DETERMINATION IN MERGER NOTIFICATION M/08/009 – KERRY/BREEO

Section 22 of the Competition Act 2002

Proposed acquisition by Kerry Group plc of Breeo Foods Limited and Breeo Brands Limited

Dated: 28/08/2008

The Competition Authority
An tÚdarás Iomaíochta

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SECTION ONE: INTRODUCTION

The Notification

1.1 On 20 March 2008, the Competition Authority ("the Authority"), in accordance with section 18(1)(a) of the Competition Act, 2002 ("the Act") was notified, on a mandatory basis, of the proposed acquisition by Rye Investments Limited, a wholly owned subsidiary of Kerry Holdings Ireland Group Limited, which in turn is a wholly owned subsidiary of Kerry Group plc ("Kerry"), of Breeo Foods Limited and Breeo Brands Limited (together "Breeo") from Reox Finance Limited, a wholly owned subsidiary of Reox Holdings plc ("Reox").

The Transaction

1.2 Pursuant to a Share Purchase Agreement dated 12 March 2008, Kerry proposed to purchase the entire ordinary issued share capital of each of the Breeo companies.

1.3 The effect of the proposed acquisition would lead to the acquisition by Kerry of:

- the business and assets of Breeo, i.e. the consumer foods division of Reox;
- the acquisition of the properties of Breeo, namely:
  a. Spreads Facility, Castlefarm, Mitchelstown, County Cork […];
  b. Offices at Clonmel Road, Mitchelstown, County Cork […];
  c. Second Floor, Block 21 Parkwest Business Park, Gallanstown, County Dublin […];
  d. Unit 4A, Cherry Orchard Business Park, Ballyfermot, Dublin 10 […];
  e. 74 Cookstown Industrial Estate, Tallaght, Dublin 24 […]; and,
  f. Block D, Knockmore Industrial Estate, Lisburn, County Antrim, Northern Ireland […];
- the intellectual property rights of the business and assets of Breeo; and,
- the trade marks used by Breeo in connection with its business, the more well-known ones being 'Dairygold', 'Galtee', 'Shaws', 'Roscrea', 'Mitchelstown' and 'Calvita'. In total […] trade marks would be acquired. Some of the trademarks would be subject to a Trade Mark Deed.

The Undertakings Involved

The Acquirer: Kerry

1.4 Kerry is listed on the Dublin and London Stock Exchanges and has a current market capitalisation in excess of €3.5 billion. It is a leading producer of food ingredients and flavours and supplies over 10,000 foods, food ingredients and flavour products to more than 140 countries worldwide. It is also a branded consumer foods processor and supplier in selected EU markets. It employs some 20,000 people throughout its manufacturing, sales and technical centres across Europe, North America, South America, Australia, New Zealand and Asia. It has manufacturing facilities and international sales offices in various countries across the globe.

1.5 Kerry's consumer foods business in the State involves the production, supply and distribution of a range of consumer products including rashers, sausages, puddings, cooked meats, cheeses and spreads.

1.6 For the year ended 31 December 2006, the worldwide turnover of Kerry Group plc was €4.788 billion and in the State was €[…]. Rye Investments Limited is not currently a trading company. It is being used specifically for the purposes of the proposed transaction and has no turnover.

The Target: Breeo

1.7 Breeo's parent, Reox, is an Irish based, unlisted plc, whose shares are traded through the grey market. 26% of Reox's shares are held by Dairygold Co-Operative Society Limited ("Dairygold") and the balance mainly held directly by 7,500 shareholders, many of whom are members of Dairygold Co-Operative Society Limited. Established in 2006, Reox is an international food company operating in Ireland, Holland, UK and USA. Reox also exports to Continental Europe and the Middle East.

1.8 Reox is 26% owned by Dairygold. As part of the restructuring of Dairygold from 2004 to 2006, three subsidiaries were transferred into Reox, two of which were the Breeo companies, previously the consumer foods division of Dairygold. Breeo has a total turnover of around €[…], of which €[…]is generated in the State. Over recent years, Breeo has been transformed from a raw material processor into a consumer-driven branded business.

1.9 Breeo has outsourced the manufacturing of cooked meats, sausages, rashers, puddings and cheeses to third parties. The only processing that Breeo is involved in is the […] at its Tallaght plant and the manufacture of dairy spreads at its Castlefarm facility. As a result of its decision to exit the manufacturing sector, Breeo has only a limited involvement in the production of retailer or own label products referred to as private label hereinafter. The parties submit […].

Rationale for the Notified Transaction

1.10 Reox stated that the disposal of Breeo would permit it to concentrate upon and invest in its other businesses, […].

1.11 The rationale for the proposed transaction from Kerry's point of view is that it would permit Kerry to further develop its consumer foods division to achieve a size and processing volume enabling it to compete more effectively in the markets in which it operates, which in turn will provide it with the opportunity to:

- enter into and develop further new markets;
- make better use of its assets;
- bring about processing and distribution efficiencies; and,
- have a more comprehensive and efficient distribution network and to have greater purchasing power.

1.12 Kerry believes that the result of the proposed transaction would be to give an improved market service to wholesalers/retailers and to bring about synergies and efficiencies.

Phase 1: Preliminary Investigation

Contacts with the Notifying Parties

1.13 The Authority was notified of the proposed transaction on 20 March 2008. An economic report by Compecon Limited ("Compecon"), commissioned on behalf of Kerry, was submitted with the notification ("Compecon Report").[1] In addition, two econometrics reports by Dr. Vincent Hogan ("Econometrics Reports") were submitted with the notification.[2]

1.14 On 16 April 2008, the Authority, in accordance with section 20(2) of the Act, required further information from the acquirer, Kerry and the target, Breeo. The requirement specified that the merging parties respond by 1 May 2008.

1.15 On 1 May 2008, the Authority received responses to both of its requests for further information, along with certificates of compliance. The new appropriate date was thus 1 May 2008. Therefore, the new deadline for the Phase 1 determination was 31 May 2008.

Third Party Submissions

1.16 The Authority received three third party submissions in writing, from Customer C, RGDATA and an individual living in Mitchelstown. Issues raised in the third party submissions were investigated as part of the review process.

Customer C

1.17 Customer C was concerned that the proposed acquisition would result in a substantial lessening of competition in all markets under review, in particular the markets for breakfast meats and cooked meats. Customer C believed that the proposed acquisition would lead to:

- a reduction in competition in the supply and distribution of the relevant products;
- higher price for consumers; and,
- increased power on the part of the merged entity vis-à-vis primary producers.

RGDATA

1.18 RGDATA was concerned about the implications of the proposed acquisition on competition in the following food categories: cooked meats, cheese and cheese snacks, sandwiches, dairy spreads, and smoothies and juices. RGDATA argued that the concentration of the market in the supply of these food products to the retail sector would have serious consequences for the level of competition.

Individual Living in Mitchelstown

1.19 The final third party submission, from an individual living in Mitchelstown, raised concerns about the impact of the proposed acquisition on the level of competition in the grocery sector. The third party also argued that the proposed acquisition would have adverse consequences for the town of Mitchelstown.

[1] The Compecon Report was entitled, "Report on the competition implications of proposed acquisition by Rye Investments Limited of Breeo Foods Limited and Breeo Brands Limited", 20 March 2008.
[2] The first report was entitled, "The Substitution of Kerry, Breeo and Third Party Products", 17 November 2007, and the second report was entitled, "A Note on the Estimation of Elasticity in the Kerry-Breeo Case", 5 March 2008.

1.20 The issues raised by the third party submissions are addressed in the analysis below with the exception of the concern raised by Customer C over the impact of the merger on primary producers. Customer C's concern is that the proposed acquisition will increase the merged entity's buyer power, particularly in the cooked meats and breakfast meats categories, such that it will drive down the price of pigmeat. Customer C argues that the merged entity will not have any incentive to pass on cost savings to end consumers. Customer C also argues that the merged entity will have an incentive to reduce its output in order to raise the price of its products. In conclusion, Customer C is concerned that there will be a substantial lessening of competition in the upstream markets, in particular the market for pigmeat.

1.21 The Authority does not accept that Customer C's concerns regarding upstream markets are warranted. There is no evidence to suggest that the proposed acquisition raises competition concerns in any upstream markets. The fact that the merged entity may be in a better position to negotiate lower input prices is likely to benefit end consumers in those retail markets where the merged entity will face strong competition from alternative suppliers post-acquisition. As described in detail below, however, the Authority is of the view that the proposed acquisition will result in a substantial lessening of competition in three retail markets.

Investigative Steps

1.22 The Authority contacted various third parties. Table 1.1 below provides details concerning the questionnaires issued by the Authority to retailers during Phase 1 and Phase 2 and the number of responses to each questionnaire.

Table 1.1
Questionnaires to Retailers, Phase 1 and Phase 2.[1]

Retailer	Phase 1	Phase 2	Phase 2 - Table	Phase 2 - Cheeses
Marks and Spencer	√	[…]	[…]	[…]
Aldi	√	[…]	[…]	[…]
Lidl	√	[…]	[…]	[…]
Tesco	√	[…]	[…]	[…]
Dunnes Stores	√	[…]	[…]	[…]
Superquinn	√	[…]	[…]	[…]
Musgrave[3]	√	[…]	[…]	[…]
BWG[3]	√	[…]	[…]	[…]
Stonehouse[2,3]	x	[…]	[…]	[…]
The Barry Group[3]	√	[…]	[…]	[…]

Note: (1) √ signifies that questionnaire/table was sent and response was received; x signifies that a questionnaire/table was sent but no response received; and, – signifies that no questionnaire/table was sent to retailer. (2) The Authority sent a questionnaire to Stonehouse during Phase 1 and was subsequently informed by Stonehouse that although it had no intention of responding to the questionnaire, Stonehouse had circulated the questionnaire to its members. Stonehouse stated that one of its members, The Barry Group, had indicated that it would be responding to the questionnaire. The Barry Group subsequently submitted a response to the questionnaire during Phase 1. (3) The Authority has called these 'retailers' for convenience. These are retail franchisors and own the franchise which they license to retail operators to whom the franchisor is the main supplier of grocery products for resale.
Source: the Authority

1.23 During the Phase 1 investigation, the Authority sent a questionnaire to nine retailers (Marks & Spencer, Aldi, Lidl, Tesco, Dunnes Stores, Superquinn, Musgrave, BWG, and Stonehouse). As Table 2.5 below indicates, these nine retailers accounted for the vast majority of sales of grocery products in the State in 2006. Retailers are used as a proxy for consumer tastes and preferences and purchase goods based on their perception of consumer demand. The demand of the retailers for the products considered in this Determination is a derived demand – the retailers' demand occurs as a result of the demand of end consumers.

1.24 As Table 1.1 above indicates, eight out of nine retailers surveyed during Phase 1 completed the questionnaire. Stonehouse did not complete the questionnaire. However, Stonehouse informed the Authority that although it had no intention of responding to the questionnaire, it had circulated the questionnaire to its members. Stonehouse stated that one of its members, The Barry Group (a small wholesaler based in Cork), had indicated that it would be responding to the questionnaire. The Barry Group subsequently submitted a response to the questionnaire during Phase 1. Thus, nine completed questionnaires in total were received from retailers during Phase 1.

1.25 At the beginning of Phase 2, the Authority sent a follow-up questionnaire to six retailers ([…]) and subsequently discussed their responses by telephone with all six. At the same time that the Authority sent a follow-up questionnaire to six retailers, the Authority also sent a table setting out some questions which each retailer was asked to complete. Four out of six retailers completed the table and returned it to the Authority. Only […] and […] did not complete the table.

1.26 The Authority did not send a follow-up questionnaire or table to three retailers in Phase 2. One retailer ([…]) did not receive a follow-up questionnaire or table in Phase 2 because it indicated to the Authority in its response to the first questionnaire that it does not do business with either of the merging parties and it believes that it is "…unable to contribute anything meaningful to the decision on the proposed merger". Two retailers ([…] and […]) did not receive a follow-up questionnaire or table in Phase 2 because, as neither stock Kerry or Breeo's branded products, there was no additional information required from them. Both retailers also indicated that they have no concerns about the proposed acquisition.

1.27 In their oral submissions of 7 August 2008 in response to the Assessment ("Oral Submission") and their written submissions of 15 August 2008 in response to the Assessment ("Written Submission"), the parties state that there does not appear to be a valid reason why these three retailers ([…], […], and […]) were not sent a follow-up questionnaire particularly in light of the fact that one retailer ([…]), who also expressed no concerns about the proposed acquisition, did receive a follow-up questionnaire. The parties state that it believes the difference in treatment arose because […] indicated it thought brands are important whereas […] and […] do not. The parties state that there is a lack of transparency in the Assessment on this point.

1.28 The Authority decided not to send a follow-up questionnaire or table to […] and […] in Phase 2 because both retailers indicated that they do not stock Kerry or Breeo's branded products in any of the product categories under review.[3] Consequently, there was no additional information they could provide on the sales and market characteristics of the merging parties' branded products. It is therefore unsurprising that both retailers informed the Authority that they have no concerns about the proposed acquisition. However, the Authority decided it was necessary to send a follow-up questionnaire and table to […] despite the absence of any express concerns because […] does stock the merging parties' brands across each of the product categories under review.

1.29 Finally, later in Phase 2, another questionnaire concerning the cheeses product category was sent to five retailers. […] was not sent this questionnaire. The five

[3] Both […] and […], however, purchase some private label products from Kerry and Breeo.

retailers contacted account for the vast majority of the sales of cheeses in the State and were thus considered representative of the whole market. The Authority discussed with four retailers by telephone their responses to this questionnaire. One retailer, […], did not respond to this questionnaire.

1.30 The Authority also contacted competitors of the merging parties. Table 1.2 below lists the competitors who received questionnaires from the Authority during Phase 1 and Phase 2 and indicates whether or not they have responded. The competitors were chosen from a list provided by the parties in the notification of their top 5 competitors in the State and worldwide across each of the product categories under review.

Table 1.2
Questionnaires to Competitors, Phase 1 and Phase 2.[1]

Competitor	Phase 1	Phase 2
Clonakilty	[…]	[…]
Cranswick	[…]	[…]
Grampian	[…]	[…]
Olhausen	[…]	[…]
Bradys	[…]	[…]
Samworth Brothers	[…]	[…]
Tulip Limited	[…]	[…]
Bernard Matthews	[…]	[…]
Carroll Cuisine	[…]	[…]
Green Farm Foods	[…]	[…]
Nestle	[…]	[…]
Parkham	[…]	[…]
Arla Foods	[…]	[…]
Glanbia	[…]	[…]
Irish Dairy Board	[…]	[…]
Unilever	[…]	[…]
Dairycrest	[…]	[…]
First Milk	[…]	[…]
Fromagerie Bel	[…]	[…]
Kraft	[…]	[…]
Lactalis	[…]	[…]
Hogans	[…]	[…]
Glenside	[…]	[…]

Note: (1) √ signifies that questionnaire/table was sent and a response was received; x signifies that a questionnaire/table was sent but no response received; and, – signifies that no questionnaire/table was sent.
Source: the Authority

1.31 Twenty three competitors received a questionnaire in Phase 1 of which twelve responded. In Phase 2, a follow-up questionnaire was sent to eleven competitors. In the case of […], […] and […], the Authority was satisfied that, given their response to the questionnaire issued in Phase 1, it was not necessary to send a follow-up questionnaire in Phase 2. In the case of […] and […], although neither responded to the Phase 1 questionnaire, it was deemed necessary to send both a follow-up questionnaire in Phase 2.

1.32 During Phase 1, the Authority also retained the services of Dr. Patrick Paul Walsh, Professor of International Development Studies, University College Dublin, to review Dr. Hogan's Econometric Reports.

Phase 1 Determination

1.33 Having considered the notification, the Compecon Report, the Econometric Reports, the additional materials submitted by the parties and also the information provided by third parties, the Authority was unable to form the view at Phase 1 that the result of the proposed acquisition would not be to substantially lessen competition in markets for goods and services in the State.

1.34 As a result, on 29 May 2008, the Authority determined, in accordance with section 21(2)(b) of the Act, to carry out a full investigation under section 22 of the Act.

Phase 2: Full Investigation

Contacts with the Notifying Parties

Request for Further Information

1.35 On 5 June 2008, the Authority sent a second request for further information to Kerry pursuant to section 20(2) of the Act, with a deadline of midday on 20 June 2008. However, as it took place later than one month from the date of receipt of the notification, this request for further information did not have an impact on the "appropriate date".

1.36 A letter requesting limitations to the information requested was received on 12 June 2008. A letter outlining the extent of the limitations granted was sent by the Authority on 19 June and Kerry's response was received on 20 June 2008.

Econometrics

1.37 A meeting was held on 3 July 2008 to explore Dr. Walsh's comments on the Econometric Reports prepared by Dr. Hogan.[4] In addition to these two experts, legal, economic and company representatives were also present from each of the parties to the proposed transaction.

1.38 On 7 July 2008, a response by Dr. Hogan was submitted to the points raised by Dr. Walsh.[5] On 14 July 2008, Dr Walsh responded,[6] disputing the arguments put forward by Dr. Hogan. Dr. Hogan then responded on the 18 July 2008.[7] Dr. Walsh responded on 24 July 2008.[8] At the Oral Submission on 7 August 2008, Dr. Hogan made a further presentation on the econometrics. As part of the parties' Written Submission, Dr. Hogan contributed two more econometric reports dated 13 August 2008,[9] on which Dr. Walsh commented in a report dated 19 August 2008.[10]

Further Contacts Pre-Assessment

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[4] After discussion with Dr Walsh, the Authority raised a number of concerns about the methodology and data used in the Econometric Reports in a letter dated 24 April 2008. On receipt of a response, Dr Walsh prepared a response to Dr Hogan's Econometric Reports. The response was sent to the undertakings involved on 26 June 2008. It formed part of the backdrop for the discussion on 3 July 2008.

[5] "Response to the Econometric Reports of Paul Walsh", 7 July 2008. This report will be referred to the "Further Econometric Report".

[6] "Response to 'Response to Econometric Reports of Paul Walsh by Vincent Hogan, July 2008-07-07". This report will be referred to as "Response Econometric Report".

[7] "Response to The Second Report of Paul Walsh*,* by Dr. Hogan, 18 July 2008". This report will be referred to as "Further Econometric Report 2".

[8] "Response to "Response to The Second Report of Paul Walsh by Vincent Hogan, July 18th 2008", Dr Walsh, UCD, 24 July 2008.

[9] "Response to Paul Walsh's Note of 24th July, 2008", Dr Hogan; "Elasticities for Kerry Products using EPOS Data," Dr. Hogan.

[10] "M/08/009, Kerry/Breeo: Written Legal Submission of the Parties, 15 August 2008, Section 17 and Annex 16, Econometrics", Dr. Walsh, 19 August 2008.

1.39 On 15 July 2008, the case team met with economic, legal and company representatives of the parties, at which the competition concerns of the case team were presented and discussed. The parties and their representatives also updated the Authority on recent developments in the markets affected by the proposed transaction.

1.40 From 18 July onwards, various emails containing argumentation and additional factual information were submitted by the parties to the Authority, e.g. on 18 July 2008, 24 July 2008 and 25 July 2008. The Authority informed the parties that due to the need to give appropriate consideration to material presented after the meeting of 15 July 2008, it might not be possible to include it in the Assessment and this indeed turned out to be the case.

Assessment

1.41 The Authority issued its Assessment and a list of the documents on its file to the parties on 25 July 2008. The parties requested access to the Authority's file, which was provided.

Further Contacts Post-Assessment

1.42 The parties made further submissions on 1 August 2008. An Oral Submission was made to the Authority on the afternoon of Thursday 7 August. Both parties and their respective legal and economic representatives were present.

1.43 The parties provided an extensive Written Submission on 15 August 2008. The Written Submission contained 18 annexes. One of the annexes was a response by Compecon to the Assessment ("the Compecon Response"). Subsequently, the parties made further submissions to the Authority dated 26 August 2008 concerning alleged threats by […] to de-list some of Breeo's product lines and evidence regarding the relative ease of entry into the market for rashers in the State.

Proposals

1.44 The parties made no proposals either informally or formally to the Authority.

Third Party Submissions

1.45 Interested parties were invited to make written or oral submissions by no later than 5.00pm on 19 June 2008. No such submissions were received.

Investigative Steps

Customers/retailers

1.46 As described in paragraphs 1.22-1.29 above, the Authority sent a number of questionnaires to retailers during Phase 1 and Phase 2 of the investigation.

1.47 In addition, the Authority also sent one question on 31 July 2008 to five retailers ([…], […], […], […] and […]) asking for any studies/research conducted by them which illustrated or described the relationship between private label and branded goods in four product categories (rashers, non-poultry cooked meats, non-butter spreads, and processed cheese). Only […] and […] responded to the question. Both informed the Authority that they have never carried out any such studies or research concerning the relationship between private label and branded goods.

1.48 A witness summons was issued to five retailers on 13 August ([…], […], […], […] and […]). A cover letter was also sent with each witness summons setting out a number of questions which the Authority intended to ask at the summons hearing. These questions were concerned with alleged instances claimed by Breeo where these retailers had refused to list certain Breeo brands. In addition, there were questions relating to the processed cheese market.

1.49 Prior to the summons hearing, all five retailers provided a written response to the questions set out in the cover letter. As a result, the Authority revoked each witness summons.

Competitors

1.50 As described in paragraphs 1.31 and 1.32 above, the Authority sent a number of questionnaires to competitors during Phase 1 and Phase 2 of the investigation.

Other

1.51 The Authority retained the services of an economics expert, Dr. Don McFetridge, a Professor in the Department of Economics at Carleton University, Ottawa, Canada, to review certain aspects of the Compecon Report and advise on the competition implications of the proposed acquisition.

1.52 The Authority retained the services of an independent accounting adviser to assist the Authority in its examination of certain aspects of the Share Purchase Agreement and related documentation as well as one issue concerning efficiencies.

SECTION TWO: BACKGROUND

Introduction

2.1 Both Kerry and Breeo supply and distribute a wide range of consumer foods throughout the State. This section provides information on:

- the level of the supply chain at which the parties operate;
- the production and supply facilities of the parties and the route to market;
- the brands and private label products of the parties;
- branded products, private label and countervailing buyer power;
- the products not analysed in detail in the Authority's Determination; and,
- the econometric results

The Level of the Supply Chain at which the Parties Operate

2.2 Breeo and Kerry supply and distribute to wholesalers and retailers, including foodservice operators.

2.3 Formerly, Breeo was involved in the manufacture/processing of its products. This is no longer the case and it now only manufactures spreads. Separately, […] which is part of the supply business. All other processing and production of Breeo's products is outsourced.

2.4 In the case of Kerry, it is not involved in any primary processing. Kerry purchases meats for its cooked meats and breakfast meats, natural cheese for its pre-packed cheese, oils for its spreads and its pre-packed sandwiches businesses from a variety of suppliers. Table 2.1 below outlines the level of processing done by the parties for the areas of overlap.

Table 2.1
Levels of Processing Carried Out by Kerry and Breeo, Main Sales Product Categories, Overlap Products, 2008

Products	**Kerry**	**Breeo**
Cooked Meats	Buys pork, poultry and beef cuts which are processed through de-boning, cooking, curing, slicing and packaging.	Outsourced production of […] for the Breeo […] plant in Tallaght and outsourced production of Breeo branded cooked bulk hams.
Rashers	Buys pork backs, streaks, cures and slices the meat and packs them into consumer formats.	Production of both branded and private label rashers outsourced.

Sausages and Puddings	Buys pork and various cuts of meat, mixes them with various ingredients rusks and spices and fills the casings and cuts and packs in various consumer formats. Casings are purchased from third party suppliers. Puddings are processed in a similar manner but must be cooked after being filled.	Production outsourced.
Cheese	Purchases natural cheese blocks which it slices into consumer pack sizes. Kerry also has a cheese processing plant which blends and mixes cheese to produce processed cheese. Kerry does not manufacture cheese.	Production outsourced. Packages and labels.
Spreads	Buys various oils which are then blended with other ingredients and pasteurised to produce spreads.	Purchases various oils, used to produce spreads, which are then packaged and distributed.
Pre-packed sandwiches	Buys in finished ingredients (e.g., bread, ham, cheese, lettuce, spreads etc.) and assembles and packs sandwiches.	Supplies pre-packed sandwiches.
Chilled fruit juices	Purchases finished product.	Production of smoothies and chilled fruit juices outsourced.
Fresh dairy products	Purchases finished product.	Production outsourced.

Source: Information provided by the parties.

Production and Supply Facilities of the Parties and the Route to Market

Production and Supply Facilities

Kerry

2.5 The production (processing and supply) facilities of Kerry are situated at:

Product Categories of Overlap	**Production Kerry Foods**
Cooked Meats	Kerry Foods, Shillelagh, Co. Wicklow
Rashers	Kerry Foods, Shillelagh, Co. Wicklow
Sausages	Kerry Foods, Shillelagh, Co. Wicklow
Puddings	Kerry Foods, Shillelagh, Co. Wicklow
Spreads	Kerry Ingredients, Listowel, Co. Kerry
Cheese	Golden Cow, Portadown, Co. Armagh DPP, Coleraine, Co. Derry Kerry Foods, Charleville, Co.Cork.

2.6 Kerry has two distribution hubs: Kerry Foods Ballymount NDC,[11] Dublin 12 and Kerry Foods, Portadown, Co. Armagh. Products are distributed from Kerry's distribution hub in Ballymount to its depots in the State, and from its distribution hub in Portadown to its depots in Northern Ireland. Kerry has nine depots on the island of Ireland.

Breeo

2.7 Breeo's processing facilities are as follows:

- Tallaght Plant (Co. Dublin). This plant is a dedicated […] plant for a selection of Breeo branded products and some private label products for Supervalu and Aldi. Private label accounts for circa […]% (but […]) of production. […] The plant is 27,000 sq. ft and […] on average […] tonnes of ham, white meats and corned beef per week. There are five […] lines running at approximately [70-80]% capacity;

- Breeo Castlefarm, Mitchelstown, Co. Cork. This is the production facility for the Dairygold range of spreads and some private label spreads. The factory is 35,000 sq. ft and processes on average […] tonnes annually; and,

- Yee By Yum, Cherry Orchard (Co. Dublin). This plant is a dedicated sandwich processing plant. The plant is approximately 18,000 sq. ft.

In June, 2006, Breeo moved from a company owned and operated warehouse to a third party warehouse operated by PRL Limited, located in Rathcoole, Co. Dublin, from which delivery is made to customers.

[11] NDC= National Distribution Centre

Route to Market

2.8 Both Kerry and Breeo distribute their products in a very similar manner. Each has its own distribution network and vehicles which distribute to wholesalers and retailers. In the case of some retailers, the parties' products are delivered to their central distribution location or centre while in the case of wholesalers and other retailers, the products are delivered to their premises. Products are distributed to the central distribution locations by third party hauliers.

Kerry

2.9 Kerry products are distributed to all vertically-integrated retailers,[12] except Dunnes, from Kerry factories through to their central distribution locations. Products are delivered from Kerry's factories to the multiples' central distribution centres by third party hauliers. The orders are then picked up by supermarkets at their central distribution centres for onward distribution to their stores. This process occurs on a daily basis.

2.10 Kerry operates its own distribution hub, based at Ballymount, from which it services Dunnes and all of the non-multiple customers. The products are directly delivered from the factory to this hub and picked up for daily delivery to Kerry's depots from which they are distributed to customers across Kerry's network of chilled vans. Kerry has approximately […] vehicles in its distribution fleet (including its retail, foodservice and sandwich fleets). Products are distributed through cash and carry to access some retail independents and foodservice outlets.

Breeo

2.11 As noted in paragraph 2.7 above, in June 2006, Breeo moved from a company owned and operated warehouse to a third party warehouse operated by PRL Limited, located in Rathcoole, Co. Dublin. This is a multi-temperature, multi-customer warehouse with both ambient and chilled operations on site. A […]-year commercial agreement is in place with PRL, which commenced on […].

2.12 Breeo manages its own demand planning and forecasting activities. An order is generated by Breeo which is then sent either to a Breeo processing site or a third party supplier.

2.13 In the majority of contracts with suppliers, the supplier is contracted to deliver the product into the PRL warehouse. Breeo has outsourced the collection and delivery of the product to third party transport providers in respect of […] of its […] suppliers.

2.14 The delivery of orders to customers is managed by the Breeo logistics team which is based at the PRL warehouse. The Breeo logistics team works in conjunction with PRL staff for transport co-ordination on a daily basis.

2.15 Deliveries are made to central distribution centres on a daily basis. Retailers that operate central distribution centres include Musgrave, Tesco, Superquinn, Lidl and

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[12] These vertically integrated retailers include: Tesco Ireland Limited ("Tesco"); Superquinn; Aldi Stores (Ireland) Limited ("Aldi"); Marks & Spencer (Ireland) Limited ("M&S" or "Marks & Spencer"); Lidl Ireland Gmbh ("Lidl"); and, Dunnes Stores ("Dunnes"). It should also be noted that some of the wholesaler-franchisor or symbol groups also use a central distribution warehouse. These groups include: Musgrave Group plc ("Musgrave"); BWG Foods Limited ("BWG"): James A Barry & Company Ltd. ("Barry Group"): ADM Londis plc ("Londis"); Mangan Bros Group (Mangan"); and Stonehouse Marketing Limited ("Stonehouse"). For further details of the operations of these undertakings, see Competition Authority, 2008, *A Description of the Structure and Operation of Grocery Retailing and Wholesaling in Ireland: 2001 to 2006*. Grocery Monitor: Report No. 1, Dublin: the Authority, pp. A-14 – A-50. This report will be referred to as the Grocery Monitor Report No. 1.

Aldi in the State, and Asda and Sainsburys in Northern Ireland. These deliveries are provided by external transport companies whose services are paid for by PRL on Breeo's behalf. For Dunnes, PRL co-ordinates a network of third party suppliers that deliver Breeo and other third party products. Deliveries are undertaken six days a week.

2.16 A number of convenience stores and cash and carries are supplied by Breeo-owned vans and agents. The overall Breeo van fleet comprises 68 vans operating across the island of Ireland.

Branded and Private Label Products of the Parties

Branded

2.17 Brands, in terms of market share, are important in each of the nine markets in which competition assessments are made in sections 3 to 8 below. The average share of all brands, including those of the parties, across the nine markets was [70-75]% in 2007. However, the importance of brands varies across these nine markets. In 2007, for example, the market share of all brands taken together, varied from almost [95-100]% in butter to [35-40]% in puddings.

2.18 Table 2.2 below presents the Kerry and Breeo brands under review for the overlap products, while Tables 2.3 and 2.4 present the market shares of Kerry and Breeo, respectively, across each of the nine markets under review. Kerry brands, apart from butter, account for at least [15-20]% in all markets when measured in terms of value, reaching almost [35-40]% in poultry cooked meats. Breeo's market share across the nine markets is at least [5-10]%, except for sausages and poultry. The merged entity would have a market share of at least a third in eight of the nine markets, and at least [35-40]% in five markets.

2.19 Since Breeo has little manufacturing capability, the Assessment took the view that the €[…] price that Kerry is willing to pay must, in large part, reflect the value of these brands. In the parties' Written Submission in response to the Assessment, this conclusion is disputed. While the parties agree that brands are naturally seen as one of the justifications for the merger, the parties argue that the Share Purchase Agreement ("SPA") and associated documentation give a more complete picture of the transaction. Once account is taken of these other aspects of the transaction, such as a sales book worth €[…] and various property assets, then it is not reasonable to assume, the parties argue, that the €[…] price was only or mainly attributable to the brands.

2.20 The Authority commissioned an independent accounting adviser to assist in its review of the SPA and associated documentation. Following this review, the Authority has concluded that the brands owned by Breeo form an integral part of the business but the following factors must also be considered in relation to the proposed acquisition:

- The opportunity for Kerry to grow the business;
- The cost efficiency/synergy opportunities;
- The positive cash flow effect of the above points;
- The management team that will transfer with the business;
- Other intangible and intellectual property built up within Breeo; and,
- The market share that Breeo has developed […].

However, there is no doubt that the Breeo brands and their strength in the market are an important factor in the valuation placed by Kerry on this Company, particularly since the target net assets as per the SPA is €[...] and the goodwill element of the deal is €[...].

2.21 The Authority's view that the price paid for Kerry reflects, in large part, the Breeo brands, is consistent with Kerry's internal documentation. In '[…]', prepared by the Managing Director of Kerry regarding the commercial case for the proposed acquisition, a series of slides consider why certain firms might buy Breeo. In each case, the strength of the Breeo brands is mentioned as a reason:

Potential Purchaser of Breeo	Why?
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]

Thus, the Authority considers that the evidence is consistent with the view_that the price paid by Kerry reflects, in large part, the value of the Breeo brands.

Table 2.2
Kerry and Breeo Selected Brands, by Overlap Products

Products	Kerry	Breeo
Spreads	Low Low Kerrymaid Golden Olive Move Over Butter Easipail Pure	Dairygold Golden Pastures Country Pride
Cheese	Low Low Charleville Easisingles Golden Vale Champion Cheestrings Attack a Snak	Mitchelstown Xtreme Three Counties Calvita Galtee
Rashers, Sausages & Puddings (Breakfast Meats)	Denny Ballyfree Clover	Galtee Shaws Roscrea
Cooked Meats (Ham, Turkey, Chicken, Beef)	Denny Ballyfree	Galtee Shaws Roscrea

Source: Information provided by the undertakings involved

2.22 Brands typically command a higher price. This is particularly the case for strong or premium brands compared to secondary or tertiary brands. There are a number of reasons why a brand may command a higher price, including 'higher perceived quality', 'innovation and advertising', and the risk if the product does not perform as anticipated.[13]

[13] For details see Competition Commission (2008) "Own-label goods." Appendix 9.10 in Competition Commission (2008) *The supply of groceries in the UK market investigation*, Volume 2, *Appendices*, London the Commission, p. 9.

2.23 The magnitude of the price premium commanded by Kerry and Breeo brands in the nine markets referred to above are presented in Tables 2.3 and 2.4, respectively. The tables show, for example, in the rashers market, that Kerry's brands are priced […]% above the average price of rashers while Breeo's brands are […]% above the average price of rashers. However, Kerry and Breeo's brands do not command a premium in all markets. In non-butter, Kerry's brands are not above the average price, while the same holds for Breeo in butter. The premiums are estimated based on market share data measured in value and volume which is also included in both of these tables.[14]

Table 2.3
Market Shares, by Volume and Value, P_{K}/P_{AV}, Kerry, Nine Markets, the State, 2007

Market	Market Share Volume (%)	Market Share Value (%)	Relative Price P_{K}/P_{AV}
Breakfast Meats			
Sausages	[30-35]	[30-35]	1.05
Puddings	[20-25]	[20-25]	1.06
Rashers	[15-20]	[20-25]	1.45
Cooked Meats			
Poultry	[25-30]	[35-40]	1.33
Non-poultry	[25-30]	[30-35]	1.26
Spreads			
Butter	n/a	n/a	-
Non-butter	[20-25]	[20-25]	0.97
Cheese			
Natural	[20-25]	[25-30]	1.12
Processed	[25-30]	[30-35]	1.27

Note: For puddings, data is available for market share by volume for Kerry and for volume and value for Kerry and Breeo combined. It is assumed that the price premium is the same for both firms in constructing the market share by value for puddings. P_{K}/P_{AV} is the ratio of the price of Kerry to the average price in the given market
Source: Compecon Report (Table 3.1, p. 25; Figure 5.11, p. 70) and information supplied by the parties.

Table 2.4
Market Shares, by Volume and Value, P_{B}/P_{AV}, Breeo, Nine Markets, the State, 2007

Product	Market Share Volume (%)	Market Share Value (%)	Relative Price P_{B}/P_{AV}
Breakfast Meats			
Sausages	[5-10]	[5-10]	1.02
Puddings	[10-15]	[10-15]	1.06
Rashers	[15-20]	[20-25]	1.49
Cooked Meats			
Poultry	[0-5]	[0-5]	1.45
Non-poultry	[10-15]	[10-15]	1.19
Spreads			
Butter	[10-15]	[5-10]	0.75

The appendix may be accessed at: http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538_9_10.pdf

[14] This can be illustrated by using Kerry as an example. The subscripts $_{K,\ T,\ AV}$ refer to Kerry, the total or overall market and the average, respectively, while P and Q refer to price and quantity. Kerry's market share measured in volume terms is: Q_{K}/Q_{T}, while Kerry's market share measured by value is $(P_{K}xQ_{K})/(P_{AV}xQ_{T})$. If Kerry's market share measured by value is divided by Kerry's market share measured by volume, then the result is P_{K}/P_{AV}.

Non-butter	[25-30]	[30-35]	1.12
Cheese			
Natural	[10-15]	[10-15]	0.92
Processed	[20-25]	[20-25]	0.88

Note: For puddings, data is available for market share by volume for Breeo and for volume and value for Kerry and Breeo combined. It is assumed that the price premium is the same for both firms in constructing the market share by value for puddings. The data relate to Kerry and Breeo combined. P_{B}/P_{AV} is the ratio of the price of Breeo to the average price in the given market
Source: Compecon Report (Table 3.1, p. 25; Figure 5.11, p. 70) and information supplied by the parties.

2.24 Kerry has much stronger brands than Breeo measured in terms of the ratio of the brands price to the average market price. In every market except non-butter, Kerry's brands command a premium. In contrast, for Breeo, the number of markets where its brands command a premium is somewhat smaller – six. Nevertheless, both Kerry and Breeo have strong brands in certain markets such as rashers, poultry cooked meats, and and non-poultry cooked meats.

Private Label

2.25 As noted above, the parties not only market their own branded products but also supply private label products for retailers. The arrangements between retailers such as Tesco and Superquinn and suppliers such as Breeo and Kerry are rarely formalised in terms of a contract and can be terminated by the retailer at short notice.

2.26 Breeo is in the process of phasing out its participation in the supply of private label and […].[15] In contrast, Kerry continues to supply private label. For example, according to the Compecon Report (Table 7.1, p. 90), Kerry supplied private label cooked meats to [retailer], [retailer], [retailer], but not [retailer] or [retailer] and breakfast meats to [retailer] and [retailer].

2.27 The parties stressed to the Authority in a presentation on 15 July 2008 the dynamic and competitive nature of supplying private label to retailers. […] Hilton Food Group plc ("Hilton"), [retailer] decided on a tender basis to source its private label puddings from Bradys/Rudds instead of […], while [retailer] is re-tendering its private label cooked meats in the third quarter of 2008.

2.28 This picture of a competitive market for the supply of private label with auctions, re-tendering and re-negotiation of supply arrangements is consistent with the view of the retailers surveyed by the Authority. It was for this reason that retailers had no concerns with respect to the impact of the proposed transaction on securing suppliers for their private label business.

Branded Products, Private Label and Countervailing Buyer Power

2.29 The parties argue in the notification that retailers such as [retailer], [retailer], [retailer] and [retailer] exercise countervailing buyer power with respect to the parties' branded products. In both their Oral and Written submissions, the parties again stress the importance of countervailing buyer power. For example, the parties state in their Written Submission, "it is submitted that Multiples/Symbol Group have and exercise strong countervailing market power and would continue to do so following the proposed transaction." (paragraph 7.32).

Definitions

[15] Breeo informed the Authority by letter dated 27 June 2008 that private label represented […]% of its business and constitutes […] of its business. Examples were presented where […] had been received by Breeo.

2.30 The Authority's *Merger Guidelines* characterise buyer power in the following terms:

> The fact that buyers are large and have a degree of bargaining power is not sufficient to conclude that market power is effectively constrained. Effective buyer power requires that buyers have alternative sources of supply, or are capable of credibly threatening to set up alternative supply arrangements. (paragraph 4.10).

2.31 Similar statements may be found in the guidelines of other competition agencies. In the guidelines of the European Commission, reference is also made to an important post-merger consideration:

> Furthermore, it is not sufficient that buyer power exists prior to the merger, it must also exist and remain effective following the merger. This is because a merger of two suppliers may reduce buyer power if it thereby removes a credible alternative. (paragraph 67)[16]

2.32 Countervailing buyer power usually refers to the ability of large customers to constrain the exercise of market power by their suppliers. As noted in the Authority's *Merger Guidelines*, the degree of buyer power possessed by a buyer will depend on the extent to which it can switch to alternative suppliers or engage in self-supply. If a buyer resells the goods it purchases, i.e, is a retailer, an additional consideration is required. The ability of a large retailer to exercise market power is limited by the willingness of the retailer's customers, the final consumers, to buy the products of alternative suppliers including the retailer. Thus, even if a larger retailer is able to buy from alternative suppliers or engage in self-supply in response to an exercise of market power by its supplier, it may not pursue this course of action if the goods of the alternative suppliers, including itself, are not considered by the retailer's customers as a suitable replacement.

2.33 Countervailing buyer power manifests itself in low input prices in the same way that a seller that has market power will raise price. In other words, buyers use their bargaining power to extract the lowest possible price from their input suppliers. The parties argue that retailers have a high degree of countervailing buyer power which they use to negotiate low prices from Kerry and Breeo.

The Importance of Retailers

2.34 There can be little doubt that a small number of retailers account for a large percentage of grocery sales in the State (see Table 2.5). If it is assumed that each retailer's share is the midpoint of the range in the table, then the leading six retailers account for 65% of all grocery products sold in the State. The parties, using the TNS data[17], argue that the leading four retailers – Tesco, Dunnes, Musgrave, and Superquinn – accounted for 25.9%, 23.0% 19.9% and 8.1%, respectively, of total grocery sales in the State in 2006 or 76.9% in total. By 2007, these four retailers accounted for 78.8%. However, irrespective of which data source is used, the conclusion is the same: a small number of retailers account for a large proportion of grocery sales in the State.

Table 2.5

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[16] European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings,* Official Journal C 31, 05.02.2004, pp. 5-18. These will be referred to as Commission, *Horizontal Merger Guidelines*.

[17] TNS is based on household survey; the data in Table 2.5 is based on a survey of the retailers. TNS is an ongoing survey using a sample of consumer designed to represent the target population in terms of their purchasing behaviour. TNS surveys 2000 households in the State and covers 80-85% of the grocery market in the State. Annex 1 of the parties' Written Submission provides more details.

Market Shares, by Turnover, Retailers, Grocery Products, 2006, the State

Retailer	Market Share (%)
Tesco	15-20
Dunnes	10-15
Musgrave	10-15
BWG	5-10
Lidl	5-10
Superquinn	5-10
Aldi	0-5
Gala	0-5
Marks & Spencer	0-5
Barry Group	n/a
Mangan	n/a
Independent Retailers	14.1
Total	100

Note: Within each band (e.g., 10-15 or 0-5) retailers are listed in alphabetical order.
Source: Grocery Monitor Report No. 1 (Table 16, p. 66).

Countervailing Buyer Power: What Form?

2.35 Buyer power by the retailer can take a number of different forms. These include [for example]: (i) threatening to de-list one of the brands of Breeo or Kerry such as all Denny rashers; (ii) deranging individual package sizes or formats for a particular product of the Breeo or Kerry such as the smallest sized package of Denny rashers; (iii) refusing to list a new product of either Kerry or Breeo; (iv) refusing to accept a proposed price rise from either Kerry or Breeo; (v) refusing to support Kerry or Breeo promotions; and, (vi) moving Kerry and Breeo products to a 'slow' part of the aisle.

2.36 The purpose of exercising buyer power by the retailer is to obtain a low price from a supplier to improve or maintain profitability. This can be achieved directly through a reduced wholesale price, or indirectly by demanding so-called below the line (e.g., slotting allowances) and above the line (e.g., marketing or promotional activities) payments from Breeo or Kerry.

2.37 It should be noted that the retailer may also de-list or derange for reasons other than the exercise of countervailing buyer power. In the normal course of business, retailers will de-list and derange slow moving products in favour of more profitable products. This view was confirmed to the Authority by all retailers.

2.38 Further, product turnover in a store is part of everyday business regardless of the size of the retailer. Thus a small corner store or a local supermarket will have limited space and, of necessity make decisions about which products to list and when to de-list a product because it is slow moving. However, such behaviour is not usually described as buyer power.

Buyer Power: Source

2.39 The source of any countervailing buyer power exercised by the retailers with respect to Breeo or Kerry (for example through de-listing or de-ranging) is not only due to the fact that the retailers purchase large volumes from Breeo and Kerry, but also due to the fact that the retailers may have alternative sources of supply. As the Compecon Report (p. 101) states "… there would appear to be plenty of alternative sources of supply in the case of the products in question." These alternatives can be divided into two groups: other branded products; and the retailers' own brand products, referred to as private label.

2.40 Whether a retailer can credibly switch to an alternative brand or private label depends on consumer demand. It is perhaps worth citing the UK Competition Commission's[18] recent findings regarding the possession of buyer power in groceries:

> We conclude that, based on the size of grocery retailers, wholesalers and buying groups relative to suppliers, together with the evidence of supplier pricing and margins, all large grocery retailers, wholesalers and buying groups have buyer power in relation to at least some of their suppliers. However, we found that the buyer power of even the largest grocery retailers may be offset by the market power possessed by suppliers of the most prominent branded goods. (paragraph 9.21).

Thus, if Breeo and Kerry have the key brands in a particular market then post-merger, large retailers may not be able to exercise sufficient countervailing buyer power to prevent a permanent price rise.

2.41 One of the alternative sources of supply to Kerry and Breeo's branded products is private label. In Ireland, private label accounted for 16.2% of grocery sales in 2006, with a slight increase to 16.4% in 2007, based on AC Neilsen data.[19] Using TNS data, the share of grocery sales for which private label accounts is higher at 35%. According to the parties, this is due to the fact that AC Neilsen covers only 60 categories while TNS covers 200 categories.

2.42 The parties in their Oral and Written Submissions point to a number of facts which suggest that private label[20] is a close competitor to Kerry and Breeo's branded products. These facts are:

- private label is available at several value and niche segments (e.g., value, standard, premium, super premium, healthy etc). Hence, private label can compete with the primary and tertiary brands of firms such as Breeo and Kerry while at the same time selling a value brand;

- the packaging of private label imitates that of the brand. At the Oral Submission, the parties brought in many actual examples to illustrate the point that private label brands copy the packaging of the brand. Furthermore, in an AC Neilsen consumer survey reported in Annex 2 of the parties' Written Submission, 65% of consumers agreed with the statement that, "Private label packs look just as good as manufacturers brands.";

- private label is a brand in its own right. It is promoted as such by the retailers. In Annex 7 to the parties' Written Submission, reference is made to the launch by Musgrave in the final quarter of 2007 of the Supervalu Supreme range which was heavily promoted and was supported by national television and press advertising;

[18] For details, see Competition Commission (2008) *The supply of groceries in the UK market investigation*, Volume 1 Summary and report, London the Commission. This may be accessed at: http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf
[19] Grocery Monitor Report No. 1 (Table 15, p. 64)
[20] It should be noted that the term 'private label' is used as a matter of convenience to refer to the brands or labels owned by major retailers. In other words, each retailer's brand or private label is really a separate brand.

- private label penetration rates, according to TNS, is 100% (ie., 100% of households purchased at least one private label good during the year);

- according to an AC Neilsen consumer survey reported in Annex 2 to the parties' Written Submission, 67% of consumers agreed with the statement that, "Private label packs quality is just as good as leading brands"; and,

- in general, retailer pricing policies dictate that private label products are a certain percentage (c. 20%) cheaper than brand leaders. Private label prices track brand prices illustrating the fact that they are competing with brands. The retailers' strategy is to target the brands by deliberately discounting their offering at each tier in the product range. The rate of discount will depend on the retailer. In some instances, the parties note private label is more expensive than the corresponding brand.

2.43 The Authority accepts that private label is indeed a competitor with the brand. The issue is whether private label is a sufficiently close substitute to constrain the merged entity if it permanently raises the price of its branded products post-merger in a particular market.

2.44 In general, as noted above, private label sells at a discount to the brands. This is consistent with the views of retailers. Retailers were asked in April 2008 how they priced their own-label brand product(s) compared to those of Kerry and Breeo since 1 January 2006. Typical of the response was Customer A who stated:

> Our comparable products would have been around [15-25]% cheaper than Kerry's and Breeo's. Our own-brand products are designed to compete with the branded products by being sold at that lower price.

Other retailers differed with respect to the size of the discount, with Customer B, for example, saying that there is a price difference between 10%-20%, depending on the product.

2.45 For the nine markets analysed in sections three to eight below, Table 2.6 presents the price of private label relative to the average price in the market, as well as relative to the prices of Kerry and Breeo. The results are consistent with the above discussion in that private label is priced at a discount to the brand.[21] Since both private label and the merging parties offer products from premium to value tiers, the discount is likely to vary across each of the markets.

2.46 The fact that on average private label is traded at a discount to the brands of Kerry and Breeo does not mean that private label does not compete with Kerry and Breeo. In each of the nine markets in Table 2.6, private label and the brands are considered to part of the same market and hence substitutes for each other. The price difference reflects consumers' perception of the relative value of one against the other depending on differences in quality and other characteristics. The issue, as noted above, is whether private label is a sufficiently close substitute to constrain the merged entity if it permanently raises price post-merger in a particular market.

Table 2.6
Market Shares, by Volume and Value, P_{PL}/P_{AV}, Private Label (including discounters), Nine Markets, the State, 2007

Market	Market Share Volume (%)	Market Share Value (%)	Relative Price P_{PL}/P_{AV}	Relative Price P_{PL}/P_K	Relative Price P_{PL}/P_B

[21] In view of the low market share of private label in butter the 1.48 should be discounted.

Breakfast Meats					
Sausages	[25-30]	[25-30]	0.95	0.90	0.93
Puddings	[65-70]	[60-65]	0.97	0.91	0.92
Rashers	[45-50]	[35-40]	0.79	0.54	0.53
Cooked Meats					
Poultry	[45-50]	[35-40]	0.80	0.60	0.55
Non-poultry	[55-60]	[45-50]	0.81	0.64	0.68
Spreads					
Butter	[0-5]	[0-5]	1.11	-	1.48
Non-butter	[10-15]	[5-10]	0.56	0.58	0.50
Cheese					
Natural	[35-40]	[30-35]	0.91	0.81	0.99
Processed	[20-25]	[10-15]	0.48	0.38	0.54

Note: For puddings, private label approximated by non-Breeo & non Kerry brands. P_{PL}/P_{AV} is the ratio of the price of private label to the average price in the given market; P_{PL}/P_K is the ratio of the price of private label to the Kerry price in the given market; and, P_{PL}/P_B is the ratio of the price of private label to the Breeo price in the given market.
Source: Compecon Report (Table 3.1, p. 25) and information supplied by the parties.

2.47 Much of the discussion above is general in nature about the importance of private label. The picture painted is of private label becoming more sophisticated and increasing in importance. Table 2.7 below tests this proposition annually over the period 2005 to 2007 with respect to the market share of private label in each of the nine markets under review.

2.48 The market share of private label varies considerably across these markets from around [0-5]% in butter to around [60-65]% in puddings. While in general, consumers might have a favourable impression of the quality of private label, in some cases this general result does not hold.

2.49 The trend in market share for private label is not continual year on year gain. In fact this only occurs for two markets – non-butter and processed cheese - out of the seven markets where the data is available in Table 2.7. In two markets – poultry and non-poultry cooked meats – private label experiences year on year declines between 2005 and 2007. Thus, in competition between the brand and private label, the former is able in some cases to increase market share. Consumer preference and choice might be influenced by brand advertising and new product development.

Table 2.7
Market Shares, Private Label (including discounters), by Value, Nine Markets the State, 2007

Product	Market Share 2005	Market Share 2006	Market share 2007
Breakfast Meats			
Sausages	-	[25-30]	[25-30]
Puddings	-	-	
Rashers	[30-35]	[35-40]	[35-40]
Cooked Meats			
Poultry	[40-45]	[40-45]	[35-40]
Non-poultry	[50-55]	[50-55]	[45-50]
Spreads			
Butter	[0-5]	[0-5]	[0-5]
Non-butter	[5-10]	[5-10]	[5-10]
Cheese			
Natural	[30-35]	[30-35]	[30-35]
Processed	[5-10]	[10-15]	[10-15]

Note: For sausages, volume rather than value is used.
Source: Compecon Report (Table 3.1, p. 25) and information supplied by the parties.

Buyer Power: Evidence

2.50 The parties have supplied the Authority with a large number of instances of what is claimed to be countervailing buyer power. These are reviewed below.

Annex 6 of the Written Submission: Kerry Example of Buyer Power

2.51 In Annex 6 of the Written Submission, the parties provide what they consider to be a comprehensive set of e-mail correspondence containing circa 30 instances of what they claim are:

(i) refusals to price increases in respect of Kerry branded products in each of cooked meats, rashers, cheese and spreads

(ii) de-listing of Kerry branded product lines (including Denny ham);

(iii) demands for support of promotional activity; and,

(iv) demands for delisting of product lines in order for Kerry to introduce new products (including rashers) "one new in one out" policy.

These e-mails cover a period from 2003 to 2008 and typically consist of one or two e-mails from (say) [retailer] or [retailer], together with a short commentary by the parties on the e-mail(s). In general, the documents are inconclusive, either in that they do not indicate whether the threat to de-list was in fact carried out, or else no evidence is provided to show that de-listing was carried out for any motive other than the normal course of business. One or two examples illustrate this point.

2.52 In one example, the e-mail correspondence is an e-mail from [retailer] dated […] 2007 to Kerry which states,

> I was surprised to receive a notification of yet another price increase for this year for […].
>
> Please complete the attached two sheets[22] and return to me asap.

The commentary by the parties is that the e-mail is evidence of [retailer] attempting to dictate the process by which a supplier may increase its prices by requiring it to enclose the attached forms. It is not clear why a retailer should not be able to ask for such information before deciding to accept such a price rise, which may put it at a competitive disadvantage compared to a rival retailer. Furthermore, in the commentary, no indication is given as to whether or not the price rise was allowed in whole or in part.

2.53 In an e-mail from [retailer] to Kerry dated […] 2004, [retailer] state:

> As part of our on going review of the convenience department, please be advised that the following products are to be de listed from [retailer's] product portfolio due to its continued poor sales performance to date.

The commentary by the parties confirms that these products were de-listed and have not been re-listed. The parties claim that it is thought that the de-listing was motivated by a desire to leave room for a greater number of private labels.

[22] The attached sheets were titled '[…] Factors Underlying Price Increase.xls' and 'Price tracker sheet old new pricing analysis.xls.'

However, the parties supply no evidence to support this view, so we are left with [retailer's] own statement that the cause of the de-listing was simply poor sales – a perfectly valid reason.

Annex 7 of the Written Submission: Refusal to List New Breeo Products.

2.54 The parties in an earlier submission provided four examples of refusal of retailers to list new Breeo products in 2008.[23] (These were repeated in Annex 7 of the Written Submission). The Authority made further inquiries, issuing witness summonses to the retailers in question to verify and clarify this information. The retailers all agreed that they had refused to list the products and gave the following reasons:

- "The basis on which [….] decided not to list these lines was that consumer demand was adequately covered within the existing range (both of own brand and branded products including Kerry and Breeo brands). The proposed lines did not bring anything new to the category…".

- "Galtee brought out several flavoured rashers some months ago. We decided not to buy […] rashers because we felt that the products would not sell as well as other products that we stock, including our own brand products. This decision was of course affected by space constraints: we have only a limited amount of space for products and we make decisions on what products we think customers want to buy."

- "Yes it is correct that […] rejected Galtee…. However, this was due to restriction on space and a subsequent range review. Although our own label offer did also undergo a review and a facelift this was not a deciding factor in not listing these products."

Based on the responses of the retailers, it is not clear how the decision not to list these products was based on any notion of trying to get better terms and conditions from Breeo, which is the essence of buyer power.

Annex 7 of the Written Submission: [retailer] *Case Study*

2.55 In Annex 7 of the Written Submission, the parties provided a case study of Breeo branded rashers in [retailer]. However, the case study admits that Breeo had no contemporaneous documentary evidence. The parties suggest that to fill this lacuna, the Authority should issue a summons to [retailer] requiring them to provide the relevant documentation, which covered a period [of eighteen months]. The Authority took the view that the two-week time period available between the receipt of the Written Submission and the date on which it had to make its Determination did not permit it to issue a summons for the production of documents (a summons that would require a reasonable notice period) and then analyse and incorporate any documents obtained into its Determination. The Authority takes the view that it is the duty of the merging parties to supply proof of its assertions to the Authority, rather than it being a function of the Authority to seek evidence in support of assertions made by the parties.

[Retailer] *Threatened Delisting of Breeo and Kerry: August 2008*

2.56 On the 15 August 2008, the Authority received a letter from Breeo which stated that [retailer] had threatened to de-list […] of Breeo's […] stock keeping units or skus in the breakfast meats category if Breeo did not give [retailer] a […]%

[23] Attention is only paid to three examples since the fourth example did not appear to be an example of buyer power. […] listed […] ([…] stock keeping units or skus), but […].

improvement in margin. To put this demand in context, the threat affected […]% of Breeo's value in this category. If Breeo did not accede to [retailer]'s demands by 18 August – giving Breeo two days business notice – then […] would start to de-list Breeo products. Subsequently, Breeo claimed that [retailer] made further financial demands. Annex 6 of the Written Submission contains an e-mail relating to a similar demand concerning getting a better margin but with respect to Kerry.

2.57 This example would certainly be consistent with the exercise of buyer power since [retailer] is using the threat to de-list to get better financial terms.

2.58 On the 26 August, the Authority asked Breeo whether the de-listing had taken place. Breeo said it had not. Breeo has informed [retailer] that they would be unable to negotiate terms with them in relation to the issue outlined above until after the conclusion of the Authority's Determination in the Kerry/Breeo merger. [retailer] subsequently took the decision to defer the decision to de-list until […].

Evidentiary value of recent conduct in merger analysis.

2.59 The issue arises of how much weight should be given to the threat referred to in 2.56 above that the parties argue demonstrates countervailing buyer when it arises in the final stages of the merger determination process.

2.60 The value of the following types of evidence of market behaviour occurring after a merger is negotiated or announced is questionable:

- evidence about the dealings of the merging parties vis-à-vis each other at least from when they begin to negotiate the merger transaction; and,
- evidence about the behaviour of the merging parties and their competitors, customers or suppliers after the proposed merger transaction is made public.

2.61 With respect to the first type of evidence, after the parties have negotiated a merger transaction, their behaviour is understandably focused on facilitating the completion of the merger.

2.62 Any dealings between a merging party and a third party are also highly likely to be influenced or impacted by their respective positions in the proposed merger.

2.63 Any evidence about marketplace behaviour occurring after the merger is negotiated or announced must be subject to careful scrutiny as to whether the behaviour may be influenced or impacted by the positions taken by the players in the market about the proposed merger. Such evidence is clearly unreliable especially in considering key issues in a merger review such as market definition or competitive effects of the merger. In general, little weight can be given to such evidence.

Retailer Responses: Biased?

2.64 The parties argue that a retailer's response to questions concerning de-listing is likely to be biased. They alleged in their Written Submission that retailers would naturally deny delisting as they do not want to be painted in a negative light nor, perhaps, open themselves to the accusation that they are engaging in […].

2.65 The Authority is very conscious of the possibility of bias, and has carefully considered the replies from retailers in that light. It has come to the following view:

2.66 First, in relation to any alleged fear retailers might have to admitting to the Authority that they have de-listed the merging parties products, retailers freely admitted to the Authority that they de-list products on a regular basis. Furthermore, as we have seen in paragraph 2.54 above, a number of retailers when summonsed admitted to having refused to list new Breeo products.

2.67 Second, the reasons advanced by the retailers seems, in general, consistent with good management of their shelf space. Retailers want to maximise profits and, given limited shelf space, products that are not popular with the end consumer will be quickly replaced by alternative products. Thus, the fact that retailers regularly de-list products is not surprising.

Conclusion

2.68 As noted above, the Authority, in considering the impact of the merger on the retailer's countervailing buyer power, looks forward over a two-year time horizon and asks itself how the merger of Kerry and Breeo will affect the bargaining options of the retailers in relation to the merged entity.

2.69 As explained above, the retailers have many bargaining strategies and levers pre-merger. There is no reason to assume that the retailers are not using those strategies and levers to the maximum extent possible at the moment. There is no evidence that the retailers are, so to speak, keeping any strategies and levers in reserve. Post-merger, the retailers would have less bargaining power as they would not be able to play off Kerry against Breeo.

2.70 The issue thus becomes what options remain open to the retailer to exercise countervailing buyer power post-merger. This matter will be considered in relation to private label and other brands in the discussion in sections three to eight below.

Products Not Analysed in Detail in the Authority's Determination

2.71 The parties overlap in the supply of various products, details of which are provided in Table 2.1 above. However, there are a number of products where, although there is an overlap between the parties, their combined market shares are relatively low and thus there is little likelihood of any competition issues arising in these sectors. These are: chilled juices, fresh dairy products and pre-packed sandwiches.

2.72 In the case of *chilled juices*, Kerry has a market share of around [10-15]% depending on whether market shares are calculated on a value or volume basis while Breeo has less than [0-5]%. Based on those figures, the Herfindahl Hirschman Index ("HHI") is likely to increase by less than 20 points as a result of the merger (from 2185 to 2203), which places it within Zone A as defined in the Authority's *Merger Guidelines*.[24] The main suppliers in this market are SHS with around [35-40]%, Innocent with [15-20]%, while private labels have around [20-25]%.

2.73 In September 2007, Kerry introduced a small number of *fresh dairy products* under the "Low-Low" brand. These currently account for around [0-5]% of sales within this product category. Breeo is estimated to have a share of around [0-5]%. In effect, therefore, the merger will have virtually no impact on concentration in this market (the HHI would increase by less than 1 point).

[24] Full details of the HHI are explained in the Competition Authority, 2004, *Notice in Respect of Guidelines for Merger Analysis*, Decision No. N/02/004, hereinafter referred to as the *Merger Guidelines*, which are available on the website, www.tca.ie. A Zone A merger is less likely to have adverse competitive effects. In contrast, Zone C mergers occur in already highly concentrated markets and may usually be those that raise competition concerns.

2.74 *Pre-pack sandwiches* are sold throughout a variety of channels including multiple supermarkets and other grocery retailers, but also delicatessens and in the transport sector. This sector is much more diverse than many of the others examined in the proposed transaction and there are no official market share figures. There are large numbers of small scale suppliers engaged in the market. Consumers can choose between purchasing a pre-pack sandwich or having one made up on the spot in an outlet. Kerry estimates that it may have as much as [10-20]% of the sandwich market but there are no other undertakings with more than around [0-10]% of the market including Breeo which has less than [0-10]%. In the absence of any reliable market share figures, the parties were unable to estimate the HHI but given the large number of undertakings with very small market shares, the parties considered that it was likely to be within Zone A as defined in the Authority's *Merger Guidelines*.

2.75 Given that there appears to be no grounds to believe that any adverse competitive effects could arise in the chilled juice, fresh dairy products and sandwich markets, they are not considered further in this Determination. Instead, throughout the remainder of the Determination, the Authority will focus on the following products, each of which will be considered in a separate section:

- Sausages;
- Puddings;
- Rashers;
- Cooked meats;
- Spreads; and,
- Cheese.

In terms of separate markets, the last three product groupings are each sub-divided into two separate markets. As a result, the Determination evaluates the competitive effects of the merger in nine markets.

2.76 The sales for each of these nine markets are presented in Table 2.8 below. There is considerable disparity in the size of the markets with non-poultry cooked meats the most important and puddings the smallest.

Table 2.8
Overlap Markets, Value of Sales, the State, 2007

Market	Sales
Breakfast Meats	
Sausages	€101 million
Puddings	€27 million
Rashers	€129 million
Total	257 million
Cooked Meats	
Poultry Cooked Meats	€49.3 million
Non-Poultry Cooked Meats	€239.7 million
Total	€289 million
Spreads	
Butter	€31.2 million
Non-butter	€90.6 million
Total	€121.8 million
Cheese	

Natural Cheese	€134.6 million
Processed Cheese	€58.9 million
Total	€193.4 million

Source: Compecon Report (various pages), notification form and information provided by the parties.

Econometric Results

2.77 The extent to which the merging parties' ability to increase price is constrained by other branded suppliers is the subject of the econometric reports prepared by Dr. Hogan for the parties, which was subsequently reviewed by Dr. Walsh for the Authority. The sequence of events in the exchange between the two experts is set out in paragraph 1.38 above.

Table 2.9
The Methodology and Data of Dr Hogan & Dr Walsh in Estimating Own and Cross Price Elasticities for Selected Food Markets

Data Issues	**Response/Answer/Resolution**
Data Source	AC Nielsen scanning data from major supermarkets with the notable exception of Dunnes.
Prepacked vs Over the Counter Sales	The data refers to pre-packed only
Level of Product Definition	Products are defined at the level of an individual Stock Keeping Unit ("SKU"). These differ by package format, size and brand. So for example, Denny's Gold Medal Cocktail 908 g
Treatment of Private Label	Private label is not available at an SKU level. Instead all private label sales/output in a particular product segment is available as a single observation. There is no private label data for cooked meats or spreads
Time period	Bimonthly periods from November 2004 to September 2007
Price/quantity data	Total value and total quantity per SKU per bi-monthly period, by geographic region
Estimation Issues	**Response/Answer/Resolution**
Model	Nested logit
Treatment of Private Label	Private label is included for rashers, sausages and cheese

Definition of estimated elasticities. (Suppose in the product segment the number of SKU's was: Kerry, 540; Breeo, 340; Other branded, 200; Private label; 1).	(a) own price elasticity for each SKU of Kerry[1] (i.e., if each of the 540 Kerry SKUs were to increase in price 1%, other things being equal, what would on average be the change in that Kerry SKU's market share) (b) cross price elasticity of each Kerry SKU with other Kerry SKU's (i.e., for each Kerry SKU if the price of the other 539 Kerry SKU's were to increase in price by 1% what would be the change in that Kerry SKU's market share. This is repeated for all Kerry SKU's an average taken (c) cross price elasticity of Breeo with Kerry (i.e., if each of the 340 Breeo SKU were to increase in price by 1%, other things being equal, what would, on average, be the change in market share of the 540 Kerry SKUs). (d) cross price elasticity of Other Brands with Kerry (i.e., if each of the 200 Other Brands SKU were to increase in price by 1%, other things being equal, what would, on average, be the change in market share of the 540 Kerry SKUs). (e) cross price elasticity of Kerry with private label (i.e., if the private label aggregate SKU were to increase in price by 1%, other things being equal, what would, on average, be the change in market share of the 540 Kerry SKUs). Weighted averages are used.
Results	**Response/Answer/Resolution**
Estimated elasticities of Dr. Hogan are (a) consistently higher than those of Dr. Walsh; and (b) the Other Brands cross price elasticities of Dr. Hogan are consistently higher than the Kerry or Breeo cross price elasticities compared to Dr. Walsh's results	The difference between the results between Dr. Walsh and Dr. Hogan reflect the fact that although they contain exactly the same assumptions, same specification and same instruments, Dr. Hogan made a technical error in his computer programme and in the formula that he used.

Note: 1. The same applies if it were Breeo or any other SKU.
Source: Information provided by the econometric reports of Dr. Hogan and Dr. Walsh.

2.78 The debate between the two sets of results is of more than academic interest. The results of Dr. Hogan's reports suggest that in every product market under review, other brands exert a much more powerful competitive constraint over the parties' brands than do either of the parties on each others' brands. Dr. Hogan's results can be summarised as follows where these are the cross price elasticities on Kerry:[25]

segment	mean(Kerry)	mean(Breeo)	mean(Other)
cheese	4.31	2.44	22.90
cooked meats	15.87	6.16	24.14
yellow fats	1.82	2.29	10.28
rashers	5.10	4.21	10.22
sausages	3.60	1.52	11.57

This implies that, other things being equal, the merged entity would be unlikely to be able to permanently raise price post merger in any of these markets.

2.79 In contrast, Dr. Walsh's results suggest that while other brands are able to constrain the merging parties in most markets, this is not the case for rashers and cooked meats. Dr Walsh's results for the same segments are as follows:[26]

segment	mean(Kerry)	mean(Breeo)	mean(other)
cheese	0.26	0.13	0.36
cooked meats	0.66	0.24	0.17
yellow fats	0.07	0.03	0.15
rashers	0.37	0.34	0.10
sausages	0.10	0.04	0.16

In rashers and cooked meats, other things being equal, the merged entity would be able to successfully raise price post-merger.

2.80 Dr. Walsh's main concern with the econometric results presented by Dr. Hogan in his first report dated 17 November 2007 was (a) that the estimated cross-price effects appeared far too large; and, (b) the sum of the cross-price effects were greater than the own-price effects. In theory, the sum of the cross-price effects should be smaller than the own-price effects.

2.81 After close inspection of the "do" files submitted by Dr. Hogan, Dr. Walsh found that there was an error in the formula for the cross-price effects. In short, the implementation by Dr. Hogan of a particular formula for the cross-price effects was incorrect in the code in his "do" file. This error makes a huge difference to the estimated cross-price effects. As a result of this error in the code by Dr. Hogan, the estimated cross-price effects are incorrect, i.e., they are much bigger than they would be if the correct code is used in the "do" file.

2.82 Dr. Walsh corrects for this error in his report dated 14 July 2008. Dr. Walsh finds that as a result of using the correct code, the cross-price effects are now: (a) at more sensible levels; and, (b) the sum of the cross-price effects are now **not** greater than the own-price elasticities as was the case in Dr. Hogan's report. Dr. Walsh argues that the difference in the two sets of results stems from a technical mistake in the calculation of the elasticities by Dr Hogan.

[25] These results are taken from Dr. Hogan's Further Econometric Report dated 7 July 2008 referred in section 1 above.
[26] These results are taken from Table 2 of Dr. Walsh's Response Econometric Report referred to in section 1 above.

2.83 Dr. Walsh corrected results are reproduced in Table 2.10 below.

Table 2.10
Cross and Own Price Elasticities, Selected Food Markets, the State

Cross price elasticities using right formula and right segmentation. Weighted (by market shares) average.									
Segment	Manufacturer	Products	Market Share	Own-Price Elasticity	Sum Cross-Price Elasticities				
					Kerry	Breeo	Other	Private Labels	Total
Butter	**Kerry**	8	**0.0001**	**-0.3**	**0.05**	**0.00**	**0.13**	**0.00**	**0.19**
Butter	Breeo	5	0.0000	-0.5	0.01	0.00	0.30	0.00	0.31
Butter	Other	73	0.0007	-0.3	0.02	0.00	0.15	0.00	0.17
Butter	Private Labels	1	0.0000	-0.4	0.00	0.00	0.00	0.00	0.00
Cheese	**Kerry**	154	**0.0004**	**-1.1**	**0.26**	**0.13**	**0.36**	**0.00**	**0.75**
Cheese	Breeo	101	0.0003	-0.8	0.25	0.16	0.30	0.00	0.71
Cheese	Other	677	0.0019	-1.0	0.10	0.04	0.14	0.00	0.27
Cheese	Private Labels	20	0.0001	-0.9	0.00	0.00	0.00	0.00	0.00
Cooked Poultry	**Kerry**	84	**0.0002**	**-1.5**	**0.51**	**0.04**	**0.45**	**0.00**	**0.99**
Cooked Poultry	Breeo	14	0.0000	-2.2	0.57	0.05	0.45	0.00	1.07
Cooked Poultry	Other	216	0.0010	-1.4	0.07	0.01	0.06	0.00	0.14
Cooked Poultry	Private Labels	1	0.0000	-0.6	0.00	0.00	0.34	0.00	0.34
Cooked Ham	**Kerry**	100	**0.0003**	**-1.6**	**0.76**	**0.34**	**0.05**	**0.00**	**1.15**
Cooked Ham	Breeo	68	0.0002	-1.4	0.67	0.32	0.04	0.00	1.03
Cooked Ham	Other	56	0.0000	-1.8	0.79	0.36	0.05	0.00	1.21
Cooked Ham	Private Labels	2	0.0000	-0.9	0.31	0.59	0.02	0.00	0.91
Non-Butter	**Kerry**	37	**0.0004**	**-0.3**	**0.08**	**0.04**	**0.15**	**0.00**	**0.27**
Non-Butter	Breeo	24	0.0007	-0.3	0.02	0.08	0.07	0.00	0.17
Non-Butter	Other	70	0.0034	-0.3	0.02	0.02	0.03	0.00	0.06
Non-Butter	Private Labels	6	0.0002	-0.2	0.00	0.00	0.00	0.00	0.00
Cooked Beef	**Kerry**	5	**0.0000**	**-1.0**	**0.33**	**0.21**	**0.05**	**0.00**	**0.59**
Cooked Beef	Breeo	3	0.0000	-1.2	0.72	0.03	0.04	0.00	0.80
Cooked Beef	Other	9	0.0000	-1.7	0.72	0.15	0.04	0.00	0.91
Cooked Beef	Private Labels	0	0.0000	NaN	NaN	NaN	NaN	NaN	0.00
Rashers	**Kerry**	82	**0.0002**	**-1.3**	**0.37**	**0.34**	**0.10**	**0.00**	**0.82**
Rashers	Breeo	70	0.0002	-1.3	0.27	0.48	0.11	0.01	0.86
Rashers	Other	236	0.0011	-1.0	0.06	0.10	0.11	0.01	0.28
Rashers	Private Labels	3	0.0000	-0.8	0.02	0.47	0.31	0.00	0.80
Sausages	**Kerry**	72	**0.0005**	**-0.5**	**0.10**	**0.04**	**0.16**	**0.00**	**0.30**
Sausages	Breeo	33	0.0001	-0.5	0.19	0.04	0.17	0.00	0.39
Sausages	Other	230	0.0018	-0.5	0.06	0.02	0.06	0.00	0.14
Sausages	Private Labels	2	0.0000	-0.3	0.16	0.04	0.18	0.00	0.38
		2462	**0.0139**						

Source: Based on estimates made by Dr. Walsh based on the methodology of Dr. Hogan.

2.84 Several points can be made about the table. The results highlighted in bold correspond to the elasticities that were presented by Dr. Hogan and are reproduced in the Compecon Report and in discussing the competitive constraints in each of the nine markets referred to above. The elasticities presented in the table can be illustrated with respect to cooked ham and rashers:

- in cooked ham if all the other brands put their price up 10%, on average, the market share of a Kerry brand in this segment would rise by 0.5 %;
- in cooked ham if all the other brands put their price up 10%, on average, the market share of a Breeo brand in this segment would rise by 0.4 %;
- compare this to the competitive pressure that Kerry and Breeo put on each other;

- in cooked ham if all Kerry brands put their price up 10%, on average, the market share of a Breeo brand in this segment would rise by 6.7 %;
- in cooked ham if all Breeo brands put their price up 10%, on average, the market share of a Kerry brand in this segment would rise by 3.4 %;
- in rashers if all the other brands put their price up 10%, on average, the market share of a Kerry brand in this segment would rise by 1%;
- in rashers if all the other brands put there price up 10%, on average, the market share of a Breeo brand in this segment would rise by 1.1 %;
- compare this to the competitive pressure that Kerry and Breeo put on each-other;
- in rashers if all Kerry brands put their price up 10%, on average, the market share of a Breeo brand in this segment would rise by 2.7 %; and
- in rashers if all Breeo brands put their price up 10%, on average, the market share of a Kerry brand in this segment would rise by 3.4 %.

2.85 In Dr. Hogan's response dated 18 July 2008, but received by the Authority on 22 July, Dr. Hogan noted that he used the formula as per the notation set out by Dr. Walsh in several of his own academic papers. Dr. Hogan further asserts that this is the correct formula. In his response dated 24 July 2008, Dr. Walsh notes that while the formula used by Dr. Hogan corresponds to the notation set out in several academic papers written by him, there is a typographical error in that notation which if used will result in the implementation of an incorrect formula. In this response, Dr. Walsh also refers to two papers in support of his argument concerning the correct formula.[27] Dr. Hogan admitted in a report dated 13 August 2008, which formed part of Annex 17 to the Written Submission, that there was indeed an error in the formula and that this error was replicated in the estimation procedure. In view of this, the Authority has decided to disregard Dr. Hogan's results using the incorrect formula.

2.86 Dr. Hogan produced another report as part of Annex 17 of the submission, also dated 13 August 2008, but confined to data for [retailer] only and for cheese, non-poultry cooked meats and rashers. These were three markets where competition concerns had been identified in the Assessment. This report used the correct formula. In contrast to the AC Neilsen data, the [retailer] data had information on [retailer's]'s private label.

2.87 Dr. Walsh reviewed Dr. Hogan's report and expressed concern about using the results to form a view about the market based on data for one, albeit important, retailer. Dr. Hogan's results are reviewed in the context of the three markets discussed in the relevant sections below.

[27] Margaret Slade, 2004, "Market Power and Joint Dominance in UK Brewing," *Journal of Industrial Economics*, Vol. LII, No. 1, March, pp. 133-163, and Jerry Hausman & Gregory Leonard, 2005, "Competitive Analysis Using a Flexible Demand Specification," *Journal of Competition Law and Economics*, Vol 1, No. 2, pp. 279-301.

SECTION THREE: BREAKFAST MEATS - SAUSAGES

Introduction

3.1 Breakfast meats can be divided into three separate products: sausages, puddings, and rashers. The question arises as to whether or not these three should be treated as separate product markets for the purposes of analysing the proposed acquisition. The undertakings involved argue that they should be treated as separate product markets. The Authority agrees with the analysis of the parties. In each case, the geographic market is at least as wide as the State. In this section, the Authority analyses the competitive effects of the proposed acquisition in sausages, while puddings and rashers are the subject of sections four and five, respectively.

Background

3.2 Sales of sausages are estimated to amount to €101m in 2007, compared with almost €96m in 2006. Around [80-85]% of sausages sold were pre-pack with approximately [15-20]% over-the-counter ("OTC") sales.

Overlap

3.3 Both parties overlap in the supply of OTC and pre-packed sausages.

Relevant Product Market

Submissions of the Undertakings Involved

Breakfast Meats

3.4 The parties in the notification form are somewhat equivocal as to whether or not breakfast meats are one or three separate markets, citing evidence to support both points of view. However, the Compecon Report argues that there are three separate markets.

3.5 In the notification form, the parties stated that there is some case law which suggests that these products comprise part of the overall processed meats market. They state that the European Commission ("Commission") has defined the processed meat product market as: "Meat from mammals or birds containing external ingredients such as salt or spices being raw, dried, smoked or cooked."[28] However, the notification also states that the Commission considers narrower markers might be appropriate.

3.6 They further state that:

> The European Commission found that such products are to be distinguished from fresh meat products. There is further but not conclusive evidence that there are separate submarkets within the processed meats market.
>
> The European Commission has stated that there are separate sub-markets in the market for processed pork and being (a) raw cured products, (b) processed meats for cold consumption, (c) canned meat, (d) cooked sausages, (e) pates and pies, and (f) ready prepared dishes. Whilst the European Commission did not need to make a decision on these submarkets, it went on to say:

[28] Case No IV/M.1313, *Danish Crown/Vestjyske Slagterier*, Case Number, 9 March 1999, paragraph 43.

In addition, raw cured pork can be divided into bacon and raw sausages.[29]

From the supply side, sausages and puddings could be possibly considered as a single market. For example, there is some degree of supply side substitution in the case of sausages and puddings in that a sausage maker could easily switch to making puddings and vice versa. For the purpose of this notification, the economic analysis has examined these products, in line with the remarks of the European Commission, from the standpoint of being separate sub-markets. This is, notwithstanding, as indicated, the narrowest possible market definition and there are arguments that all form part of the wider processed pork market.

3.7 The Compecon Report states that breakfast meats include three relevant product markets: sausages, rashers and puddings. The Compecon Report briefly considered whether or not these products are substitutes and therefore part of the same market.

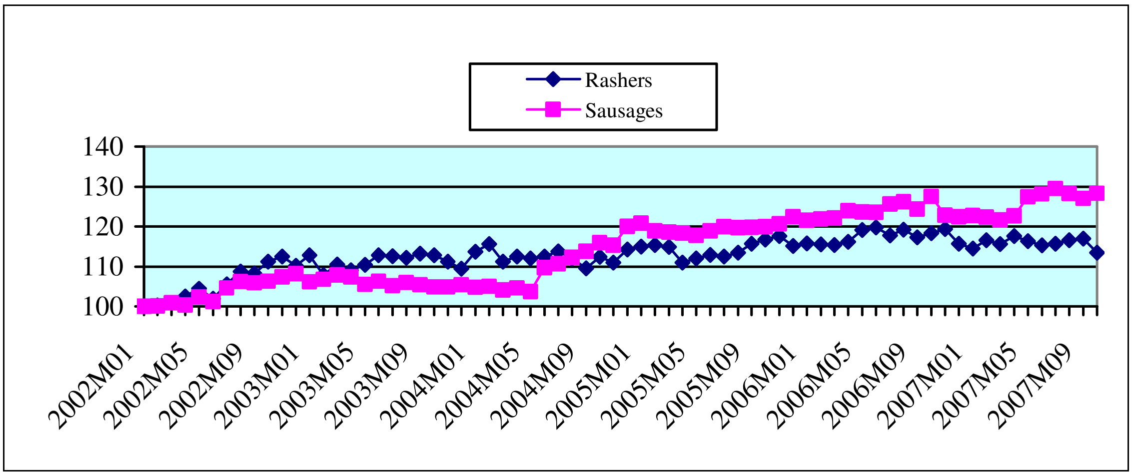
3.8 The Compecon Report stated that each of the proposed candidate markets would appear to satisfy the requirements of the SSNIP test to be deemed a relevant product market. For example, it seems unlikely that if a hypothetical monopoly supplier of sausages were to raise its prices by 5% that enough consumers would switch to an alternative product as to render the price increase unprofitable.

3.9 It is also relevant, Compecon argues, that this is consistent with the perceptions of market operators. Thus, for example, Kerry monitors the performance of its sausage brands against other sausage brands. Similarly market research data on market shares categorises sausages, rashers, puddings, cooked meats, spreads and cheeses as separate markets.

3.10 Compecon notes that the standard test for defining markets is the SSNIP test. Other measures may provide some indications as to whether or not products are part of the same market. For example, it is recognised that price correlations cannot establish whether or not two products are part of the same market because of the possibility of a spurious correlation. Where prices of products do not move in line with one another, however, the products clearly are not part of the same market. The parties provided Figure 3.1 below, which they stated illustrates trends in national average retail prices of sausages and rashers over the past five years on the basis of published Central Statistical Office ("CSO") data on national average prices of the products.

[29] Ibid, paragraph 16.

Figure 3.1
Average Monthly Prices of Rashers and Sausages, the State, 2002 - 2007 (Jan 2002=100)



Source: Compecon Report (Figure 5.1, p. 54)

3.11 Compecon concludes that Figure 3.1 indicates that relative retail prices of the two products have changed over time, which is inconsistent with the two being part of the same market.

Over The Counter ("OTC")

3.12 The parties argue that both cooked and uncooked meat products are sold in loose and pre-packed formats. For example, cooked meats are sold unwrapped at the delicatessen counters of supermarkets and other grocery outlets. Similarly rashers, sausages and puddings are also sold unwrapped in butchers' shops and at the meat counters of supermarkets and other grocery outlets. The question is whether OTC products are close substitutes for pre-packed products. The parties argue that there would appear to be good intuitive grounds for arguing that OTC and pre-packed versions of the same product are close substitutes and should be considered to constitute part of the same market. Both OTC and pre-packed versions of the products share similar characteristics and have the same intended use.

3.13 The parties also argue that larger supermarkets are changing their deli/OTC service offering. There is now a move towards having OTC cooked meats, rashers and sausages displayed in cabinets in segmented quantities, giving the appearance that these have been prepared in the delicatessen section of the store and left out for customers when in fact they are bought in this fashion. This development is referred to as grab 'n' go and illustrates that the distinction between pre-pack and OTC has become very blurred over time. Similarly, Irish Bacon Slicers have gained a significant foothold by slicing and packaging rashers unbranded and supplying them to butchers shops throughout the country. The parties argue that this blurs the distinction between pre-pack and OTC.

3.14 Market research data also shows that a high proportion of consumers purchase both pre-pack and OTC. This is true in the case of [25-30]% of consumers purchasing sausages, [30-35]% purchasing rashers and [60-65]% purchasing cooked meats. Thus, it would seem reasonable to argue that OTC and pre-packed meat products are part of the same market.

3.15 In sum, the preponderance of the evidence presented by the parties suggests that there are three separate breakfast meats markets: sausages, puddings and rashers. In each of these markets, OTC and pre-packed meats are part of the same market.

Authority's Investigation

<u>Supply-side Substitution</u>

3.16 From the supply side, it could be argued that pre-packed sausages and OTC/deli sausages could be considered as a single product market. In theory, if a hypothetical monopoly supplier of OTC/deli sausages increased the price permanently by 5-10%, a supplier of pre-packed sausages could easily switch to supplying OTC/deli sausages. However, it is not clear that the reverse is true since the supply of pre-packed sausages entails the extra cost of packaging the product. However, on balance, the Authority considers that it is reasonable to expect that if a hypothetical monopoly supplier of pre-packed sausages increased the price permanently by 5-10%, a supplier of OTC/deli sausages could easily switch within a 12-month period to supplying pre-packed sausages.

3.17 The same analysis regarding supply-side substitution between OTC/deli and pre-pack applies to puddings and sausages.

Conclusion on the Relevant Product Market

3.18 Despite these considerations, for the purposes of examining the competitive effects of the proposed acquisition, the Authority agrees with the analysis in the Compecon Report and has taken the view that the relevant product market is sausages. However, it does recognise that there may be separate product markets for (a) OTC/deli sausages, and (b) pre-packed sausages. The Authority does not need to come to a view on this because the Authority's conclusions concerning the competitive effects of the proposed acquisition, outlined below, will be unaffected if the relevant product market is narrower.

3.19 The same conclusion is reached with respect to puddings and rashers.

Relevant Geographic Market

Submissions of the Undertakings Involved

3.20 The parties submit in the notification that the geographic market for all of the product markets is at least the State. This view applies not just to breakfast meats but to all the other products covered by the proposed transaction and analysed in the remaining sections of this Assessment.

3.21 The test for determination of whether a market might be wider than the State has been set down by the Commission in a couple of cases. In *Pepsico/General Mills*[30] the Commission indicated a number of factors which are indicative of a national market. If some or all of these factors do not apply, the market may be wider than national in nature. These factors are:

- The business is organised and operates at national level and is directed towards largely national markets;
- Significant differences in competitor prices;
- Market shares differ from one national market to another; and,

[30] Case No. IV/M.233, Pepsico Inc/General Mills, 5 August 1992.

- National market tends to have unique taste differences and thus there is little cross-border brand penetration.

3.22 In *Nestle/San Pellegrino*[31] the Commission also examined the extent of the geographic market. It examined, in addition to the matters raised in *Pepsico/General Mills*, the following:

- the significance of transport costs;
- access or lack of access to distribution; and,
- labelling.

3.23 In respect of the relevant product markets, it is submitted by the parties that the geographic market could be wider than the State in each case.

3.24 Given the undertakings involved import or can import raw materials for their products, in particular, Breeo which outsources all of its products, there are, in the parties' view, no unique national taste differences. In this regard, it might be noted that in the case of meat, Kerry's market research indicates that whilst Irish consumers may state a preference for Irish product, if all else is equal, recent history of consumer patterns does not support this preference. For example, during 2006 and 2007, one of the two leading national rasher brands removed the Bord Bia "Quality Assurance Origin Ireland" logo from its range while the other national brand continued to display it on its range. During this time period, the relative market shares of these brands did not change in any significant manner. The consumers' comfort in purchasing non-Irish product has also been seen in the success of non-Irish brands such as Plumrose (in the breakfast meats markets) over recent years.

3.25 There is cross-border brand penetration. Transport costs, the parties argue, would not be significant and would not deter suppliers from outside of the State. This is demonstrated by the current suppliers to the market. There is access to distribution facilities and labelling does not raise an issue. Accordingly, it is submitted by the undertakings involved that given the nature of the markets for each of the overlapping products, there is a strong case for viewing the geographic market as greater than the State and at least EEA-wide. At a minimum, this would be the case from the supply side, which would be able to react and impose constraints on the parties operating on the relevant product markets. This had occurred in the case of rashers where Tulip's brand has entered from time to time into the market and immediately gained market share.

Conclusion on the Relevant Geographic Market

3.26 The Authority agrees with the parties that the relevant geographic market for the supply of sausages at the wholesale level - which is the level that both Breeo and Kerry operate - is at least the State. As the Compecon Report (p. 89) states, "Kerry and Breeo do not sell directly to consumers. They sell to retailers, either directly or via wholesalers, and it is the retailers who sell to the final consumer."

3.27 While the Authority accepts that on the supply side the market may be wider than the State, on the demand side, given the importance of brands, particularly Irish brands, it is unlikely that if a hypothetical monopolist of sausages in the State were to increase price by 5 to 10% that this would result in the entry of brands located outside the State. The issue of whether or not imports are a competitive constraint is, however, analysed in the competitive effects section of each chapter.

[31]Case No. IV/M.1065,Nestle/San Pellegrino, 16 February 1998.

3.28 The same conclusion is reached with respect to puddings and rashers.

Market Structure

Introduction

3.29 Market structure can be characterised as the number and size distribution of firms. The initial impact of any merger is felt on market structure as two firms pre-merger become one firm post merger. In this section, the pre- and post-acquisition market shares in the sausages market are considered.

Measuring Market Concentration

<u>HHI Index</u>

3.30 Market concentration refers to the degree to which production in a particular market or industry is concentrated in the hands of a few large firms. It refers in particular to the number and size distribution of firms in the relevant market: the fewer the number of firms and/or the more disparate the firms are in terms of size, the more concentrated the market. The significance of concentration in competition analysis is that in highly concentrated markets in which barriers to entry are also high, effective competition is likely to be weak.

3.31 The most commonly used measure of concentration is the Herfindahl-Hirschman index (HHI), which is defined as the sum of the squares of the market shares of all firms participating in the market. According to the Authority's *Merger Guidelines*, a HHI in excess of 1800 combined with a change in pre compared to the post merger HHI of greater than 100 indicates a situation where "mergers occur in already highly concentrated industries and more usually be those that raise competitive concerns" (paragraph 3.10). Therefore, if the HHI is above 1800, this indicates that firms in that market may be able to exercise market power.

3.32 As the Authority's *Merger Guidelines* make clear, in order to accurately characterise the competitive conditions in a market, attention has also to be paid to factors such as barriers to entry and exit, buyer power, switching costs, and so on. Thus, while market shares and the HHI index are used as screening mechanisms, reference to other market characteristics is necessary in order to determine the presence of market power post acquisition.

<u>Retail vs Wholesale</u>

3.33 An important issue is whether the HHI's should be estimated at the retail or the wholesale level. Market shares at the retail level typically list the private brands of the retailers separately. While this is appropriate from the point of view of the final consumer, it could be argued that when measuring the importance of Kerry and Breeo, account should be taken of the fact that Kerry, although not Breeo except on a legacy basis, supplies private label products to retailers. Hence, if the HHI's are measured at the wholesale level, the HHIs would be larger than at the retail level.

3.34 This distinction is potentially important in examining theories of harm caused by the merger. If pre-merger, Kerry were to raise the price of its branded products then consumers are likely to switch to some extent to private label. If Kerry supplies these private label brands, then it is likely to experience an increase in demand. It is able to internalise the externality created by the rise in price of its branded products. If Breeo supplies the private label then some of the increase in demand will be captured by Breeo. However, post-merger that increase in demand will be captured by the merged entity. This may mean that post-merger a price increase becomes profitable that was not so pre-merger.

3.35 However, this scenario is extremely unlikely to materialise. First, as noted in section two above, Breeo is exiting the supply of private label business, subject to a small number of legacy arrangements. Second, there are no long term contracts in the provision of private label business. Third, all the evidence suggests that the provision of private label business is very competitive, with retailers increasingly using auctions to select their supplier(s).

3.36 As a result, the HHI indices below are presented at the retail level unless otherwise stated.

Value vs Volume

3.37 The Authority's *Merger Guidelines* state that a variety of different bases can be used to measure the HHI: volume, capacity and value. The *Merger Guidelines* further state, "… where the units are non-homogeneous or pricing non-uniform, value measures are easier to use." (paragraph 3.5). In the markets under review in this proposed transaction, pricing is non-uniform with branded products, for example, often selling at a substantial premium as shown in section two above. Furthermore, the products are non-homogeneous.

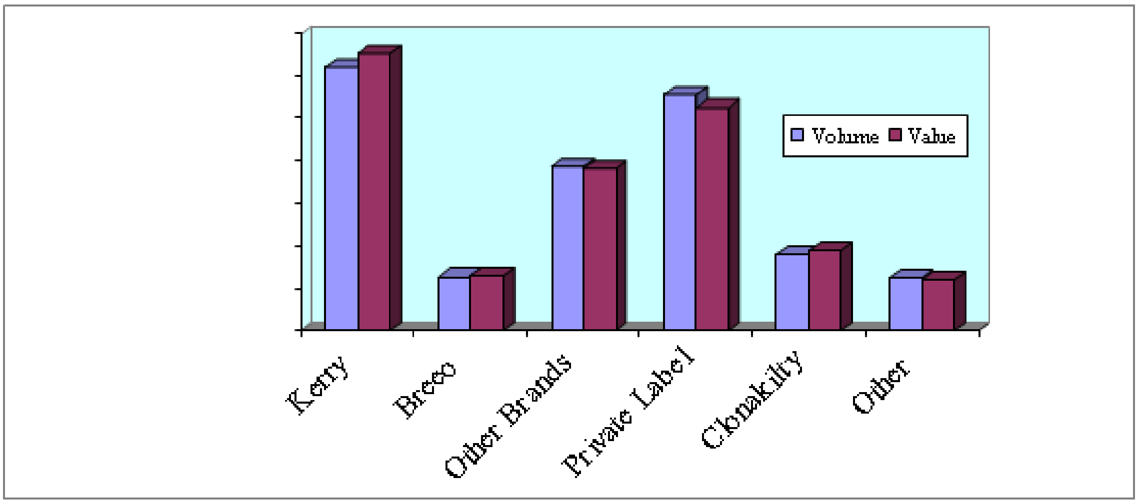
3.38 Although it would appear that the HHI should be most appropriately measured by value, frequently the data for volume was presented by the parties. Nevertheless, to the maximum extent, the Authority has requested data in terms of value. On occasions, where both are available, they are presented, while in others only volume appears to be available.

The Impact of the Merger

3.39 Figure 3.2 gives a breakdown of the distribution of sausage sales by undertaking in both value and volume terms. The figure shows that there is virtually no difference between the volume and value based market share figures.[32] The figure shows that Kerry brands accounted for [30-35]% of sales, while Breeo brands accounted for just over [5-10]% of sales. Private label brands accounting for [25-30]% of the total sausage market. Clonakilty accounted for around [5-10]% of the market. Aggregate sales of all other brands accounted for around [15-20]% of the total. Other sales, mainly butchers' shops brand sales accounted for around [5-10]% of the market.

[32] Volume based market shares are used throughout the balance of this section. It should be noted that the market shares include both OTC and pre-packed sausages.

Figure 3.2
Market Share by Undertaking (%), Sausages, Volume and Value, the State, 2007 [partially redacted]



Source: Compecon Report (Figure 5.3, p.5)

3.40 Table 3.1 provides a more detailed breakdown of sausage sales by individual brand by undertaking. In addition to the merging parties, there are around 20 smaller sausage brands on the market. The major retailers all have their private label brands. Unbranded sausages are also sold by independent butchers' shops and other outlets.

Table 3.1 Market Shares by Undertaking and Brand, Sausages, Volume, 2006-2007

Undertaking/Brand	**2006**	**2007**
Kerry		
Denny	[30-35]	[30-35]
Ballyfree	[0-5]	[0-5]
Kerry Total	[30-35]	[30-35]
Breeo		
Shaws	[0-5]	[0-5]
Galtee	[0-5]	[0-5]
Barcastle	[0-5]	[0-5]
Roscrea	[0-5]	[0-5]
Breeo Total	**[5-10]**	**[5-10]**
Clonakilty	[5-10]	[5-10]
Olhausen		
Olhausen	[0-5]	[0-5]
Kearns	[0-5]	[0-5]
Byrnes	[0-5]	[0-5]
Olhausen Total	**[5-10]**	**[5-10]**
Other Brands		
Mallons	[0-5]	[0-5]
Granby	[0-5]	[0-5]
Country Style	[0-5]	[0-5]
Hafners	[0-5]	[0-5]
Hodgins	[0-5]	[0-5]
Doherty	[0-5]	[0-5]

Rudds	[0-5]	[0-5]
Mattersons	[0-5]	[0-5]
Drover	[0-5]	[0-5]
Tullamore	[0-5]	[0-5]
Connaught Gold	[0-5]	[0-5]
Other Brands	[0-5]	[0-5]
Other Brands Total	**[10-15]**	**[10-15]**
Other (Butchers)	[5-10]	[5-10]
Private Label		
Tesco	[0-5]	[0-5]
Superquinn	[5-10]	[5-10]
Dunnes Stores	[0-5]	[0-5]
SuperValu	[0-5]	[0-5]
Discounters	[0-5]	[0-5]
Symbols	[0-5]	[0-5]
Other Outlets	[0-5]	[0-5]
Private Label	**[25-30]**	**[25-30]**
Total	**100.0**	**100.0**

Source: Compecon Report (Table 5.1, p.58).

3.41 The table shows that Kerry's Denny brand is the largest selling sausage brand with around [30-35]% of the market. Breeo's brands have a combined market share of just over [5-10]% with Shaws being its largest selling brand with less than [0-5]% of the market. The second largest brand is Clonakilty with around [5-10]%. Superquinn's own label sales account for almost [5-10]% of total sales. Tesco, Dunnes Stores and SuperValu private label sales each account for around [0-5]% of the market. Olhausen has a total market share of around [0-5]% while there are several manufacturers with market shares in the [0-5]% range. Several of the smaller brands such as Mallons, Olhausen, Kearns, Granby and Hafners have a strong presence in particular regions.

3.42 Table 3.2 estimates the HHI for the sausage market pre and post merger.[33]

Table 3.2
Sausage Market, HHIs, Pre- and Post-merger, by Value, the State, 2007

Pre-Merger	**1313.2**
Post-Merger	**1713.5**
Change	**400.3**
Zone	**B**

Source: Compecon Report (Table 5.2, p.59).

3.43 The HHI results would put the transaction in Zone B as defined by the Competition Authority's *Merger Guidelines*. In other words, the sausage market post-merger would be defined as moderately concentrated. While this does not automatically exclude the risk of an adverse effect on competition, the risk is lower than would be the case for a transaction in a highly concentrated market.

Competitive Analysis

Introduction

[33] Butchers shops have an aggregate market share of [5-10]%. As there are several hundred such outlets, their aggregate market share has not been squared in estimating the HHI as this would overstate the HHI slightly.

3.44 This section analyses several market characteristics that are likely to prove decisive in deciding whether or not the proposed merger will lead to a significant lessening of competition, an issue dealt with below. These characteristics are:

- closeness of competition;
- possibility of entry;
- expansion and capacity;
- imports; and,
- buyer power and switching costs.

3.45 These characteristics were those identified by the undertakings involved, by third parties, and by the Authority during the course of its investigation.

Closeness of competition

3.46 This refers to:

- the degree to which the undertakings involved competed with each other pre-merger; and,
- the extent to which non-merging undertakings constrain the merged entity's ability to raise price.

General Arguments of the Parties

3.47 Post-acquisition, the parties would have a combined market share of [35-40]% and private labels would have around [25-30]%. Other brands would account for [25-30]% with Clonakilty being the most important of these with around [5-10]%. Furthermore, in pre-packed sausages, Clonakilty's share of sales relative to Breeo's increased from roughly one third in 2003 to [35-40]% in 2007.

3.48 A number of the other brands have a small market share at national level but have a strong position in regional markets. The fact that there are a large number of other strong competitors at both national and regional level indicates, in the view of the undertakings involved, that there is little likelihood of the transaction resulting in the creation of a dominant position.

3.49 The Compecon Report argues, correctly, that the products involved are differentiated consumer goods. As a result the issue in deciding whether or not the merger will lead to a substantial lessening of competition ("SLC") is whether or not the merged entity would have the power to unilaterally raise prices post-merger. The Compecon Report applies a two part test in order to address this issue:

- whether the merged entity would be likely to enjoy a dominant position; or,
- would otherwise have sufficient market power to enable it to unilaterally raise price.[34]

3.50 The results of the econometric analysis of the sausage market undertaken by Dr. Hogan on behalf of the merging parties are presented in section two. The

[34] For further discussion see J. Fingleton and D. Nolan (2003) "Minding the Gap. La riforma del regolamento communitario sulle concentrazioni. *Mercato Concorrenza Regole*, August, pp 309-336. This may be accessed at www.tca.ie

Compecon Report states that the econometric results of Dr. Hogan show that third party brands represent a greater competitive constraint than Breeo brands.[35] However, for reasons set out in section two above, the Authority prefers to rely on the econometric results of Dr. Walsh.

Views of the Competition Authority

Authority Survey of Retailers

3.51 The Authority sent a questionnaire to nine retailers. Retailers are used as a proxy for consumer tastes and preferences. Retailers buy based on their perception of consumer demand. They are knowledgeable experts on consumer demand. The demand of the retailers for sausages, rashers and other products considered in this Determination is a derived demand – the retailers demand occurs as a result of the demand of end consumers.

3.52 Of course, it could be argued that retailers might give biased responses since they are buyers as well as competitors of Breeo and Kerry. The direction of any bias is not at all clear.

3.53 Presumably as competitors (retailers sell private label in competition with branded products) retailers would be in favour of a merger that reduced competition among branded products since prices of branded products might increase post-merger. This would be advantageous to retailers who could also raise the price of private label as a response. However, as reported in this and other sections below, retailers express reservations concerning the merger.

3.54 As buyers of the products of Breeo and Kerry, retailers like to be able to play one off against the other, even if only implicitly, in order to secure lower prices. This in turn offers retailers, who are successful in securing lower prices, a competitive advantage in the retail market. However, if this is the reason why the retailers are concerned about the merger then such a concern should not be treated as suspect from a competition policy perspective. In fact, a concern over loss of buying power is relevant to the Authority's investigation to determine whether or not there is a substantial lessening of competition as a result of the merger.

3.55 Six out of nine retailers indicated that it is essential to have branded products in their product range for sausages.[36] In addition, the Authority asked which brands are considered "must have" or "must carry" brands. Six out of nine retailers indicated that they consider Denny to be a "must have" brand in the sausages market. This is not surprising given that Denny is the number one brand in sausages with a market share of [30-35]%. Of these six retailers, three indicated that they also consider Clonakilty to be a "must have" brand while two retailers indicated that they also consider Breeo's Galtee brand to be a "must have" brand. Finally, one retailer cited the Kearns brand as a "must have" brand.[37]

3.56 The Authority sent a follow-up questionnaire to six out of the nine retailers.[38] The following question was posed:

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[35] The elasticities are presented in paragraph 2.78, section two above.

[36] Of the remaining three retailers, one gave an "N/A" response; one gave no response while one retailer indicated that brands are not considered 'must have' products. Two of these three retailers are discounters while the third only sells its own private label products.

[37] The Kearns brand is owned by Olhausen. One retailer cited Olhausen as a "must have" brand but only for its retail outlets located in the Leinster region.

[38] […] did not receive a follow-up questionnaire because it does not do business with either of the merging parties and has no opinion on the proposed acquisition, while […] and […] did not receive a follow-up questionnaire because they do not stock any of Kerry's or Breeo's branded products and have no concerns about the proposed acquisition.

Do you have the ability to credibly threaten to de-list and/or de-range the merged entity's sausage products post-acquisition and switch to other sausage brands such as Clonakilty/Kearns/Olhausen and/or own-label sausages? If not, why not?

3.57 Four retailers indicated that they will not have the ability to credibly threaten to de-list and/or de-range the merged entity's sausage products post-acquisition. However, one of these retailers noted that "there is the implicit threat of Clonakilty". Another one of these four retailers noted that Clonakilty does not have the scale to supply it with the required volume of sausages. The same retailer stated that it would require a range of alternative sausage suppliers if it de-listed the merged entity and this would not be a cost-effective option for the retailer.

3.58 Although each of these four retailers has its private label sausages, none believe they could credibly threaten to focus more on own-label sausages if trading terms with the merged entity deteriorated post-acquisition. All retailers perceive private label sausages as offering end consumers a cheaper option relative to the branded sausages. In addition, all retailers indicated that private label sausages are approximately 10-20% cheaper than branded sausages. Significantly, retailers do not see private label sausages as being a close substitute for branded sausages.

3.59 Finally, all four retailers expressed the view that both Kerry and Breeo are implicitly aware of each other when negotiating trading terms with retailers.

3.60 Of the remaining two retailers that received a follow-up questionnaire, one retailer indicated that it would be able to overcome any difficulties it may encounter when negotiating trading terms with the merged entity post-acquisition. When asked to elaborate on how precisely discipline could be exerted on the merged entity post-acquisition, the retailer stated that there are a number of negotiating tactics available, the precise details of which the retailer was unwilling to explain. The retailer did note, however, that one option would be to focus more on the retailer's own label sausages.

3.61 Finally, one retailer indicated it had no concerns with the proposed acquisition. However, when asked to explain how it could credibly threaten to discipline the merged entity post-acquisition should trading terms deteriorate, the retailer indicated that although it would have the option of de-listing or de-ranging the merged entity's products, this would not be a credible threat. The retailer stated that its ability to discipline the merged entity would largely depend on whether alternative suppliers are available.

<u>Review of Parties' Internal Documents</u>

3.62 Some internal documentation provided by Kerry's Pork Business Unit appears to indicate that the latter perceives Breeo to be its closest competitor. The following two quotes[39] appear in a document provided by Kerry to the Authority entitled "[…]" - "[…]";[40] "[…]". Significantly, Breeo appears to perceive Kerry as its closest competitor in the cooked meats and breakfast meats segments. The following quote is taken from documentation provided by Breeo to the Authority entitled "[…]" – "[…]".

[39] The Authority asked Kerry to explain the apparent contradiction between these two quotes and (a) the views of the Compecon Report concerning countervailing buyer power, and (b) the results of Dr. Hogan's econometric analysis. Kerry stated in a letter to the Authority dated 20 June, 2008 that:

[…]; and,

there is no contradiction between these statements and (a) the views of the Compecon Report concerning countervailing buyer power, and (b) the results of Dr. Hogan's econometric analysis.

[40] When using the term "both markets", Kerry is referring to the State and Northern Ireland, respectively.

3.63 However, other internal documentation provided by Kerry appears to indicate that Kerry perceives Clonakilty to be its closest competitor in some markets within the breakfast meats segment. The following quote appears in a document provided by Kerry to the Authority […]. Thus, it appears that Kerry perceives Clonakilty to be its closest competitor in the sausages market.[41]

Econometric Evidence.

3.64 Dr. Walsh, whose results are summarised in Table 2.10 above, found the following in the sausages segment:

- The own price elasticities for Kerry, Breeo and other brands are quite low - -0.5 - which indicates that the brands are not that sensitive to price changes; and

- Kerry and Breeo's products are more substitutable with other sausage brands than with each other but the overall cross-price elasticities are quite low.

3.65 These results indicate that while Breeo's brands exercise some constraint on Kerry's brands, other brands exercise a greater competitive constraint on Kerry's brands.

Conclusion

3.66 The evidence clearly indicates that Kerry's closest competitor in the sausages market is Clonakilty. The latter is the number two brand in the sausages market. More retailers list Clonakilty as a "must have" brand in sausages than Breeo's Galtee brand. Most significantly, Kerry has stated in internal documentation that Clonakilty is the number two brand in sausages. Finally, the econometric evidence suggests that other brands exercise a greater competitive constraint on Kerry's brands than Breeo's brands.

3.67 The Authority's conclusions are consistent with the position of the parties. The latter stress the importance of regional firms. However, Table 3.1 suggests that the market share of such firms is minimal and between 2006 and 2007 they demonstrated little sign of gaining market share.

Entry

Submissions of the Undertakings Involved

3.68 The Compecon Report argues that there would appear to be no significant barriers to entry or expansion in the market. It would be relatively easy for a new entrant to set up production facilities without incurring any significant sunk costs. The key to gaining access to the market is to gain entry into one or more of the multiple retail outlets. The shift by the multiples towards centralised distribution makes it easier for new entrants in the grocery business since they no longer need to establish a nationwide distribution network. Similarly gaining access to multiple outlets is far more significant in terms of gaining entry to the market than trying to establish a brand image through an advertising campaign.

3.69 The sausage market has seen significant new entry in recent years. Clonakilty is a clear example of a new entrant which has been able to expand its brand image from a related market (puddings) and has captured a significant share of the

[41] Kerry's Denny brand is the clear market leader in sausages. The following quote appears in internal documentation provided by Kerry entitled "Raw Meats Steering Presentation – Oct 06" – "[...]".

market ([5-10]%) within a relatively short period of time. The lack of barriers to expansion means that there is also potential for some of the existing strong regional brands to expand beyond their existing market niches in the event of a post-merger price increase.

3.70 Overall the indications, argues the Compecon Report, are that the proposed transaction would be unlikely to significantly increase market power in the case of the sausage market given the relatively small shares of Breeo's brands and the fact that the main competitors to Denny in this market would appear to be other national, regional and private label brands. Barriers to entry and expansion would also appear to be relatively low in this market.

Views of the Competition Authority

3.71 The Authority's *Merger Guidelines* require the following three requirements to be met for entry to be able to constrain the merged entity from raising prices post merger:

- Entry must be timely – entry is considered timely only if it occurs within two years;
- Entry must be likely – in other words, entry must be profitable at existing (or lower) prices; and,
- Entry must be sufficient – entry must return prices to their pre-merger levels. For this to happen, entry must occur on a sufficient scale.

3.72 In other words, for entry to be a constraint on the ability of the merged entity to raise price post-merger, entry must be timely, likely and sufficient.

3.73 Given the importance of branded products in the sausages market, the Authority does not believe that an entrant with a new brand will be able to gain sufficient market share within two years such that it will be able to constrain the merged entity from raising price. The three leading brands in the sausages market – Denny, Clonakilty and, to a lesser extent, Galtee – are long-established brands which have gradually built up brand recognition amongst end consumers over a long period of time. For example, Clonakilty originally started producing puddings in the 1970s before extending the brand into sausages in the 1990s. Clonakilty informed the Authority that it has taken it […] to build up its market share in sausages – certainly more than the two-year time horizon set out in the Authority's *Merger Guidelines*.

3.74 A new entrant would have to invest substantial resources to over a long period of time in developing brand awareness in order to establish a foothold in the sausages market. It is more likely that entry will occur on a regional basis and it is significant in this regard that there are a number of regional brands in the sausages market. The Authority does not believe that a new entrant will be able to establish a sufficiently strong presence in the sausages market within a two-year period such that it will be able to constrain the merged entity from raising prices post-acquisition.

3.75 The Authority considers that entry into the supply of private label sausages to retailers is easy. Retailers informed the Authority that contracts with suppliers for the supply of private label sausages tend to be short-term in nature. In addition, retailers also stated that it is easy to break these contracts should retailers become dissatisfied with the contract terms offered by suppliers and this happens on a regular basis. Moreover, retailers stated that in some cases, there is no legal contract between the retailer and the supplier for the supply of private label sausages.

Expansion and Capacity

3.76 Expansion of non-merging firms in a market may also constrain the ability of the merged entity to raise prices post-merger. Expansion in turn is linked to the issue of whether the non-merging firms can expand capacity. In each instance, the same timely, likely and sufficient criteria outline above for entry are applied.

3.77 Clonakilty […]. Notwithstanding the views of one retailer, Clonakilty has indicated to the Authority that […] has the spare capacity to expand production of sausages if needed.

Conclusions

3.78 Sausages are a differentiated product. In such markets, mergers might lead to what is referred to as unilateral effects. These effects, according to the Authority's *Merger Guidelines,* "… arise where, as a result of the merger, the merged firm finds it profitable to raise price, irrespective of the reaction of its competitors or customers." (paragraph 4.4). Pre-merger if, for example, Kerry raised price from the prevailing level it might lose sufficient sales to (say) Breeo and other competitors to make the price increase unprofitable. However, post-merger, the same price increase might be profitable if sufficient lost sales from Kerry's brands are captured by Breeo brands, which are now part of the merged entity.

3.79 The proposed acquisition of Breeo by Kerry does not raise, in the Authority's opinion, unilateral effects in the market for sausages that are likely to lead to a substantial lessening of competition because:

- The HHI results place the proposed transaction in Zone B of the Authority's *Merger Guidelines* meaning that the sausages market would be defined as moderately concentrated;
- The merger sees the acquisition by Kerry owner of the leading brand, Denny, with a market share of [30-35]% in 2007, of the fourth ranked firm, Breeo, with a market share of [5-10]% in 2007;
- Evidence from a variety of sources indicates that Kerry's closest competitor is Clonakilty with a market share of [5-10]% in 2007;
- Breeo has two main sausage brands, Shaws and Galtee, the latter of which has been described by […] as a brand in decline. This is consistent with the market share data which indicates that Galtee's share declined from [0-5]% to [0-5]% between 2006 and 2007;
- Despite the concern expressed by a majority of retailers that they will not be able to credibly threaten to de-list and/or de-range the merged entity's sausage products post-acquisition in response to a deterioration in trading terms, the Authority is of the view that the presence of Clonakilty will constrain the merged entity from raising prices post-acquisition; and,
- Clonakilty has sufficient spare capacity to expand output should retailers switch from the merged entity.

3.80 In consequence of the foregoing, the Authority is of the opinion that the proposed transaction will not result in a substantial lessening of competition in the market for sausages in the State.

SECTION FOUR: BREAKFAST MEATS - PUDDINGS

Introduction

4.1 In 2007, puddings sales in the State were estimated at just under €27m of which [90-95]% was due to pre-pack sales and the balance due to OTC sales. The discussion in the previous section addressed the issue of market definition. This section is concerned with market structure and the competitive effect of the proposed acquisition in the puddings market in the State.

Relevant Market

4.2 The relevant market is the market for puddings in at least the State.

Market Structure

Introduction

4.3 Market structure can be characterised as the number and size distribution of firms. The initial impact of any merger is felt on market structure as two firms pre-merger become one firm post merger. In this section, the pre- and post-acquisition market shares in the puddings market are considered.

Measuring Market Concentration

4.4 Market concentration refers to the degree to which production in a particular market or industry is concentrated in the hands of a few large firms. Paragraphs 3.30 to 3.32 and 3.37 to 3.38 above contain further discussion with respect to the definition and measurement of market concentration using the HHI. The caveat, noted in paragraphs 3.33 to 3.36 above, concerning HHI measurement at the retail and wholesale level should also be noted.

Market Structure

4.5 Table 4.1 provides a breakdown of market shares by undertaking and individual brand. Output is measured in volume. The limited evidence available suggests that the value and volume measures are quite similar.[42] It is not clear if volume and value measures yield the same results. It seems reasonable to assume that the volume market shares understate the importance of undertakings selling brands (e.g. Kerry and Breeo) and overstates the share of retailers' private label sales (e.g. Tesco and Dunnes) since the latter typically charge a lower price.

Table 4.1
Market Shares by Undertaking and Brand, Puddings, by Volume, the State, 2006-2007

Undertaking/Brand	**2006**	**2007**
Kerry Foods		
Denny	**[10-15]**	**[20-25]**
Breeo		
Barcastle	[0-5]	[0-5]
Galtee	[5-10]	[0-5]
Roscrea	[0-5]	[0-5]
Shaws	[10-15]	[5-10]
Breeo Total	**[15-20]**	**[10-15]**
Clonakilty	[15-20]	[20-25]

[42] For details, see Tables 2.3, 2.4 and 2.6 above.

Other Brands		
Country Style	[0-5]	[0-5]
Drover	[0-5]	[0-5]
Granby	[0-5]	[0-5]
NCF	[0-5]	[0-5]
Olhausen	[5-10]	[0-5]
Hicks	[0-5]	[0-5]
West Cork	[0-5]	[0-5]
Stauntons	[0-5]	[0-5]
Tullamore	[0-5]	[0-5]
Other	[0-5]	[5-10]
Total Other Brands	**[15-20]**	**[15-20]**
Private Label		
Tesco	[0-5]	[5-10]
Superquinn	[0-5]	[0-5]
Dunnes Stores	[0-5]	[0-5]
SuperValu	[5-10]	[5-10]
Discounters	[5-10]	[0-5]
Others	[5-10]	[5-10]
Private Label Total	**[30-35]**	**[25-30]**
Total	**100.0**	**100.0**

Source: Compecon Report (Table 5.7, p.72).

4.6 The proposed acquisition sees the firm with the largest market share in 2007, Kerry, merge with Breeo, the firm with the third largest market share. Kerry's Denny brand is the largest selling brand in the pudding market closely followed by Clonakilty. Breeo's Shaws and Galtee brands are the next biggest sellers although their market shares are much smaller at [5-10]% and [0-5]%, respectively. Kerry and Clonakilty's market shares have substantially increased between 2006 and 2007 while, in contrast, Breeo's market share has declined. There are around 10 other suppliers in the market excluding private label.

4.7 Table 4.2 presents estimates of HHI figures for the puddings market.[43] The HHI figures would put the transaction within Zone B, the same zone as in the sausages market, according to the Authority's *Merger Guidelines*. In other words, the puddings market post-merger would be defined as moderately concentrated, but nevertheless the merger may raise serious competition concerns. While this does not automatically exclude the risk of an adverse effect on competition, the risk is lower than would be the case for a transaction in a highly concentrated market

Table 4.2
Puddings Market, HHIs, Pre- and Post-merger, by Volume, the State, 2007

Pre-Merger	1215.3
Post-Merger	1789.4
Change	574.1
Zone	B

Source: Compecon Report (Table 5.7, p.72).

[43] As in the case of rashers, the figures for the residual category of other shops were not treated as a single aggregate entity

Competitive Analysis

Closeness of Competition[44]

Arguments of the Parties

4.8 The Compecon Report argues that the merged entity would be the largest firm in the pudding market. There would appear to be sufficient competitive constraints from Clonakilty, private label and other smaller brands to preclude the possibility of any unilateral price increase post-merger.

4.9 The Compecon Report also argues that strong countervailing buyer power indicates that the proposed transaction will not create or strengthen a dominant position.

4.10 The parties did not undertake an econometric analysis in the case of puddings as the necessary data is not available.

Views of the Competition Authority

Authority Survey of Retailers

4.11 In the Authority's survey of retailers, six out of nine retailers indicated that it is essential to have branded products in their product range for puddings.[45] The Authority also asked which brands are considered "must have" or "must carry" brands. Five out of nine retailers indicated that they consider Clonakilty and Denny to be "must have" brands in the puddings market. This is not surprising given that Clonakilty and Denny are the two leading brands in puddings, each with a market share of [20-25]%. One retailer described Clonakilty as being "synonymous with puddings". Of these nine retailers, two indicated that they also consider Shaws to be a "must have" brand while one retailer indicated that it also considers Galtee to be a "must have" brand in puddings.

4.12 The Authority sent a follow-up questionnaire to six out of the nine retailers.[46] The following question was posed:

> Do you have the ability to credibly threaten to de-list and/or de-range the merged entity's pudding products post-acquisition and switch to other pudding brands such as Clonakilty/Olhausen/Country Style and/or own-label pudding? If not, why not?

4.13 Four retailers indicated that they would not have the ability to credibly threaten to de-list and/or de-range the merged entity's puddings products post-acquisition. One of these four retailers noted that Clonakilty does not have the scale to supply it with all its required puddings volume. The same retailer would require a range of alternative puddings suppliers if it de-listed the merged entity and this would not be a cost-effective option for the retailer.

4.14 Although three out of these four retailers have their private label puddings, none of these four retailers believe they could credibly threaten to focus more on private label puddings if trading terms with the merged entity deteriorated post-

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[44] See paragraph 3.46 for a definition of the term.

[45] Of the remaining three retailers, one gave an "N/A" response; one gave no response while one retailer indicated that brands are not considered 'must have' products. Two of these three retailers are discounters while the third only sells its own private label products.

[46] […] did not receive a follow-up questionnaire because it does not do business with either of the merging parties and has no opinion on the proposed acquisition, while […] and […] did not receive a follow-up questionnaire because they do not stock any of Kerry's or Breeo's branded products and have no concerns about the proposed acquisition.

acquisition. Most retailers perceive private label puddings as offering end consumers a cheaper option relative to the branded puddings. All retailers indicated that private label puddings are approximately 10-20% cheaper than branded puddings. Significantly, retailers do not see private label puddings as being a close substitute for branded puddings.

4.15 All four retailers expressed the view that both Kerry and Breeo are implicitly aware of each other when negotiating trading terms with retailers.

4.16 Of the six retailers that received a follow-up questionnaire, one retailer indicated that it would be able to overcome any difficulties it might encounter when negotiating trading terms with the merged entity post-acquisition. When asked to elaborate on how precisely discipline could be exerted on the merged entity post-acquisition, the retailer stated that there are a number of negotiating tactics available, the precise details of which the retailer was unwilling to explain. The retailer did note, however, that one option would be to focus more on the retailer's own label puddings.

4.17 Finally, one retailer indicated it had no concerns with the proposed acquisition. However, when asked to explain how it could credibly threaten to discipline the merged entity post-acquisition should trading terms deteriorate, the retailer indicated that although it would have the option of de-listing or de-ranging the merged entity's products, this would not be a credible threat. The retailer stated that its ability to discipline the merged entity would largely depend on whether alternative suppliers are available.

<u>Review of Parties' Internal Documents</u>

4.18 Internal documentation provided by Kerry appears to indicate that Kerry perceives Clonakilty to be its closest competitor in some markets within the breakfast meats segment. The following quote appears in a document provided by Kerry to the Authority […]. Thus, it appears that Kerry perceives Clonakilty to be the leading brand in the puddings market.

<u>Econometric Evidence</u>

4.19 The A.C. Nielsen dataset does not have any data on puddings, thus no econometric analysis was undertaken by Dr. Walsh.

Conclusion

4.20 The evidence clearly indicates that Kerry's closest competitor in the puddings market is Clonakilty. Table 4.1 above indicates that Denny and Clonakilty are the two leading brands in the puddings market while Breeo's market share is in decline. This is confirmed by the views of customers who list the two leading brands as the "must have" brands in puddings. Significantly, Kerry has stated in internal documentation that Clonakilty is the number one brand in puddings. The importance of Clonakilty as a competitive constraint was also stressed by the parties as noted above.

Entry

Submissions of the Undertakings Involved

4.21 As with other breakfast meats, the Compecon Report argues entry barriers would appear to be relatively low. Clonakilty is an example of a successful new entrant which entered the market on the back of its success in the restaurant market. It has established itself as a credible nationwide brand with a [20-25]% market share and a presence in independent butchers' shops throughout the State.

Views of the Competition Authority

4.22 The Authority's *Merger Guidelines* require that for entry to be a constraint on the ability of the merged entity to raise price post-merger, entry must be timely, likely and sufficient.

4.23 Given the importance of branded products in the puddings market, the Authority does not believe that an entrant will be able to establish a new brand within two years. The two leading brands in the puddings market – Denny and Clonakilty – are long-established brands which have gradually built up brand recognition amongst end consumers over a long period of time. For example, Clonakilty originally started producing puddings in the 1970s.

4.24 A new entrant would have to invest substantial resources over a long period of time in developing brand awareness in order to establish a foothold in the puddings market. It is more likely that entry will occur on a regional basis and it is significant in this regard that there are a number of regional brands in the puddings market, e.g., Stauntons, Tullamore, Hicks, etc. The Authority does not believe that a new entrant will be able to establish a sufficiently strong presence in the puddings market within a two-year period such that it will be able to constrain the merged entity from raising prices post-acquisition.

4.25 The Authority considers that entry into the supply of private label puddings to retailers is easy for reasons set out in section three above with respect to sausages.

Expansion and Capacity

4.26 Expansion of non-merging firms in a market may also constrain the ability of the merged entity to raise prices post-merger. Expansion in turn is linked to the issue of whether the non-merging firms can expand capacity. In each instance the same timely, likely and sufficient criteria outlined above for entry are applied.

4.27 Notwithstanding the views of one retailer, Clonakilty informed the Authority that it has the spare capacity to expand production of puddings.

Conclusions

4.28 The acquisition of Breeo by Kerry does not raise, in the Authority's opinion, unilateral effects in the market for puddings that are likely to lead to a substantial lessening of competition because

- The HHI results place the proposed transaction in Zone B of the Authority's *Merger Guidelines* meaning that the puddings market would be defined as moderately concentrated;
- The merger sees the acquisition by the leading brand, Denny, with a market share of [20-25]% in 2007 and owned by Kerry, of the third ranked firm, Breeo, with a market share of [10-15]% in 2007;
- Evidence from a variety of sources indicates that Clonakilty is the number one brand in puddings, although in 2007 its market share was marginally below Dennys ([20-25]% vis-à-vis [20-25]%);

- Breeo's market fell between 2006 and 2007 from [15-20]% to [10-15]%, with both its Shaws and Galtee brands experiencing declines in market share;

- Despite the concern expressed by a majority of retailers that they will not be able to credibly threaten to de-list and/or de-range the merged entity's puddings products post-acquisition in response to a deterioration in trading terms, the Authority is of the view that the presence of Clonakilty will constrain the merged entity from raising prices post-acquisition; and,

- There is sufficient spare capacity amongst competitors to expand output should retailers switch from the merged entity.

4.29 In consequence of the foregoing, the Authority is of the opinion that the proposed transaction will not result in a substantial lessening of competition in the market for puddings in the State.

SECTION FIVE: BREAKFAST MEATS - RASHERS

Introduction

5.1 In 2007, sales of rashers, or as they are sometimes referred to 'bacon rashers', in the State in 2007 were €129m up from €120m in 2006. Pre-packed sales accounted for [70-75]% of sales and the balance due to OTC sales. The discussion in section three addressed the issue of market definition. This section is concerned with market share data and the competitive effect of the proposed acquisition in the rashers market in the State.

Relevant Market

5.2 The relevant market is the market for rashers in at least the State.

Market Structure

Introduction

5.3 Market structure can be characterised by the number and size distribution of firms. The initial impact of any merger is felt on market structure as two firms pre-merger become one firm post merger. In this section, the pre- and post-acquisition market shares in the rashers market are considered.

Measuring Market Concentration

5.4 Market concentration refers to the degree to which production in a particular market or industry is concentrated in the hands of a few large firms. Paragraphs 3.30 to 3.32 and 3.30 to 3.32 above contain further discussion with respect to the definition and measurement of market concentration using the HHI. The caveat, noted in paragraphs 3.33 to 3.36 above, concerning measurement at the retail and wholesale level should be noted.

Market Structure in the Rashers Market

5.5 Table 5.1 below provides a breakdown of rasher sales by undertaking and brand for 2007 measured in terms of volume and value. The large differences in market share between value and volume reflects the fact that branded rashers such as Denny and Galtee command a substantial price premium compared to private label brands with the exception of […]'s private label rashers offering.

Table 5.1
Market Shares by Undertaking and Brand, Rashers, Volume and Value, the State, 2007

Undertaking/Brand	Volume	Value
Kerry		
Denny	[10-15]	[20-25]
Ballyfree	[0-5]	[0-5]
Clover	[0-5]	[0-5]
Kerry Total	**[15-20]**	**[20-25]**
Breeo		
Galtee	[10-15]	[20-25]
Roscrea	[0-5]	[0-5]
Shaws	[0-5]	[0-5]
Breeo Total	**[15-20]**	**[20-25]**
Cookstown	[0-5]	[0-5]
Clonakilty	[0-5]	[0-5]
Olhausen	[0-5]	[0-5]
Tulip	[0-5]	[0-5]
Rudds	[0-5]	[0-5]
Connaught Gold	[0-5]	[0-5]
Other Brands	[0-5]	[0-5]
Other Brands Total	**[5-10]**	**[5-10]**
Private Label		
Tesco	[10-15]	[5-10]
Superquinn	[0-5]	[0-5]
Dunnes Stores	[5-10]	[5-10]
Supervalu	[15-20]	[10-15]
Discounters	[5-10]	[0-5]
Private Label	**[45-50]**	**[35-40]**
Others	[15-20]	[10-15]
Total	**100.0**	**100.0**

Source: Compecon Report (Table 5.4, p.66).

5.6 The two largest suppliers of rashers are Kerry and Breeo with [20-25]% and [20-25]% of the market in value terms, respectively. There are more than 20 smaller brands with a combined market share of [5-10]%. This latter group includes a number of relatively recent entrants such as Cookstown, Clonakilty, Glen Farm and Tulip. OTC sales excluding the main supermarket groups, i.e. mainly butchers' shops, account for almost [15-20]% of sales in volume terms but just [10-15]% in value terms.

5.7 Table 5.1 provides only a snapshot in time. Table 5.2 provides market share data for 2005 to 2007 by value, with total Breeo sales declining in market share by […] of a percentage point and total Kerry sales increasing by [0-5] percentage points. In terms of brands, Breeo's Galtee brand is gaining market share and Kerry's Denny brand is also gaining market share. The recent entrants' market shares are small. Private label accounts for about a third of the market by value, having grown between 2005 and 2006, before declining between 2006 and 2007. Nevertheless, over the period 2005 to 2007, private label has gained market share mainly at the expense of All Others (including butchers).

Table 5.2
Market Share, Rashers, by Value and Volume, 2005 - 2007

Undertaking/Brand	**KG Volume** 2005 (%)	2006 (%)	2007 (%)	**€ Value** 2005 (%)	2006 (%)	2007 (%)
Breeo Foods	[15-20]	[15-20]	[15-20]	[25-30]	[25-30]	[20-25]
Galtee	[10-15]	[10-15]	[10-15]	[15-20]	[15-20]	[20-25]
Shaws	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Roscrea	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Kerry Foods	[10-15]	[10-15]	[15-20]	[20-25]	[15-20]	[20-25]
Denny	[10-15]	[10-15]	[10-15]	[15-20]	[15-20]	[20-25]
Ballyfree	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Clover	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Cookstown	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Clonakilty	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Olhausen	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Tulip	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Rudds	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Connaught Gold	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
All Others (incl. butchers)	[25-30]	[20-25]	[15-20]	[15-20]	[10-15]	[10-15]
Private Label (incl. Discounters)	[35-40]	[45-50]	[45-50]	[30-35]	[35-40]	[35-40]

Source: Based on data provided by the parties.

5.8 The parties in the 24 July submission on private label, referred to in paragraph 1.40 above, provided more recent data than that contained in Table 5.2. However, the disadvantage is that the data relates to pre-packed rashers only, not the whole market. In 2007, pre-packed cooked rashers accounted for [70-75]% of total rashers sales. However, the data source for both is AC Nielsen.[47]

5.9 Table 5.3 presents trends in pre-packed rashers for 10 and 8 week periods between April 2007 and April 2008. There is some volatility in the market share data, reflecting promotional activity by the various market participants, such as large price reductions. Later in this section, the issue of such promotions and their impact on market share will be discussed.

5.10 Table 5.3 is consistent with the annual data in Table 5.2. Kerry is increasing market share slightly, while Breeo experienced a small loss in market share – less than a percentage point. Private label is gaining market share, but mainly at the expense of 'Others', not the merging parties.

[47] In the Authority's Assessment bi-monthly data on market share was presented for pre-packed rashers for the period from the end of 2004 until July 2007. Since the market definition is not pre-packed rashers but all rashers the data in Table 5.2 is to be preferred for the purposes of the Determination.

Table 5.3
Market Shares, Pre-Packed Rashers by Value, Eight to Ten Week Periods, the State 2007-2008

	8WE 22.4.07	10WE 1.7.07	10WE 9.9.07	8WE 4.11.07	8WE 30.12.07	8WE 24.2.08	8WE 20.4.08	Change on Year
Kerry	[25-30]	[25-30]	[25-30]	[25-30]	[25-30]	[25-30]	[25-30]	[0-5]
Breeo	[25-30]	[30-35]	[25-30]	[25-30]	[30-35]	[25-30]	[25-30]	-[0-5]
Private Label	[25-30]	[25-30]	[25-30]	[25-30]	[25-30]	[25-30]	[25-30]	[0-5]
Discounters	[0-5]	[0-5]	[5-10]	[5-10]	[5-10]	[0-5]	[5-10]	[0-5]
Clonakilty	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Others	[10-15]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	-[0-5]

Note: 8WE or 10WE refers to the 8 or 10 week period with the end date indicated.
Source: the parties based on AC Neilsen.

5.11 Table 5.4 provides estimates of the pre- and post-merger HHIs using value rather than volume as the measure of market size.[48] The results show that the transaction would fall within Zone C as defined by the Authority's *Merger Guidelines*. In other words, the rashers market post-merger would be defined as highly concentrated. It is more usually in such markets that mergers raise competition concerns.

Table 5.4
Rashers Market, HHIs, Pre- and Post-acquisition, by Value, the State, 2007

	Value
Pre-Merger	**1457.4**
Post-Merger	**2549.9**
Change	**1092,5**
Zone	**C**

Source: Compecon Report (Table 5.5, p.67).

Conclusion

5.12 The fact that a merger falls into Zone C does not necessarily mean that it will substantially lessen competition. As the Authority's *Merger Guidelines* point out, factors that affect whether a merger in Zone C will raise competition concerns include the closeness of competition and whether there are low barriers to entry. It is to these and other related issues that attention is turned below.

Competitive Analysis

Closeness of competition[49]

General Arguments of the Parties

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[48] The fact that butchers shops account for around [15-20]% of total sales posed some difficulties for estimating accurate HHI figures. As this group consists of large numbers of individual outlets, treating them as a single group in the calculation would have resulted in the HHI figures being substantially overestimated. The approach adopted was to simply include a value equivalent to their market share in the HHI estimates, i.e. they were treated as though there were a group of individual shops each with 1% of the market. Even this means that the HHI estimate is overstated but not to any great extent. It should also be noted that if volume was used to measure the HHI then the merger would be Zone B not Zone C.
[49] For definition see paragraph 3.46 above.

5.13 The Compecon Report argues that the position in the rashers market is somewhat different from that in the sausages market. In the case of rashers, the Compecon Report argues that the proposed acquisition would bring the two firms with the largest market shares and two significant brands under common control. However, the Compecon Report argues that private label brands e.g., SuperValu, Tesco and Dunnes Stores, have quite a significant market share.

5.14 The merging parties combined market share would be [30-35]% by volume, in a market in which the main competitive constraint would come from private label brands with [45-50]% of the market by volume.

5.15 The Compecon Report argues that due to the lack of entry barriers and the existence of countervailing buyer power, the merging parties would not appear likely to have a dominant position in the market post-merger.

5.16 The Compecon Report states that the econometric results of Dr. Hogan in the rashers market show that third party brands represent a greater competitive constraint than Breeo brands.[50] These results are reported in section two. However, for reasons set out in section two, the Authority prefers to rely on the results of Dr. Walsh.

5.17 The Compecon Reports also states that the rashers market has also seen entry by a number of UK brands. Examples of this are Plumrose, Cookstown and Tulip. The Compecon Report states that such brands have managed to secure significant market shares in a relatively short period of time, although their shares have subsequently declined. It states that this reflects a trend whereby the multiples have tended to introduce such brands on a promotional basis at times when prices internationally are low. The parties argue that this demonstrates: (a) the power of the retailers, and (b) consumers' willingness to buy new brands. They also say it demonstrates that any attempt to raise prices post-merger would probably trigger entry by overseas suppliers within a relatively short period of time.

5.18 The Compecon Report argues that the main competitive constraint in the case of rashers would appear to come from private label. With almost [45-50]% of the market by volume, including OTC, this group would clearly exert a significant competitive constraint. There are around 20 small suppliers in this market. At present, these may not exercise a significant competitive constraint, although this could change. In particular, suppliers such as Rudds and Clonakilty have the potential to increase their presence in the market. Overseas suppliers such as Plumrose, Danepak, and Tulip have all demonstrated that they have the capacity to enter the market and capture significant market share within a short period of time.

5.19 Finally, the Compecon Report argues that the market is characterised by a strong degree of countervailing buyer power. This is confirmed by the use by the retail multiples of UK brands such as Plumrose and Tulip to mount strong promotional campaigns in the past.

5.20 The Compecon Response to the Assessment argues that the retailers response to questions concerning their ability to de-list 'must have brands' and the substitutability of private label for Kerry and Breeo brands is inconsistent with the facts. The Compecon Response also argues that the Authority relies on very few internal documents and that, in some cases,

[50] The elasticities are presented in section 2 above.

these documents do not preclude the possibility that Breeo may also see private label as a closer competitor.

5.21 The Compecon Response to the Assessment also refers to the new econometric results of Dr Hogan using [retailer] EPOS data. The results are reproduced in Table 5.5 below. The Compecon Response argues that these results indicate that the high degree of substitution between Kerry and Breeo products is of a similar order of magnitude to that between Kerry and all other brands including private label. This would provide some support, the Compecon Response argues, for Kerry and Breeo being each other's closest competitors.

Table 5.5
Kerry Rasher Cross Price Elasticities from [retailer] EPOS

Other Kerry	0.67
Breeo	O.82
Others branded	0.36
[retailer] private label	0.48

Source: Dr. Hogan "Elasticities for Products Using EPOS Data," 13 August 2008, Annex 16 to the Written Submission.

5.22 The parties' Written Submission argues, using a range of market facts and observations, that private label is a close competitor to Kerry and Breeo such that private label would constrain the merged entity from raising price. They also advance a series of arguments that there are no 'must have' brands. These arguments are considered in detail below. Like the Compecon Response, the Written Submission draws attention to the econometric results of Dr Hogan using [retailer] EPOS data. However, instead of concluding that it shows Kerry and Breeo are each other's closest competitors, the Written Submission argues that the results indicate that [retailer] and other brands combined are marginally closer substitutes for Kerry products than is Breeo. The parties also draw attention to the omission from the Assessment of the views of competitors.

Views of the Competition Authority

Authority Survey of Retailers

5.23 In the Authority's survey of retailers, six out of nine retailers indicated that it is essential to have branded products in their product range for rashers.[51] In addition, the Authority also asked which brands are considered 'must have' or 'must carry' brands. Five out of nine retailers indicated that they consider Kerry's Denny and Breeo's Galtee to be 'must have' brands in the rashers market, while two retailers also said that their private label brand was also a must have brand. This is not surprising given that Denny and Galtee are the two leading brands in rashers, each with a market share of over 20% by value. No other rashers brand was listed as a 'must have' brand.

[51] Of the remaining three retailers, one gave an "N/A" response; one gave no response while one retailer indicated that brands are not considered 'must have' products. Two of these three retailers are discounters while the third only sells private label products.

5.24 The Authority sent a follow-up questionnaire to six out of the nine retailers.[52] The following question was posed:

> Do you have the ability to credibly threaten to de-list and/or de-range the merged entity's rashers products post-acquisition and switch to other rashers brands such as Clonakilty/Olhausen/Country Style and/or own-label rashers? If not, why not?

5.25 Three retailers (customers A, C and F) indicated that they would not have the ability to credibly threaten to de-list and/or de-range the merged entity's rashers products post-acquisition. Furthermore, all three indicated that private label rashers are approximately 10-20% cheaper than branded rashers. Also, all three retailers expressed the view that both Kerry and Breeo are implicitly aware of each other when negotiating trading terms with retailers. It is useful to examine the individual responses of each of these three retailers.

5.26 Of the six retailers that received a follow-up questionnaire, three retailers (customers B, D and E) indicated that they had no concerns about the impact of the proposed acquisition in the market for rashers. Once again, it is useful to examine the individual responses of each of these three retailers.

Customer A

5.27 Customer A is concerned about the impact of the proposed acquisition in the market for rashers. In its response to the second questionnaire, Customer A states that there is no credible alternative to the merging parties' brands in the rashers segment. Furthermore, Customer A also states that whereas in the sausages and puddings markets there is the implicit threat of switching to […], this does not exist in the rashers segment. Customer A also filled out a table drawn up by the Authority. One of the questions posed in the table was whether private label is a strong competitor – Customer A replied that it does not consider private label to be a strong competitor.

Customer C

5.28 Customer C is concerned about the impact of the proposed acquisition in the market for rashers. However, in its response to a query in the Authority's first questionnaire as to whether there had been any significant changes in sales volumes since 1 January 2006, Customer C stated that

> There have been no overall significant changes in the rasher business volumes since 2006, however the share of the business in own label has increased significantly through the development of its own branded range. As seen above, this growth in own label came at the expense of Kerry branded share.

5.29 Data provided by Customer C indicates that the proportion of total rasher sales by value accounted for by Customer C's own-label rasher offering increased from […]% in 2006 to […]% in 2007. In contrast, Kerry's rasher sales in Customer C declined dramatically from […]% in 2006 to […]% in 2007.

[52] These are the same six as referred to in the previous paragraph. […] did not receive a follow-up questionnaire because they have no opinion on the proposed acquisition while […] and […] did not receive a follow-up questionnaire because they do not sell the parties' branded products.

5.30 Customer C noted in its response to the Authority’s first questionnaire that its own brand rashers business is relatively small in the context of the size of the total rashers market in the State.

5.31 In its response to the second questionnaire, Customer C stated that in the two biggest areas of turnover – rashers and non-poultry cooked meats – the option of de-listing and/or de-ranging is not available to Customer C post-acquisition should Customer C become dissatisfied with the terms offered by the merged entity. Customer C also filled out a table drawn up by the Authority. One of the questions posed in the table was whether private label is a strong competitor – Customer C replied that it does not consider private label to be a strong competitor.

Customer F

5.32 Customer F, […] is concerned about the impact of the proposed acquisition in rashers.

Customer B

5.33 Customer B is not concerned about the impact of the proposed acquisition in the market for rashers. Private label sales accounted for over […]% of total rasher sales in Customer B in 2007. The combined share of other third-party brands was also quite high at […]%. Kerry and Breeo had a combined share of […]% in 2007. Given these shares, it is perhaps not surprising that Customer B has no concerns about the impact of the proposed acquisition in the rashers market. Customer B stated in its response to the second questionnaire that there is less brand loyalty in the rashers segment and that sales are driven by promotional activity. Customer B further stated that Denny and Galtee are the two strongest brands while Breeo’s Shaws brand is considered a premium brand.[53]

5.34 Customer B indicated that it would be able to overcome any difficulties it may encounter when negotiating trading terms with the merged entity post-acquisition. When asked to elaborate on how precisely discipline could be exerted on the merged entity post-acquisition, the retailer stated that there are a number of negotiating tactics available, the details of which the retailer was unwilling to provide. The retailer did note, however, that one option would be to focus more on its private label rashers.

Customer E

5.35 Customer E has no concerns about the proposed acquisition. Private label sales of rashers in Customer E are […]. Customer E informed the Authority that it […] has a […] private label rasher offering. Customer E noted that its private label offering has been around for some time. Kerry and Breeo had a combined share of […]% of total rasher sales in Customer E in 2007. This figure raises doubts about the credibility of Customer E’s view that should trading terms with the merged entity deteriorate post-merger, one option open to it would be to try to focus more on its private label offering. Customer E also stated that another option open to it would be to look for alternative suppliers. Customer E stated that the ability to distribute on a nationwide basis […]. This, according to Customer E, is one of the successful aspects of both Kerry and Breeo.

[53] Breeo’s Shaws brand only had a [0-5]% market share in rashers in 2007.

5.36 Customer E also filled out a table drawn up by the Authority. One of the questions posed in the table was whether private label is a strong competitor – Customer E replied that it does not consider private label to be a strong competitor in the rasher segment. This further casts doubt on its views concerning its private label rashers offering described above.

5.37 When asked to explain how it could credibly threaten to discipline the merged entity post-acquisition should trading terms deteriorate, Customer E stated that although it would have the option of de-listing or de-ranging the merged entity's products, this would not be a credible threat. The retailer stated that its ability to discipline the merged entity would largely depend on whether alternative suppliers are available. Customer E stated that it considers […], […] and […] to be credible alternative suppliers in the rashers market to Kerry and Breeo.

Customer D

5.38 Customer D is not concerned about the impact of the proposed acquisition in the market for rashers. Customer D considers that the top sellers in rashers are its private label offering, Denny and Galtee. In its response to the Authority's second questionnaire, Customer D stated that its private label rasher offering is […]. Customer D also filled out a table drawn up by the Authority. One of the questions posed in the table was whether private label is a strong competitor – Customer D replied that it does consider private label to be a strong competitor.

5.39 Private label accounted for just over [..]% of Customer D's total rasher sales by value in 2007. There was a slight decline in private label sales between 2006 and 2007. In contrast, both Breeo and, in particular, Kerry increased their share of total rasher sales in Customer D between 2006 and 2007.

Conclusion

5.40 Of the nine retailers that responded to the Authority's first questionnaire, six considered that it was essential to have branded products in their rashers range. None of the remaining three sells brands. Five of the six named Kerry's Denny and Breeo's Galtee brands as must have, while two also listed their private label offering as well.

5.41 Of the nine retailers that responded to the Authority's first questionnaire, three have concerns about the impact of the merger on the rashers market: Customers A, C, and F. Five retailers have no concerns – Customers B, D, E, G, and H. However, the views of customers G, and H should be seen in light of the fact that neither stocks any of the merging parties' branded rasher products.[54]

5.42 Of the six retailers that were sent a follow-up questionnaire in Phase 2, three out of six retailers - Customers A, C, and F - indicated that they will not have the ability to credibly threaten to de-list and/or de-range the merged entity's rashers branded products post-acquisition. However, Customer C's concerns in the rashers market should be seen in light of the dramatic increase in private label rashers sales between 2006 and 2007 at the expense of Kerry's brands.

[54] One retailer, Customer I, has no views on the proposed acquisition and does not stock any of the merging parties' branded products.

5.43 Of the six retailers that were sent a follow-up questionnaire in Phase 2, three out of six retailers - Customers B, D, and E – have no concerns about the impact of the proposed acquisition in the market for rashers. However, Customer E's views on the proposed acquisition should be seen in the context of its statement that although it would have the option of de-listing or de-ranging the merged entity's products, this would not be a credible threat, while although Customer B said that they would be able to overcome any difficulties posed by the merger, they were unwilling to specify how that would be achieved.

5.44 In conclusion, the majority of retailers clearly indicate that Kerry and Breeo's brands are 'must have', while two also list private label. In terms of being able to successfully resist a post-merger price increase, although the evidence is somewhat mixed, on balance it shows retailers will have difficulty resisting such a price rise.

Authority Survey of Competitors

5.45 Seven competitors were sent a questionnaire during Phase 1. Only four responded – Competitor 1, Competitor 4, Competitor 5, and Competitor 6. The latter stated in its response that it has no views on the proposed merger as it does not supply any breakfast meats in the State. During Phase 2, a follow-up questionnaire was only sent to Competitor 1, Competitor 4 and Competitor 5.

5.46 All three raise concerns about the impact of the proposed acquisition in the breakfast meats category in terms of the ability of the merged entity to control pricing and shelf space that disadvantages competitors. Competitor 1, for example, is concerned about the impact of the proposed merger across all of the breakfast meat categories including rashers. In particular, Competitor 1 is concerned about the merged entity's power to influence the retailers' decisions concerning shelf space management post-merger.

5.47 The response of Competitor 1 was as follows:

> In rashers, there are so many versions of the same thing and brand extensions that Kerry/Breeo gets one version of each in. They each have so many SKUs, they dominate the shelves. The most serious concern [for Competitor 1] is the power of the merged entity to influence retailers on what they have on the shelves.

5.48 Competitor 4 commented,

> In our sector, it does place the two national brand leaders under the control of one company. From our company's viewpoint much will depend on the reaction, if any, of the retailers and the consumer. The single ownership of the main national brand leaders may provide an opportunity for the next tier of brands, or for the private label offerings. As mentioned, much depends on the retailers' reaction

5.49 Competitor 5 also commented on the increasing importance of private label,

> The large retailers, especially the multiples, have increased their focus on Private (Own) Label in Cooked Meats, Sausage, Rasher and Pudding. They have all launched a full range of products in these sectors. The extension of Own Label brands by the multiples has been the most significant development since January 2006. All of these activities, plus

the increased aggression of the leading brands, has made it very difficult to maintain ones position and protect sales.

Conclusion

5.50 Competitors raise concerns about the impact of the proposed acquisition bringing together the two leading brands in the breakfast meats category. Each competitor surveyed also notes that private label is becoming more important in this category.

Review of Parties' Internal Documents

5.51 Internal documentation provided by Kerry's Pork Business Unit appears to indicate that the latter perceives Breeo to be its closest competitor. The following two quotes[55] appear in a document provided by Kerry to the Authority entitled "[…]" - "[…]";[56] "[…]". Significantly, Breeo appears to perceive Kerry as its closest competitor in the cooked meats and breakfast meats segments. The following quote is taken from documentation provided by Breeo to the Authority entitled "[…]".

5.52 Significantly, other internal documentation provided by Kerry also appears to indicate that Kerry and Breeo see each other as their closest competitor in the rashers market. The following quote appears in a document provided by Kerry to the Authority […]. Thus, it is clear that Kerry perceives Clonakilty to be a weak competitor in the rashers market. As Table 5.1 and Table 5.2 above illustrate, this is not surprising given Clonakilty's market share in rashers is less than [0-5]%.

5.53 The following quote taken from a document created in 2008 entitled "[…]" illustrates Kerry's concern about the growing threat of private label products:

[…].[57]

5.54 The Authority has to consider the impact of the proposed acquisition over a two-year time period. This quote from Kerry casts doubt on the view expressed by the parties in its Written Submission that private label will be a sufficient constraint on the merging parties' brands such that it will be unable to permanently raise the price of rashers post-acquisition. Furthermore, Kerry talks about "protecting and building the branded share of our categories". Given the negligible market share of third party brands in the market for rashers (see Table 5.2 above), the reference by Kerry to growing market share as a result of the proposed acquisition suggests that Kerry sees the merged entity as having the potential to take market share away from private label post-acquisition.

Conclusion

5.55 The documentary evidence demonstrates that the parties see each other as their closest competitors. Private label as a threat is acknowledged as growing.

Econometric Evidence

[55] See footnote 39 above.
[56] When using the term "both markets", Kerry is referring to the State and Northern Ireland, respectively.
[57] This quote by Kerry is used in reference to the breakfast meats category, including the market for rashers.

5.56 Dr. Walsh, whose results are presented in Table 2.10 above, found the following in the rashers segment:

- The own price elasticities for Kerry, Breeo and other brands are slightly above unity which indicates that the brands are sensitive to price changes;
- Breeo and Kerry are each other's closest competitors;
- Other brands exercise a weak influence on the parties compared with the impact of Breeo on Kerry and Kerry on Breeo; and
- The results suggest that post-merger the merged entity could unilaterally raise price and that other brands would not prevent such a price rise.

<u>Private Label</u>

5.57 As noted above, the parties argue that private label rashers are a close competitor to the Kerry and Breeo brands. In the Written Submission, the parties provide an extensive set of reasons why private label is a close competitor of Kerry and Breeo. The Authority accepts that the private label is competitor of the merging parties. They are in the same market and hence are competitors. The question is whether private label is a close enough competitor to constrain the merged entity should it raise price permanently post-merger.

5.58 First, the parties argue that private label has increased its market share. However, as discussed above, this has not been at the expense of the parties, but rather the category 'Others' (see Table 5.2 above).

5.59 Second, the parties argue that private label takes on many of the characteristics of the brands in terms of physical appearance, pricing at a discount in relation to the brand, and so on. The Authority accepted this view in the discussion of private label in section two above. However, this means that private label is a competitor of the brands, not necessarily a close competitor. If private label is a close competitor, it is not clear why it would need to discount its price, on average, substantially compared to the brand.

5.60 Third, data from […], a market research firm, indicates that [60-65]% of those who have tried a private label brand in rashers have converted to regular purchasers. This is, on average, [10-15]% higher than the conversion rate for any brand. The parties draw the conclusion from this that private label will continue to grow. However, while the market share of private label has increased between 2005 and 2007, the market share data showed that Kerry's market share has increased between 2005 and 2007 while that of Breeo has declined slightly between 2005 and 2006, but remained constant between 2006 and 2007 (see Table 5.2 above). Thus, it is not clear that this 'conversion' is sufficiently important to cause the share of the leading brands to decline.

5.61 Fourth, based on TNS data, which is a household survey, the parties claim that rashers is a repertoire market where consumers purchase from a repertoire of brands with low loyalty to any single brand. TNS data indicates that for the 52 weeks ending July 2008, the percentage of customers who purchased Kerry rasher brands only was [0-5]%, for Breeo [0-5]%, for Kerry and Breeo together [0-5]%. In contrast, [75-80]% of consumers purchased at least one brand and a private label.

5.62 TNS is a household survey. Hence, since different members of the household might have different preferences with respect to rashers, it is not surprising that households purchase more than one brand (including private label). Since rashers are frequently sold on substantial price promotions by both private label suppliers and brands, it is not surprising that a large proportion of households purchase a brand and a private label. However, promotions are based on large and temporary price reductions which are not, as noted below, indicative of close substitutes using the Authority's *Merger Guidelines*

5.63 Fifth, the parties present a chart for the sales of thick cut rashers for Galtee, Denny, Shaws and [retailer] on a weekly basis for the week ending 6 July 2008. The graph highlights the impact of various sales promotions of [retailer] on its thick cut rashers - 40% extra free. The sales of [retailer] increase while those of Kerry and Breeo usually decline. Another chart relates to instances where Denny is on promotion. The parties argue that this is persuasive evidence that there is a degree of substitutability; otherwise promotions would have no impact on sales of the other party's products.

5.64 This evidence cannot be used to test the proposition that the brands of the parties and [retailer] private label are close substitutes. Since all these brands are in the same market, it is not surprising that consumers purchase more private label or a brand when they are on sale at a substantial price discount. However, these are temporary one-off large price reductions, not permanent price reductions. The charts indicate no lasting effect on the sales of the brands in response to [retailer] private label temporary price reductions.

5.65 The Authority's *Merger Guidelines* state, "The test for substitutability within the market involves a lower threshold than for the test for substitutability at the market definition level, with a 3% price increase being typically used." (paragraph 4.6). The 3% standard is set in the context of the ability of the merged entity to internalise sales that would be lost absent the merger and, therefore, would make it profitable for the merged firm to increase the price. The 40% price promotions described above are in excess of 3% by a considerable margin.

5.66 Sixth, the parties also provide [customer preferences] for rashers based on [retailer] store data. The [customer preferences] indicate in respect of [retailer] customers who purchase rashers, the proportion of their total rasher spend which is on a particular stock keeping unit or sku. Hence, for example, [retailer] […] Back Rashers 400g or Denny Hickory Back Rashers 420g are considered to be separate skus. The highest [customer preference] is [20-25]%, the 10th ranked is [15-20]%, the lowest ranked 77th is [0-5]%.[58] The [customer preferences] refer to the year ending 6 July 2008. The parties state that the [customer preferences] are low, with [retailer] private label having the highest score. However, the top ten [customer preferences] consist only of Kerry, Breeo and [retailer's] private label.

5.67 It is not clear that the data shows low loyalty and hence by implication that consumers regard the brands and private label as close substitutes. To the extent that the customer purchases on behalf of the whole household, this data will reflect the preferences of the various members of the household as in TNS data. In addition, given the prevalence of promotional activity, consumers will purchase lower priced offerings on occasion in view of the deep price reductions.

[58] A complete listing is provided in the Written Submission at Annex 10.

5.68 As noted above, the loyalty value is estimated for each sku. If a consumer is loyal to a particular brand, but selects different skus of that brand, this would not be captured by the index.

5.69 Seventh, the parties in their Written Submission note that the Assessment relied on the response of the retailers that Kerry and Breeo brands were 'must haves' and could not credibly de-list these brands. However, the parties dispute this on the grounds that the retailers have countervailing buyer power and in any event the retailers "are [likely to provide biased responses]." (paragraph 9.13). The Authority is not persuaded by these arguments for the reasons set out in section two above.

5.70 Eighth, it is argued by the parties, correctly, that the Assessment did not draw attention to the views of competitors on the strength of private label. The Written Submission is correct that, as noted above, the competitors all commented on the increasing importance of private label. However, as noted above, they also raised concerns about the ability of the merged entity to control pricing and shelf space to the disadvantage of competitors such as themselves.

5.71 Hence, it would appear that the evidence is consistent with the view that the smaller competitors in the rashers market are concerned about competition from both private label and the increased market power of the merged entity. This is consistent with the quote from one of the competitors cited above.

5.72 Ninth, the parties in their Written Submission refer to the increasing importance of the discounters – Lidl and Aldi. For example, comparing the eight week period ending 22 April 2007 with the eight week period ending 20 April 2008, the share of the discounters in pre-packed rashers increases from [0-5]% to [5-10]% (See Table 5.3 above). The parties argue that since the discounters do not stock any rasher brands, this is inconsistent with the view that the parties' brands are 'must have' brands.

5.73 However, the discounters compete in the value spectrum of the range of rasher offerings, rather than the premium level of the brands. Furthermore, although discounters do not stock the brands, consumers can still shop in the discounters for certain items and Tesco, Dunnes or Superquinn for the brand. The Authority's Grocery Monitor Report No 1 (Figure 22, p. 123) found that in 2006, 72%% of shoppers visited more than one supermarket/hypermarket in the previous four weeks.

5.74 In sum, the Authority has carefully examined and reviewed the evidence and arguments prepared by the parties in relation to whether or not private label is a close enough competitor to the brands of Kerry and Breeo to constrain any permanent price rise of the merged entity. The evidence clearly establishes that private label is a competitor with Kerry and Breeo. The issue is how close. The Authority, for the reasons set out above, is not persuaded by any of the nine arguments put forward by the parties designed to demonstrate that private label products are close competitors of the Kerry and Breeo.

Conclusion

5.75 The evidence clearly indicates that Kerry's closest competitor in the rashers market is Breeo. Tables 5.1 and 5.2 above indicate that Kerry's Denny and Breeo's Galtee are the two leading brands in the rashers market. The combined market share of the other brands is just over [5-10]% by value and only one brand has a market share in excess of [0-5]% (Cookstown). This is confirmed by the views of retailers most of which list Denny and Galtee as the 'must have' brands in rashers.

5.76 Dr. Walsh's econometric results show that other brands do not exercise a greater competitive constraint on Kerry's brands than Breeo's brands. Dr. Hogan's estimates, using [retailer] data, confirm the findings of Dr. Walsh. Dr. Hogan also reports that [retailer] private label has an influence slightly greater than the other brands.

5.77 The internal documents of the parties demonstrate that the parties see each other as their closest competitors. Private label, although acknowledged to be a growing threat, is not, in the view of the Authority, a sufficiently close competitor to exert a sufficient constraint post-merger on the merged entity.

5.78 Thus, the Authority takes the view that on balance the evidence indicates that retailers will have difficulty resisting a post-merger price rise, and considers that private label will not act as a sufficient constraint in such circumstances.

Entry

Submissions of the Undertakings Involved

5.79 The Compecon Report argues that entry barriers in the rasher market would appear to be relatively low. Raw materials can be imported in bulk quite easily and all that is required to commence production is slicing and packaging facilities. Sunk costs are therefore relatively low. The parties argue that while establishing a brand might be difficult, the most effective way to gain entry is to gain access to one or more multiples. The parties state that Irish Bacon Slicers has established a significant presence in the market by supplying unbranded pre-pack rashers to independent butchers' shops. The parties argue that there have been a number of new entrants in recent years. These include Cookstown, Clonakilty, Danepak and Tulip. Apart from Clonakilty, all of these firms have entered within the past few months.

5.80 At their Oral Submission to the Authority on 15 July 2008, the parties again stressed the entry of Hilton Foods, Tulip Ltd, which handles the business of the Danish Crown in the UK and Ireland, and Vion Food Group which owns Cookstown through the acquisition of the Grampian Group in June 2008. In all instances, these are large well established businesses with a proven track record of success.

5.81 In the subsequent Written Submission, the parties strongly disagree with the view in the Assessment that while entry might be timely and likely it is not sufficient. The parties state that the Authority's conclusion is just not credible. Further, the parties state that the Assessment has no evidence to back up its arguments about sufficiency of entry.

5.82 The parties in their Written Submission emphasise the importance of the retailers as gatekeepers for suppliers of rashers in gaining access to consumers. In contrast to Clonakilty which has been relatively unsuccessful in entering the rashers market, the major international players could be used by the retailers should the merged entity decide to raise price post-merger. They have the capacity according to the parties.

5.83 The international players identified by the parties in the Written Submission are Tulip, Hilton, and Cookstown. Tulip is a large international player which enters the Irish market sporadically, often on deep cut promotion. Tulip gains market share when on promotion.

5.84 Hilton Foods supplies private label rashers and sausages to Tesco as of August 2008. It has recently built a large plant in the State. The parties argue that this entrant shows the speed with which it is possible to set up the facilities necessary to produce rashers on a large scale. Hilton appears to market no branded rashers.

5.85 Cookstown is considered by the parties as a "[…]". It was acquired in June 2008 by Vion, a major international brand in breakfast meats with €7 billion turnover. Cookstown is the number one selling brand in Northern Ireland. Cookstown is intermittently stocked in the State by retailers on promotion, when it is able to expand sales and gain market share.

5.86 The Compecon Response argues that brands such as those owned by Tulip and Cookstown are able to gain market share rapidly when the price is right. The price is often at a substantial discount because they are sold on promotion.

Views of the Competition Authority

5.87 The Authority's *Merger Guidelines* require for entry to be a constraint on the ability of the merged entity to raise price post-merger, it must be timely, likely and sufficient.

5.88 Given the importance of branded products in the rashers market, the Authority does not believe that an entrant will be able to establish a new brand within two years. A new entrant would have to invest substantial resources over a long period of time in developing brand awareness in order to successfully establish a significant foothold in the rashers market. It is significant that Clonakilty, a brand leader in the puddings market and the number two brand in sausages, has struggled to increase its market share since extending into the rashers market in 2002.

5.89 Another option is that entry will occur on a regional basis and it is significant in this regard that there are a number of regional brands in the rashers market, e.g., Stauntons, Tullamore, Hicks, etc. However, none of these regional suppliers has been able to establish a nationwide supply of rashers to retailers and their market shares are minimal.

5.90 The parties and Compecon posit another potential source of entry, large international players such as Vion and Tulip. These are likely to enter in a timely manner. Indeed, their brands are already sold in the State. However, the evidence suggests that this is usually on promotion. The market share of each of these firms, on an annual basis, was less than [0-5]% in 2007 with the exception of Cookstown (see Table 5.2 above). The parties state that they have not presented any evidence that these players have specific plans to enter the Irish market at present. Thus, the Authority does not consider that the entry of these players will be sufficient to offset any permanent price increase post-merger by the merged entity.

5.91 The parties argue that the retailers are gatekeepers and so will be able to stock brands such as those of Vion and Tulip to defeat any price rise by the merged entity. However, retailers cannot determine what sells and what does not. That is up to end consumers. Retailers are aware of consumer demand. Given the above discussion of the poor performance of the brands owned by Vion and Tulip seems confined to promotions, it is unlikely that the retailers will stock these brands in preference to those of the merged entity in the case of a post-merger price rise.

5.92 The Authority does not believe, contrary to the views of the parties, that a new entrant will be able to establish a sufficiently strong presence in the rashers market within a two-year period such that it will be able to constrain the merged entity from permanently raising prices post-acquisition. In other words, entry may be likely and timely given the recent record of entry, but will not be sufficient. Indeed, the entry that is observed is consistent with the substantial price premium that Kerry and Breeo are able to command.

5.93 The Authority considers that entry into the supply of private label rashers to retailers is easy for reasons set out above with respect to sausages.

Expansion and Capacity

5.94 Expansion of non-merging firms in a market may also constrain the ability of the merged entity to raise prices post-merger. Expansion in turn is linked to the issue of whether the non-merging firms can expand capacity. In each instance the same timely, likely and sufficient criteria outlined above for entry are applied.

5.95 Given that other brands and private label products are not sufficiently close competitors to the merging parties' brands in the rashers market, the issue of whether suppliers and/or retailers will be in a position to expand capacity post-acquisition is not pertinent.

Conclusions

5.96 The Authority is of the view that the proposed acquisition of Breeo by Kerry will result in a unilateral price increase by the merged entity. In other words, Kerry will be able to internalise the forgone profits of any lost sales to Breeo since it will own Breeo post-merger. The reasons for this conclusion are as follows:

- The HHI results place the proposed acquisition in Zone C of the Authority's *Merger Guidelines* meaning that the rashers market would be defined as highly concentrated and more liable to raise competition concerns;
- The merger sees the acquisition of the leading brand, Denny, of the second ranked brand, Galtee;
- The market shares of Galtee and Denny have shown considerable stability over the period 2005 to 2007;
- Evidence from a variety of sources indicates that Kerry's Denny brand and Breeo's Galtee brand are each other's closest competitor in the market for rashers. Post-acquisition, these two brands will account for [45-50]% by value of the rashers market;
- There are no credible alternative brands in the rashers market that will enable retailers to constrain the merged entity from raising prices permanently post-acquisition;
- The combined market share of the other brands in the rashers market is only [5-10]% by value and only one brand has a market share in excess of [0-5]% (Cookstown);
- Despite being one of the leading brands in both the puddings market and the sausages market, Clonakilty has not been able to

build its market share since extending into the rashers market in 2002. This illustrates the difficulty for new entrants in establishing a significant foothold in the rashers market;

- New entrants will be unable to establish a sufficiently strong presence in the rashers market within a two-year period such that they will be able to constrain the merged entity from raising prices post-acquisition;

- Despite having a combined market share of [35-40]% by value, private label rashers are not considered by retailers to be a sufficiently close competitor to Denny or Galtee. It is essential for retailers to stock the two "must have" rasher brands, i.e. Denny and Galtee; and

- Retailers will be unable to credibly threaten to discipline the merged entity post-acquisition since (a) there are no credible alternative branded rashers suppliers, (b) entry of branded rashers will not be sufficient within a two-year period, and (c) private label rashers are not considered a sufficiently close competitor in the market and, thus, cannot be used to replace the merged entity's rashers offering.

5.97 In consequence of the foregoing, the Authority is of the opinion that the proposed transaction will result in a substantial lessening of competition in the market for rashers in the State.

SECTION SIX: COOKED MEATS

Introduction

6.1 In this section, the Authority considers the implications of the proposed acquisition for competition in the cooked meats segment which the Authority divides into two separate product markets: (a) poultry cooked meats, and (b) non-poultry cooked meats. Total cooked meat sales in 2007 were estimated to amount to €289m, [65-70]% of which were accounted for by pre-pack sales with the remaining [30-35]% accounted for by OTC sales mainly at delicatessen counters in supermarkets and convenience stores.

Relevant Product Market

Submissions of the Undertakings Involved

Poultry and Non-poultry Cooked Meats

6.2 Cooked meats comprise poultry, ham and beef. Non-poultry cooked meats is mainly made up of ham cooked meats with beef cooked meats being a very small element of this sub-market.

6.3 Both the notification and the Compecon Report are somewhat equivocal as to whether or not cooked meats is a single product market or two separate product markets. Essentially the undertakings involved conclude that the competitive implications of the proposed merger are the same irrespective of whether there is one or two separate markets.

6.4 There is some case law which the notification suggests that poultry and non-poultry cooked meats constitute separate sub-markets. However, although this was suggested in *Smithfield Oaktree/Sara Lee*[59], the Commission did not have to make a decision on this question.

6.5 The Compecon Report cites evidence that poultry and non-poultry cooked meats are in separate markets. Kerry markets its poultry and non-poultry cooked meats under different brand names. It has also indicated that these brands are identified with those specific meat types and that attempts to transfer a brand name associated with one type of meat to the other have not proved successful because consumers identify the brands with the particular type of meat.

6.6 The Compecon Report (p.49) also notes that, "There are some EU precedents that different meats constitute separate markets. In the absence of conclusive evidence to support a finding of separate markets, we have considered cooked meats as a single market."

6.7 In the parties Oral and Written submissions and in the Compecon Response to the Assessment, the parties provide arguments that in their view lead to the conclusion that the correct market definition is cooked meats.

6.8 The arguments provided by the parties are that the Authority's investigation with respect to market definition:

- Places too much reliance on the results of the SNIPP test;
- Provides an inaccurate interpretation of the parties internal documents; and,

[59] Case No. Comp/M.4257, *Smithfield Oaktree/Sara Lee*, 28 July 2006.

- Does not consider the potential for supply side substitution between poultry and non poultry cooked meats.

6.9 These arguments are discussed in detail below.

Are OTC and Pre-packed in the Same Market?

6.10 The Compecon Report states that both cooked and uncooked meat products are sold in loose and pre-packed formats. For example, cooked meats are sold unwrapped at the delicatessen counters of supermarkets and other grocery outlets. The question is whether OTC products are close substitutes for pre-packed. There would appear to be good intuitive grounds for arguing that OTC and pre-packed versions of the same product are close substitutes and should be considered to constitute part of the same market. Both OTC and pre-packed versions of the products share similar characteristics and have the same intended use.

6.11 It should also be noted that larger supermarkets are changing their deli/OTC service offering. There is now a move towards having OTC cooked meats displayed in cabinets in segmented quantities giving the appearance that these have been prepared in the delicatessen section of the store and left out for customers when in fact they are bought in this fashion. This development is referred to as grab 'n' go and illustrates that the distinction between pre-pack and OTC has become very blurred over time.

6.12 Market research data also shows that a high proportion of consumers purchase both pre-pack and OTC. This is true in the case of [60-65]% purchasing cooked meats. Thus, it would seem reasonable to argue that OTC and pre-packed meat products are part of the same market.

Authority's Investigation

6.13 In considering whether a separate product or geographic market exists, the Authority applies the Small but Significant Non-transitory Increase in Price ("SSNIP") Test (also known as the hypothetical monopolist test) where the price increase is between 5- 10%.[60] The SSNIP test in merger analysis applies a price increase "above the prevailing level."[61] In some instances, the prevailing price will be the competitive price, in others a price in excess of the competitive level.

Are Poultry and Non-poultry Cooked Meats in the Same Market?

<u>Competition Authority Survey of Retailers</u>

6.14 Since it is the retailer that makes the final decision as which products are stocked in their outlet(s), the Authority carried out a survey of retailers to determine whether they consider poultry cooked meats compete with non-poultry cooked

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[60] The SSNIP Test asks whether a hypothetical monopolist of product A would be able to permanently increase its price by 5-10%. If a sufficient number of consumers respond to the price increase by purchasing another product, say product B, then it is appropriate to include product B in the same relevant market as product A. The test is then reapplied to a hypothetical monopolist of both product A and B and asks if a hypothetical monopolist of both products could profitably increase the price of both products by 5-10%. If a sufficient number of consumers switch to another product, say product C, the test is then reapplied by including product C with products A and B. The test is iteratively applied until a hypothetical monopolist of some group of products could profitably increase the price of all products in the group by 5-10%. This group of products is defined as the relevant product market. Full details of the test are explained in the Competition Authority, *Merger Guidelines*.

[61] Competition Authority, *Merger Guidelines*, paragraph 2.5.

meats. The Authority sent a detailed questionnaire to nine leading retailers in the State, all of which responded.[62]

6.15 One of the questions posed in the questionnaire related to the SSNIP test:

> Assume that all poultry cooked meats were supplied by one undertaking and if this undertaking were to permanently raise the price of poultry cooked meats by between 5% and 10% from its current level. Assume also that at the same time all other conditions (such as quality, etc) as well as the price of non-poultry cooked meats (i.e., ham, beef, etc) remained unchanged. In these circumstances, would you:
>
> (i) Maintain your spend on poultry cooked meats (and buy less)?
> (ii) Purchase the same volume of poultry cooked meats and pay more?
> (iii) Switch some of your spend away from poultry cooked meats. If so, to which non-poultry cooked meats would you switch and what proportion of spend?

6.16 The parties have argued that too much reliance is placed on the results of the SNIPP test and that the results are not conclusive. Nine retailers were surveyed and six responded. Of the six responses:

- two retailers provided multiple and contradictory answers which thus can not be properly interpreted;
- two retailers indicated that they would switch some of their spend away from poultry cooked meats to non-poultry cooked meats (answer (iii)); and,
- two retailers indicated that the would not switch from poultry cooked meats to non-poultry cooked meats (answers (i) and (ii)).

6.17 On balance, the Authority is of the view that this evidence cannot be used by itself to identify the relevant markets and additional evidence is required.

<u>Internal Documentation</u>

6.18 Another source of evidence reviewed by the Authority for the purpose of assessing the relevant markets are the internal documents of the parties.

6.19 The parties internal documentation is consistent with the view that there are two separate markets as the following quotes taken from the documents supplied by Kerry to the Authority suggest:

- […];
- […];[63]
- […]; and
- […].

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[62] One retailer, […], did not respond to the Authority's questionnaire but distributed the questionnaire to its members, one of which, […], responded.
[63] NPD refers to New Product Development.

6.20 In each case, the Kerry documents refer to the position of and challenges faced by its Ballyfree brand in 'white meat' (i.e., poultry meats) as a distinct product. In addition, the brands mentioned as competitors, Bernard Matthews and Green Farm Foods, are primarily suppliers of poultry cooked meats.

6.21 The parties argue in paragraph 10.5 of the Written Submission that "whilst this may be evidence that Kerry occasionally adopts strategies for 'white meats' within the overall product, it is not persuasive evidence that there are separate product markets." By contrast, the Authority is of the view that internal pre-existing documentary evidence is very persuasive and this follows the best practice guidelines for merger analysis set out by the International Competition Network ("ICN"):

> "Pre-existing documents that were prepared before the merger was under consideration are especially useful. Pre-existing documents are valued by agencies for the opportunity to see how the parties acted and how they viewed competition and markets before they had the merger in mind." [64]

> "It may be helpful to request from undertakings involved in the merger (or indeed other firms active in the market) their commercial strategies and other internal documents such as internal communications, public statements, and studies on consumer preferences, market research, advertising plans, general marketing plans or business plans. These may indicate which products the undertakings believe to be the closest substitute to their own products and may also provide information on which companies they consider to be their competitors." [65]

6.22 "Pre-existing documents that were prepared before the merger was under consideration are especially useful. Pre-existing documents are valued by agencies for the opportunity to see how the parties acted and how they viewed competition and markets before they had the merger in mind."[66]

> "It may be helpful to request from undertakings involved in the merger (or indeed other firms active in the market) their commercial strategies and other internal **documents** such as internal communications, public statements, and studies on consumer preferences, market research, advertising plans, general marketing plans or business plans. These may indicate which products the undertakings believe to be the closest substitute to their own products and may also provide information on which companies they consider to be their competitors."[67]

6.23 Another indication that poultry cooked meats and non poultry cooked meats operate in separate markets can be seen in the way the parties use different brands to market poultry and non-poultry cooked meats. Table 6.1 illustrates this point clearly: only one of the five brands of the parties, namely Shaws, operates across both the poultry and non-poultry markets.

Table 6.1
Kerry and Breeo Brands by Poultry and Non-Poultry Cooked Meats

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[64] ICN (2005), *Investigative Techniques Handbook for Merger Review*, p.39. This may be accessed at www.internationalcompetitionnetwork.org.
[65] ICN (2006), *Merger Guidelines Workbook*, Prepared for the Fifth Annual ICN Conference in Cape Town, April 2006, p.21 (emphasis in original). For further details of the ICN see footnote 129 below.
[66] ICN (2005), *Investigative Techniques Handbook for Merger Review*, p.39. This may be accessed at www.internationalcompetitionnetwork.org.
[67] ICN (2006), *Merger Guidelines Workbook*, Prepared for the Fifth Annual ICN Conference in Cape Town, April 2006, p.21 (emphasis in original). For further details of the ICN see footnote 129 below.

Undertaking/Brand	Poultry Cooked Meats	Non-Poultry Cooked Meats	Both
Kerry - Denny		√	
Kerry - Ballyfree	√		
Breeo - Galtee		√	
Breeo - Shaws			√
Breeo - Roscrea		√	

Source: the Authority

Supply side substitution

6.24 In both the Oral and Written Submissions of the parties and the Compecon Response, it is noted that supply side substitution was not examined by the Authority in its Assessment. The discussion of the identification of the relevant markets in Authority's *Merger Guidelines* notes that the substitutability of products is looked at primarily from the standpoint of consumers (i.e., demand-side substitutability)[68] while supply side constraints can be examined in the competitive effects analysis. This is the approach undertaken by the Authority in this market.

6.25 Further, paragraph 2.12 of the Authority's *Merger Guidelines* set out the evidence required to assess the feasibility of supply side substitution. This includes:

(a) Whether substitution by potential suppliers is technically possible, the costs of switching production and the time it would take to switch production between products;

(b) Whether potential suppliers are free to switch production (for example, whether they have spare capacity);

(c) Consumers' views of potential suppliers, e.g., would their products be considered substitutes; and

(d) Evidence of influential brands.

6.26 Evidence of this nature was not supplied by the parties in either the original notification nor in any subsequent submission.

6.27 The Authority did ask competitors whether manufacturing processes for poultry cooked meats could be easily switched to non-poultry cooked meats. Evidence supplied by Competitor 5 and Competitor 9 suggests that poultry and non-poultry cooked meats are not run in same plant due to health reasons.

Are OTC and Pre-packed in the Same Market?

Survey Evidence – OTC v Pre-packed Sausages

[68] This is supported by the practice of the Commission in paragraphs 13 and 14 of its *Horizontal Merger Guidelines*:
13. Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.
14. The competitive constraints arising from supply side substitutability other then those described in paragraphs 20 to 23 and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

6.28 The Authority also carried out a survey of retailers to determine whether they consider over the counter/deli non-poultry cooked meats compete with pre-packed non-poultry cooked meats. The Authority sent a follow-up questionnaire to six out of the nine retailers.[69]

6.29 One of the questions posed in the follow-up questionnaire related to the SSNIP test:

> Assume that all pre-packed non-poultry cooked meats were supplied by one undertaking and if this undertaking were to permanently raise the price of pre-packed non-poultry cooked meats by between 5% and 10% from its current level. Assume also that at the same time all other conditions (such as quality, etc) as well as the price of over the counter/deli non-poultry cooked meats remained unchanged. In these circumstances, would you:
>
> (i) Maintain your spend on pre-packed non-poultry cooked meats (and buy less)?
> (ii) Purchase the same volume of pre-packed non-poultry cooked meats and pay more?
> (iii) Switch some of your spend away from pre-packed non-poultry cooked meats to over the counter/deli non-poultry cooked meats. If so, what proportion of spend?
>
> In each case, please explain your answer and how this would be achieved.

6.30 Two out of six retailers indicated that they would purchase the same volume of pre-packed non-poultry cooked meats and pay more. One retailer indicated that it would maintain its spend on pre-packed non-poultry cooked meats and buy less. One retailer did not give a specific response but did state that in its view, pre-packed cooked meats do not compete with over the counter/deli cooked meats. Finally, one retailer indicated that its response would be determined solely by end consumers.

6.31 Thus, on balance, the survey results suggest that from a demand side perspective, pre-packed cooked meats occupy a distinct product market from over the counter/deli cooked meats.

Supply-side Substitution

6.32 From the supply side, it could be argued that pre-packed poultry cooked meats and over the counter/deli poultry cooked meats could be considered as a single product market. In theory, if a hypothetical monopoly supplier of over the counter/deli poultry cooked meats increased the price permanently by 5-10%, a supplier of pre-packed poultry cooked meats could easily switch to supplying over the counter/deli poultry cooked meats. However, it is not clear that the reverse is true since the supply of pre-packed poultry cooked meats entails the extra cost of slicing and packaging the product.

6.33 On balance, the Authority considers that it is reasonable to expect that if a hypothetical monopoly supplier of pre-packed poultry cooked meats increased the price permanently by 5-10%, a supplier of over the counter/deli poultry cooked meats could easily switch within a twelve-year period to supplying pre-packed poultry cooked meats.

[69] […] did not receive a follow-up questionnaire because they have no opinion on the proposed acquisition while […] and […] did not receive a follow-up questionnaire because they have no concerns about the proposed acquisition.

Conclusions on the Relevant Product Market

6.34 The Authority has taken the view that there are two relevant product markets for cooked meats: poultry cooked meats and non-poultry cooked meats.

Relevant Geographic Market

Submissions of the Undertakings Involved

6.35 As described in paragraphs 3.20-3.25 above, the parties submit that the geographic market for all of the product markets is at least the State.

Conclusion on the Relevant Geographic Market

6.36 The Authority considers that the relevant geographic market for both poultry and non-poultry cooked meats is at least as wide as the State. The impact of imports is considered when examining the competitive impact of the proposed acquisition.

Poultry Cooked Meats

Market Structure

Introduction

6.37 Market structure can be characterised as the number and size distribution of firms. The initial impact of any merger is felt on market structure as two firms pre-merger become one firm post merger. In this section, the pre- and post-acquisition market shares in the sausages market are considered.

Measuring Market Concentration

6.38 Market concentration refers to the degree to which production in a particular market or industry is concentrated in the hands of a few large firms. Paragraphs 3.30 to 3.32 and 3.37 to 3.38 above contain further discussion with respect to the definition and measurement of market concentration using the HHI. The caveat, noted in paragraphs 3.33 to 3.36 above, concerning HHI measurement at the retail and wholesale level should also be noted.

Market Structure in Poultry Cooked Meats

6.39 Table 6.2 provides a breakdown of market shares by undertaking in the market for poultry cooked meats annual for 2005 to 2007. Market size is measured by value. If, however, volume were used instead then the results would differ dramatically. In 2007, Kerry, Bernard Matthews and private label including discounters accounted for [35-40]%, [5-10]% and [35-40]% by value, respectively, but [25-30]%, [10-15]% and [40-45]% by volume.[70] This difference illustrates the premium that branded products in poultry cooked meats are able to command, as set out in Tables 2.3 and 2.4 above for Kerry and Breeo, respectively.

Table 6.2
Market Shares, by Undertaking, Poultry Cooked Meats, Value, the State, 2005-2007

Undertaking	2005	2006	2007
Kerry	[35-40]	[35-40]	[35-40]
Breeo	[0-5]	[0-5]	[0-5]
Bernard Matthews	[5-10]	[5-10]	[5-10]

[70] The volume market shares are taken from Compecon Report (Table 4.4, p. 50).

Green Farm Foods	[0-5]	[0-5]	[5-10]
Carroll Cuisine	[0-5]	[0-5]	[0-5]
Other Brands	[0-5]	[0-5]	[0-5]
Private Label			
Tesco	N/A	N/A	N/A
Superquinn	N/A	N/A	N/A
Dunnes Stores	N/A	N/A	N/A
SuperValu	N/A	N/A	N/A
Discounters	N/A	N/A	N/A
Other Private Label	N/A	N/A	N/A
Private Label Total	[40-45]	[40-45]	[35-40]
Total	100.0	100.0	100.0

Source: Based on information supplied by the parties.

6.40 Kerry has [35-40]% of the market in 2007, little changed from 2005. Private labels have around [35-40]%, down from 2005 by [0-5] percentage points. Breeo has just over [0-5]% of this market. There are several other significant suppliers including Bernard Matthews with [5-10]% in 2007 and Green Farm Foods with [5-10]% in 2007. Breeo's minimal share – [0-5]% in 2007 - in poultry cooked meats suggests that the proposed acquisition may have very little impact on competition.

6.41 Table 6.3 presents the estimated HHIs for poultry cooked meats pre and post merger.[71] The results show that the transaction would fall within Zone C as defined by the Authority *Merger Guidelines*. In other words, the poultry cooked meats market post-merger would be defined as highly concentrated. It is more usually in such markets that mergers raise competition concerns.

Table 6.3
Poultry Cooked Meats Market, HHIs, Pre- and Post-Merger, 2007

Pre-Merger	**1,899**
Post-Merger	**2,226**
Change	**327**
Zone	**C**

Source: The Competition Authority

6.42 The fact that a merger falls into Zone C does not necessarily mean that it will substantially lessen competition. As the Authority's *Merger Guidelines* point out, factors that affect whether a merger in Zone C will raise competition concerns include the closeness of competition and whether there are low barriers to entry. It is to these and other issues that attention is turned below.

Competitive Analysis

Closeness of Competition[72]

General Arguments of the Parties

[71] For the purposes of calculating the HHIs and in the absence of any individual private label data for each retailer, the Authority has attributed a value of 6.35% to each of Tesco, Superquinn, Dunnes Stores, SuperValu, Discounters, and Other Private Label for 2007.
[72] For a definition, see paragraph 3.46 above.

6.43 The parties provide general arguments regarding total cooked meats as a whole and some relating to pre-pack cooked meats. The Compecon Report argues that the cooked meats market is very competitive. There are a large number of competitors; the most important one's being retailer's private label brands. Private label brands account for [55-60]% of total cooked meat sales.[73] In contrast, the merged entity would have a combined market share of around [35-40]%.

6.44 In recent years, private label brands have increasingly taken market share away from brands. Kerry's Denny brand is the largest selling cooked meats brand with [20-25]% of the total market. However, Denny's market share has fallen substantially in recent years due to the growth in the share of private label. Aldi and Lidl have also gained significant shares in the market going from under [0-5]% in 2005 to almost [5-10]% in 2007. There seems little likelihood, the Compecon Report argues, that the merged entity would have the necessary market power to be regarded as dominant.

6.45 The Compecon Report states that the second issue to be addressed is whether the merger would result in a significant weakening of competition by bringing the closest substitutes under common control. The results of the econometric analysis conducted by Dr. Hogan indicate:

- Own price elasticities are quite high suggesting that consumers are relatively sensitive to price increases and thus firms ability to profitably increase prices is limited.

- Cross price elasticities between Kerry's and Breeo's products confirm that Breeo products are substitutes for Kerry's products.

- However, Kerry products tend to have even higher elasticities of substitution with other third party products.

6.46 The Compecon Report argues that the results indicate, therefore, that while Breeo's brands exercise some constraint on the Kerry brands, other third party brands exercise a far greater competitive constraint on Kerry's brands than Breeo's products. However, it should be noted that these results apply to cooked meats as a single market.

6.47 The Compecon Report also argues that these econometric results above exclude OTC which accounts for [30-35]% of the total market. The results are therefore likely to understate the competitive significance of own label brands. However, for reasons set out in section two above, the Authority has decided not to rely on the results of Dr. Hogan's analysis.

6.48 The Compecon Report states that the econometric results are supported by other evidence. Kerry has two cooked meats brands: Dennys with [20-25]% of the market and Ballyfree with around [0-5]%. Kerry sells poultry meats under the Ballyfree brand with all other cooked meats marketed under the Denny brand. Breeo has three cooked meats brands: Galtee, Shaws and Roscrea. The Denny brand operates right across the cooked meats market spectrum, except poultry. Breeo's brands do not operate across the market spectrum. Rather, its brands each operate in different parts of the cooked meats market.

6.49 While Breeo's overall market share has fallen, the Shaws brand has increased its market share but its Galtee and Roscrea brands have been losing market share and have just [0-5]% and [0-5]%, respectively. The […] brand in particular is viewed by […] as a rather weak brand. This brand has recently been de-listed in […]

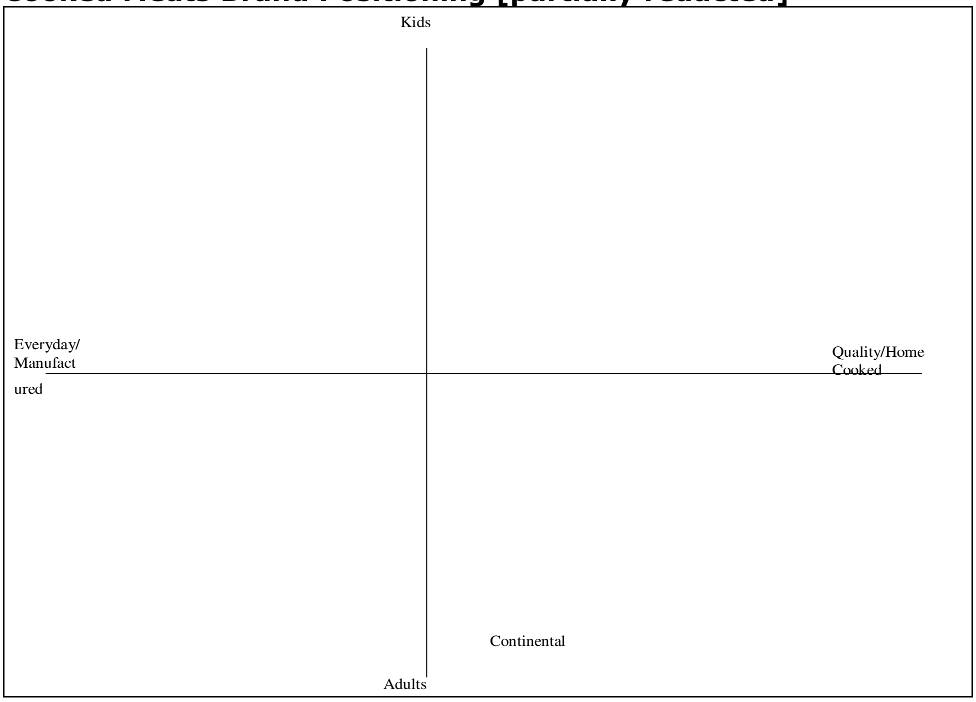
[73] It should be noted that these market shares are based on volume not value measures of market size.

and so […]. This tends to suggest that the Galtee brand is unlikely to constitute a major competitive constraint. […].

6.50 The parties state that they asked Kerry's marketing personnel to provide their view on the closeness of the various brands in terms of product space in cooked meats. The results for cooked meats are shown in Figure 6.1 below.

6.51 The parties state that Galtee and Roscrea brands compete in the segment of the market which largely involves standard 4x4 packs. Denny also has some brands in this segment but all of the own-label brands are also present in this segment suggesting that Galtee and Roscrea are unlikely to provide a major competitive constraint. The parties note that this segment of the cooked meats market is declining with consumers shifting towards the quality segment of the market.

Figure 6.1
Cooked Meats Brand Positioning [partially redacted]



Source: Compecon Report (Figure 4.7, p. 45).

6.52 The Compecon Report states that at the quality end of the market, Shaws would compete with Denny's "[…]" and "[…]" brands but this segment also includes own-labels such as "[…]" and "[…]". A number of the smaller suppliers such as Green Farm and Bradys are also present in the quality end of the market where they have a significant market share. For example, it is estimated that Green Farm would have around [5-10]% and Bradys around [0-5]% of pre-pack sales in the "Super Premium" segment.

6.53 The Compecon Report states that the chart illustrates that the Denny brand operates right across the market spectrum. Tesco and Dunnes Stores both have private label brands in the higher quality end. This supports the view that the differences in volume and value market shares in the case of Denny reflect at least in part quality differences, i.e. a higher proportion of Denny sales are likely to be in the higher quality end of the market while the private labels are likely to be less important in the quality end of the market.

Views of the Competition Authority

<u>Authority Survey of Retailers</u>

6.54 In the Authority's survey of retailers, six out of nine retailers indicated that it is essential to have branded products in their product range for poultry cooked meats.[74] In addition, the Authority also asked which brands are considered "must have" or "must carry" brands. Four out of nine retailers indicated that they consider Kerry's Ballyfree brand to be a "must have" brand in the poultry cooked meats market. This is unsurprising given that Ballyfree is the leading brand in poultry cooked meats market. Two retailers listed Breeo's Shaws brand as a "must have" brand in the poultry cooked meats market.

6.55 The Authority sent a follow-up questionnaire to six out of the nine retailers.[75] The following question was posed:

> Do you have the ability to credibly threaten to de-list and/or de-range the merged entity's poultry cooked meat products post-acquisition and switch to other poultry cooked meat brands such as Bernard Matthews/Green Farm Foods/Carroll Cuisine? If not, why not?
>
> Could you credibly threaten to de-list and/or de-range the merged entity's poultry cooked meat products post-acquisition and switch to own-label poultry cooked meat products? If not, why not?

6.56 Four out of six retailers indicated that they will not have the ability to credibly threaten to de-list and/or de-range the merged entity's poultry cooked meats products post-acquisition.

6.57 Although three of these four retailers have their private label poultry cooked meats, none believe they could credibly threaten to focus more on private label poultry cooked meats if trading terms with the merged entity deteriorated post-acquisition. All six retailers perceive private label poultry cooked meats as offering end consumers a cheaper option relative to the branded poultry cooked meats. All retailers indicated that private label poultry cooked meats are approximately 10-20% cheaper than branded poultry cooked meats. Significantly, retailers do not see private label poultry cooked meats as being a close substitute for branded poultry cooked meats.

6.58 With respect to the discussions that currently take place between retailers and suppliers of poultry cooked meats, all four retailers expressed the view that both Kerry and Breeo are implicitly aware of each other when negotiating trading terms with retailers.

6.59 Of the six retailers that received a follow-up questionnaire, one retailer indicated that it would be able to overcome any difficulties it may encounter when negotiating trading terms with the merged entity post-acquisition. When asked to elaborate on how precisely discipline could be exerted on the merged entity post-acquisition, the retailer stated that there are a number of negotiating tactics available, the precise details of which the retailer was unwilling to explain. The

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[74] Of the remaining three retailers, one gave an "N/A" response; one gave no response while one retailer indicated that "brands are not considered 'must have'". Two of these three retailers are discounters while the third is M&S.

[75] […] did not receive a follow-up questionnaire because it does not do business with either of the merging parties and has no opinion on the proposed acquisition, while […] and […] did not receive a follow-up questionnaire because they do not stock any of Kerry's or Breeo's branded products and have no concerns about the proposed acquisition.

retailer did note, however, that one option would be to focus more on the retailer's private label poultry cooked meats.

6.60 Finally, one retailer indicated it had no concerns with the proposed acquisition. However, when asked to explain how it could credibly threaten to discipline the merged entity post-acquisition should trading terms deteriorate, the retailer indicated that although it would have the option of de-listing or de-ranging the merged entity's products, this would not be a credible threat. The retailer stated that its ability to discipline the merged entity would largely depend on whether alternative suppliers are available.

6.61 Bernard Matthews is a UK supplier of poultry cooked meats and it is the number two brand in the State with an [5-10]% market share by value. Three out of six retailers indicated that they do not consider Bernard Matthews to be a credible alternative brand in the poultry cooked meats market. This is largely due to […]. Two of these three retailers indicated that they no longer stock the Bernard Matthews brand. Nevertheless, despite these setbacks, Bernard Matthews still has a market share of [5-10]% and is still stocked by […] .

Authority Survey of Competitors

6.62 Six competitors were sent a detailed questionnaire seeking their views on the proposed acquisition. Although all six responded, the responses of only three were relevant to poultry cooked meats. Three competitors (Competitor 8, Competitor 10, and Competitor 9) indicated that they have no concerns with the proposed acquisition. One of these competitors stated that

> With the Kerry Group positioning themselves into a dominant position in the sector, we at [Competitor 10] maintain that there is room for new and existing operators which bring new products and services to the sector.

6.63 Competitor 10 entered the poultry cooked meats market in […]. Competitor 10 informed the Authority that it is the category leader in the carvery white cooked meat segment. Competitor 10 indicated that its competitors in this segment include Kerry, Competitor [..], Competitor […] and Breeo.

Review of Parties' Internal Documents

6.64 The importance of branded products in the cooked meats segment is highlighted in the following quote[76] which appears in a document provided by Kerry to the Authority entitled "[…]" - "[…]". [77]

6.65 Despite the fact that Breeo is only the fourth largest brand in the poultry cooked meats market with a market share of [0-5]%, some of the internal documentation provided by Kerry suggests that the latter perceives Breeo to be its closest competitor. The following three quotes[78] appear in a document provided by Kerry to the Authority entitled "[…]" - "[…]";[79] "[…]"; and "[…]".

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[76] The Authority asked Kerry to explain how this quote could be reconciled with the following view expressed in the Compecon Report – "Own label and discounter brands would continue to exercise a strong competitive constraint on the parties post-merger". Kerry stated in a letter to the Authority dated 20 June, 2008 that:
[…];
[…]; and,
the document needs to be viewed as a marketing presentation of Kerry's products, which focussed mainly on one element of the cooked meats category and was not a market analysis.
[77] "PPSCM" refers to pre-packed sliced cooked meats.
[78] See footnote 39 above.
[79] When using the term "both markets", Kerry is referring to the State and Northern Ireland, respectively.

6.66 However, the following quote appears in a document provided by Kerry to the Authority entitled "[…]" – "[…]". In addition, the following quote appears in a document provided by Kerry entitled "[…]" which suggests that Kerry considers that Bernard Matthews and private label is its closest branded competitor in poultry cooked meats – "[…]".[80]

6.67 Breeo appears to perceive Kerry as its closest competitor in the cooked meats and breakfast meats segments. The following quote is taken from documentation provided by Breeo to the Authority entitled "[…]" – "[…]".

6.68 On balance, the internal documentation suggests that Breeo may not be the closest competitor to Kerry in the poultry cooked meats market.

<u>Econometric Evidence</u>

6.69 Dr. Walsh, whose results are presented in Table 2.10 above, found the following in the poultry cooked meats segment:

- The own price elasticities for Kerry, Breeo and other brands are high which indicates that the brands in poultry cooked meats are sensitive to price changes;
- Brands of other third parties are much closer substitutes to Kerry's brands than Breeo's brands. Likewise, brands of other third parties are much closer substitutes to Breeo's brands than Kerry's brands; and
- These results suggest that other third party brands exert a far greater competitive constraint on Kerry's brands and Breeo's brands, respectively.

Conclusion

6.70 Kerry's Ballyfree brand is the clear market leader in the poultry cooked meats market. Kerry had a market share of [35-40]% in poultry cooked meats in 2007 and the vast majority was accounted for by the Ballyfree brand.[81] It is not clear, however, which brand is Ballyfree's closest competitor. On balance, it does not appear that Kerry faces strong competition from any one particular brand in the market. Bernard Matthews is number two brand in the poultry cooked meats market with an [5-10]% market share. However, no retailer listed the Bernard Matthews brand as a "must have" brand. Moreover, retailers have informed the Authority that […] and two retailers no longer stock the product.

6.71 Two retailers listed Breeo's Shaws brand as a "must have" in the poultry cooked meats market. However, with a market share of only [0-5]%, albeit growing since 2005, it does not appear that Breeo is currently exerting a significant competitive constraint on Kerry's Ballyfree brand. This is confirmed by the econometric analysis which suggests that Breeo's brands exert a minimal competitive constraint to Kerry's brands. Thus, in conclusion, the evidence indicates that Kerry's Ballyfree brand does not currently face strong competition from any other brand in the poultry cooked meats market.

6.72 The parties argue that private label acts as a competitive constraint on Breeo and Kerry by taking market share from them. However, Table 6.1 shows clearly that both Breeo and Kerry are gaining market share, while private label has declined from [40-45]% to [35-40]% over the period 2005 to 2007. Thus, it is not possible

[80] "YoY" refers to year on year while "PL" refers to private label.
[81] Kerry also sells poultry cooked meats under the Denny brand name but, unlike non-poultry cooked meats, sales are […].

to say that private label is a sufficiently close competitor to constrain the merging parties from implementing a permanent increase in the price.

Entry

Submissions of the Undertakings Involved

6.73 The Compecon Report argues that barriers to entry in the cooked meats market are relatively low. Kerry cooks, slices and packages meat for sale as cooked meats, however, Breeo purchases already cooked ham in log form from third party suppliers and only slices and packages the cooked meats. The Compecon Report argues that Breeo has been able to compete in the market place on this basis. When Breeo considered exiting from the manufacturing element of the supply of cooked meats, four or five bidders tendered for the outsourcing contract and Breeo's experience was that generally there was a lot of spare capacity in Europe. Thus, according to the Compecon Report, in order to gain entry to the market, a new entrant need only purchase slicing and packaging equipment as meat can be imported in log form and sliced and packaged.

6.74 The Compecon Report argues that there are no significant sunk costs. The changing structure of retailing in Ireland means that the key to gaining access to the market is to be listed by one or more of the major multiple groups. This is far more important in terms of developing a brand image than traditional mechanisms of brand advertising. The shift by multiples to centralised distribution has also removed the need for suppliers to establish a widespread distribution network to deliver their products to individual stores since the distribution is now handled by the multiples. Thus, suppliers need only deliver to a single distribution depot.

6.75 The Compecon Report argues that there have been a number of new entrants into the market in recent years. These include Bernard Matthews, Bradys, Cookstown, Green Farm and Hogans. Bernard Matthews and Green Farm, in particular, have succeeded in capturing a significant share of the poultry cooked meats market. Bernard Matthews is a major supplier of cooked meats in the UK. Cookstown is a well established supplier in Northern Ireland. The Compecon Report argues that Breeo's Shaws brand has captured a significant market share in just five years which again illustrates the lack of significant entry barriers.

6.76 Finally, the Compecon Report states that it would be relatively easy for UK based suppliers to gain access to the market through the multiples. Some of the multiples are themselves subsidiaries of UK groups and a number of UK based suppliers of cooked meat products would thus already have trading relationships with those parents. Furthermore, supermarkets have engaged in short-term promotions using and promoting brands to Irish consumers. The ability of the supermarkets to engage in more regular and longer promotions with new brands will be unaffected by the proposed acquisition.

Views of the Competition Authority

6.77 The Authority's *Merger Guidelines* require that for entry to be a constraint on the ability of the merged entity to raise price post-merger, entry must be timely, likely and sufficient.

6.78 Given the retailers' stated view that it is vital to stock branded products in the poultry cooked meats market, the Authority does not believe that a new entrant will be able to successfully establish a new brand within two years. The leading brand in the poultry cooked meats market – Ballyfree – is long-established and has gradually built up brand recognition amongst end consumers over a long period of time.

6.79 A new entrant would have to invest considerable resources over a long period of time in developing brand awareness in order to establish a foothold in the poultry cooked meats market. It is significant in this regard that Green Farm Foods, the third biggest brand in the poultry meats market, commenced production in 1995. Likewise, Carroll Cuisine entered the poultry cooked meats market in 2004.

6.80 Although the Authority and the parties do not agree on the ease of entry, there is nevertheless some agreement that there are some other important brands that are likely to exercise a constraining influence over the merged entity.

Conclusions

6.81 The Authority is of the view that the proposed acquisition of Breeo by Kerry will not lead to a unilateral price increase post merger in the market for poultry cooked meats:

- Although the HHI results place the proposed acquisition in Zone C of the Authority's *Merger Guidelines* meaning that the poultry cooked meats market would be defined as highly concentrated, Kerry's Ballyfree brand is the clear market leader with a [35-40]% market share. Breeo's Shaws brand is the fourth largest brand in the poultry cooked meats market with a market share of only [0-5]% in 2007. Thus, the merged entity's market share post-acquisition will not change dramatically;

- Breeo does not appear be the closest competitor to Kerry in the poultry cooked meats market;

- The combined market share of other brands in the poultry cooked meats market is over [15-20]% by value with Bernard Matthews and Green Farm Foods possessing market shares of [5-10]% and [5-10]%, respectively; and

- the extent to which retailers can credibly discipline the merged entity in the poultry cooked meats market will be unaffected by the proposed acquisition.

6.82 In consequence of the foregoing, the Authority is of the opinion that the proposed transaction will not result in a substantial lessening of competition in the market for poultry cooked meats in the State.

Non-Poultry Cooked Meats

Market Structure

Introduction

6.83 Market structure can be characterised as the number and size distribution of firms. The initial impact of any merger is felt on market structure as two firms pre-merger become one firm post merger. In this section, the pre- and post-acquisition market shares in the non poultry cooked meats market are considered.

Market Structure of the Non-Poultry Cooked Meats Market

6.84 Table 6.4 below provides market share data for non-poultry cooked meats by undertaking for 2005 to 2007. As with poultry cooked meats, there are considerable differences between market share measured in value and volume terms. In 2007, for example, the market share of Kerry, Breeo and private label including discounters by value was [30-35]%, [10-15]% and [45-50]%, respectively. In contrast, the corresponding market shares by volume were [25-

30]%, [10-15]% and [55-60]%, respectively.[82] Again the differences reflect the premium price that brands can charge compared to private label.

Table 6.4
Market Shares by Undertaking, Non-poultry Cooked Meats, Value, the State, 2005-2007

Manufacturer	**2005**	**2006**	**2007**
Kerry	[30-35]	[30-35]	[30-35]
Breeo	[10-15]	[10-15]	[10-15]
Carroll Cuisine	[0-5]	[0-5]	[0-5]
Other Brands	[0-5]	[0-5]	[0-5]
Private Label			
Tesco	N/A	N/A	N/A
Superquinn	N/A	N/A	N/A
Dunnes Stores	N/A	N/A	N/A
SuperValu	N/A	N/A	N/A
Discounters	N/A	N/A	N/A
Other Private Label	N/A	N/A	N/A
Private Label Total	**[50-55]**	**[50-55]**	**[45-50]**
Total	**100.0**	**100.0**	**100.0**

Source: Based on information provided by the parties.

6.85 As a result of the proposed acquisition, Kerry will acquire the number two supplier in the non-poultry cooked meats market, i.e., Breeo. The market share of these two undertakings has been relatively stable over the period 2005 to 2007.

6.86 The proposed acquisition will leave the merged entity with [45-50]% of the non-poultry cooked meats market. The remaining brands accounted for [5-10]% of the market, with the most important brand accounting for [0-5]%. Private label accounts for [45-50]% in 2007, a decline in share from [50-55]% in 2005.

6.87 In the 24 July submission on private label, the parties provided more recent data than that contained in Table 6.4. However, the disadvantage is that the data only relates to pre-packed non-poultry cooked meats, not the whole market. In 2007, pre-packed cooked meats, as mentioned in paragraph 6.1 above, accounted for [65-70]% of all cooked meats. However, the data source for both is AC Nielsen.[83]

6.88 Table 6.5 present trends in pre-packed non-poultry cooked meats for 10 and 8 week periods between April 2007 and April 2008. There is some volatility in the market share data, reflecting promotional activity by the various market participants, such as large price reductions. Later in this section, the issue of such promotions and their impact on market share will be discussed.

Table 6.5
Market Shares, Pre-Packed Non-Poultry Cooked Meats, by Value, Eight to Ten Week Periods, the State 2007-2008

	8WE 22.4.07	10WE 1.7.07	10WE 9.9.07	8WE 4.11.07	8WE 30.12.07	8WE 24.2.08	8WE 20.4.08	Change on Year
Kerry	[45-50]	[40-45]	[40-	[45-50]	[40-45]	[45-50]	[45-50]	-[0-5

[82] The volume market shares are taken from Compecon Report (Table 4.6, p. 52).
[83] In the Authority's Assessment, bi-monthly data on market share was presented for pre-packed non-poultry cooked meats for the period from the end of 2004 until July 2007. Since the market definition is not pre-packed non-poultry cooked meats but all non-poultry cooked meats, the data in Table 5.2 is to be preferred for the purposes of the Determination.

			45]					
Breeo	[15-20]	[20-25]	[20-25]	[15-20]	[15-20]	[15-20]	[15-20]	-[0-5
Private Label	[15-20]	[15-20]	[15-20]	[15-20]	[15-20]	[15-20]	[15-20]	[0-5
Discounters	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[0-5
Others	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[0-5]
Total	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	

Note: 8WE or 10WE refers to the 8 or 10 week period with the end date indicated.
Source: AC Nielsen

6.89 First, it should be noted that in pre-packed non-poultry cooked meats the parties have a much higher market share than for non-poultry cooked meats as a whole. In 2007, the parties accounted for [45-50]% of the non-poultry cooked meats market, but slightly more than [60-65]% in the pre-packed cooked meats.

6.90 In terms of trends, Table 6.5 is inconsistent with Table 6.4 in that Kerry and Breeo are experiencing small declines in market share, while private label remains virtually unchanged, with an increase of only […] of a percentage point.

6.91 Table 6.6 below presents the HHI results for the non-poultry cooked meats market.[84] The results show that the transaction would fall within Zone C as defined by the Authority *Merger Guidelines*. In other words, the non-poultry cooked meats market post-merger would be defined as highly concentrated. It is more usually in such markets that mergers raise competition concerns.

Table 6.6
Poultry Cooked Meats Market, HHIs, Pre- and Post-Merger, 2007

Pre-Merger	**1703**
Post-Merger	**2682**
Change	**979**
Zone	**C**

Source: The Competition Authority

6.92 The change in the HHI places the proposed acquisition in Zone C of the Authority's *Merger Guidelines*. The fact that a merger falls into Zone C does not necessarily mean that it will substantially lessen competition. As the Authority's *Merger Guidelines* point out, factors that affect whether a merger in Zone C will raise competition concerns include the closeness of competition and whether there are low barriers to entry. It is to these and other issues that attention is turned to below.

Competitive Analysis

Closeness of Competition[85]

<u>General Arguments of the Parties</u>

[84] For the purposes of calculating the HHIs and in the absence of any individual private label data for each retailer, the Authority has attributed a value of [5-10]% to each of Tesco, Superquinn, Dunnes Stores, SuperValu, Discounters, and Other Private Label for 2007.
[85] The term is defined in paragraph 3.46 above.

6.93 The parties presented views on the competitive impact of the proposed acquisition for the cooked meats segment as a whole encompassing both poultry cooked meats and non-poultry cooked meats. These views are summarised in paragraphs 6.43 to 6.53 above.

6.94 The parties in their Written Submission in response to the Assessment argue, using a range of market facts and observations, that private label is a close competitor to Kerry and Breeo such that private label would constrain the merged entity from raising price. They also advance a series of arguments that there are no 'must have' brands. These arguments are considered in detail below. Like the Compecon Response, the Written Submission draws attention to the econometric results of Dr Hogan using [retailer] EPOS data, presented below in Table 6.7. The parties draw attention to the higher elasticity value for [retailer] private label than Breeo.

Table 6.7
Kerry Cross Price Elasticities of Non-poultry Cooked Meats Products, [retailer] EPOS

Other Kerry	0.58
Breeo	0.23
Other branded	0.02
[retailer] private label	0.35

Source: Dr. Hogan "Elasticities for Products Using EPOS Data," 13 August 2008, Annex 16 to the Written Submission of the parties.

6.95 The Compecon Response argues that the Assessment's conclusions on the issues of credible alternative brands, the competitive constraint exercised by private label and the importance of countervailing buyer power are not supported by the evidence. In this connection, the Compecon Response refers to its discussion on these issues with respect to rashers.

6.96 Compecon also argues, using pre-packed non-poultry cooked meats, that Kerry and Breeo have experienced a decline in market share over the period 2005 to 2007 – [5-10]% and [0-5]%, respectively, measured by value. In contrast, private label increased market share by [0-5]%. However, as noted above, the correct market definition is not pre-packed non-poultry cooked meats. Table 6.5 was only introduced because it provided more recent data. For the period 2005 to 2007, Table 6.4 is therefore the correct frame of reference in discussing market share trends.

6.97 The Compecon Response also casts doubt on the Authority's interpretation and use of internal documents.

Views of Competition Authority

<u>Authority Survey of Retailers</u>

6.98 In the Authority's survey of retailers, six out of nine retailers indicated that it is essential to have branded products in their product range for non-poultry cooked meats.[86] In addition, the Authority also asked which brands are considered "must have" or "must carry" brands. Three out of nine retailers indicated that they consider Kerry's Denny brand and Breeo's Shaws brand to be "must have" brands in the non-poultry cooked meats market. One retailer listed Denny, Shaws and Bradys as the "must have" brands in the non-poultry cooked meats market. Two

[86] Of the remaining three retailers, one gave an "N/A" response; one gave no response while one retailer indicated that brands are not considered 'must have' products. […].

retailers – Customer's C and D - noted that in addition to the Denny and Shaws brands, their own-label non-poultry cooked meats offering is a "must have" brand. No other non-poultry cooked meats brands were listed as a "must have" brand by any retailer.

6.99 The Authority sent a follow-up questionnaire to six out of the nine retailers.[87] The following two questions were posed:

> Do you have the ability to credibly threaten to de-list and/or de-range the merged entity's non-poultry cooked meat products post-acquisition and switch to other non-poultry cooked meat brands such as Green Farm Foods/Bradys/Carroll Cuisine? If not, why not?
>
> Could you credibly threaten to de-list and/or de-range the merged entity's non-poultry cooked meat products post-acquisition and focus more/solely on own-label non-poultry cooked meat products? If not, why not?

6.100 Four retailers indicated that they would not have the ability to credibly threaten to de-list and/or de-range the merged entity's non-poultry cooked meats products post-acquisition. Furthermore, all four indicated that private label non-poultry cooked meats are approximately 10-20% cheaper than branded non-poultry cooked meats. Also, all four retailers expressed the view that both Kerry and Breeo are implicitly aware of each other when negotiating trading terms with retailers. It is useful to examine the individual responses of each of these four retailers.

Customer C

6.101 Customer C is concerned about the impact of the proposed acquisition in non-poultry cooked meats. Data provided by Customer C indicates that the proportion of total cooked meats sales by value accounted for by Customer C's private label cooked meats offering decreased from […]% in 2006 to […]% in 2007. Kerry's cooked meat sales in Customer C increased from […]% in 2006 to […]% in 2007 while Breeo's cooked meats sales increased from […]% to […]%.

6.102 Customer C also stated in its response to the first questionnaire that in addition to Denny and Shaws, Customer C's own-brand offering is also a "must have" brand in the cooked meats segment. Furthermore, Customer C also filled out a table drawn up by the Authority. One of the questions posed in the table was whether private label is a strong competitor – Customer C replied that it does consider private label to be a strong competitor in both poultry cooked meats and in non-poultry cooked meats.

6.103 However, in its response to the second questionnaire, Customer C stated the following regarding non-poultry cooked meat products,

[87] […] did not receive a follow-up questionnaire because it has no opinion on the proposed acquisition while […] and […] did not receive a follow-up questionnaire because they do not sell the parties' branded products.

> the sector is very dependent on brands – there has always been a [Customer C] ol [own label] here, so there is not the possibility of introducing one to reduce the power of the brands. [Customer C] supports its ol, it is competitively priced, frequently promoted and the quality is fine, there is not any more that it can do. [Customer C] has a very big concern in this segment – "it doesn't have a leg to stand on".

Customer D

6.104 Customer D is concerned about the impact of the proposed acquisition in non-poultry cooked meats, in particular pre-packed cooked meats. Customer D stated that in addition to Denny and Shaws, it would also recommend that stores should stock its private label cooked meats offering. Furthermore, when asked to illustrate occasions since January 2006 when Customer D was able to negotiate down the price it paid for the products purchased from Kerry by referring to the price received from a rival supplier (e.g., Breeo), Customer D provided the following example:

> some stronger promotions negotiated on breeo/shaws cooked meats […] due to increased on shelf competition from own brand promotions.

6.105 Data provided by Customer D indicates that the proportion of total cooked meats sales by value accounted for by its private label cooked meats offering increased from […]% in 2006 to […]% in 2007. The combined share of total cooked meats sales accounted for by the merging parties was […]% in 2007.

6.106 In its response to the second questionnaire, Customer D stated the following when asked whether it could credibly threaten to de-list and/or de-range the merged entity's non-poultry cooked meat products post-acquisition and switch to other brands or focus more on private label,

> [Customer D] is very concerned about this segment and it does not believe that it has the ability to credibly threaten to de-list or de-range the merged entity's non-poultry cooked meats products. [Customer D] explained that while alternative suppliers of non-poultry cooked meats products do exist, none are credible. The main reasons for this are that none of these alternative suppliers have the capacity to meet the volume of cooked ham that Customer D requires, and the majority of consumers will wish to continue to purchase the mainstream brands produced by kerry/breeo.

6.107 When asked to what extent, if any, does its private label compete with branded products, Customer D responded that,

> [Customer D] has been developing its own-label products for quite some time. However, Customer D […]. [Customer D] stated that […]. [Customer D] stated, however, that it has to stock branded products in all the segments under review because the consumer wants a choice of branded and own brand products.

6.108 When asked why Customer D cannot focus more on private label products as a way of credibly threatening the merged entity post-acquisition, Customer D responded as follows,

> While private label offers consumers real choice and value, and is a very important part of the overall offer, the majority of consumers continue to purchase well-established, familiar brands with a strong heritage in the marketplace. Some consumers perceive private label products to be inferior to branded products and that with respect to the products under review brand loyalty continues to be very strong.

6.109 Finally, Customer D also filled out a table drawn up by the Authority. One of the questions posed in the table was whether private label is a strong competitor – Customer D replied that it does not consider private label to be a strong competitor in either pre-packed poultry cooked meats or in pre-packed non-poultry cooked meats. However, in the case of bulk non-poultry cooked meats, Customer D indicated that private label is a strong competitor.

Customer A

6.110 Customer A is concerned about the impact of the proposed acquisition in non-poultry cooked meats. It does not see its private label non-poultry cooked meats offering as a strong competitor to brands. Customer A states that it does not have the ability to de-list or de-range the merged entity's non-poultry cooked meats post-merger. Customer A considers that the brands of both Kerry and Breeo are "must have" brands in both the poultry cooked meats and non-poultry cooked meats segments.

6.111 Customer A also filled out a table drawn up by the Authority. One of the questions posed in the table was whether private label is a strong competitor – Customer A replied that it does not consider private label to be a strong competitor in both poultry cooked meats and in non-poultry cooked meats.

Customer F

6.112 Customer F, […], is concerned about the impact of the proposed acquisition in non-poultry cooked meats.

6.113 Of the six retailers that received a follow-up questionnaire, only two retailers indicated that they had no concerns about the impact of the proposed acquisition on the market for non-poultry cooked meats. Once again, it is useful to examine the individual responses of these two retailers.

Customer B

6.114 As with the market for rashers, Customer B has no concerns about the impact of the proposed acquisition in non-poultry cooked meats. Customer B stated that it believes it will be able to discipline the merged entity post-acquisition should it attempt to raise price. When asked to elaborate, Customer B stated that there are a number of negotiating tactics available, the precise details of which Customer B was unwilling to explain. It did note, however, that one option would be to focus more on its private label non-poultry cooked meats offering. Data provided by Customer B indicates that its private label cooked meats offering accounted for around […]% of total cooked meats sales in 2007. The combined share of total cooked meats sales accounted for by the merging parties was around […]% in 2007.

Customer E

6.115 Customer E has no concerns with the proposed acquisition in cooked meats. However, when asked to explain how it could credibly threaten to discipline the merged entity post-acquisition should trading terms deteriorate, Customer E indicated that although it would have the option of de-listing or de-ranging the merged entity's non-poultry cooked meats, this would not be a credible threat. Customer E stated that its ability to discipline the merged entity would largely depend on whether alternative suppliers are available. Customer E does not have a private label offering in cooked meats.

Conclusion

6.116 Of the nine retailers that responded to the Authority's first questionnaire, four have concerns about non-poultry cooked meats: Customers A, C, D, and F. Four retailers have no concerns – Customers B, E, G, and H. However, Customer G and H's views should be seen in light of the fact that neither stocks any of the merging parties' branded non-poultry cooked meats products.[88]

6.117 Thus, of the six retailers that were sent a follow-up questionnaire in Phase 2, four out of six retailers - Customers A, C, D, and F - indicated that they will not have the ability to credibly threaten to de-list and/or de-range the merged entity's non-poultry cooked meats branded products post-acquisition. Two out of six retailers - Customers B and E – have no concerns about the impact of the proposed acquisition in the market for non-poultry cooked meats. However, Customer's E views on the proposed acquisition should be seen in context of its statement that although it would have the option of de-listing or de-ranging the merged entity's products, this would not be a credible threat.

6.118 Thus, in conclusion, it is clear that a majority of retailers who have their own private label non-poultry cooked meats offering are concerned about the impact of the proposed acquisition in this market.

Authority Survey of Competitors

6.119 Six competitors in the total cooked meats category were sent a detailed questionnaire seeking their views on the proposed acquisition. Four competitors (Competitor 10, Competitor 9, Competitor 8 and Competitor 11) indicated that they have no concerns with the proposed acquisition.[89] One competitor (Competitor 5) indicated that they have concerns with the proposed acquisition. Finally, one competitor has no views on the proposed acquisition.

Competitor 10

6.120 Competitor 10 entered the non-poultry cooked meats market in 2001. Competitor 10 informed the Authority that although the presence of private label has been increasing over the past number of years, retailers still have to stock branded cooked meats products.

6.121 With respect to the proposed acquisition, Competitor 10 stated the following:

> With the Kerry Group positioning themselves into a dominant position in the sector, we at [Competitor 10] maintain that there is room for new and existing operators which bring new products and services to the sector.

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[88] One retailer, Customer I, has no views on the proposed acquisition and does not stock any of the merging parties' branded products.

[89] Competitor 8 is not active in the non-poultry cooked meats market while Competitor 11 supplies continental sliced cooked meats in the State (e.g., salami).

6.122 In a follow-up telephone conversation, Competitor 10 explained this comment by stating that opportunities in the cooked meats segment will arise as a result of the proposed acquisition where retailers will need other cooked meats products stocked on their shelves.

Competitor 9

6.123 Competitor 9 informed the Authority that its main focus in the cooked meats segment is bulk cooked ham, i.e., OTC/deli cooked ham. In contrast, pre-pack cooked ham is a very small part of Competitor 9's cooked meats business. Competitor 9 noted that unlike bulk cooked ham, a strong brand is very important for entering the pre-packed cooked meats segment. Competitor 9 stated that Kerry is the brand leader in the pre-packed cooked meats segment.

Competitor 5

6.124 Competitor 5 is concerned that post-acquisition, the cooked meats segment will be controlled by the merged entity which will have very significant power to control pricing, shelf space, and consumer awareness. Competitor 5 claims that consumers will have little choice post-acquisition as the merged entity will control all the key brands in the cooked meats sector, particular cooked ham.

Review of Parties' Internal Documents

6.125 The internal documentation provided by Kerry indicates that while Kerry considers private label products to be a competitive threat to their brands, their main competitor in the majority of the product categories under review is Breeo.

6.126 The following quote taken from a document entitled "[…]" illustrates Kerry's concern about the growing threat of private label products – "[…]".

6.127 The Authority has to consider the impact of the proposed acquisition over a two-year time period. This quote from Kerry casts doubt on the view expressed by the parties in their Written Submission that private label will be a sufficient constraint on the merging parties' brands such that it will be unable to permanently raise the price of rashers post-acquisition. Furthermore, Kerry talks about "[…]". Given the negligible market share of third party brands in the market for non poultry cooked meats (see Table 6.4 above), the reference by Kerry to […] as a result of the proposed acquisition suggests that Kerry sees the merged entity as having the potential to take market share away from private label post-acquisition.

6.128 The importance of branded products in the cooked meats segment is highlighted in the following quote[90] which appears in a document provided by Kerry to the Authority entitled "[…]" - "[…]". [91]

6.129 The following three quotes[92] which appear in a document provided by Kerry to the Authority entitled "[…]" illustrate the way in which Kerry perceives Breeo - "[…]";[93] "[…]"; and "[…]".[94]

6.130 Significantly, Breeo appears to perceive Kerry as its closest competitor in the cooked meats segment. The following two quotes are taken from documentation provided by Breeo to the Authority entitled, "[…]" – "[…]"; and "[…]".

[90] See footnote 75 above.
[91] "PPSCM" refers to pre-packed sliced cooked meats.
[92] See footnote 39 above.
[93] When using the term "both markets", Kerry is referring to the State and Northern Ireland, respectively.
[94] Breeo owns the Shaws brand.

6.131 On balance, the internal documentation indicates that Breeo may be the closest competitor to Kerry in the non-poultry cooked meats market.

Econometric Evidence

6.132 Dr. Walsh, whose results are summarised in Table 2.10 above, found the following in the non-poultry cooked meats segment:

- As with poultry cooked meats, the own price elasticities for Kerry, Breeo and other brands are high - -1.6, -1.4, and -1.8, respectively - which indicates that the brands in non-poultry cooked meats are sensitive to price changes;

- However, unlike poultry cooked meats, Breeo's brands are much closer substitutes to Kerry's brands compared to third party brands. Likewise, Kerry's brands are much closer substitutes to Breeo's brands compared to third party brands; and

- These results suggest that Breeo's brands exert a far greater competitive constraint on Kerry's brands than third party brands.

Private Label

6.133 As noted above, the parties argued that private label non-poultry cooked meats are a close to competitor to the Kerry and Breeo brands. In the Written Submission, the parties provide an extensive set of reasons why private label is a close competitor of Kerry and Breeo. The Authority accepts that private label is a competitor of the merging parties. They are in the same market and hence are competitors. The question is whether private label is a close enough competitor to constrain the merged entity should it raise price permanently post-merger.

6.134 The parties advance arguments relating to:

- Private label takes on many of the characteristics of the brands, such as similar packaging;

- […] data indicate that [70-75]% of those who have tried a private label brand of cooked meats have become regular users. This is on average [10-15]% higher than the conversion rate for any brand;

- TNS data showing that households over a year purchase a variety of brands with, for example, [55-60]% of households purchasing a brand and private label. The percentage of households that purchase only Kerry brands, Breeo brands or Kerry or Breeo brands is [0-5]%, [0-5]% and [0-5]%, respectively. The parties conclude that this demonstrates that brand loyalty for Kerry and Breeo brands is low;

- Charts that relate to the impact of temporary price reductions of Denny and [retailer] ham. When these brands are on promotion, their market share increases while that of other brands declines. The parties argue that the impact of these large temporary price cuts is persuasive evidence that there is a degree of substitutability between Denny and [retailer] brands of ham;

- [retailer] data that is used to estimate [customer preferences] – for [retailer] customer they indicate the percentage of their total non-poultry cooked meats which is spent on a particular stock keeping unit or sku in the year to 6 July 2008. The parties argue such data shows low loyalty to brands;

- That the parties brands are not 'must have' and that the retailers could credibly threaten to delist these brands in the event of a permanent post-merger price increase;

- No reference is made in the Assessment to the fact that five out of six competitors indicate that private label is prevalent and increasing; and,

- The growth of the discounters is inconsistent with the view that the brands are 'must have'.

6.135 These arguments were also advanced by the parties in relation to rashers. For the reasons set out in the discussion in section five above, the Authority does not find these arguments persuasive in showing that private label is a close competitor to Kerry and Breeo.

6.136 With respect to market share data, the parties focus on the data presented in Table 6.5 above for pre-packed non-poultry cooked meats to show the growth of private label, but its share is essentially unchanged. In contrast, Kerry and Breeo experienced declines. However, as pointed out above, the relevant market definition is non-poultry cooked meats and the data for 2005 to 2007 clearly shows that Kerry and Breeo are gaining market share over this period while private label is losing market share.

6.137 The parties argue correctly that each retailer's private label is a brand in its own right. Data is presented by volume for non-poultry cooked meats which the parties argue shows that Breeo is no longer the number two brand but is ranked fifth. However, if these market shares are expressed in value terms then Breeo is still the second ranked brand.

Table 6.8
Market shares by Undertaking & Brand, Non-Poultry Cooked Meats, Value and Volume, the State, 2007

Undertaking/Brand	**Volume**	**Value**
Kerry		
Kerry Denny	[25-30]	[30-35]
Kerry Total	**[25-30]**	**[30-35]**
Breeo		
Breeo Galtee	[0-5]	[0-5]
Breeo Roscrea	[0-5]	[0-5]
Breeo Shaws	[5-10]	[5-10]
Breeo Barcastle	[0-5]	[0-5]
Breeo Total	[10-15]	[10-15]
Other Brands	[0-5]	[0-5]
Private Label		
Tesco	[10-15]	[5-10]
Superquinn	[0-5]	[0-5]
Dunnes Stores	[10-15]	[10-15]
SuperValu	[10-15]	[10-15]
Others	[5-10]	[0-5]
Discounters	[5-10]	[5-10]
Private Label Total	**[55-60]**	**[45-50]**
Total	**100.0**	**100.0**

Note: the parties provided market share data by volume. Table 6.4 presents data for market share by value, but does not break down the private label total or the Breeo total. In order to derive market share measured by value, these totals were prorated on the basis of volume share within those two totals.
Source: the parties and Table 6.4 above.

6.138 In sum, the Authority has carefully examined and reviewed the evidence and arguments prepared by the parties in relation to whether or not private label is a close enough competitor to the brands of Kerry and Breeo to constrain any permanent price rise of the merged entity. The arguments and evidence clearly establish that private label is a competitor with Kerry and Breeo. However, the Authority, for the reasons set out above, takes the view that private label is not a sufficiently close competitor to constrain any permanent price rise on the part of the merged entity.

Conclusion

6.139 The evidence clearly indicates that Kerry's closest competitor in the non-poultry cooked meats market is Breeo. Table 6.4 above indicates that Kerry and Breeo are the two leading brands in the non-poultry cooked meats market with a combined market share of [45-50]% by value. The combined market share of the other brands is just under [5-10]% by value and no brand has a market share in excess of [5-10]%.

6.140 This is confirmed by the views of retailers who list these two brands as the "must have" brands in non-poultry cooked meats market. Furthermore, retailers do not see private label non-poultry cooked meats as being a close substitute for branded non-poultry cooked meats. This view is also supported by the internal documentation which indicates that both parties view the other as its closest competitor in non-poultry cooked meats market.

6.141 The econometric evidence of Dr Walsh – in contrast to that of Dr Hogan - suggests that Breeo exerts a far greater competitive constraint on Kerry than third party brands. For reasons set out in section 2 above, the Authority prefers to rely on Dr Walsh's results.

6.142 Although Dr. Hogan's estimate using [retailer] EPOS data confirm the findings of Dr. Walsh with respect to other brands, they show that private label has a stronger influence on Kerry than Breeo. This however is inconsistent with the preponderance of the other evidence and for that reason the Authority does not give it weight.

6.143 The parties argue that private label is taking market share from the Kerry and Breeo. However, as Table 6.4 shows this is not the case. Kerry's market share is expanding year on year between 2005 and 2007 while private label's market share has declined from [50-55] to [45-50]%. Furthermore, as noted in Tables 2.3 and 2.4 above, Kerry and Breeo brands in non-poultry cooked meats command a considerable premium.

6.144 Taking all of the above into account, the Authority takes the view that private label will not act as a sufficient constraint in the event of a post-merger price rise by the merged entity.

Entry

<u>Submissions of the Undertakings Involved</u>

6.145 The parties' views on entry into the cooked meats segment as a whole are summarised in paragraphs 6.73 to 6.76 above.

6.146 In the Written Submission of the parties and Compecon it is argued – as with rashers – that the entry of international players in cooked meats – Tulip and Vion through its ownership of Cookstown – would be sufficient to prevent the merged parties from raising price post-merger. As argued in rashers, the retailers are considered to be the gatekeepers that provide access to consumers and can list these international players should the merged entity raise price.

Views of the Competition Authority

6.147 The Authority's *Merger Guidelines* require that for entry to be a constraint on the ability of the merged entity to raise price post-merger, entry must be timely, likely and sufficient.

6.148 Given the importance of branded products in the non-poultry cooked meats market, the Authority does not believe that an entrant will be able to establish a new brand within two years.

6.149 A new entrant would have to invest substantial resources over a long period of time in developing brand awareness in order to establish a significant foothold in the non-poultry cooked meats market. It is significant that Competitor 9, a brand leader in the supply of premium bulk cooked ham, has struggled to increase its market share since extending into sliced pre-packed cooked ham in [>2 years]. Competitor 9 informed the Authority that the cost of establishing a major new brand in retail can be in excess of €1million per annum. Like Competitor 9, Competitor 5 extended into the sliced pre-packed cooked ham segment in [>2 years] after […] years supplying OTC bulk cooked ham. Competitor 5 has also struggled to grow its market share in non-poultry cooked meats since [>2 years] and it estimates that the costs of establishing a sliced cooked meats brand would be in the region of €1million per annum.

6.150 The parties argue that entry will take place by large international players such as Vion and Tulip, with access to consumers being facilitated through the retailers. However, for the same reasons as discussed in section five for rashers, the Authority does not consider that the entry of these players will be sufficient to offset any price increase post-merger by the merged entity.

6.151 In conclusion, the Authority does not believe that a new entrant will be able to establish a sufficiently strong presence in the non-poultry cooked meats market within a two-year period such that it will be able to constrain the merged entity from permanently raising prices post-acquisition.

Expansion and Capacity

6.152 Expansion of non-merging firms in a market may also constrain the ability of the merged entity to raise prices post-merger. Expansion in turn is linked to the issue of whether the non-merging firms can expand capacity. In each instance the same timely, likely and sufficient criteria outline above for entry are applied.

6.153 Given that third party brands and private label products are not close competitors to the merging parties in the non-poultry cooked meats market, the issue of whether suppliers and/or retailers will be in a position to expand capacity post-acquisition is not pertinent. As explained above, the majority of retailers have informed the Authority that the option of switching to alternative branded non-poultry cooked meats suppliers or focusing more on their private label offering is not a credible threat should the merged entity increase the price post-acquisition.

6.154 The Authority also considered whether branded suppliers in the poultry cooked meats market could successfully extend production into the non-poultry cooked meats market within a two-year period and whether this might constrain the merged entity post-acquisition. As illustrated in Table 6.1 above, Bernard Matthews and Green Farm Foods have established a foothold in the poultry cooked meats market. However, neither supplier is considered by retailers to be a close competitor to Kerry's Ballyfree brand.

6.155 Despite being active in the poultry cooked meats market since 1995, Green Farm Foods is not considered by retailers to be a close competitor to the merging parties. Therefore, the Authority does not consider it likely that Green Farm Foods would be able to establish itself as a leading brand in the non-poultry cooked meats market within a two-year period such that it would be able to constrain the merged entity post-acquisition. It is worth noting in this regard the view expressed by the parties in the notification that attempts by Kerry to transfer a brand name associated with one type of meat to a different type of meat have not proved successful because consumers identify the brands with a particular type of meat.[95]

6.156 In conclusion, the Authority does not consider that non-merging firms in either the non-poultry cooked meats market or the poultry cooked meats market will be able to constrain the ability of the merged entity to raise prices post-merger.

Imports

6.157 The parties argue that it would be relatively easy for UK-based suppliers to gain access to the non-poultry cooked meats market through multiples.

6.158 For the reasons outlined in paragraphs 6.147 and 6.151 above, the Authority does not believe that a new entrant will be able to establish a sufficiently strong presence in the non-poultry cooked meats market within a two-year period such that it will be able to constrain the merged entity from raising prices post-acquisition.

Buyer Power and Switching Costs

6.159 The parties argue that retailers have sufficient countervailing buyer power to resist any attempted price increase by the merged entity. The parties note that the rise in private label may reflect the growing emergence of retailers as brands. The parties note that private label sales account for a large share of the non-poultry cooked meats market.

6.160 The parties also argue that retailers could easily source the non-poultry cooked meats products that they currently purchase from Kerry and/or Breeo elsewhere. The parties argue that retailers can also source their private label non-poultry cooked meats products elsewhere quite easily. In addition, the parties argue that retailers have the option of de-listing certain brands rather than a supplier's entire range in response to any attempt to raise price.

6.161 The parties in their Written Submission responding to the Assessment argue that the retailers have considerable countervailing buyer power. A small number of retailers purchase a high proportion of non-poultry cooked meats. Both parties have experienced delisting and other instances of what the parties consider to be examples of countervailing buyer power. These were assessed in section two above. The shelf space allocated to the brands has also declined.

6.162 As explained above, the majority of retailers have indicated to the Authority that they will not have the ability to credibly threaten to de-list and/or de-range the merged entity's non-poultry cooked meats products post-acquisition in response to a price increase. The evidence in the Authority's possession clearly indicates that Kerry's closest competitor in the non-poultry cooked meats market is Breeo.

[95] The parties also state that this might suggest that poultry and non-poultry cooked meats constitute distinct product markets.

Retailers do not see private label non-poultry cooked meats as being a close substitute for branded non-poultry cooked meats. The merging parties' non-poultry cooked meats brands are considered as "must have" brands by the majority of retailers.

6.163 The Authority accepts the view put forward by the merging parties that retailers can source their private label products from alternative suppliers. The majority of retailers have no concerns about sourcing supplies of private label non-poultry cooked meats from alternative suppliers other than the merged entity. Some retailers informed the Authority that they have adopted an auction process for suppliers to provide tenders for the right to supply their own label products. For example, […] is re-tendering for cooked meats in the third quarter of 2008 which […] currently supplies.

6.164 However, the existence of credible alternative suppliers of private label non-poultry cooked meats in the State does not alleviate the Authority's competition concerns. This is because private label non-poultry cooked meats is not a sufficiently close competitor to branded non-poultry cooked meats. As explained above, retailers do not have the ability to credibly threaten to de-list and/or de-range the merged entity's non-poultry cooked meats products post-acquisition in response to a price increase.

6.165 In conclusion, the Authority considers that retailers do not have a sufficient degree of countervailing buyer power such that they will be able to credibly threaten to discipline the merged entity post-acquisition.

Conclusion on Non-Poultry Cooked Meats

6.166 The Authority is of the view that the proposed acquisition of Breeo by Kerry will lead to a unilateral price rise because:

- The HHI results place the proposed acquisition in Zone C of the Authority's *Merger Guidelines* meaning that the non-poultry cooked meats would be defined as highly concentrated and more liable to raise competition concerns;

- The merged entity will have a [45-50]% market share by value post-acquisition in comparison to the combined market share of the other brands in the non-poultry cooked market of [5-10]% by value with no one supplier having more than [0-5]%;

- Breeo's and Kerry's combined market share has increased over the period 2005 to 2007 from [40-45]% to [45-50]%;

- Evidence from a variety of sources indicates that Kerry and Breeo are each other's closest competitor in the market for non-poultry cooked meats;

- Private label's share of the non-poultry cooked meats market has declined from [50-55]% in 2005 to [45-50] in 2007. Private label non-poultry cooked meats are not considered by retailers to be a sufficiently close competitor to Kerry or Breeo;

- There are no credible alternative brands in the non-poultry cooked meats market that will enable retailers to credibly threaten to discipline the merged entity from raising prices post-acquisition;

- New entrants will be unable to establish a sufficiently strong presence in the non-poultry cooked meats market within a two-year period such that they will be able to constrain the merged entity from raising prices post-acquisition; and

- Retailers do not have sufficient countervailing buyer power to enable them to credibly threaten to discipline the merged entity post-acquisition because (a) there are no credible alternative branded non-poultry cooked meats suppliers, (b) entry of branded non-poultry cooked meats will not be sufficient within a two-year period, and (c) private label non-poultry cooked meats are not considered a sufficiently close competitor in the market and, thus, could not be used to replace the merged entity's non-poultry cooked meats offering.

6.167 In consequence of the foregoing, the Authority is of the opinion that the proposed transaction will result in a substantial lessening of competition in the market for non-poultry cooked meats in the State.

SECTION SEVEN: SPREADS

Introduction

7.1 In this section, the Authority considers the implications of the proposed acquisition for competition in the overall spreads segment which the Authority divides into two separate product markets: (a) butter, and (b) spreads (i.e., non-butter products). A competitive effects analysis is then presented for each market.

Relevant Product Market

Submissions of the Undertakings Involved

Butter and Non-Butter

7.2 The parties are somewhat agnostic as to whether or not there is a single overall spreads market or two separate markets. For example, the first line on the issue in the notification says, "In some respects, the precise product market for spreads is inconclusive." However, as with cooked meats, the parties argue that the competitive effects analysis results in the same conclusion irrespective of whether there is one or two markets.

7.3 The parties draw attention in the notification to the fact that the Commission distinguished between the product markets for "packet yellow fats" and "bulk yellow fats". Packet yellow fats were defined as: "packet butter, blends/spreads and margarine".[96]

7.4 The Commission went on to indicate, but without coming to any decision, that the product market was three separate submarkets, namely butter, blends/spreads and margarine.[97]

7.5 In a Report commissioned by the Commission,[98] a section on the UK retail market refers to the margarine and butter markets as being separate product markets but further appears to treat "margarine and other spreads" as a single market.

7.6 The Compecon Report treats butter, spreads, and margarine as one market. This is justified on the characteristics and intended use of these products and other indicators.

7.7 The parties state in the notification that recent AC Nielsen market information suggests that butter sales are increasing to the detriment of spreads, indicating substitutability between these products. The parties argue that this is probably correct in that the reasoning of the Commission's view of separate markets was mainly founded on the price differential, the price of margarine and spreads being driven by the price of oil and that of butter being driven by the intervention price of milk. Given changes in intervention at EU level, it is submitted by the parties that such would not necessarily hold true today.

7.8 The parties state in the notification that AC Nielsen market information indicates that these products are substitutable on the demand side and this would seem to indicate that in the State, butter and spreads are part of the same sub-market. Trends in the average retail price of Kerrygold butter (Irish Dairy Board) and the

[96] Arla Foods/Express Dairies (Case Number M.3130) (10/06/2003), para. 27
[97] Ibid.
[98] "Buyer power and its impact on competition in the food retail distribution sector of the European Union", 13/10/1999.

three most popular spread brands (Flora, Low Low and Dairygold) over the period from November 2004 to September 2007 suggest that the prices of these products have tracked one another relatively closely. The parties argue that while this information may not be totally conclusive of their being one product market for butter and spreads, it is persuasive and supportive of the view that butter is part of the overall spreads market.

7.9 Finally, the parties state in the notification that in light of the econometric analysis which identifies customer trends, it may not be necessary to make a final determination on this product market. The parties state that the econometric analysis was run for the entire spreads market and then run separately for spreads excluding butter, but the results were largely the same in both cases.

7.10 In the parties' Written Submission, the parties refer to paragraph 7.2 of the Assessment where it is stated that the parties are "somewhat agnostic" as to whether or not there is a single overall spreads market or two separate market. The parties state, however, that the intention in the Notification was to refer to the fact that the authorities (i.e. decisions of the European Commission) are inconclusive regarding product definition.

7.11 The parties state that they wish to make it absolutely clear that their position, in summary, is that they compete within a yellow fats market, which, for reasons of consumer perception, volume trends, and widespread usage, includes butter. The parties state that for the purposes of the analysis of the proposed acquisition, Breeo's main product, Dairygold Original, is positioned in the "taste" segment, whereas Kerry's main yellow fats product, Low-Low, is positioned in the "health" segment. The parties state that the evidence which has been presented to the Authority makes clear that the parties' major brands are not each other's closest substitutes. The parties state that this evidence confirms the factors listed by the Authority in its Assessment at paragraph 7.85, which leads to the conclusion that there would be no significant lessening of competition in any overall market/category or market segment as a result of the proposed acquisition.

7.12 The parties define the category as one yellow fats consolidated category. The parties state that there are three main reasons for defining the category in this way:

(a) The consumer perceives the category in this way;

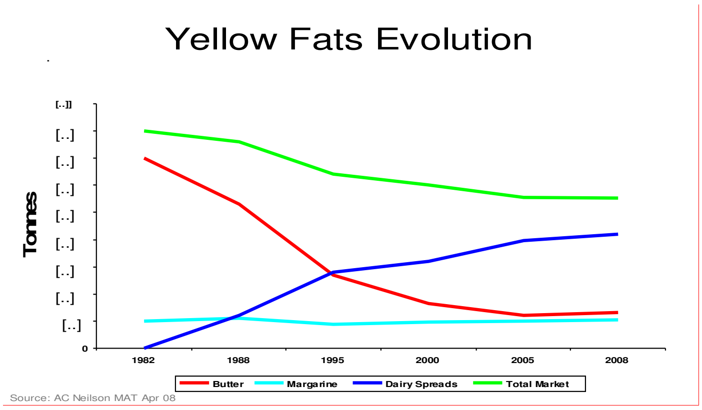
(b) The long term volume trend supports the inter-relationships in the category; and,

(c) widespread usage of this category definition (the retailers and the market research industry have defined the category in this way since 1985 and continue to do so today).

7.13 In support of (a), the parties cite a [consumer research] ("[Consultant]") report entitled, "[…] Consumer Research Yellow Fats, 4th June 2003 (the "[Yellow Fats Report]"). The parties state that in the [Yellow Fats Report] on yellow fats, [Consultant] looked at consumer usage, consumer needs, product substitutability and category inter-relations to determine which products make up the category in question. The parties state that the [Yellow Fats Report] provides support for their view that butter and spreads are in the same product market.

7.14 With respect to (b), the parties state that Dairygold original was launched onto the Irish market in 1985 for two reasons. First, to address the main consumer frustration with block butter, namely lack of spreadability. Secondly, in a static market comprising butter and margarine, to develop a new source of output for cream. The parties state that Dairygold entered the market as spreadable butter and was clearly aimed at taking share from block butter. The parties state that butter volume share at the time of launch was circa 87% of the yellow fats market and, as can be seen from the chart below, the majority of Dairygold's volume has, over time, come directly from block butter. In the parties' view, clearly they form part of the same market category/definition.

Figure 7.1
Yellow Fats By Segment, Tonnes, 1982-2008, the State



Source: The Parties

7.15 With respect to (c), the parties state that the "narrow" category as defined by the [Yellow Fats Report] (i.e. butter spreads, light spreads, health spreads etc.) has become the standard used by practitioners in the industry.

7.16 The parties state in their Written Submission that category segmentation is more dynamic than category definition, as new product development and changes in brand positioning can affect product groupings within the category. The parties state that there are several category segmentation approaches in use but all share the same fundamental category split as identified earlier in the consumer needs analysis i.e. "taste", "health" and "cooking".

7.17 The parties state that Dairygold Original was launched in 1985 as "modern butter". The parties state that four specific elements support this position:

(a) Dairy cream is the product's primary ingredient;

(b) it is manufactured by churning cream, unlike other spreads;

(c) its packaging positions it as convenient butter; and,

(d) it is advertised like real butter.

7.18 The parties state that Dairygold Original is the closest spread to real butter and competes directly with Kerrygold butter. The parties state that Dairygold Original is the only spread on the Irish market made using the traditional churning process (the same way that butter is manufactured). All other spreads, including Dairygold health spreads, are perfected using a blend of oils. In the manufacture of Dairygold Original fresh cream is blended with vegetable oil and pasteurized, before undergoing the traditional churning process. The whipping of the cream blend during the churning process contributes to the consistency and texture of the product which gives a fuller and slower melt down in the mouth, making the product closely replicate the sensory characteristics of standard butter.

7.19 The parties state that Dairygold Original was the first dairy spread launched on the Irish market in 1985. Dairygold positioned itself as 'modern butter' from day one, offering the best of both worlds in terms of consumer needs: the taste of butter and the spreadability of margarine. The parties state that as previously pointed out to the Authority in both the Oral and Written Submissions, the pricing of Dairygold Original has followed Kerrygold butter closely as both products share a critical raw material, namely, cream. The parties state that since 14th October, 2007, however, the price relativity between the two products changed due to the […].

7.20 The parties state that the continued focus on the butter churn process can be witnessed on the Dairygold advertising campaigns over the last number of years. On initial launch of the product in 1985, the retail trade positioned the product adjacent to butter on shelf as a direct substitute for butter. This positioning has remained until this day. The parties state that several other taste spreads, for example Kerrymaid, have sought to emulate Dairygold original in proposition, communication and packaging, however these products have made only limited impact. In Breeo's view, the primary source of competition to Dairygold original is from Kerrygold butter, which should be included in the "taste" segment of the category.

7.21 The parties state that a second fundamental aspect to category evolution was the launch of low fat health spreads, and in particular Unilever's Flora. Unilever is the largest margarine manufacturer in the world. The parties state that the response in Ireland to the launch of Flora was the launch by Kerry of its Low Low spread. Since the initial launch, Low Low's marketing strategy has always been to position the brand as a healthy spread. The parties state that Flora and Low Low directly compete for the same consumers.

7.22 The parties state that Dairygold has developed three "health" spreads, Light, Heart and Omega which compete directly with Kerry's Low Low and Unilever's Flora. Dairygold health spreads are advertised separately to original Dairygold and are merchandised in the "health" Section of the Yellow Fats fixture, not within the taste sector. The parties state that Dairygold's health spreads have collectively an extremely small share of the overall category.

7.23 The parties state that it is clear from the passages quoted at paragraphs 7.14 and 7.15 of the Assessment that Breeo perceives there to be an overall yellow fats market. The parties state that the business language of Breeo treats Dairygold Original as a spreadable butter, is a competitor for butter and is subject to substitution by butter.

7.24 The parties state that is clear from passages from Breeo's internal documentation that Dairygold perceives Kerrygold as the key competitor in the taste segment. The parties state that this internal documentation provides further evidential support for the view that Dairygold and Low Low are not each other's close competitors. The parties state that Breeo's internal documents also highlight the strength of Unilever, primarily in the health segment.

7.25 The parties state that paragraph 7.14 of the Assessment states that internal documentation provided by Kerry indicates that it perceives the overall spreads segment (i.e., butter and non-butter products) to be broken down into four categories: butter, taste, health, and cooking. The parties state that this broadly is in accordance with Breeo's perception of the market and with the category segmentation identified in the [Yellow Fats Report]. Kerry sees its Low Low spread as falling within the health segment, with Unilever's Flora being its principal competitor.

Competition Authority Investigation

Authority Survey of Retailers

7.26 Since it is retailers who make the final decision as to which products are stocked in their outlet(s), the Authority carried out a survey of retailers to determine whether they consider butter products to compete with spreads (i.e., non-butter products). The Authority sent a detailed questionnaire to nine leading retailers in the State, all of which responded.[99]

7.27 One of the questions posed in the follow-up questionnaire related to the SSNIP test:

> Assume that all butter was supplied by one undertaking and if this undertaking were to permanently raise the price of butter by between 5% and 10% from its current level. Assume also that at the same time all other conditions (such as quality, etc) as well as the price of other spreads (i.e., margarine, blends, etc) remained unchanged. In these circumstances, would you:
>
> (i) Maintain your spend on butter (and buy less)?
>
> (ii) Purchase the same volume of butter and pay more?
>
> (iii) Switch some of your spend away from butter. If so, to which other spreads would you switch and what proportion of spend?

7.28 Four out of the nine retailers indicated that they would opt for either option (i) or option (ii). Two retailers provided unclear responses as to how they would react to a permanent rise in price of butter. One retailer indicated that it was not sure how it would react to this hypothetical situation. One retailer gave an "N/A" response. Finally, one retailer provided no response to this question.

7.29 Thus, the survey results, although not conclusive, lean towards supporting a view that butter occupies a distinct product market from other spreads (i.e., non-butter products such as margarine, blends, etc). This conclusion is strengthened in the discussion with the retailers – detailed below – on the competitive implications of the merger for the spreads market in paragraphs 7.56 to 7.58.

Review of Internal Documentation

7.30 Internal documentation provided by Kerry indicates that it perceives the overall spreads segment (i.e., butter and non-butter products) to be broken down into four categories: butter, taste, health, and cooking. For example, the following quote appears in a document entitled "[…]" – "[…]."

7.31 Internal documentation provided by Breeo indicates that it perceives there to be an overall yellow fats market encompassing butter and non-butter products. For example, the following two quotes appear in a document entitled "[…]" – "[…]"; and ""[…]". The following quote appears in a document entitled "[…]" – "[…]".

7.32 Thus, on balance, while Breeo perceives itself as competing in a wider market for yellow fats, comprising both butter and spreads products, Kerry's internal

[99] One retailer, […], did not respond to the Authority's questionnaire but distributed the questionnaire to its members, one of which, […], responded.

documentation indicates that Kerry perceives the yellow fats category to be disaggregated into four narrower segments.

Supply-side Substitution

7.33 From the supply side, it is not clear that if a hypothetical monopoly supplier of butter products increased the price permanently by 5-10%, a supplier of other spreads could easily switch within a 12-month period to supplying butter products.

7.34 The Authority sent a detailed questionnaire to three suppliers of, *inter alia*, other spreads (i.e., non-butter products) in the State. The questionnaire sought views on, *inter alia*, whether spreads and butter products could be manufactured in the same production facility and the costs associated with switching production from spreads to butter.

7.35 One supplier indicated that it is not possible to switch production from spreads to butter as the production process is very different for each product. The supplier stated that different manufacturing plants are required to produce spreads and butter products.

7.36 One supplier informed the Authority that it produces butter and spreads in the same facility, but uses two different production lines. The supplier indicated that the production line for butter uses much simpler technology. The churning process for a spread is much more complicated than for butter and therefore butter is usually produced in a cheaper, simpler churning plant. The supplier stated that if it was commercially sensible, the more complicated spreads churner could produce butter and, assuming the cream supply lines had sufficient capacity, the time to switch would be only a few hours.

7.37 On balance, the Authority does not believe that if a hypothetical monopoly supplier of butter products increased the price permanently by 5-10%, a supplier of spreads will be able to switch within a 12-month period to supplying butter products.

Conclusions on the Relevant Product Market

7.38 For the purposes of examining the competitive effects of the proposed acquisition in this product category (i.e., butter and spreads), the Authority does not need to come to a definitive view on the relevant product market definition. The Authority's conclusions concerning the competitive effects of the proposed acquisition, described in detail below, will be unaffected whether there are separate product markets for butter and spreads, respectively, or a wider product market encompassing butter *and* spreads.

Relevant Geographic Market

Submissions of the Undertakings Involved

7.39 As described in paragraphs 3.20-3.25 above, the parties submit that the geographic market for all of the product markets under review is at least the State.

Conclusion on the Relevant Geographic Market

7.40 Irrespective of the precise product market definition (and, as explained in paragraph 7.38 above, the Authority does not need to come to a definitive view on product market definition), the Authority considers that the relevant geographic market is at least as wide as the State. The impact of imports is considered when examining the competitive impact of the proposed acquisition.

Butter

Market Structure

Introduction

7.41 Market structure can be characterised as the number and size distribution of firms. The initial impact of any merger is felt on market structure as two firms pre-merger become one firm post-merger. In this section, the pre- and post-acquisition market shares in the butter market are considered.

Market Structure of the Butter Market

7.42 Table 7.1 below provides market share data for butter by value for 2005 to 2007. In view of the small share of private label – less than [0-5]% - it is unlikely that the differences recorded in cooked meats between value and volume measures of market share would be recorded for butter.

Table 7.1
Market Shares, by Undertaking, Butter, Value, the State 2005-2007

Undertaking	2005	2006	2007
Irish Dairy Board	[60-65]	[60-65]	[60-65]
Breeo	[10-15]	[5-10]	[10-15]
Champion	[5-10]	[10-15]	[10-15]
NCF	[5-10]	[5-10]	[5-10]
Glanbia	[0-5]	[0-5]	[0-5]
Private Label (incl. discounters)	[0-5]	[0-5]	[0-5]
Bandon	[0-5]	[0-5]	[0-5]
Lee Strand	[0-5]	[0-5]	[0-5]
Other	[0-5]	[0-5]	[0-5]
Total	**100.0**	**100.0**	**100.0**

Source: Based on data supplied by the parties

7.43 The clear market leader in the butter market in the State is Kerrygold with a [60-65]% market share in 2007 compared to [60-65]% in 2005. Breeo has a market share of -10-15]%, while Kerry's market share is negligible – less than [0-5]%.

7.44 The market share data indicate that the proposed acquisition would fall into Zone A as defined in the Authority's *Merger Guidelines* and is therefore less likely to have adverse competitive effects.

Competitive Analysis

7.45 It is clear from Table 7.1 above that there will be little change in market concentration post-acquisition due to Kerry's negligible share in the butter market in the State. As a result, the Authority has concluded that the proposed acquisition raises no concerns in this market.

Spreads

Market Structure

Market Structure of the Spreads Market in the State

7.46 Table 7.2 below provides market share data for spreads for 2005 to 2007 by value. As with butter, the market share accounted for by private label is quite small – less than [5-10]% - so no comparisons are made between value and volume market shares.

Table 7.2
Market Shares, by Undertaking, Spreads, Value, the State, 2005-2007

Undertaking	**2005**	**2006**	**2007**
Breeo	[30-35]	[30-35]	[30-35]
Unilever	[25-30]	[25-30]	[25-30]
Kerry	[20-25]	[20-25]	[20-25]
Private Label (incl. discounters)	[5-10]	[5-10]	[5-10]
Glanbia	[0-5]	[0-5]	[0-5]
Dairycrest	[0-5]	[0-5]	[0-5]
MC Neill	[5-10]	[5-10]	[5-10]
Other	[0-5]	[0-5]	[0-5]
Total	**100.0**	**100.0**	**100.0**

Source: Based on information supplied by the parties.

7.47 Breeo is the market leader with a [30-35]% share of the spreads market in 2007 followed by Unilever on [25-30]% and Kerry on [20-25]%. Breeo's key brand in the spreads market is Dairygold, Unilever's key brand is Flora while Kerry's key brand is Low-Low. These three suppliers account for the vast majority of the spreads market - [80-85]%. Furthermore, the ranking and magnitude of the market shares of these undertakings were relatively stable during the 2005 to 2007 period.

7.48 Table 7.3 gives estimates of HHIs for the spreads market.[100]

Table 7.3
Spreads Market, HHIs, Pre- and Post-Merger, 2007

Pre-Merger	**2345**
Post-Merger	**3814**
Change	**1469**
Zone	**C**

Source: Competition Authority based on Table 7.2 above.

7.49 The change in the HHI places the proposed acquisition in Zone C of the Authority's *Merger Guidelines*. The results show that the transaction would fall within Zone C as defined by the Authority *Merger Guidelines*. In other words, the spreads market post-merger would be defined as highly concentrated. It is more usually in such markets that mergers raise competition concerns.

Conclusion

7.50 The fact that a merger falls into Zone C does not necessarily mean that it will substantially lessen competition. As the Authority's *Merger Guidelines* point out, factors that affect whether a merger in Zone C will raise competition concerns

[100] The Authority does not have individual market shares for each retailer's private label spreads. Thus, the HHI figures will be overstated since all private label sales are treated as a combined unit. However, the classification of the proposed acquisition as a Zone C merger would not be affected even if individual market share data for each retailer's private label spreads was available since the pre- and post-acquisition HHI can be no greater than those in Table 7.3.

include the closeness of competition and whether there are low barriers to entry. It is to these and other issues that attention is turned below.

Competitive Analysis

Closeness of Competition[101]

General Arguments of the Parties

7.51 The Compecon Report provides views on the competitive impact of the proposed acquisition for a broad spreads market (i.e. butter and non-butter). The Compecon Report states that the merged group would be the largest in the market with almost [35-40]% of the total. It further argues that the merging parties would not appear likely to enjoy a dominant position post-merger. There are two other significant players, Unilever and Kerrygold. The buyers enjoy significant countervailing buyer power, it is argued, and there are a number of overseas producers that are capable of entering the market in response to any price increase.

7.52 The results of Dr. Hogan's econometric analysis are described in Section 2 above. However, for reasons set out in Section 2, the Authority prefers to rely on the results of Dr. Walsh.

Views of the Competition Authority

Authority Survey of Retailers

7.53 In the Authority's survey of retailers, six out of nine retailers[102] indicated that it is essential to have brands in their product range for spreads.[103] In addition, the Authority also asked which brands are considered "must have" or "must carry" brands. Four out of nine retailers indicated that they consider Breeo's Dairygold, Kerry's Low-Low, and Unilever's Flora to be "must have" brands in the spreads market.

7.54 The Authority sent a follow-up questionnaire to six out of the nine retailers.[104] The following questions were posed:

> Do you consider that Flora would be a strong competitor to the merged entity post-acquisition? If not, why not?
>
> Do you have the ability to credibly threaten to de-list and/or de-range the merged entity's spread products post-acquisition and switch to other brands such as Flora/Kerrygold/Avonmore and/or own-label spreads? If not, why not?

7.55 Five retailers indicated that they would not have the ability to credibly threaten to de-list and/or de-range the merged entity's spreads products post-acquisition. Although two of these five retailers have their own private label spread, none believe they could credibly threaten to focus more on private label spreads if trading terms with the merged entity deteriorated post-acquisition. Significantly,

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101 The term is defined in paragraph 3.46 above.

102 Of the remaining three retailers, one gave an "N/A" response; one gave no response while one retailer indicated that "brands are not considered 'must have'". Two of these three retailers are discounters while the third is M&S.

103 In its first survey of retailers, the Authority defined the term spreads as including butter and margarine products.

104 […] did not receive a follow-up questionnaire because it does not do business with either of the merging parties and has no opinion on the proposed acquisition, while […] and […] did not receive a follow-up questionnaire because they do not stock any of Kerry's or Breeo's branded products and have no concerns about the proposed acquisition.

retailers do not see private label spreads as being a close substitute for branded spreads.[105]

7.56 It is relevant to examine in detail the specific responses of some retailers regarding the spreads market. One retailer informed the Authority that while Unilever's Flora competes with Kerry's Low Low, nothing competes against Breeo's Dairygold. The retailer stated that all three brands are must-stock brands. Furthermore, the retailer explained that it doesn't perceive the overall yellow fats segment in terms of butter and non-butter products but, instead, it distinguishes between healthy and non-healthy yellow fats. The retailer stated that Breeo's Dairygold is in the middle of the yellow fats segment, Unilever's Flora is seen as a healthy spread while full-fat butter is at the other end of the yellow fats segment.

7.57 Another retailer indicated that it views the yellow fats segment as being divided into "butter" and "spreads" products. The retailer explained that in the butter segment, Kerrygold is the leading brand. In the spread segment, the retailer stated that there are no credible alternative suppliers that would allow it to discipline the merged entity post-acquisition. With respect to Unilever's Flora brand, the retailer stated that it considers Flora to be a health-conscious spread that does not directly compete with other spread brands such as Kerry's Low-Low and Breeo's Dairygold.

7.58 Another retailer indicated that it considers the yellow fats segment to be divided into three categories: butter, healthy non-butter, and taste-based non-butter. The retailer stated that within non-butter there is a clear distinction (in terms of customer preferences and functional characteristics) between healthy spreads and standard taste-based spreads. The retailer stated that Kerrygold is the "must have" brand in butter. In healthy spreads, Flora and Low-Low are the "must have" brands while Dairygold is "must have" brand in taste-based spreads.

7.59 All five retailers expressed the view that both Kerry and Breeo are implicitly aware of each other when negotiating trading terms with retailers for the supply of spreads.

7.60 Finally, one of the six retailers indicated to the Authority that it had no concerns with the proposed acquisition. However, when asked to explain how it could credibly threaten to discipline the merged entity post-acquisition should trading terms deteriorate, the retailer indicated that although it would have the option of de-listing or de-ranging the merged entity's spreads products, this would not be a credible threat. The retailer stated that its ability to discipline the merged entity would largely depend on whether alternative suppliers are available.

7.61 In conclusion, the merged entity's spreads brands are "must have" brands. However, the views expressed by some retailers suggest that the spreads market may be segmented according to taste and health. It appears that Breeo's Dairygold and Kerry's Low-Low are not close competitors in the spreads market since the former is perceived by retailers as a taste-based spread while the latter is perceived as a health-based spread. Some retailers appear to perceive Unilever's Flora brand as competing closely against Kerry's Low-Low brand in the health-based segment of the spreads market. In contrast, Breeo's Dairygold brand does not appear to have a close competitor in the taste-based segment of the spreads market.

Authority Survey of Competitors

[105] Private label is not a major player in the spreads market. This is illustrated in Table 7.1 above where the combined market share of retailers' private label spreads is only [5-10]%.

7.62 Five competitors in the total yellow fats segment were sent a detailed questionnaire seeking their views on the proposed acquisition. One competitor (Competitor 16) has no concerns about the proposed acquisition. Two competitors (Competitor 14 and Competitor 17) indicated that they have concerns with the proposed acquisition. One competitor (Competitor 15) has no views on the proposed acquisition.[106] Finally, one competitor did not provide a response.

Competitor 16

7.63 As Table 7.2 above indicates, Competitor 16 is the […] brand in the spreads market with a market share of […]% in 2007. Competitor 16's key brand is […] which accounts for the vast majority of Competitor 16's sales of spreads in the State. Competitor 16 considers that its […] spread does not compete with butter products. Competitor 16 stated that the brand leader in spreads is Breeo's Dairygold brand with Competitor 16 […]. Competitor 16 stated that there has been no major change in the spreads market since 1 January 2006 and that brands are very important in this market.

7.64 Competitor 16 informed the Authority that it does not believe that there will be a decline in the level of competition in the spreads market post-acquisition. Competitor 16 anticipates that competition between it and the merged entity will be intense. Competitor 16 argues that post-acquisition, retailers will still have options – e.g., retailers could (a) give more space to own label spreads, (b) encourage niche players, (c) encourage market entry by other branded suppliers, e.g. suppliers from the UK. Competitor 16 stated that if a price rise is seen as unacceptable, retailers could encourage entry. Competitor 16 also argues that a player in the butter market could enter the spreads market and they cited the examples of Kerry and Breeo.

Competitor 14

7.65 As Table 7.2 above indicates, Competitor 14 is the […] brand in the spreads market with a market share of […]% in 2007, […] in 2005. Competitor 14's key brand is […]. Competitor 14 considers that spreads do not compete with butter. Competitor 14 argues that post-acquisition retailers will have no credible alternative to the merged entity's spreads offering. Competitor 14 argues that the merged entity will control more brands that are important to retailers with the effect that alternative brands will become less attractive. Competitor 14 argues that many retailers may choose post-acquisition to only deal with the merged entity and, as a result, there will be no shelf space for other brands. Competitor 14 also argues that, in addition, the one-stop-shop facility offered by the merged entity will make it difficult for retailers to consider alternative branded spreads.

7.66 When asked whether retailers could focus more on […] in the spreads market to credibly discipline the merged entity, Competitor 14 replied that […] is at the health end of the spreads market and the merged entity will own the key brands in this market post-acquisition such that retailers will have little ability to credibly threaten to switch to alternative suppliers should trading terms deteriorate.

7.67 Competitor 14 indicated to the Authority that it is very difficult for a new brand to successfully enter the spreads market. Competitor 14 stated that the spreads market is highly concentrated such that line extensions of existing brands tend to be the ones that get listings and, therefore, grow market share.

[106] […].

Competitor 17

7.68 Competitor 17's key brand in spreads is […] and, as indicated in Table 7.2 above, it has a […] market share of […]%, down from […]% in 2005. Competitor 17 informed the Authority that brands dominate the spreads market and, thus, brand is vital for entry. Competitor 17 stated that the butter and spreads markets overlap and it perceives the overall segment as being split between the taste sector and the health sector. Competitor 17 stated that it considers that these two products are in competition but the likelihood of customer switching would be low. To illustrate this comment, Competitor 17 stated that if […] was on a buy-one-get-one-free promotion, very few customers of […] would switch.

7.69 Competitor 17 argues that the proposed acquisition will allow the merged entity to have a powerful position in spreads as it will own three of the top four brands and will also supply […] with its own-label spreads. Competitor 17 argues that the merged entity's dominance in spreads may lead to the de-listing of competitor brands resulting in less choice for consumers.

Review of Parties' Internal Documents

7.70 The internal documentation provided by Kerry does not provide relevant insights into how Kerry perceives the spreads market. In a document entitled "[…]", the following quote appears which suggests that Kerry perceives private label as a competitive threat: "[…]".

7.71 In addition, the same document contains the following quote[107], "[…]".

7.72 The above quotes should be seen in the context of the market share data presented in Table 7.2 above where the three leading brands dominate and the combined market share of the retailers' private label spreads is only [5-10]%. In addition, the majority of retailers and competitors informed the Authority that brands dominate the spreads market.

7.73 From the perspective of Breeo, the following quote, which appears in a document entitled "[…]", illustrates the way in which Breeo perceives the competitive landscape in the spreads market: "[…]". In the same document, the following quote underlines the strong position of Breeo's Dairygold brand in the spreads market: "[…]".

7.74 In conclusion, it is clear that Breeo sees Kerry and Unilever as its key competitors in the spreads market. However, the market share data presented in Table 7.2 above does not support the views expressed in Kerry's internal documentation that private label is a growing competitive threat in the spreads market, notwithstanding the fact that the combined private label market share in spreads has grown from [5-10]% to [5-10]% between 2005-2007.

Econometric Evidence

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[107] The Authority asked Kerry to explain (1) why the merger would lead to this result, (2) why […], and (3) why […]. Kerry stated in a letter to the Authority dated 20 June, 2008 that:

- the context of the report from which this quote was taken needed to be understood and appreciated;
- […];
- […];
- […];
- […];
- […];
- […];
- […].

7.75 Dr. Walsh, whose results are set out in Table 2.10 above, found the following in the spreads segment:

- The own price elasticities for Kerry, Breeo and other brands are quite low which indicates that the brands in spreads are not particularly sensitive to price changes;
- Notwithstanding the fact that the cross-price effects are weak, brands of other third parties are closer substitutes to Kerry's brands than Breeo's brands. Likewise, brands of other third parties are closer substitutes to Breeo's brands than Kerry's brands; and
- These results suggest that other third party brands exert a greater competitive constraint on Kerry's brands and Breeo's brands, respectively.

Conclusion

7.76 The evidence clearly indicates that Kerry, Breeo and Unilever are the market leaders in the spreads market. Collectively, they account for close to [80-85]% of the market. However, the difficulty lies in establishing the closeness of competition that currently exists between Unilever and the merging parties' brands and the extent to which Unilever will be able to constrain the merged entity's ability to raise price post-acquisition.

7.77 The views of retailers are somewhat contradictory. On the one hand, five out of six retailers are concerned that they will not have the ability to credibly threaten to de-list and/or de-range the merged entity's spreads post-acquisition.[108] However, four out of these five retailers also indicated that they consider Dairygold, Low-Low, and Flora to be "must have" brands in the spreads market. Thus, given the strength of Unilever's Flora brand in the spreads market and the fact that it is considered a "must have" brand by all retailers, it is not clear why retailers cannot use Unilever to discipline the merged entity post-acquisition.

7.78 Further complicating matters is the view expressed by three out of six retailers that there is a clear distinction within the spreads market between health-based spreads and taste-based spreads. All three retailers indicated that Unilever's Flora brand and Kerry's Low-Low brand are perceived as health-based spreads while Breeo's Dairygold brand is perceived as a taste-based spread. Moreover, the parties state the following in the notification: "Kerry's brand positioning indicates that Low-Low is regarded as competing more with Flora than with Breeo's brands and Breeo's Dairygold is closer to Kerrygold". Finally, Kerry's internal documentation indicates that it perceives there to be a distinction in the overall spreads category (i.e., butter and non-butter products) between butter, taste, health, and cooking.

7.79 The internal documentation also clearly indicates that Breeo sees Kerry and Unilever as its closest competitors in the yellow fats segment. In contrast, Kerry's internal documentation is not clear as regards closeness of competition.

7.80 Finally, the econometric evidence suggests that other third party brands exert a greater competitive constraint on Kerry's brands and Breeo's brands, respectively.

[108] It is significant, in this regard, that one retailer, who does not have concerns about any of the other product markets under review, indicated that he does not believe he will have sufficient countervailing buyer power to discipline the merged entity post-acquisition in the spreads market. The main reason given by this retailer was the absence of credible alternative brands.

7.81 On balance, the evidence indicates that the spreads market is segmented by taste and health with Breeo's Dairygold the only strong brand in taste-based spreads while Unilever's Flora and Kerry's Low-Low brands compete head-on in health-based spreads. Thus, although Kerry (via Low-Low), Breeo (via Dairygold) and Unilever (via Flora) compete in a spreads market,[109] it is clear that the proposed acquisition does not alter the competitive landscape in the spreads market. Post-acquisition, Breeo's Dairygold will still not have a close competitor in taste-based spreads. Likewise, Unilever's Flora brand and Kerry's Low-Low brand will continue post-acquisition to compete closely in health-based spreads. In short, the degree to which the undertakings involved compete with each other will be unaffected by the proposed acquisition.

Entry

Submissions of the Undertakings Involved

7.82 The Compecon Report states that barriers to entry would appear to be more significant in the spreads market than is the case of breakfast meats.

Views of the Competition Authority

7.83 The Authority's *Merger Guidelines* require for entry to be a constraint on the ability of the merged entity to raise price post-merger, entry must be timely, likely and sufficient.

7.84 Given that the spreads market is a very branded market and there has been no entry in recent years, the Authority does not believe that a new entrant will be able to establish a new brand within two years such that it will be able to constrain the merged entity from permanently raising price post-acquisition. The three leading brands in the spreads market are long-established and have gradually built up brand recognition amongst end consumers over a long period of time. A new entrant would have to invest substantial resources over a long period of time in developing brand awareness in order to establish a foothold in the spreads market.

7.85 In conclusion, the Authority does not believe that a new entrant will be able to successfully establish a new spreads brand within two years such that the merged entity will be constrained from permanently raising the price of spreads post-acquisition.

Expansion and Capacity

7.86 Expansion of non-merging firms in a market may also constrain the ability of the merged entity to raise prices post-merger. Expansion in turn is linked to the issue of whether the non-merging firms can expand capacity. In each instance the same timely, likely and sufficient criteria outline above for entry are applied.

7.87 Given that Unilever is a close competitor to the merging parties in the spreads market, the issue of whether Unilever will be in a position to expand capacity post-acquisition is important. There is no evidence to indicate that Unilever will not be in a position to expand capacity. Unilever is a large company and it supplies the Flora product range in a number of countries.

7.88 In conclusion, the Authority considers that Unilever will be able to expand production of its Flora product range within a two-year period.

[109] There is no evidence of significant price differences between these three brands that might suggest separate products markets for taste-based spreads and health-based spreads.

7.89 The Authority also considered whether branded suppliers in the butter market could successfully extend production into the spreads market within a two-year period and whether this might constrain the merged entity from permanently raising price post-acquisition. The Authority does not believe that this is likely for two reasons.

7.90 First, responses from competitors indicate that the production of butter and spreads require different production facilities. Thus, it is not clear that a butter manufacturer could switch to the production of spreads within a two-year period.

7.91 Second, as mentioned in paragraph 7.84 above, a new entrant in the spreads market would have to invest substantial resources over a long period of time in developing brand awareness. Of course, this might be less of a barrier to expansion for a branded butter supplier with high brand awareness amongst end consumers. However, it is worth noting in this regard the view expressed by the parties in the notification that attempts by Kerry to transfer a brand name associated with one type of cooked meat to a different type of cooked meat have not proved successful because consumers identify the brands with a particular type of cooked meat. It is reasonable to assume that the same problem might arise in transferring a brand name associated with butter to spreads.

Imports

7.92 The parties argue that there is the existing presence of imports and the potential for overseas firms to enter the total spreads segment. In this regard, the parties cite the growth of Unilever's brands and the entry of Dairycrest's "Utterly Butterly" and "Clover" brands.

7.93 With respect to Unilever, the Flora brand range has been sold in the State for 25 years and has gradually built up brand recognition amongst end consumers over this time. In the case of Dairycrest, however, despite acquiring the "Utterly Butterly" brand in 2002, Dairycrest has a minimal market share ([5-10]%) which has been in decline since 2006.

7.94 Both Competitor 16 and Competitor 17 informed the Authority that there is a preference amongst Irish consumers for Irish spreads. Competitor 14 stated that although there is a preference amongst Irish consumers for Irish spreads, this preference is declining.

7.95 For the reasons outlined above, the Authority does not believe that a new entrant will be able to establish through imports a sufficiently strong presence in the spreads market within a two-year period such that it will be able to constrain the merged entity from permanently raising prices post-acquisition.

Buyer Power

7.96 The Compecon Report argues that retailers have sufficient countervailing buyer power to resist any attempted price increase by the merged entity. The parties state that the rise in private label may reflect the growing emergence of retailers as brands.

7.97 The Compecon Report also argues that retailers have the option of de-listing certain brands rather than a supplier's entire spreads range in response to any attempt to raise price.

7.98 The degree of countervailing buyer power exerted by retailers post-acquisition will largely depend on whether or not credible alternative suppliers exist in the spreads market. As explained in paragraphs 7.76-7.81, the degree to which the merging parties' brands compete with each other and alternative suppliers is unlikely to be affected by the proposed acquisition. Post-acquisition, Breeo's Dairygold will still not have a close competitor in taste-based spreads. Likewise, Unilever's Flora brand and Kerry's Low-Low brand will continue post-acquisition to compete closely in health-based spreads. Thus, contrary to the view expressed by retailers that they will not have the ability to credibly threaten to de-list and/or de-range the merged entity's spreads products post-acquisition, the degree of countervailing buyer power currently exerted by retailers will remain unchanged post-acquisition.

7.99 In conclusion, the Authority considers that the degree of countervailing buyer power held by retailers will be unaffected by the proposed acquisition.

Conclusions

7.100 The following factors lead the Authority to conclude that the proposed transaction will not result in a unilateral permanent price rise by the merged entity:

- Breeo's Dairygold and Kerry's Low-Low are not close competitors in the spreads market since the former is perceived by retailers as a taste-based spread while the latter is perceived as a health-based spread. Instead, Unilever's Flora, also a health-based spread, competes with Kerry's low Low;

- Unilever's Flora brand is number two in the spreads market with a market share of [25-30]%;

- The majority of retailers indicated that Flora is a "must have" brand in the spreads market;

- Breeo's internal documentation indicates that it perceives Unilever as a close competitor in the spreads market;

- The degree to which the undertakings involved compete with each other will be unaffected by the proposed acquisition;

- The degree of countervailing buyer power held by retailers will be unaffected by the proposed acquisition; and

- The extent to which retailers can credibly threaten to discipline the merged entity post-acquisition will be unaffected by the proposed acquisition.

7.101 In consequence of the foregoing, the Authority is of the opinion that the proposed transaction will not result in a substantial lessening of competition in the market for spreads in the State.

SECTION EIGHT: CHEESE

Introduction

8.1 In this section, the Authority considers the implications of the proposed acquisition for competition in the cheese segment which the Authority divides into two separate product markets: (a) natural cheese, and (b) processed cheese.

Relevant Product Market

Submissions of the Undertakings Involved

8.2 The parties argue that there is one cheese market, not two separate markets. Furthermore, even if there were two separate markets then the merger would still not give rise to competitive concerns.

8.3 The parties state in the notification that there is very little evidence on the nature of the cheese product market and any evidence that there is, is inconclusive. In a number of Commission decisions, submissions were put forward that the cheese market can be sub-divided and that one sub-market was that for hard/semi-hard cheese and that cheese spreads and cheese specialities were also separate sub-markets.[110]

8.4 The parties state in the notification that the economic analysis in the Compecon Report treats cheese as one market, given 94% of this product market is pre-packed and most being of the cheddar cheese variety. Natural cheese ([65-70]% of pre-packed) is a commodity with many cheese producers, including Kerry, buying, slicing and packing cheeses, as opposed to producing same. The parties state that processed cheese ([30-35]% of pre-packed) is a technical process and takes place in a high care facility where cheese is blended and mixed to produce products such as Easi-Singles, cheese spreads, etc. The parties state in the notification that in the case of natural cheese products, supply and demand side substitution is easy but less so in the case of processed cheese.

8.5 The parties argue in their Written Submission that consumers purchase cheese on the basis of […], as evidenced by research carried out for Kerry by […] in March 2008. The research shows that [80-85]% of consumers purchased both natural and processed cheese products in a one year period, with [10-15]% purchasing only natural cheese and [0-5]% purchasing only processed cheese. The parties argue that this represents a very high degree of overlap indicating that cheese purchasers alternate between natural and processed cheese.

8.6 The parties state that the fact that cheese products constitute a single market is further evidenced by the fact that manufacturers of the one have successfully switched to the other. The parties provide two examples: (1) Kerry's Low Low, traditionally a natural cheese offering, has stretched successfully into processed cheese; and (2) Dairylea and Calvita, traditionally processed cheese brands, have stretched into natural cheese.

8.7 The parties state that cheese is not separated into natural and processed cheese on the supermarket shelf and the products are generally inter-mingled on the shelf. The parties argue that this suggests that retailers also view the category as one market rather than two separate markets. The parties also note that Kerry tracks continuous market shares for the total cheese market.

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[110] Case No. Comp/M.2011, *Delta Selections/Aria Foods Hellas*, 21 August 2000 and Case No. Comp M/4323, *Arla/Ingman Foods*, 15 January 2007.

8.8 The parties state that if a consumer is shopping for cheese slices for a burger or cheese melt, they will go shopping for a cheese slice as opposed to looking for a natural or processed cheese slice.

8.9 The parties state in their Written Submission that the Assessment draws heavily on internal documentation in supporting the conclusion that the cheese market can be broken down into two distinct markets: natural cheese and processed cheese. The parties argue that the Assessment's usage of documents is very limited and highly selective.

8.10 The parties state that the Assessment adds further confusion in its subdivision of the processed cheese market into three segments: sliced processed cheese, processed cheese snacks, and processed cheese spreads. The parties state that they would never segment the market in this manner.

8.11 The Compecon Report states that a question arises as to whether cheese should be regarded as a single product market or as a number of separate markets. In particular, there is a question of whether natural and processed cheeses are part of the same market.

8.12 The Compecon Report states that more than 90% of cheese sold at retail level in the State is pre-pack cheese. Roughly one third of this is processed cheese and the remaining two thirds is natural cheese. The parties state that there is evidence that there is some degree of substitutability between the two products on both the demand and supply sides. On the demand side, cheeses such as Calvita and Galtee are seen by many consumers as being the equivalent of cheddar cheese.

8.13 The Compecon Report states that on the supply side both types of cheese are produced from the same raw material. Thus, in response to a price increase by a hypothetical monopolist in natural cheese, a producer of processed cheese could switch from producing processed to natural cheese. The parties state that it would be more difficult for a natural cheese producer to switch to producing processed cheese as this requires more specialised plant and equipment. The parties state that there is plenty of available capacity for producing processed cheese in other EU Member States so that any attempt by a hypothetical processed cheese monopolist to raise prices would be likely to trigger entry by such producers. The parties state that Irish based firms could contract out the production of processed cheese to such an operator in the event of such a price increase. In other words, a producer of natural cheese could enter the processed cheese market in response to a price increase by a hypothetical monopolist in that sector.

8.14 The Compecon Report states that even if the natural and processed cheese were considered to be separate markets, the proposed acquisition would be unlikely to give rise to any adverse effect on competition. The Compecon Report states that it was not possible to run the econometric analysis on the market for natural or processed cheese separately as there was not sufficient data available to do this.

8.15 The Compecon Response to the Assessment states that the Assessment's finding that natural and processed cheeses constitute separate markets is based to a large extent on its survey of retailers. The Compecon response argues that the survey results in the Assessment are insufficient to allow the proper application of the SSNIP test.

Competition Authority Investigation

<u>Authority Survey of Retailers</u>

8.16 Since it is the retailer that makes the final decision as to which products are stocked in their outlet(s), the Authority carried out a survey of retailers to determine whether they consider processed cheese to compete with natural cheese. The Authority sent a detailed questionnaire to nine leading retailers in the State, all of which responded.[111]

8.17 One of the questions posed in the follow-up questionnaire related to the SSNIP test:

> Assume that all processed cheese was supplied by one undertaking and if this undertaking were to permanently raise the price of processed cheese by between 5% and 10% from its current level. Assume also that at the same time all other conditions (such as quality, etc) as well as the price of natural cheese remained unchanged. In these circumstances, would you:
>
> (i) Maintain your spend on processed cheese (and buy less)?
>
> (ii) Purchase the same volume of processed cheese and pay more?
>
> (iii) Switch some of your spend away from processed cheese to natural cheese. If so, what proportion of spend?

8.18 Four out of the nine retailers indicated that they would opt for either option (i) or option (ii). Two retailers provided unclear responses as to how they would react to a permanent rise in price of processed cheese. One retailer indicated that it was not sure how it would react to this hypothetical situation. One retailer gave an "N/A" response. Finally, one retailer provided no response to this question.

8.19 Thus, the survey results, although not conclusive, lean towards supporting a view that processed cheese occupies a distinct product market from natural cheese.

<u>Review of Internal Documentation</u>

8.20 Internal documentation provided by Kerry indicates that it perceives the overall cheese segment to be broken down into processed cheese and natural cheese. For example, in a document entitled "[…]", the data for the cheese segment is divided into natural and processed cheese. Likewise, in a document entitled "[…]",[112] Kerry's Low-Low brand value of €[…] is divided into butter spread, natural cheese and processed cheese.[113] Finally, the following quote appears in a document entitled "[…]" – "[…]".

8.21 Documentation provided by Breeo clearly indicates that it perceives the cheese segment to be divided into processed cheese and natural cheese. For example, the following three quotes appear in a document entitled "[…]" – "[…]"; "[…]"; and "[…]".

8.22 In conclusion, it is clear that the parties perceive themselves as competing in separate product markets for natural cheese and processed cheese.

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[111] One retailer, […], did not respond to the Authority's questionnaire but distributed the questionnaire to its members, one of which, […], responded.
[112] NPD refers to national product development.
[113] As described in section 7 above, Kerry's Low-Low brand is one of three leading spreads brands in the State. Thus, the use of the term "butter" to describe Kerry's Low-Low brand is inaccurate.

Supply-side Substitution

8.23 From the supply side, it is not clear that if a hypothetical monopoly supplier of processed cheese increased the price permanently by 5-10%, a supplier of natural cheese could easily switch within a 12-month period to supplying processed cheese.

8.24 The Authority sent a detailed questionnaire to two suppliers of, *inter alia*, natural cheese products in the State. The questionnaire sought views on, *inter alia*, whether processed cheese and natural cheese could be manufactured in the same production facility and the costs associated with switching production from natural cheese to processed cheese.

8.25 One supplier indicated that the production processes for processed cheese and natural cheese are very different. The supplier stated that different manufacturing facilities are required to produce processed cheese and natural cheese and the storage costs for the latter are very high.

8.26 The other supplier informed the Authority that because processed cheese is made from natural cheese, it is unlikely that a supplier would switch production; it would just purchase another manufacturing plant to convert the natural cheese to processed cheese.

8.27 On balance, the Authority does not believe that if a hypothetical monopoly supplier of processed cheese increased the price permanently by 5-10%, a supplier of natural cheese will be able to switch within a 12-month period to supplying processed cheese.

Conclusion on the Relevant Product Market

8.28 In conclusion, notwithstanding the arguments of the parties, taking into account the survey results, the parties' own view of the market as evidenced in the quoted internal documents and the fact that suppliers of natural cheese could not easily switch in a 12-month period to supplying processed cheese, the Authority considers that there are two separate product markets: the market for natural cheese and the market for processed cheese.

Relevant Geographic Market

Submissions of the Undertakings Involved

8.29 As described in paragraphs 3.20-3.25 above, the parties submit that the geographic market for all of the product markets under review is at least the State.

8.30 In its response to the Assessment, the Compecon Response argues that the geographic market would appear to be wider than the State. In support of this view, Compecon notes that Kerry's processing plant for processed cheese slices is located in Northern Ireland.

Conclusion on the Relevant Geographic Market

8.31 The Authority considers that the relevant geographic market for both natural cheese and processed cheese is at least as wide as the State. The impact of imports is considered when examining the competitive impact of the proposed acquisition.

Natural Cheese

Market Structure

Introduction

8.32 Market structure can be characterised as the number and size distribution of firms. The initial impact of any merger is felt on market structure as two firms pre-merger become one firm post-merger. In this section, the pre- and post-acquisition market shares in the natural cheese market are considered.

Market Structure of the Natural Cheese Market

8.33 Table 8.1 below provides market share data for natural cheese. Kerry is the market leader with a [25-30]% share of the natural cheese market followed by Glanbia on [15-20]%, Breeo on [5-10]%, and Carbery on [5-10]%. The combined market share of private label sales is [30-35]%. Over the period 2005 to 2007, Kerry has steadily increased its market share while Breeo at first increased market share before declining. Private label shows little change in market share over the period captured by the table.

Table 8.1
Market Shares by Undertaking, Natural Cheese, Value, 2005-2007

Undertaking	**2005**	**2006**	**2007**
Kerry	[25-30]	[25-30]	[25-30]
Breeo	[5-10]	[15-20]	[5-10]
Glanbia	[20-25]	[15-20]	[15-20]
Kraft	[0-5]	[0-5]	[0-5]
Carbery	[0-5]	[5-10]	[5-10]
Fromagerie Bel	[0-5]	[0-5]	[0-5]
Dairycrest	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]
Private Label (incl. discounters)	[30-35]	[30-35]	[30-35]
Total	**100.0**	**100.0**	**100.0**

Source: Based on information provided by the parties

8.34 Table 8.2 gives estimates of HHIs for the natural cheese market.[114]

Table 8.2
Natural Cheese Market, HHIs, Pre- and Post-merger, 2007

Pre-Merger	**2397**
Post-Merger	**2786**
Change	**389**
Zone	**C**

Source: The Competition Authority

8.35 The change in the HHI places the proposed acquisition in Zone C of the Authority's *Merger Guidelines*. In other words, the natural cheese market post-merger would be defined as highly concentrated. It is more usually in such markets that mergers raise competition concerns.

[114] The Authority does not have individual market shares for each retailer's private label sales. Thus, the HHI figures will be overstated since all private label sales are treated as a combined unit. However, the classification of the proposed acquisition as a Zone C merger would not be affected even if individual market share data for each retailer's private label sales was available since the pre- and post-acquisition HHI can be no greater than those in Table 8.2.

Conclusion

8.36 The fact that a merger falls into Zone C does not necessarily mean that it will substantially lessen competition. As the Authority's *Merger Guidelines* point out, factors that affect whether a merger in Zone C will raise competition concerns include the closeness of competition and whether there are low barriers to entry. It is to these and other issues that attention is turned below.

Competitive Analysis

Closeness of Competition[115]

General Arguments of the Parties

8.37 The parties provide views in the notification on the competitive impact of the proposed acquisition for a broad cheese market. The parties state that there seems little likelihood that the proposed acquisition would create a dominant position in cheese despite the parties having a combined market share of around [35-40]%. The parties state that there are a number of strong competitors in the market in the form of retailers' private labels. The parties state that in addition to private labels, Glanbia and Kraft are significant players in the overall cheese market while Carbery has also established a significant presence through its Dubliner brand. The parties argue that the presence of a number of strong competitors combined with countervailing buyer power rules out the possibility of the merger establishing a dominant position.

8.38 The parties state that the cross price elasticities between Kerry and third party brands are around ten times greater than the cross price elasticities between Kerry and Breeo brands. The parties state that this clearly indicates that the main constraint on Kerry raising prices comes from third party brands which will not be affected by the proposed acquisition. However, for reasons set out in section two, the Authority prefers to rely on the econometric results of Dr. Walsh.

8.39 The parties state that these results are supported by the profile of the cheese market provided by Kerry marketing personnel. The parties state that Breeo's Mitchelstown brand is seen as operating in the low price/everyday end of the market in contrast to Kerry's Charleville brand which is at the higher price end of the market. The parties state that Tesco's own label range is seen as operating right across the spectrum. The parties state that the Calvita and Galtee brands are also declining which suggests that they do not represent a significant competitive constraint.

Views of the Competition Authority

Authority Survey of Retailers

8.40 In the Authority's survey of retailers, six out of nine retailers[116] indicated that it is essential to have brands in their product range for cheeses.[117]

[115] The term is defined in paragraph 3.46 above.
[116] Of the remaining three retailers, one gave an "N/A" response; one gave no response while one retailer indicated that "brands are not considered 'must have'". […].
[117] In its first survey of retailers, the Authority defined the term cheeses as including natural cheese and processed cheese.

8.41 The Authority sent a follow-up questionnaire to six out of the nine retailers.[118] All retailers indicated that they perceive the overall cheese segment to be divided into natural cheese and processed cheese. The Authority asked which brands are considered "must have" or "must carry" brands in natural cheese. Five retailers indicated that they consider Kerry's Charleville brand to be a "must have" brand in the natural cheese market. Four retailers indicated that they consider Glanbia's Kilmeaden brand to be a "must have" brand in the natural cheese market. Two retailers indicated that they consider Breeo's Mitchelstown brand to be a "must have" brand. Two retailers indicated that they consider Carbery's Dubliner brand to be a "must have" brand. Finally, one retailer indicated that it considers Kerry's Low-Low brand to be a "must have" brand.

8.42 Four out of six retailers indicated that they do not have any concerns about the impact of the proposed acquisition on the natural cheese market. The majority of retailers indicated that Breeo's Mitchelstown brand is weak in this market and would not be considered a "must have" brand. This is highlighted by the [0-5]% decline in Breeo's market share between 2006 and 2007.

8.43 In conclusion, retailers do not perceive Breeo to be a close competitor to Kerry in the natural cheese market.

<u>Review of Parties' Internal Documents</u>

8.44 The internal documentation provided by Kerry suggests that Kerry perceives private label to be a growing threat in the overall cheeses segment. In a document entitled "[…]", the following quote appears: "[…]".

8.45 In addition, the same document contains the following quote, "[…]".

8.46 From the perspective of Breeo, the following quote, which appears in a document entitled "[…]", illustrates the way in which Breeo perceives the competitive landscape in the natural cheese market: "[…]". In the same document, the following quote indicates how Breeo perceives its position in the natural cheese market: "[…]".

8.47 Furthermore, in a document provided by Breeo entitled "Information Memorandum prepared by Merrion for Breeo Foods Limited dated October 2007", the following quote appears in relation to the branded natural cheese market – "Mitchelstown maintained market share during the period, whereas the shares of two of its main competitors, Charleville and Avonmore, have fallen significantly".

8.48 In conclusion, it is clear that Breeo sees Kerry and Glanbia as its key competitors in the natural cheese market. However, there is no evidence to indicate that Breeo sees private label as a close competitor in the natural cheese market. In contrast, Kerry perceives private label to be a growing competitive threat in the natural cheese market.

Econometric Evidence

8.49 Dr. Walsh, whose results are presented in Table 2.10 above, found the following in the cheese segment:

[118] […] did not receive a follow-up questionnaire because it does not do business with either of the merging parties and has no opinion on the proposed acquisition, while […] and […] did not receive a follow-up questionnaire because they do not stock any of Kerry's or Breeo's branded products and have no concerns about the proposed acquisition.

- The own price elasticities for Kerry, Breeo and other brands are around unity;
- Brands of other third parties are closer substitutes to Kerry's brands than Breeo's brands. Likewise, brands of other third parties are closer substitutes to Breeo's brands than Kerry's brands; and
- These results suggest that other third party brands exert a somewhat greater competitive constraint on Kerry's brands and Breeo's brands, respectively.

8.50 Data was not available for processed and natural cheese separately.

Conclusion

8.51 The evidence strongly indicates that Breeo's Mitchelstown brand is not a close competitor to Kerry's Charleville brand. It is clear that the main competitive threat to Kerry in the natural cheese market is coming from Glanbia's Kilmeaden brand.

Entry

<u>Submissions of the Undertakings Involved</u>

8.52 The Compecon Report argues that entry barriers to the overall cheeses segment are relatively low, at least in the case of firms with an established brand name in other markets. Compecon cites as an example Kerry's Low-Low brand which only entered the cheese segment in 2005. Compecon cites Wexford as another example of recent entry, albeit one that has not been based on an existing successful brand in another related market. Finally, Compecon also cites Fromagerie Bel as an example of recent entry.

<u>Views of the Competition Authority</u>

8.53 As described above, it is essential for retailers to stock the "must have" brands in the natural cheese market. The Authority does not believe that a new entrant will be able to successfully establish a new natural cheese brand within two years. The two leading brands in the natural cheese market – Kerry's Charleville and Glanbia's Kilmeaden - are long-established and have gradually built up brand recognition amongst end consumers over a long period of time. The two examples of recent entry cited in the Compecon Report – Wexford and Fromagerie Bel – have negligible market share in the natural cheese market. Furthermore, it is significant that Carbery's Dubliner brand, which was launched in 1996, is only the number four brand in the natural cheese market with a market share of [5-10]%.

Expansion and Capacity

8.54 Expansion of non-merging firms in a market may also constrain the ability of the merged entity to raise prices post-merger. Expansion in turn is linked to the issue of whether the non-merging firms can expand capacity.

8.55 Given that Glanbia is the closest competitor to Kerry in the natural cheese market, the issue of whether Glanbia will be in a position to expand capacity post-acquisition is important. There is no evidence to indicate that Glanbia will not be in a position to expand capacity. Glanbia is a large company and it supplies a range of food products to the grocery sector in the State.

Buyer Power

8.56 The Compecon Report argues that retailers have sufficient countervailing buyer power to resist any attempted price increase by the merged entity.

8.57 Kerry's closest competitor in the natural cheese market is Glanbia's Kilmeaden brand. In contrast, Breeo's Mitchelstown brand is a distant competitor to Kerry. The degree of countervailing buyer power currently exerted by retailers will remain unchanged post-acquisition since Glanbia will remain a credible alternative brand in the natural cheese market.

Conclusions

8.58 The factors listed below lead the Authority to conclude that the proposed transaction will not result in a unilateral permanent price rise by the merged entity in the market for natural cheese. Thus, the Authority is of the opinion that the proposed transaction will not result in a substantial lessening of competition in the market for natural cheese in the State.

- Although the HHI results place the proposed acquisition in Zone C of the Authority's *Merger Guidelines*, Breeo is a distant competitor to Kerry in the natural cheese market;

- The merger will see the first ranked undertaking in terms of market share, Kerry on [25-20]%, acquire the third ranked firm, Breeo on [5-10]%. However, in 2007 the fourth ranked firm, Carbery had a market share of [5-10]%;

- Glanbia's Kilmeaden brand is the closest competitor to Kerry in the natural cheese market with a market share of [15-20]%;

- The majority of retailers indicated that Kilmeaden is a "must have" brand; and

- The extent to which retailers can credibly threaten to discipline the merged entity post-acquisition will be unaffected by the proposed acquisition.

Processed Cheese

Market Structure

Market Structure of the Processed Cheese Market

8.59 Table 8.3 below provides market share data for processed cheese by value for 2005 to 2007.

Table 8.3
Market Shares by Undertaking, Processed Cheese, Value, 2005-2007

Undertaking	**2005**	**2006**	**2007**
Kerry	[30-35]	[30-35]	[35-40]
Breeo	[20-25]	[20-25]	[15-20]
Kraft	[15-20]	[20-25]	[15-20]
Fromagerie Bel	[10-15]	[10-15]	[10-15]
Hochland	[0-5]	[0-5]	[0-5]
Glanbia	[0-5]	[0-5]	[0-5]
Others	[0-5]	[0-5]	[0-5]
Private Label (incl. discounters)	[5-10]	[10-15]	[10-15]
Total	**100.0**	**100.0**	**100.0**

Source: Based on information provided by the parties.

8.60 Kerry is the market leader with a [35-40]% share of the processed cheese market followed by Breeo on [15-20]%, Kraft on [15-20]%, and Fromagerie Bel on [10-15]%. The combined market share of private label sales is only [10-15]%, up from [5-10]% in 2005. While Kerry has increased its market share steadily over the period 2005 to 2007, Breeo experienced a decline from [20-25]% to [15-20]%.

8.61 Table 8.4 gives estimates of HHIs for the processed cheese market.[119]

Table 8.4
Processed Cheese Market, HHIs, Pre- and Post-merger, 2007

Pre-Merger	**2254**
Post-Merger	**3636**
Change	**1382**
Zone	**C**

Source: Competition Authority

8.62 The change in the HHI places the proposed acquisition in Zone C of the Authority's *Merger Guidelines*. The results show that the transaction would fall within Zone C as defined by the Authority *Merger Guidelines*. In other words, the processed cheese market post-merger would be defined as highly concentrated. It is more usually in such markets that mergers raise competition concerns.

Competitive Analysis

Introduction

8.63 This section analyses the market characteristics that are likely to prove decisive in deciding whether or not the proposed acquisition will lead to a significant lessening of competition.

Closeness of Competition

General Arguments of the Parties

8.64 The parties present views on the competitive impact of the proposed acquisition for the cheeses segment as whole encompassing both natural and processed cheese. These views are summarised in paragraphs 8.37 to 8.39 above.

8.65 In their Written Submission in response to the Assessment, the parties argue that private label cheese products are in direct competition with branded cheese products and constitute a real competitive constraint post-acquisition. The parties note that private label cheese accounted for [30-35]% of the total cheese market by value in the State in 2007. Referring to the view expressed in the Assessment that private label with a market share of only [10-15]% of the processed cheese market, does not offer a credible alternative to the brands of the merged entity the parties state that the market share of private label in a segment which is not the proper product market is an inappropriate criterion for determining whether private label could constitute an adequate competitive constraint post-acquisition.

8.66 The parties state that even if one was to accept the product market defined in the Assessment, a [10-15]% share puts private label – treated as a single group - at

[119] The Authority does not have individual market shares for each retailer's private label sales. Thus, the HHI figures will be overstated since all private label sales are treated as a combined unit. However, the classification of the proposed acquisition as a Zone C merger would not be affected even if individual market share data for each retailer's private label sales was available since the pre- and post-acquisition HHI can be no greater than those in Table 8.5.

fifth place in the market which is significant. The parties note that Customer D informed the Authority that "the consumer wants a choice of branded and own brand products". The parties state that this is not quoted in the Assessment, yet it shows that private label represents a genuine competitive constraint.

8.67 The parties state that if one were to accept that processed cheese slices was a separate segment of the market, recent AC Nielsen data indicates that the market share of private label for processed cheese slices stands at [25-30]%. The parties further state that data shows that more [retailer] shoppers buy [retailer] branded processed cheese than buy either of the parties' brands. Data also shows that promotional activity results in switching between the [retailer] brand and the parties' brands.

8.68 The parties state that the strength of private label is further supported by the views of competitors: two out of three competitors indicated in their responses to the Authority that private label cheese was prevalent and growing while Customers C and D listed their own-label cheese as must-have brands.

8.69 The parties note that [70-100]% of Kerry sales of cheese are to the multiples/symbol groups which demonstrate that Kerry is hugely dependent on the retailers.

Views of the Competition Authority

<u>Authority Survey of Retailers</u>

8.70 As stated in paragraph 8.40 above, in the Authority's survey of retailers, six out of nine retailers indicated that it is essential to have brands in their product range for cheeses.

8.71 The Authority sent a follow-up questionnaire to these six retailers. In addition to listing the brands that are considered "must haves" by retailers, it is useful to examine in some detail the specific responses of retailers regarding their perception of the processed cheese market.

8.72 One retailer indicated that it perceives the processed cheese market to be divided into two categories: sliced processed cheese and processed cheese snacks. The retailer indicated that the former category accounts for approximately 80% of total sales by value in processed cheese. In sliced processed cheese, Kerry's Easisingles brand and Breeo's Calvita and Galtee brands are considered by the retailer to be the "must have" brands. The retailer is concerned about the impact of the proposed acquisition in sliced processed cheese because there will be no credible alternative to the merged entity's brands post-acquisition. Finally, the retailer indicated that Kraft's Dairylea brand is a strong brand in processed cheese snacks.

8.73 One retailer indicated that it perceives the processed cheese market to be divided into three categories: (a) processed cheese singles – sales in this category would represent approximately 50% of total sales by value in processed cheese; (b) processed cheese snacks – the retailer described this as on-the-go, convenience food, and (c) spreadable processed cheese – this is a small part of the processed cheese segment. The retailer indicated that within the processed cheese singles category, there are two "must have" brands: Kerry's Easisingles and Breeo's Mitchelstown brand. The retailer is very concerned about this segment of processed cheese because post-acquisition there will be no credible alternative brands to the merged entity's brands. The retailer further indicated that neither Kraft nor Fromagerie Bel are credible alternatives because neither have a singles processed cheese offering. With respect to processed cheese snacks, the retailer indicated that there are two key brands – Kerry's cheese strings and Kraft's Dairylea. The retailer is not concerned about this category because post-acquisition Kraft's Dairylea brand will continue to be a strong competitor to Kerry's cheese strings.

8.74 Another retailer indicated that there are four "must have" brands in processed cheese: Kerry's Easisingles, Kerry's cheese strings, Breeo's Calvita, and Breeo's Galtee. The retailer is concerned about the impact of the proposed acquisition because there are no alternative branded suppliers. The retailer indicated that Kraft's Dairylea brand has been in decline in recent years while the Philadelphia brand is aimed at adults and, therefore, does not compete closely with the four "must have" processed cheese brands. Finally, the retailer indicated that Fromagerie Bel's Mini Babybel brand is limited to […] skus and, therefore, is not considered to be a credible alternative to the brands of the merged entity.

8.75 Finally, one retailer indicated that it has no concerns with the proposed acquisition. The retailer explained that the processed cheese market is divided into two categories: (a) standard processed cheese, and (b) processed cheese snacks. With respect to standard processed cheese, the retailer indicated that Breeo's Calvita and Galtee are the "must have" brands. The retailer indicated that the standard processed cheese category is in decline and, as a result, if there was no merger between Kerry and Breeo it is likely that there would be consolidation in this category in the future. With respect to processed cheese snacks, the retailer that the two key brands are Kerry's cheese strings brand and Kraft's Dairylea brand. The retailer is not concerned about this category as Kerry will continue to compete strongly against Kraft post-acquisition.

8.76 As described in paragraph 8.66 above, the parties note that [retailer] and [retailer] informed the Authority that their private label cheese products are must-have brands. However, [retailer] only sells […]. Furthermore, Customers A and E informed the Authority that private label represents a very small share of the processed cheese market while Customer B never mentioned private label when providing its views to the Authority regarding the processed cheese market.

8.77 In conclusion, it appears that the processed cheese market is segmented into standard/sliced processed cheese, processed cheese snacks, and processed cheese spreads. A majority of retailers are concerned about the impact of the proposed acquisition on the standard/sliced processed cheese segment which accounts for the majority of sales in the processed cheese market. In this segment, the merged entity's brands are the "must have" brands and, post-acquisition, it does not appear that alternative brands exist that can be used by retailers to discipline the merged entity.

<u>Authority Survey of Competitors</u>

8.78 The Authority sent a questionnaire to Competitor 20 […].[120] Competitor 20 stated in its response to the questionnaire that it has no concerns with the proposed acquisition. However, Competitor 20 provided no explanation as to why it has no concerns. In addition, Competitor 20 did not indicate in its response to the Authority which brands it considers to be the leading brands in the processed cheese market.

8.79 As described in paragraph 8.68 above, the parties point out that two out of three competitors indicated in their responses to the Authority that private label cheese was prevalent and growing. However, these two competitors were referring solely to the natural cheese market when making their comments regarding the growth of

[120] The Authority subsequently sent a questionnaire to Competitor 20 […] whose views are detailed in paragraph 8.92 below.

private label cheese products. As can be seen in Table 8.1 above, private label accounted for [30-35]% of the natural cheese market in 2007.

Review of Parties' Internal Documents

8.80 Kerry describes its Easisingles processed cheese brand as follows in a document entitled "[…]" – "[…]."

8.81 Breeo describes its Calvita processed cheese brand as follows in a document entitled "[…]" – "[…]."

8.82 Thus, it appears that Kerry and Breeo are the two leading brands in the processed cheese market. However, the internal documentation does not provide much insight into closeness of competition in the processed cheese market.

Econometric Evidence

8.83 Dr. Walsh presents econometric results for the overall cheese segment, incorporating natural and processed cheese. However, no results are available for processed cheese. Thus, the econometric analysis provides no indication on closeness of competition in the processed cheese market.

Conclusion

8.84 The evidence indicates that Kerry and Breeo are each other's closest competitor in the standard/sliced processed cheese segment of the processed cheese market.

Entry/Expansion

Submissions of the Undertakings Involved

8.85 The parties state in the notification that it could be argued that barriers to entry are higher in the processed cheese market than in the natural cheese market. The parties argue that it would not be necessary for a new entrant to establish manufacturing facilities in Ireland and incur those sunk costs in order to enter the processed cheese market in the State. The parties state that this is evidenced by Breeo's business model where the latter supplies the Irish market by buying processed cheese from overseas producers.

8.86 In the parties' Written Submission, it is stated that new entrants would be able to establish a sufficiently strong presence in the processed cheese market within a two-year period following the proposed acquisition such that they would be able to constrain the merged entity from raising prices post-acquisition.

8.87 The parties note the Assessment's contention that neither Kraft nor Fromagerie Bel are credible alternatives to Kerry's Easisingles and Breeo's Mitchelstown brand because neither have a singles processed cheese offering. The parties state that the Assessment fails to consider the ease with which either of these two companies might expand into a singles range. The parties state that there is no indication that extending existing processed cheese production to new processed cheese products would present any significant difficulty. The parties note that the Assessment states that both Kraft and Fromagerie Bel would be able to expand production of their processed cheese product range within a two-year period.

8.88 The parties state that […] indicated to the Authority that it has capacity to expand production but this is not mentioned in the Assessment.

8.89 The parties identify four global players which have sufficient scale to enter the market in a timely, likely and sufficient manner. These players are Kraft, Fromagerie Bel, Hochland, and Lactalis. The parties state that these players share a number of features: they already have existing relationships with retailers based on the global nature of cheese supply; they have an existing product portfolio and brands that require no modification or adaptation for the Irish market; and they have an existing sales infrastructure. The parties argue that should Irish retailers want to facilitate entry or expansion of these players in the future, these operators would be able to enter almost overnight.

<u>Views of the Competition Authority</u>

8.90 The Authority's *Merger Guidelines* require the following three requirements to be met for entry to be able to constrain the merged entity from raising prices post merger:

- Entry must be timely – entry is considered timely only if it occurs within two years;
- Entry must be likely – in other words, entry must be profitable at existing (or lower) prices; and,
- Entry must be sufficient – entry must return prices to their pre-merger levels. For this to happen, entry must occur on a sufficient scale.

8.91 In other words, for entry to be a constraint on the ability of the merged entity to raise price post-acquisition, entry must be timely, likely and sufficient. The Authority now examines whether the entry of […] or […] into the slices segment of the processed cheese market will constrain the merged entity from raising prices post-acquisition.

Competitor 20

8.92 Competitor 20 currently supplies processed cheese […] under the […] brand and processed cheese […] under the […] brand. Competitor 20 does not currently supply processed cheese slices in the State. Competitor 20 informed the Authority of the following[121]:

- Competitor 20 currently sells processed cheese slices in […] under the […] brand;
- Competitor 20 introduced the […] brand (including processed cheese slices) in the State approximately […] years ago but it was discontinued due to poor sales;
- Competitor 20 has no plans to expand its cheese business in the State;
- Competitor 20 would supply processed cheese slices if approached by a multiple and it has the capacity to supply slices in the State; and,
- Competitor 20's […] has been declining in popularity in recent years […].[122]

8.93 Customers [..], [..], and [..] informed the Authority that Competitor 20 is not a credible alternative to the merging parties' brands in the slices segment of the

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[121] As noted in paragraph 8.78 above, the Authority originally sent a questionnaire to Competitor 20 […] and subsequently sent a questionnaire to Competitor 20 […].
[122] Customer [..] expressed similar views to the Authority.

processed cheese market. Customers [..], [..], and [..] informed the Authority that they have never approached Competitor 20 to sell processed cheese slices in the State nor vice versa. Customer [..] is not sure whether it has approached Competitor 20 to sell processed cheese slices in the State or vice versa. Customer [..] informed the Authority that:

> demand is likely to be limited as these [Competitor 20's] brands have insufficient presence and awareness amongst Irish consumers currently to make them serious competitors in the market.

8.94 The Authority considers that the entry of Competitor 20 in the slices segment of the processed cheese market will be timely and likely but it will not be sufficient to "…return prices to their pre-merger levels…it also requires entry to be sufficiently responsive to localised sales opportunities created by removal of direct competition among sellers of differentiated products".[123] End consumers will not switch to Competitor 20 processed cheese slices in sufficient numbers within a two-year period to render a price rise unprofitable for the merged entity. Given the current decline in popularity of the […] in the processed cheese […] segment in the State and the fact that Competitor 20 was unsuccessful in establishing a foothold in the slices segment […] years ago in the State, the Authority does not believe that Competitor 20 will be successful in building brand awareness/loyalty amongst end consumers through advertising within a two-year period.

Competitor 19

8.95 Competitor 19, […], currently supplies processed cheese […] in the State under the […] brand. Competitor 19 does not currently supply processed cheese slices in the State. Competitor 19's […] informed the Authority that Competitor 19 considered supplying processed cheese slices in the State three years ago but decided against this for cost reasons. […] explained that as Competitor 19 does not sell slices in the United Kingdom, it did not make economic sense from the perspective of packaging costs to only supply the State and not the United Kingdom market.

8.96 As with Competitor 20, Customers [..], [..], and [..] informed the Authority that Competitor 19 is not a credible alternative to the merging parties' brands in the slices segment of the processed cheese market.[124] Customers [..], [..], and [..] informed the Authority that they have never approached Competitor 19 to sell processed cheese slices in the State nor vice versa. Customer [..] is not sure whether it has approached Competitor 19 to sell processed cheese slices in the State or vice versa.

8.97 The Authority considers that the entry of Competitor 19 in the slices segment of the processed cheese market will neither be timely, nor likely given the views set out above concerning previous considerations given to entering slices in the State. The Authority also considers that Competitor 19's entry would not be sufficient to "…return prices to their pre-merger levels".[125] The Authority considers that end consumers will not switch to Competitor 19 processed cheese slices in sufficient numbers within a two-year period to render a price rise unprofitable for the merged entity. Given the doubts expressed by some retailers about the strength of the Competitor 19 brand in the […] segment of the processed cheese market, the Authority does not believe that Competitor 19 will be successful in building brand

[123] Competition Authority *Merger Guidelines*, paragraph 5.5.
[124] Customers [..] and [..] also raised doubts about the strength of the Competitor 19 brand in the […] segment of the processed cheese market. Customer [..] informed the Authority that "…Competitor 19 is limited to […] for the […]" while Customer [..] informed the Authority that "…Competitor 19 is not a significant competitor in Snacks".
[125] Competition Authority *Merger Guidelines,* paragraph 5.5.

awareness/loyalty amongst end consumers through advertising within a two-year period.

8.98 In conclusion, the Authority does not believe that a new entrant will be able to successfully establish a new processed cheese slices brand within two years such that the merged entity will be constrained from permanently raising the price of processed cheese slices post-acquisition.

8.99 Expansion of non-merging firms in a market may also constrain the ability of the merged entity to raise prices post-acquisition. Expansion in turn is linked to the issue of whether the non-merging firms can expand capacity. In each instance, the same timely, likely and sufficient criteria outline above in paragraph 8.90 for entry are applied. The Authority now examines whether the expansion of Competitor 23 or Competitor 21 in the slices segment of the processed cheese market will constrain the merged entity from raising prices post-acquisition.

Competitor 23

8.100 Competitor 23 had a [0-5]% share of the processed cheese market in 2007. Competitor 23 informed the Authority of the following:

- Competitor 23 commenced selling processed cheese slices in the State in […];
- Competitor 23 supplies processed cheese slices to all the large retailers in the State with the exception of […];[126]
- Competitor 23 has grown "…year on year & have built up a loyal following"; and,
- Competitor 23's processed cheese slices offering is a value brand as distinct from a premium brand.

8.101 No retailer indicated to the Authority that it considers Competitor 23's processed cheese slices offering to be a "must have" brand in the processed cheese market. Customer […] informed the Authority that within the last four years, it has stocked processed cheese slices from Competitor 23 but it does not currently stock any processed cheese from Competitor 23 as a result of its bi-annual category review process. Customer […] also informed the Authority that Competitor 23 has proposed [...] new processed cheese slices products which Customer […] will consider at its next category review. With respect to Competitor 23, Customer […] informed the Authority that

> these [Competitor 23] brands do not have sufficient presence in the market currently so demand and commercial viability are likely to be limited.

8.102 Customer […] informed the Authority that it used to stock Competitor 23 natural cheese slices but does not do so any more due to poor sales performance. Customer […] has never stocked Competitor 23 processed cheese slices. Customers […] and […] indicated to the Authority that they both stock Competitor 23 processed cheese slices. Customer […] informed the Authority that this decision was taken "…in response to the discounters".

[126] This was confirmed by both customers. Customer […], however, informed the Authority that it used to stock Competitor 23 natural cheese slices but not any more due to poor sales performance. Customer […] indicated that it has never stocked Competitor 23 processed cheese slices.

8.103 The Authority considers that the expansion of Competitor 23 in the slices segment of the processed cheese market will be timely and likely but it will not be sufficient to "…return prices to their pre-merger levels".[127] The Authority considers that end consumers will not switch to Competitor 23 processed cheese slices in sufficient numbers within a two-year period to render a price rise unprofitable for the merged entity. Given the doubts expressed by Customer […] about the strength of the Competitor 23 processed cheese brand and Customer […]'s de-listing of Competitor 23's natural cheese slices offering, the Authority does not believe that Competitor 23 will be successful in building brand awareness/loyalty amongst end consumers through advertising within a two-year period. In this regard, it is also significant that despite being active in the processed cheese market for [>2] years, Competitor 23 has a minimal share of the processed cheese market ([…]%) with […] growth over the period 2005-2007 (see Table 8.3 above).

Competitor 21

8.104 Competitor 21 sells processed cheese slices in the State […]. […], Competitor 21 had a negligible share of the processed cheese market in 2007. Only one customer (Customer […]) indicated to the Authority that it stocks Competitor 21 processed cheese slices offering. With respect to Competitor 21, Customer […] informed the Authority that

> these [Competitor 21] brands do not have sufficient presence in the market currently so demand and commercial viability are likely to be limited.

8.105 Customer […] informed the Authority that

> We reviewed [Competitor 21] processed cheese proposals in […] of this year [2008] and concluded there was not sufficient market for their proposals.

8.106 As with Competitor 23, the Authority considers that end consumers will not switch to Competitor 21 processed cheese slices in sufficient numbers within a two-year period to render a price rise unprofitable for the merged entity. In conclusion, the Authority considers that the expansion of Competitor 21 in the slices segment of the processed cheese market will not be sufficient to "…return prices to their pre-merger levels".[128]

Imports

8.107 The parties argue that imports impose a strong competitive constraint in the overall cheeses segment. The parties cite the presence of […] and […] as examples.

8.108 As explained in paragraphs 8.92-8.99 above, the Authority does not believe that Competitor 20 or Competitor 19 will constrain the merged entity from permanently raising the price of processed cheese slices in the processed cheese market post-acquisition.

Buyer Power

8.109 The Compecon Report argues that retailers have sufficient countervailing buyer power to resist any attempted price increase by the merged entity. The Compecon

[127] Competition Authority *Merger Guidelines,* paragraph 5.5.
[128] Competition Authority *Merger Guidelines*, paragraph 5.5.

Report also argues that retailers have the option of de-listing certain brands rather than a supplier's entire cheeses range in response to any attempt to raise price.

8.110 In the parties' submission, it is stated that [70-100]% of Kerry's sales of processed cheese is to multiples/symbol groups and a similar proportion accounts for Breeo's sales to the multiples/symbol groups. The parties argue that the multiples/symbol groups will continue to exercise countervailing buyer power following the proposed acquisition and will react to any attempted price increase by the merged entity by supporting entry or re-positioning any of the major global brands who could easily enter the market.

8.111 As explained in paragraph 2.35, retailers have numerous bargaining strategies and levers at their disposal. Given that retailers wish to maximise profits, there is no reason to believe that retailers are holding any of these strategies in reserve. However, post-acquisition, retailers will have less leverage with the merged entity as they will not be able to play Breeo off against Kerry or vice versa. In effect, there will be price increases that retailers may have been able to resist pre-merger that they will not be able to resist post-acquisition.

8.112 Retailers' countervailing buyer power (bargaining leverage) post-acquisition will depend upon the options available to them. As explained above, there will be no credible alternative processed cheese slices brands available to retailers should the merged entity permanently raise the price of their processed cheese slices offering. The fact that retailers may decide to offer (increased) shelf space to alternative suppliers such as Kraft, Fromagerie Bel, Hochland or Lactalis is irrelevant since end consumers will not switch to these processed cheese slices brands in sufficient numbers within a two-year period to render a price rise unprofitable for the merged entity.

8.113 In conclusion, the Authority considers that the degree of countervailing buyer power exerted by retailers will decline post-acquisition.

Conclusions

8.114 The Authority is of the view that the proposed acquisition of Breeo by Kerry will result in a unilateral price increase by the merged entity.

- The HHI results place the proposed acquisition in Zone C of the Authority's *Merger Guidelines* meaning that the processed cheese market would be defined as highly concentrated and more liable to raise competition concerns;

- The proposed merger would see the leading firm by market share, Kerry on [35-40]% acquire the second ranked firm by market share, Breeo on [15-20]%;

- Post-acquisition, Kerry and Breeo will account for [55-60]% of the processed cheese market;

- The processed cheese market may be segmented by: (a) processed cheese slices; processed cheese snacks; and, processed cheese spreads;

- Evidence from retailers indicates that Kerry and Breeo's brands are each other's closest competitor in the slices segment of the processed cheese market. This segment accounts for approximately 40% of total sales in the processed cheese market;

- There are no credible alternative brands in the slices segment of the processed cheese market that will enable retailers to constrain the merged entity from permanently raising prices post-acquisition. The expansion of non-merging firms such as Hochland and Lactalis will not be sufficient to constrain the merged entity from permanently raising the price of processed cheese slices post-acquisition;

- New entrants such as Kraft or Fromagerie Bel will be unable to establish a sufficiently strong presence in the slices segment of the processed cheese market within a two-year period such that they will be able to constrain the merged entity from permanently raising the price of processed cheese slices post-acquisition;

- Private label processed cheese sales accounts for only [10-15]% of the processed cheese market and is not considered by retailers to be a close competitor to Kerry or Breeo's processed cheese products; and

- Retailers will be unable to credibly threaten to discipline the merged entity post-acquisition since (a) there are no credible alternative branded processed cheese slices suppliers, (b) entry of branded processed cheese slices will not be sufficient within a two-year period, and (c) private label processed cheese is not considered a close competitor in the market and, thus, cannot be used to replace the merged entity's processed cheese slices offering.

8.116 In consequence of the foregoing, the Authority is of the opinion that the proposed acquisition will result in a substantial lessening of competition in the market for processed cheese in the State.

SECTION NINE: EFFICIENCIES

Introduction

9.1 In this section, the Authority considers whether the efficiencies that the parties claim will occur as a result of the proposed acquisition are sufficient to outweigh any anticompetitive effects of a substantial lessening of competition that will occur as a result of the merger.

9.2 The Authority employs a net price test in evaluating efficiencies. According to the *Merger Guidelines*, "An increase in the price cost margin resulting from a merger may be compensated by a reduction in the cost that leaves the eventual market price unchanged or lower." (paragraph 5.9).

Submissions of the Undertakings Involved

9.3 The Compecon Report provides estimates of the efficiency gains that are likely to flow from the merger. These efficiency gains are divided into three categories: purchasing; production costs; distribution costs. These savings are estimated to amount to €[…] per year.

9.4 In terms of *purchasing cos*ts, […] Compecon state that

9.5 On *production costs*, the Compecon Report argues that […]

9.6 […]

9.7 […]

9.8 […]

9.9 In terms of *distribution*, the Compecon Report argues that […]

9.10 […]

9.11 […]

9.12 […]

9.13 […]

9.14 […]

9.15 The overall pattern of savings summarised in Table 9.1 below is reproduced from the Compecon Report.

Table 9.1
Kerry Estimates of Variable Cost Reductions Due to the Proposed Transaction, by Market and Source

Product	Purchasing	Production	Other/Misc. including Distribution		Total
	€m	€m	€m	€m	€m
Spreads	[…]	[…]	[…]	[…]	[…]
Cheese	[…]	[…]	[…]	[…]	[…]
Rashers	[…]	[…]	[…]	[…]	[…]
Sausage	[…]	[…]	[…]	[…]	[…]

Sliced Meats	[...]	[...]	[...]	[...]	[...]
Pudding	[...]	[...]	[...]	[...]	[...]
Unspecified	**-**	**-**	[...]	-	[...]
Total [%]	**[18%]**	**[22%]**	**[60%]**		**[100%]**

Note: (i) Other consists of €[…] in other marginal costs and €[…] savings from automation. It was not possible to allocate these amounts to individual product categories; and (ii) the total for spreads is […] and not as in the source […].
Source: Compecon Report (Table 9.1, p. 105).

9.16 Compecon argues that the efficiency savings are for the most part merger specific, e.g. purchasing and distribution savings. Although pure scale economies might not be considered merger specific, the fact that the increased volumes arising from the merger would justify Kerry investing in more efficient plant such savings should also be taken into account. This would also bring forward these efficiency gains.

Authority Investigation

Merger Guidelines

9.17 The Authority's *Merger Guidelines* set out the framework within which the Authority considers efficiencies. Certain efficiencies may be considered. These include savings related to purchasing processes and those that occur because of technology transfer.

9.18 There are, however, certain other efficiencies that are not considered. These include input price reductions related to buyer power and efficiencies related to economies of scale and scope that do not involve marginal cost reductions. It is only reductions in marginal cost that will feed through to price reductions, and hence less weight is attached to changes in fixed costs.

9.19 The burden of demonstrating efficiencies rests with the parties. They are required to show, according to paragraph 5.16 of the Authority's *Merger Guidelines*, that any efficiencies:

- Must be directly achieved by the merger;
- Cannot be achieved by another less restrictive (of competition) means; and,
- Will be achieved within a reasonable timeframe and with sufficient likelihood.

9.20 Finally, it should be noted that the Authority's *Merger Guidelines* state that:

> … the parties must demonstrate what incentives the merged firm would have to realise efficiencies where rivalry has been lessened. Given the incentives of the parties to put efficiencies in the most optimistic light, it is necessary that efficiency gains claimed are clearly verifiable, quantifiable, and timely. (paragraph 5.16).

These conditions are now applied to the estimates of efficiencies provided by the parties.

Are the Claimed Efficiencies Verifiable?

9.21 As noted above, the efficiency gains of the parties must be verifiable. This, in turn, implies that there is evidence to support the existence and magnitude of the claimed efficiencies.

9.22 The International Competition Network ("ICN"), which develops and disseminates recommended best practice guidelines in competition policy, set out in the *ICN Merger Guidelines Workbook* what evidence might constitute in the context of efficiencies:

> The **evidence** of the claimed efficiencies is normally solely in the possession of the merging parties. Such evidence may include internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and pre-merger external experts' studies on the type and size of efficiency gains. (paragraph F.12, emphasis in original).[129]

The Commission takes a similar position in its *Horizontal Merger Guidelines* (paragraph 88).[130]

9.23 The Authority, in its request for information referred to in section one above, requested from the parties all studies, presentations and documents associated with the merger. Despite receiving voluminous material, only one four page document, "Acquisition efficiencies rough work", related to the claimed efficiencies that were expected to flow from the merger. It is unclear, however, what role, if any, this undated document played in the merger itself. In any event, the document forms the basis for the treatment of efficiencies in the Compecon Report.

9.24 Both the Written Submission of the parties and the Compecon Response dispute the Assessment's conclusion that "there is little evidence with which to verify the claimed efficiencies". The submission states that the Compecon Report detailed clearly the efficiencies flowing from the proposed transaction. The submission argues that this was supported by a number of documents [created pre-notification] that were furnished to the Authority in response to the request for information.[131] These documents are:

(i) […]

(ii) […]

(iii) […]

(iv) […]

(v) [...]

(vi) [...]

(vii) […]

(viii) Acquisition efficiencies rough work.

Many of these documents relate to the profit, sales, and margin expectations that Kerry has going forward. Several observations can be made about these documents.

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[129] ICN (2006) *ICN Merger Guidelines Workbook.* Merger Working Group: Investigation and Analysis Subgroup. Prepared for the Fifth Annual ICN Conference in Cape Town. April. The Authority and the UK Office of Fair Trading were co-chairs of the Merger Working Group. The Workbook may be accessed *at:* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMergerGuidelinesWorkbook.pdf

[130] Commission (2004) *Guidelines on the assessment of horizontal mergers* under the Council Regulation on the control of concentrations between undertakings Official Journal C 31, 05.02.2004, p. 5-18.. These will be referred to as the Horizontal Merger Guidelines. They may be accessed at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205(02):EN:NOT

[131] This request is referred to in paragraph 9.23 above.

9.25 First, as stated in the Written Submission, these documents were provided in response to the Authority's request for information. The request referred specifically to documents relating to improved efficiencies, synergies and cost savings. Second, the Written Submission states, correctly, that only one of these documents specifically refers to efficiencies in its title (i.e, viii as referred to in the previous paragraph). Nevertheless, the submission states that the documents provide the background to the efficiencies claimed. Third, the Written Submission states that where Kerry acquires a firm, it would examine what the business being acquired is worth to Kerry and what are the expectations in terms of one off costs of integration and what would be added in terms of operating profit. The Written Submission argues that the supporting documents referred to clearly demonstrate Kerry's expectations in terms of operating profit.

9.26 The Written Submission further states at paragraph 13.7 that:

> The level of synergies/efficiencies that are expected to be generated by the proposed transaction was set out in "[..]" dated […] and other supporting documents in particular, the document entitled "Acquisition efficiencies rough work."

"[…] sets out the financial performance expected of the merged entity and the key assumptions in the branded meats and dairy sectors (e.g., "[…]"). The "Acquisition efficiencies rough work" contains estimates of the expected efficiencies in terms of production raw materials, labour production costs for breakfast and cooked meats, product rationalisation for […], production variable costs for breakfast and cooked meats and so on. It is these detailed estimates that are set out in the Compecon Report and which are described in paragraphs 9.3 to 9.16 above.

9.27 The Authority has very carefully examined the set of eight documents referred to by the parties and listed in paragraph 9.24 as underlying the efficiency claims. Apart from the "Acquisition efficiencies rough work" document to which the Authority made reference to in its Assessment, the remaining documents contain little or no additional information on the claimed efficiencies of the merger.

9.28 In order to assist the Authority in coming to a view on this issue, the Authority commissioned an independent accounting adviser to review the above documentation. The adviser advised the Authority that:

> The Notifying Parties have said that the efficiencies are covered in detail in Section 9 of the Compecon Report and by a number of documents supplied by Kerry to TCA [the Competition Authority] on 1 May 2008 in response to Question 2 of the Request for Information from the Authority dated 16 April 2008 (which were included in Annex 12 to the written submission).
>
> In relation to the documents supplied in Annex 12 of the submission, the only substantive detail provided on the efficiencies is entitled "Acquisition efficiencies rough work". This particular document is supported by section 9 of the Compecon Report.

9.29 The Authority thus sees no reason to change its view that there is only one short document, "Acquisition efficiencies rough work", that is related to the claimed efficiencies that were expected to flow from the merger.

9.30 In Annex 13 to the Written Submission, the parties do, however, provide some additional information relating to efficiencies.[132] A very short case study is presented

[132] "[…]."

of Kerry's […] acquisition of […]. The efficiencies are divided into several categories, including:

- […] production costs;
- Distribution costs;
- Raw material savings;
- Elimination of distributors admin & regional management team; and,
- Move from agents owned vans.

Furthermore, the savings were typically realised within […] months and sometimes sooner. Annex 13 states that since many of the key Kerry Foods Ireland senior management team who were responsible for the […] acquisition are still in place, it means that Kerry is well placed to realise the claimed Breeo efficiencies within a […]-month timescale with a worst case scenario of […] months.

9.31 It is undoubtedly the case that Kerry's previous experience in incorporating acquired businesses should increase the precision and reliability of estimated efficiencies in the current merger.

9.32 The submission also states that in Kerry's experience the actual efficiencies realised tend, if anything, to be higher than those expected. However, in order for this claim to be substantiated, the parties would have had to present ex-ante as well ex-post efficiency estimates of past mergers in which it was involved. Such documentation was not presented. The onus is on the parties to substantiate any claimed efficiencies.

Are the Claimed Efficiencies Quantified?

9.33 The parties in the Compecon Report quantify the claimed efficiencies that flow from the merger. However, the estimates are almost certainly biased upwards.

9.34 The €[…]saving from […] *production* […]. To the extent that the price paid to the outside supplier includes a contribution to their overheads, this means that the saving would be overstated. This reflects the emphasis in the Authority's *Merger Guidelines* (paragraph 5.13) on variable as opposed to fixed cost savings.

9.35 The cost of the proposed […] investment should be deducted from the €[…] savings it yields, since the savings should be on a net basis not gross.

9.36 With respect to €[…] saving in [other/misc. including distribution] through logistical savings […]. The net saving to the merged entity is likely smaller than the running cost of […]. The saving on […] depends on everything remaining as it is post-merger. If some customers change their sources of supply (for example, so that they still have three suppliers post-merger), then the merged entity may not be able to retain all Breeo's existing business post-merger.

9.37 It is not clear what are the "associated finance and administration savings from […]". If this cost is incurred at the corporate level, it may be an unallocated cost and it would not necessarily be saved […]. In other words, it may not be possible to realise the savings. For example, there may be 1 accounting staff person and it might not be possible to reduce that to 0.9 staff person.

9.38 The parties in their Written Submission dispute the conclusion of the Assessment that while the claimed efficiencies are quantified, they are biased upwards. The submission states that there is no evidence to support this claim and, further, that the claim appears to be based purely on assumptions. The discussion in paragraphs 9.34 to 9.37 above state grounds for believing that the efficiencies are overstated. In short, biased upwards. In each case, the reasons are capable of being rebutted by the parties and shown to be fallacious. However, apart from one argument put forward concerning the approach adopted in paragraph 9.34, discussed below, the parties and Compecon have chosen not to rebut the arguments put forward above.

9.39 In the Written Submission, the parties argue that there was a failure in the Assessment to take into account the documents listed in paragraph 9.24 above. However, account was clearly taken of "Acquisition efficiencies rough work," since that document's estimates accord with the Compecon Report. As to the other documents, as discussed above, it is not at all clear that they have any relevance to the issue of efficiency savings in the context of the Authority's *Merger Guidelines*.

9.40 Finally, in the Written Submission, it is pointed out, correctly, that the Assessment only deals with some of the efficiencies claimed in the Compecon Report. As a result, the parties claim that the Assessment has discounted entirely the parties' claims in relation to efficiencies. It is correct that the efficiencies discussed above relate to only €[…] of the €[…] efficiencies claimed. For the sake of completeness, the Authority considers that the same arguments as set out above with respect to […] apply, *mutatis mutandis*, to the labour cost reductions of €[…] and the production variable cost reductions of €[…]. Finally, whether the saving in purchasing costs is an overstatement depends, in part at least, on whether these represent cost savings for suppliers or whether suppliers are forced to accept lower margins by the merged entity. The Authority's *Merger Guidelines* state that input price reductions related to buyer power are not generally considered to be an efficiency gain.

9.41 The Compecon Response to the Assessment argues *firstly* that the management of Kerry would be expected to be able to deliver the efficiencies claimed. Thus, the Compecon Response states that the Kerry management would have an incentive to adopt a cautious approach. Further, Compecon states that in the past Kerry's estimates in earlier mergers have been underestimates. However, for reasons set out above, the Authority does not find these arguments persuasive.

9.42 In this context, it might be noted, Massimo Motta, a leading competition economics expert quoted with approval in the Compecon Response, states on the issue of efficiencies, "When efficiency gains are a crucial determinant in the decision on the prohibition or acceptance of a merger, it is clear that the merging firms have an incentive to overstate efficiency claims."[133]

9.43 The *second* issue raised in the Compecon Response is that the Assessment concludes that if unit variable costs of in-house and outside production are the same then there is no saving from switching production. The Compecon Response argues that if one accepts this line of reasoning then the Authority should have ascertained the relative costs of in-house and external production instead of advancing a hypothetical argument.

9.44 However, as noted above, the onus is on the parties to the merger to demonstrate the efficiencies. In any event, it is the parties that have access to the in-house and the external production costs of the merging parties, not the Authority. In neither the parties' Written Submission nor in the Compecon Response has such data been furnished for the Authority to consider.

9.45 The *third* issue that the Compecon Response raises is analogous to the second, but with respect to the issue of distribution savings. The same arguments apply.

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[133] Massimo Motta (2004) *Competition Policy. Theory and Policy*. Cambridge, UK: Cambridge University Press, p. 242.

9.46 Finally, the Compecon Response argues that the Assessment arguments in relation to production and distribution savings represent a fundamental flaw in its reasoning.

9.47 The Compecon Response states that the Authority's *Merger Guidelines* indicate that the issue in relation to efficiencies in merger analysis is whether the cost savings as a result of the merger would reduce the merging firm's costs sufficiently to offset any potential price increase that results from the merger. This involves a consumer welfare standard.

9.48 The Compecon Response also suggests that the Authority has introduced a new welfare standard. In the case of distribution, for example, the test now seems to be, according to the Compecon Response, that all firms in the industry must now reduce their costs.

9.49 The Authority is not arguing for a wider industry welfare standard. The Assessment in discussing certain of the savings did use, perhaps infelicitously, the terms 'social gain' and 'social savings'. However, the Authority's meaning should now be clear from paragraphs 9.34 and 9.36.

9.50 Thus, the Authority takes the view that the claimed efficiencies are biased upward.

Are the Claimed Efficiencies Timely?

9.51 An important issue in evaluating claimed efficiencies is when such efficiencies are likely to be realised. As the Commission states in paragraph 83 of its *Horizontal Merger Guidelines*:

> In general, the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them. This implies that, in order to be considered as a counteracting factor, the efficiencies must be timely.

This is especially so when the price enhancing effects of a merger can take place as soon as the merger is completed.

9.52 The parties in the Compecon Report provide no evidence as to when the claimed efficiencies are likely to be realised.

9.53 In this respect, it should be noted that there do not appear in the Compecon Report to be any one time adjustment costs of […] deducted from the efficiencies estimates.[134] The one time adjustment costs are usually incurred up front while the cost savings are phased in over time. The usual form this type of analysis takes is to find the net present value of the efficiencies and then annualize it.

9.54 The Assessment came to the conclusion that it is not clear if the claimed efficiencies are timely. The response of the parties in their Written Submission and the Compecon Response give little assistance in this regard. The Compecon Response blames the Authority for not making any attempt to contact the parties on this issue. The Authority stresses once again: on efficiencies, the onus is on the parties to provide the relevant information to the Authority.

9.55 The parties in their Written Submission refer to one of the documents listed in paragraph 9.24, "[…]", which according to the Written Submission, stated that there would be an integration period of […] months post-acquisition and this detailed the one off costs. It should be noted that the presentation referred to is 44 slides/pages in length. There is a slide titled '[…]' which has a line across the bottom which reads '[…] month Integration Period (Post Competition Approval)'. However, nothing further

[134] The Compecon Response clarified that these one off costs are included in the calculations.

is stated. It is therefore unclear whether: (a) the integration period refers to the one off costs only; (b) whether it refers to the integration period plus the realisation of the cost savings as well; (c) what is the likely variance around the […] months; and, (d) whether the period been confirmed by an independent expert.

9.56 Nevertheless, as noted above, the parties provided in their submission a case study with respect to the […] integration of […] into its operations […]. In their submission, the parties argue that Kerry management take the view that the efficiencies must be realised within a […] and any delay would be a major distraction.

9.57 The Authority is prepared to accept as a working assumption that the efficiency benefits are likely to be realised within […] months.

Are the Claimed Efficiencies Merger Specific?

9.58 Merger specificity is an important attribute that claimed efficiencies must satisfy. The Commission's *Horizontal Merger Guidelines* set out in some detail the meaning of this condition:

> 85. Efficiencies are relevant to the competitive assessment when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives. In these circumstances, the efficiencies are deemed to be caused by the merger and thus, merger-specific. It is for the merging parties to provide in due time all the relevant information necessary to demonstrate that there are no less anti-competitive, realistic and attainable alternatives of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) than the notified merger which preserve the claimed efficiencies. The Commission only considers alternatives that are reasonably practical in the business situation faced by the merging parties having regard to established business practices in the industry concerned.

9.59 It could be argued – as is recognised in the Compecon Report – that all of the purchasing and production claimed efficiencies are not merger specific.

9.60 In essence, all these claimed efficiencies are related to the fact that Kerry will become larger through the acquisition of Breeo, something which is not in itself merger specific. There are other ways for Kerry to grow the size of its business and thus realise the benefits of size.[135] These include winning more contracts for private label, which frequently account for a large proportion of the output of the markets reviewed in this assessment[136] or supplying other firms in these markets or exporting, since in many of these markets the products are traded or competing more vigorously with Breeo and other branded competitors.

9.61 The Assessment concluded that the claimed purchasing and production efficiencies do not appear to be merger specific. The parties argued that […]

9.62 The Authority accepts that these arguments may have some validity. However, the parties referred to Hilton Food Group plc which has opened operations in the State supplying 100% of [a major retailer's] beef, pork and lamb and does not supply any other retailer. This suggests that private label can be consistent with a longer term relationship. In any event, the Authority is prepared to accept as a working assumption that an important part of any efficiency gains are merger specific.

[135] The Compecon Report may be correct, however, in the observation that the merger enables these benefits to be brought forward.

[136] For details see Table 2.6 above.

Are There Less Restrictive of Competition Ways of Realising the Claimed Efficiencies?

9.63 One of the aspects of merger specificity is whether or not the claimed efficiencies could be achieved in a less restrictive manner. Are there, for example, alternative arrangements that could be used to realise the claimed efficiencies?

9.64 In this context, it is not clear why a joint venture between Kerry and Breeo could not realise the [other/misc. including distribution] efficiencies, which as Table 9.1 shows, is the largest single claimed efficiency accounting for [60]% of the €[…]. [Other/misc. including distribution] is often undertaken by third parties suggesting that it is a function that can be carried on at arm's length from Kerry and Breeo.

9.65 The Assessment concluded that there are grounds for arguing that the [other/misc. including distribution] efficiencies could be realised through mechanisms other than the merger. The parties dispute this conclusion. On this issue, the parties in their Written Submission and the Compecon Response make two points. First, it appears that the [other/misc. including distribution] function also involves services such as sales promotion. It would be difficult, the parties and Compecon argue, to reach an agreement on whose products should have priority in terms of promotion. Kerry claim such a conflict arose when it distributed […]. The second argument is that Breeo […] has no interest in a joint venture.

9.66 The Authority thinks that there is some merit in the first argument, but is doubtful whether the second argument has merit. If the second argument were accepted, it would be very difficult in many mergers to establish that there are ways of realising the claimed efficiencies that are less restrictive of competition. In a large number of mergers, the target wishes to exit the market.

Are the Claimed Efficiencies Likely to be Passed on to Consumers?

9.67 As noted above, one of the considerations in the Authority's *Merger Guidelines* is that "the parties must demonstrate what incentives the merged firm would have to realise efficiencies where rivalry has been lessened". The Commission, in its *Horizontal Merger Guidelines*, elaborates on this point:

> 84. The incentive on the part of the merged entity to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to be passed on, to a sufficient degree, to the consumer. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.

9.68 In several of the markets analysed, the merged entity would have a very considerable share of the branded segment of a market, particularly in rashers, non-poultry cooked meats, and processed cheese. As a result, it is difficult to see what incentives the merged entity would have to pass on any efficiency gains. Since the parties to the merger see no competition concerns flowing from the merger, this is not an issue they address.

9.69 The parties in their Written Submission and the Compecon Response dispute the Assessment's conclusion that there would be appear to be good grounds for arguing that there are insufficient incentives for the merged entity to pass on any efficiency gains to consumers. The Compecon Report argues correctly that even a monopolist would pass on some savings to the consumer. A monopolist with a linear demand curve would, for example, pass on half of any efficiency gains. In any event, the parties and the Compecon Response argue that the merged entity will continue to experience strong rivalry and hence will pass the gains on to the consumer. Nevertheless, the Authority does not find these arguments persuasive in those markets where it has determined that there will be a substantial lessening of competition.

Efficiencies: How Much Would Consumers Gain from the Merger?

9.70 As the legal representative for Kerry pointed out at the Oral Submission, the Authority in its Assessment did not carry out a net price test. Neither, it must be said, did the parties or Kerry's economic expert, Compecon.

9.71 The Authority, in its Assessment, stated that the reason for not conducting a net price test was that the parties had not made a credible case that the claimed efficiencies flowing from the merger are:

- verifiable;
- not biased upwards;
- timely;
- merger specific;
- cannot be achieved by methods less restrictive of competition; and,
- will be passed on to consumers.

9.72 The discussion above suggests that the Written Submission and the Compecon Response have gone some way to assuage those concerns. The Authority is therefore minded to estimate the reduction in price should all the efficiency savings be passed on to consumers in the form of lower prices. Since the parties allocated the efficiency savings by market, the exercise can be conducted on a market by market basis. The results are presented in Table 9.2 below.

9.73 These results should be regarded as the maximum reduction in price occasioned by the merger for at least three reasons:

- first, it seems unlikely that *all* of the efficiency gains would be passed on to the consumer;
- second, as noted above, the Authority still has a number of reservations concerning whether or not the claimed efficiencies meet the conditions set out in the Authority's *Merger Guidelines*; and,
- third, a price rise can take place soon after the merger while the efficiency gains will take longer to emerge – 6 to 12 months. Thus, the adverse effects of the merger could be realised before the efficiency gains translate into lower prices. No attempt has been made to discount these two effects so as to take into account this difference in timing.

Table 9.2
Estimates of Reduction in Price Due to the Proposed Transaction, Variable Cost Reductions, 100% Pass-Through to Consumers

Product	Efficiency Gains (prorating the	Sales (2007)	Reduction in Price Assuming All Efficiency Gains	Reduction in Price Assuming All Efficiency Gains Passed on to

	unspecified efficiencies)		Passed on to Consumers (Unspecified not considered)	Consumers & Unspecified Gains Prorated by Sales
	€m	€m	%	%
Spreads	[…]	[…]	3.2	3.5
Cheese	[…]	[…]	0.8	0.8
Rashers	[…]	[…]	1.1	1.4
Sausages	[…]	[…]	0.6	1.1
Cooked Meats	[…]	[…]	0.6	0.7
Puddings	[…]	[…]	1.3	3.4
Unspecified	[…]	-	-	
Total	[…]	[…]	**1.4**	**1.4**

Note: Other consists of €[…] in other marginal costs and €[…] savings from automation. It was not possible to allocate these amounts to individual product categories. However, in the right hand column, the unspecified gains are prorated weighted by the sales figures in the table.
Source: Compecon Report (Table 9.1, p. 105 and Table 2.7 above)

9.74 The results in Table 9.2 suggest that the decline in price due to the efficiency savings consequent on the merger is quite modest. If the unspecified efficiencies are not considered, the decline in prices post merger is around 1%, with the exception of spreads where the saving is more substantial at 3.2%. In the markets where the Authority has determined that there will be a substantial lessening in competition – rashers, non-poultry cooked meats, and processed cheese – the reduction in price, should all the savings be passed on, will be between 1.1% and 0.6%. If the unspecified efficiency gains are included, the reduction increases somewhat but is still quite modest, particularly in the markets where the Authority comes to the conclusion that there will be a substantial lessening in competition.

9.75 These are not large savings. Further, they are likely to be maximum savings. The Authority does not consider that they will large enough to offset the price enhancing effects of the findings of a substantial lessening in competition in rashers, non poultry cooked meats and processed cheese.

SECTION TEN: DETERMINATION

Determination

The Competition Authority, in accordance with section 22(3)(b) of the Competition Act, 2002, has determined that, in its opinion, the result of the proposed acquisition by Kerry Group plc (through Rye Investments Limited) of the entire ordinary issued share capital of Breeo Foods Limited and Breeo Brands Limited will be to substantially lessen competition in the markets for rashers, non-poultry cooked meats and processed cheese in the State and, that accordingly, the acquisition may not be put into effect.

For the Competition Authority

____
William Prasifka
Chairman of the Competition Authority
Member of the Competition Authority

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Dr. Paul K. Gorecki,
Member of the Competition Authority

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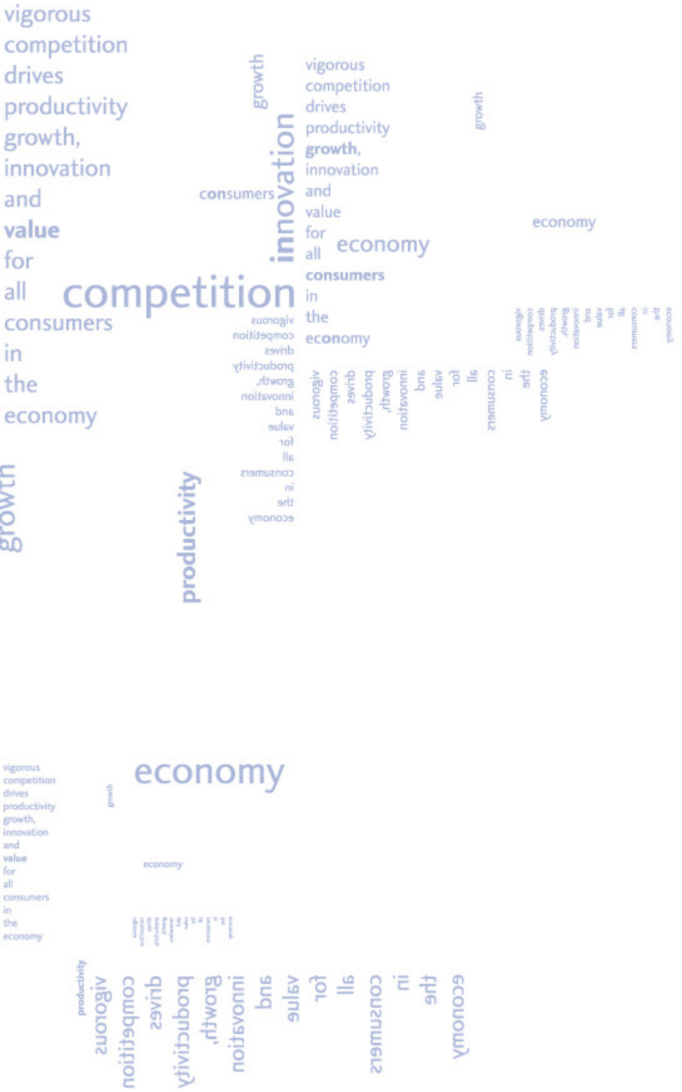
Declan Purcell
Member of the Competition Authority

____
Dr. Stanley Wong
Member of the Competition Authority



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