



**DETERMINATION OF MERGER NOTIFICATION M/13/036 –
Glanbia / Wexford Creamery**

Section 22 of the Competition Act 2002

Proposed acquisition by Glanbia Ingredients Ireland Limited of the entire issued share capital of Wexford Creamery Limited from Wexford Milk Producers Limited

Dated 30 April 2014



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1. INTRODUCTION

The Notification

- 1.1 On 12 December 2013, in accordance with section 18 of the Competition Act 2002 ("the Act"), the Competition Authority ("the Authority") received a notification of a proposed transaction whereby Glanbia Ingredients Ireland Limited ("GIIL") would acquire the entire issued share capital of Wexford Creamery Limited ("Wexford Creamery") from Wexford Milk Producers Limited ("Wexford Producers").
- 1.2 The proposed transaction would be implemented pursuant to a Share Purchase Agreement ("SPA") dated 19 November 2013 between Wexford Milk Producers, Glanbia Co-operative Society Limited ("Glanbia Co-op"), GIIL and Glanbia Plc.
- 1.3 The parties state that
- "[W]e collectively refer to [Glanbia] Co-op, [Glanbia] Plc (and its subsidiaries) and GIIL as "Glanbia" since, for the purposes of merger control, together they constitute a single economic entity".¹*
- 1.4 Consistent with the view of the parties, stated above, in this determination, unless specifically stated otherwise, the name "Glanbia" will be used when referring to any or all of Glanbia Co-op, Glanbia Plc or GIIL.²

The Undertakings Involved

Acquirer – Glanbia

- 1.5 GIIL, established in late 2012, is controlled by Glanbia Co-op which holds 60 per cent of its issued share capital. The remaining 40 percent shareholding is held by Glanbia plc.³
- 1.6 Glanbia Co-op and Glanbia Plc are co-located in Kilkenny, County Kilkenny, Ireland and GIIL is headquartered in Ballyragget, County Kilkenny, Ireland.
- 1.7 Globally and within the State Glanbia is involved in various dairy product sectors including liquid milk (i.e., milk for human consumption in liquid form), cream,⁴ cheese,⁵ whey proteins, milk powders, sports nutrition products and micronutrients. Glanbia has a physical presence in 17 countries and its products are distributed in over 130 countries worldwide with the largest markets being the US and continental Europe. It also has a smaller scale presence in the Middle East, Asia Pacific and Latin America.

¹ Notification page 2.

² See <<http://www.glanbia.com>>

³ Glanbia Co-op's shareholding in Glanbia Plc is approximately 40 per cent. Glanbia Co-op also nominates the majority of Glanbia Plc's board of directors. The remaining shares are held by institutional and retail investors including Co-op members.

⁴ This includes supplying Diageo plc, the manufacturer of Bailey's Irish Cream.

⁵ This includes supplying the Irish Dairy Board for subsequent export to markets outside the State.

- 1.8 Within the State, Glanbia is involved in the procurement of raw milk from dairy farmers, the production and supply of dairy products, including liquid milk, and also in the manufacture and supply of farm inputs, feed and fertiliser through Glanbia's Agribusiness Division.
- 1.9 Within the State, GIIL focuses primarily on the procurement of milk for the processing and supply of manufactured milk products (i.e., other than liquid milk) to customers within the State and for export customers in more than 50 countries.
- 1.10 Also within the State Glanbia business divisions other than GIIL are involved in the procurement, processing and supply of liquid milk. Glanbia states with respect to liquid milk that:

*"GIIL proposes to transfer [Wexford Creamery]'s liquid milk business to Glanbia Foods Ireland Limited, a company within [Glanbia] Plc's "Dairy Ireland" division, post-completion of the Proposed Transaction."*⁶

- 1.11 Glanbia branded products within the State include⁷:
- Avonmore – milk, cream and butter, cheese and other products.
 - Kilmeaden.⁸
 - Regional milk and cream brands:
 - Premier - linked in particular with the Greater Dublin Area.
 - Snowcream - linked in particular with the South East.
 - CMP - linked in particular with the Cork region.
 - Golden Vale - linked, by contract/licence, with the Limerick region and surrounding areas.
 - Dawn - linked, by contract/licence, with the Limerick region and surrounding areas.
 - Kerrygold butter under licence from the Irish Dairy Board.
 - Optimum Nutrition and BSN sports nutrition products.⁹
- 1.12 In addition, within the State, Glanbia supplies own-label butter, cheese, cream, milk, and dairy spread products to large retail chains.
- 1.13 Glanbia Co-op has over 16,000 members, approximately [...] of whom supply milk to GIIL. This figure includes approximately [...] dairy farmers

⁶ Notification page 4. Note that the use of the term "proposal" in this instance is distinct and different to the meaning implied in Section 20 of the Act.

⁷ Glanbia also distributes third party brands such as Innocent Smoothies and Yoplait. See <<http://www.glanbia.com/our-business/dairy-ireland/consumer-products#consumer-products>>.

⁸ See <<http://www.kilmeaden.ie/our-history/>>.

⁹ See <<http://www.bsnonline.net>>.

located in County Wexford who were Glanbia Co-op members prior to the proposed transaction.¹⁰

- 1.14 For the year ended 29 December 2012, Glanbia Co-op's worldwide turnover was approximately €2.9 billion of which approximately €[...] billion was generated within the State.
- 1.15 For the year ended 29 December 2012, Glanbia Plc's worldwide turnover was approximately €2.2 billion (excluding joint ventures) of which €[...] billion was generated within the State.
- 1.16 For the four months to the end of 24 November 2012, GIIL's worldwide turnover was approximately €287 million of which €[...] million was generated within the State.

Target – Wexford Creamery

- 1.17 Wexford Creamery, located in Rocklands, County Wexford, is involved primarily in the processing of raw milk into non-branded cheese for export to business customers in Europe, the UK and the USA.
- 1.18 Within the State Wexford Creamery is involved in the procurement of raw milk and the processing of raw milk into liquid milk, cream and cheese. Also within the State, Wexford Creamery supplies various liquid milk, cream and cheese products under the "Wexford Creamery" brand.¹¹ Within the State Wexford Creamery sells cheese by-products (including whey cream and whey concentrate) to Glanbia.
- 1.19 Wexford Creamery is currently 70% owned by Wexford Producers, a co-operative comprising approximately [...] shareholders of which approximately [...] are County Wexford based farmers. The remaining 30% shareholding is held by Cressdene Limited, a subsidiary of UK-based Dairy Crest plc.¹²
- 1.20 For the year ended 31 March 2013, Wexford Creamery's worldwide turnover was approximately €[...] million of which €[...] million was generated within the State.¹³

Milk Supply Agreements

- 1.21 Implementation of the proposed transaction will be followed by new milk supply agreements ("MSAs") between
 - (a) Wexford Producers and Wexford Creamery,¹⁴ and

¹⁰ Notification page 6 and Annex 1.1(b).

¹¹ For more information on Wexford Creamery and Wexford Creamery brands see <<http://www.wexfordcreamery.com>>.

¹² The notified transaction has two key elements. Wexford Producers would acquire the Cressdene Limited's minority shareholding (30 per cent) in Wexford Creamery and then GIIL would acquire 100 per cent of the issued share capital of Wexford Creamery. For more information on Dairy Crest see <<http://www.dairycrest.co.uk>>.

¹³ Of the €[...] million turnover within the State approximately €[...] million turnover was generated by sales of liquid milk including €[...] million own-brand sales to [...].

¹⁴ The MSA (to become effective upon completion of the proposed transaction) is referred to in Clause 1.160 of the SPA and is listed in Schedule 4 of the SPA "Documents in the Agreed Terms".

- (b) Wexford Producers and its dairy farmer suppliers (as suppliers).¹⁵

1.22 At the time the proposed transaction was notified to the Authority the time periods set out in the two MSAs were as follows:

- (a) For the MSA between Wexford Creamery and Wexford Producers (to come into effect upon implementation of the proposed transaction):

- i. Minimum term of MSA - [...] years.
- ii. Notice period to terminate the MSA - [...] years.¹⁶

- (b) For the related MSA between Wexford Producers and its dairy farmer suppliers:

- i. Minimum term of MSA - [...] years.
- ii. Notice period to terminate the MSA - [...] years.¹⁷

1.23 On 4 April 2014 the parties advised the following:¹⁸

- (a) For the MSA between Wexford Creamery and Wexford Producers – no change (i.e., as described above in paragraph 1.22a).

- (b) For the MSA between Wexford Producers and its dairy farmer suppliers:

- i. Minimum term of MSA – 5 years.
- ii. Notice period to terminate the MSA - 2 years.¹⁹

1.24 Glanbia also stated that agreements between (i) Wexford Producers and its milk suppliers and between (ii) Glanbia and its current milk suppliers are both due to commence on 1 January 2015. Glanbia states also

“Please note that while the wording/format of the proposed contracts between Glanbia/GIIL and its suppliers, on the one hand, and between Wexford Creamery and its suppliers, on the other are different, their respective key commercial provisions including duration are, in effect, identical.”²⁰

1.25 The Authority does not consider that competitive effects arising from the introduction of MSAs between milk suppliers and purchasers is specific to the merger. Consequently an analysis of the competitive effects, if

¹⁵ Clause 3.1 of the agreement between Wexford Creamery and Wexford Producers states:
[...]

¹⁶ The earliest date to give notice to terminate the MSA would be [...] years after the commencement date and hence the earliest exit date would be [...] years after the commencement date.

¹⁷ The earliest date to give notice to terminate the MSA would be [...] years after the commencement date and hence the earliest exit date would be [...] years after the commencement date.

¹⁸ Correspondence from each of Glanbia and Wexford Creamery both dated 4 April 2014.

¹⁹ The earliest date to give notice to terminate the MSA would be 3 years after the commencement date and hence the earliest exit date would be 5 years after the commencement date.

²⁰ Correspondence from Glanbia dated 4 April 2014.

any, from MSAs is not part of the Authority's analysis of the proposed transaction under Part Three of the Act.

Rationale

1.26 Glanbia states:

*"Pursuant to the Proposed Transaction, GIIL intends to maximise the milk processing capacity of [Wexford Creamery] thereby [...]. The Proposed Transaction also provides GIIL with potential to grow its whey ... and cheese business. Glanbia also anticipates generating efficiencies by consolidating the [Wexford Creamery's] (small-scale) liquid milk activities into Glanbia's (large-scale) existing liquid milk operations."*²¹

1.27 Wexford Creamery states:

*"[Wexford Producers] members anticipate that they will obtain security for their raw milk processing needs for the medium-long term. [Wexford Producers] members anticipate higher returns on their raw milk production arising from an increased cost per litre for raw milk supplied to [Wexford Creamery]."*²²

The Procedure

Preliminary Investigation (Phase 1)

1.28 The Authority's preliminary investigation of the proposed transaction began on 12 December 2013, the date on which the proposed transaction was notified. The preliminary investigation included (i) review of the notification documents, including an economic report by Professor Francis O'Toole of Trinity College Dublin, commissioned on behalf of Glanbia ("the O'Toole Report"),²³ (ii) ongoing contacts with the notifying parties, (iii) submissions by and unsolicited phone calls from third parties, (iv) market enquiries initiated by the Authority and (v) engaging Professor Paul Walsh of University College Dublin ("UCD"), to provide expert econometric advice.

Contacts with Notifying Parties

1.29 The Authority requested and received further information and clarifications from the notifying parties including an informal information request dated 23 December 2013. The Authority also met with the notifying parties on 3 March 2014.

1.30 On 10 January 2014, the Authority served a Requirement for Further Information ("RFI") pursuant to section 20(2) of the Act on each of GIIL and Wexford Creamery. In accordance with sections 19(6)(b) and 21(2) of the Act, the issuing of the RFIs automatically suspended the statutory time period for the completion of procedure for the Authority's Phase 1 assessment.

²¹ Notification page 7.

²² *Ibid.* page 7 and also Annex 2.7.

²³ Professor Francis O'Toole "Glanbia's Proposed Acquisition of Wexford" 12 December 2013.

- 1.31 Upon receipt of the parties' responses to the RFIs on 7 February 2014, the "appropriate date" (for the purposes of section 19(6) of the Act) became 7 February 2014 and the new Phase 1 deadline for the completion of the Authority's Phase 1 assessment became 6 March 2014.
- 1.32 The Authority also requested and received, on an on-going basis, further information and clarifications from the notifying parties.

Third Party Submissions

- 1.33 Twenty three submissions were received by the Authority during the Phase 1 investigation. The Authority also received eleven unsolicited phone calls during the Phase 1 investigation. Some of the issues raised in submissions and in unsolicited phone calls were related to competition concerns which were of direct relevance to the Authority's investigation. Other issues raised were not related to the competition implications of the merger and therefore were not considered as part of the Authority's analysis of the proposed transaction.
- 1.34 Competition concerns raised in submissions and phone calls received included:
- That the duration of the MSA between GIIL and Wexford Producers was too long.
 - That the duration of the MSA between Wexford Producers and its dairy farmers was too long, particularly the time period before farmers could give notice to terminate supply.
 - The alleged dominant position of Glanbia in:
 - (i) The procurement of raw milk from farmers not only in County Wexford but also in the East of the State,²⁴ and
 - (ii) The retail supply of dairy products (in particular milk) and especially in County Wexford, including the risk that Glanbia would discontinue the Wexford brand.
 - The exclusive arrangement between Glanbia and Wexford Producers in the sale process was such that no alternative deal or deals were presented to Wexford Producer shareholders at the Special General Meeting held on 3 December 2013.

Market Enquiries

- 1.35 During the preliminary investigation, the Authority sought the views of a number of third parties in particular competitors of Glanbia and Wexford Creamery and also the Irish Cooperative Organisation Society ("ICOS").²⁵
- 1.36 Competitors who responded did not express significant concerns about how the proposed transaction might affect them but did include that:

²⁴ Various respondents during market enquiries also mentioned a Glanbia monopsony or near monopsony east of a line drawn between Counties Louth and Cork.

²⁵ For more information on ICOS see <<http://www.icos.ie>>.

- There is a history of switching by customers of dairy processors (e.g., retailers) for own label products.
- In contrast, historically there has not been significant switching upstream in the procurement of raw milk, by either:
 - (i) Dairy farmers changing from one processor to another, or
 - (ii) Processors changing from one or more dairy farmers to another one or more dairy farmers.
- While some dairy farmers are “dual suppliers” (i.e. supply more than one dairy processor) it is more common for a dairy farmer to supply only one processor.
- *De novo* entry of a new dairy processor in the State would appear unlikely.
- There is a trend toward consolidation in the dairy processing sector.
- Within the State, consistent with experience in other countries, there is a trend away from processor branded dairy products towards retailer “own brand” dairy products, particularly in the case of milk.
- Milk production is likely to increase significantly after the reform of milk quotas in 2015.
- There was only limited interest by other firms (other than Glanbia) in acquiring Wexford Creamery.

External Expert

1.37 On 10 February 2014, the Authority engaged the services of an expert econometrician, Professor Patrick Paul Walsh of UCD, for assistance in the analysis of the notified transaction.

Phase 1 Determination

1.38 On 5 March 2014, after having considered all the available information in its possession at the time, the Authority was unable to form the view at the conclusion of the Phase 1 investigation that the result of the notified transaction would not be to substantially lessen competition in any markets for goods or services in the State and pursuant to section 21(2)(b) of the Act, the Authority therefore decided to undertake a full investigation.²⁶

Full Investigation (Phase 2)

1.39 The Authority’s full investigation of the proposed transaction, under section 22 of the Act, began on 6 March 2014. The Phase 2 investigation included further ongoing contacts with the notifying parties, the receipt of further third party submissions and phone calls, continued market

²⁶ See <<http://www.tca.ie/images/uploaded/documents/M-13-036%20Glanbia%20-%20Wexford%20Creamery.pdf>>.

enquiries with customers, competitors and other bodies involved with the dairy sector, and further econometric analysis.

Contacts with Notifying Parties

- 1.40 On 7 March 2014, the Authority served a Requirement for Further Information ("RFI") pursuant to section 20(2) of the Act on each of GIIL and Wexford Creamery. The issuing of this RFI had no effect on either the "appropriate date" or the phase 2 deadline.
- 1.41 The parties made further submissions to the Authority, including in relation to issues raised at meetings between the Authority and the notifying parties on 3 March 2014. On 18 March 2014 Wexford Creamery facilitated a site visit by Authority staff to the Rocklands plant.
- 1.42 The Authority also requested and received, on an on-going basis, further information and clarifications from the notifying parties. This included, for example, the parties' responses on 4 April 2014 to Authority questions dated 1 April 2014, concerning the MSAs described above in paragraphs 1.21-1.23.

Third Party Submissions

- 1.43 Five submissions and two unsolicited phone calls were received by the Authority during the Phase 2 investigation. The issues raised in the submissions and phone calls included:
- Uncertainty about MSAs – i.e., that the terms of the agreement, in particular time periods, were being amended by GIIL and Wexford Creamery.
 - The alleged dominant position of Glanbia in the East of the State.
 - The ongoing viability of Wexford Creamery in the absence of the proposed transaction.

Market Enquiries

- 1.44 During the Phase 2 investigation, the Authority sought the views of a number of third parties in particular competitors and customers of Glanbia and Wexford Creamery and also the National Dairy Council ("NDC"), the National Milk Agency (NMA") and Teagasc.²⁷ Competitors and customers did not express significant concerns about how they could be affected by the proposed transaction. Market enquiries also indicated a number of points including:
- The Wexford Creamery brand is strong in County Wexford although not every retailer of dairy products in County Wexford sells Wexford branded dairy products.
 - Retailers can and do switch between one or more suppliers of dairy products.

²⁷ For more information on NDC see <<http://www.ndc.ie/>>. For more information on the NMA see <<http://www.nationalmilkagency.ie/>>. For more information on Teagasc see <<http://www.teagasc.ie/>>.

- It is common practice for larger so-called multiple retailers of dairy products to set prices nationally – i.e., not to vary prices paid by retail customers to any significant degree between one location and another.
- There is a trend away from processor branded products towards retailer “own brand” products – this is particularly the case for milk.
- Some retailers require that their own-label milk carries the NDC label (as described in paragraph 3.21) although others do not have such a policy.
- Milk production is likely to increase by up to 50% nationally after the removal of milk quotas in 2015.

Expert Econometric Advice

1.45 The results of Professor Walsh’s analysis are reported in Section Four below. Although the Authority benefitted from Professor Walsh’s expert advice, both at the Phase 1 and Phase 2 stages of its investigation, it is the Authority alone that made the Determination and is responsible for the views expressed in it.

2. BACKGROUND: DAIRY SECTOR IN IRELAND

Structure of Dairy Sector in the State

- 2.1 There are three essential stages in the dairy product supply chain (i.e., from the farm to the final consumer) in the State. First, raw milk produced by cows on dairy farms is sold to (or procured by) dairy processors for processing into milk or other dairy products. Second, milk and other dairy products are sold on to the processors' immediate customers, such as retailers.²⁸ Third, milk and other dairy products are sold to final customers, e.g., in supermarkets or other stores that sell milk and other dairy products. The second and third stages described above include the sale of both branded products (i.e., dairy processors' brands) and retailers' own ('private label') brands.
- 2.2 In 2012, dairy farmers in the State supplied 5,225 million litres of raw milk to processors in the State. Of this amount, 8% (approximately 420 million litres) was processed as milk for direct human consumption and the remaining 92% (approximately 4,810 million litres) was used as "manufacturing milk" for making milk based products.²⁹
- 2.3 Whereas most milk consumed in liquid form is consumed domestically, the majority of dairy products made from manufacturing milk is exported.

Liquid Milk

- 2.4 The Milk (Regulation of Supply) Act, 1994 ("Supply Act") prohibits the sale of heat-treated milk for liquid consumption unless it has been produced under a supply contract registered under that Act or the sale is exempt from the Supply Act, with the most important exemption being for milk legally imported into the State.³⁰ Milk that may be sold for liquid consumption is commonly (if confusingly) referred to as "liquid milk", whereas other milk is referred to as "manufacturing milk". Liquid milk is suitable for human consumption in liquid form as, for example, full fat milk, low fat milk, or cream. The contracts required to be registered under the Supply Act must also be registered with the National Milk Agency ("NMA"). A key element of most liquid milk supply contracts is the commitment to supply milk on a year round basis (i.e., 52 weeks a year) for which dairy farmers typically receive a premium price above the price of manufacturing milk.³¹

²⁸ In addition to retailers, dairy processor customers include other processors or manufacturers. Also not all final customers will purchase dairy products from retail stores since dairy products are also sold by food service operators and, to a much lesser extent, by direct to door sales. The Authority's analysis of the proposed transaction focuses primarily on sales to retailers and final customers.

²⁹ National Milk Agency Annual Report and Accounts 2012, page 10.

³⁰ See <<http://www.irishstatutebook.ie/1994/en/act/pub/0025/sec0005.html#sec5>>.

³¹ See <<http://www.irishstatutebook.ie/1994/en/act/pub/0025/sec0006.html>>. As described by the NMA there are two types of premium payments: Manufacturing Milk Price plus Bonus System ("MMP") and the FLAT Price System. Under the MMP System, a milk price equal to the monthly manufacturing milk price, with price differentials for constituents (e.g., milk fat and protein) is paid with the addition of fixed or variable winter bonus payments. Under the FLAT Price System, milk is paid for at a monthly flat price per litre with higher prices paid in the winter months and no price differentiation for milk constituents. See National Milk Agency Annual Report and Accounts 2012, page 18.

Manufacturing Milk

- 2.5 Manufacturing milk is used as an input in the production of other dairy products such as butter, skimmed milk powder, cheese, and whey. The regulation of the dairy sector by the State means that, within the State, manufacturing milk can only be used to produce products other than liquid milk for human consumption. The vast majority of dairy farmers in the State only produce raw milk for processing as manufacturing milk, reflecting in part the more arduous requirement for year-round production of liquid milk in comparison to manufacturing milk production which is seasonal in nature.
- 2.6 While manufacturing milk, procured and produced in the State cannot be used for direct human consumption liquid milk can, in contrast, be used as an input for manufacturing other dairy products. In 2012, only 52% of the raw milk produced by the 1,992 registered liquid milk producers actually went into the production of liquid milk. The remaining 48% of liquid milk produced was processed as manufacturing milk for the production of dairy products other than milk for human consumption.³²

Milk Procured Outside the State

- 2.7 The distinction made in the State between liquid and manufacturing milk does not appear to be widely replicated outside the State. In particular in Northern Ireland there is no differentiation between raw milk procured for human consumption in liquid form and raw milk procured for the manufacture of dairy products. As noted above, the Supply Act authorises the sale for liquid consumption of all milk legally imported into the State. Consequently any legally imported Northern Ireland raw milk can be procured, processed and sold for human consumption anywhere on the island of Ireland.
- 2.8 Raw milk procured and/or processed in Northern Ireland is also used in the production of manufactured milk products for sale in, or export from, the State.
- 2.9 NMA states that

“These bulk imports were equivalent to 8% of domestic supplies and 21% of Northern Ireland’s annual milk supplies. ... Bulk imports for processing into manufactured dairy producers in the State represented 85% of these imports, while bulk imports for processing into liquid consumption in the State ... represented 15% ...”³³

Dairy Co-ops

- 2.10 A co-operative (“co-op”) is a form of business organisation that is owned and controlled by its shareholder members. In the case of dairy co-ops, within the State many co-op shareholders are also suppliers of raw milk to the co-op. For example, the parties state that [...] of Wexford Producers’ [...] shareholders are active milk suppliers to Wexford

³² National Milk Agency Annual Report and Accounts 2012, page 11.

³³ *Ibid* page 11.

Producers and approximately [...] of Glanbia Co-op's approximately 16,200 shareholders are active milk suppliers of raw milk to GIIL.³⁴

- 2.11 Within the State most raw milk is procured from farmers by co-ops either directly, e.g., as in the case of Wexford Producers, or indirectly, e.g., as in the case of Glanbia Co-op's controlling interest of GIIL. A key feature of the dairy co-ops in Ireland is the relationship between the co-op as a purchaser of raw milk and the dairy farmer as a supplier of raw milk, the essence of which is to manage and maintain continuity of supply and purchase. That is, (i) the co-op agrees to buy whatever quantity of milk the farmer produces and (ii) the farmer agrees to supply all milk produced by his or her herd to the co-op. (An exception to this is where a farmer is a dual supplier, i.e., has agreements with, or is a member of, more than one co-op. But only a small minority of farmers are dual suppliers.).

Prices and Contracts

Prices Paid to Dairy Farmers

- 2.12 Information from the parties and market enquiries indicate that the prices paid by processors to dairy farmers are typically based on quality of the raw milk, i.e., protein per kilogram and butterfat per kilogram, and the cost of processing the raw milk.³⁵ Prices are set by individual co-ops on a monthly basis and will vary for various reasons including seasonal factors such as changes in the protein and butterfat density. Market enquiries also indicate that there is competition between the co-ops for suppliers, reported in "league tables",³⁶ which takes the form of maintaining or increasing prices to dairy farmers to the extent that is commercially possible.³⁷
- 2.13 Market enquiries indicate also that prices paid by dairy processors to dairy farmers for raw milk are influenced to some extent by the prices, domestic and particularly international, paid to dairy processors by their customers.³⁸
- 2.14 Market enquires also indicate that international prices for dairy products can vary significantly over time as a result of changes in demand and/or supply. For example, price variations can arise from both longer term changes in consumer preferences and from shorter term global supply shocks such as adverse weather conditions affecting global production (particularly if there is a fall in the production volumes of larger producers).

³⁴ Notification pp 2-3.

³⁵ This is also known as A+B-C pricing where A is the price per kilo of protein B is the price or butterfat per kilo, and C is the cost of processing the raw milk.

³⁶ See for example <<http://www.farmersjournal.ie/irish-farmers-journal-kpmg-milk-price-review-151147>>.

³⁷ In this respect the dairy sector differs from other sectors where buyers of inputs typically have strong incentives to minimise input costs. This form of competition for suppliers, which involves keeping input prices high, may be explained, at least in part, by the fact that co-ops who buy raw milk from suppliers are owned or part-owned by the same suppliers.

³⁸ Other factors that could affect prices to dairy farmers could include, for example, the productivity of the co-op's processing facilities (including labour and capital costs), milk quota levels, and the management of the processor including strategic decision making.

Prices Paid to Dairy Processors

- 2.15 Information from the parties and market enquiries indicate that there is a mixture of long-term contractual and ad hoc trading relationships between dairy processors and their customers. Some larger customers, e.g., food manufacturers purchasing large volumes and/or specialty ingredients, may establish long term contractual arrangements covering, for example, prices and quality standards. By way of contrast commercial arrangements with retailers, with some notable exceptions, are typically subject to ongoing ad hoc negotiations between retailers and dairy processors.³⁹

Retail Prices

- 2.16 Ultimately the prices paid to retailers by the final consumer for dairy products depend on consumer preferences, supply costs and competition the participants in the various stages of the supply chain⁴⁰. Information obtained from the parties and market enquiries stress that the presence of retail own brand dairy products is a significant feature at the retail level in this market.
- 2.17 Market enquiries also indicate that there is a significant retail price differential between processor branded products and retailers' own branded products. Branded products typically sell at a substantial premium to own brand products.

The CAP and Milk Quotas

- 2.18 The Common Agricultural Policy ("CAP") has a significant impact on the dairy sector. For example, the CAP through the setting and allocation of milk quotas, influences the quantity of raw milk produced in the State and in Northern Ireland and consequently processed by milk producers in the State. As described below the milk quota system also has an impact on (i) milk processors' potential production volumes and (ii) to some extent on switching behaviour by dairy farmers and dairy processors.
- 2.19 Milk quotas were introduced in 1984. Under the milk quota system, EU Member States may produce raw milk up to a specified annual quota, and must pay a levy to the EU where this overall national quota is exceeded. The Milk Quota Regulations (SI 227/2008) provide for the payment of a levy, known as the "super levy", on milk deliveries in excess of Ireland's annual national quota. Penalties apply to producers who exceed the quota. The liability of individual producers who have exceeded their individual quotas, which is expressed in terms of volume and fat content, is established after the re-allocation of quotas which have not been used by other producers (usually called "surplus quotas").
- 2.20 Market enquiries indicate a low level of switching by dairy farmers between dairy processors. Various explanations were offered, including the nature of the relationship between supplier and purchaser, as described above. Switching would also appear to be inhibited, at least to some extent, by one aspect of the existing milk quota system, i.e.,

³⁹ The flexibility of contractual arrangements between suppliers and their customers is not, however, unique to the dairy sector. See for example <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Pallas--Crossgar.aspx>>

⁴⁰ See para 2.1 above.

whereas dairy farmers are able to switch from one dairy processor to another, if they choose to do so they are required to give three months' notice of intention to switch and may then switch on only four days during the year, namely 1 January, 1 April, 1 July and 1 October.⁴¹

Milk Quota Reform

- 2.21 Milk quotas will be abolished across the EU in 2015. Market enquiries indicate a widely held expectation that milk production in the State will increase significantly at this time and processors have accordingly been increasing production capacity in recent years. For example the Irish Dairy Board ("IDB") has recently stated:

*"With the removal of milk quotas fast approaching, the marketing and selling of Irish dairy products across global markets has never been more important. For the first time in 30 years the Irish dairy industry will be allowed grow to its true potential."*⁴²

- 2.22 Market enquiries indicate that the abolition of quotas can be expected to provide significant opportunities for increased production of manufacturing milk as an input into dairy products for an expanding export market, particularly for dairy ingredients and whey-based products in comparison to more traditional exports such as butter and cheese.

- 2.23 Market enquiries also support the view that, by comparison, the opportunities for liquid milk suppliers will be less significant. Liquid milk is largely produced for consumption on the domestic market and cannot be exported as easily as products derived from manufacturing milk. Consumption of liquid milk on the domestic market is unlikely to increase, due to the abolition of quotas, from already high levels of consumption. For example as noted by the ICOS:

*"Ireland has the third-highest per capita consumption of liquid milk in the world, at 130 litres per person per annum. Only Finland at 183 litres per head and Sweden 143 litres per head has a greater per capita consumption. In comparison the fastest growing market for milk consumption, China, consume only 9 litres per head."*⁴³

- 2.24 The abolition of milk quotas in 2015 will be a major structural change in the dairy sector. Together with changes in consumers' preferences and supply conditions, quota reform is likely, over time, to affect all levels of the supply chain, e.g., prices paid to dairy farmers by dairy processors, prices paid by retailers to dairy processors and the prices paid to retailers by final consumers. The Authority's review of the proposed transaction is, however, limited in scope to the competitive effects that are specific to the proposed transaction.

⁴¹ This is set out in Regulation 26 of S.I. No. 227 of 2008 European Communities (Milk Quota) Regulations 2008. See <<http://www.irishstatutebook.ie/pdf/2008/en.si.2008.0227.pdf>>.

⁴² See <<http://www.idb.annualreport13.com/chiefexecutivesreport.php>>.

⁴³ See <<http://www.icos.ie/members/dairy>>.

3. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

Introduction

3.1 In this section, the key relevant markets that are likely to be affected by the proposed transaction are reviewed in terms of product and geographic dimensions. The views of the undertakings involved are summarised and the Authority's views and conclusions are set out.

Relevant Product Markets

Views of the Undertakings Involved

3.2 The parties' submissions argue that the following should be regarded as the relevant product markets for the purpose of analysing the effect on competition of the proposed transaction:

- Procurement by dairy processors from dairy farmers of raw milk.
- Production and supply of liquid milk (branded and un-branded) for sale to the retail and foodservice sectors and also door step delivery. The parties further claim that the narrowest relevant product market is the sale of liquid milk to retailers.⁴⁴
- Production and supply of cream (branded and un-branded) to retailers.
- Production and supply of natural cheese.⁴⁵

3.3 The parties do not propose a relevant product market, or markets, for dairy ingredients, such as whey and/or whey-based products. Rather, they simply state that there is no existing horizontal overlap for the following reasons:

*"[...]. Furthermore, Glanbia is not generally active in the supply of whey. There is thus, in effect, no change arising from the Proposed Transaction. The parties thus submit that this is **not** a relevant horizontal overlap."⁴⁶*

Views of the Authority

3.4 The Authority defines markets to the extent necessary depending on the particular circumstances of a given case. Accordingly, caution is advised when drawing any inference from findings in previous cases.⁴⁷

⁴⁴ Notification pp. 19-21.

⁴⁵ The parties cite M/08/009 – Kerry/Breco in support of a distinction between natural and processed cheese. See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M08009--Kerry-Breco.aspx>>.

⁴⁶ Notification page 11.

⁴⁷ For example, in M/10/029 – Kerry/Newmarket the Authority considered the production and sale of raw milk (equivalent to procurement by dairy processors) was a relevant product market. See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Kerry--Newmarket-Cooperative-Creameries.aspx>>.

In M/05/006 – Glanbia/CMP the Authority considered the manufacture of liquid milk, branded and own-label, for supply to retailers was a relevant market. See <http://www.tca.ie/images/uploaded/documents/m_05_006_p1d.pdf>.

- 3.5 For the purposes of reviewing the proposed transaction the Authority is of the view that it is not necessary for the Authority to define precise markets for (i) the procurement of raw liquid milk and raw manufacturing milk, (ii) the production and supply of branded and unbranded (or retailer own-brand) milk and cream, (iii) the production and supply of cheese or (iv) the production and supply of other dairy products (including whey or whey based products).
- 3.6 However for the purposes of analysing the competitive effects of the notified transaction, the Authority assumes that:
- (a) The narrowest relevant product market with respect to raw milk is the procurement by dairy processors from dairy farmers of raw milk.
 - (b) The narrowest relevant product markets with respect to both liquid milk and cream, is
 - i. of liquid milk for sale to retailers and
 - ii. of cream for sale to retailers.
 - (c) The relevant product market for cheese and other dairy products can be left open.
- 3.7 No plausible alternative market definition would result in a different conclusion to the one that the Authority has reached.

Relevant Geographic Markets

Views of the Undertakings Involved

- 3.8 The parties cite various decisions of the Authority, the UK Office of Fair Trading and the EU Commission⁴⁸ and argue that the relevant geographic market is no smaller than the island of Ireland for each of:
- Procurement of raw milk from dairy farmers.
 - Production and supply of branded and un-branded liquid milk.
 - Production and supply of (branded and un-branded) cream.
 - Production and supply of natural cheese.

In M/11/004 - Glanbia/Dawn Dairies and Golden Vale Dairies the Authority considered a precise definition of distinct product markets for the retail sale of liquid milk and cream was not necessary, notwithstanding the limited substitutability of milk and cream. See <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Glanbia--Dawn-Dairies-and-Golden-Vale-Dairies.aspx>>.

⁴⁸ For example COMP/M.4344 – Lactalis / Nestle / JV (II) see <http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_4344>, COMP/M.5046 Friesland Foods/Campina see <http://ec.europa.eu/competition/mergers/cases/decisions/m5046_20081217_20600_en.pdf>, OFT First Milk/Milk Link see <http://www.ofg.gov.uk/shared_ofg/mergers_ea02/361227/FirstMilk2.pdf>, M/11/004 Glanbia / Dawn Dairies and Golden Vale Dairies see <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Glanbia--Dawn-Dairies-and-Golden-Vale-Dairies.aspx>> and M/11/037 - Connaught Gold / Donegal Creameries see <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Connaught-GoldDonegal-Creameries.aspx>>.

Procurement of Raw Milk

- 3.9 The parties argue that technological developments together with better roads increases the distance that milk can be transported, i.e., milk can travel further while maintaining product quality than was previously the case.

*"The parties believe that recent technological developments, improvements in road infrastructure, the spread of milk processors throughout the 32 counties allied to the prevalence of imports from Northern Ireland strongly support the view that the geographic dimension of this product market is the island of Ireland..."*⁴⁹

- 3.10 The parties also argue that

*"... [R]aw milk processing facilities of various dairy companies such as ... are located at various sites across the island of Ireland. Processors may enter into supply arrangements with competitors as regards the delivery of raw milk, which also facilitates the supply of raw milk across the island of Ireland."*⁵⁰

- 3.11 The parties argue further, with reference to NMA figures, that approximately 25% of Northern Ireland's milk supply is exported into the State either as bulk manufacturing milk, bulk liquid milk or packaged liquid milk.⁵¹ The parties argue that this is evidence of a geographic market comprising the island of Ireland.

- 3.12 The parties argue that a geographic market definition as wide as the island of Ireland is supported to some extent by national pricing by processors within the State to dairy farmers.

Production and Supply of Liquid Milk

- 3.13 The parties argue that the relevant geographic market for the production and supply of branded and own-branded liquid milk to retailers is the island of Ireland. For example the parties state:

*"Retailers can easily purchase supplies of own-label and branded milk from liquid milk processors based in both Northern Ireland and the State. Furthermore, liquid milk can be transported over significant distances."*⁵²

- 3.14 The parties state that the same national pricing argument, as presented in paragraph 3.12, also applies for pricing downstream, e.g.:

*"In addition, pricing at the downstream level (specifically pricing by retailers with outlets across Ireland) does not vary by region. These factors clearly support the argument that there is a chain of substitution covering the island of Ireland."*⁵³

⁴⁹ Notification page 19.

⁵⁰ *Ibid* page 19.

⁵¹ Notification page 19 and National Milk Agency Annual Report and Accounts 2012 page 13.

⁵² Notification page 20.

⁵³ *Ibid* page 19.

Production and Supply of Cream

- 3.15 The parties state that the arguments in support of an island of Ireland geographic market for the production and supply of liquid milk apply similarly to the production and supply of cream.

Natural Cheese

- 3.16 The parties argue that the geographic market for natural cheese is larger than the island of Ireland and at least as large as the European Economic Area (i.e., the 28 Member States of the EU and Iceland Liechtenstein and Norway.) The parties highlight, for example, that some of Wexford Creamery's customers are located in US, UK and continental Europe.⁵⁴

Wexford Regional Market(s)

- 3.17 The parties argue against the existence of regional geographic markets, such as County Wexford, for either milk procurement or the production and sale of liquid milk or other dairy products.

Views of the Authority

- 3.18 As stated in the Authority's Merger Guidelines

"The relevant geographic market is usually defined in terms of the location of suppliers and it includes those suppliers that customers consider to be feasible substitutes. The relevant geographic market may be local, regional, national or wider."⁵⁵

- 3.19 It is also possible, depending on the specific circumstances, for problematic competitive effects to be felt at a local level even where the overall geographic market is national or regional. The Authority has examined regional and local effects in previous cases.⁵⁶
- 3.20 With respect to the procurement of raw milk, market enquiries clearly indicate that there is a low level of switching (i) by dairy farmers switching from one dairy processor to another dairy processor, or (ii) by dairy processors switching or seeking to switch dairy farm suppliers. Infrequent switching by either milk suppliers or co-ops is not surprising given (i) the nature of the farmer and Co-op obligations to each other and (ii) the existence of milk quotas (as described in paragraph 2.19).
- 3.21 Another factor that may limit the extent of the geographic market for dairy products is the attempt by the NDC to differentiate between milk for human consumption produced and processed within the State in comparison to milk for human consumption produced and/or processed outside of the State. In particular, in September 2009 the NDC launched its NDC mark⁵⁷ for which liquid milk must meet two separate criteria:

⁵⁴ Notification page 21.

⁵⁵ See <<http://www.tca.ie/images/uploaded/documents/N-13-001%20Guidelines%20for%20Merger%20Analysis.pdf>>.

⁵⁶ See for example <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/Musgrave--Superquinn.aspx>> and <<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M09024--Greenstar--Veolia-Ireland.aspx>>.

⁵⁷ See <<http://www.ndc.ie/news/News090915PackagingMarkLaunch.asp>>.

- Milk must be procured within the State.
 - Milk must be processed within the State.⁵⁸
- 3.22 To the extent that this differentiation reflects or influences dairy processors and/or downstream consumer preferences, it may also limit the geographic market for the procurement of milk and in particular the procurement or sale of liquid milk. Market inquiries indicate that the NDC mark is of increasing importance to retailers and retail customers and is making it more difficult for producers and processors in Northern Ireland to secure and keep customers in the State.
- 3.23 Market enquiries and third party submissions also indicate that regional provenance is relevant at least to some retailers and final customers. For example, various third party submissions to the Authority expressed concerns about the effect of the proposed transaction on the purchase of Wexford Creamery branded products within the Wexford region.
- 3.24 On the basis of its analysis of its market enquiries and of third party submissions received, the Authority considers that the possibility of geographic markets smaller than the island of Ireland cannot be ruled out.
- 3.25 It is not, however, necessary for the Authority to reach a conclusion on the precise relevant geographic markets, in relation to the proposed transaction. Regardless of how the geographic markets are defined in this case the Authority's view is that no significant competition concerns arise from the proposed transaction.
- 3.26 However, for the purposes of assessing the proposed transaction the Authority has, for the reasons elaborated below, considered competitive effects within (i) the island of Ireland, (ii) the State and (iii) regionally, i.e., County Wexford in this instance.

⁵⁸ See <<http://www.ndc.ie/NDC-Packaging-Mark>>.

4. COMPETITIVE ASSESSMENT

Introduction

- 4.1 This section sets out the Authority's analysis of the competitive effects of the notified transaction. The Authority's merger review function is to determine whether or not a notified merger or acquisition will or will not substantially lessen competition in markets for goods or services in the State.
- 4.2 The Authority's analysis of the notified transaction involves assessing the following:
- (a) The relevant counterfactual – i.e., the likely state of competition in the relevant market or markets in the absence of the notified transaction,
 - (b) Competitive effects of the proposed transaction (in comparison to the relevant counterfactual).
- 4.3 In this instance the Authority has focused on the following three theories of harm:
- (a) Retail effects in the supply and sale of liquid milk including local effects in County Wexford.
 - (b) National and/or local effects on dairy processing resulting from the possible blocking of an alternative acquirer and in particular a new entrant (by acquisition).
 - (c) National and/or local effects on the procurement of milk and/or downstream markets resulting from a monopsony or near-monopsony of Glanbia in procuring milk from dairy farmers in County Wexford.

Competitive Effects

Views of the Undertakings Involved

- 4.4 The parties' view is that the proposed transaction does not give rise to competition concerns. Their views are broadly stated as follows

*[I]n the absence of any horizontal or vertical competition concerns in any of the overlapping markets, the Proposed Transaction does not give rise to a substantial lessening of competition."*⁵⁹

Horizontal Overlap

- 4.5 The parties' argument is based in part on market share data presented in the O'Toole Report which states the following:

⁵⁹ Notification page 23.

- (a) For a geographic market comprising the State⁶⁰ for the *procurement of raw milk*⁶¹
- Glanbia has a market share of approximately [25-35]%, followed by Kerry (approximately [15-20]%) and Dairygold (approximately [15-20]%).
 - Wexford Creamery has a market share of approximately [0-5]%.
- (b) For a geographic market comprising the State for *sales by retailers of liquid milk*:⁶²
- Total retailer own brands (including milk produced by Glanbia and Wexford Creamery)⁶³ represent approximately [50-55]% or all sales.
 - Sales of Glanbia branded milk represents approximately [25-30]% with no other brand above [0-5]%.
 - Sales of Wexford Creamery branded milk has a market share of approximately [0-5]%.
- (c) For a geographic market comprising the Rest of Leinster (i.e., excluding Dublin) for *the retail sale of liquid milk*
- (i) Glanbia branded milk has a market share of approximately [45-50]%.
 - (ii) Wexford Creamery branded milk has a market share of approximately [0-5]%.

4.6 The parties also supplied market share information for *cream* and *cheese* which showed:

- The strength of retailer own-branded products in a national market.
- A large disparity in the relative size of Glanbia and Wexford Creamery in a national market and also (to a lesser extent) in a Rest of Leinster market.
- Wexford Creamery sells only modest amounts of branded cheese and cream.

⁶⁰ The parties also provided data for the procurement of liquid milk for a geographic market comprising the island of Ireland whereby Glanbia has a market share of approximately [30-35]%, followed by Dale Farm [15-20]% and Strathroy [10-15]% and Wexford Creamery has a market share of approximately [0-5]%.

⁶¹ These are Glanbia estimates of the 2011/2012 quota season.

⁶² Data for sales by retailers are more readily available than data for sales to retailers. The estimates for milk (and cream and cheese mentioned in paragraph 4.10) are Glanbia estimates for the week ended 6 December (i.e., immediately preceding the proposed transaction) based on AC Nielsen data.

⁶³ The market share figure for "Total Retailer Own Brands" is for all retailer own brand sales, i.e., all own brand sales by all retailers for which data is collected. Both Glanbia and Wexford Creamery are involved in the production of own brand liquid milk. These estimates, based in part on AC Nielsen data include market shares for Aldi and Lidl but exclude Dunnes Stores.

Regional or Local Effects

- 4.7 The parties argue that regional or local downstream markets do not exist and hence a local or regional theory of harm is not possible.

"In addition, it is noted that a credible theory of harm narrative that centred on a regional or local upstream procurement of raw milk market would also require at least the existence of a related regional or local downstream market. In particular, final consumers of, say, liquid milk could only be harmed by an alleged distortion in an upstream regional or local market if significant "imports" of liquid milk into the regional/locality were not feasible. The material in Sections 4 and 5 [of the O'Toole report]... suggest strongly that no such regional or local downstream markets exist."⁶⁴

Countervailing Buyer Power

- 4.8 The parties argue that dairy product retailers have buyer power and low switching costs sufficient to maintain a competitive constraint on the merged entity.
- 4.9 The parties also argue that the continued and strengthening presence of retailer own label milk, cream, and cheese products is evidence of significant buyer power.⁶⁵

Vertical Effects

- 4.10 The parties identify the following existing vertical relationships between GIIL and Wexford Creamery: [...].
- 4.11 The parties state that these vertical relationships do not give rise to competition concerns. The parties also note that there is vertical integration in both GIIL and Wexford Creamery to the extent that milk suppliers have an ownership stake in GIIL and/or Wexford Creamery or both in the instance of dual GIIL/Wexford Creamery suppliers.

Views of the Authority

- 4.12 There is a horizontal overlap in the activities of Glanbia and Wexford Creamery nationally, provincially and in County Wexford. Both parties are involved in the procurement of raw milk and in the production and supply of liquid milk for human consumption and other dairy products. The overlaps in the activities of the parties, as presented in the O'Toole Report, do not appear significant in a national market. However, as stated in paragraph 3.19 regional competition concerns may arise notwithstanding an absence of clear competition concerns in a national market.
- 4.13 Given the limited product life and the relatively difficult transportability of liquid milk relative to other products such as cheese the Authority's analysis of possible regional competitive effects focuses only on liquid milk since it is the most likely product segment that would give rise to regional or local competitive effects. Also the Authority's analysis does

⁶⁴ O'Toole Report, page 12.

⁶⁵ Notification page 22.

not consider in detail competitive effects with respect to cream given the small production volumes of cream by Wexford Creamery.

- 4.14 In addition to its analysis of overlaps in the activities of the parties, the Authority's analysis of the proposed transaction also focuses on issues such as entry by acquisition or entry *de novo* of existing or potential competitors.
- 4.15 As stated in paragraph 4.3 the Authority's analysis of the likely impact of the transaction focuses on (i) retail effects, primarily with respect to the sale of liquid milk, (ii) preventing rival dairy processor entry and (iii) monopsony effects with respect to Glanbia's procurement of raw milk, especially in County Wexford.
- 4.16 As part of its analysis of the proposed transaction the Authority sought additional information from the notifying parties for expert econometric analysis, the findings of which are described below.

Retail Effects

- 4.17 A viable theory of harm at the local retail level will depend in part on the strength of Wexford Creamery brands in the local market and the closeness of competition between Wexford Creamery and Glanbia for both branded and own label products. This includes a consideration of whether the loss of the competitive constraint on each other currently provided by Glanbia and Wexford Creamery brands would result in a substantial lessening of competition ("SLC"). Given the small volumes of cream produced by Wexford Creamery and also given the longer durability and transportability of cheese (and consequently the wider geographic market for cheese) the Authority has focused its analysis of local retail effects on liquid milk only.
- 4.18 Information supplied by the parties together with market enquiries indicates that the Wexford Creamery brand for dairy products is strongest within the County Wexford area. Consequently it might be expected that the competitive constraint from Wexford Creamery branded liquid milk on Glanbia branded liquid milk will be strongest in a County Wexford geographic market. Market enquiries also indicate, however, that the strength of Wexford Creamery brands is not uniform across County Wexford either in terms of the location of stores or between different retailers.
- 4.19 AC Nielsen retail data indicates a stronger degree of competition between Glanbia and Wexford Creamery for dairy products including liquid milk in Leinster (excluding Dublin) - the smallest area for which useful retail data is available - in comparison to the State. Furthermore, data provided by Wexford Creamery indicated that there is competition between Glanbia and Wexford Creamery in branded products within County Wexford.
- 4.20 As discussed below in paragraph 4.25 and confirmed by market enquiries, retailers' own-brand milk is a significant competitive constraint on both Glanbia branded and Wexford Creamery branded products and would continue to be a constraint on the merged entity if the proposed transaction were put into effect (although that constraint may be reduced to the extent that Glanbia accounts for a large proportion of this milk).

Econometric Analysis

4.21 The Authority engaged Professor Paul Walsh of UCD, to undertake an econometric analysis of price and volume data supplied by the parties.⁶⁶

4.22 The data comprised:

- (a) Wholesale data (i.e., value and volume of sales to customers such as retailers).
- (b) Retail data (i.e., value and volume of sales by retailers to customers).⁶⁷

4.23 The retail sales data included data for competitors of Glanbia and Wexford Creamery.⁶⁸ In contrast the analysis at the wholesale level was more limited. Only data for the parties, Glanbia and Wexford Creamery, was readily available.⁶⁹

4.24 Key findings from the analysis of wholesale price and volume data include:

- The vast majority of Wexford Creamery dairy products (including liquid milk) are sold to customers in County Wexford. This comprised approximately [90-95]% of all Wexford Creamery products and approximately [95-100]% of branded Wexford Creamery products.
- Glanbia brand liquid milk sales in County Wexford account for only [0-5]% of the total Glanbia brand liquid milk sales compared to [35-40]% in County Dublin.
- Wexford Creamery is strongest in County Wexford as a competitor to Glanbia. For example:
 - (i) Within a geographic market consisting of County Wexford, Wexford Creamery would appear to be a significant competitor of approximately 80-85% the size of Glanbia (when measured by branded liquid milk sales revenues).
 - (ii) Within a geographic market consisting of Country Wexford and its four neighbouring counties - Carlow, Kilkenny, Wicklow and Waterford the equivalent figure is approximately 15%-20%.
 - (iii) Within a geographic market consisting of Leinster the equivalent figure is approximately [0-5]%.

4.25 Another finding from the econometric analysis of retail price and volume data is that Wexford Creamery liquid milk products do not act as a significant competitive constraint on Glanbia liquid milk products in

⁶⁶ The parties provided the data in to the RFIs issued to each of the notifying parties on 10 January 2014.

⁶⁷ The retail data supplied by the parties was AC Nielsen data at stock keeping unit level and collected at point of sale.

⁶⁸ AC Nielsen data does not, however, include data from Dunnes Stores.

⁶⁹ In this instance an analysis at the wholesale level focusing only the two notifying parties was considered sufficient for the Authority's analysis. However, it is possible that in different circumstances an analysis including third parties may be required.

either a national geographic market or a geographic market consisting of the Rest of Leinster (i.e., excluding County Dublin).⁷⁰ Extensive analysis failed to establish that the proposed transaction would harm competition by removing an important competitive constraint. A further finding is that the major source of competitive pressure on Glanbia, in national provincial or regional markets, is from retailers' own-brand products.

- 4.26 In summary, the Authority has not found evidence to support a local retail effects theory of harm referred to in paragraph 4.3, i.e., the Authority has not found evidence to support a finding of an SLC in a retail market for liquid milk in a narrower geographic market than the State.

Effects on Entry or Expansion

- 4.27 A second theory of harm investigated by the Authority concerns whether the proposed transaction, either as consequence or a strategy, inhibits the entry or expansion by actual or potential competitors and thereby leads to an SLC. Glanbia is the leading processor of liquid milk in the State. Its "Avonmore" brand is the leading brand in Ireland and its "Premier" brand is in the top 25.⁷¹ Glanbia has recently increased its prominence in supplying own label milk in Ireland. Competition by processors based in Northern Ireland has become more difficult given the increasing success of the NDC mark. Thus, if Glanbia's purchase of the Rocklands plant eliminated a promising avenue for entry or expansion into processing liquid milk in the State, that could raise competition concerns.

- 4.28 In this context the Authority notes that some third party submissions raised concerns that Wexford Creamery had (i) entered into an exclusive sales arrangement with GIIL and (ii) consequently the choice presented at the SGM on 3 December 2014 to Wexford Producers' shareholders was limited.

- 4.29 However, there is not credible evidence to indicate that the proposed transaction is a blocking strategy pursued by Glanbia to prevent rival competitors from gaining access to upstream or downstream markets or that the proposed transaction would have that effect. [...].

- 4.30 The Authority is also aware, from its review of internal documents, that Wexford Creamery and each of [...] and [...], on separate occasions prior to the notified transaction, had reached reasonably advanced stages of engagement prior to the potential acquirers deciding ultimately not to make a bid. The Authority saw no evidence suggesting any possibility of future interest from either potential bidder. Moreover, the possibility of Wexford Creamery's being sold has been publicly discussed for some time but no serious bid appeared before Glanbia's.

- 4.31 Further, [...],⁷² [...].⁷³

⁷⁰ Whereas wholesale data supplied by the parties is disaggregated to county level, AC Nielsen data is disaggregated only to provincial level with the exception of a Rest of Leinster area (i.e., Leinster excluding Dublin).

⁷¹ Shelflife.ie 100 Master Brands at Home, 26 June 2013, see <<http://www.shelflife.ie/article.aspx?id=4095>>.

⁷² [...].

⁷³ [...].

- 4.32 The Authority has not seen any internal Glanbia or Wexford Creamery documents that would support a theory of harm based on preventing access of competitors to Wexford Creamery. Nowhere was there any discussion of the merger removing a possible entry route or of any willingness to pay a price reflective of benefits in terms of market power.
- 4.33 Internal documents seen by the Authority, market enquiries and also an on-site visit by Authority staff on 18 March 2014 support the view that Wexford Creamery is not a particularly attractive target to other dairy processors within the State or elsewhere. This is in part because of Wexford Creamery's current emphasis on cheese as compared to more lucrative dairy products such as higher quality whey and also because of the small scale of Wexford Creamery particularly regarding liquid milk. Rocklands is overwhelmingly a commodity cheese plant with a small liquid milk processing capacity.
- 4.34 In summary, if the Rocklands plant represented an attractive opportunity for entry or expansion into the processing of liquid milk in the State, its acquisition by the leading processor could raise competition concerns. However, the Authority concludes that the evidence does not support this theory of harm.

Monopsony Effects in the Procurement of Raw Milk

- 4.35 As stated in paragraph 1.34 a number of submissions and unsolicited phone calls to the Authority identified and/or expressed concerns about Glanbia acquiring a monopsony or near-monopsony position with respect to the procurement of raw milk in County Wexford (i.e., there would be no other viable option to dairy farmers but to supply Glanbia).
- 4.36 In addition various third party submissions, and market enquiries identified and/or expressed concerns about Glanbia acquiring a monopsony or near-monopsony position with respect to the procurement of raw milk in an area larger than County Wexford (e.g., Leinster).⁷⁴
- 4.37 Given Wexford Creamery's size, there does not appear to be a basis for substantial concern with respect to procuring raw milk in the State or on the island of Ireland.
- 4.38 From the perspective of a milk supplier, the primary concern is that a monopsonist, or near monopsonist, would purchase a lower quantity than would otherwise be the case in a competitive market, with a knock-on impact on downstream markets, and at lower prices thereby reducing the income of the milk supplier. This does not, however, appear to be a likely consequence of the proposed transaction, at least in the short to medium term. As described in paragraph 2.12 an important aspect of the relationship between a dairy co-op such as Wexford Producers and a farmer is that (i) a co-op agrees to purchase all the milk produced by the farmer and (ii) the farmer agrees to supply all the milk that s/he produces to the co-op.⁷⁵ The relationship between Wexford Producers and its milk suppliers will remain unchanged following the implementation of the proposed transaction.

⁷⁴ For clarity of exposition this is written in terms of monopsony, although just as selling-side concerns can arise short of monopoly, buying-side concerns can arise short of monopsony.

⁷⁵ Where a farmer is a dual supplier there will be agreements with more than one processor. Only a very small minority of Irish dairy farmers are dual suppliers.

- 4.39 As discussed in section 2 the abolition of milk quotas and the expected increased demand in export markets suggests that processors will require additional milk supplies post 2015. Glanbia's stated rationale for the proposed transaction and also market enquiries support this view and suggest that Glanbia will have little incentive to decrease procurement from dairy farmers.
- 4.40 From a competition policy perspective the most obvious monopsony harm to consumers arises when, for example, a monopsonist reduces the quantity of inputs purchased and consequently reduces supply (or equivalently increases the price) to its downstream customers.
- 4.41 As elaborated below, there do not appear to be sufficient downstream competition concerns in either of (i) County Wexford or (ii) elsewhere in the State that would support a finding of SLC as a consequence of Glanbia increasing its share of the procurement of raw milk to the extent involved in the proposed transaction.
- 4.42 As confirmed by market enquiries in County Wexford:
- (a) Since 1 April 2014 Strathroy has begun collecting milk from approximately 40-50 farmers that formerly supplied Wexford Creamery
 - (b) Strathroy expects to have a similar number of farmers signed up for 1 July 2014, the next available day to switch.⁷⁶
- 4.43 These events would suggest that collection of raw milk by a competitor to Glanbia is possible (even by a competitor based in County Tyrone). Hence Glanbia is not the only viable procurement option for dairy farmers in County Wexford.
- 4.44 The incremental impact of the proposed transaction in an area larger than County Wexford is not likely to be significant. Wexford Creamery's share obviously declines in a broader market. Also, Wexford Creamery is located close to the south eastern edge of any geographic market larger than County Wexford, so its acquisition is likely to have an even less significant impact elsewhere in the State.

Conclusion on Competitive Effects

- 4.45 The Authority identified the three theories of harm set out in paragraph 4.3. The Authority has not, in the course of its investigation, found sufficiently robust or consistent evidence to support any of these theories or a finding that the proposed transaction would lead to an SLC in any of the product or geographic markets within the State.
- 4.46 In light of the above, the Authority considers that the notified transaction will not substantially lessen competition in any market for goods and services within the State.

⁷⁶ [...].

5. ANCILLARY RESTRAINTS

- 5.1 The parties have not identified any arrangements that they consider to be ancillary restraints (i.e., directly related and necessary to the implementation of the proposed transaction).

DETERMINATION

The Competition Authority, in accordance with section 22(3)(a) of the Competition Act 2002 has formed the view that the result of the proposed acquisition whereby Glanbia Ingredients Ireland Limited would acquire the entire issued share capital of Wexford Creamery Limited from Wexford Milk Producers Limited will not be to substantially lessen competition in market for goods or services in the State and, consequently, the Authority hereby determines that the acquisition may be put into effect.

For the Competition Authority

Isolde Goggin
Chairperson
Competition Authority

