

Completed acquisition by Monaghan Mushrooms of assets of Sussex Mushrooms Limited

ME/5152/11

The OFT's decision on reference under section 33(1) given on 2 December 2011. Full text of decision published 1 February 2012.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **Monaghan Mushrooms Limited** and its Irish parent company Monaghan Middlebrook Mushrooms (jointly, '**Monaghan**') grow fresh mushrooms in primarily the UK and the Republic of Ireland and supply their own and other growers' mushrooms primarily to grocery retailers in the UK. In 2010, Monaghan's revenues were around €[] million (around £[] million) worldwide and around €[] million (around £[] million) in the UK.
2. **Sussex Mushrooms Limited ('SML')** grew fresh mushrooms and sold these and other growers' mushrooms to grocery retailers and other customers in the UK. In 2010, SML's revenues were around £[] million in the UK.

TRANSACTION

3. On 28 July 2011 Monaghan, through its wholly owned subsidiary Thakeham Mushrooms Limited, acquired the business of SML (this business referred to as '**Sussex**'), comprising mainly of its assets, IT systems, goodwill, records, compost permit and lease rights of Sussex's farm near Thakeham in West Sussex (the '**Transaction**'). SML's employees also transferred to Monaghan.

JURISDICTION

4. As a result of the Transaction Monaghan and Sussex ceased to be distinct. These enterprises overlap in the supply of mushrooms, with a combined share of supply exceeding 25 per cent (see paragraph 29 below). The share of supply test in section 23 of the Enterprise Act 2002 (the 'Act') is therefore met. Therefore, the OFT believes that it is or may be the case that the Transaction has resulted in the creation of a relevant merger situation.
5. The Transaction was announced on 1 August 2011. The OFT launched an own-initiative merger investigation on 4 August 2011 after receiving a complaint from a third party. Following extensions under section 25(2) of the Act, the statutory deadline is 30 December 2011. The administrative deadline is 2 December 2011.

COUNTERFACTUAL

Exiting firm scenario

6. Monaghan submitted that SML was a failing firm and that therefore the appropriate counterfactual to assess the Transaction is not the state of competition before the Transaction but SML's exit from the market. In forming a view on an 'exiting firm' scenario, the OFT will consider:
 - a) whether the firm would inevitably have exited the market, in particular whether the firm was unable to meet its financial obligations in the near future and to restructure itself successfully
 - b) whether there would have been a substantially less anti-competitive alternative purchaser for the firm or its assets and
 - c) what would have happened to the firm's sales in the event of its exit.¹
7. Monaghan submitted that SML had been in a critical financial position since early 2011 and that SML's directors had been looking for a buyer for the business for a few months before the Transaction. On 23 June 2011 HMRC petitioned the High Court to wind up SML. Following a withdrawal of bank support for SML, in early July Monaghan agreed to purchase SML's assets and funded certain critical expenses, including salaries, to allow SML to continue operating. Subsequently SML's directors appointed joint

¹ *Merger Assessment Guidelines* (CC2 and OFT1254, September 2010), paragraphs 4.3.8-18.

liquidators. On 15 July the High Court granted a validation order and removed HMRC's petition to enable the sale of SML's assets. On 29 July, the day after Monaghan's acquisition of the assets, SML was placed into voluntary creditors liquidation.

8. A number of third parties informed the OFT that they were interested in buying Sussex but that they were not given the opportunity to do so when a sale became urgent in early July. This was disputed by Monaghan, which stated that potential buyers had withdrawn when it agreed to buy Sussex and that after SML's imminent liquidation no other company would realistically have been able to acquire SML or its business.
9. However, the OFT has not needed to conclude on whether the exiting firm scenario applies because, as discussed below, the Transaction does not raise competition concerns on the basis of a status quo ante counterfactual.

Sussex's loss of the majority of its sales before the Transaction

10. Monaghan also submitted that shortly before the Transaction, [], two of Sussex's largest customers that jointly represented over 80 per cent of Sussex's sales in volume and value, switched supplies to Monaghan. In early July, Monaghan initially provided temporary cover for these retailers and later in July it reached agreement with both retailers to switch supply on a more permanent basis. According to Monaghan, these switches were unrelated to the Transaction as they were not dependent on Monaghan's acquisition of Sussex, which had not yet been completed when the switches took place.
11. Both retailers confirmed to the OFT that their choice of Monaghan was not dependent on its completion of the Transaction. []
12. Following the switch by [], Sussex started supplying Monaghan with mushrooms it previously supplied directly to these retailers. However, Monaghan submitted that it would have been able to supply [] even if the Transaction had not taken place. It noted that it had started supplying [] with mushrooms from a different source even before it had acquired Sussex and continues to do so. It also noted that it was able to continue supplying both [] when [].
13. This suggests that absent the Transaction Sussex would still have lost its major contracts to Monaghan, even if Sussex had been purchased by

another buyer. However, such an alternative buyer may have been able to rebuild Sussex's business and start competing with Monaghan for these and other contracts. On balance, therefore, in assessing the Transaction the OFT has not considered that the permanent loss of Sussex's main supply contracts constitutes the appropriate counterfactual. Nevertheless, the OFT has taken customers' views on Sussex's position before the Transaction into account in considering the closeness of competition between the merged parties (from paragraph 37 below). Also, the switch by Sussex's two main customers and [] are taken into account in considering the existence of buyer power (from paragraph 54 below).

MARKET DEFINITION

14. The parties overlap in importing, growing, packing and supplying mushrooms, mainly to grocery retailers but also to food service and manufacturing customers in the UK. Monaghan derived around [] per cent of its total supplies in the first half of 2011 from its own production and the remainder from other mushroom growers, both in the UK and abroad. Sussex derived around [] per cent from its own production during this period and the remainder from mushroom growers mainly in the Netherlands.
15. The parties also both produce mushroom compost. Monaghan produces some of the compost needed for its mushroom production and also has 60 per cent of the shares in Tunnel Tech, which produces compost both for Monaghan and for other mushroom growers. Sussex produced compost only for its own use and did not buy in any compost. Compost is an essential input for the production of mushrooms. Tunnel Tech is the only UK producer of compost to third parties, but compost is also imported in significant quantities from the Netherlands and Belgium, including by Monaghan itself.
16. The OFT will generally only include production used for self-supply within the relevant market if it can be demonstrated that it would be profitable for the supplier to forgo its use and sell into the merchant market (that is, to other users) in response to a price increase.² In this case, Sussex did not supply any compost to other mushroom growers and there is no evidence to suggest that it could profitably have started doing so. Therefore, the OFT considers that Sussex was not active in the market for compost and it

² *Merger Assessment Guidelines*, paragraph 5.2.20 (fourth bullet point).

was not necessary to consider such a market further. However, the OFT has considered below whether any vertical concerns arise from the fact that both parties produced compost.

Product market

17. Monaghan suggested that the product market may include the supply of other vegetables, as consumers often purchase a selection of vegetables and some suppliers supply a range of vegetables to retailers and other customers. This was suggested by previous decisions of the European Commission regarding traders in a wide range of vegetables and fruit.³ However, the OFT's starting point is to take the narrowest plausible candidate market in which the parties overlap, then to consider whether this may be widened through demand-side substitution and, if appropriate, supply-side substitution.⁴ In this case the OFT considers that there is insufficient evidence to consider the supply of mushrooms to be part of a wider market for vegetables, given in particular the lack of evidence for demand-side substitutability on the part of retailers and consumers and the fact that both the parties and many of their competitors supply only mushrooms. The OFT has therefore considered the Transaction only in relation to the supply of mushrooms.

Supply to retail customers and food service customers

18. The parties both focus largely on the supply of mushrooms to retail customers. In several previous decisions concerning food products, the OFT distinguished separate markets for retail customers and food service customers.⁵ Although the mushrooms supplied to both customer types are the same and mushrooms are mainly sold under retailers' own labels rather than under strong brands, Monaghan has raised a number of factors that suggest such a distinction is appropriate in this case, including:

³ See, for example, decision of 11 August 2008, Case COMP/M.5201 *Total Produce/Haluco*, paragraph 16. In this case the European Commission distinguished in the supply chain between the import/production level, which includes the supply to large wholesalers and large retailers, and the wholesale level, which consists of the supply by large wholesalers to smaller wholesalers, small retailers and food service customers. Such a distinction was not suggested by either Monaghan or third parties, but the OFT considers that in this case it is comparable to the distinction between the supply to grocery retailers and food service customers. Neither of the parties supplied wholesalers.

⁴ See *Merger Assessment Guidelines*, paragraphs 5.2.6 to 5.2.19.

⁵ See for example the cases referred to in the OFT's decision of 23 September 2011 in *Greencore/Uniq*, paragraph 11.

- the difference in packaging, as mushroom suppliers supply food service customers with loose product in large trays while they supply retailers mainly with smaller units that are pre-packaged by the mushroom suppliers
- suppliers have more flexibility in supplying mushrooms to food service customers, with longer order lead times and delivery windows at customer depots, resulting in lower distribution costs
- [], and
- [].

19. For food manufacturing customers, an additional factor may be that mushrooms may be prepared by the supplier by, for example, chopping and slicing them before delivery to the customer. The OFT did not receive any evidence that this or any other factors mean that food manufacturers should be treated differently to food service customers.
20. However, as no substantial competition concerns arise even on a narrower market for retail customers, as set out below, it was not necessary for the OFT to reach a conclusion on the exact scope of the relevant product market in this respect.

Provenance of mushrooms

21. Both merged parties supplied both mushrooms grown in the UK and imported from abroad. Monaghan submitted that there may be some preference for UK provenance among consumers, but that this is not a significant driver of consumer choice as it is secondary to factors such as freshness, quality and price. This was supported by an internal research document that Monaghan provided.⁶ Monaghan further noted that nearly 59 per cent of mushrooms sold in the UK are imported,⁷ mostly from the Republic of Ireland, the Netherlands and Poland, and that these mushrooms are sold alongside mushrooms grown in the UK at the same price. Monaghan also stated that the decline in UK mushroom production in the context of steady overall UK demand shows that UK provenance is not a decisive factor for either retailers or consumers.

⁶ [], presentation to Monaghan by [] of 20 January 2010.

⁷ Supported by *Basic Horticultural Statistics*, Department for Environment, Food and Rural Affairs.

22. Third-party comments about the importance of provenance were mixed. Most third parties said that imported mushrooms were the same as UK mushrooms in terms of product characteristics and quality. Two grocery retailers have a policy of selling only UK mushrooms in their core lines (for example advertised as '100% British', meaning the UK rather than only GB), while two other retailers also sell imported mushrooms but referred to a consumer preference for British mushrooms. One further grocery retailer said that imported and British mushrooms were substitutable. Some of the parties' competitors also noted that consumers preferred UK mushrooms and that exchange rate changes and delivery times can make importing more difficult.
23. The OFT considers that there are strong reasons to believe that, although consumers may prefer UK mushrooms, imported mushrooms are demand-side substitutes. This is borne out, in particular, by the large volume of imports and the apparent lack of price difference. This is also supported by the similarity in the merged parties' share of supply to retailers for mushrooms sourced in the UK compared to all mushrooms (see paragraph 33 below). However, on a cautious basis the OFT has considered the impact of the Transaction on the supply of UK mushrooms separately.

Types of mushrooms

24. Monaghan submitted that there are two main types of mushrooms: (a) white and chestnut mushrooms, and (b) exotic mushrooms, such as shiitake, oyster and enoki. White and chestnut mushrooms are varieties of *Agaricus bisporus*, with the only difference between button, closed cup, open cup, flat and portabello mushrooms being the time of harvesting. Monaghan stated that white mushrooms represent over 90 per cent — and chestnut mushrooms over five per cent — of mushrooms sold in GB respectively, with the remainder made up of exotic mushrooms. This was confirmed by a third party. Monaghan submitted that white and chestnut mushrooms are substitutable both on the demand side for consumers and on the supply side, where growers can change from white to chestnut mushrooms within around six weeks. Third parties did not provide evidence to the contrary. There is also no evidence to suggest that the merged parties' position in white mushrooms is significantly different from their position in chestnut mushrooms.
25. The OFT has therefore considered white and chestnut mushrooms as part of the same market. As the OFT has no reason to believe that Monaghan

and Sussex have a significant presence in the supply of exotic mushrooms and the OFT has not received competition concerns from any third parties in relation to exotic mushrooms, the OFT has not further considered the supply of exotic mushrooms.

Conclusion

26. For the reasons set out above, the OFT has considered the Transaction by reference to the supply of UK white and chestnut mushrooms and all white and chestnut mushrooms, separately to retailers and to food service customers.

Geographic market

27. Monaghan submitted that there are good reasons to suggest that the geographic scope of the market is wider than the UK, covering at least a region of Europe, given mainly the extent of imports into the UK (around 59 per cent). Monaghan itself is based in the Republic of Ireland (just across the border with Northern Ireland) and most mushrooms grown in the Republic of Ireland are exported to the UK. Monaghan also referred to previous cases in which the European Commission did not exclude the possibility that the import/distribution and wholesale markets for vegetables were wider than national. Third parties confirmed the extent of imports, but also noted consumer preferences for UK mushrooms (see above).
28. The parties supply mainly to UK customers. On a cautious basis, the OFT has therefore considered the impact of the Transaction on a national market (that is, the supply to UK retail and food service customers). However, as no substantial competition concerns arise on such a market, it was not necessary for the OFT to reach a conclusion on the exact scope of the relevant geographic market.

UNILATERAL EFFECTS

Shares of supply

Supply of all mushrooms to retailers

29. Monaghan has estimated the merged parties' and their main competitors' shares of supply of all mushrooms (that is, grown in the UK and abroad) to retailers, as set out in Table 1 below.

Table 1: Shares of supply of mushrooms to retailers in 2010

Company	Volume (tonnes)	Share (per cent)
Monaghan	[]	[30-40]
Sussex	[]	[0-10]
Combined	[]	[40-50]
G's Marketing	[]	[5-15]
Breffni	[]	[0-10]
Prime Champ	[]	[0-10]
Hughes	[]	[0-10]
Walsh	[]	[0-10]
Drinkwater	[]	[0-5]
Rothwell	[]	[0-5]
Others ⁸	[]	[10-20]
Total	130,000	100

Source: Monaghan's estimates.

30. Monaghan's estimate of the total size of the market is based on retail sales volumes calculated by Kantar Worldpanel. Monaghan submitted that Kantar's calculation underestimates the actual volumes sold, as it does not include smaller 'top up' sales and shoppers in the AB social classes,⁹ who buy relatively more mushrooms according to loyalty card data, are under-represented. Based on a comparison of Kantar data for specific retailers with Monaghan's own sales within these retailers and loyalty card data from two major grocery retailers, Monaghan increased Kantar's volume estimate by around 12 per cent to arrive at the total in Table 1. Monaghan submitted further that this is still a conservative estimate, because an alternative retail sales estimate calculated by Mintel with a different method is significantly higher (around 175,000 tonnes).
31. A third party provided the OFT with different estimates, calculating the shares of supply of Monaghan and Sussex at [50-60] and [0-five] per cent respectively, with a combined share of [55-65] per cent. There are two explanations for the difference with Monaghan's estimate. Firstly, this third party, like Monaghan, used the Kantar data to calculate the total size of the

⁸ Including Banken, Fiddleford, Fresh Mushrooms Europe, Greyfriars, Leckford, Oakfield, Okechamp and Waveney.

⁹ Described as intermediate and higher managerial, administrative and professional occupations.

market but it reduced the Kantar figure by seven per cent to exclude chestnut and organic mushrooms. It also did not apply an increase to adjust Kantar's figure, as Monaghan did. Secondly, this third party significantly overestimated Monaghan's production (but slightly underestimated Sussex's production). Combining this third party's estimate of the size of the market with Monaghan's production figures results in shares of supply for Monaghan and Sussex of [40-50] and [0-10] per cent respectively, with a combined share of [45-55] per cent.

32. The OFT considers that, in view of the evidence provided by Monaghan and the Mintel estimate, Kantar's estimate of the size of the market appears to underestimate the actual figure. Also, it does not appear to be appropriate to exclude chestnut mushrooms given the likely demand- and supply-side substitutability. While the OFT believes exotic mushrooms should be excluded from the market, this does not make a significant difference in the total size of the market given the very small sales of exotic mushrooms. On this basis, the OFT considers that the most reliable estimate of the merged parties' combined share of supply of mushrooms to retailers appears to be around or just above [40-50] per cent with an increment of around or just above [0-10] per cent.

Supply of UK mushrooms to retailers

33. The OFT has also considered the shares of supply to retailers of mushrooms sourced in the UK. Monaghan provided the OFT with the merged parties' shares of supply to retailers of mushrooms sourced in Great Britain, excluding Northern Ireland, rather than the UK as a whole. However, there is no reason to believe that Northern Ireland is not part of any market for mushrooms of UK provenance (for example, mushrooms advertised as '100% British' include mushrooms sourced in Northern Ireland). Monaghan did provide estimates for shares of supply to all customer types for UK mushrooms, where the merged parties have a combined share of around [35-45] per cent. The equivalent share for the supply to retailers is likely to be somewhat higher, as shown by the difference in the parties' shares of supply for mushrooms sourced in GB to retailers and all customer types. If the same relationship between these shares exists for mushrooms sourced in the UK, then the merged parties' combined share of supply to retailers of these mushrooms is around [40-50] per cent. The OFT notes that the similarity of this share to the merged

parties' share for all mushrooms as set out above supports a conclusion that there is in fact no separate market for mushrooms sourced in the UK.

Supply to food service customers

34. Monaghan submitted that both it and Sussex focused on supplying retail customers. Monaghan's supply to other customers represented only around [0-five] per cent of its total supplies, while for Sussex this figure was around [15-25] per cent. Monaghan estimated its and Sussex's shares of supply of mushrooms to food service customers to be around [0-five] and [0-five] per cent respectively. Monaghan's estimate of the size of the total supply to food service customers was confirmed by a third party. [].

Conclusion on shares of supply

35. The merged parties' combined share of supply in the narrowest plausible market for the supply of mushrooms sourced in the UK to retailers is likely to be around [40-50] per cent. Their combined share of the supply of all mushrooms (though excluding exotic mushrooms) to retailers is also around [40-50] per cent. These shares, though not high, are not so low as to rule out cause for concern over unilateral effects,¹⁰ in particular given the difference in size between the merged firm and its competitors. However, as set out below, there are a number of factors to allay any significant competition concerns.

36. The merged parties' combined share of supply to food service customers is [0-five] per cent and does not therefore raise concerns.

Closeness of competition

37. Several third parties stated that the merged parties were close competitors, taking into account that Sussex was one of the largest producers of mushrooms in the UK after Monaghan and that both supply more than one grocery retailer. However, two of these grocery retailers suggested that Sussex's technical and commercial capabilities and the quality of its mushrooms were not to the same standard as those of Monaghan and some other suppliers.

38. Monaghan also submitted that Sussex's mushroom growing facilities were in relatively poor condition and that []. Monaghan further noted that

¹⁰ *Merger Assessment Guidelines*, paragraph 5.3.5.

shortly before the Transaction, [] had switched all of their purchases from Sussex to Monaghan due to concerns over continuity of Sussex's supplies (see further from paragraph 10 above). As a result, according to Monaghan, Sussex had become a supplier of much diminished importance, at least temporarily.

39. The OFT notes that grocery retailers are supplied by a range of suppliers and that for none of the retailers the merged parties are the first and second largest suppliers, although the OFT has also been provided with evidence that Monaghan and Sussex bid against each other for retailers' business.
40. In this regard, the OFT undertook a comparative analysis of prices offered by suppliers to the four largest customers of mushrooms in the UK, which suggested that — although there was no consistent pattern in average prices charged to retailers by suppliers — Monaghan's average prices were closer to those of other rivals than to those of Sussex.
41. Consistent with this, the OFT also undertook an analysis of the volumes purchased by the four largest customers. For three customers, Monaghan's volumes were closer to the volumes supplied by other rivals than to Sussex's. For the other customer, Monaghan's and Sussex's volumes supplied were close (£[] and £[]) but were very small in comparison to the customer's main supplier (£[]).
42. On balance, it appears that Sussex was not a closer competitor to Monaghan than several other mushroom suppliers and there are indications from customers that Sussex was in fact seen as a less strong supplier. Sussex's apparent poor position shortly before and after the Transaction, not only financially but also in terms of quality and commercial and technical capability, meant that in any case in the short term it is unlikely to have been a close competitor.

Ease of switching

43. Monaghan submitted that it is easy for customers to switch suppliers, partly because virtually all mushrooms are sold under retailers' own label. Most third parties confirmed that switching was easy. One third party also referred to the homogenous nature of mushrooms as a relevant factor in this respect. Both Monaghan and third parties provided examples of retailers switching supply at short notice, including in some cases for significant volumes such as the switch by [] from Sussex to Monaghan in July 2011. []
44. Some third parties also noted that the limited number of alternative suppliers in the UK could make switching more difficult. However, this was raised as a concern by only one customer. Another customer stated that, although it would prefer to buy UK-sourced mushrooms, it could switch to imports. Two other customers were not concerned about the availability of alternative suppliers. The OFT also notes that most retailers have, in addition to the merged parties, at least three suppliers across the range of suppliers listed in Table 1 above, such as Drinkwater, Rothwell and Walsh. That there is some spare capacity in the market, at least outside of the period of peak demand late in the year, is shown by []. Monaghan also provided evidence of several planning applications for new mushrooms farms in the UK, which indicates that capacity will increase.

Competition from imports

45. Most of the mushrooms sold in the UK (nearly 60 per cent) are imported, mainly from the Republic of Ireland (around 43 per cent of imports), the Netherlands (around 32 per cent) and Poland (around 18 per cent). Monaghan further submitted that transportation costs are low and do not impede imports even by grocery retailers who may require daily supplies. For example, 21 per cent of mushrooms sold by grocery retailers comes from continental Europe and a significantly greater percentage from the Republic of Ireland.
46. Monaghan provided examples of Dutch, French and Polish suppliers that produce at least as many mushrooms as Monaghan and significantly more mushrooms than Sussex, including Banken, France Champignons, Fresh Mushrooms Europe, Greenery, Okechamp and Prime Champ. Many of these suppliers currently supply mushrooms to both retailers and other customer groups in the UK either directly or via UK distributors. Even relatively small

mushrooms companies such as Sussex itself import mushrooms for distribution to UK customers. The extensive imports take place despite the fact that currently the Euro: Sterling exchange rate is higher than it has been in the recent past. The continental mushroom growers the OFT contacted confirmed that continental growers could expand exports to the UK.

47. Therefore, although imports are not a replacement for mushrooms grown in the UK in any market for these mushrooms, it nevertheless appears there are sufficient customers, including retailers, that are willing to import mushrooms from outside the UK to exercise a significant degree of competitive constraint on the merged firm's supply of UK-grown mushrooms. This is supported by retail customers' comments on switching to imports (see paragraph 44 above) and their mixed views on the importance of provenance (see paragraph 22 above).

Conclusion

48. The merged parties' combined share of supply of mushrooms to retailers is around [40-50] per cent, both for mushrooms sourced in the UK and for UK and imported mushrooms combined, with an increment of around [five-15] per cent and [0-10] per cent respectively. Although this combined share is not so low as to rule out concerns over unilateral effects, Sussex was not a closer competitor to Monaghan than several other mushroom suppliers and may in fact have been significantly less strong as a competitor. Although some concern was raised about the reduction in the number of alternative suppliers for customers to switch to, most retailers have at least three suppliers, in addition to the merged parties, and there is significant competition from foreign mushroom growers.
49. Taking all of these factors into account, the OFT considers that after the Transaction the merged firm continues to face sufficient competitive constraints to reach the conclusion that the Transaction does not give rise to a realistic prospect of a substantial lessening of competition ('**SLC**'), even in the narrowest plausible market for the supply of UK-sourced mushrooms to retailers.

BARRIERS TO ENTRY AND EXPANSION

50. Monaghan's submission shows that barriers to entry and expansion are relatively high. Monaghan estimated that the cost of a new growing facility

comparable in size to Sussex would be around £26 million in total, including the cost of compost production. Monaghan also noted that the supply standards set by retailers are high and that constructing a new facility without an established customer base carries significant risks. However, it is made easier for small producers to enter the market, according to Monaghan, by the possibility to supply to a larger producer, which then takes on the burden of negotiating with retailer customers.

51. Third-party estimates of the cost of building a new production facility (between £6.5 and £12 million) were significantly lower than Monaghan's estimate, although third-party estimates are unlikely to have included the cost of compost production. One third party estimated the cost of constructing a composting yard to be £5 million. However, several third parties stated that it would take several years (estimates ranged between five and 10) to recover the investment and that this may be difficult to justify and finance given the low margins in the mushroom industry.
52. Nevertheless, Monaghan provided evidence of several planning applications for new mushrooms farms in the UK. An example of new entry into the UK is Walsh, an Irish mushroom grower and distributor that opened a mushroom farm in Suffolk in 2010.
53. Taking all of these factors into account, the OFT considers that there is only limited evidence that entry or expansion will be timely, likely and sufficient to exert a significant competitive constraint on the merged firm. However, as the Transaction does not give rise to concerns over unilateral effects, there is no need for the OFT to reach a conclusion regarding barriers to entry and expansion.

BUYER POWER

54. The OFT may rely on the existence of countervailing buyer power as a factor making it less likely that the Transaction results in a substantial lessening of competition. Buyer power can be generated by, for example, buyers' ability to switch away from the merged firm, which is affected in turn by the availability of alternative suppliers and the ability to sponsor new entry or vertically integrate.¹¹

¹¹ *Merger Assessment Guidelines*, paragraphs 5.9.1 to 5.9.3.

55. Monaghan submitted that large grocery retailers, which account for the large majority of its and Sussex's sales, have significant buyer power. Monaghan referred to factors such as the ease of switching, the lack of long-term contracts and the prevalence of own-label sales. []
56. The existence of a degree of buyer power was confirmed by virtually all third parties, including the merged parties' retail customers. Some third parties noted the importance of the fact that retailers are supplied by more than one supplier (often by at least four suppliers), which allows retailers to play off their suppliers against each other.¹² However, one third party stated that buyer power would be significantly reduced following the Transaction due to the limited number of remaining alternative suppliers, in particular of UK-grown mushrooms, although the evidence set out above raises doubts about this (see at paragraph 44 above).
57. Neither Monaghan nor third parties submitted that customers could sponsor new entry or could start growing mushrooms themselves through vertical integration. The OFT is aware of only one grocery retailer, Waitrose, that grows mushrooms for self-supply. The OFT has therefore not taken sponsoring of new entry or self-supply into account as significant contributing factors to buying power.
58. There are therefore some indications that countervailing buyer power may constitute at least some constraint on Monaghan's position following the Transaction, although it is not clear to what extent such buyer power is also held by the merged firm's small customers. However, as the Transaction does not give rise to concerns over unilateral effects, there is no need for the OFT to reach a conclusion regarding countervailing buyer power.

VERTICAL ISSUES

59. As set out above (see paragraphs 15 and 16), Monaghan has 60 per cent of the shares in Tunnel Tech, which is the only supplier of mushroom compost produced in the UK. Compost is also imported from abroad. Some third parties raised a concern that Monaghan's position in the supply of

¹² One third party suggested that the prices that Monaghan charges some retailers for some products may be lower than cost price with the aim of precluding its competitors from gaining contracts with these retailers. Conversely, this may be evidence of buyer power. However, it is not clear that Monaghan's prices are consistently lower than those of its competitors. Nor is it clear that Monaghan's ability to employ exclusionary tactics is significantly enhanced by the Transaction.

compost, through Tunnel Tech, would allow it to reduce compost supplies to competing mushroom growers or to charge higher prices for compost. Two third parties also submitted that it is costly to import compost, in particular for growers in the north of England where imported compost was reported to be around 10 to 15 per cent more expensive due to transport costs, and that there is a risk that the quality of compost may be reduced through overheating during transport, in particular during the summer.

60. Monaghan submitted, and a third party confirmed, that there are three types of mushroom compost, Phase 1, Phase 2 and Phase 3 compost, depending on how quickly the compost can be used for mushroom production. According to Monaghan, use of Phase 1 compost by mushroom growers is minimal. Monaghan estimated that Phase 2 compost is largely provided by self-supply, including by Monaghan and Sussex, which represented around [five-15] and [35-45] per cent of total Phase 2 compost production respectively but produced compost only for their own use. Tunnel Tech supplies only around [10-20] per cent of Phase 2 compost. Monaghan further submitted that there are no mushroom growers making their own Phase 3 compost and that Tunnel Tech supplies around [40-50] per cent of Phase 3 compost, with the remainder being imported, mainly from the Netherlands and Belgium.¹³
61. Monaghan submitted that the extent of imports into the UK shows that transport costs and possible quality problems are not impediments for imports. It provided compost prices charged by Tunnel Tech and Dutch producers, which, according to Monaghan, show that Dutch prices are so much lower that the delivered price is still lower if additional transport costs are taken into account. Monaghan further noted that quality problems can be easily prevented by treating compost with CO₂ at low cost. The OFT considers that the large volume of compost imports supports that transport costs and quality problems do not form significant obstacles for imports.
62. As noted above, Sussex produced compost only for its own use and there is no reason to believe that Sussex would have started supplying other mushroom growers. The Transaction therefore does not remove a supplier

¹³ Monaghan is currently acquiring Walkro, which produces mushroom compost in the Netherlands, Belgium and Germany. This acquisition was cleared by the Dutch competition authority on 18 November 2011. Walkro was not named by Monaghan in its list of current suppliers of UK mushroom growers.

of compost from the market and there is no concern about customer foreclosure.¹⁴

63. Monaghan stated that it is planning to close Sussex's compost facility and buy compost from its Tunnel Tech subsidiary or import it from abroad. Monaghan submitted that any purchaser of Sussex would have done the same, given the significant investment that would be required to modernise Sussex's compost facility to comply with environmental regulations. It is therefore not clear that this would not also have happened in a counterfactual of Sussex's purchase by an alternative purchaser.
64. However, even if as a result of the Transaction, Monaghan diverted some of Tunnel Tech's supplies to Sussex and reduced supplies to competing growers, the OFT does not consider that there is a realistic prospect that this results in an SLC. The OFT approaches the risk of such partial input foreclosure by reference to the merged firm's ability and incentive to engage in it as well as the effect of such foreclosure.¹⁵ In this case, the evidence indicates that the merged firm would not have, in particular, the ability significantly to harm competing growers, because they can import compost at no or relatively limited additional cost. Also, the fact that Monaghan holds only 60 per cent of the shares in Tunnel Tech means that the holder of the remaining 40 per cent (Northern Straw Limited, which as far as the OFT is aware is not linked to Monaghan) is unlikely to allow the loss of profits upstream to result in additional profits for Monaghan downstream.
65. Therefore, the OFT does not consider that the Transaction raises substantial competition concerns based on Monaghan's vertical integration of mushroom and compost production.

THIRD-PARTY VIEWS

66. Third-party views have been discussed above where relevant. Most of the merged firm's competitors raised significant concerns about the Transaction, in particular regarding Monaghan's large share of supply for UK mushrooms. However, only one of the merged firm's customers that were approached by the OFT expressed a concern, relating to the limited number of alternative suppliers. Another customer also referred to this

¹⁴ See *Merger Assessment Guidelines*, paragraph 5.6.13 (second bullet point).

¹⁵ *Merger Assessment Guidelines*, paragraphs 5.6.9 to 5.6.12.

factor but, rather than raising a concern, stated that the Transaction could now enable it to source regional products from Sussex. Other customers were not concerned about the Transaction.

ASSESSMENT

67. Monaghan and Sussex overlapped in importing, growing, packing and supplying mushrooms, mainly to grocery retailers but also to food service and manufacturing customers in the UK. Both parties also produced mushroom compost.
68. The merged parties' combined share of supply of mushrooms to food service and manufacturing customers is [0-five] per cent. Their combined share of supply to retailers is around [40-50] per cent, both for mushrooms sourced in the UK and for UK and imported mushrooms combined, with an increment of around [five-15] per cent and [0-10] per cent respectively.
69. Although the merged firm's combined shares of supply to retailers are not so low as to rule out concerns over unilateral effects, Sussex was not a closer competitor to Monaghan than several other mushroom suppliers and may in fact have been significantly less strong as a competitor. Third parties raised some concerns about the reduction in the number of alternative suppliers for customers to switch to, but the OFT found that most retailers have at least three suppliers in addition to the merged parties, and there is significant competition from foreign mushroom growers.
70. The OFT further concluded that no vertical concerns were raised by Monaghan's position as the majority shareholder of Tunnel Tech, the only supplier of mushroom compost in the UK. As Sussex produced compost only for its own use, the Transaction will not result in customer foreclosure. There is also no evidence to suggest that the Transaction could result in significant input foreclosure, due in particular to a lack of ability and incentive on Monaghan's part to engage in such foreclosure.
71. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

72. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.

END NOTES

1. In relation to paragraph 12, Monaghan clarified that after the Transaction it has supplied the retailer in question with mushrooms from the Sussex site in addition to mushrooms from other sources, although it stated that it remains capable of supplying this retailer without using mushrooms from the Sussex site.
2. The OFT clarifies that the Dutch, French and Polish suppliers referred to in paragraph 46 produce comparable but somewhat smaller volumes of mushrooms compared with Monaghan, with one exception of a supplier that produces significantly more mushrooms than Monaghan.