



MCCAA

MALTA COMPETITION AND
CONSUMER AFFAIRS AUTHORITY

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Assessment of Proposed Acquisition by Lidl Immobiliare Malta Limited of Property at Żabbar Belonging to Said Investments Limited to operate Lidl Supermarket (Phase I Decision)

Office for Competition - Case COMP/MCCAA/13/2023

29 December 2023

Decision on Proposed Acquisition in terms of Regulations 6(1)(iii) of the Control of Concentrations Regulations

NON-CONFIDENTIAL VERSION

THIS DECISION IS NOT BINDING ON THE OFFICE FOR COMPETITION

The decision to open a Phase II investigation does not bind the Office for Competition and is without prejudice to the 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.

In accordance with Article 28 of the Malta Competition and Consumer Affairs Authority Act, any information which the inquiry group considered to be confidential and/or revealing business secrets has been redacted from this version. All omissions are indicated by [X] while sensitive market data has been replaced by a range in square brackets.

Done at the Office for Competition, Malta Competition and Consumer Affairs Authority, Mizzi House, National Road, Blata I-Bajda, Malta on 29 December, 2023.

Members of the Office for Competition who conducted the Assessment of this concentration

Melchior Vella (Director, Primary Manufacturing and Retail Markets)

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The Office for Competition would also like to thank Dr Aloysius Bianchi (Director, Inspectorate and Cartel Investigations) for the valuable contributions and reviews.

1. SUMMARY

1. The Office for Competition within the Malta Competition and Consumer Affairs Authority has opened an in-depth investigation to assess whether the proposed acquisition by Lidl Immobiliare Malta Limited (Purchaser) of properties at Żabbar 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 for Competition, Lidl Immobiliare Malta Limited will be acquiring the Scotts supermarket in Żabbar and the adjacent portion of land currently used as a parking area by Scotts supermarket from Said Investments Limited with the intention of eventually leasing it out to Lidl Malta Limited to operate a 'Lidl' supermarket.
3. The Office of Competition 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, especially at the local level. 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. For this reason, the Office for Competition requires detailed market data, including the outcome of an exit store survey to be able to carry out its assessment and quantify the effects of this acquisition on competition. Accordingly, the Office for Competition is hereby initiating proceedings for an in-depth investigation in accordance with regulation 6(1)(iii) of the Control of Concentrations Regulations.

2. THE PARTIES

4. Lidl is a German discount chain belonging to the Schwarz Group, a German-based retailer operating 12,000 stores in 31 countries, with a worldwide turnover of EUR154.1 billion in 2022. The first Lidl store to open its doors in Malta was in Santa Venera in 2008. Since then, the company expanded further and today counts ten supermarkets, in Mosta, San Ġwann, Qormi, Luqa, Safi, Żejtun, Santa Venera, Gozo, and more recently in Sliema and Burmarrad.
5. In fact, following the decision of the Office for Competition on 9 June 2021, Lidl Malta Limited was granted permission to purchase two divided undeveloped portions of land in Attard, the Burmarrad outlet and lease rights to the portion of land situated near Scotts Supermarket in Burmarrad and leased by Scotts Limited as a parking area for cars, and the supermarket outlet in Sliema from Said Investments Limited. Moreover, on 26 August 2021, the Planning Authority issued a permit for Lidl Malta Limited to expand its operations in Żebbuġ (Malta) in the site currently occupied by SMW Cortis, while a permit for a proposed supermarket in the former General Soft Drinks Complex in Qormi (Malta) is in its screening process. As a result, apart from this concentration, Lidl Malta Limited will be expanding its number of outlets to eleven supermarkets in the short-term, possibly to twelve if granted permission to develop another supermarket outlet in Qormi.
6. In Malta, Lidl operates through three companies: Lidl Malta Limited (C 36317), Lidl Immobiliare Malta Limited (C 36321) (hereinafter "**the Notifying Party**") and Lidl Logistica Malta Limited (C 79620), all having their registered address at The Vassallo Business Park, Burmarrad Road, Naxxar, NXR 6345, 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 is a non-operating company which at present is not operating any retail or logistics hub. All companies are part of the same group structure, with the Lidl Italia S.r.l being the majority shareholder.

7. The turnover of Lidl Malta Limited for the year ended 28 February 2022 was circa. EUR[§] million (2021: approx. EUR[§] million). This puts Lidl Malta Limited as the leader in Malta's grocery retail sector in terms of turnover. Through its current ten stores, Lidl Malta Limited boasts a total sales area of around [§] square meters and on average employed around [§] employees during the year ended 28 February 2022 (2021: [§] employees). The company generated a profit after tax of circa. EUR[§] million (2021: approx. EUR[§] million) for the financial year ending 28 February 2022. The current existing sales floor area of Lidl is [§] square meters.
8. The other parties to the concentration are Said Investments Limited (hereinafter "**the Target**") 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.
9. 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.
10. 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 Spinola outlet in January 2019, and selling the Sliema and Burmarrad outlets to Lidl Immobiliare Malta Limited in June 2021. The turnover of Scotts Limited was circa. EUR[§] million in 2022 (2021: approx. EUR[§] million). The total sales area of Scotts Limited is estimated around [§] square meters in 2022, when excluding the Sliema and Burmarrad outlets.
11. The Notifying Party and the Target shall together be referred to as "**the Parties**".

3. PROPOSED TRANSACTION

12. The proposed concentration is the acquisition by Lidl Immobiliare Malta Limited of properties at Żabbar (as better defined hereinafter) belonging to Said Investments Limited and leases belonging to Scotts Limited (hereinafter after "**the Proposed Transaction**").
13. On 24 August 2023, Lidl Immobiliare Malta Limited entered into a Promise of Sale agreement with Said Investments Limited to acquire the Żabbar Properties comprising of a complex without official number in Triq il-Mina ta' Hompesch in Ħaz-Żabbar, with a superficial area of approximately 6,020 square metres 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 Ħaz-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 [§] 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 [§] 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-Mandarin” in the limits of Ħaz-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 [X], on the south west in part by property of [X] 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 [X] or other variable boundaries.
14. The Parties to the concentration agree that the Żabbar Properties will be sold tale quale in their current state and condition, with all their rights and appurtenances, including the overlying airspace and their underlying terrain. The Żabbar Properties will be transferred with vacant possession upon the signing of the Deed of Sale.
15. The Parties to the concentration agree that their intention is to transfer the Żabbar properties as a stand-alone asset. According to the Notifying Parties to the concentration, it is not the intention for Lidl Immobiliare Malta Limited and/or Lidl Malta Limited to acquire the business that is carried out by Scotts Limited from the Żabbar Properties. The transaction therefore excludes the transfer of any going concern, personnel, goodwill, intellectual property, tradenames or trademarks, trade secrets and/or customer databases, etc. Furthermore, nothing in the Promise of Sale and /or the Deed of Sale shall be interpreted or construed so as to create or impose any sort of limitation or prohibition on how the Vendor (Said Investments Limited) or the Tenant (Scotts Limited) conduct their business in the future, and accordingly Said Investments Limited and/or Scotts Limited may perform any act of business or trade, including those which may be in competition with the business or trade of the Purchaser.
16. The Promise of Sale agreement is conditional on the decision of the Director General of the Office for Competition, declaring the transaction a lawful concentration in terms of the Control of Concentration Regulations. The proposed concentration is not subject to review by any other competition authority.

4. LEGAL BASIS AND JURISDICTION

17. The mission statement of the Malta Competition and Consumer Affairs Authority is “*the attainment and maintenance of well-functioning markets for the benefit of consumers and economic operators*”.¹ To this end, the Authority is entrusted with a number of functions amongst which is “*to promote and enhance competition*”.² This function is carried out by the Office for Competition which is empowered by law to apply and enforce the Competition Act, Cap. 379 of the Laws of Malta.
18. Article 14 (1) of the MCCA Act explicitly states that the Office for Competition has the responsibility “*to examine and control concentrations between undertakings in terms of their effect on the structure of competition on the market*”.³ The Office for Competition 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 of the undertakings concerned as set out in the definition of concentration in regulation 2 of the Control of Concentrations Regulations.
19. Regulation 2 of the Control of Concentrations Regulations defines a concentration as, *inter alia*,

¹ Article 4(1) of the Malta Competition and Consumer Affairs Authority Act (henceforth 'MCCA Act'), Chapter 510 of the Laws of Malta.

² Article 4(2)(a) of the MCCA Act.

³ Article 14(1)(b) of the MCCA Act.

“...the acquisition by one or more undertakings or by one or more persons already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.”

[Emphasis Added]

20. The Office for Competition considers that the transaction which has been notified falls under regulation 3(2) proviso of the Control of Concentrations Regulations which provides that:

“Provided that where two or more such transactions take place within a two-year period between the same persons or undertakings they shall be treated as one and the same concentration arising on the date of the last transaction.”

[Emphasis Added]

21. The Office for Competition considers that pursuant to the above provision, the transaction dated 30 June 2021 (which relates to the date of signing of final deed of sale between Lidl Immobiliare Malta Limited and Said Investments Limited following the decision by the Office on 9 June 2021 to approve the concentration between the said Parties) and the transaction dated 22 March 2023 (which relates to both the Promise of Sale Agreement for the purchase of the Żabbar Properties and the Promise of Assignment of Lease Agreements for the assignment of leases of Attard, Santa Lucia, and Naxxar properties between Lidl Immobiliare Malta Limited and Said Investments Limited) **should be aggregated and shall be treated as one and the same concentration having occurred simultaneously on 22 March 2023**. Under these conditions, taking into account a period of less than two years between this first transaction and the second transaction, it is appropriate to include the first transaction in the scope of the acquisition to be examined.
22. The Office considers that notwithstanding that the Promise of Sale Agreement entered on the 22 March 2023 for the purchase of the Żabbar Properties was terminated, the new arrangement, entered on 24 August 2023 is merely an amended form of the initial promise of sale agreement. The new Promise of Sale Agreement is re-proposing the original contemplated transaction entered on 22 March 2023, i.e., the purchase of the Żabbar Properties. The Office considers that irrespective if in the form originally contemplated, or as notified to the Office, the transactions would have brought about an acquisition of control, in particular of the target undertaking subject to the notification.
23. The Office thus considers the Proposed Transaction as constituting a concentration and since the thresholds are satisfied, the transaction is deemed notifiable for all effects and purposes of the law.
24. Furthermore, regulation 6(1)(iii) of the Control of Concentrations Regulations 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.”

25. 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.

5. PROCEDURE

26. On 24 August 2023, a Promise of Sale Agreement was duly signed between Said Investments Limited (Vendor) and Scotts Limited (Tenant), and Lidl Immobiliare Malta Limited (Purchaser) to purchase the Żabbar Properties with operational permits and with vacant possession. The Proposed Transaction follows another proposed transaction dated 22 March 2023 which relates to both the Promise of Sale Agreement for the purchase of the Żabbar Properties and the Promise of Assignment of Lease Agreements for the assignment of leases of Attard, Santa Lucia, and Naxxar properties between Lidl Immobiliare Malta Limited and Said Investments Limited. The transaction of 22 March 2023 was later abandoned by the Parties.
27. Following a number of meetings convened between the Office for Competition and the Notifying Party, the concentration notification form was deemed complete on Tuesday 14 November 2023. The period between the date of the agreement 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 to by the Director General of the Office for Competition.
28. The filing and the acceptance of the concentration notification was notified to the public through a public notice in the Government Gazette (No. 21,152) on Friday 17 November 2023 and a notice that appeared in a local newspaper and on the Malta Competition and Consumer Affairs Authority's website on the same day.⁴
29. In compiling the competitive assessment at this stage, the Office for Competition has relied extensively on relevant guidelines issued by the European Commission, European competition case law, and previous decisions issued by the Office for Competition in the Maltese grocery retail sector. These include the Phase II decision issued by the Office for Competition on 5 June 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,⁵ the Phase II decision issued by the Office for Competition on 9 June 2021 concerning the acquisition by Lidl Immobiliare Malta of some of the buildings belonging to Said Investments Limited and leases belonging to Scotts Limited to operate 'Lidl' supermarkets from them,⁶ and the Phase I decision issued by the Office for Competition on 10 November 2021 in relation to the proposed acquisition by Lidl Immobiliare Malta Limited of property at Żabbar belonging to Said Investments Limited to operate Lidl supermarket.⁷ The former 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. The latter concentration concerned the same sector in Malta and involved the same parties to this proposed concentration, whereby the Office analysed the competitive situation pre- and post-acquisition of these Parties.
30. On 17 November 2023, the Office for Competition published an invitation for third parties to put forward their objections on the proposed concentration.⁸ To guarantee wide outreach, the Office for Competition has also published the invitation on the Government Gazette and a local newspaper on the same day. Moreover, on 17 November 2023, the Office for Competition also

⁴ *Invitation to Comment* < <https://mccaa.org.mt/media/8794/invitation-for-third-parties-to-comment-lidl-scotts-zabbar-property-november-2023.pdf> > last accessed 25 November 2023, 17 November 2023.

⁵ Case COMP/MCCAA/01/2020 - Assessment of Proposed Concentration between Retail Marketing Ltd., Co-op Trading Company Ltd., Polrem Ltd., S. Borg & Sons Ltd., Tower Supermarkets Complex Ltd., Valyou Pendergardens Operations Ltd., Belleview Supermarkets Co. Ltd. and Valyou Supermarket Ltd (Phase II Decision).

⁶ Case COMP/MCCAA/13/2020 - 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. (Phase II Decision)

⁷ Case COMP/MCCAA/11/2021 - Assessment of Proposed Acquisition by Lidl Immobiliare Malta Limited of Property at Żabbar Belonging to Said Investments Limited to operate Lidl Supermarket (Phase I Decision)

⁸ *Notification of Concentration* < <https://mccaa.org.mt/Section/Content?contentId=9368> > last accessed 25 November 2023, 17 November 2023.

sent an email to grocery retail outlets inviting them to submit their comments on the proposed concentration. Four Third-Party objections were received.

31. In evaluating the Żabbar proposed concentration in 2021 by the same Parties, the Office for Competition deemed it important to analyse both the demand-side and supply-side aspects. The demand-side (consumer) perspective is considered important for the following reasons: (i) it plays a crucial role in accurately defining and delineate the retail grocery market in Malta, (ii) it ensures that the competitive evaluation is grounded in the local context, rather than relying exclusive on European case law, and (iii) it guarantees that the decision made by the Office for Competition is reflective of the current market dynamics rather than being rooted in conjecture and counterfactuals driven by subjective elements. On the other hand, when examining the supply-side perspective, specifically focusing on grocery retail outlets, the Office for Competition is drawing upon two key sources of data: (i) Third-Party Objections raised against the proposed concentration, and (ii) Requests for Information sent to all grocery retail outlets in Malta. These requests primarily cover data pertaining to store market size, turnover, average sales per customer, selling prices of various branded products, the breadth of product offerings across diverse food and beverage categories, and additional inquiries related to services such as advertising programmes, customer service standards, and loyalty schemes, among others.
32. As of 23rd November 2023, in light of the absence of publicly accessible information regarding the supply-side retail grocery market in Malta, the Office for Competition issued a Request for Information to grocery retail outlets in Malta, in accordance with Regulation 10 of the Control of Concentrations Regulations. The analysis of the demand-side will involve conducting an exit-store survey at the Żabbar outlet, aiming to provide a more precise quantification of the impact of the acquisition on competition. Consequently, evaluating the demand-side perspective is important not only for understanding the prevailing consumer trends but also for gaining insights into consumer behaviour.
33. The adopted methodology is the same as the one employed in previous retail market concentration decisions that also involved the same Parties (refer to paragraph 29). Nevertheless, the Office is updating the supply-side data to include recent turnovers, newly established outlets, and potential alterations in product diversity and service attributes. Simultaneously, the necessary groundwork is being undertaken to analyse the demand-side aspects.
34. Furthermore, for the purposes of conducting the assessment required in the Phase I decision, the Office for Competition relied on publicly available final consumption expenditure of households by consumption purpose data issued by the National Statistics Office 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 was assumed to be the most reliable available source of data to estimate the total market value of sales generated by supermarket operators in Malta.

5.1. The Grocery Retail Sector in Malta

35. The grocery retail 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 defined as food and beverages sold by grocery retailers, as well as toiletries, cleaning products and similar items.⁹ Alongside core groceries, the Parties involved in this concentration also sell items such as electronic equipment, household goods, clothing and personal care items, etc.
36. Based on data published by the National Statistics Office, in 2022 Maltese households spent around EUR1,093.5 million on food and non-alcoholic beverages which figure surpasses EUR1,406.7 million if alcoholic beverages and tobacco are also included. Food and non-alcoholic beverages account for approximately 13.2 percent of Maltese households' total expenditure

⁹ Food sold at restaurants, cafes and take-outs is excluded from the definition of 'core groceries' adopted in this decision.

which figures increases by 3.8 percentage points when including alcoholic beverages and tobacco. The component of food and non-alcoholic beverages is one of the largest components of the households' consumption basket. 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.

37. The grocery retail landscape in Malta is diverse, encompassing a wide array of outlets. Within the modern retail trade channel, one can find supermarkets, discount stores, grocery and convenience stores, online platforms, as well as independent food specialists such as vegetable hawkers, butchers, and fish hawkers. These establishments may operate as part of larger retail chains or as standalone, independent undertakings.
38. In its previous decisions, the Office for Competition defined 'grocery and convenience stores' and 'independent food specialists' as grocery retail outlets with a sales floor area smaller than 200 square meters and that sell a range of grocery products. 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. In order to precisely define the product market, the Office for Competition is collecting and analysing total sales data from each store. Like in previous decisions, the Office for Competition does not view this distinction as a decisive factor in determining the boundaries of the relevant market. For instance, although Lidl stores fall under the category of discount stores, they are recognised as exerting a competitive influence on other grocery retail outlets in Malta, despite belonging to a different channel. Nevertheless, the Office for Competition consistently labels Lidl stores as discounters due to their distinctive product offerings, appeal to price-sensitive consumers, and the widespread industry usage of this term.

5.2. Counterfactual

40. The Office evaluates the impact of a concentration by comparing it to the scenario that would exist in the absence of the proposed concentration, known as the counterfactual. Typically, for proposed concentrations, the Office uses the existing competitive conditions as the counterfactual against which to assess the effect of the concentration. In its assessment, the Office for Competition evaluates whether the proposed concentration results in a substantial lessening of competition when compared to the prevailing market environment situation, i.e., absence of the proposed concentration.
41. However, the Office recognises the importance of considering additional factors in its assessment. This includes taking into account potential competition, such as the entry of Eurospin, a prominent discount store presently operating in Italy and Slovenia, as ex-post counterfactual and proposed new retail grocery outlets.
42. The scope of counterfactual analysis is not intended to forecast the market at a specific moment in time. Rather, the goal is to develop plausible and realistic counterfactuals that serve as a benchmark for assessing the actual market outcomes. Although the Office for Competition commonly adopts existing competitive conditions as the counterfactual, it remains open to exploring alternative scenarios with varying probabilities as potential market environments. It is essential to note, however, that any counterfactual competitive dynamics considered by the Office for Competition must align with and adhere to competition law.

5.3. Summary of Selected Concentration Decisions within an EU Jurisprudence Framework

43. The Office for Competition has reviewed some of the most important decisions of concentrations that have taken place in the grocery retail sector within the EU jurisprudence framework. The

rest of this section highlights the main decisions for which an in-depth investigation was warranted, for a final concentration decision to be taken.

44. The Office for Competition issued a Phase I decision in 2020 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.¹⁰ The Office for Competition 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 for Competition 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. This concentration was then subsequently cleared by the Office for Competition following a Phase II assessment.¹¹
45. In the grocery retail market, the Office for Competition issued another Phase I decision in 2021 on the proposed acquisition by Lidl Immobiliare Malta of some of the buildings belonging to Said Investments Limited and leases belonging to Scotts Limited to operate 'Lidl' supermarkets from them, specifically the Scotts supermarkets in Burmarrad, Sliema, and Żabbar, as well as two divided portions of undeveloped land in Attard.¹² The Office for Competition opined that the proposed concentration raised doubts regarding the compatibility with the Control of Concentrations Regulations and believed that it may limit competition in the grocery retail market. This was 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 Office for Competition concluded the proposed concentration may have led to a substantial lessening of competition in the grocery retail market, especially at the local level when it came to the Żabbar outlet when assessing the competition constraints within the Żabbar outlet's geographic catchment area.
46. Consequently, the Office for Competition made an in-depth assessment of this concentration at phase II¹³ and concluded that following the abandonment of the original proposed concentration as contained in the original notification and the submission of a modified agreement duly signed on 10 May 2021, whereby the parties terminated the promise of sale agreement in so far only as it concerns the Żabbar properties and retained the agreement with respect to the Attard and Burmarrad properties and the original leased properties promise agreement for the Sliema outlet, save for minor modifications, the proposed acquisition was cleared by the Office for Competition as it was not expected to result in a substantial lessening of competition in Malta.
47. The Office for Competition also issued a phase I decision in relation to the proposed acquisition by Lidl Immobiliare Malta Limited of property at Żabbar belonging to Said Investments Limited to operate a 'Lidl' supermarket.¹⁴ As was the case in the previous COMP/MCCAA/13/2020 decision issued by the Office for Competition, this proposed acquisition raised serious doubts as it could lead to a substantial lessening of competition in the grocery retail sector, especially at the local level. The Office also concluded that it required detailed market data, including the outcome of a store exit survey to be able to carry out its assessment and quantify the effects of this acquisition

¹⁰ Case COMP/MCCAA/01/2020 - Assessment of Proposed Concentration between Retail Marketing Ltd., Co-op Trading Company Ltd., Polrem Ltd., S. Borg & Sons Ltd., Tower Supermarkets Complex Ltd., Valyou Pendergardens Operations Ltd., Belleview Supermarkets Co. Ltd. and Valyou Supermarket Ltd (Phase I Decision).

¹¹ Case COMP/MCCAA/01/2020 - Assessment of Proposed Concentration between Retail Marketing Ltd., Co-op Trading Company Ltd., Polrem Ltd., S. Borg & Sons Ltd., Tower Supermarkets Complex Ltd., Valyou Pendergardens Operations Ltd., Belleview Supermarkets Co. Ltd. and Valyou Supermarket Ltd (Phase II Decision).

¹² Case COMP/MCCAA/13/2020 - 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. (Phase I Decision).

¹³ Case COMP/MCCAA/13/2020 - 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. (Phase II Decision).

¹⁴ Case COMP/MCCAA/11/2021 - Assessment of Proposed Acquisition by Lidl Immobiliare Malta Limited of Property at Żabbar Belonging to Said Investments Limited to operate Lidl Supermarket (Phase I Decision).

on competition. However, during the Phase II investigation carried out by the Office for Competition, this proposed acquisition was abandoned on 8 February 2022.

48. The British multinational Tesco plc agreed to acquire the UK's largest grocery wholesaler, Booker Group plc, in 2017.¹⁵ 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.
49. 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.
50. 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 2018.¹⁶ 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 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.
51. Data on the market shares of grocery stores in Great Britain shows that the percentage share of the grocery market of the so-called big four outlets (i.e., Tesco, Sainsbury, Asda, and Morrisons) dropped by 4 percentage points from 71.1% from January 2017 to 67.1% in October 2023. For the same period, Aldi and Lidl shares collectively increased by 6.8 percentage points from 10.7% to 17.5%.¹⁷ Moreover, their shares are growing exponentially. In fact, in September 2022, Aldi took over fourth place in the grocery store ranking from Morrisons in the grocery retail market for the first time. Moreover, in April 2023, Aldi's market share reached double digits also for the first time in the UK market. Data also shows that the German based Schwarz Group, which operates the discounter Lidl, is by far the leading food and beverage retailer in Europe.¹⁸ Moreover, the second largest retailer in Europe is Aldi, showing even more the increasing influence that discounters are exerting in the grocery retail market in Europe. Data shows that in most European countries, Lidl is often the more popular with consumer, from the two big discounters mentioned.
52. In 2017, the German Federal Cartel Office (hereinafter referred to "FCO"), prohibited the acquisition of the supermarket chain Tengelmann by EDEKA.¹⁹ Tengelmann sought to offload its Kaiser's business to Edeka, as Kaiser was too small to compete with Germany's leading food

¹⁵ Tesco/Booker merger enquiry, CMA decision of 21 July 2017 (Phase I).

¹⁶ J Sainsbury PLC/Asda Group Ltd merger inquiry, CMA decision of 27 September 2018 (Phase I),

¹⁷ Bedford, Emma. "Market Share of Grocery Stores in Great Britain from January 2017 to December 2022." *Statista*, 14 Nov. 2023, www.statista.com/statistics/280208/grocery-market-share-in-the-united-kingdom-uk/.

¹⁸ Statista. "Sales of Europe's Leading Food Retailers 2018." *Statista*, 2023, www.statista.com/statistics/666886/leading-food-retailers-of-europe-based-on-sales/.

¹⁹ Case B2 - 31/17 Examination under competition law following the withdrawal of appeals against the ministerial authorisation granted to EDEKA/Tengelmann, 16 November 2017.

retails such as Lidl, Aldi, Metro's Real hypermarkets, and Rewe. Generally, the FCO follows a more data-based approach when assessing mergers and market power. For the EDEKA/Tengelmann case, the FCO analysed a huge body of data which showed how the turnover generated by different supermarket formats (full range and discount) changed with the opening and closure of other outlets. In its investigation, the FCO opined that the takeover would have considerably worsened competitive conditions in highly concentrated regional markets and in municipal districts such as Berlin and Munich, where Edeka's market share would surpass 10%. The takeover of Kaiser's Tengelmann would have greatly limited the choice for local consumers and the possibilities for them to switch to another retailer. The elimination of an important competitor would also have given the remaining competitors greater leeway for raising prices in the future.

53. Another concentration in the retail grocery market was the one 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 2019.²⁰ 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 2019.²¹ 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 (hereinafter referred to as "ICA") 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.
55. The Spanish Competition Authority (hereinafter referred to as "SCA") approved the acquisition of Supersol proximity stores and supermarkets in Spain for a final value of €78 million by Carrefour Group.²² The concentration included the acquisition of 172 convenience stores and supermarkets mainly located in Andalusia and the Madrid region. The proposed concentration gave rise to three reference product markets in which the activities of the Parties overlap in Spain; the retail distribution of daily consumer goods, the supply of daily consumer goods, and the real estate market specifically the rental segments of real estate for commercial and industrial purpose. In the analysis of the geographic market, the SCA considered isochrons with a distance of 15 minutes assuming that consumers are within the that urban area and 30 minutes when consumer live in a rural area or there is no other close establishment. The SCA opined that from the relevant market established as defined by the above isochrones, the concentration does not pose any threats to competition and that alternative retail outlets can still compete within that catchment area. Thus, the notified transaction did pose an obstacle to the effective competition in the analysed markets, resulting in it to be a first phase decision without commitments.
56. In June 2022, the European Commission referred in its entirety, to the Belgian Competition Authority (hereinafter 'BCA'), the proposed acquisition by ITM Alimentaire Belgium S.A. of Mestdagh S.A. and its 100%-owned subsidiary Superlog S.A.²³ The relevant markets identified

²⁰ Case Soditroy/ Association des Centres Distributeurs E. Leclerc, decision of 24 October 2019.

²¹ Case C12247B - BDC Italia-Conad/Auchan, 25 February 2020.

²² Case C/1154/20 CARREFOUR / SUPERSOL, 12 January 2021.

²³ Case CONC-C/C-22/0031 - ITM ALIMENTAIRE BELGIUM / MESTDAGH

were the national market for the procurement of daily consumer goods for sale via retailers and the local market for the retail sale of daily consumer goods through modern distribution channels. Before the envisaged concentration, Mestdagh's 89 points of sale were being operated under the Carrefour "Market" and "Express" brands based on a master franchise and franchise agreement entered into between Mestdagh and Carrefour Belgium. Following the share purchase agreement by which ITM acquired the shares in Mestdagh, the latter terminated the franchise agreement with Carrefour. The idea was to align the Mestdagh sales strategy with ITM's independent operation mode and to operate outside a franchise structure. The BCA gave its approval of this merger in a published phase I decision on 9 November 2022, as it found no serious doubts that the merger would create competitive constraints. However, this decision was challenged by Carrefour, as the concentration could be problematic, in particular in certain catchment areas that Carrefour considered to be affected markets. However, the Belgian Court of Appeal rejected Carrefour's request for the suspension of the BCA's decision.

57. Following a Phase I assessment, the ICA approved on 6 June 2023 the acquisition by Conad Nord Ovest, through its associate and investee NordOvest Insieme, of a Bennet business branches, concerning three supermarkets in Turin (classified as hypermarket), Ovada and Verbania, changing the branches names from Bennet to Conad.²⁴ The transaction involving Turin and Ovada, with a total turnover of less than 32 million euros in 2021, have already been acquired on 31 January 2023. However, the acquisition became notifiable as the last acquisition involving the supermarket in Verbania exceeded the threshold of 32 million euros of the total turnover, and thus triggered the obligation to notify the entire operation. The market involved the retail sale of food and non-food products. When assessing the local geographic market, the ICA defined these as consisting of isochrones curves centres on the target point of sales, with a distance of 10 minutes' drive for small supermarkets and 15 minutes for larger supermarkets and hypermarkets. After making its assessment, the ICA concluded that both on a national and local level, the concentration in question does not appear suitable to significantly hinder the effective competition in interested markets and to determine the creation or strengthening of a dominant position.

6. RELEVANT MARKET

58. 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 Competition for highlighting immediate competitive constraints faced by the parties involved in the concentration.

59. 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".

60. 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

²⁴ Case C12532 - NORDOVEST INSIEME/RAMI DI AZIENDA DI BENNET.

involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure".²⁵

61. For the purposes of this decision, the Office for Competition retained the same methodology adopted in the assessment of the previous concentrations involving the same parties. The methodology adopted in this decision shall not be construed as the starting point on which future assessments will develop.

6.1. Product Market

62. 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".²⁶

6.1.1. Retail Grocery Market

63. In its previous decisions, the Office for Competition has delineated the product market of the retail supply of groceries based on multiple-criteria analysis.²⁷ Following numerous case law and studies on the subject, at the first stage, the Office for Competition 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.
64. At the second stage, the Office for Competition 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. 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. Grocery stores that were identified as exerting a competitive constraint in at least two of the three store attributes (Price, Range, and Service) were considered to be within the relevant product market.²⁸ The Office for Competition concluded that out of the 72 grocery retail outlets with a sales floor area which is equal to or greater than 200 square meters, 41 grocery retail outlets are classified as supermarkets and discounters or exert direct competitive pressure on this channel.²⁹
65. Based on the above, the Office concluded that it is appropriate to delineate between stores of different size. Discounters and supermarkets owned by the Parties are constrained by other supermarkets. However, convenience stores, independent stores and free-standing food specialists do not significantly constrain the Parties.³⁰
66. The Notifying Party, however, submits that the product market should be more broadly defined. The Notifying Party argues that in light of the current socioeconomic circumstances of the Maltese economy the competitive analysis of this proposed concentration, should not, exclude competitors merely due to their sales floorspace being below 200 square meters. Furthermore, the Notifying Party contends that in the competitive assessment, the Office should not assess

²⁵ See Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), para 2.

²⁶ Ibid, para 7.

²⁷ Cases COMP/MCCAA/01/2020; COMP-MCCAA/13/2020; COMP/MCCAA/11/2021

²⁸ Case COMP-MCCAA/13/2020, para 63

²⁹ Case COMP-MCCAA/11/2021, para 55

³⁰ Case COMP/MCCAA/13/2020, para 63.

each store individually but in aggregate, meaning that each convenience-type store of the same chain in the same geographic market should be treated as one outlet. Specifically, the parties argue that the Office should distinguish between “organised grocery retail networks” (such as The Convenience Shop, Maypole or Daves) which operate in the market through a mix of outlets in excess of or smaller than 200sqm and online, and independent corner stores or grocery stores which do not form part of an organised grocery retail network, and which therefore do not in and of themselves exert a competitive constraint over supermarkets and discounters.

67. While the Office acknowledges the views presented by the Parties, it maintains that there is insufficient justification to remove or alter the 200 square meters benchmark. The product market definition established in recent cases remains pertinent.
68. The Office emphasises that the reason behind this delineation by store size is that from a demand-side perspective, small stores are not considered to be good substitutes for larger stores on the basis that they may not supply the full range of products which a larger store offers and therefore, may not be able to cater for shopping ‘missions’ that involve larger or wider range of products. In fact, there is also general consensus that the competitive constraints faced by grocery stores is asymmetric in the sense that large stores do impose competitive constraints on smaller stores but not vice-versa.³¹
69. The Office notes that in its past decisions the 200 square meters benchmark was not arbitrary set as there is a strong correlation between store size and product range for stores with sales area larger than 200 square metres, with a correlation factor of 0.8. This signifies that with a bivariate linear model, 80% of the variation in product range can be explained by the size of the store. While the Office recognises that this should in no way should be interpreted as causal, this relationship between store size and product range supported the view that customers may not find stores with less floorspace an effective substitute for stores with more floorspace due to their smaller range of products.
70. Additionally, from the supply-side standpoint, it would be speculative to assert that smaller outlets lack distinctiveness from larger stores. From a supply point of view, smaller outlets cannot reap the benefits of economies of scale, implying that their average cost per unit to remain high or decrease less significantly as they expand their operations. Furthermore, smaller stores are confronted with higher average fixed costs than larger stores because they have more constraints to streamline operations, manage inventory more efficiently, and enhance customer service. By way of example, smaller stores, irrespective their ownership, have limited ability to spread fixed costs, such as rent, utilities, and labour, over a larger revenue base. For example, The Convenience Store, despite having a chain of stores, in its prospectus notes that:

“In recent years, the Group has been refining its strategy at an operational level. From an own operated store perspective, the Group is now also focusing on the acquisition of existing grocery stores with a specific preference on stores which exceed 400 square meters in floor area. This approach reduces the risk of setting up a new store (which may underperform) and also allows the Group to realise better own store margins due to the economies of scale of operating a larger shop.”³²

[Emphasis Added]

These supply-side factors further justify the distinction based on size.

³¹ For example, Co-operative Group / Nisa retail merger enquiry, CMA decision of 23 April 2018; Tesco / Booker merger enquiry, CMA decision of 21 July 2017 (Phase 1) and Final Report of 20 December 2017 (Phase 2); Asda stores / Cooperative Group merger inquiry, CMA decision of 28 November 2014; J Sainsbury PLC / Asda Group Ltd merger inquiry, CMA decision of 25 April 2019.

³² The Convenience Shop (Holding) PLC Prospectus of 25 January 2023, page 18.

71. Furthermore, the Office also notes that the 200 square meters benchmark was never objected by the same Parties involved in this concentration in previous notifications.
72. The Parties argue that any price, quality, range, and services assessment carried out by the Office in previous decisions which forms the basis of the “product market” definition of the proposed concentration may need to be revisited to reflect the changing trends in the Maltese grocery sector experienced over the past three years. For the Office for Competition to analyse the price, quality, range, and service attributes for each retail outlet with a sales floor area equal to or exceeding the indicated threshold, an RFI was sent on 23 November 2023 to the grocery retail outlets in Malta. The main objective was to determine the sales floor area and, if it exceeds 200 square meters, collect data on price, quality, range, and service. The Office is still in the gathering process of some observations and is also in the progress of analysing the primary data collected.

6.1.2. Online Grocery

73. The Parties also contend that the growing phenomenon of online shopping should also be re-assessed from previous decisions and should be included by the Office in the relevant market definition given that this constitutes an important and substantial segment of the groceries market in Malta. The Notifying Party further argues that the growing demand for this service, exercises a competitive constraint on brick-and-mortar grocery stores, and can be evidenced by the fact that most major players in the consumer grocery market (except for LIDL) provide this service to consumers.
74. The Office for Competition contends that in previous decisions grocery shopping was found to be unpopular in Malta. From the analysis conducted in 2020, the Office noted that there are heterogenous preferences for the online channel, in particular, the majority of those who engage expressed preferences for online shopping related to food cupboard items and household detergents.³³ On the other hand, pet food and ironmongery items are the least popular choices for online grocery shopping. Furthermore, the Office found that only a small proportion of respondents who do not currently engage in online grocery shopping were considering substituting the traditional method with the online alternative. This indicates a certain level of resistance or hesitancy among a significant portion of the surveyed population towards adopting online grocery shopping as their primary method.
75. The Office acknowledges that the Covid-19 pandemic and the availability of online platforms may indicate a change in consumer preferences. Therefore, the Office will assess the online channel in two ways. First, by measuring the size of the sales generated through the online channel relative to the overall sales in the grocery retail market, to determine in Phase II if it is substantial after all. In this regard, to determine the size of the online market, an RFI was sent on 23 November 2023 to the grocery retail outlets in Malta. Second, the Office will conduct an exit-store survey in the affected market to evaluate the online channel and define the product market accordingly. Past decisions of European Commission have left it open and other competition authorities concluded that online delivered groceries represent a separate product market rather than being part of a product market that also included in-store groceries.

6.1.3. Amalgamation of Stores

76. The Notifying Party believes that the affected product market should be re-assessed and should include, organised grocery retail networks with an aggregate floor space equal to or in excess of 200 square meters. This is because a number of convenience shop outlets in the relevant

³³ COMP/MCCAA/01/2020 - 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 Ltd., Belleview Supermarkets Co. Ltd. and Valyou Supermarket Limited (Phase 2 decision)

geographic market, may be compared in sales floor area to 2 or 3 medium-sized supermarkets in excess of 200 square meters when taken together. Therefore, according to the Notifying Party, the consequent exclusion of a number of undertakings from the relevant product market on this basis, should be reviewed and/ or reconsidered, given that such approach is likely to lead to a skewed delineation of the market realities currently at play in the Maltese grocery sector.

77. The Office asserts that the amalgamation of sales floor areas of nearby stores should be avoided, and the competitive assessment is to be based on each store, even those that are in the same operator's chain. This method is grounded in several factors, as explained further below.
78. To begin, when assessing the potential competition effects and determining the presence of competitive constraints, the approach involves differentiating between store sizes. Therefore, the amalgamation of these stores, as suggested by the Notifying Party, would essentially blur the distinctions in store sizes. This approach risks categorising any mini-market, grocer, or discount chain as a supermarket or hypermarket, irrespective of their pricing strategy. It is important to recognise that the store size principal remains a pivotal aspect in the evaluation of competition within the retail market, in particular because of product range (refer to paragraph 69). Treating stores within the same town or geographical area as a one store not only alters why chains choose to cluster stores in particular areas but also overlooks why smaller stores have different price, quality, range and service strategies and their presence in strategic locations.
79. Additionally, amalgamation of small stores would also overlook the fact that typically it is sales-per-square foot, not local community need, that dictate where supermarket chains choose to locate. For example, when a convenience store or supermarket chooses to open a new outlet first sift locations according a wide range of factors – population density, footfall, the proximity of certain locations such as shopping malls, business centres, hotels and entertainment hubs nearby, schools or attractions, amongst others.³⁴ Furthermore, smaller stores are subject to competitive constraints from other convenience and smaller stores due to relatively the same revenue base.
80. Moreover, the European Commission and competition authorities rely their assessment on stores/points of sale to evaluate proposed concentrations, specifically focusing on distinct types such as hypermarkets, supermarkets, minimarkets, and discount stores.³⁵ Competition authorities have used analysis of catchment areas to identify areas where the Parties' stores overlap. Stores are likely to be alternatives for some customers, and therefore competitors, if their catchment areas overlap. If the Parties' catchment areas overlap, then further analysis will be required to determine whether a substantive competition lessening may arise.
81. Furthermore, each of these points of sale is meticulously differentiated based on various characteristics like size, positioning, product range, presence of fresh food counters, and other factors that contribute to determining their quality and level of services. Also, a large one-stop shop grocery store typically has a 10-to 15-minute catchment area, whereas a small grocery store has a much smaller catchment area.³⁶ So, aggregating smaller stores into one would also distort the geographic market catchment area to discussed further in the next section.
82. From a supply perspective, as discussed in paragraph 70, smaller outlets cannot take advantage of economies of scale. This implies that their average cost per unit remains high or decreases less significantly as they expand their operations by opening further small outlets. Therefore, aggregating outlets would distort the supply-side characteristics of each store and the fact that they each have different points of sale.

³⁴ For example, see the Prospectus of The Convenience Shop (Holding) PLC, published on 25 January 2023, pg. 18.

³⁵ For example, see Case C12279 - DIPERDI/COMPANY BRANCHES OF SMA AND SOCIETÀ GENERALE DISTRIBUTION; Case M.11165 – CARREFOUR / ROMANIA HYPERMARCHE 23-26; C12532 - NORDOVEST INSIEME/RAMI DI AZIENDA DI BENNET; Case M.10631 – ITM / MESTDAGH para 20.

³⁶ Case ME/3777/08 Office for Fair Trading. Anticipated acquisition by Co-operative Group Limited of Somerfield Limited.

6.2. Geographic Market

83. 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”.*³⁷

84. When defining the geographic market for concentrations in the grocery retail sector, European case law generally distinguishes between national and local aspects to competition.³⁸

85. According to the Notifying Party’s submissions, the parties to the concentration consider the relevant national geographic market to be Malta. The Office for Competition concurs with the Notifying Party’s views in the sense that the geographic market definition should exclude retail 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.

86. The views expressed by the Office for Competition are the same as those stated in previous decisions. According to the demand-side survey conducted by the Office for Competition, 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 for Competition corroborates its view that the national definition of the geographic market should be limited to the Maltese territory since the grocery retail outlet involved in this concentration is located in Malta.

87. To delineate the local geographic market, the Office for Competition 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”.*³⁹

³⁷ Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), para 8.

³⁸ 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.

³⁹ 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.

86. The Parties contend that the geographic market should include, organised grocery retail networks with an aggregate floor space equal to or in excess of 200 square meters in the relevant local geographic market and the travel time should also be revised. While the Office acknowledges the scope for reassessing the catchment areas defined by drive-time isochrones, it maintains that the calculation of travel time should be conducted from each store, as detailed in the reasons presented in paragraph 78-82.
87. Following the methodology adopted in its previous decisions, the Office for Competition will reassess, in Phase II, the local geographic market definitions subject to different scenarios. These are intended to account for possible different traffic volumes.

7. COMPETITIVE ASSESSMENT

7.1. Assessment Framework

88. In compiling the competitive assessment at this stage, the Office has relied extensively on relevant European Commission Guidelines, European competition case law and information received from third parties.
89. As part of its assessment of the effects of a concentration on competition, the Office may use market shares and measures of concentration, assessed on the relevant markets indicated in the previous section. In order to calculate the market shares and compute the concentration ratios, the Office needs access to sales revenue data depending on the relevant market being analysed.
90. As a result, ensuring that the relevant markets (i.e. the relevant product market, the relevant geographic market on a national basis and the relevant geographic market on a local basis) are properly delineated is key for the Office as this determines the boundaries within which the Office defines grocery stores as being substitutable to each other. For example, if the relevant product market is food and beverages, then the Office needs to ensure that when calculating the market shares of supermarkets, the turnover data analysed is solely that attributed to food and beverages and excludes other products not falling under the food and beverages umbrella which the supermarket could be selling from its premises.
91. As stated in regulation 4 of the Control of Concentrations Regulations, in assessing whether a concentration leads to substantial lessening of competition in the Maltese market, the Director General shall take into account, inter alia:
- 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."

92. For the purpose of Section 6 III of the Concentration Notification Form (annexed to the Regulations on the Control of Concentrations), affected markets are 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*

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."

93. The activities of the Parties involve horizontal relationships since collectively the Parties operate 16 established local supermarket stores in Malta and Gozo, 15 of which collectively operate in Malta.

94. In assessing any competitive concerns in relation to the above relationships as a result of the proposed transaction, the Office will factor whether the proposed concentration gives rise to the following anti-competitive effects:

a. **Horizontal unilateral effects:** unilateral effects in concentrations involving horizontal relationships can arise when firms that previously provided a competitive constraint join forces, allowing the joint venture entity to raise prices on its own and without needing to coordinate with its rivals. A theory of harm relevant to the consideration of horizontal unilateral effects is the loss of existing competition.

b. **Coordinated effects:** these arise when firms operating in the same market recognise that they are mutually interdependent and that they can reach a more profitable outcome if they coordinate to limit their rivalry. Coordinated effects could take many forms including firms keeping prices higher than they would otherwise have been post concentration or dividing markets for example by geographic area or customer characteristics.

95. As is postulated in regulation 4 of the Control of Concentrations Regulations:

"Concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration shall not be prohibited if the undertakings concerned prove that such efficiency gains cannot otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services."

96. After assessing the potential anti-competitive effects, the Office shall assess possible efficiencies which are likely to arise from this proposed concentration. These efficiencies will be considered as a mitigating factor, counteracting potential harmful effects on competition that might result from the concentration.

97. In assessing whether a concentration leads to a substantial lessening of competition, the Office will also consider the Third-Party's views and possible changes in the barriers to entry and expansion as a result of the transaction. The Office will also conduct an assessment as to whether the concentration gives rise to countervailing buyer power.
98. The Office considers that it is important to consider the dynamic nature of the groceries market. This includes, on the supply-side, competitors' repositioning to improve and upgrade their offer, and future entry beyond planned store openings. On the demand side, the assessment should incorporate customer preferences, capturing their considerations and hypothetical but probable actions in the event of the Żabbar acquisition.

7.2. Assessment

99. To provisionally measure the size of the product market, the Office for Competition 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. This methodology is in line with the one employed by the Office for Competition in its previous decisions in the Maltese grocery retail sector (refer to cases in paragraph 29). However, the Office shall delineate the product market of the retail supply of groceries based on multiple-criteria analysis as described in paragraph 63).
100. The total market expenditure on food, beverages, personal care and household related equipment in Malta and Gozo for 2021 and 2022 has been estimated at €1.461 billion and €1.709 billion, respectively.⁴⁰ After adjusting for the fact that household stores and ironmongers 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 revised downwards (Table 1).

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

	2021	2021 (adjusted)	2022	2022 (adjusted)	Adjustments
Food and Non-Alcoholic Beverages	930,200	930,200	1,093,500	1,093,500	
Alcoholic Beverages and Tobacco	269,700	269,700	313,200	313,200	
Tools and equipment for house and garden	29,700	7,425	29,000	7,250	25%
Personal care	231,500	173,625	273,700	205,275	75%
Total Market	1,461,100	1,380,950	1,709,400	1,619,225	
Population		520,174		542,051	
of which: Malta		480,907		501,860	
Gozo		39,267		40,191	
Total Market Adjusted for Malta Only⁴¹		1,276,705		1,499,166	

Source: National Accounts, NSO & Eurostat (158/2023)

⁴⁰ NSO & Eurostat (158/2023).

⁴¹ The total market adjusted figure includes all stores in Malta irrespective of size. This is based on the assumption that turnover is proportional to district population and that the grocery retail market accounts for 25% of tools and equipment for house and garden, as well as 75% of personal care sales. This approach was adopted in COMP/MCCAA/01/2020 and COMP/MCCAA/11/2021. The Office leaves open the in-market adjustment parameters as it does not affect the Phase I decision to go for a Phase II investigation.

101. The Parties subject to this concentration collectively accounted for [x] and [x] of Malta's total grocery retail market in 2021 and 2022, respectively. The Office has to still delineate the product market at Phase II as data from the supply-side from the grocery retail outlets in Malta collected through a Request for Information is still being verified. However, even without the delineation of the product market, and subsequently the delineation of the national definition of the geographic market, at this preliminary stage when considering the whole grocery retail market in Malta, the Parties to the proposed concentration already have a combined market share that exceeds the 15% threshold.
102. Following the delineation of the product market by sales area, the Office will then proceed to further sub-divide the product market according to other important demand-side characteristics. In order to properly infer these demand-side characteristics and ascertain that these characteristics truly reflect the local context, apart from referring to European case law, the Office will also be collecting primary data by means of an exit store survey. This survey will help the Office at eliciting consumer behaviour and perception in the Maltese grocery retail market.
103. The review of a proposed concentration should be evidence-based rather than based on subjectivity. Consequently, the replies to the Request for Information received from third parties in the grocery retail markets and the information inferred from the exit store survey will form the backbone for the competitive assessment of the Office.
104. Furthermore, the Office opines that based on the financial data presented in COMP/MCCAA/11/2021 and the application of the product market definition, the Office notes that the Notifying Party had already a substantial market share of [x]% and [x]% for 2019 and 2020, respectively, and the combined market share would increase to [x]% and [x]% for 2019 and 2020, respectively, when including the turnover of Scotts Żabbar,
105. 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.”⁴²

[Emphasis Added]

106. Furthermore, the Office for Competition also refers to paragraph 18 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, whereby it is stated:

“Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share

⁴² 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.

of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it.”

[Emphasis Added]

107. In MCCA/COMP/11/2021, the Office for Competition opined that since the market share of Lidl Malta Limited at a national level both in 2019 and 2020 significantly exceeded the 25% threshold both pre- and post-concentration, a deeper assessment of the theories of harm potentially attributed to this concentration was warranted.⁴³
108. 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...”⁴⁴

[Emphasis Added]

109. The Office also noted in MCCA/COMP/11/2021 that in 2019, the post-concentration HHI exceeds marginally the 2000 threshold value. This is coupled with a HHI delta value which is less than the 150 benchmark. On the other hand, the post-concentration HHI value in 2020 is just under the 2000 threshold value coupled with a delta value of 95.7.
110. Consequently, while market shares analysis at a national level for 2019 and 2020 indicated that the concentration could possibly lead to substantial lessening of competition, the HHI analysis seemed to oppose this view and indicated a more favourable situation. Nonetheless, given the contradictory indications, the Office took the cautionary approach and opted to assess the theories of harm and possible efficiencies which were likely to arise from the proposed acquisition.⁴⁵
111. The Office for Competition therefore concludes that it is too premature to make any significant conclusions from the prima facie evidence and that a more detailed investigation is warranted using more recent product market data.

8. THIRD PARTY VIEWS AND OBJECTIONS

112. On 17 November 2023, the Office notified for general information that it received a notification of a proposed concentration between Said Investments Limited (Vendor, Birkirkara, Malta) and Scotts Limited (Tenant, Birkirkara Malta), and Lidl Immobiliare Malta Limited (Purchaser, Luqa Malta) to purchase Żabbar Properties, belonging to Said Investments Limited and leases belonging to Scotts Limited with operational permits and with vacant possession. The concentration notification was notified to the public through a public notice in the Government Gazette (No. 21,152) and a notice that appeared on the Malta Competition and Consumer Affairs Authority’s website and in a local newspaper on the same day. In that notification, the Office invited interested parties to submit their comments on the proposed concentration. Furthermore, the Office for Competition also sent an email to grocery retail outlets inviting them to submit their comments on the proposed concentration.
113. In total, the Office received four Third-Party submissions, all raising concerns to the proposed concentration. The views submitted by third parties reflect a range of views shared by other grocery retailers on the relative position of Lidl and their competitors.

⁴³ See MCCA/COMP/11/2011, para 76.

⁴⁴ 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.

⁴⁵ See MCCA/COMP/11/2011, para 79.

114. In summary, the main issues relate to the fact that the concentration will lead to a substantial lessening of competition which will bring about negative consequences to both the business community and consumers. A summary is provided in the next subsections.

8.1. Lidl's Dominant Position

115. In general, third parties claim that Lidl has a dominant position in the product market and will continue to consolidate its position. Indeed, respondents stated that Lidl Malta's size is a significant concern especially since its market share has continued to increase over these years of operations and is expected to continue to increase considering the opening of other planned outlets in Malta. Supermarkets, grocery stores, convenience stores, discount stores, butchers, salumerie, vegetable shops and hawkers, fish shops and hawkers as well as online groceries platforms will all be affected.
116. The views claim that an intensification of Lidl's dominance in the market will further attenuate competition; in particular, affecting the viability of other players in the grocery retail industry and eroding consumer welfare because of potentially higher prices, diminished consumer choice, dominance in upstream markets and inferior quality of services.
117. In this regard, two respondents extenuated their arguments by quoting the Office for Competition decisions, in 2020 and 2021, with regards to Lidl and Scotts concentrations. Specifically, one respondent stated that in the Office's decision COMP/MCCAA/13/2020: "... *acquiring the Zabbar grocery retail outlet from Scotts Limited would increase the market share of Lidl Malta Limited... The absolute level of the HHI pre- and post-acquisition markedly exceed the 2000 threshold.*" and goes on to say that "... *the acquisition of the Zabbar grocery retail store is likely to lead to a substantial lessening of competition within this geographic catchment area*" and that "*it is likely to lead to horizontal unilateral effects relating to the elimination of a competitive constraint.*" While the other respondent referred to the Office's COMP/MCCAA/11/2021 decision and argued that back then the Office had raised significant reservations about the compatibility of Lidl's proposed concentration, even when Lidl operated only eight supermarkets. Since then, despite a post-COVID population increase, Lidl has expanded its supermarket count. This expansion, stemming from acquisitions such as those from Scotts and direct Lidl supermarket openings, further highlights the breach of the market share threshold, a concern previously noted by the Office in 2020/21.
118. One third party expressed its concerns that the market power is abused to dictate conditions and pricing on other operators. This causes concern and market tension given that the same operators do not afford to give these same conditions to other Lidl competitors.
119. Given the already significant percentage of market share enjoyed by Lidl, one third-party asserts that the proposed concentration would further cause harm to the market. The same third-party further pronounces that no other supermarket chain in Europe has such a high level of market share within a single country.
120. The proposed concentration will impinge negatively on the viability of the businesses operating within this sector as respondents view Lidl's expansion as diminishing their market share of household grocery consumption.

8.2. Geographical Market and the close proximity of other Lidl Stores

121. In the same vein, respondents claim that on regional level, due to proximity, Lidl competes with them directly and the spread Lidl has on the island makes is a threat for small groceries as it is eating away at their market share of household consumption. Thus, Lidl taking over further territory, means a substantial direct hit to such operators. This also needs to be considered in view that Lidl already has 3 other outlets operating in proximity of the proposed concentration in Ħal Luqa, Ħal Qormi and Żejtun, all within a short distance from one another.

122. Indeed, another respondent quoted the Office's demand-side survey conducted in COMP/MCCAA/11/2021, whereby it was determined that consumers are generally willing to drive a maximum estimated weighted average of 12.8 minutes for their primary grocery shopping. The respondent argued that given this average, it is evident that Lidl already has three supermarkets in close proximity to the proposed location, each within a shorter driving time than this average.

Lidl Zejtun to Scotts Zabbar: Distance - 3.2km, Driving Time* - 7 minutes
Lidl Luqa to Scotts Zabbar: Distance - 5.7km, Driving Time* - 9 minutes
Lidl Qormi to Scotts Zabbar: Distance - 7.5km, Driving Time* - 12 minutes
(*Driving Time is Average Driving Time obtained from Google Maps during daytime hours)

Furthermore, they argue that Lidl's current market share not only surpasses the acceptable threshold percentage but the presence of three existing Lidl supermarkets in close proximity to Scotts Zabbar should be deemed critical factors opposing this application.

123. Most of the received comments view the local market as being too small to accommodate more Lidl stores around Malta and this might lead to LIDL becoming a monopoly. One third party argued that the proposed concentration effectively means "*attaining a large square area of circa 6,000 sqm in Ħaż-Żabbar*", which is over and above the acquisition of further floor area in Ħ'Attard (circa. 2,040 sqm), Żebbug (circa. 2000sqm) and Ħal Qormi (circa 2000sqm). This will lead to a complete comprehensive geographical coverage in Malta - North, South and Central.

8.3. Disruptions in the Wholesale Network

124. One of the respondents argued that this acquisition will severely limit and stifle competition in the grocery supply and retail chain, local food/beverage products manufacturing chain, as well as within the importer and distribution supply chain. Competition will be lessened because of horizontal and vertical consequences in the retail supplies of groceries.
125. Specifically, this is since most local importers and distributors do not sell to Lidl despite their various attempts. This is due to the fact that most products sold at Lidl are sourced and purchased centrally from their headquarters using their economies of scale to do so. Given the size of our local economy and Lidl's size this creates an unlevel playing field for importers, distributors and even those in retail.
126. In a situation where one undertaking is controlling a significant share of the market, importers and suppliers will be operating in a market that will not be economically viable.
127. Similarly, local food producers and manufacturers depend heavily on the local market – only a handful can thrive on exports whereas the majority do not export. Like most of the importers and distributors, they do not sell their products into LIDL.

8.4. Implications for retail consumers

128. With respect to consumer welfare, one third party argues that because the proposed concentration would substantially lessen competition, consumers might face higher prices, less product diversity, as well as, less quality of service. To substantiate its argument, the same party also quotes from Phase I COMP/MCCAA/13/2020 decision that:

"...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."

Furthermore, a third-party claims that the proposed concentration will not necessarily be to the consumers' advantage as it decreases the choices available to consumers with less quality of services. Indeed, the third-party quotes from a survey carried out by the Office on Maltese grocery shoppers in Phase 1 COMP/MCCAA/13/2020 decision which states that:

"... more than 75% of respondents value price, quality, range and service as significant factors when choosing a store for their main grocery shopping."

8.5. Tax Advantage

129. Two respondents noted that Lidl is eligible for the 6/7 tax refund that facilitates its offer significantly and puts local businesses at a disadvantage.

8.6. Unlawful Proposition

130. A third-party strongly noted that:

"...the proposed concentration is not in line with the spirit and dispositions of Control of Concentrations Regulations (Subsidiary Legislation 379.08) particularly more so when taking into consideration regulation 2 which 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 year." and regulation 4 which lays down the factors that need to be taken into consideration when assessing whether the concentration lessens competition in the Maltese market."

131. In addition, the respondent made specific reference to Article 102 of the Treaty on the Functioning of the European Union which prohibits abuse of dominant positions. In Hoffmann-La Roche v Commission (CJEU 85/76), the European Court defined market dominance as follows:

"[the dominant position] relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking, which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment".

The respondent made reference to the Office's COMP/MCCAA/13/2020 decision and argued the fact that this acquisition was already rejected by the Office in 2021 and given that Lidl's market share continued to increase, the conclusion carried out by the Office should still apply.


132. The Office will analyse whether the arguments put forward by the third parties point to serious doubts of substantial lessening of competition. Third parties will also have further opportunities to present their views during the Phase II investigation.

9. CONCLUSION

133. Considering the arguments presented above, and also the concerns raised in the previous Phase I decision by the Office, the Office believes that the proposed concentration may create a situation where it may be expected to result in substantial lessening of competition within a market or markets in Malta.
134. This is especially when taking into account the close proximity of other LIDL stores from the proposed LIDL Żabbar. In line with a previous case decision, the Office holds the preliminary belief that a substantial lessening of competition could potentially occur in the local geographic area. Indeed, this area might exhibit a higher concentration compared to other local geographic areas.
135. However, the Office opines that prima facie evidence does not support conclusive findings to be able to draw conclusions at this stage and there is a need for a thorough investigation to substantiate concerns arising from the proposed concentration.

10. DECISION

136. On the basis of the analysis and assessment presented above, the Director General of the Office for Competition considers that a deeper assessment is warranted and has decided that the Office should initiate proceedings in respect of the proposed concentration in accordance with regulation 6(1)(iii) of the Control of Concentrations Regulations since the proposed concentration raises serious doubts as to the lawfulness thereof.


Melchior Vella
Director