

**Assessment of Proposed Acquisition by Lidl Immobiliare Malta Limited of some of the buildings belonging to Said Investments Limited and leases belonging to Scotts Limited to operate 'Lidl' supermarkets from them**

**15 February 2021**

**Decision on Proposed Acquisition in terms of Regulations 6(1)(iii) of the Control of Concentrations Regulations (LN 294 of 2002 as subsequently amended)**

**Office for Competition - Case COMP/MCCAA/13/2020**

**NON-CONFIDENTIAL VERSION**

**THIS DECISION IS NOT BINDING ON THE DIRECTOR GENERAL OF THE OFFICE FOR COMPETITION**

The decision to open a Phase II investigation does not bind the Director General of the Office for Competition and is without prejudice to his final decision which will be adopted after a deeper assessment of the planned concentration. The decision to open a Phase II investigation shall not in any way be interpreted as confirming the unlawfulness of the proposed concentration, or as committing the Office for Competition into blocking or accepting the planned concentration with remedies.

Done at the Office for Competition, Malta Competition and Consumer Affairs Authority, Mizzi House, National Road, Blata I-Bajda, Malta on 15-02-2021.

**Please note that [X] indicates figures or text which have been deleted or replaced for reasons of commercial confidentiality.**

## **SUMMARY**

1. The Office for Competition (hereinafter referred to as 'the Office') within the Malta Competition and Consumer Affairs Authority has opened an in-depth investigation to assess whether the proposed acquisition of Lidl Immobiliare Malta Limited (Purchaser) of some of the buildings belonging to Said Investments Limited (Vendor) and leases belonging to Scotts Limited (Tenant) is in line with the Control of Concentrations Regulations (Subsidiary Legislation 379.08).
2. If the parties' request is acceded by the Office, Lidl Immobiliare Malta Limited will be acquiring the Scotts Supermarket in Burmarrad, the one in Sliema, the Żabbar grocery retail outlet as well as two divided portions of undeveloped land in Attard. The acquirer intends to lease out the above-mentioned properties to Lidl Malta Limited to operate grocery retail activities.
3. The Office has serious doubts regarding the compatibility of the proposed concentration with the Control of Concentrations Regulations and believes that it may limit competition in the grocery retail market. This is primarily because the proposed concentration could lead to horizontal unilateral effects, both existing and future constraints, harming competition and consumer welfare in the process. Consequently, the proposed concentration may lead to a substantial lessening of competition in the grocery retail market, especially at the local level. For the reasons above, the Office requires detailed market data to be able to carry out its assessment and quantify the effects of this acquisition on competition. Accordingly, the Office is hereby initiating proceedings for an in-depth investigation in accordance with regulation 6(1)(iii) of the Control of Concentrations Regulations.

## **ASSESSMENT**

### **Parties**

4. Lidl is a German discount chain belonging to the Schwarz Group, a German-based retailer operating 12,500 stores in 33 countries. The first Maltese store opened its doors in 2008 in Santa Venera. Since then the company expanded further and now counts eight supermarkets, in Mosta, San Gwann, Qormi, Luqa, Safi, Zejtun, Santa Venera, and Gozo.
5. In Malta, Lidl operates through three companies; Lidl Malta Limited (C 36317), Lidl Immobiliare Malta Limited (C 36321) and Lidl Logistica Malta Limited (C 79620), all having their registered address at The Administration Office, Triq il-Karmnu, Luqa, LQA1311 Malta. Lidl Malta Limited's principal activity is to operate supermarkets and retail outlets for the sale of finished and packaged products relating to foodstuffs, beverages and allied products, and household items. On the other hand, Lidl Immobiliare Malta Limited is a property company responsible for acquiring immovable property and plant and machinery for leasing in its ordinary cause of operations. Lidl Logistica Malta Limited is a non-operating company which at present is not operating any retail or logistic building. All

companies are part of the same group structure, with the majority of holding held by Lidl Italia S.r.l.

6. The turnover of Lidl Malta Limited for the year ended 29 February 2020 was [€]. This puts Lidl Malta Limited as the leader in Malta's grocery retail sector in terms of turnover. Through its eight stores, Lidl Malta Limited boasts a total sales area of around [€] square meters and on average employed around 354 employees during the year ended 29 February 2020 (2019: 340 employees). The company generated a profit after tax of *circa*. [€] for the financial year ending 29 February 2020.
7. The other parties to the concentration are Said Investments Limited and Scotts Limited. Said Investments Limited is a limited liability company registered in Malta with company registration number C13285 and registered address at The Said Buildings, Fleur de Lys Road, Birkirkara, Malta. Said Investments Limited is a property company whose objectives include purchasing and acquiring immovable property in Malta and the carrying on of the business as operator and administrator in connection with the properties that it purchases and acquires.
8. Scotts Limited is a limited liability company registered in Malta with company registration number C33305 and the same registered address of Said Investments Limited. Scotts Limited acts as an importer and retailer of finished products relating to foodstuffs, beverages and allied products, and household items.
9. Scotts Limited opened its doors in 2002 with the first grocery supermarket located in Naxxar. Scotts Limited expanded further by opening seven other grocery retail outlets throughout the years, in Attard, Burmarrad, Santa Lucia, Sliema, Żabbar, Birkirkara and Spinola, before closing the latter outlet in January 2019. The turnover of Scotts Limited was *circa*. [€] in 2019 (2018: approx. [€] million), ranking Scotts Limited with the top [€] in the sector in terms of revenue. Scotts Limited has a total sales area which is estimated to have exceeded [€] square meters in 2019. In fact, in terms of sales floor area, Scotts Limited [€] for some exceptions, in terms of island coverage [€].

## Transaction

10. The proposed concentration is Lidl Immobiliare Malta Limited's acquisition of some of the buildings belonging to Said Investments Limited and leases belonging to Scotts Limited.
11. On 9 October 2020, Lidl entered into an agreement with Said Investments Limited to acquire:
  - i. Two divided portions of land in Triq il-Linja in Attard:
    - a. one divided portion of land has a superficial area of approximately one thousand one hundred and fourteen square metres (1,114sq.m.), having its frontage on Triq il-Linja, bounded on the north by Triq il-Linja, on the south by Triq il-Mithna and on the west and east by other portions of the same land property of the Sammut family, forming part of the lands known as Ta' Lancik and Ta' Pawla and Tax-Xewk.

- b. another divided portion of land in Triq il-Linja, Attard, forming part of the lands known as Ta' Lancik and Ta' Pawla and Tax-Xewk, which portion of land has a superficial area of approximately nine hundred and thirty square metres (930sq.m.), having its frontage on Triq il-Linja, bounded on the north by Triq il-Linja and on the south, almost in its entirety, by Triq il-Mithna but also in part by property of unknown third parties.
- ii. Burmarrad Land and Property comprising of:
  - a. portion of land having an area of approximately four hundred square meters (400sq.m.) situated near Scotts Supermarket in Burmarrad and leased by Scotts as a parking area for cars.
  - b. the building used as a supermarket, without number, named Scotts, in Triq Burmarrad in Burmarrad, with superficial area (including the lower floor) of approximately two thousand three hundred fifty-eight square metres (2,358sq.m.), bounded on the east by Triq Burmarrad, on the west by Triq I-Insolja and on the south by the property of Vincent Camilleri which building also includes the extension of the complex of stores formerly named "Price Club" by a portion of land measuring approximately one hundred and eighty one point zero six square metres (181.06sq.m.) known as "ta Xbekka".
- iii. leases to the Sliema Property consisting of the premises at Amery Street, Sliema, with a superficial area of approximately two thousand one hundred eighteen square metres (2,118 sq.m.) consisting of (a) the supermarket in Amery Street which includes the premises at ground floor level previously used as a supermarket and storage area at basement level and three enclosed areas (including parking area) at basement level, and (b) the shop (retail outlet) underlying third party property and overlying the supermarket in High Street, [X].
- iv. Żabbar Properties comprising of a complex without official number in Triq il-Mina ta' Hompesch in Haz-Żabbar, with a superficial area of approximately six thousand twenty square metres (6,020sq.m.) consisting of:
  - a. the building used as a supermarket, without official number known as "Scotts" formerly known as "Sisa" and formerly known as "Pirella Supermarket" and prior to that as "Corrigo Hall Wedding Complex", in Triq il-Mina ta' Hompesch in Haz-Żabbar, which building in part underlies third party property; of the outside areas include the out-buildings without number which are accessible by a driveway which forms an integral part of this complex and which also provides access to the Żabbar Parking Area, which driveway measures approximately five hundred and five square metres (505sq.m.) and is bounded on the east in part by the remainder of this complex and in part by the Żabbar Parking Area, on the south by Triq il-Mina ta' Hompesch and on the north by the property of Raphael Fenech Adami or of his successors in title; which entire complex is bounded on the south by Triq il-Mina ta' Hompesch, on the north east by the Żabbar Parking Area and on the north by property of Raphael Fenech Adami or of his successors in title as defined by the existing boundary walls and which complex includes all and any improvements made thereon and all its rights and appurtenances including the overlying airspace and the underlying terrain.

- b. the divided portion of land of a rectangular shape known as “Tal-Madrin” in the limits of Haz-Żabbar, surrounded on all sides with a boundary wall which segregates it from adjacent properties, which land is used as a parking area of the Żabbar Supermarket and has a superficial area of not less than three thousand four hundred square metres (3,400sq.m.), bounded on the north west by property of Aldo and Carmen spouses Farrugia, on the south west in part by property of Raphael Fenech Adami or his successors in title and in part by the Żabbar Supermarket to which it is interconnected and in part by property of the Government of Malta and on the west by property of Matthew Azzopardi or other variable boundaries.
12. The parties’ intention to the concentration is for Lidl Immobiliare Malta Limited to acquire the Properties and the Leased Properties from Scotts Limited to then lease them out to Lidl Malta Limited to operate ‘Lidl’ supermarkets from them. Lidl Immobiliare Malta Limited will acquire all the mentioned properties with vacant possession. It is not the parties’ intention to the concentration for Lidl Malta Limited to acquire the business that is carried out by Scotts Limited and, therefore, Scotts Limited intends to continue operating its current supermarket business under the same brand name.
13. The proposed concentration is not subject to review by any other competition authority.

#### **Jurisdiction**

14. It is the primary duty of the Office to promote competition for the benefit of consumers. Part of this responsibility is to investigate concentrations between undertakings to ensure that they do not substantially lessen competition once affected.
15. The Office is bound by law, to assess concentrations between undertakings having an aggregate turnover in Malta exceeding EUR2,329,373.40 and each of the undertakings concerned accounting for at least 10 percent of the combined aggregate turnover. The anticipated concentration satisfies these thresholds and is therefore deemed notifiable for all effects and purposes of the law.
16. Regulation 6(1)(iii) of the Control of Concentrations Regulations (Legal Notice 294 of 2002) states that:

*“where he [the Director General of the Office for Competition] finds that the concentration notified falls within the scope of these regulations and raises serious doubts as to its lawfulness in terms of the provisions of these regulations, he shall decide to initiate proceedings.”*
17. The above-mentioned regulation is the legal basis upon which the Director General is initiating proceedings. **This does not mean that the Office is going to block the proposed concentration or to accept it subject to remedies.** However, an in-depth investigation is warranted to study matters further.

## Procedure

18. On 9 October 2020, a promise of sale and purchase agreement was duly signed between Said Investments Limited (Vendor) and Scotts Limited (Tenant), and Lidl Immobiliare Malta Limited (Purchaser) to purchase the Attard properties as undeveloped land with vacant possession, and the Burmarrad property and Żabbar properties with operational permits and with vacant possession.
19. On the same day, a promise of assignment and transfer of leases was duly signed between Said Investments Limited and Scotts Limited, and Lidl Immobiliare Malta Limited. This agreement covers the portion of land situated near Scotts Supermarket in Burmarrad and leased by Scotts Limited as a parking area for cars and the premises in Sliema outlined in paragraph 11 of this decision.
20. Both agreements are subject to terms and conditions, and in particular, the former agreement is subject to the Purchaser also acquiring the tenancy rights of the leased properties on the date of publication of the deed of sale. Both agreements are conditional on the decision of the Director General of the Office, declaring the transaction a lawful concentration in terms of the Control of Concentration Regulations.
21. Following a number of meetings convened between the notifying party and the Office, a notification of the concentration was deemed complete on 12 January 2021. It is noteworthy that the period between the date of the agreements and the notification of the concentration exceeds the fifteen working days stipulated in regulation 5(1) of the Control of Concentrations Regulations. However, the extension of the time period was acceded by the Director General of the Office.
22. The filing and the acceptance of the concentration notification was notified to the public through a public notice in the Government Gazette (No. 20,556) on 15 January 2021 and a notice that appeared in a local newspaper and on the Malta Competition and Consumer Affairs Authority's website on the same day.
23. Regulation 2 of the Control of Concentrations Regulations states that the turnover threshold test is subject to the activity in the *preceding financial year*. The year 2020 was characterised by an unprecedented event – the COVID-19 pandemic. COVID-19 has definitely impacted the Maltese economy, with different sectors effected in dissimilar fashions.
24. Given that 2020 was an exceptional year characterised by idiosyncratic shocks, the Office opines that resorting its assessment solely on data attributed to this year, risks increasing the margin of error for Type I (false-positive) and Type II (false-negative) errors when taking its decision. As a result, the Office seeks to base its arguments and conclusions by corroborating data for the last two years.
25. In compiling the competitive assessment at this stage, the Office has relied extensively on relevant guidelines issued by the European Commission, European competition case law and on the phase II decision issued by the Office in July 2020 concerning the full-function joint venture between Retail Marketing Limited and Co-op Trading Company Limited, Polrem Limited, S. Borg & Sons Limited, Tower Supermarkets Complex Limited, Valyou Pendergardens Operations Limited, Belleview Supermarkets Company Limited and Valyou Supermarket Limited. This concentration concerned the Maltese grocery retail market and involved analysing the market competitive environment pre- and post the

integration of the operational activities of four established local supermarket chains, collectively operating eight retail supermarkets and one convenience shop in Malta.

26. In its assessment, the Office relied on primary data gathered from both the demand-side (consumer) and the supply-side (grocery retail outlets) of the grocery sector.
27. From the supply-side, the Office relied on two sources of data; (i) third-party objections on the proposed concentration, and (ii) Requests for Information (RFI) sent to all grocery retail outlets in Malta, primarily covering data related to store market size, turnover, average sales per customer, selling price of a number of branded products, product breadth of a number of food and beverage categories and other questions related to service such as advertising programmes, customer service, loyalty schemes, etc.
28. Data from the demand-side is important for three compelling reasons: (i) to properly define and delineate the grocery market in Malta, (ii) to ascertain that the competitive assessment reflects the local context rather than wholly relying on European case law, and (iii) to ensure that the decision taken by the Office reflects the market situation at hand rather than hypothesis and counterfactuals based on elements of subjectivity. Data on this facet of the market was gathered by means of a tailor-made survey designed to elicit consumer behaviour and perceptions in the Maltese grocery retail market. Fieldwork has taken place in February of last year by means of computer-assisted telephone interviews.
29. For the proposed concentration at hand, the Office seeks to adopt the same methodology utilised for the full-function joint venture. As explained in paragraphs 23 and 24 of this decision, since Regulation 2 of the Control of Concentrations Regulations emphasizes the need for the analysis to be based on activity that took place in the preceding financial year, the Office will be gathering updated data from the grocery retail undertakings operating presently in Malta.
30. On 15 January 2021, the Office has published an invitation for third parties<sup>1</sup> to put forward their objections on the proposed concentration. To guarantee wide outreach, apart from publishing the invitation on the Government Gazette and a local newspaper the Office has also sent an email to all grocery retail outlets which in the full-function joint venture decision were identified as having a sales floor area equal to or exceeding 200 square meters<sup>2</sup>, inviting them to submit their comments on the proposed concentration. Furthermore, the same subset of grocery retail outlets was also requested to furnish the Office with market data by means of a Request for Information ('RFI') in line with Regulations 10 and 11 of the Control of Concentrations Regulations.
31. From the demand-side perspective, given that the data collected pertains to consumer behaviour and perceptions in the Maltese grocery retail market, the Office assumes that the results remain a good representation of current consumer behaviour since the data collected reflects structural behaviour and is non-stochastic. For this reason, the Office will resort and adopt the conclusions found therein.

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<sup>1</sup> For ease of reference: <https://mccaa.org.mt/media/5695/invitation-to-comment-1512021.pdf>

<sup>2</sup> The decision of the Office for Competition to employ the benchmark of 200 square meters is discussed later in the section titled 'Relevant Market'.

## Background of the Grocery Retail Market in Malta

32. The grocery market is an important sector in Malta both because of its size, and its provision of essential items to Maltese households. The core business activity involves the provision and sale of grocery goods. This has been defined in COMP/MCCAA/01/2020<sup>3</sup> as food and beverages sold by grocery retailers, as well as toiletries, cleaning products and similar items.<sup>4</sup> Alongside core groceries, the parties involved in this concentration also sell items such as electronic equipment, household goods, clothing and personal care items, etc., which together constitute around [ ]% of their total turnover.
33. Based on data published by the National Statistics Office (NSO), in 2019 Maltese households spent around EUR916 million on food and non-alcoholic beverages which figure approaches EUR1,200 million if alcoholic beverages and tobacco are also considered. Food and non-alcoholic beverages account for approximately 15 percent of Maltese households' total expenditure which figures soars by 4.5 percentage points when including alcoholic beverages and tobacco. The component of food and non-alcoholic beverages is the second largest component of the households' consumption basket and is equivalent to EUR114 per household per week. For particular types of households (e.g. one-person households or two-person households with at least one adult being 65 years or older) the share of consumption expenditure on food and non-alcoholic beverages is much higher. As a result, any changes in the degree of competition within this sector are likely to have a pronounced impact on Maltese households, especially those spending relatively higher shares of their income on food and beverages.
34. The grocery retail industry covers a broad range of outlets. In Malta, the modern retail trade channel includes supermarkets, discount stores, grocery and convenience stores, online stores and independent food specialists (vegetable hawkers, butchers, fish hawkers, etc.) that either forms part of retail chains or independent undertakings.
35. In COMP/MCCAA/01/2020, the Office has defined grocery stores based on a multi-level criterion. At the first stage, the Office has made a distinction between grocery stores according to the size of their sales floor area and stated that the competitive constraints faced by grocery stores is asymmetric i.e. a large store constrains a smaller store but not vice versa. The Office has further sub-divided stores at the second stage according to the Price, Quality, Range, and Service (PQRS) analysis.
36. In Malta, the largest sales are generated by 'supermarkets' and 'discount stores' which in COMP/MCCAA/01/2020 have been defined as self-service grocery stores having a sales floor area which is larger than 200 square meters and which offer a wider range of products relative to the other retail trade channels. According to primary data collected by the Office for 2018, there are 64 stores in Malta which fall under this umbrella, and collectively these are estimated to have generated approximately [ ]. Discount stores (such as 'Lidl' stores), which are often analysed separately by industry experts because they typically sell at lower prices than those charged by the traditional supermarkets, are estimated to have accounted for more than [ ] of the total turnover generated by this channel. Following Lidl as the largest grocery retail chain in Malta in terms of turnover, [ ] of the total turnover generated by grocery retail outlets exceeding 200 square meters.

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<sup>3</sup> For ease of reference: <https://mccaa.org.mt/media/5303/200805-non-confidential-final-phase-ii-decision-retail-marketing-limited.pdf>

<sup>4</sup> Food sold at restaurants, cafes and take-outs is excluded from the definition of 'core groceries' adopted in this decision.

37. Moreover, it is estimated that approximately [ ] were generated through online sales in aggregate. According to the data collected by the Office, in 2018, there were [ ] out of 64 grocery retailers who offered an online platform. It is noteworthy that the data was collected before the onset of COVID-19 and as a result, today, one expects the size of sales generated through the online channel to have grown markedly.
38. In COMP/MCCAA/01/2020, 'grocery and convenience stores' and 'independent food specialists' have been defined by the Office as grocery retail outlets with a sales floor area smaller than 200 square meters and that sell a range of grocery products. In 2018, these channels are estimated to have generated around [ ] million of grocery sales. A number of convenience stores are owned by companies that own several convenience stores around Malta and Gozo (such as 'Maypole' and 'The Convenience Shop') while the other channels are non-affiliated independents (such as corner grocery stores or minimarkets).
39. The above categorization is in line with the vernacular adopted in expert reports on this sector. Notwithstanding this, as was the case in COMP/MCCAA/01/2020, the Office does not consider this distinction a determinant of the boundaries of the relevant market. For example, Lidl stores classified under the discount stores umbrella are considered to provide a competitive constraint on the other grocery retail outlets in Malta, even though they belong to a different channel. Nonetheless, the Office continues to refer to Lidl stores as discounters in view of its differential offering, its allure to more price-sensitive consumers, and the common use of the term in the industry.

## Counterfactual

40. In its assessment, the Office evaluates whether the prospects for competition with the proposed concentration in effect significantly deteriorate when compared to the prevailing market environment situation, i.e. absent the concentration. The latter is referred to as the 'counterfactual'. The counterfactual is not a statutory test but rather an analytical tool used by the Office to benchmark the outcomes deduced from the substantial lessening of competition test.
41. The use of counterfactual analysis does not seek to ossify the market at a particular point in time. In fact, while it is general practice for the Office to adopt the prevailing conditions of competition as the counterfactual, the Office may consider other plausible scenarios with different likelihoods as potential market environments. Notwithstanding this, the Office will only consider counterfactual competitive dynamics that are in line with competition law, i.e. selling price fixing between undertakings violates Article 5 of the Competition Act and is therefore not a counterfactual the Office will assess.

## A Case of Counterfactual Analysis? Two divided portions of land in Triq il-Linja in Attard

42. The Commission Consolidated Jurisdictional Notice (CJN) under Council Regulation (EC) No 139/2004 on the Control of Concentrations between undertakings states that:

*"The Merger Regulation provides in Article 3(1)(b), (2) that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly*

***attributed. The transfer of the client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover.***<sup>5</sup>

[Emphasis Added]

43. The Office refers to the above regulation, for considering the properties involved in the proposed acquisition by Lidl Immobiliare Malta Limited of some of the buildings belonging to Said Investments Limited and leases belonging to Scotts Limited to operate 'Lidl' supermarkets. The regulation states that the properties involved in the concentration must constitute "*market presence*" for consideration in the baseline of the analysis.
44. The European Commission dealt with a similar query in the case of Netto/Grocery Store at Armitage Avenue Little Hulton.<sup>6</sup> The European Commission concluded that the assets being acquired, including the freehold property of an empty retail store in the UK and the permit to use the land for retail purposes and the license to sell alcoholic beverages, did not constitute an '*undertaking*' in the sense of paragraph 24 of the CJN mainly because the retail store being acquired was empty and the transaction did not entail the transfer of goodwill.
45. In the case of the proposed concentration being investigated by the Office, the case is different for most of the Properties being acquired by Lidl Immobiliare Malta. The Burmarrad, Sliema, and Żabbar grocery retail outlets are currently operational under the Scotts supermarket chain. Furthermore, they are expected to be operational as 'Lidl' grocery retail outlets within a short period of time should the Office declare the proposed concentration lawful. As a result, the aforementioned acquired properties will be considered in the baseline analysis due to their market presence.
46. However, in the case of the Attard Properties, which include two portions of undeveloped land, the situation is different. In EU case law, the closest example to this situation is the case of SEGRO/PSPiB/Warehouse.<sup>7</sup> The approach adopted by the European Commission was that the real estate assets under construction qualified as an '*undertaking*' within the meaning of paragraph 24 of the CJN given that they already had a customer base when they were acquired and thus were expected to generate turnover in the short-term. The plot of land acquired jointly by SEGRO and PSiB from Warehouse was already approved and under development at the time of the decision. However, this is not the case for the Attard Properties.
47. As a result, the Office has some reservations including the Attard Properties in the baseline analysis, given that the application for the development of these properties is still under consideration. Moreover, paragraph 24 of the CJN states that "*a market turnover can be clearly attributed*" for an asset to form part of that concentration. The Office considers including the Attard Properties as part of its counterfactual analysis of the proposed concentration.

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<sup>5</sup> See Commission Consolidated Jurisdictional Notice under Council Regulation No. 139/2004 on the Control of Concentrations (Official Journal – 2008/C 95/01), paragraph 24.

<sup>6</sup> Case M.7940 – Netto/Grocery Store at Armitage Avenue Little Hulton of 26 February 2016.

<sup>7</sup> Case M.9119 – SEGRO/PSPiB/Warehouse of 25 October 2018.

## Concentration Decisions within an EU Jurisprudence Framework – Brief Summary

48. For this Phase I decision, the Office has reviewed some of the most important literature of concentrations that have taken place in the grocery retail within the EU jurisprudence framework. The rest of this section highlights the main literature for which a Phase II in-depth investigation was warranted, for a final concentration decision to be taken.
49. The Office issued a Phase I decision in 2019 on the full-function joint venture between Retail Marketing Limited and Co-op Trading Company Limited, Polrem Limited, S. Borg & Sons Limited, Tower Supermarkets Complex Limited, Valyou Pendergardens Operations Limited, Belleview Supermarkets Company Limited and Valyou Supermarket Limited.<sup>8</sup> The Office opined that the proposed concentration could result in a substantial lessening of competition when defining the relevant geographic market at a local level. This would be especially the case in local geographic markets which contain more than one of the grocery stores involved in the concentration. As such, some local geographic areas may potentially be more concentrated relative to other local geographic markets that have been delineated for the other supermarkets involved in the joint venture. The Office thus concluded that it was too premature to make any significant conclusions from its initial findings and that a more detailed investigation was warranted to verify the concerns involved in this concentration, thus opening a Phase II investigation.
50. The British multinational Tesco plc agreed to acquire the UK's largest grocery wholesaler, Booker Group plc, in 2017.<sup>9</sup> Tesco is the UK's largest grocery retailer and operates approximately 3,500 supermarkets and convenience stores, including some operating under the One Stop brand. Booker provides grocery wholesale services to retailers and caterers, and through its supply of 'symbol' group brands including Premier, Londis, Budgens and Family Shopper, amounts to around 5,500 retail stores. In its phase I investigation, the UK Competition and Markets Authority (hereinafter referred to as "CMA") opined that this merger could give rise to a potential substantial lessening of competition because of horizontal and vertical effects in the retail supplies of groceries. The CMA believed that in more than 350 local areas where there is an overlap between Tesco stores and Booker supplied 'symbol' stores, consumers could face worse terms when buying their groceries.
51. Moreover, the CMA had concerns that post-merger, the merged entity could have the ability and incentive to worsen Tesco's retail offering/Booker's wholesale 'symbol' group offering such that end-customers may switch to shop at Booker's 'symbol' group retail stores/Tesco stores instead. However, the CMA could not conclude whether this merger gives rise to realistic prospects of a substantial lessening of competition in its phase I decision. Further investigation and research had to be conducted, including analysing other theories of harm, for a concentration decision to be taken.
52. Another major concentration in the UK that required a Phase II investigation was the proposed merger between British supermarkets J Sainsbury Plc and Asda Group Ltd. This merger would have created the UK's biggest supermarket chain in 2018.<sup>10</sup> Sainsbury's and Asda are the second and third largest grocery retailers in the UK and two of the four largest online groceries in the UK. They also supply fuel through petrol filling stations, often

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<sup>8</sup> Retail Marketing Limited, decision on full-function joint venture of 13 February 2020 (Phase I).

<sup>9</sup> Tesco/Booker merger enquiry, CMA decision of 21 July 2017 (Phase I).

<sup>10</sup> J Sainsbury PLC/Asda Group Ltd merger inquiry, CMA decision of 27 September 2018 (Phase I),

adjacent to their larger grocery stores. The CMA had concluded from its Phase I investigation that the merger raises sufficient concerns to be referred for a more in-depth review. Given that both companies are amongst the largest grocery retailers in the UK and their stores overlap in several local areas, the CMA concluded that the merger could lead to a potential lessening of competition in the retail supply of groceries in-store at both national and local level and that the final consumer could in turn face higher prices or a worse quality of service. The CMA also concluded that concerns relating to fuel, general merchandise including clothing, and increased 'buyer power' over suppliers would be better dealt with by undertaking a deeper analysis once a Phase II investigation was opened.

53. A more recent concentration was analysed by the French Competition Authority (hereinafter referred to as "FCA"). The FCA opened an in-depth examination Phase II for the acquisition of a Géant Casino hypermarket located in the Troyes urban area by Soditroy and the Association des Centres Distributeurs E. Leclerc (hereinafter referred to as "ACDLec") in 2019.<sup>11</sup> ACDLec is the body that defines the strategy of the E. Leclerc group, and its members are the natural persons managing the companies that operate the E. Leclerc stores. Soditroy is owned by a member of the E. Leclerc group, which also operates another hypermarket in the Troyes area. In its Phase I investigation of this transaction, the FCA concluded that the merger of companies operating competing hypermarkets in the outskirts of Troyes could result into a substantial lessening of competition between the two main hypermarket retailers in the area, which are Carrefour and E. Leclerc, given that this transaction will lead to the disappearance of the retailer Géant Casino. The FCA also argued that an extended consultation with market stakeholders is required to further investigate the impact that this transaction would have on the local retail food distribution markets and whether this transaction would result in loss of diversity for consumers.
54. The largest Italian supermarket chain, Conad, agreed to acquire the seventh largest grocery retailer in Italy, Auchan, in 2019.<sup>12</sup> The decision to embark on such an acquisition was taken since the French chain suffered a €1.1 billion loss in the preceding financial year of this acquisition. The Italian Competition Authority opened a phase II investigation given the size of this acquisition and the need to conduct a market survey with shoppers to study the effects of this transaction on the retail grocery market. Moreover, a more in-depth analysis was required to establish the extensive definition of the relevant product markets for the retailing of food and non-food products and to analyse the local geographic market dimension.

## Relevant Market

55. Market definition provides a framework for assessing the competitive effects of a concentration and involves an element of judgement. The boundaries of the market are in themselves an analytical tool – a means to an end – and do not determine the outcome of the analysis of the competitive effects of the concentration. There could be external factors to the relevant market that could exert constraint on the subject parties. Defining relevant markets is a systematic methodology adopted by the Office for pinpointing the most immediate competitive constraints faced by the parties involved in the concentration.

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<sup>11</sup> Soditroy/ Association des Centres Distributeurs E. Leclerc, decision of 24 October 2019.

<sup>12</sup> C12247B - BDC Italia-Conad/Auchan, 25 February 2020.

56. Regulation 2 of the Control of Concentrations Regulations defines the relevant market as “...*the market for the products or services whether within Malta or limited to any particular area or locality within Malta or outside Malta, and whether or not restricted to a particular period of time or season of the year*”.
57. Market definition typically contains two dimensions: the product and geographic markets. As stated in the European Commission’s notice on the definition of the relevant market (97/C/372/03), “...*the main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behaviour and of preventing them from behaving independently of effective competitive pressure.*”<sup>13</sup> The product and geographic markets are discussed in the subsequent sub-sections.
58. For this decision, the Office has largely based its assessment on the approach applied in COMP/MCCAA/01/2020. For completeness, the Office notes that the approach adopted in Phase II may vary (given the additional time for investigation and ability to gather further evidence) and that the approach adopted in this Phase I decision is therefore not intended to act as the starting point from which the Phase II assessment will develop.

### **Product Market**

59. The relevant market concept implies that there can be effective competition between the products that form part of it. In the European Commission’s notice on market definition, it is stated that “*a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.*”<sup>14</sup>
60. In COMP/MCCAA/01/2020, the Office has delineated the product market based on multiple-criteria analysis. Following numerous case law and studies on the subject, at the first stage, the Office has made a distinction between grocery retail outlets having a sales floor area which is equal to or greater than 200 square meters versus those with a retail sales area smaller than the indicated threshold, indicating that the former pose constraints on the latter but not vice-versa. At the second stage, the Office referred to the population-based survey of Maltese grocery shoppers to infer the most important demand-side factors determining customers’ store choice for their main grocery shopping. In fact, the demand-side survey concluded that more than 75% of respondents value price, quality, range and service as significant factors when choosing a store for their main grocery shopping.
61. For the Office to be able to gauge the score of the price, quality, range and service variables for each retail outlet having a sales floor area equal to or exceeding the indicated threshold, the Office sent an RFI to all grocery retail outlets in Malta falling within the indicated store size.
62. Based on store size classification and the extent of the competitive constraint imposed on the notifying parties in terms of PQRS, each store was classified as either being within the relevant product market or outside it. The classification based on the PQRS analysis is

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<sup>13</sup> See Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), paragraph 2.

<sup>14</sup> Ibid, paragraph 7.

checked against a number of headline indicators (e.g. average customer spending per visit, identification of competitors, etc.) to ensure that the relevant product market's definition is based on sensible criteria.

63. Based on the above, each grocery retail store was classified as either being within the relevant product market or outside it. Grocery retail stores that were found to impose a competitive constraint in at least two out of the three store characteristics (Price, Range and Service) were included as part of the relevant market.
64. Thirty-eight out of sixty-four stores with a sales floor area exceeding or equal to 200 square meters were deemed to be part of the relevant product market. Given that the classification of grocery retail outlets entailed some degree of subjectivity, the classification was benchmarked against the classification based on the headline indicators.
65. After reconciling the minor differences, the Office concluded that the relevant product market consists of the following grocery retail outlets: Alfsons ENT. Ltd., Chain Supermarket, Chef's Choice, G&G Supermarket, Greens Supermarket, Iceland Supermarket, Interspar, J&L Supermarket, JK Supermarket, Lasco Supermarket, LIDL stores, PAMA Supermarket, PAVI supermarket, Park Towers Supermarkets, Piscopo's Cash & Carry, Scotts Supermarket, Smart Supermarket, Tower Supermarket, Trolees Supermarket, and Valyou Supermarkets.
66. As a result, although Lidl Malta Limited and Scotts Limited operate via different business models and that there exist differences between both stores, e.g. Scotts Limited offers a wider choice in term of different brands of the same products that it carries and also offers specialised services such as delicatessen services while Lidl Malta Limited does not, the Office opines that these are still regarded as direct competitors to each other.
67. For this decision, the Office refers to the grocery retail stores listed in paragraph 65 as constituting the relevant product market of this decision. The Office intends to employ the same methodology in the Phase II investigation but with updated data.

### **Geographic Market**

68. The European Commission defines the relevant geographic market as "*comprising the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*".<sup>15</sup>
69. When defining the geographic market for concentrations in the grocery retail sector, European case law generally distinguishes between national and local aspects to competition.<sup>16</sup>
70. According to the notifying party's submissions, the parties to the concentration consider the relevant national geographic market to be Malta. The Office concurs with the notifying party's views in the sense that the geographic market definition should exclude retail

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<sup>15</sup> Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), paragraph 8.

<sup>16</sup> Asda / Netto, OFT decision of 23 September 2010; Co-operative Group Ltd / Somerfield Ltd, OFT decision of 20 October 2008; J Sainsbury PLC / Asda Group Ltd merger inquiry, CMA decision of 25 April 2019.

grocery stores situated and operating in the island of Gozo. This is because of an additional travel time of around 20 minutes (the average time taken by a typical ferry crossing) and related ferry expenses.

71. The views expressed by the Office are the same as those outlined in COMP/MCCAA/01/2020. According to the demand-side survey conducted by the Office, it was concluded that the maximum estimated weighted average driving time that consumers are willing to drive for their main grocery shopping is 12.8 minutes. Based on this average, the Office corroborates its view that the national definition of the geographic market should be limited to the Maltese territory since all the grocery retail outlets involved in this concentration are located in Malta.
72. To delineate the local geographic market, the Office refers to the methodology proposed in the Merger Assessment Guidelines issued by the Competition Commission and the Office of Fair Trading whereby it is stated that:

*“When assessing mergers involving a large number of local geographic markets – for example, mergers of grocery retailers operating over multiple localities – the Authorities may examine the geographic catchment area within which the great majority of a store’s custom is located. Catchment areas are a pragmatic approximation for a candidate market to which the hypothetical monopolist test can be applied; the use of catchment areas is not an alternative conceptual approach. However, the geographic market is identified using the hypothetical monopolist test will typically be wider than a catchment area, Consequently, if the impact of the merger on concentration in this catchment area appears unproblematic, then the Authorities may exclude the local area from further analysis without concluding on the boundaries of that particular relevant geographic market.”<sup>17</sup>*
73. Based on the population-based survey, the Office aims to adopt the weighted average driving time of 12.8 minutes and individually define the local geographic market for each grocery retail outlet Lidl Malta Limited will acquire if the proposed concentration is affected.
74. As was the case in COMP/MCCAA/01/2020, the Office will also propose different local geographic market definitions subject to different scenarios. These are intended to account for possible response measurement biases and different traffic volumes during the different hours of the day.

### **Competitive Assessment**

75. For this decision, in compiling the competitive assessment, the Office has based its assessment on the primary data collected in COMP/MCCAA/01/2020, relevant guidelines issued by the European Commission, competition case law within the jurisdiction of the EU, guidelines and competition case law within the jurisdiction of the UK, and information submitted by the parties to this concentration.
76. According to Regulation 4 of the Control of Concentrations Regulations, in assessing whether a concentration leads to a substantial lessening of competition in the Maltese market, the Director General shall consider, *inter alia*:

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<sup>17</sup> See Merger Assessment Guidelines, a joint publication of the Competition Commission and the Office of Fair Trading (OFT1254, September 2010 CC2 Revised), paragraph 5.2.25.

- a. the need to maintain and develop effective competition in the Maltese market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside Malta;
  - b. whether the business, or part of the business, of a party to the concentration, has failed or is likely to fail;
  - c. the nature and extent of development and innovation in a relevant market;
  - d. the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.
77. To set the framework for the analysis of the competitive effects of the concentration, the Office refers to Section 6(III) of the Concentration Notification Form (annexed to the Control of Concentrations Regulation) whereby *affected markets* are defined as relevant product markets where in the Maltese territory or a relevant part thereof:
- a. two or more of the parties to a concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15% or more, or
  - b. one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market share is 25% or more, regardless of whether there is or is not any existing supplier customer relationship between the parties to the concentration.
78. The activities of the parties subject to this concentration involve horizontal relationships since both parties are actively present in the grocery retail market sector and collectively operate fourteen grocery retail outlets.
79. In assessing the proposed concentration, the Office will factor whether the market situation that would prevail with the proposed concentration is likely to be characterised by any of the below anti-competitive effects:
- a. **Horizontal unilateral effects:** unilateral effects can arise in a horizontal merger when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity profitably to raise prices or degrade non-price aspects of its competitive offering (such as quality, range, and service) on its own and without needing to coordinate with its rivals. The competitive constraint eliminated by a merger may be an existing constraint, or a potential future constraint. Horizontal unilateral effects are the most common type of effects that gives rise to competition concerns in mergers analysed by the Office.
  - b. **Coordinated effects:** coordination occurs when firms operating in the same market act on a common understanding to limit their rivalry. Coordination may take different forms and affect any aspect of competition; firms may decide to divide up the market by geographic area or fix prices. Regardless of the form, in many instances,

coordination will result in firms keeping prices higher than they would otherwise have been in a more competitive market.

### **National Definition of the Geographic Market – Merging the Product Market definition**

80. To delineate the national definition of the geographic market, the Office refers to Eurostat's National Accounts data for Malta to estimate the total market value of commodities sold by the market operators in this sector. For this purpose, the figure for total individual consumption on food, beverages, household equipment and personal care consumed in Malta is assumed to be the most reliable available data source to estimate the total market value of sales generated by supermarket operators in Malta.
81. To use the data collected from the grocery retail outlets in COMP/MCCAA/01/2020, the Office refers to the total market value of commodities sold by the market operators in the grocery retail sector in 2018 as presented in COMP/MCCAA/01/2020. In fact, the figure of the total market value of commodities sold by the market operators in 2018 has been revised by the National Statistics Office. However, since the Office has derived the implicit revenue of supermarkets and grocery stores having a sales area less than 200 square meters as the residual in COMP/MCCAA/01/2020, updating the total figure would risk creating data and time inconsistencies. While the Office acknowledges this caveat, the purpose of this decision is to assess whether on a *prima facie* basis, the proposed concentration may give rise to a substantial lessening of competition. As a result, to be able to employ the richness of data available in COMP/MCCAA/01/2020, the Office chooses detail over using the most up-to-date data. Nevertheless, given that the total market value of commodities sold by the market operators in 2018 is only used to derive the implicit total market value of commodities sold by market operators having a sales floor area less than 200 square meters and given that these stores do not fall within the same geographic market of the parties subject to this concentration, the Office is assuming that this approach will not limit the reliability of the results.
82. The approach detailed above by the Office is only applied for the purposes of this decision so that the claims put forward in this decision are backed by detailed analysis. For the purposes of an in-depth investigation, as outlined in paragraph 24, the Office will seek to employ updated 2019 and 2020 data.
83. The total market expenditure on food, beverages, personal care and household related equipment purchased from supermarkets and convenience shops in Malta and Gozo for 2018 has been estimated at €1.239 billion.<sup>18</sup> After adjusting for the fact that ironmongers and other household stores also sell equipment for house and garden, and personal care products are also sold by other operators such as pharmacies, the total established market value was adjusted downwards (Table 1).

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<sup>18</sup> NSO & Eurostat (034/2020).

Table 1: Individual Consumption Expenditure in Malta and Gozo – Adjustments (€000)

	2018	2018 (adjusted)	Adjustments
Food and Non-Alcoholic Beverages	752,245	752,245	
Alcoholic Beverages and Tobacco	259,301	259,301	
Tools and equipment for house and garden	21,100	5,275	25%
Personal care	206,600	154,950	75%
<b>Total Market</b>	<b>1,239,247</b>	<b>1,171,772</b>	
Population		475,701	
of which: Malta		442,978	
Gozo		32,723	
<b>Total Market Adjusted for Malta Only</b>		<b>1,091,167</b>	

Source: National Accounts, NSO & Eurostat (034/2020)

84. Based on the information gathered in COMP/MCCAA/01/2020 and the application of the product market definition, the Office computed the parties' market share subject to this concentration. The grocery retail outlets mentioned in paragraph 65 of this decision accounted for around [X] percent of the total adjusted grocery retail market in 2018.
85. The parties subject to this concentration collectively accounted for nearly [X] or nearly [X] of Malta's total grocery retail market. When applying the product market definition, Lidl's market share is [X] percent, while the market share of Scotts Limited is [X] (Table 2).

Table 2: National Geographic Market based on the Product Market Definition

Name of Grocery Retail Outlet	Revenue (€000)	Pre-Merger Market Share (%)	Post-Merger Market Share (%) <sup>19</sup>	Pre-Merger HHI	Post-Merger HHI
Lidl Malta (Santa Venera)	[X]	[X]	[X]	[X]	
Lidl Malta (San Gwann)	[X]	[X]	[X]	[X]	
Lidl Malta (Zejtun)	[X]	[X]	[X]	[X]	
Lidl Malta (Safi)	[X]	[X]	[X]	[X]	
Lidl Malta (Luqa)	[X]	[X]	[X]	[X]	
Lidl Malta (Qormi)	[X]	[X]	[X]	[X]	
Lidl Malta (Mosta)	[X]	[X]	[X]	[X]	
<b>Lidl Malta Limited</b>	<b>[X]</b>	<b>[X]</b>		<b>[X]</b>	
<b>Lidl Malta Limited (Post Concentration)</b>	<b>[X]</b>		[X]		[X]

<sup>19</sup> See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Official Journal C 031, 05/02/2004 P.0005-0018), paragraph 18., paragraph 15; "...Post-merger market shares are calculated on the assumption that the post-merger combined market share of the merging parties is the sum of their pre-merger market shares".

Scotts (Attard)	[X]	[X]	[X]	[X]	
Scotts (Naxxar)	[X]	[X]	[X]	[X]	
<b>Scotts (Burmarrad)</b>	[X]	[X]		[X]	
Scotts (St. Lucia)	[X]	[X]	[X]	[X]	
<b>Scotts (Sliema)</b>	[X]	[X]		[X]	
Scotts (Spinola)	[X]	[X]	[X]	[X]	
<b>Scotts (Żabbar)</b>	[X]	[X]		[X]	
Scotts (Fleur De Lys)	[X]	[X]	[X]	[X]	
<b>Scotts Limited</b>	[X]	[X]		[X]	
<b>Scotts Limited (Post Concentration)</b>	[X]		[X]		[X]
Park Towers (St. Venera)	[X]	[X]	[X]	[X]	[X]
Park Towers (St. Julian's)	[X]	[X]	[X]	[X]	[X]
Park Towers (Balluta)	[X]	[X]	[X]	[X]	[X]
Valyou (Mellieha)	[X]	[X]	[X]	[X]	[X]
Valyou (Naxxar)	[X]	[X]	[X]	[X]	[X]
Valyou (St. Julian's)	[X]	[X]	[X]	[X]	[X]
Towers (Sliema)	[X]	[X]	[X]	[X]	[X]
Trolees (Qawra)	[X]	[X]	[X]	[X]	[X]
<b>Retail Marketing Limited</b>	[X]	[X]	[X]	[X]	[X]
<b>Lasco Supermarket</b>	[X]	[X]	[X]	[X]	[X]
PAVI	[X]	[X]	[X]	[X]	[X]
PAMA	[X]	[X]	[X]	[X]	[X]
<b>PG Group</b>	[X]	[X]	[X]	[X]	[X]
<b>Alfsons Ent. Ltd.</b>	[X]	[X]	[X]	[X]	[X]
SPAR (Marsaxlokk)	[X]	[X]	[X]	[X]	[X]
SPAR (Sliema)	[X]	[X]	[X]	[X]	[X]
<b>SPAR</b>	[X]	[X]	[X]	[X]	[X]
<b>Smart Supermarket Ltd</b>	[X]	[X]	[X]	[X]	[X]
<b>J&amp;L Supermarket</b>	[X]	[X]	[X]	[X]	[X]
<b>JK Supermarket</b>	[X]	[X]	[X]	[X]	[X]
<b>Green's Supermarket</b>	[X]	[X]	[X]	[X]	[X]
Chain (Carters – Tarxien)	[X]	[X]	[X]	[X]	[X]
Chain (Fgura)	[X]	[X]	[X]	[X]	[X]
Chain (Zabbar)	[X]	[X]	[X]	[X]	[X]
Chain (Tigne Point)	[X]	[X]	[X]	[X]	[X]

Chain Supermarkets	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Chef Choice (Marsaskala)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Piscopo Cash & Carry	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Iceland Store (Qawra)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Iceland Store (Mosta)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Iceland Supermarkets	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
G&G Self Service (Attard)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Total Market</b>	<b>[REDACTED]</b>	<b>100%</b>	<b>100%</b>	<b>1,748.22</b>	<b>2,004.91</b>
<b>ΔHHI</b>					<b>256.70</b>

86. Should the Office declare the proposed concentration lawful, the market share of Lidl Malta Limited is estimated to increase by [REDACTED] percentage points to [REDACTED] while Scotts Limited registers a decrease in its market share from [REDACTED] to [REDACTED].

87. According to the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings:

*“According to well-established case law, very large market shares — 50% or more — may in themselves be evidence of the existence of a dominant market position. However, smaller competitors may act as a sufficient constraining influence if, for example, they have the ability and incentive to increase their supplies. A merger involving a firm whose market share will remain below 50% after the merger may also raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes. **The Commission has thus in several cases considered mergers resulting in firms holding market shares between 40% and 50%, and in some cases below 40%, to lead to the creation or the strengthening of a dominant position.**”<sup>20</sup>*

[Emphasis Added]

88. The Office also refers to the Merger Assessment Guidelines where it is stated that:

*“In relation to market shares, previous OFT decisions in mergers in markets where products are undifferentiated **suggest that combined market shares of less than 40 per cent will not often give the OFT cause for concern over unilateral effects...**”<sup>21</sup>*

[Emphasis Added]

89. The Office opines that given that the market share of Lidl Malta Limited is estimated at [REDACTED] and therefore [REDACTED] below the 40% threshold, an extensive and exhaustive analysis beyond market shares needs to be undertaken. To assess whether the proposed concentration leads to the creation or the strengthening of a dominant position, the Office also needs to factor:

<sup>20</sup> See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Official Journal C 031, 05/02/2004 P.0005-0018), paragraph 17.

<sup>21</sup> See Merger Assessment Guidelines, a joint publication of the UK Competition Commission and the Office of Fair Trading (OFT1254, September 2010 CC2 Revised), paragraph 5.3.5.

- a. the likelihood that a concentration would have anti-competitive effects in the relevant markets, in the absence of countervailing factors,
  - b. the likelihood that buyer power would act as a countervailing factor to an increase in market power resulting from the concentration,
  - c. the likelihood that entry would maintain effective competition in the relevant markets,
  - d. the likelihood that efficiencies would act as a factor counteracting the harmful effects on competition which might otherwise result from the concentration.
90. The Office also refers to the section on HHI levels in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, whereby it is stated that:

*“The Commission is also **unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150...**”<sup>22</sup>*

[Emphasis Added]

91. According to the concentration levels presented in Table 2, this concentration has a post-merger HHI which just exceeds the 2000 threshold identified by the European Commission and similarly, only marginally exceeded the HHI delta value.
92. The above concentration analysis corroborates the view of the Office that the assessment of the proposed concentration is not clear-cut and that a more in-depth investigation is warranted.

#### **Local Definition of the Geographic Market – Merging the Product Market definition**

93. The Office refers to the aforementioned guidelines for benchmarking market shares and HHI delta values. The geographic catchment area for the Burmarrad, Żabbar, and Sliema grocery retail outlets have been delineated using the weighted average driving time of 12.8 minutes inferred from the population-based survey presented in COMP/MCCAA/01/2020.
94. The analysis is presented hereunder for each aforementioned grocery retail outlet subject to this concentration, juxtaposing the local market environment pre- and post-acquisition.

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<sup>22</sup> See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Official Journal C 031, 05/02/2004 P.0005-0018), paragraph 20.

## Scotts Supermarket – Żabbar Outlet

### Pre-Acquisition

No	Supermarket	No. of Stores	Revenue Estimate (€000s)	Market Share	Market Share Squared
1	Scotts Limited	2	[REDACTED]	[REDACTED]	[REDACTED]
2	Lidl Malta Limited	3	[REDACTED]	[REDACTED]	[REDACTED]
3	Lasco Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
4	SPAR Malta	1	[REDACTED]	[REDACTED]	[REDACTED]
5	Chain Supermarket	3	[REDACTED]	[REDACTED]	[REDACTED]
6	Chef's Choice	1	[REDACTED]	[REDACTED]	[REDACTED]
7	Antonio Piscopo Wines & Spirits	1	[REDACTED]	[REDACTED]	[REDACTED]
	<b>Total Supermarkets</b>	<b>12</b>	<b>[REDACTED]</b>	<b>100.0%</b>	<b>3,159.0</b>

### Post-Acquisition

No	Supermarket	No. of Stores	Revenue Estimate (€000s)	Market Share	Market Share Squared
1	Lidl Malta Limited	4	[REDACTED]	[REDACTED]	[REDACTED]
2	Scotts Limited	1	[REDACTED]	[REDACTED]	[REDACTED]
3	Lasco Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
4	SPAR Malta	1	[REDACTED]	[REDACTED]	[REDACTED]
5	Chain Supermarket	3	[REDACTED]	[REDACTED]	[REDACTED]
6	Chef's Choice	1	[REDACTED]	[REDACTED]	[REDACTED]
7	Antonio Piscopo Wines & Spirits	1	[REDACTED]	[REDACTED]	[REDACTED]
	<b>Total Supermarkets</b>	<b>12</b>	<b>[REDACTED]</b>	<b>100.0%</b>	<b>3,737.4</b>

Change in HHI

578.4

## Scotts Supermarket – Burmarrad Outlet

### Pre-Acquisition

No	Supermarket	No. of Stores	Revenue Estimate (€000s)	Market Share	Market Share Squared
1	Scotts Limited	3	[REDACTED]	[REDACTED]	[REDACTED]
2	Lidl Malta Limited	1	[REDACTED]	[REDACTED]	[REDACTED]
3	Retail Marketing Limited	4	[REDACTED]	[REDACTED]	[REDACTED]
4	PG Group	1	[REDACTED]	[REDACTED]	[REDACTED]
5	Smart Supermarket Ltd	1	[REDACTED]	[REDACTED]	[REDACTED]
6	J&L Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
7	JK Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
8	Green's Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
9	Iceland Stores	2	[REDACTED]	[REDACTED]	[REDACTED]
10	G&G Self Service	1	[REDACTED]	[REDACTED]	[REDACTED]
	<b>Total Supermarkets</b>	<b>16</b>	<b>[REDACTED]</b>	<b>100.0%</b>	<b>1,745.8</b>

### Post-Acquisition

No	Supermarket	No. of Stores	Revenue Estimate (€000s)	Market Share	Market Share Squared
1	Lidl Malta Limited	2	[REDACTED]	[REDACTED]	[REDACTED]
2	Scotts Limited	2	[REDACTED]	[REDACTED]	[REDACTED]
3	Retail Marketing Limited	4	[REDACTED]	[REDACTED]	[REDACTED]
4	PG Group	1	[REDACTED]	[REDACTED]	[REDACTED]
5	Smart Supermarket Ltd	1	[REDACTED]	[REDACTED]	[REDACTED]
6	J&L Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
7	JK Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
8	Green's Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
9	Iceland Stores	2	[REDACTED]	[REDACTED]	[REDACTED]
10	G&G Self Service	1	[REDACTED]	[REDACTED]	[REDACTED]
	<b>Total Supermarkets</b>	<b>16</b>	<b>[REDACTED]</b>	<b>100.0%</b>	<b>1,823.6</b>

Change in HHI

77.8

## Scotts Supermarket – Sliema Outlet

### Pre-Acquisition

No	Supermarket	No. of Stores	Revenue Estimate (€000s)	Market Share	Market Share Squared
1	Scotts Limited	3	[REDACTED]	[REDACTED]	[REDACTED]
2	Lidl Malta Limited	2	[REDACTED]	[REDACTED]	[REDACTED]
3	Retail Marketing Limited	6	[REDACTED]	[REDACTED]	[REDACTED]
4	Alfsons Ent. Ltd.	1	[REDACTED]	[REDACTED]	[REDACTED]
5	SPAR Malta	1	[REDACTED]	[REDACTED]	[REDACTED]
6	Smart Supermarket Ltd	1	[REDACTED]	[REDACTED]	[REDACTED]
7	JK Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
8	Green's Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
9	Chain Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
	<b>Total Supermarkets</b>	<b>17</b>	<b>[REDACTED]</b>	<b>100.0%</b>	<b>1,859.9</b>

### Post-Acquisition

No	Supermarket	No. of Stores	Revenue Estimate (€000s)	Market Share	Market Share Squared
1	Lidl Malta Limited	3	[REDACTED]	[REDACTED]	[REDACTED]
2	Scotts Limited	2	[REDACTED]	[REDACTED]	[REDACTED]
3	Retail Marketing Limited	6	[REDACTED]	[REDACTED]	[REDACTED]
4	Alfsons Ent. Ltd.	1	[REDACTED]	[REDACTED]	[REDACTED]
5	SPAR Malta	1	[REDACTED]	[REDACTED]	[REDACTED]
6	Smart Supermarket Ltd	1	[REDACTED]	[REDACTED]	[REDACTED]
7	JK Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
8	Green's Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
9	Chain Supermarket	1	[REDACTED]	[REDACTED]	[REDACTED]
	<b>Total Supermarkets</b>	<b>17</b>	<b>[REDACTED]</b>	<b>100.0%</b>	<b>2,057.8</b>

**Change in HHI**

**197.9**

95. As can be noted from the above market share and HHI analysis, the market shares at a local level of Lidl Malta Limited following the acquisition of the Burmarrad and Sliema grocery retail outlets are well under the threshold identified by the European Commission to pose any alarming substantial lessening of competition concerns. Similarly, the absolute HHI value and the delta HHI values are also within the indicated thresholds, although post-concentration, the HHI value of the Sliema grocery retail outlet marginally exceeds the 2000 absolute value benchmark.
96. While these indicators are already a good starting point, there could be cases where even a market share below 40% can lead to the creation or the strengthening of a dominant position and thus, pose serious threats to the competitive environment. As a result, while these concentration indicators are not ringing any alarming bells, the analysis also needs to consider other factors namely, barriers to entry and expansion, countervailing buyer power and concentration efficiencies, amongst others. Only after considering all potential theories of harm can the Office be in a robust position to give his verdict.
97. On the other hand, the above-presented analysis for the Żabbar grocery retail outlet shows a completely different picture to that presented for the Burmarrad and Sliema properties. Acquiring the Żabbar grocery retail outlet from Scotts Limited would increase the market share of Lidl Malta Limited within that geographic catchment area to [x] percent. Both the absolute levels of the HHI pre- and post-acquisition markedly exceed the 2000 threshold.
98. The HHI considers the relative size distribution of the firms in a market. The HHI ranges between 0 in the case where the market is occupied by a large number of relatively equal sized firms and 10,000 in the case of a monopoly. A market with an HHI value above 2,500 points is regarded to be highly concentrated. As can be observed from the pre- and post-acquisition HHI levels, the HHI reflects an increasing disparity in size between those operating in this market.
99. The delta HHI value is also considered very high by European Commission's standards. As a result, whilst acknowledging that the analysis is far from complete, however based on the concentration indicators presented above, the Office has reason to believe that at the outset, the acquisition of the Żabbar grocery retail outlet is likely to lead to a substantial lessening of competition within this geographic catchment area.
100. *A priori*, the Office for Competition believes that the acquisition of the Żabbar outlet raises serious doubts about the compatibility of the concentration with the Control of Concentrations Regulations because it is likely to lead to horizontal unilateral effects relating to the elimination of a competitive constraint by removing an alternative that customers could switch to.

### **Third-Party Views**

101. On 15 January 2021, the Office has published an invitation for third parties to put forward their objections on the proposed concentration. To date, the Office has received a number of third-party submissions who raised concerns regarding the effects of this concentration. The majority argued that this concentration would lead to the substantial lessening of competition within the Maltese grocery sector. This is because due to its market power, including its countervailing buyer power vis-à-vis the suppliers, and its economies of scale, Lidl can adopt the 'economy pricing strategy' to the extent that smaller incumbents are not able to compete on price.

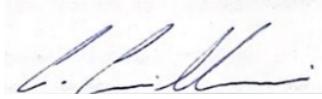
102. One particular third-party has emphasized that Lidl's countervailing buyer power is so strong that certain product categories at Lidl are priced lower at the retail level than the wholesale price offered by the supplier. This makes it impossible to compete at the retail level, creating an unlevelled playing field for the smaller incumbents.

103. Some of these submissions have already been referred to briefly in this decision. Other submissions, including those relating to theories of harm and product overlaps not addressed in this decision will be considered in the Office's phase II investigation. Third parties will also have further opportunities to present their views during the phase II investigation.

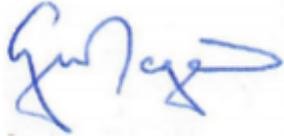
## **Decision**

104. For the reasons set out above, the Director General of the Office opines that a deeper assessment is warranted and therefore will be initiating proceedings in accordance with regulation 6(1)(iii) of the Control of Concentrations Regulations.

Signed by the following:



Mr. Gilmour Camilleri,  
Director Communications, Energy, Transport and Financial Services,  
for and on behalf of the Office for Competition; and



Mr. Godwin Mangion,  
Director General,  
for and on behalf of the Office for Competition.

This decision report has been drafted by the leading investigator, Mr. Gilmour Camilleri and by senior economics manager, Mr. Sean Buttigieg.

For any questions on the contents of this case, please do not hesitate to contact the undersigned.

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