivo Phase 2 RFI.

butter to also supply branded butter to the retailer's CDC.<sup>103</sup> This means that they can readily produce both branded and unbranded butter and can switch production between the two in response to any increase or decrease in demand or price from one or the other. Taking this into account, the Commission does not consider it necessary to further examine supply-side substitutability.

### Conclusion

3.65 The Commission has concluded that it does not need to precisely define the market for butter, as doing so will not affect its review of the Proposed Transaction. For the purposes of its analysis of the competitive impact of the Proposed Transaction, the Commission has identified the supply of branded butter as the narrowest possible market, as this is where the activities of Aurivo Group and the Target Assets overlap.

### Conclusion on the relevant product markets

3.66 Based on the above, the Commission considers that, for the purposes of its review of the competitive effects of the Proposed Transaction, the following are relevant product markets:

- (a) the production and supply of branded and unbranded liquid milk;
- (b) the production and supply of branded and unbranded cream; and,
- (c) the supply of branded butter.

## Relevant Geographic Markets

### Previous decisions

3.67 In *M/13/036 – Glanbia / Wexford Creamery*, the Authority did not come to a definitive view on the precise relevant geographic market definition but assessed both: (i) the production and supply of branded and unbranded liquid milk; and (ii) the production and supply of branded and unbranded cream, in the following

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<sup>103</sup> Arrabawn does not supply branded butter to CDCs, only unbranded.

geographic markets: (i) the island of Ireland; (ii) the State; and (iii) regionally (i.e., County Wexford).<sup>104</sup>

3.68 In both *M/11/004 – Glanbia / Dawn Dairies and Golden Vale Dairies* and *M/11/037 – Connacht Gold/Donegal Creameries*, the Authority did not come to a definitive view on the precise relevant geographic market definition. However, in both cases, it assessed the production and supply of liquid milk to retailers on an island-of-Ireland basis. Furthermore, in assessing the retail sale of liquid milk and cream in *M/11/004 – Glanbia / Dawn Dairies and Golden Vale Dairies*, the Authority identified County Dublin and Munster as the two narrowest possible geographic markets affected by the proposed transaction.<sup>105</sup> Similarly, in respect of the retail sale of liquid milk and cream in *M/11/037 – Connacht Gold/Donegal Creameries*, the Authority identified County Donegal as the narrowest possible geographic market in which it could assess the competitive impact of the proposed transaction.<sup>106</sup>

### Views of the Parties

3.69 In the Merger Notification Form, the Parties submitted that the relevant geographic market for each of the above product markets is likely to be as wide as the island of Ireland, since modern refrigeration technology and improvements in infrastructure have enabled suppliers to provide liquid milk, cream and butter to retailers across the island of Ireland.

3.70 In a subsequent submission to the Commission,<sup>107</sup> Aurivo Group stated that the relevant geographic market is likely to be as wide as the island of Ireland due to the fact that “[d]istribution of liquid milk, cream and butter products can and does occur island-wide in large volumes at all levels of the supply chain and barriers to entry are low for processors based in Northern Ireland wishing to expand into the

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<sup>104</sup> [M/13/036 – Glanbia / Wexford Creamery](#), paragraph 3.26.

<sup>105</sup> [M/11/004 – Glanbia / Dawn Dairies](#), paragraph 56.

<sup>106</sup> [M/11/037 – Connacht Gold/Donegal Creameries](#), paragraph 71.

<sup>107</sup> Aurivo Group’s submission to the Commission, bearing the filename ‘*Aurivo Responses to CCPC Questions Received 18 July 2023(71062194.3).docx*’.

*State or vice versa*". In this submission, Aurivo Group also stated that customers of dairy co-operatives are able to *"switch between processors located across the island of Ireland"* and noted that *"[n]o regulatory constraints existed in selling liquid milk, cream and butter across the island of Ireland."*

- 3.71 In the same submission, Aurivo Group stated that *"[p]rices are negotiated on a national basis through the respective retailers' head offices. Retailers then set prices in each store throughout the State centrally."*

### **Views of Third Parties**

- 3.72 Based on the Parties' view of the geographic market definition expressed in the Merger Notification Form, the Commission engaged with a number of third parties in relation to the relevant geographic market definition.
- 3.73 All three retailers contacted by the Commission stated that they only procure liquid milk and cream that originates in the State (i.e., they do not purchase milk which originates in Northern Ireland).

### **Views of the Commission**

- 3.74 As noted in paragraph 2.19 of the Merger Guidelines, *"The relevant geographic market is usually defined in terms of the location of suppliers and it includes those suppliers that customers consider to be feasible substitutes. The relevant geographic market may be local, regional, national or wider."*
- 3.75 The Commission requested information on potential geographic markets from the Parties in both the Phase 1 and Phase 2 RFIs and Information Requests issued to the Parties. The Commission also requested and received information in relation to potential geographic markets informally from the Parties throughout the merger review process as well as during the In-Person Presentation Meeting. The Commission, at the end of the Phase 1 merger review process, considered that further analysis was required to confirm whether or not the relevant markets were narrower than the State and could be regional.

3.76 The Commission did not consider the competitive effects of the Proposed Transaction should be considered by reference to a geographic market definition which is wider than the State (i.e., the island of Ireland)<sup>108</sup> for the following reasons:

- (a) Arrabawn does not supply any liquid milk, cream or butter to customers in Northern Ireland. Aurivo Group's sales of liquid milk, cream and butter to Northern Ireland are minimal in relation to its overall sales on the island of Ireland.<sup>109</sup> Furthermore, Arrabawn does not procure raw milk from farmers located in Northern Ireland, and Aurivo Group procures approximately █% of its raw milk from farmers located in Northern Ireland.
- (b) The Commission has identified only one milk processor supplying the State that is in Northern Ireland – Strathroy, Co. Tyrone. Strathroy procures milk from farmers in the State, processes it in Co. Tyrone and supplies its dairy products to customers in the State. As discussed above, over the course of the Commission's third-party engagement, three retailers explained to the Commission that they only accept milk that originates in the State.

3.77 Although the geographic market definition for each of the potential product markets identified for the Proposed Transaction could be the island of Ireland, the Commission is of the view that, on balance, it is likely that each market could be considered on a narrower State-wide basis.

3.78 The Commission does not believe that the competitive effects of the Proposed Transaction should be considered by reference to a geographic market definition which is narrower than the State (i.e., regionally) for the following reasons:

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<sup>108</sup> Note that export business outside the island of Ireland is not included in the Proposed Transaction, so there is no need to consider a potential market which is wider than the island of Ireland.

<sup>109</sup> Approximately █% of Aurivo Group's branded and unbranded liquid milk sales on the island of Ireland are to customers in Northern Ireland, approximately █% of its branded and unbranded cream sales on the island of Ireland are to customers in Northern Ireland and approximately █% of Aurivo Group's branded and unbranded butter sales on the island of Ireland are to customers in Northern Ireland.

(a) While some branded dairy products are supplied to different regions only, all unbranded liquid milk, cream, and butter products, which as discussed above are individually in the same product market as their branded counterparts, are supplied nationally. All unbranded dairy products (and branded butter) are supplied to retailers through their CDCs, before then being delivered by the retailer direct-to-store. Therefore, the Commission considers that, on balance, the geographic market definition for each of the defined product markets is likely not to be narrower than State-wide.

(b) There is often a regional preference shown by consumers in the purchase of branded liquid milk and cream. Aurivo Group supplies branded liquid milk directly to customers in Connacht and Ulster. However, Aurivo Group also supplies its branded liquid milk "*Organic for Us*", to CDCs in Munster and Leinster. Aurivo Group's branded cream is also sold throughout Connacht and Ulster. In terms of branded butter, Aurivo Group's branded butter "*Connacht Gold*" is sold to retailers through CDCs nationally. Arrabawn, although it does not deliver branded dairy products to CDCs, does have customers of branded liquid milk, cream and butter in Connacht, Leinster, and Munster, with circa [55-65]% of its branded liquid milk customers located in Connacht.

3.79 The Commission, however, does not need to come to a definitive view on the precise boundaries of the relevant geographic market in this case since its conclusions on the result of the Proposed Transaction would be unaffected whether the geographic market was defined on a narrower basis (i.e., regionally) or a broader basis (i.e., the island of Ireland).

#### Conclusion on relevant geographic markets

3.80 Taking into account previous merger determinations by the Authority and all the evidence and information in its possession, the Commission has concluded that

the narrowest potential geographic market for each of the abovementioned relevant product markets is the State.

### **Overall conclusion on relevant market definition**

3.81 For the purposes of its competitive analysis of the horizontal overlaps that exist between the Parties, the Commission has examined the competitive impact of the Proposed Transaction in the following relevant potential markets (“Relevant Potential Markets”):

- (a) The production and supply of branded and unbranded liquid milk in the State;
- (b) The production and supply of branded and unbranded cream in the State; and,
- (c) The supply of branded butter in the State.



## 4. RELEVANT COUNTERFACTUAL

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### Introduction

4.1 The test in section 22(3) of the Act – namely, whether, or not, the merger or acquisition will result in a substantial lessening of competition (“SLC”) in markets for goods or services in the State – 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 would 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”. The Commission generally adopts the prevailing conditions of competition as the counterfactual against which it assesses the impact of the merger.<sup>110</sup>

4.2 Paragraph 1.12 of the Merger Guidelines states as follows:

*“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.”*

4.3 Inevitably there is a degree of uncertainty as regards hypothetical future events, and the Commission will consider all the evidence adduced by Parties in forming a view as to whether the result of the Proposed Transaction would give rise to an SLC in the future. 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 basis or otherwise) in respect of each item of evidence. Nor is it obliged to find that any particular potential event is more likely

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<sup>110</sup> Merger Guidelines, paragraphs 1.12 – 1.15.

than not to occur before it can take it into account in its overall assessment of the probability of an SLC.

4.4 Paragraph 1.15 of the Merger Guidelines states that:

*“[T]he 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 obviously be consistent with the parties’ own internal pre-merger assessments of the likely counterfactual.”*

## Views of the Parties

4.5 In response to the Arrabawn Phase 1 Information Request, Arrabawn stated the following in relation to the relevant counterfactual:

*“The counterfactual situation to the sale of the van sales book to Aurivo would be the current market position... In this counterfactual, approximately nine dairy suppliers would compete for the supply contracts to the major retailers.”<sup>111</sup>*

4.6 In response to the Aurivo Phase 1 RFI, Aurivo Group stated the following in relation to the relevant counterfactual:

*“It is Aurivo’s view that the relevant counterfactual to the proposed transaction is that market conditions are likely to remain the same in the short-to-medium term.”<sup>112</sup>*

## Views of the Commission

4.7 The Commission notes that Arrabawn ceased the supply of unbranded liquid milk and cream in June 2023. In response to the Arrabawn Phase 2 Information Request, Arrabawn stated the following:

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<sup>111</sup> Arrabawn’s response to question 36 of the Arrabawn Phase 1 Information Request

<sup>112</sup> Aurivo Group’s response to Question 36 of the Aurivo Phase 1 RFI.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>113</sup>

4.8 In *M/21/021 – Bank of Ireland/Certain Assets of KBC*, the Commission, in analysing the counterfactual, considered that post-notification developments that are directly related or attributable to the proposed transaction should not be taken into account in the identification of the counterfactual.<sup>114</sup> The Commission considers that the actions detailed above were taken by Arrabawn post-notification and should not have the effect of altering the counterfactual or the assessment of the Proposed Transaction. The Commission has not gathered any evidence to suggest that Arrabawn would have ultimately ceased to supply unbranded liquid milk and cream for reasons unrelated to the Proposed Transaction. The Commission has not gathered any evidence which shows that Arrabawn made a firm decision to cease the production and supply of unbranded liquid milk and cream in the State *before* the Proposed Transaction.

### **The Commission’s conclusion on the relevant counterfactual**

4.9 Taking all of the evidence into account, for the purposes of assessing the Proposed Transaction, the Commission considers that the relevant counterfactual is that, absent the Proposed Transaction, Arrabawn would remain in the market and the *status quo* would prevail. The prevailing conditions of competition would be maintained and Arrabawn would remain an independent undertaking active in the Relevant Potential Markets set out in Section 3 of this Determination.

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<sup>113</sup> Arrabawn’s response to Question 2 of the Arrabawn Phase 2 Information Request.

<sup>114</sup> See paragraph 5.17 *M/21/021 – Bank of Ireland/Certain Assets of KBC*, available [here](#).

## 5. COMPETITIVE ASSESSMENT: HORIZONTAL UNILATERAL EFFECTS

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### Introduction

5.1 In this section, the Commission sets out its assessment of the competitive impact of the Proposed Transaction, as regards horizontal unilateral effects, in each of the Relevant Potential Markets identified in Section 3 above.

5.2 Unilateral effects, as explained in paragraph 4.8 of the Merger Guidelines, occur when “a merger results in the merged entity having the ability and the incentive to raise prices at its own initiative and without coordinating with its competitors.”

5.3 In addition, the European Commission’s ‘Guidelines on the assessment of horizontal mergers’ state the following in respect of “Non-coordinated effects”:

*“A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms’ price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market.”<sup>115</sup>*

5.4 The Commission assesses each Relevant Potential Market in turn below under the following headings:

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<sup>115</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004) OJ C 31, p 5–18, paragraph 24 (available [here](#)).

- (a) Views of the Parties;
- (b) The impact of the Proposed Transaction on market structure;
- (c) Views of the Commission; and,
- (d) Conclusion.

## **The production and supply of branded and unbranded liquid milk in the State**

### Views of the Parties

5.5 The Parties submitted that the Proposed Transaction would not result in an SLC. In particular, the Parties stated the following in the Merger Notification Form in relation to the production and supply of branded and unbranded liquid milk, cream, and butter in the State:

*“Strong buyer power will ensure the Proposed Transaction has no unilateral effects. Buyers are typically large major retailers, wholesalers/distributors and large food-service companies all of which have strong buyer power.*

*For instance, the retail supermarket sector in the State is characterised by the presence of five large players: Tesco, Dunnes Stores, Lidl, Aldi and the Musgrave Group (which includes Centra and Supervalu as well as MusgraveMarketplace cash and carry/wholesalers). These chains’ size and their commercial significance to producers of liquid milk, cream and butter, while not necessarily proof positive of buyer power, are strong factors which weigh in favour of continued strong competition.*

*Barriers to switching are low and any of these retailers would have little difficulty in switching suppliers of dairy products, including to suppliers based outside of the State...*

*The newly enlarged Aurivo Group will continue to face strong competition from close substitutes. Aurivo Group’s liquid milk, cream and butter*

*products can be readily substituted by products from rival suppliers of those products in the State.*

*Moreover, recent years have seen a significant rise in the prominence of unbranded (i.e., retailer own brand) liquid milk, cream and butter products. In many cases, the packaging is relatively similar to branded packaging with, for example, unbranded butter being sold in gold foil packs. Retailers can also readily substitute Aurivo Group’s unbranded products with imports from Northern Ireland (and further afield)...”<sup>116</sup>*

5.6 In response to informal written questions sent by the Commission to the Parties in advance of the In-Person Presentation Meeting, Arrabawn stated the following in relation to the production and supply of liquid milk:

*“Arrabawn believes that the proposed transaction will not give rise to a substantial lessening of competition in liquid milk in Connacht or, indeed, in any other part of the State. This view is supported by the following factors:*

- Strength of price and other competition between branded and own label liquid milk;*
- Fierce rivalry between the various suppliers of branded and own label liquid milk based both throughout the State and in Northern Ireland;*
- The strong negotiating power of, in particular, the major supermarkets plus the large food service companies;*
- Recent declines in consumption of liquid milk”<sup>117</sup>*

#### The impact of the Proposed Transaction on market structure

5.7 Paragraph 3.1 of the Commission’s Merger Guidelines states that “[a] central element in assessing the competitive impact of a merger is identifying its effect on

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<sup>116</sup> Merger Notification Form, Section 5.3.

<sup>117</sup> Response to Q1 of the questions sent in advance of the In-Person Presentation Meeting.

*market structure.*” Market structure can be characterised by the number, size and distribution of firms in a market. A merger or acquisition will have an impact on market structure as the merging parties which were two firms pre-acquisition become one firm post-acquisition.

5.8 The structure of the potential market for the production and supply of branded and unbranded liquid milk in the State is detailed in Table 1 below.

**Table 1: The production and supply of branded and unbranded liquid milk in the State, 2022**

Processor	% share based on volume produced
Arrabawn	[5-10]%
Aurivo Group	[15-20]%
<b>Combined</b>	<b>[25-30]%</b>
Tirlán (Glanbia)	[40-45]%
Strathroy	[10-15]%
Natural Dairies <sup>118</sup>	[5-10]%
Clóna	[5-10]%
Lakeland	[0-5]%
Lee Strand	[0-5]%
North Cork Co-Op	[0-5]%
Centenary Thurles	[0-5]%
Dale Farm	[0-5]%
<b>Total</b>	<b>=~100</b>
<b>Pre-Merger HHI</b>	<b>2295</b>
<b>Post-Merger HHI</b>	<b>2567</b>
<b>Delta</b>	<b>272</b>

<sup>118</sup> The Parties provided this estimate in the Merger Notification Form for liquid milk and cream combined – Natural Dairies’ share of the potential market for the production and supply of branded and unbranded milk in the State is therefore potentially slightly less than this.

Source: The Commission's analysis, based on information from third parties and the Parties

5.9 Paragraphs 3.9 to 3.10 of the Commission's Merger Guidelines set out that the Commission utilises the Herfindahl-Hirschman Index ("HHI") as a measure of market concentration. The Commission's Merger Guidelines state at paragraph 3.10 that the Commission will have regard to the following HHI thresholds:

*"A post-merger HHI below 1,000 is unlikely to cause concern.*

*Any market with a post-merger HHI greater than 1,000 may be regarded as concentrated and highly concentrated if greater than 2,000.*

*Except as noted below, in a concentrated market a delta of less than 250 is unlikely to cause concern and in a highly concentrated market a delta of less than 150 is unlikely to cause concern."*

5.10 Based on the HHI calculations set out above, and consistent with the Commission's Merger Guidelines, the Commission's view is that the potential market for the production and supply of branded and unbranded liquid milk in the State is highly concentrated. In a highly concentrated market, an HHI delta of less than 150 is unlikely to cause concern, and as shown in Table 1, the HHI delta is 272.

5.11 However, as explained in the Commission's Merger Guidelines at paragraph 3.11:

*"the purpose of the HHI thresholds is not to provide a rigid screen in order to determine whether or not a merger is likely to result in an SLC. Rather, the HHI is a screening device for deciding whether the Commission should intensify its analysis of the competitive impact of a merger."*

5.12 The Commission has therefore intensified its analysis and its assessment of unilateral effects within this potential market is set out below.

#### Views of the Commission

5.13 The Commission considers that the Proposed Transaction is unlikely to give rise to unilateral effects in the potential market for the production and supply of branded and unbranded liquid milk in the State for the reasons set out below.



5.14 **First**, Aurivo Group will continue to face a competitive constraint from a number of other dairy co-operatives which are active in the production and supply of branded and unbranded liquid milk in the State. These include: Tirlán ([40-45]%), Strathroy ([10-15]%), Natural Dairies ([5-10]%), Clóna ([5-10]%), and Lakeland ([0-5]%), along with a number of smaller dairy co-operatives.

5.15 **Second**, the Commission has considered the impact of countervailing buyer power in the potential market for the production and supply of branded and unbranded liquid milk in the State. As explained at paragraph 7.1 of the Commission's Merger Guidelines:

*“Countervailing buyer power refers to the ability of a customer or customers, because of their position in the market, successfully to resist supplier price increases. In some circumstances, a customer may possess sufficient negotiating strength to enable it to constrain the ability of a supplier or suppliers to harm competition.”*

5.16 During its review and investigation, the Commission has gathered evidence which shows that customers of the Parties, in particular retailers of various sizes, have successfully resisted increases in the price of branded and unbranded liquid milk. This resistance occurred both when the Parties tendered for the supply of an unbranded product to a retailer, and when the Parties attempted to implement a price increase for branded products.

5.17 In an internal document provided to the Commission in response to the Arrabawn Phase 1 Information Request, following Arrabawn's submission of a tender to supply unbranded milk to a significant retailer (█████), the retailer stated the following in an email to Arrabawn:

*“Reviewing the [price] in comparison to other suppliers, we are looking at Arrabawn being roughly ██████ in the difference which seems quite significant.... Can you please review both requests.”*

5.18 In response to the retailer, Arrabawn stated the following:

“[The] Reason for price increases from our side is [REDACTED]  
 [REDACTED].... Other costs have increased in  
 terms of [REDACTED]  
 [REDACTED]. Having said all this, [REDACTED] business is critical to  
 Arrabawn... [REDACTED]  
 [REDACTED]”<sup>119</sup>

- 5.19 In an internal Arrabawn email dated January 26, 2022, two Arrabawn employees discussed a meeting held with a small retail customer (a [REDACTED] shop). At this meeting Arrabawn discussed taking away the customer’s rebate on the branded milk Arrabawn supplies to it and the employees recounted that the customer gave Arrabawn the following options:

“ [REDACTED]  
 [REDACTED]  
 [REDACTED]”.

- 5.20 The same email stated that: “[Customer] [REDACTED]  
 [REDACTED]” and notes  
 that, if Arrabawn [REDACTED]  
 [REDACTED]  
 [REDACTED].<sup>120</sup>

- 5.21 Most major retailers have a formal price change request template which a dairy co-operative must complete in order to request an increase in the price of its branded products to retailers.<sup>121</sup> In email correspondence provided to the Commission in response to the Aurivo Phase 1 RFI, Aurivo Group sent a formal price change request to a large retailer ([REDACTED]) along with “slides

<sup>119</sup> Arrabawn internal email with the subject “RE: DSD Milk Tender 2020”, dated 1 July 2020, provided in response to Question 11 of the Arrabawn Phase 1 Information Request.

<sup>120</sup> Arrabawn internal email with the subject “Re: [REDACTED]”, dated 26 January 2022, provided in response to Question 11 and Question 22 of the Arrabawn Phase 1 Information Request.

<sup>121</sup> Arrabawn’s response to Question 9 of the Arrabawn Phase 1 Information Request.

*outlining the massive challenges around Commodities, Cost increase forms for direct to store business [and] Cost increase forms for organic for us to CDC". Aurivo Group sent this email correspondence to the retailer on 3 March 2022, with price increases proposed to take effect on 4 April 2022. The retailer responded by email on 7 March 2022 stating: "Please see attached the MRPI Letter of Rejection, in relation to your proposed cost increase. Your increase has not been accepted at this time."<sup>122</sup>*

- 5.22 The evidence available to the Commission therefore suggests that customers, and in particular, not only big retailers, exercise an appreciable degree of countervailing buyer power over the co-operatives that supply branded and unbranded liquid milk. The Commission has seen no evidence to suggest that, on the particular facts of this case, the ability of retailers to exert an appreciable degree of countervailing buyer power would be diminished as a result of the Proposed Transaction.

#### Conclusion

- 5.23 Based on the above, the Commission considers that the Proposed Transaction does not raise any horizontal competition concerns in the potential market for the production and supply of branded and unbranded liquid milk in the State.

### **The production and supply of branded and unbranded cream in the State**

#### Views of the Parties

- 5.24 The Parties submitted that the Proposed Transaction would not result in an SLC in the potential market for branded and unbranded cream in the State. The Parties' views on the production and supply of branded and unbranded cream are set out in paragraph 5.5 above.

#### The impact of the Proposed Transaction on market structure

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<sup>122</sup> Aurivo Group internal email with the subject "Aurivo - Cost price increase Branded Milk 7/03/2022 - MRPI Letter of Rejection 7th March 2022", dated 7 March 2022, provided in response to Question 11 of the Aurivo Phase 1 RFI.

5.25 The structure of the potential market for the production and supply of branded and unbranded cream in the State is detailed in Table 2 below.

**Table 2: The production and supply of branded and unbranded cream in the State, 2022<sup>123</sup>**

Processor	% share based on volume produced
Arrabawn	[15-20]%
Aurivo Group	[10-15]%
<b>Combined</b>	<b>[25-30]%</b>
Tirlán (Glanbia)	[30-35]%
Strathroy	[0-5]%
Clóna	[15-20]%
Lakeland	[10-15]%
Lee Strand	[0-5]%
North Cork Co-Op	[0-5]%
Centenary Thurles	[0-5]%
Dale Farm	[0-5]%
<b>Total</b>	<b>=100</b>
<b>Pre-Merger HHI</b>	<b>1939</b>
<b>Post-Merger HHI</b>	<b>2344</b>
<b>Delta</b>	<b>405</b>

*Source: The Commission's analysis, based on information from third parties and the Parties*

5.26 The Commission's approach to analysing HHI thresholds is detailed in paragraph 5.9 above. Based on the HHI calculations set out in Table 2 above, and consistent with the Commission's Merger Guidelines, the Commission's view is that the potential market for the production and supply of branded and unbranded cream in the State is highly concentrated. In a highly concentrated market, an HHI delta

<sup>123</sup> Natural Dairies is also active in the supply of branded and unbranded cream in the State. The Commission could not successfully contact Natural Dairies and so does not have an estimate of its share in the potential market for the production and supply of branded and unbranded cream in the State. As discussed in footnote 118 above, in providing an estimate of Natural Dairies' share of this potential market, the parties provided a combined share for both liquid milk and cream. Natural Dairies' omission from Table 2 means that the Parties' shares of this potential market are potentially overestimated.

of less than 150 is unlikely to cause concern, and as shown in Table 2, the HHI delta is 405.

- 5.27 However, as explained in the Commission’s Merger Guidelines at paragraph 3.11, and as noted at paragraph 5.11 above:

*“the purpose of the HHI thresholds is not to provide a rigid screen in order to determine whether or not a merger is likely to result in an SLC. Rather, the HHI is a screening device for deciding whether the Commission should intensify its analysis of the competitive impact of a merger.”*

- 5.28 The Commission has therefore intensified its analysis and its assessment of unilateral effects within this potential market is set out below.

#### Views of the Commission

- 5.29 The Commission considers that the Proposed Transaction is unlikely to give rise to unilateral effects in the potential market for the production and supply of branded and unbranded cream in the State for the reasons set out below.

- 5.30 **First**, Aurivo Group will continue to face a competitive constraint from a number of dairy co-operatives which are active in the production and supply of branded and unbranded cream in the State. These include: Tirlán, Strathroy, Clóna, and Lakeland, along with a number of smaller dairy co-operatives.

- 5.31 **Second**, the Commission has considered the impact of countervailing buyer power in the potential market for the production and supply of branded and unbranded cream in the State. During the review and investigation, the Commission has gathered evidence which shows that customers of the Parties, in particular retailers of various sizes, have successfully resisted increases in the price of branded and unbranded cream.

- 5.32 As detailed in paragraph 5.6 above, the Parties have submitted that there is *“strong negotiating power of, in particular, the major supermarkets plus the large food service companies”* in the market for the production and supply of cream.

- 5.33 Support for this position can be found in internal documents provided to the Commission by the Parties. In a document provided to the Commission in response to the Aurivo Phase 1 RFI, a significant retailer ( ) noted in an email that Aurivo Group’s proposed prices to supply various ranges of cream seemed “quite high” and noted that it “would be looking to hold last year’s cost on the core lines for 12 month period” [sic]. The retailer asked Aurivo Group to review its proposed prices. Aurivo Group submitted a revised tender twice more until the prices were “back closer to last years prices”.<sup>124</sup>
- 5.34 The evidence available to the Commission therefore suggests that customers, and in particular, not only large retailers, exercise an appreciable degree of countervailing buyer power over the co-operatives that supply branded and unbranded cream. The Commission has seen no evidence to suggest that, on the particular facts of this case, the ability of retailers to exert an appreciable degree of countervailing buyer power would be diminished post-transaction.

### Conclusion

- 5.35 Based on the above, the Commission considers that the Proposed Transaction does not raise any horizontal competition concerns in the potential market for the production and supply of branded and unbranded cream in the State.

## **The supply of branded butter in the State**

### Views of the Parties

- 5.36 The Parties submitted that the Proposed Transaction would not result in an SLC in the potential market for the supply of branded butter in the State. The Parties’ views on the production and supply of branded butter are set out in paragraph 5.5 above.

### The impact of the Proposed Transaction on market structure

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<sup>124</sup> Aurivo Group internal email with the subject “RE: Cream tender”, dated 7 August 2020 provided in response to Question 22 of the Aurivo Phase 1 RFI and Aurivo internal email with the subject “FW: Tenders 11 and cream”, provided in response to Question 22 of the Aurivo Phase 1 RFI.

5.37 Table 3 below is based on information requested from the Parties and Third Parties on their supply of branded butter in the State.

**Table 3: The supply of branded butter in the State, 2022**

Processor	% share based on volume produced
Arrabawn	[0-5]%
Aurivo Group	[5-10]%
Combined	[10 15]%
Tirlán (Glanbia)	[10 15]%
Strathroy	[0-5]%
Ornua ( <i>Kerrygold</i> ) <sup>125</sup>	[20-25]%
Kerry Group ( <i>Dairygold</i> ) <sup>126</sup>	[25-30]%
Lakeland	[20-25]%
Lee Strand	[0-5]%
North Cork Co-Op	[0-5]%
Bandon	[0 5]%
Tipperary Co-Op	[0 5]%
Centenary Thurles	[0-5]%
Dale Farm	[0-5]%
<b>Total</b>	<b>=~100</b>
<b>Pre-Merger HHI</b>	<b>1819<sup>127</sup></b>
<b>Post-Merger HHI</b>	<b>1900</b>
<b>Delta</b>	<b>81</b>

Source: The Commission based on information from third parties and the Parties

<sup>125</sup> As discussed above, although the Parties are shareholders in Ornua, they do not have control of it.

<sup>126</sup> In the Merger Notification Form, the Parties estimate that Kerry Group's market share in the supply of *Dairygold*-branded butter in the State is approximately [40-45]%. The estimate provided in Table 3 has been calculated by the Commission by considering the merging parties' volume estimate for *Dairygold*, as well as volumes provided by other processors in response to the Commission's third-party questionnaire.

<sup>127</sup> These HHI figures were calculated using the exact market share estimates, before they were rounded to one decimal place.

- 5.38 The Commission's approach to analysing HHI thresholds is detailed in paragraph 5.9 above. Based on the HHI calculations set out in Table 3 above, and consistent with the Commission's Merger Guidelines, the Commission's view is that the potential market for the supply of branded butter in the State is concentrated. In a concentrated market, an HHI delta of less than 250 is unlikely to cause concern, and as shown in Table 3, the HHI delta is 81.
- 5.39 As noted in Section 3 above, data provided by the Parties on market shares for various products is not consistent, as sometimes certain spreads are included with branded butter but sometimes, they are not. The information in Table 3 therefore includes at least some spreads, and so would refer to a potential relevant market including branded butter and spreads. If the potential relevant market did not include spreads, then the Parties' combined market share post-Proposed Transaction would be higher than the [10-15]% shown in the Table 3. If the Commission were to exclude the one co-operative which it is aware of that only supplies spreads (Kerry Group -*Dairygold*), then the combined market share of the Parties in the supply of butter would be approximately [15-20]%.
- 5.40 As discussed in Section 3 above, in defining potential relevant markets, the Commission does not consider it necessary to come to a conclusion on whether or not a potential market for branded butter should include spreads, and notes that overlap between Aurivo and the Target Assets is limited to the supply of branded butter. Even although the HHI delta based on the information provided by the Parties is lower than the level that would typically give rise to concern and prompt the Commission to intensify its analysis, for completeness and in recognition of possible inconsistencies in data provided by the Parties and Third Parties, the Commission has carried out an assessment of unilateral effects.

#### Views of the Commission

- 5.41 The Commission considers that the Proposed Transaction is unlikely to give rise to unilateral effects in the potential market for the supply of branded butter in the State for the reasons set out below.





*Brand increase to take effect from the 5th September”. Aurivo Group sent this request along with “supporting slides showing commodity movement” and a “price increase submission”. The retailer responded by email stating: “please be advised that your CPI Cost price increase has been rejected in Full – for the 5th September 2022.”<sup>130</sup>*

5.47 The evidence available to the Commission therefore suggests that customers exercise an appreciable degree of countervailing buyer power over the co-operatives that supply branded butter. The Commission has seen no evidence to suggest that, on the particular facts of this case, the ability of retailers to exert an appreciable degree of countervailing buyer power would be diminished post-transaction.

#### Conclusion

5.48 Based on the above, the Commission considers that the Proposed Transaction does not raise any horizontal competition concerns in the potential market for the supply of branded butter in the State.

### **Conclusion on horizontal unilateral effects**

5.49 For the reasons set out in this section and considering all of the evidence described above, the Commission is of the view that the Proposed Transaction does not raise horizontal unilateral effects concerns in the Relevant Potential Markets:

- the production and supply of branded and unbranded liquid milk in the State;
- the production and supply of branded and unbranded cream in the State; and,
- the supply of branded butter in the State.

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<sup>130</sup> Aurivo Group internal email with the subject “RE: Connacht Gold Branded Butter Increase -Rejected in full 19th July 2022”, dated 19 July, provided in response to Q11 of the Aurivo Phase 1 RFI.



## 6. COMPETITIVE ASSESSMENT COORDINATED EFFECTS

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- 6.1 Coordinated effects can occur where a proposed transaction changes the nature of competition in the relevant market by making it more likely that the merged entity and some, or all, of its competitors will coordinate their behaviour by, for example, raising prices and/or decreasing output. Thus, the key question<sup>131</sup> is whether the Proposed Transaction would materially increase the likelihood that firms active in Relevant Potential Markets, could coordinate their behaviour or could strengthen existing coordination between firms in these relevant markets.
- 6.2 Based on the information in the possession of the Commission in its review and investigation of the Proposed Transaction, no plausible coordinated effects theory of harm was identified given the relevant counterfactual.
- 6.3 Therefore, on this basis, the Commission considers that the Proposed Transaction does not raise any coordinated effects concerns in the State.
- 6.4 Therefore, no further discussion of coordinated effects is carried out for the purposes of assessing the likely effects of the Proposed Transaction in the Relevant Potential Markets.

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<sup>131</sup> Merger Guidelines, paragraph 4.23.

## 7. VERTICAL RELATIONSHIP

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7.1 The Commission has identified the following potential vertical relationships between Aurivo Group and the Target Assets:

- Aurivo Group procures raw milk, and the Target Assets produce liquid milk and cream; and
- Arrabawn procures butter from third parties to supply to customers, and Aurivo Group produces butter.

### Potential Vertical Relationship 1

7.2 A potential vertical relationship exists as Aurivo Group both procures raw milk and produces and supplies liquid milk, cream, and butter. The Target Assets are used to produce liquid milk and cream, and supply liquid milk, cream, and butter. Therefore, there is a potential vertical relationship between Aurivo Group's procurement of raw milk and the Target Asset's production of liquid milk and cream.

7.3 The Commission considers that this potential vertical relationship does not raise any vertical competition concerns for the following reasons:

- **Input foreclosure:** since the raw milk procurement element of Arrabawn's business does not form part of the Proposed Transaction, Arrabawn's current suppliers of raw milk will be unaffected and will continue to supply raw milk to Arrabawn following implementation of the Proposed Transaction. Suppliers will continue to have a number of processors to whom they could supply their relevant milk produce. These include any of the co-operatives listed in Tables 1-3 above.
- **Customer foreclosure:** Similarly, customer foreclosure is unlikely because Aurivo Group is already vertically integrated. The supply of raw milk to Aurivo Group by its members/owners, as well as third parties, will be unaffected by the implementation of the Proposed Transaction.

## Potential Vertical Relationship 2

7.4 A second potential vertical relationship exists as Arrabawn does not produce butter, but procures it from third parties including Lakeland Dairies, North Cork Creameries, and Dale Farm. Aurivo Group produces butter. Therefore, there is a potential vertical relationship between Aurivo Group's production of butter and Arrabawn's procurement of butter from third parties.

7.5 The Commission considers that this potential vertical relationship does not raise any vertical competition concerns for the following reasons:

- **Input foreclosure:** The Commission considers that input foreclosure by Aurivo Group in the supply of butter in the State is unlikely. There remain numerous other suppliers of butter following the Proposed Transaction, as detailed in Table 3 above. Furthermore, the Commission is unaware of any other dairy co-operative other than Arrabawn who supplies butter but does not produce it.
- **Customer foreclosure:** Arrabawn has an estimated 4.8% market share in the downstream supply of butter in the State. The third parties which Arrabawn currently procures butter from will continue to have access to a number of customers following the implementation of the Proposed Transaction. These customers will include many wholesalers, food-service operators and retailers in the State.

## Conclusion on vertical effects

7.6 Based on the information in the possession of the Commission, no plausible vertical effects theory of harm was identified. Therefore, no further discussion of vertical effects is carried out for the purposes of assessing the likely effects of the Proposed Transaction.

## 8. EFFICIENCIES

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8.1 Paragraphs 8.1 and 8.2 of the Commission’s Merger Guidelines state that:

*“A merger may generate various efficiencies for the merged entity. The Commission’s analysis of efficiencies goes beyond the impact of efficiencies on the merged entity and focuses on whether verifiable efficiencies mitigate adverse competitive effects and prevent an SLC”.*

*“The onus rests on the parties to show that claimed efficiencies are (i) merger-specific, (ii) verifiable and (iii) benefit consumers sufficiently to prevent an SLC”.*

8.2 The Commission has not, to date, received any submission from the Parties on efficiencies which meets the criteria set out in paragraph 8.2 of the Commission’s Merger Guidelines.

## 9. CONCLUSION

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- 9.1 In the light of its analysis of all the information and evidence, as set out in this Determination, the Commission has formed the view that the result of the Proposed Transaction will not be to substantially lessen competition in any market for goods or services in the State.
- 9.2 Before making a determination in this matter, the Commission, in accordance with section 22(8) of the Act, has had regard to any relevant international obligations of the State, and concluded that there were none.



## **10. ANCILLARY RESTRAINTS**

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10.1 No ancillary restraints were notified.

## 11. DETERMINATION

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The Competition and Consumer Protection Commission, in accordance with section 22(3)(a) of the Competition Act 2002, as amended, (the “Act”) has determined that the result of the proposed acquisition whereby Aurivo Consumer Foods Limited, a wholly-owned subsidiary of Aurivo Co-operative Society Limited would acquire certain assets of Arrabawn Co-Operative Society 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.

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

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**Brian McHugh**

Chairperson  
Competition and Consumer Protection Commission

