

Proposed acquisition by J Sainsbury plc of 18 petrol stations from Rontec Investments LLP

ME/5407/12

The OFT's decision on reference under section 33(1) given on 7 June 2012. Full text of decision published 19 June 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. **J Sainsbury plc (Sainsbury's)** is a large national grocery retailer, which is also active in the retail supply of fuel in the UK. Sainsbury's is listed on the London Stock Exchange.
2. **Rontec Investments LLP (Rontec)** is a special purpose joint venture partnership between GMR Capital Limited, Investec plc, Grovepoint Capital LLP and others. Rontec recently acquired Total's retail fuel network in the UK, Isle of Man and Channel Islands made up of 810 Total branded sites.¹
3. **The target business (the Target)** is comprised of 18 petrol forecourts owned by Rontec, nine of which are company-owned-dealer-operated (**CODO**) and nine of which are company owned company operated. The UK turnover of the 18 petrol stations being acquired is £[] for the financial year ended 31 December 2010.²

¹ See Case ME/5139/11 – Proposed acquisition by Rontec Investments LLP of petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Ltd and their affiliates dated 20 October 2011.

² Total revenue (both fuel and non-fuel) inclusive of fuel duty but exclusive of VAT.

TRANSACTION

4. Sainsbury's proposes to acquire the Target which is comprised of six freehold properties, 12 leaseholds as well as a number of transferring employees for consideration of £[] for the six freeholds and annual rent payable of £[] for the 12 leaseholds being acquired (the **Transaction**).
5. The Transaction was notified to the Office of Fair Trading (**OFT**) on 5 April 2012 and the administrative deadline is 7 June 2012.

JURISDICTION

6. As a result of this Transaction Sainsbury's and the Target will cease to be distinct. The OFT believes that the combination of assets acquired by Sainsbury's is sufficient to constitute an 'enterprise' for the purposes of section 23 of the Enterprise Act 2002 (the **Act**).
7. The merging parties submitted to the OFT that the UK turnover of the Target does not exceed £70 million, so the turnover test in section 23(1)(b) of the Act is not satisfied.
8. The merging parties submitted that the share of supply test is not met with respect to the retail supply of fuel as no area exceeds 25 per cent. Further, they submitted that kiosks in petrol forecourts should not be considered as providing an increment in the share of supply of groceries. Therefore, no relevant merger situation has been created.
9. In determining the goods or services to be considered for the purposes of the share of supply test, the OFT has a wide scope of appreciation, which it can apply, although it will have regard to a reasonable description of a set of goods or services to determine whether the share of supply test is met.³ In this case, the OFT considers that petrol forecourts supply groceries and therefore there is an increment in the supply of groceries in the UK. This is consistent with previous cases involving petrol forecourts.⁴

³ OFT Mergers - Jurisdictional and procedural guidance, OFT527, dated June 2009 at paragraphs 3.52 to 3.55.

⁴ See cases ME/5139/11 – Proposed acquisition by Rontec Investments LLP of petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Ltd and their affiliates dated 20 October 2011 and ME/5191/11 Completed acquisition by Shell UK Limited of 253 petrol stations from Rontec Investments LLP dated 3 February 2012.

10. In this respect, the merging parties overlap in the supply of groceries in the UK. The merging parties submitted Sainsbury's share of supply in groceries in Croydon, West Berkshire, Southampton, Hillingdon, Southampton UA, Surrey, Wandsworth and Warwick is [20-30] per cent, [20-30] per cent, [20-30] per cent, [20-30] per cent, [20-30] per cent, [25-35] per cent, [20-30] per cent and [25-35] per cent respectively. The merging parties' activities overlap in each of these areas and their combined share of supply is greater than 25 per cent in those areas aggregated together. The OFT considers that, collectively, these areas account for a substantial part of the UK.
11. As such, the share of supply test in section 23 of the Act is met. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

FRAME OF REFERENCE

12. The merging parties overlap in the retail supply of fuel and groceries. Each of these is considered in turn below.

Product scope

Retail supply of fuel

13. The retail supply of fuel involves the sale of fuel to motorists via petrol forecourts, which are typically owned either by the oil companies that supply the petrol forecourts with fuel, by supermarkets, or by independent third parties.⁵
14. In line with previous recent OFT decisions,⁶ the merging parties submitted that the relevant product market is the retail supply of fuel. Further, based

⁵ Case ME/5139/11 – Proposed acquisition by Rontec Investments LLP of petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Ltd and their affiliates dated 20 October 2011.

⁶ Cases ME/5139/11 – Proposed acquisition by Rontec Investments LLP of petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Ltd and their affiliates dated 20 October 2011 and ME/5191/11 Completed acquisition by Shell UK Limited of 253 petrol stations from Rontec Investments LLP dated 3 February 2012.

on supply-side substitutability no further segmentation is required between the different types of fuel such as petrol and diesel since the distribution of such fuels is made at the same point of sale, the merging parties' sites supply both petrol and diesel and they monitor a competing site for both without exception.⁷

15. The OFT did not receive any evidence which suggests it should depart from its previous findings. In addition, given that the merging parties' activities do not overlap in the supply of fuel through motorway sites or in the retail supply of liquefied petroleum gas, the OFT does not consider it necessary to reach a firm conclusion as to whether further segmentation in this respect is required. Therefore, for the purposes of this assessment, the OFT has assessed the Transaction on the basis of the retail supply of fuel.

Retail supply of groceries

16. In mergers involving grocery chains, in line with the Competition Commission's grocery report,⁸ the OFT's approach has been to break down the overall supply of groceries into the following three markets, which are asymmetric in nature, based on store size:⁹

- One-stop stores: those with a net sales area of 1,400 square metres (sqm) or more. Stores of this category compete with other stores of the same size and constrain stores of a smaller size.
- Mid-range stores: those with a net sales area of between 280 sqm and 1,400 sqm. Stores of this category compete with other stores of the same size and are also constrained by one stop stores. Mid-range stores constrain convenience stores but do not constrain one stop stores.
- Convenience stores: those with a net sales area of less than 280 sqm. Stores of this category compete with all other stores of the same size

⁷ Case ME/1975/05 – Anticipated acquisition by Tesco Stores Limited of former BP/Safeway petrol forecourts and stores from Wm Morrison Supermarkets plc dated 24 October 2005.

⁸ Competition Commission Report, The supply of groceries in the UK market investigation, dated 30 April 2008.

⁹ See Cases ME/3777/08 Anticipated acquisition by Co-operative Group Limited of Somerfield Limited dated 20 October 2008, ME/4810/10 Anticipated acquisition by One Stop Stores Limited of 76 stores of the Mills Group of companies dated 14 March 2011 and ME/5317/12 Anticipated acquisition by Co-operative Group Limited of David Sands Limited dated 16 April 2012.

and are also constrained by mid-range and one stop stores.

Convenience stores do not constrain mid-range or one stop stores.

17. This Transaction involves petrol station kiosks (**Kiosks**) and a large grocery retailer operating through Kiosks as well as convenience, mid-range and one-stop stores. The OFT therefore considered the position of Kiosks within the groceries market.
18. The merging parties submitted that Kiosks are not part of the groceries market as they are not a convenience store (given their size, range of products and shopping mission) and are more akin to newsagents and off licences. Nevertheless, the merging parties did indicate that it is arguable that one-stop, mid-size and convenience stores impose a competitive constraint on Kiosks.
19. The majority of third parties considered that all Kiosks should be considered in the same grocery retailing frame of reference despite some third parties noting that the product offering between Kiosks can differ widely.
20. The majority of third parties indicated that convenience stores do exercise a competitive constraint on Kiosks. A number also specified that Kiosks impose a competitive constraint on convenience stores although one third party indicated that competition is dependent on who operates the Kiosk and the level of grocery offering in the Kiosk.
21. With respect to the asymmetric constraint from mid-size and one stop stores, third party views were mixed with some third parties indicating that mid-sized and one-stop shops constrain Kiosks, and others indicating that due to a different type of shopping mission, they are not constraints. Third parties also indicated that newsagents are unlikely to constrain Kiosks, unless they are in close geographic proximity and sell a similar range of products, and so are similar to convenience stores.
22. Without concluding on market definition, for the purposes of this assessment, the OFT has considered the impact of the Transaction taking into account the competition between Kiosks as well as the asymmetric constraint convenience, mid-size and one-stop stores exert on Kiosks.

Geographic scope

Retail supply of fuel

23. Whilst the merging parties noted that the European Commission has reviewed retail fuel mergers at a national level¹⁰ and price marker sites¹¹ were not used in older OFT cases,¹² they nevertheless provided data in line with the most recent fuel retail cases reviewed by the OFT.¹³ In this regard, they applied filtering criteria to remove from the analysis local areas which do not raise prima facie competition concerns on the basis of drive time isochrones and/or 'price marker' lists of Sainsbury's and Rontec.
24. Whilst a number of European Commission decisions found the market to be national in scope, the OFT notes that in the most recent decision cited by the merging parties, the European Commission in fact acknowledged the local nature of the retail fuel supply, stating that its assessment 'has to take into account that competition also takes place at the local level.'¹⁴ In addition, third parties consistently viewed the retail supply of fuel to be local.
25. In terms of local market competition, and in line with Shell/Rontec and Rontec/Total,¹⁵ the merging parties adopted an initial filtering approach

¹⁰ Case COMP/M.4919 Statoil/ConocoPhillips dated 21 October 2008, Case COMP/M.4723 Eni/Exxon Mobil dated 24 July 2007, Case COMP/M.3516 Repsol YPF/Shell Portugal dated 13 September 2004, Case COMP/M.3110 OMV/BP Southern Germany Package dated 11 June 2003, Case No. IV/M.1383 Exxon/Mobil dated 29 September 1999.

¹¹ Price marker sites are sites whose price is actively monitored by a reference site, and can affect that site's own prices.

¹² Case ME/1975/05 – Anticipated acquisition by Tesco Stores Limited of former BP/Safeway petrol forecourts and stores from Wm Morrison Supermarkets plc dated 24 October 2005 and case ME/3933/08 – Completed merger between Co-operative Group Limited and Lothian Borders & Angus Co-operative Society Limited dated 6 March 2009.

¹³ Cases ME/5139/11 – Proposed acquisition by Rontec Investments LLP of petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Ltd and their affiliates dated 20 October 2011 and ME/5191/11 Completed acquisition by Shell UK Limited of 253 petrol stations from Rontec Investments LLP dated 3 February 2012.

¹⁴ Case COMP/M.4919 Statoil/ConocoPhillips dated 21 October 2008, paragraph 29.

¹⁵ Cases ME/5139/11 – Proposed acquisition by Rontec Investments LLP of petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Ltd and their affiliates dated 20 October 2011 and ME/5191/11 Completed acquisition by Shell UK Limited of 253 petrol stations from Rontec Investments LLP dated 3 February 2012.

based on drive time isochrones on the basis of a 10-minute drive time in urban areas and a 20-minute drive time in rural areas. The OFT did not receive any evidence in this case to depart from that approach. Therefore, the OFT has assessed the merger on this local area basis.

26. In addition, and in line with Rontec/Total, the merging parties identified each local overlap where one of the merging parties' site is price marked against the other such that:
- Either of the merging parties identifies a site of the other party as a main marker.
 - Either of the merging parties identifies a site of the other party as one of only three marker sites or fewer.
 - Either of the merging parties identifies the other party as one of only three brands or fewer within their respective marker lists.
27. Rontec marks sites at a local level and the merging parties provided the OFT with a list of markers and key markers for the relevant Target sites. Therefore, the OFT has also assessed the merger on a local area basis that utilises the Rontec/Total filter using price marking sites, as outlined above.
28. The OFT has also examined the case on a national basis.

Retail supply of groceries

29. The OFT considers it important to have regard to both the national and local competition aspects in this case and considers below the filtering methodology adopted by the merging parties.
30. The merging parties submitted that because the shopping mission of many Kiosk customers is fuel, the geographic scope in which they impose a constraint on each other is greater than that for convenience stores. However, out of caution, the merging parties used the same geographic scope as for convenience stores.
31. The merging parties applied the same methodology as in CGL/Somerfield,¹⁶ with the addition of a one mile radius.¹⁷ The merging parties therefore applied the following filters:

¹⁶ Case ME/3777/08 Anticipated acquisition by Co-operative Group Limited of Somerfield Limited dated 20 October 2008.

- All convenience stores and Kiosks within one mile.¹⁸
- All conveniences stores and Kiosks within five minutes.¹⁹
- All mid-size stores within five/10 minutes (urban/rural).
- All one stop stores within 10/15 minutes (urban/rural).

Conclusion

32. The OFT has considered the impact of the Transaction on the retail supply of fuel on both a national and local basis as well as on the retail supply of groceries on both a national and local basis.

HORIZONTAL ISSUES

National retail supply of fuel

33. The merging parties submitted that, according to the latest Catalyst data for the first quarter of 2011, they will have a combined share of supply for fuel in the UK of [five-10] per cent by volume with an increment of [0-five] per cent.
34. Given the low combined share of supply and low increment, the OFT considers that the Transaction does not give rise to a substantial lessening of competition (**SLC**) in the retail supply of fuel in the UK.

Local retail supply of fuel

35. As noted above, the OFT has applied the filter method as applied in Shell/Rontec and Rontec/Total. That is, the filter identified where the proposed Transaction will give rise to a reduction in the number of fascia from four to three or fewer on the basis of a 10-minute drive time in urban

¹⁷ See Case ME/5317/12 Anticipated acquisition by Co-operative Group Limited of David Sands Limited dated 16 April 2012.

¹⁸ The merging parties also ran a sensitivity check removing all Kiosks following which only Sports Centre Southampton (which failed the filter on a one mile radius) failed.

¹⁹ The merging parties also ran a sensitivity check removing all Kiosks following which only Sports Centre Southampton (which failed the filter on a one mile radius) failed.

areas and a 20-minute drive time in rural areas.²⁰ In this case only one local area failed this filtering, namely Falkland.

36. In terms of the price marker filtering, Sainsbury's operates a national pricing policy which it applies locally. Sainsbury's price matches []. The OFT considers that although these national rankings may inform any assessment of closeness of competition at a national level, in an individual local area they are not binding, and any type of petrol station could be the cheapest in that area. In this case, the filtering exercise based on price markers has not identified any additional areas for investigation.
37. However, when applied to the Target sites, three additional areas are identified, namely:
 - Worcester Road identifies Sainsbury's Blackpole.
 - Haydon's Road identifies Sainsbury's Merton.
 - Hayes identifies Sainsbury's Hayes.
38. Combining the two filtering methods, the following local areas will be discussed in further detail below:
 - Falkland.
 - Hayes.
 - Haydons Road.
 - Worcester Road.
39. As a part of the OFT's merger investigation, in each of these areas the merging parties conducted customer surveys, the design of which was discussed with the OFT, in order to produce an empirical estimate of the diversion ratios. The OFT has analysed the raw survey results and concluded that they are sufficiently robust for the purposes of this investigation.
40. The diversion ratios, which were calculated both to and from the Target and Sainsbury's sites, did not exceed 15 per cent for any area, with the exception of Hayes where the diversion ratio was 80 per cent from the

²⁰ All Total branches involved in the Shell/Rontec transaction were treated as if they were Shell fascia. In addition, all unbranded sites were treated as one fascia.

Target site to Sainsbury's.²¹ This suggests that the merging parties are not each other's closest competitors in Falkland, Haydons Road and Worcester Road.

41. The merging parties also provided evidence on margins, which are [0-five] per cent for all areas. The gross upward pricing pressure index (**GUPPI**), was below one per cent for Falkland/Newbury, Haydons Road/Merton and Worcester Road/Blackpole.²²
42. Given the diversion ratios between the merging parties are low, with a correspondingly low GUPPI measure, the OFT considers that the Transaction does not give rise to a SLC in the retail supply of fuel in Falkland/Newbury, Haydons Road/Merton and Worcester Road/Blackpole. Given the higher diversion ratio in Hayes, the OFT conducted further analysis in that area, as detailed below.

Hayes

43. As noted above, Hayes fails the primary filter as Sainsbury's is the Target site's main marker.
44. Whilst, as noted above, the diversion ratio from the Target site to Sainsbury's is high (80 per cent), the diversion ratio from Sainsbury's to the Target is only seven per cent. The merging parties submitted that this results in a GUPPI of under one per cent for Sainsbury's and under four per cent for the Target.²³
45. Within the 10-minute isochrone, there are a total of eight additional fascia, which means the Transaction would result in a fascia reduction of 10 to nine centred on Sainsbury's and an eight to seven centred on the Target

²¹ 9.6 per cent from Total Falkland to JS Newbury, 0 per cent from JS Newbury to Total Falkland, 0.9 per cent from Total Haydons Road to JS Merton, 15 per cent from JS Merton to Total Haydons, 0 per cent from Total Worcester Road to JS Blackpole and 0.9 per cent from JS Blackpole to Total Worcester Road.

²² The margins were calculated as retail price net of VAT less; base price per litre, fuel duty per litre, and other variable costs, over retail price net of VAT. The OFT also ran a sensitivity check excluding fuel duty from the margin calculation, which showed the GUPPI remained below five per cent for all areas other than Hayes.

²³ This was calculated as above. The OFT notes that if duty were excluded from the margin calculations the GUPPI would exceed five per cent.

site.²⁴ Diversion ratios revealed that there was diversion to two Shell sites and one Total site (which is not part of the Transaction and therefore is being retained by Rontec) outside of the 10-minute isochrone, but there was only diversion to two fascia, other than the merging parties, within the 10-minute isochrones (Tesco (at two sites), and BP). This suggests that although Sainsbury's is a strong competitor of the Target site in Hayes, there are a number of competitors, which would continue to constrain the merging parties post-transaction. In particular, Tesco will provide a particularly strong constraint as it is Sainsbury's main marker, and the diversion ratio from Sainsbury's to Tesco's in Hayes is high (63 per cent).

46. In Shell/Rontec, the OFT was concerned that GUPPI may underestimate the price effect in areas where the diversion ratio is high, as GUPPI does not account for any accommodating price reactions, which are referred to as a feedback effect.²⁵ This is in contrast to another upward pricing pressure model – the illustrative price rise (**IPR**) – which takes account of both pass through and the feedback effect, through its assumptions about the curvature of demand. In this case, diversion from Sainsbury's to the Target is low (seven per cent). Therefore, any increase in price from Sainsbury's would likely lead to diversion to Tesco or one of the other competitors in the area and this will reduce the feedback effect. The asymmetric isoelastic IPR is also low (under five per cent).
47. Whilst Sainsbury's Hayes is Total Hayes' main marker, the Target site does mark another five sites.²⁶ The merging parties provided data which shows that over the course of a month, the Target site charged on average two pence more per litre for unleaded fuel and 1.2 pence more per litre for diesel than the Sainsbury's site.²⁷ In addition, data on volumes of fuel sold at each site showed that the Target site only sold [] per cent of the volume of the Sainsbury's.²⁸
48. As noted above, Sainsbury's national marking policy, which is applied at a local level, is to price match []. Sainsbury's have confirmed this policy is not flexed locally and there is no manager discretion in applying it. Further,

²⁴ The fascia present are BP, Texaco (two sites), Shell, Tesco (two sites), Esso (three sites), Murco, Pace and Total (site retained by Rontec).

²⁵ See paragraphs 90-92 of Shell/Rontec.

²⁶ Tesco Hayes, Tesco Yeading, Texaco Hayes End, BP The Grapes and Esso South Hayes.

²⁷ Data covers the period from 8 April 2012 to 8 May 2012.

²⁸ Total sold [] litres of fuel compared to Sainsbury's sales of [] litres.

Sainsbury's indicated that where []. In this particular area, post-transaction, [] shows that Tesco is currently the cheapest competitor of both Sainsbury's Hayes and Total Hayes, which means Tesco will provide a direct price constraint on the Target site. The Target site will also continue to be constrained by Sainsbury's Hayes pricing.

49. Therefore, despite the high diversion ratio in Hayes, the GUPPI is low, as is the IPR measure, used as a sensitivity check. The OFT notes that there are a number of additional competitors in the area and that Tesco will continue to impose a strong constraint on Sainsbury's, resulting in a muted feedback effect.²⁹ In addition, the OFT notes that the Total site is both smaller than Sainsbury's (by volume sold) and more expensive, and will continue to be constrained by the cheapest competitor in the local area [].
50. The merging parties have informed the OFT that [].
51. Based on the available evidence, the OFT considers that the Transaction does not give rise to a SLC in the retail supply of fuel in Hayes.

National retail supply of groceries

52. Sainsbury's share of supply of groceries does not exceed 25 per cent. In addition, the increment added by the Target sites is negligible (substantially less than one per cent). As such, the OFT considers that the Transaction does not give rise to a SLC in the retail supply of groceries on a national basis in the UK.

Local retail supply of groceries

53. The merging parties submitted that the following four areas failed one of the grocery filters:
 - Rawdon: failed the five minute isochrone filter on the output re-centred for 30.1 per cent of the population.
 - Hayes: failed the five minute isochrone filter on the output re-centred for 15.9 per cent of the population.

²⁹ The OFT also notes that the Transaction will not lead to a substantial diminution of non-price factors of retail fuel offering in the local area. For example, seven sites within 10 minutes of Hayes offer a 24-hour service. These are Esso (two sites), Tesco, Murco, Shell, Texaco and BP sites.

- Falkland: failed the output re-centred isochrone for 19 per cent of the population on a five minute drive time, irrespective of how the competitor set was defined as well as the output re-centred on a one-mile radius.
- Sport Centre Southampton: failed the output re-centred isochrone for 16 per cent of the population, when Kiosks were excluded from the filter (given Sport Centre is branded as a Spar the OFT assessed this area further on a cautious basis).

Rawdon and Hayes

54. The merging parties provided evidence on the limited grocery offerings at Rontec's sites in Rawdon and Hayes. In particular, the OFT was provided with net sales area for both sites and data on turnover generated for Hayes. The merging parties confirmed that the retail offer at Hayes was broadly equivalent in terms of number and type of stock keeping units to Rawdon.
55. The merging parties submitted that they do not have access to sales data for Rawdon as it is a CODO Kiosk. However, the Rawdon Kiosk has a sales area of only 860 square feet, in contrast with the typical Sainsbury's convenience store with a sales area of over 2,000 square feet. In the absence of sales data, the merging parties have provided evidence of the offering at the Kiosk, which shows that within this small sales area only a very small amount of sales space is dedicated to groceries, with no fresh fruit and vegetables and a very small selection of chilled foods, mostly comprising of pre-packed sandwiches.
56. For Hayes, the merging parties submitted that the Hayes Total Kiosk generated weekly sales of around £[]. This Kiosk is also a CODO site and therefore the merger parties did not have a breakdown of sales by category. In contrast, however, the average weekly sales generated by Sainsbury's comparable Kiosks were £[].
57. The merging parties further provided a list of independent convenience stores in the area (two within five minutes of Total Rawdon and six within five minutes of Total Hayes), which, given the limited grocery offering by the stores in Rawdon and Hayes, were likely to exert a competitive constraint on them.

58. Based on the number of other competitors likely to exercise a constraint post-transaction on the merging parties, the OFT considers that the Transaction does not give rise to a SLC in the retail supply of groceries in Rawdon and Hayes.

Falkland and Sports Centre Southampton

59. The merging parties undertook surveys at Falklands and Sports Centre Southampton.
60. The diversion ratio from Total Falkland to JS Newbury was six per cent while there was no diversion in the other direction. This suggests that the merging parties are not close competitors in the retail supply of groceries in Falkland/Newbury.
61. The merging parties also provided evidence on margins at Falkland and Newbury,³⁰ which are around [] per cent and [] per cent respectively. As such, isoelastic IPRs were all below two per cent for Falkland/Newbury.
62. Given the diversion ratios between the merging parties are low and they are not each other's closest competitors, the OFT considers that the Transaction does not give rise to a SLC in the retail supply of groceries in Falkland/Newbury.
63. Total Sports Centre Southampton failed the primary filter on a one mile radius and on the cautious sensitivity check of excluding competing petrol station Kiosks from the filtering.
64. The diversion from Total Sports Centre to Sainsbury's (Burgess Road, Shirley and Lordshill) was 18 per cent. The merging parties used margins of [] per cent for Total Sports Centre [] and an average margin of the margins of Burgess Road and Shirley for Sainsbury's to calculate the IPR which was less than five per cent. The OFT has identified some concerns around the margin and IPR calculations.³¹ However, the OFT also notes that if customers buying fuel as well as groceries were to be excluded from the results (as their primary shopping mission may have been the purchase of

³⁰ These were calculated by taking the revenue from sales less; cost of goods, labour costs, and other direct variable costs over revenue from sales.

³¹ In particular margins for Lordshill were not calculated and the OFT's sensitivity analysis based on margins shows that if certain assumptions about the proportion of labour costs that are variable are flexed, the asymmetric IPR will exceed five per cent.

fuel, which would lead to a different set of potential diversion options), the diversion ratio from Sports Centre to Sainsbury's drops to 11 per cent and the IPR remains low at below five per cent.

65. The survey data showed diversion to stores outside of the one mile radius.³² Further, the data suggests that only approximately 30 per cent of individuals would have walked to the store from within the one mile radius. In addition, 71 per cent of customers travelled for over five minutes, which suggests the five minute drive time filter is appropriately cautious for this area.
66. Further, the OFT is conscious that excluding competing Kiosks is a very cautious approach given the survey results showed some diversion from the Sainsbury's Kiosk to Shell Winchester Road and to the Total Sports Centre site.
67. The merging parties submitted that the Total Sports Centre site is small, generating weekly turnover of only £[] from sales of fruit and vegetables and has a much smaller proportion of chilled products compared to comparable Sainsbury's stores (when matched in terms of catchment, pitch, demographic and size). The survey also suggested that the nature of grocery purchases were different at Sports Centre compared to the other sites surveyed.³³
68. Given the diversion ratios for groceries only between the merging parties are low suggesting they are not close competitors, the number of other competitors outside of the one mile radius registering diversion and the retail grocery offering at Sports Centre Southampton, the OFT considers that the Transaction does not give rise to a SLC in the retail supply of groceries in Sport Centre Southampton.

³² Diversion of 8.2 per cent to Asda Bournemouth Road, 6.9 per cent to Tesco Tebourba Way and 8.5 per cent and 5.8 per cent respectively to Sainsbury's Burgess Road and Lordshill which are all outside the one mile radius.

³³ In Falkland 40.4 per cent of shoppers indicated this was a planned regular grocery shop and 29.3 per cent that it was a top-up purchase of groceries whereas this was the case for only 3.9 per cent and 14.6 per cent, respectively of Total Sport Centre customers. By contrast Total Sports Centre shoppers were making a purchase of convenience items they urgently needed and had run out of (37.9 per cent) and buying something to eat or drink straightaway (27.2 per cent).

Barriers to entry and expansion

69. Sainsbury's submitted that barriers to entry for grocery retailing from petrol forecourts in local areas are low in line with the OFT's findings in Tesco/Wm Morrison.³⁴ Further, the merging parties provided evidence of empty shops generally³⁵ as well as examples of empty properties in Rawdon, Sports Centre and Hayes.
70. Three third parties confirmed they believe barriers to entry to be low although one indicated these are high for larger sites (in excess of 280 sqm) and a number listed obtaining sites as the main barrier to entry for new firms to grocery retailing from petrol forecourts.
71. However, as the Transaction does not give rise to concerns over unilateral effects, there is no need for the OFT to reach a firm conclusion regarding barriers to entry and expansion.

THIRD PARTY VIEWS

72. Third party comments have been taken into consideration and discussed above where relevant. Other concerns raised by third parties about potentially anti-competitive practices are discussed below.
73. One third party raised concerns relating to the retail supply of groceries specifically with respect to the acquisition of two stores in the Wimbledon area (262 Wimbledon Park Road and 298 Haydons Road). However, within a five minute isochrone, the Transaction would result in a reduction in fascia from six to five when centred on the Target site and no reduction when centred on Sainsbury's. As such, the OFT is of the view that sufficient competitors will remain in the area to constrain the merged entity.
74. The OFT also received a complaint concerning Carshalton Beeches. However, the OFT was of the view that sufficient competitors will remain in the area to constrain the merged entity as they did not fail the filters on either the fuel or the groceries side.

³⁴ Case ME/1975/05 – Anticipated acquisition by Tesco Stores Limited of former BP/Safeway petrol forecourts and stores from Wm Morrison Supermarkets plc dated 24 October 2005.

³⁵ Local Data Company's end of year vacancy report for 2011 indicated town centre vacancy rates of 14.6 per cent for February 2011.

75. Complaints were made with respect to the retail supply of fuel generally. However, the OFT is of the view these have been addressed by the assessment above. The OFT also received complaints relating to alleged predatory and anti-competitive pricing by Sainsbury's. However, the OFT is of the view that these are not merger specific and notes that they are being considered by the appropriate team within the markets and projects group.³⁶

ASSESSMENT

76. The merging parties overlap in the retail supply of fuel and groceries in the UK. At the national level, the merging parties submitted that their combined shares of supply in the retail supply of fuel and groceries are less than 25 per cent in each case and the increment is small.
77. The OFT also assessed the Transaction at a local level. With respect to fuel, the OFT identified four areas which failed the primary filters. Of these, only one area, Hayes, showed a high diversion ratio suggesting the merging parties were close competitors (at least from the Total site to the Sainsbury's site). However, the GUPPI is low (as is the IPR measure used as a sensitivity check), a number of competitors will continue to constrain the merged entity, and while the diversion to Sainsbury's is high, the corresponding diversion to the Total site is low. Sainsbury's national marketing policy suggests []. The OFT also considered that the Transaction will not result in a material reduction in non-price factors of competition in Hayes. As such, on the basis of all the evidence considered in the round, the OFT concludes that Hayes does not raise any concerns with respect to the retail supply of fuel.
78. With respect to the retail supply of groceries, the OFT identified four areas which failed the primary filter. The data provided by the merging parties with respect to the stores in Rawdon and Hayes suggested they had a limited grocery offering and would be constrained by the independent grocers in their area. The diversion ratio from Falkland to JS Newbury was low and no diversion was found the other way around.
79. At Sports Centre Southampton the retail grocery offering is limited which suggests that it may be appropriate to include competing Kiosks in the

³⁶ See OFT website for press release entitled 'OFT provisionally decides not to launch a market study into road fuels in the UK' dated 26 April 2012.

analysis. Further, the survey results showed local shoppers divert to some extent to a number of competitors which lie just outside the one mile radius. In any case, the IPR calculation for this local area was low.

80. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

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