



**Determination No. M/03/001 of the Competition Authority, dated 13 March 2003, under Section 21 of the Competition Act, 2002**

**Notification No. M/03/001 – Musgrave Limited / Express Check-out**

**Introduction**

1. On 12 February 2003 the Competition Authority, in accordance with Section 18(1) of the Competition Act, 2002 (“the Act”) was notified, on a mandatory basis, of a proposal whereby Musgrave Limited would acquire from Mr Joseph Nally four supermarkets operating under the SuperValu brand in Kells, Leixlip, Dunshaughlin and Ashbourne, together with a supermarket development in Ratoath and an interest in a potential development site in Navan.

**The Parties**

2. Musgrave Limited (“Musgrave”), the purchaser, is beneficially wholly-owned by Musgrave Group plc (“the Group”). The principal activity of the purchaser in Ireland is the wholesale and retail distribution of food and general merchandise through a franchise/licence arrangement with independent retailers who own and operate supermarkets under the SuperValu and Centra brand names. The Group also operates a cash and carry business, selling to independent non-aligned retailers and traders. The Group has similar businesses in the UK and Spain.
3. Joseph William Nally, the vendor, is the 100% beneficial owner of Express Check-out, an unlimited company. It acts as a holding company for a series of limited and unlimited companies which are principally involved in the supermarket business, operating under the SuperValu brand under franchise from Musgrave.
4. The undertakings involved in the proposed acquisition are Musgrave Limited and the following target companies (“the targets”) - Lofoten Ltd, Drakenberg Ltd, Garrich Ltd, Berajan Ltd, Tyven Ltd, and their subsidiaries, Express Check-out (Kells), Express Check-out (Leixlip), Lobinda Ltd, Express Check-out (Dunshaughlin), Codami Ltd, Dictamin Ltd, Handby Ltd - which operate the supermarkets and own the development sites that the purchaser wishes to acquire, all located in Counties Meath and Kildare.

**Analysis**

*Horizontal Effects*

5. The proposed transaction would result in a vertical merger between an upstream grocery wholesaling undertaking and a group of downstream grocery retail outlets. As the only grocery retail outlets in the State owned by the purchaser are in Galway and South Dublin, there is no horizontal aspect to this transaction.



### *Vertical Effects*

6. Foreclosure of competing wholesalers could be a concern if the proposed transaction would enable Musgrave to prevent rival wholesalers from selling to Musgrave-owned retail outlets. However, as [80-100] % of goods sold by the target supermarkets are already supplied by the Musgrave Group, these supermarkets are currently unavailable to competing wholesalers.
7. The proposed transaction only marginally strengthens the vertical link which already exists between the purchaser and the targets which operate existing SuperValu supermarkets. There is no reason to believe that this merger would cause Musgrave to profitably discriminate in favour of its Musgrave-owned retail outlets over other retail outlets that the Group supplies.
8. Similarly, there is no risk that this merger would contribute to facilitating collusion at the wholesale level.

### *Ancillary Restrictions*

9. On implementation, Musgrave intends to sell the targets on to new or existing SuperValu/Centra franchisees. Failing that, Musgrave will operate those supermarkets itself. Musgrave enclosed in its notification, copies of its licence agreement with the vendor, Joseph William Nally, and details of the only substantial difference Musgrave proposes to make in its future licence agreements with new retailers. As these licence agreements are not arrangements constituting restrictions which are directly or indirectly related and necessary to the implementation of the notified proposed transaction (as referred to in Sections 4(8) and 5(3) of the Act), they are not covered by this Determination.
10. Clause 12 of the Sale and Purchase Agreement relating to the proposed transaction imposes non-compete restrictions on the vendor. In the initial notification, these restrictions went beyond what was reasonable and proportionate to ensure the protection of the purchaser's legitimate business concerns. In particular, the vendor was restricted from (a) being involved in any business competing with the targets *anywhere in the island of Ireland*, (b) soliciting business from any customers or suppliers of the targets *for any purpose* and (c) engaging, employing or soliciting any employee of the targets *for any purpose* for a period of two years after the proposed transaction was complete and from *ever* doing or saying anything which "is harmful to the reputation" of the Group or which "may lead any person to cease to deal with any Group Company on substantially equivalent terms to those previously offered or at all".

### **Proposals**

11. The parties subsequently submitted a proposal to the Authority, in accordance with Section 20(3) of the Act, which provided that Clause 12 be revised so that the vendor would be restricted from the above outlined behaviour only for the purposes of any business competing with the targets, in the geographic area<sup>1</sup> of

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<sup>1</sup> as identified by the parties in a map in the proposal.



## **Determination of the Competition Authority**

the target companies, for a period of two years. The Authority accepts this proposal, which forms part of the basis of its determination.

### **Determination**

The Competition Authority, in accordance with Section 21(2) of the Competition Act, 2002, has determined that, in its opinion, the result of the proposed acquisition will not be to substantially lessen competition in markets for goods and services in the State and, accordingly, that the acquisition may be put into effect.

**For the Competition Authority**

**Terry Calvani**  
**Member of the Competition Authority**

**13 March 2003**