



EUROPEAN COMMISSION
DG Competition

***Case M.7940 - NETTO /
GROCERY STORE AT
ARMITAGE AVENUE
LITTLE HULTON***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(a) INAPPLICABILITY
Date: 26.2.2016

***In electronic form on the EUR-Lex website under
document number 32016M7940***



EUROPEAN COMMISSION

Brussels, 26.2.2016
C(2016) 1340 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties:

Dear Sir/Madam,

**Subject: Case M.7940 – NETTO / GROCERY STORE AT ARMITAGE AVENUE
LITTLE HULTON
Commission decision pursuant to Article 6(1)(a) of Council Regulation
No 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²**

- (1) On 22 January 2016, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertakings J Sainsbury plc ("Sainsbury's", United Kingdom) and Dansk Supermarked ("Dansk", Denmark) parent companies to Netto Limited ("Netto", United Kingdom), acquire within the meaning of Article 3(1)(b) of the Merger Regulation control from Wm Morrison Supermarkets plc ("Morrison's", United

¹ OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 ("the EEA Agreement").

Kingdom) of the freehold property of a retail store located at Armitage Avenue, Worsley ("the Target Store", United Kingdom) by way of purchase of assets ('the Transaction')³. Sainsbury's and Dansk are designated hereinafter as the 'Notifying Parties'. The Notifying Parties together with Netto are designated hereinafter as the 'Parties'.

1. THE PARTIES

- (2) Netto is a discount retailer of grocery and non-grocery goods that re-entered the United Kingdom markets in November 2014 where it holds thirteen stores prior to the Transaction. Netto is independently held from the Netto trade formula stores outside of the United Kingdom.
- (3) Netto is a 50/50 joint venture operated on a trial basis between Sainsbury's and Dansk. Netto is a non full-function joint venture given that, on the basis of the rules under which it operates, [description of operating arrangements].
- (4) Sainsbury's is a United Kingdom retailer of grocery and non-grocery goods. It is also active in the retail supply of petrol and pharmacy products, retail banking and insurance services. Sainsbury's has over 1,300 stores and 161,000 employees in the United Kingdom. Outside the United Kingdom, Sainsbury's has limited online sales in Ireland (from its Northern Irish stores).
- (5) Dansk is a Danish retailer of grocery and non-grocery goods active in Denmark, Germany, Poland, Sweden and the United Kingdom (through its interest in Netto) under the trade formulas føtex, Bilka, Netto and Salling. Dansk has no activities in the United Kingdom aside from its joint venture interest in Netto.
- (6) The Target Store was a mid-sized Morrisons grocery store which ceased to trade on 29 November 2015. The Target Store is located in an urban area in the north west of England in the area of Little Hulton. The Target Store is to be reopened as a Netto branded grocery store as of [...] April 2016.

2. THE CONCENTRATION

- (7) Pursuant to paragraph 24 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ('Jurisdictional Notice')⁴, an acquisition of control over assets can only be considered a concentration within the meaning Article 3 of the Merger Regulation if those assets constitute the whole or part of an undertaking, i.e. a business with a market presence, to which turnover can be clearly attributed.
- (8) The Transaction concerns the acquisition of the freehold property of the Target Store. This freehold property benefits from planning approval allowing the use of the land for retail purposes. Morrisons will also transfer to Netto the licence allowing the sale of alcoholic beverages at the Target Store ("Premise Licence"). This freehold property will be transferred empty, as it was stripped of all its

³ Publication in the Official Journal of the European Union No C 37, 30.01.2016, p. 3.

previously installed fixtures and fittings.⁵ The Transaction does not involve the transfer of any other tangible or intangible assets. The Transaction was executed by means of a private sale and purchase agreement (the ‘SPA’) entered into on 14 January 2016 by Netto and Morrisons.

- (9) Against this background, the European Commission analysed whether the Target Store can be considered an undertaking within the meaning Article 3 of the Merger Regulation and paragraph 24 of the Jurisdictional Notice.
- (10) The European Commission has considered the specific circumstances of the present transaction. Whereas the relevant criteria may vary according to the particular circumstances of each case, the cumulative factors set out below in paragraphs 11 to 15 were considered relevant in the present case.
- (11) First, the Transaction consists merely in the transfer of the freehold property of a single real estate asset (the Target Store) which can be used as a retail store, and the Premises Licence (which, as indicated by the Parties, could have been obtained by Netto in any event without excessive difficulties or delays).
- (12) Second, the Transaction concerns an empty real estate asset, stripped of all its previously installed fixtures and fittings, without involving the transfer of any other tangible or intangible assets.⁶ The Transaction does not include, in particular, the transfer of significant goodwill. In that regard, the Commission has notably considered two aspects.
- (13) In the first place, if goodwill is included in the transfer, the Commission would normally expect the price paid by the purchaser to be higher than the price to be paid for a mere real estate property. In this case, although the Notifying Parties stated that Netto [reference to commercial arrangements] took into account the fact that the site was operated as a supermarket and it had the appropriate administrative consents, the Parties did not show that there was a specific discussion between them and Morrisons as to the transfer of any significant goodwill (and its value), nor have they brought forward any other elements which might suggest that significant goodwill will be transferred. This is also confirmed by the fact that the purchase agreement does not contain any clause indicating a transfer of goodwill, such as for instance specific obligations undertaken by the seller to facilitate the retention of the customer base.
- (14) In the second place, the Commission considered the effect of the closure of the store on any potential transfer of goodwill. The fact that the Target Store was closed on 29 November 2015 and thus no longer actively trading at the moment of completion of the Transaction may not in itself prevent the Target Store from being considered to constitute an undertaking. However, in the case at hand the period of around five months of inactivity prior to re-opening of a new supermarket is likely to affect the transfer of significant goodwill. In fact, taking into account the

⁵ [reference to commercial arrangements].

⁶ Although the absence of additional classical supermarket physical assets, such as fridges or shelves can be taken into account in the overall assessment of relevant facts, it is not in itself a decisive factor to establish whether the target concerned constitutes a business. As indicated, the different factors mentioned in that respect are cumulative.

frequency of grocery shopping for average consumers, the Commission does not expect that significant goodwill will be passed on to Netto after the lapse of time the Target Store has been closed.

- (15) Moreover, the Transaction does not entail the transfer of any contract with tenants, suppliers or employees and does not trigger the application of the United Kingdom TUPE regulations⁷ on the transfer of undertakings.
- (16) Therefore, considering those elements together, in this particular case the Transaction should be viewed, in essence, as a real estate transaction consisting in the acquisition of an empty freehold property, rather than as the transfer of a business with a market presence to which a turnover can be attributed. In conclusion, the Commission considers that the Target Store cannot be deemed to constitute an undertaking within the meaning of paragraph 24 of the Jurisdictional Notice and Article 3 of the Merger Regulation.

3. CONCLUSION

- (17) For the above reasons, the European Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3 of the Merger Regulation and consequently does not fall within the scope of that Regulation. This decision is adopted in application of Article 6(1)(a) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(signed)

Margrethe VESTAGER

Member of the Commission

⁷ TUPE refers to the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014. The TUPE rules apply to organisations of all sizes and protect employees' rights when the organisation or service they work for transfers to a new employer.