
Completed merger between Co-operative Group Limited and Lothian Borders & Angus Co-operative Society Limited

ME/3933/08

The OFT's decision on reference under section 22(1) given on 6 March 2009. Full text of the decision published on 18 March 2009.

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

PARTIES

1. **Co-operative Group Limited (CGL)** is the UK's largest co-operative society with some 4.5 million members. It is active in a diverse range of activities including food retail, pharmacy, banking, travel agency, optical services, funeral services, and petrol forecourts. This case involves CGL's food retailing, pharmacy services, funeral services, petrol forecourt and home store businesses.
2. **Lothian Borders & Angus Co-operative Society Limited (LBA)** is a regional co-operative society, based in Scotland. LBA comprises 65,000 members and is active in diverse sectors including food retail, pharmacy services, funeral services and petrol forecourts. LBA also has one store selling carpets and furniture. LBA's UK turnover for the year ending 26 January 2008 was £122.7 million.

TRANSACTION

3. Both CGL and LBA are corporate bodies registered under the Industrial and Provident Societies Act 1965. In December 2008, LBA transferred its engagements to CGL under section 51(1) of the Industrial and Provident

Societies Act 1965. The transaction was completed upon registration by the Financial Services Authority, which occurred on 14 December 2008.

4. Following the Monopolies and Mergers Commission (MMC) investigation into the Co-operative Wholesale Society's (CWS) acquisition¹ of the funeral undertaking business of House of Fraser, the Secretary of State for Trade and Industry accepted undertakings from CWS on 27 November 1987 to notify the Office of Fair Trading (OFT) of any future proposed acquisitions of funeral undertaking businesses in Scotland. CGL has complied with its obligations under the 1987 undertakings (which are still in place) in respect of this transaction.
5. The parties notified the transaction to the OFT on 11 December 2008 and the transaction completed on 14 December 2008. The extended administrative and statutory deadlines for the OFT to decide whether to refer the merger to the Competition Commission (CC) expire on 6 March and 9 May 2009 respectively.

JURISDICTION

6. As a result of this transaction CGL and LBA have ceased to be distinct. The UK turnover of LBA exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

SUBSTANTIVE ASSESSMENT

7. The parties overlap in the following sectors in Scotland, which will be considered below in turn:
 - a) grocery retailing
 - b) pharmacy services
 - c) funeral services, and
 - d) petrol forecourts.
8. The parties also overlap in the home store market. LBA operates one department store in Selkirk selling carpets and furniture and CGL has an

¹ CWS being a predecessor to CGL.

online business selling beds and electrical goods across mainland UK. However, in light of the numerous online retailers supplying similar goods to that offered by CGL, the OFT considers it unlikely that the merger will result in a substantial lessening of competition in the home stores market in either Selkirk or across mainland UK. Therefore, no further consideration will be given to home stores.

GROCERY RETAILING

Parties' activities

9. CGL operates over 3,000 food retail stores in the UK (including those recently acquired through its acquisition of Somerfield Limited), comprising approximately 1,900 convenience stores, 1,000 mid size stores and 100 one-stop stores. CGL is the manager and representative member of the Co-operative Retail Trading Group (CRTG), a buying group that comprises the major co-operative societies engaged in grocery retailing in the UK.
10. LBA operates 53 food retail stores in Scotland, comprising 35 convenience stores, 17 mid-size stores and one one-stop store. LBA is also a member of CRTG.

Product scope

11. The groceries industry has been examined extensively in recent years by both the OFT and Competition Commission (CC).²
12. At the outset the OFT considers that it is worth noting that market definition is not an end in itself but simply a starting point for the

² For OFT examples, see Completed acquisition by Tesco Stores Limited of Brian Ford Discount Store Limited, OFT decision of 22 December 2008 (*Tesco/Brian Ford*); Anticipated acquisition by Co-operative Group Limited of Somerfield Limited, OFT decision 20 October 2008 (*CGL/Somerfield*), and Anticipated merger between Co-operative Group Limited and United Co-operatives Limited, OFT decision of 23 July 2007 (*CGL/United*). For CC examples, see The supply of groceries in the UK market investigation (April 2008) (*Groceries report*); and Tesco plc and the Co-operative Group (CWS) Limited: a report on the acquisition of the Co-operative Group (CWS) Limited's store at Uxbridge Road, Slough by Tesco plc (November 2007) (*Tesco/CWS*); Somerfield plc and Wm Morrison Supermarkets plc: A report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc (September 2005) (*Somerfield/Morrison*); and Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets plc; J Sainsbury plc; and Tesco plc: a report on the mergers in contemplation (September 2003) (*Safeway report*).

competitive analysis. This is especially true in activities such as grocery retailing in which various retailers are highly differentiated in their offerings across many factors such as price, store locations, the number of products on offer, the amount of choice within each product category, store facilities, shopping ambience, staff service levels, home delivery services and branding. As such, there will be a continuum of constraints placed on each retailer in each individual location which may not be easily captured in a precise market definition across all locations.

Grocery retailing

13. For the purposes of the CC's recent Groceries report, groceries were defined as including food, pet food, drinks, cleaning products, toiletries and household goods, although most stores will also sell a wider range of other products.
14. In past cases the CC and the OFT have considered that grocery retailing comprises three broad product markets:
 - one-stop stores: those with a net sales area of 1,400 square metres or above.³ These stores form their own product market
 - mid-size stores: those with a net sales area of less than 1,400 square metres but above 280 square metres. These stores are constrained by one-stop stores and so one-stop stores must be included in any market definition with mid size stores as its focus, and
 - convenience stores: those with a net sales area of less than 280 square metres. These stores are constrained by all grocery stores and so the product market focussed on convenience stores must also include mid size and one-stop stores.
15. The parties submitted that these distinctions should form the basis for the OFT's analysis in this case.

³ In its market investigation into groceries, the CC considered that the floor size threshold for larger grocery stores was larger than 1,000 to 2,000 square metres (paragraph 12) but used the threshold of 1,400 square metres for much of its analysis (paragraph 13). In Tesco/CWS the CC also used 1,400 square metres as the threshold.

16. The OFT questioned other grocery retailers about the most appropriate product market definition and almost all agreed that the distinctions listed above were appropriate. One retailer raised concerns about the precise sales area threshold of a mid size store asserting that it would be more appropriate to define mid size stores as those between 300 and 1,000 square metres.
17. An aspect of product market definition in previous grocery investigations has been which store fascia to include within the relevant product market. The OFT and CC's previous approach has been to exclude for the purposes of product market definition a number of grocery retailers due to their limited product range. The excluded retailers included the 'Limited Assortment Discounters' (LADs), namely Aldi, Lidl and Netto,⁴ and frozen food retailers, such as Iceland and Farmfoods, and specialist grocery retailers such as butchers, fishmongers and greengrocers.⁵
18. Given that the product market definition is only a starting point, the OFT, in adopting a cautious approach, has used the product market definition previously adopted by the OFT and CC in recent reports. That is, there are three distinct product markets distinguished by size of the sales area (as set out in paragraph 14 above) and these product markets are fascia specific (as set out in paragraph 17 above).
19. In addition, the OFT has considered in this case whether the regional co-operatives should be included in the effective competitor set (discussed below).
20. Notwithstanding this cautious approach to market definition, other evidence, such as survey results and diversion ratios, are used later in this decision for the purposes of the competitive assessment, and take account of the degree of competitive constraint from all competitors, such as LADs, in specific areas.

⁴ The CC noted that LADs typically sell fewer than 1,000 products (or stock keeping units – SKUs), compared with approximately 5,000 to 10,000 products sold by large grocery retailers in stores in the same size range as those operated by LADs.

⁵ These exclusions do not apply when considering which grocery stores are likely to constrain convenience stores.

Geographic scope

21. Previous CC and OFT reports into supermarkets have found that there are both national and local aspects to competition.⁶ The CC report stated that although certain aspects of the retail offer are predominantly set on a national basis, this does not mean that the geographic market is national. The CC concluded that, at the local level, the appropriate parameters of competition could be measured as:
- for one-stop stores, 10 minutes' drive time in urban areas and 15 minutes' drive time in rural areas
 - for mid-size stores, a five-minute drive time in urban areas and 10 minutes' drive time in rural areas but these stores are also constrained by one-stop stores within a 10-minute drive time (or a 15-minute drive time in rural areas), and
 - for convenience stores, five minutes' drive time in all areas but these stores are constrained by one-stop stores within a 10-minute drive time (or a 15-minute drive time in rural areas) and by mid size stores within a five-minute drive time (or a 10-minute drive time in rural areas).
22. The OFT tested this approach to the geographic scope with third parties. All third parties stated that they agreed with, or generally had no objection to, the definition of local geographic markets via such drive time criteria.
23. Consequently the OFT has adopted the approach set out in paragraph 21 above as the geographic market for its local area analysis, which is consistent with the CC's Groceries report and CGL/Somerfield.

⁶ For example, *CGL/United* (paragraphs 103 and 104); *Tesco/Administore* (paragraph 11); *Safeway report* (paragraph 2.65).

Horizontal issues

Relationship between CGL and LBA

24. CRTG operates as a buying group on behalf of approximately 25 co-operative societies. CGL Food Retail, a business unit within CGL, acts as the manager and representative member of CRTG. The CRTG Category Management Team (employed by CGL Food Retail) conducts and concludes all negotiations with suppliers in relation to cost prices, terms of trade, ranges and promotions for the food operations of all CRTG members. In its role as CRTG manager, CGL provides price recommendations to all CRTG members. As noted by the OFT in CGL/United, given their common membership of the CRTG buying group, both Co-op and LBA's decisions on product ranges are made in consultation with CRTG, and the 'Co-op' own-brand products available in both parties' stores are identical. National promotional activity is coordinated by CRTG, which negotiates the terms with relevant suppliers.
25. As such, the OFT believes that the degree of competition between CGL and members of the CRTG buying group, including LBA, may well be less than that between CGL and a fully independent fascia. However, the degree of competition that does remain may be sufficient for its removal to create a realistic prospect of a substantial lessening of competition. The OFT stated in CGL/United that:
- 'However, the parties at no point sought to argue that their stores should not be treated as competing local propositions in the merger assessment. Indeed, there would appear to be scope for the PQRS offering to vary between the parties' local overlap stores. Each party is free to determine the amount of shelf space allocated to different product categories, and price-setting decisions are taken independently. Local managers have some ability to propose local pricing, promotional or product range initiatives, subject to sign-off from their society management. There is also clearly scope for local quality and service aspects of competition to vary between stores, and for consumers to respond to such variation through switching behaviour.' (CGL/United, paragraph 111)
26. However, it does not follow that all the regional co-operatives should be treated as independent, competing fascia for the purposes of the OFT's assessment. As discussed at length in CGL/Somerfield (see paragraphs 94-

108), there is a significant degree of explicit co-operation and similarity in retail offering between the CRTG members. In relation to pricing, at least, this similarity varied between CRTG members depending on the extent to which (if at all) they followed CGL's recommended prices.⁷

27. In the absence of compelling evidence in a particular case on the precise relationship between CGL and a particular CRTG member, the OFT is therefore required in a given case to conduct its phase one filtering analysis on the basis that:
- CGL may compete sufficiently with the acquired store (in this case LBA) such that the removal of competition between them creates the realistic prospect of a substantial lessening of competition, but
 - CGL does not compete sufficiently strongly with other CRTG members in any relevant overlap areas for them to be regarded as independent constraints equivalent to a fully independent fascia.
28. This difference of treatment is explained by the combination of the asymmetry of the reference test ('is or may be the case') and the exceptional nature of the factual relationship between CGL and the CRTG members. The OFT would not expect these issues to arise in other grocery cases that do not involve such a close relationship between two nominally separate operators.

National competition

29. The OFT has investigated whether there is a realistic prospect that the proposed merger would lead to a substantial lessening of competition at the national level.
30. When considering the merger effect at the national level it is appropriate to consider the merged entity's share of supply across all store sizes combined, as national competition does not take place according to the size of an operator's retail stores. On this measure, after the merger CGL

⁷ In *CGL/Somerfield*, the parties conducted a mystery shopping exercise which concluded that price differences between CGL and the regional co-operatives varied from being []. By way of comparison, prices between Somerfield and the regional co-operatives varied from around []. The parties themselves acknowledged that the price dispersion between Somerfield and the regional co-operatives was greater than between CGL and the regional co-operatives.

will account for approximately eight per cent of total UK groceries sales. The increment attributable to LBA is significantly less than one per cent. Further, CGL would continue to face strong competition from other larger retailers.

31. In light of CGL's limited share of all UK groceries (post-merger), the small increment attributable to its merger with LBA and the presence of other larger supermarket operators, the OFT does not believe that any competition concerns on the basis of unilateral effects arise at the national level as a result of this merger.
32. In addition, the OFT has considered whether the merger can be expected to create or strengthen buyer power to such an extent that it distorts grocery suppliers' incentives to invest in new capacity, products and production processes. However, no third parties raised any concerns, nor considered that their relationship with CRTG would be altered as a result of this transaction. Accordingly, the OFT does not consider that the merger will adversely affect grocery suppliers to the detriment of UK consumers.
33. Finally, the OFT considered whether there is a realistic prospect that the merger would lead to a substantial lessening of competition at the national level by creating or strengthening some form of coordinated effects operating between the national grocery groups. However, given the merged entity would have a national share of supply of about eight per cent, and in light of the minor increment attributable to LBA, the OFT does not consider that the merger will represent a sufficiently material change in market structure to raise national coordinated effects concerns.
34. Overall therefore, the OFT considers that any national issues regarding unilateral and coordinated effects, or buyer power in the supply chain, are very unlikely to arise from such a minor increment in market share. In addition, no third parties raised national competition concerns and therefore the OFT has not considered this issue any further.

Local competition

Unilateral effects (CGL and LBA overlap areas)

35. The OFT examined whether there was a realistic prospect that, as a result of the merger, CGL and/or LBA would be able to raise prices, reduce

service standards, reduce the range or quality of goods offered, reduce investment levels or otherwise harm consumers in those local areas in which LBA and CGL are currently competing. This is a unilateral effects theory of harm.

36. In order to examine these potential local area competition concerns, the parties undertook detailed local analysis. The methodology applied for this analysis closely follows previous work undertaken by the OFT in CGL/Somerfield.
37. In the context of this work, an initial filtering exercise was undertaken, in order to reduce the number of local areas for investigation. The parties provided local area mapping and fascia and store size identification. No third party comments received by the OFT suggest that the mapping work submitted by the parties is out of date or is a misleading indicator of current local competitive concerns.
38. The results of the stage one filtering and stage two competition assessment analysis are detailed below, starting with the unilateral effects theory of harm at the local level.
39. In CGL/Somerfield, CGL argued that one of the bases for a unilateral effects theory of harm at a local level – ability to raise price – was of reduced relevance in this case given CGL's pricing policies. CGL submitted that it allocates each of its stores to one of [] pricing bands; although it considers a range of factors in allocating a store to a pricing band, predominant among these is the store format (which is strongly correlated with the store size).⁸ As such, local pricing was more likely to be based on store size than local competition. In CGL/Somerfield, the OFT considered this pricing policy but did not consider that it militated against its unilateral effects concern for two reasons. First, CGL accepted that local conditions may be taken into account to some extent in determining price and the OFT did not, in any event, see conclusive evidence that there was no prospect of local price flexing in any form. Second, there are a number of ways, other than pricing, in which competitive harm might occur, such as through a deterioration of non-price factors such as quality, range and

⁸ Data submitted by CGL in *CGL/Somerfield* show that [] of CGL stores (representing over [] of sales) fall within [] price bands. Relative to the [] price band, [] is, on average, [], while [] is around [].

service. Accordingly, the OFT has examined whether the merger creates unilateral effects at a local level in this case.⁹

40. To examine unilateral effects at the local level, the OFT undertook a two stage approach.

Stage 1 – fascia reduction filter

41. Stage 1, as mentioned above, involved a desktop filtering exercise centred on the LBA store which identified 49 LBA stores that potentially overlapped with a CGL store (i.e. the CGL store lay within the maximum reach isochrone of the LBA store).¹⁰ The 49 overlap stores were subsequently subjected to a more detailed isochrone analysis, incorporating a fascia reduction filter and various re-centring techniques. This exercise identified eleven LBA stores¹¹ that required further investigation because the overlap resulted in a reduction in fascia from four to three, or worse.¹²
42. In keeping with the approach undertaken in *CGL/Somerfield*, the OFT asked the parties to undertake additional filtering analysis centred on a number of the CGL stores (the 'CGL-centred' analysis). This was necessary due to the asymmetry in store size classifications between LBA stores and the local overlap CGL stores. Specifically, where a CGL store is in a smaller size classification than, for instance, a local LBA one-stop store then the latter would be deemed to be unconstrained by the CGL store on the basis that it is in a lower size band. Therefore this local market would be excluded if the filtering were based purely on an analysis centred on LBA stores. However,

⁹ The OFT also considered whether the way that CRTG operates means that the substantial lessening of competition in certain existing CGL/LBA overlap areas would be enhanced if another CRTG member were also present in the local market. This effect was discussed in *CGL/Somerfield*, where it was characterised as an 'aggravated unilateral effect' to the extent that the CRTG member follows the lead of the CGL store, any unilateral effect arising through the coming together of CGL and LBA may also be transmitted to the other local CRTG members and, as a result, any local unilateral effect may be extended. However, to the extent that the OFT has already found a realistic prospect of a substantial lessening of competition in these areas, any remedy in respect of standard unilateral effects concerns would also mean that there was no merger-specific lessening of competition in such areas.

¹⁰ The methodology adopted in this case is similar in approach to that applied in *CGL/Somerfield* (as described in Annex 1 of *CGL/Somerfield*).

¹¹ In alphabetical order: Arbroath (Abbey Gate Centre), Arbroath (Timmergreens), Dunbar (Countess Crescent), Ellon, Forfar (Academy Street), Forfar (Dundee Road), Kelso, Kirriemuir The Roods, Prestonpans, Selkirk and Tranent.

¹² In line with the OFT's cautious approach to CRTG members, the OFT treated CRTG members other than LBA as not being effective competitors to the parties. However, in this case, this made no difference to the application of the phase 1 filter.

from the point of view of those who shop at the smaller CGL store, the CGL store may be constrained by the larger LBA store and this possible (one-way or 'asymmetric') constraint will be lost post merger. This would be captured through an analysis centred on the CGL stores.

43. This additional filtering highlighted one additional overlap between CGL and LBA which failed the Stage 1 analysis (but which had not previously been identified through the prior centring on LBA stores).¹³
44. Therefore, following the Stage 1 filtering process, eleven LBA stores and one CGL store required further consideration at Stage 2.

Stage 2 – diversion ratio estimation and competition analysis

45. Stage 2 of the local unilateral effects analysis involved a competition assessment of the twelve local overlap areas that failed at Stage 1. This assessment involved combining new and pre-existing customer survey data (from CGL/Somerfield) to estimate diversion ratios and calculate illustrative price rises.¹⁴
46. The parties, using the diversion ratio (14.3 per cent) and illustrative price rise (five per cent) thresholds from the Somerfield/Morrison report¹⁵ identified that all twelve local areas also failed the Stage 2 filter.
47. The OFT received no evidence during the course of its investigation to warrant moving away from undertaking its competition assessment using the diversion ratio and illustrative price rise thresholds adopted by the CC in its Somerfield/Morrison report, which the parties accepted were relevant in this case.

¹³ Kirkcudbright (CGL)/Castle Douglas (LBA).

¹⁴ The illustrative price rise is a measure which the CC used in *Somerfield/Morrison*. It combines the diversion ratio between the merging parties and the profit margin of a store to provide an indication of whether a store has the ability and incentive to raise its prices post-merger or equivalently worsen its non-price offer. Therefore, the illustrative price increase is probative of a unilateral effects theory of harm in that it measures potential upward pressure on prices or equivalent pressure to worsen the non-price offer. It does not, however, predict post-merger prices (that is, it concerns ability and incentive but not necessarily effect) nor does it suggest that the OFT is willing to tolerate post-merger price increases of up to five per cent. For further information see the OFT's decision of 8 May 2008, Anticipated acquisition of the online DVD rental subscription business of Amazon Inc by LOVEFiLM International Limited.

¹⁵ The OFT previously used these thresholds in its *CGL/United* and *CGL/Somerfield* decisions.

Regional co-operatives (LBA / other CRTG member overlap areas)

48. The OFT also considered whether competition concerns could be raised in local areas where LBA is present alongside other members of the buying group, CRTG, in which CGL participates (who are all regional co-operatives). The theory of harm in this case would be a reduction in competition caused by the replacement in an area of LBA by CGL, and therefore a change in the competitive dynamic between this store and other CRTG member stores in the area.
49. In practice, however, there were no additional areas in which the merger would, on this basis, fail the phase 1 filter tests. Thus, the OFT did not need to consider this theory of harm further.

Ownership of landsites

50. The CC found that when a grocery retailer in a highly-concentrated local market exercises control over a landsite in that area, it makes entry more difficult for a competing retailer, allowing the incumbent retailer to continue to benefit from its position and therefore creating an adverse effect on competition.¹⁶ Mechanisms for controlling land in this way included land bank sites, landsites that are leased or sub-leased to third parties, restrictive covenants, and exclusivity arrangements.
51. To the extent that competition concerns arise from ownership by one of the merging parties of landsites from which it currently benefits, these are not merger specific and are therefore not considered further in this decision. However, the transaction raises the possibility of creating new ownership associations between landsites held pre-merger by one party and mid-range or larger stores operated by the other party in highly-concentrated local markets. Such concerns could arise in local markets in which the parties do not already have overlapping grocery stores.
52. During the course of its investigation the OFT found that CGL has [] land bank sites¹⁷ and LBA has [].¹⁸ However, none of these land bank sites raise any further competition concerns because either the land bank site in question was not within the isochrone of the other party's nearest store or

¹⁶ Paragraph 7.121 of the *Groceries report*.

¹⁷ Located in [].

¹⁸ Located in [].

the overlap in question had already been considered in the context of an overlap between existing stores.¹⁹

Coordinated effects at the local level

53. The theory of harm outlined in paragraphs 48 and 49 above could potentially be characterised as a coordinated effects theory. The OFT did not discount the possibility that the replacement, in an area in which another CRTG member is present, of LBA by CGL may increase the potential for coordination between those CRTG members (i.e. because the competitive dynamic might change as a result of CGL, which has the responsibility for recommending CRTG prices, becoming present in the local area). However, the OFT considered that such a potential coordinated theory of harm would only arise in areas where new overlaps between CGL and CRTG members arose in concentrated local markets (that is, where CGL was itself not already present). In practice, no such new overlaps are created by the merger.
54. Other than the theory of harm discussed in paragraph 53 above, the OFT could not in this case identify any other theory that the merger would affect the potential for coordination on the locally-set competitive variables of the retail offer, nor was this suggested in any evidence received.

Vertical issues

55. Vertical concerns do not arise in this case. Although CGL administers CRTG, the buying group (discussed above), CRTG supplies its members at cost and []. Therefore, CGL is not in a position where it can, through CRTG, increase its rival retail co-operatives' costs in order to win any sales that its rivals lose via its own retailing activities.
56. On the basis of the evidence before it the OFT does not consider that the proposed merger will provide the merged entity with any additional ability or incentive to foreclose downstream rivals.

¹⁹ Concerns would only potentially arise in local markets in which the parties do not already have overlapping stores. See *CGL/Somerfield* paragraph 133.

Third party views

57. During the course of its investigation the OFT solicited views from competing grocery retailers and suppliers to the parties. No third party indicated to the OFT that the proposed merger raised competition concerns at the national level or in any local area not already identified above.

Conclusion

58. CGL and LBA overlap in the retail of groceries in Scotland. The OFT has not found any realistic prospect of competition concerns arising at the national level. However, the OFT considers that as a result of the merger, there is a realistic prospect of a substantial lessening of competition arising in twelve local areas as a result of local unilateral effects.
59. Consequently, the OFT believes 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.

PHARMACY SERVICES

60. CGL is active in the retail pharmacy sector through a number of CGL subsidiaries, principally National Co-op Chemist Limited. CGL has approximately 800 retail pharmacy sores in the UK.
61. LBA operates five pharmacy branches located in Arbroath (two branches), Port Seton, Ormiston and Tranent.

Product scope

62. The overlap in the provision of retail pharmacy services encompasses a range of professional and retail services. As set out in previous cases by the OFT,²⁰ these include the retail supply of:
- Prescription only medicines (ethicals). There is no price competition between pharmacies on ethicals because the price of the prescription is

²⁰ Anticipated acquisition by Boots plc of Alliance UniChem plc, 6 February 2006 (*Boots/Unichem*); Anticipated acquisition by Lloyds Pharmacy Limited of Independent Pharmacy Care Centres plc, 8 June 2007 (*Lloyds/IPCC*); and *CGL/United*.

set by the NHS. Pharmacies are reimbursed by the NHS (less a clawback) for the cost of the drugs dispensed.

- Pharmacy only medicines (P medicines) such as certain hayfever remedies or stronger variants of some GSL medicines (see below), that do not require a prescription but can only be dispensed by a pharmacist. Pharmacists can set their own retail prices²¹ for P medicines; therefore limited pricing competition occurs.
 - General sales list (GSL) medicines, which do not need to be sold only in pharmacies and can therefore also be found in supermarkets, convenience stores, petrol stations, etc. Due to the fact that some P medicines have a GSL alternative, there is some pricing constraint on P medicines from GSL alternatives.
 - Non-pharmaceutical products. Some pharmacies stock non-pharmaceutical products, such as toiletries, baby food and health food.
 - Other pharmacy services. Some pharmacies include screening and consultation services, for example on medicine use, smoking cessation and needle exchanges. In addition, some pharmacies may also offer home delivery and repeat prescription services.
63. However, for the purposes of market definition, nothing is gained in this case by considering separate product frames of reference for the individual supply of products and/or services supplied at the retail level by pharmacies. Although the constraints in relation to price and non-price parameters of competition may differ depending on the product or service in question (and in particular, whether that parameter is regulated), these issues are best dealt with in the competitive assessment.
64. The relevant frame of reference for the competition assessment is therefore taken to be the overall provision of retail pharmacy services.

²¹ Following the ending of resale price maintenance on over-the-counter (P and GSL medicines) in 2001.

Geographic scope

Retail pharmacy (supply of retail pharmacy services to consumers)

65. In keeping with the findings of the OFT report on the control of entry regulations,²² the OFT has previously used a one mile radius as the basic proxy for the scope of relevant local geographic markets. However, consideration has been given to narrower and larger areas in cases where significant geographic features affected local access or the closest competing pharmacy was more than one mile away.
66. The parties consider that the one mile radius broadly corresponds to the settlement served by each pharmacy and is the closest approximation to the catchment area. Some third parties have confirmed that a radius of one mile is appropriate; others have suggested that a radius of two miles or of a specific neighbourhood would be more appropriate.
67. The OFT has not obtained any convincing evidence to warrant departing from using a one mile radius as the principal basis and starting point for the assessment of retail pharmacy competition in this case. However, the OFT acknowledges that identifiable local factors may warrant some flexibility in this approach, including flexing of the one mile radius. In this case, due to the small number of overlaps between the parties, the OFT was able to consider each local area on an individual basis based on specially-prepared maps and other relevant evidence.

Supply of pharmacy services to the NHS/health boards

68. In addition to providing services to customers, pharmacies have contractual relationships with the NHS for Scotland. This includes negotiating the national pharmacy contract with the Scottish Department of Health, which specifies the core services to be undertaken by the pharmacies and remuneration levels, and negotiating enhanced service level initiatives with local individual health boards.²³

²² The control of entry regulations and retail pharmacy services in the UK – A report of an OFT market investigation (January 2003). This report found that 78 per cent of consumers travel less than one mile to get to a pharmacy and 96 per cent travel less than three miles.

²³ For example to provide enhanced service levels such as, smoking cessation.

Horizontal issues

Retail pharmacy – national shares

69. CGL currently operates 800 pharmacies throughout the UK. CGL's national retail pharmacy share is approximately [] per cent.²⁴ LBA's 2007 national retail pharmacy share was significantly less than one per cent. Given the relatively small scale of this acquisition, combined with lack of third party concerns, national competition issues are not considered to arise. Accordingly, the supply of retail pharmacy services at the national level is not considered further.

Regional (health board) overlaps

70. Given the minor increment to CGL's position as a result of the merger with LBA, the scale of the merger is not considered to be sufficient to raise concerns in relation to the negotiation and provision of services to Scottish health boards. This view was supported by the two Scottish health boards involved,²⁵ neither of whom raised any concerns in relation to this transaction. Accordingly, the supply of enhanced services at the regional level is not considered further.

Analytical framework for the assessment of local overlaps

71. In terms of the potential for competition between retail pharmacies at a local level, restrictions in some NHS pharmacy contracts may limit the parameters of competition. For example, there is no price competition between retail pharmacies in the supply of prescription medicines. However, despite the high percentage of turnover derived from the supply of prescription medicines (over which there is no price competition)²⁶ previous OFT investigations have established that there is some scope for competitive interaction between pharmacies at a local level across a range of service and quality parameters.²⁷

²⁴ In relation to ethicals, for the three months June to August 2008.

²⁵ NHS Tayside and NHS Lothian.

²⁶ The parties and majority third party responses show that turnover accruing from prescriptions typically account for in excess of 80 per cent of pharmacy turnover.

²⁷ For example, provision of consultation space, offer of home delivery, collection of prescriptions (from a surgery), prescription waiting times (availability of prescribed medicines), price competition of non-ethical medicines, provision of enhanced facilities/service and opening times, see *CGL/United, Boots/Unichem* and *Lloyds/IPCC*.

72. In this case, the parties have confirmed that pharmacies compete on price (except for ethicals), range, quality and convenience. One third party stated that pharmacies also compete on prescription collection and delivery services. Several third parties stated that they monitored their competitors on product range, NHS services offered and prices charged by competitors.
73. The parties stated that geographic location, in particular close proximity to a General Practitioner (GP), is the main factor determining a customer's choice of pharmacy.
74. In a previous case,²⁸ the OFT concluded that, in the absence of mitigating factors of local competition, the creation of a two-to-one and/or three-to-two fascia reductions would give rise to competition concerns. Moreover, three-to-two fascia reductions are of particular concern where they become two-to-one fascia reductions when some radius flexing and/or re-centring is undertaken.

Assessment of local overlaps

75. Consistent with previous practice, the OFT has adopted a fascia count approach as a first screen.²⁹ Based on the OFT's analysis, using a one mile radius, the merger gives rise to a two-to-one fascia reduction in one local area.³⁰ Absent any mitigating factors, such a fascia reduction would normally give rise to competition concerns.
76. While the parties' pharmacies are located within a one mile radius of each other, the parties submitted that, due to the geographic peculiarities of the area, the actual driving distances between the CGL and LBA pharmacies are significantly larger (approximately two miles). In addition, the parties argued that, on the basis of such driving distances (rather than on any specific radius), another independent pharmacy should be included in the competitor set, which would result in a three-to two (rather than two-to-one) fascia reduction.

²⁸ *Lloyds/IPCC*

²⁹ *CGL/United, Boots/Unichem and Lloyds/IPCC*. However, the OFT recognises that in some circumstances fascia analysis is capable of under-reporting potential problem areas where the parties are particularly close competitors, as a fascia approach treats all (included) competitors as being of equal competitive discipline on each other.

³⁰ Port Seton/Prestonpans.

77. While the parties were not able to provide any specific evidence on this issue, the OFT considers it reasonable to expect that a significant proportion of customers walk to their pharmacy and therefore the analysis on driving distances may not be relevant. In addition, post-merger, CGL would in the wider area have three out of the four nearest pharmacies to the local Cockenzie Health Centre which both parties serve. Furthermore, the only remaining independent pharmacy is approximately half the size³¹ of either of the two CGL pharmacies (and so may be perceived by consumers to stock a more limited range of pharmacy products and therefore only exert a limited constraint on the parties post-merger).
78. Accordingly, whether the OFT considered the geographic market on the basis of a one mile radius (with a two-to-one fascia reduction) or considered a wider market taking into account local competitive conditions, the outcome remained identical, in that there remain competition concerns from the merger in relation to this local area (Port Seton/Prestonpans).

Barriers to entry and expansion

79. As set out in previous OFT decisions,³² the control of entry regulations remain the key barrier to entry in retail pharmacy. In previous cases, entry possibilities have not typically been considered sufficient to mitigate competition concerns arising from local fascia count reductions. The OFT has not received any evidence suggesting that entry or expansion would be sufficient to mitigate concerns in this local area.

Vertical issues

80. There is no evidence that the merger raises any vertical concerns and no third parties voiced any concerns in relation to pharmacy services.

Third party views

81. Several third parties including competitors and local health boards were contacted. None raised any concerns specific to the merger.

³¹ According to estimates provided by the parties.

³² *CGL/United, Boots/Unichem and Lloyds/IPCC.*

Conclusion

82. The OFT believes that the merger creates a realistic prospect of a substantial lessening of competition in relation to one local area with a two-to-one fascia reduction, located in Port Seton/Prestonpans.

FUNERAL DIRECTING SERVICES

Parties' activities

83. CGL's funeral business consists of Co-operative Funeralcare, the principle activity of which is funeral undertaking, although it is also active in the manufacture of coffins and coffin liners. CGL operates approximately 800 funeral homes across the UK, and in 2007 conducted [] funerals.
84. LBA operates four funeral homes located in Arbroath, Brechin, Forfar and Kirriemuir, and in 2007 conducted [] funerals.

Product scope

Funeral directing services

85. The parties overlap in the provision of funeral directing services in Scotland. Funeral directing services comprise not only services provided directly by the funeral director (for example, providing a coffin and managing the funeral) but also arranging for the provision of services offered by others (for example, church, cemetery or crematoria services).
86. Funeral directing services are provided to individuals on an at-need³³ basis, or, to a lesser extent, on the basis of a pre-paid funeral plan. However, in either case the service provided will be the same and in previous merger investigations³⁴ these two services have been considered together. In this case, one third party stated that larger funeral home businesses may have an advantage in competing within the pre-paid market due to the greater resources they can devote to national advertising of such schemes. To the

³³ A funeral that has not been pre-paid.

³⁴ Anticipated acquisition by Co-operative Group Limited (formerly Co-operative Wholesale Society Limited) of George Burgess & Son Ltd (*CGL/Burgess*) (2009).

degree that such an advantage exists, independent funeral homes may not be able to compete effectively with larger operators and pre-paid funerals may constitute a separate market. However, it has not been necessary to conclude definitely on this issue since no concerns arise under either market definition considered.

Mortuary services

87. The parties overlap in the provision of mortuary services in Scotland. Mortuary services consist of the removal of the deceased from the place of death in the event of a sudden or accidental death, and transportation of the body to a mortuary pending collection of the body by relatives. These services are put out for tender by large organisations, such as local councils and National Health Boards (NHBs), with contracts typically lasting between three to five years.
88. In a previous case,³⁵ third parties indicated that mortuary services are usually provided at a very low cost or even free by the funeral director in the hope that they will win the follow-on contract with the family of the deceased to provide funeral directing services. In CGL/Fairways, there was some indication that larger funeral businesses may have an advantage in competing for mortuary service contracts. Therefore, the OFT adopted a cautious approach and considered that the provision of mortuary services was a separate frame of reference from the provision of funeral directing services.
89. In this case, neither CGL nor LBA have any mortuary contracts in place in [Angus or Dundee], nor have they tendered for any in the last five years. The parties do provide mortuary services to organisations such as the police and NHS though these are provided on an ad hoc basis (that is, not under formal contracts). However, having regard to a number of factors, including the ad hoc nature of these mortuary services and lack of third party concerns, the OFT does not believe that the merger raises competition concerns in this sector in Scotland. Therefore, no further consideration will be given to mortuary services.

³⁵ Completed acquisition by Co-operative Group (CWS) Limited of Fairways Group UK Limited (CGL/Fairways) (2006).

Geographic scope

Funeral directing services

90. The funeral market operates at a local level given the nature and extent of the search carried out by next-of-kin when looking to make funeral arrangements. This approach is consistent with past cases; and the information provided by the parties supports the view that the market for funeral directing services to individuals is local in scope.³⁶
91. Previous decisions have suggested two ways in which the geographic market may be examined. The first is on the basis of the geographic area from within which 80 per cent of the acquired funeral director's funerals are derived. The second is on the basis of a geographic area around the acquired funeral director with a radius of two or five miles, depending essentially on how urban the local area is.
92. Nothing in the current case suggests that the OFT should depart from the 80 per cent catchment area definition considered in previous cases in the first instance. An analysis based on radial distance is not considered appropriate in this case, as the target is located in a rural area and the appropriate distance for any such radius has not been considered in previous cases and it would be disproportionate to do so in the present case.

Horizontal issues

Competitive assessment

93. Previous inquiries have suggested that competition in the funerals sector is muted³⁷ and third party comments in the current case support this. All third parties that responded to this question suggested that the proportion of

³⁶ This is consistent with the MMC's conclusions in its reports on Co-operative Wholesale Society Limited and House of Fraser plc 1987, Acquisition by Service Corporation International and Plantsbrook Group plc 1995, Anticipated acquisition by Co-operative Group of McIntosh Funeral Directors 2006, *CGL/Fairways*, *CGL/United* and Anticipated acquisition by Co-operative Group Limited (formerly Co-operative Wholesale Society Limited) of George Burgess & Son Ltd (*CGL/Burgess*) (2009).

³⁷ The Price Commission Funeral Charges Report No 22, 1977; the MMC report on the Co-operative Wholesale Society Limited and House of Fraser plc 1987, Acquisition by Service Corporation International and Plantsbrook Group plc 1995, *CGL/Fairways*, *CGL/United* and *CGL/Burgess*.

customers obtaining more than one quote is extremely low.³⁸ This is due to the fact that customers are generally vulnerable and distressed due to the nature and infrequency of the purchase, lack of experience and time pressures involved.

94. Previous cases suggest that national and/or regional branding by the parties does not appear to be a major competitive factor in the provision of funeral services to individuals given the significant number of strong independent competitors.³⁹ Although several competitors commented that they competed against either CGL or LBA, none thought that they competed against both. Indeed, several competitors commented that CGL and LBA were unlikely to compete with one another.

Assessment of local competition

95. In the Monopolies and Merger's Commission's 1995 inquiry into the SCI/Plantsbrook merger, where the merger increased the market share (measured as share of deaths⁴⁰) above 25 per cent within the relevant local market, the CC required divestments (of either acquired or pre-merger homes) to reduce it to no more than 25 per cent. For local markets where the acquirer had a market share of over 25 per cent before the merger, the CC asked for divestments of the acquired branches. However, in that case the MMC was required to consider a large number of potential overlaps in different geographic areas.
96. This approach has been followed in more recent merger investigations giving rise to multiple potential overlaps, including CGL/United, and CGL/Fairways, although the approach to the geographic market definition has varied, principally due to data availability. The 25 per cent 'rule of thumb' is a conservative threshold, particularly given that competition between funeral homes has been noted to be strongly muted.⁴¹ However, it does provide a useful initial basis for assessing whether overlaps can be

³⁸ Third parties estimated that the number of people obtaining a second quote was between 0 and 2 per cent.

³⁹ Possible exceptions to this including mortuary services and pre-paid funerals.

⁴⁰ Share of deaths equates to the number of funerals conducted by a funeral home in a specified catchment divided by the total number of deaths in the same catchment area. This need not be the same as share of funerals (that is, number of funerals divided by the total number of funerals) given that not everyone who is buried in an area died there and vice versa.

⁴¹ See paragraph 93 above.

ruled out as giving rise to a reduction in competition, thereby allowing the OFT to concentrate its analysis on the remaining overlaps areas.

97. Applying the 25 per cent methodology, there is only one local area identified for further analysis, William Black (LBA) in Brechin. In this case, the post-merger combined market share is [] per cent, but the increment is extremely small. Looking at the individual postcode bricks that make up the 80 per cent catchment area, LBA accounted for [] per cent of funerals⁴² and CGL accounted for just [] within the catchment area.⁴³
98. Accordingly, and in keeping with its approach in CGL/Fairways, the OFT has applied a second stage of analysis to Brechin, which includes consideration of additional factors, including the number of other competitors present, share of funeral homes, and geographic proximity (as a proxy for closeness of competition).
99. The LBA branch (William Black) in Brechin is the only funeral home within its 80 per cent catchment area and is roughly 25 miles from either of the nearest two CGL funeral homes situated in Stonehaven and Dundee. At least one funeral home lies between the parties' funeral homes and all are likely to face stronger competition from the independent funeral operators situated more locally.
100. Although the parties' combined share of deaths exceeded 25 per cent, the increment does not exceed [] per cent. This is because the data on deaths is collected on the basis of the postcode of the deceased, whereas some funerals may be conducted by funeral branches outside of these local catchment areas.⁴⁴ Therefore, small increments of this nature, particularly where there is no geographical overlap between the parties, would not appear to be indicative of competitive interaction between the parties. In addition, several third party competitors commented that CGL and LBA were unlikely to compete with one another.
101. Overall, on the basis of the evidence provided, the OFT believes that the merger does not give rise to a realistic prospect of a substantial lessening of competition for the supply of funeral directing services.

⁴² [] funerals.

⁴³ [].

⁴⁴ For example, where the deceased passed away in an area outside their home or relatives chose to hold the funeral in another area.

Vertical issues

102. CGL owns one crematorium in Craigton (Glasgow). The crematorium is located more than two hours' drive time on a motorway from the nearest LBA branch.⁴⁵
103. There is no evidence that the merger raises any vertical concerns and no third parties voiced concerns in relation to the provision of cremation services.
104. CGL manufactures coffins and some of these are sold to LBA. LBA does not manufacture coffins and therefore there is no horizontal overlap. No third party concerns were raised with respect to foreclosure or similar concerns.

Third party views

105. Third party comments have been discussed, where relevant, in the text above.
106. The OFT invited comments from local funeral home competitors, the local NHS board and local police authority. No third parties raised any concerns specific to the merger.

Conclusion

107. 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 for funeral directing services in the United Kingdom.

PETROL FORECOURTS

Parties' activities

108. CGL operates 225 forecourts throughout the UK.

⁴⁵ CGL also has other facilities located in England, but these are not in the vicinity of any LBA branch.

109. LBA operates three forecourts in Scotland, located in Forfar, Lauder and Tranent.

Product scope

110. Most fuel retailers sell two types of fuel: unleaded petrol and diesel. In its 1998 report on fuel retailing,⁴⁶ the OFT considered that although these products are not substitutable on the demand side,⁴⁷ on the supply side retailers could more easily switch between selling unleaded petrol and diesel (subject to emptying and cleaning of storage tanks) as the equipment required for retailing each product is the same.

111. In light of the above and consistent with a previous decision,⁴⁸ the relevant product frame of reference is considered to be the retail supply of fuel.

Geographic scope

112. In its 1998 report on the supply of petrol in the UK, the OFT found that individual retailers operate in local markets with most sites monitoring competitor prices within a fairly limited radius, typically three miles. The OFT noted that the possibility of a national market was unlikely given that prices vary considerably between local areas. However, the OFT considered that, at its widest, the geographic market for fuel retailing could be regional.

113. In *Tesco/Wm Morrison*, the OFT found that there existed an important competitive dynamic between petrol filling stations at the local level. Petrol retailers were found to monitor the prices of other retailers in the local vicinity when setting their own prices. In urban areas this monitoring occurred within a small radius (within one or two miles). In rural areas sites as far away as 20 or 30 miles may be monitored. For the purposes of assessment in that case and most recently applied in *CGL/Somerfield*, the OFT examined fascia within a three mile radius of either target or acquiring forecourts.

⁴⁶ 'Competition in the supply of petrol in the UK', May 1998 (OFT 230).

⁴⁷ As cars designed to run on diesel cannot take petrol, and vice versa.

⁴⁸ Anticipated acquisition by Tesco Stores Limited of former BP/Safeway petrol forecourts and stores from Wm Morrison Supermarkets plc (*Tesco/Wm Morrison*) (2005).

114. The areas of overlap in this case are relatively rural. Therefore, based on previous findings of the OFT, the geographic market is likely to be within a three and 30 mile radius of overlapping forecourts. However, it is not necessary to conclude on this issue because no competition concerns arise under any geographic definition.

Horizontal issues

115. In previous cases,⁴⁹ the OFT examined the number of fascia present within a three mile radius of each acquired forecourt.

116. Similarly, in this case, the parties provided data indicating the number of petrol stations within a three and five mile radius and the location of the nearest CGL petrol forecourt. In addition, due to the rural nature of the parties' petrol stations, in relation to Forfar and Lauder, the parties provided maps detailing the location of competing petrol retailers within a 30 mile radius. The results revealed that in Forfar although there were two CGL petrol forecourts located between 10 and 15 miles away, there were at least nine other competing fascia. In Lauder, although there were two CGL petrol forecourts located between 25 and 30 miles away, there were at least 10 other competing fascia.

117. Overall, on the basis of the information provided, the OFT believes that the merger does not give rise to a realistic prospect of a substantial lessening of competition in petrol retailing.

Barriers to entry and expansion

118. As set out in previous OFT decisions,⁵⁰ barriers to entry are high and the OFT has not obtained any evidence from the parties to alter this conclusion.

Vertical issues

119. There is no evidence that the merger raises any vertical concerns and no third parties voiced any concerns in relation to the retail supply of fuel.

⁴⁹ *CGL/Somerfield and Tesco/Wm Morrison.*

⁵⁰ *Tesco/Mw Morrison and CGL/Somerfield.*

Third party views

120. No third parties raised any concerns in relation to the retail supply of fuel.

Conclusion

121. 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 for petrol forecourts in the United Kingdom.

BUYER POWER

122. In relation to grocery retailing, pharmacy services, funeral services and petrol forecourts, customers are individual consumers and therefore do not possess any countervailing buyer power.

COORDINATED EFFECTS AT THE LOCAL LEVEL

123. In relation to grocery retailing, pharmacy services, funeral services and petrol forecourts, save for paragraph 53 above, the OFT could not in this case identify a suitable theory that the merger would affect the potential for coordination on the locally-set competitive variables of the retail or service offer, nor was this suggested in any evidence received.

ASSESSMENT

124. The parties overlap in the supply of grocery retailing, pharmacy services, funeral services and petrol forecourts in Scotland. The parties also overlap in the home store market. The OFT believes that no competition concerns arise in respect of home stores, funeral services and petrol forecourts.

125. In relation to grocery retailing, the OFT has not found any realistic prospect of a substantial lessening of competition at the national level. However, the OFT considers that as a result of the merger, there is a realistic prospect of a substantial lessening of competition arising in twelve local areas.

126. In relation to pharmacy services, the OFT identified one local area (Port Seton/Prestonpans) giving rise to realistic prospect of a substantial lessening of competition.

127. Consequently, the OFT believes 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.

UNDERTAKINGS IN LIEU OF A REFERENCE

128. Where the duty to make a reference under section 22(1) of the Act applies, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned undertakings as it considers appropriate.

129. The OFT has therefore considered whether there might be undertakings in lieu of reference which would address the competition concerns outlined above. The OFT's Mergers Substantive Assessment Guidance states that, 'undertakings in lieu of reference are appropriate only where the competition concerns raised by the merger and the remedies proposed to address them are clear cut, and those remedies are capable of ready implementation.'⁵¹

130. The parties indicated that in order to remedy any competition concerns identified by the OFT, and to avoid a reference to the CC, they would be prepared to offer undertakings in lieu. The parties therefore offered a divestment package covering each of the grocery and pharmacy sectors. The extent to which these packages are considered by the OFT to be capable of addressing the competition concerns identified above in a clear cut manner, in accordance with the scheme of the Act as well as the OFT's Guidance and decisional practice, is addressed in turn below.

Divestments – grocery retailing

131. The parties offered to divest to a suitable purchaser either the CGL or the LBA store(s) in each of the twelve local areas in which CGL and LBA overlap which give rise to competition concerns as a result of this transaction. In this way, the overlap resulting from the merger would be removed by the undertakings.

132. Eight of these twelve local areas are already covered by undertakings accepted by the OFT as a result of the CGL/Somerfield merger (see paragraphs 88 to 122 of that decision).⁵² The undertakings accepted by the OFT as a result of that transaction already require the divestment of the CGL (ex-Somerfield) stores in these areas.⁵³ The undertakings in lieu in this case will cover not only those eight areas, but also the additional four areas in where the merger raises the realistic prospect of a substantial lessening of competition.⁵⁴

Divestments – pharmacy services

133. The parties have offered undertakings with a view to remedying the realistic prospect of a substantial lessening of competition identified as a result of the merger in the reduction of fascia from two-to-one within the relevant one mile catchment area for the supply of pharmacy services in Port Seton/Prestonpans. In order to solve competition concerns, the parties have offered to divest either the CGL or LBA pharmacy.

134. The OFT believes that the undertaking offered is capable of clearly addressing the competition concerns arising in the local area identified above, as it would restore pre-merger competition (and fascia count) to the relevant local areas.

Divestments – conclusion

135. The OFT considers that the undertakings offered in respect of grocery retail and pharmacy services are clearly capable of addressing the competition concerns arising in those local markets. The OFT considered whether it was appropriate in the circumstances of this case to require that the relevant divestments be made in whole or in part to an up-front buyer or buyers. However, the OFT concluded that an up-front buyer requirement was not necessary in this case, given that for each of the stores there are a number of large and smaller purchasers able to acquire the divested assets and that might be expected to be interested in doing so.

⁵¹ Paragraph 8.3.

⁵² Arbroath (Abbeygate Centre), Arbroath (Timmergreen), Dunbar (Countess Crescent), Forfar (Academy Street), Forfar (Dundee Road), Kirriemuir The Roods/Forfar, Kelso and Selkirk.

⁵³ CGL was not given the choice to divest the LBA store in those localities given that it did not own LBA at the time the undertakings were prepared.

DECISION

136. The OFT has therefore decided to refer the completed acquisition by CGL of LBA to the Competition Commission pursuant to section 22 of the Act. However the OFT's duty to refer is suspended because the OFT is considering whether to accept undertakings in lieu of reference from CGL pursuant to section 73 of the Act.

⁵⁴ Ellon, Kirkcudbright/Castle Douglas, Prestonpans and Tranent.