

Anticipated acquisition by Asda Stores Limited of Netto
Foodstores Limited

The OFT's decision on reference was given on 23 September 2010. The full text of the decision was published on 20 October 2010.

ME/4551/10

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. **Asda Stores Limited** (Asda) is one of the UK's largest supermarket chains and is a wholly owned subsidiary of the US retailer Wal-Mart Stores Inc. Asda operates around 350 stores in the UK, almost all of which are large supermarkets (that is, having more than 1,400 sq m of sales space). Asda also sells (among other products and services) clothing (through the 'George' range), general household items, financial products (for example, insurance products and credit cards), travel agency services and in-store pharmacy services.
2. **Netto Foodstores Limited** (Netto), a wholly owned subsidiary of Dansk Supermarked A/S (Dansk) which in turn is 68 per cent owned by the Danish company AP Møller-Maersk A/S. Netto operates 194 stores in the UK. It is a limited assortment discounter offering fewer product lines than similarly sized mainstream

supermarkets.¹ Netto does not offer non-grocery products to a significant extent.

THE TRANSACTION

3. On 27 May 2010 Asda entered into a sale and purchase agreement with Dansk to acquire the entire issued share capital of Netto.
4. Once the transaction is completed Asda intends to convert the Netto stores to trade under the Asda fascia.

JURISDICTION

5. As a result of the proposed merger the enterprises Asda and Netto will cease to be distinct.
6. For the year ending 31 December 2009 Netto had a UK turnover of around £745 million. Therefore, the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is met.
7. Consequently, the OFT considers that arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation.²

BACKGROUND

8. On 23 September 2010 the OFT announced that the proposed merger created a realistic prospect of a substantial lessening of competition within a market or markets in the United Kingdom.³ The OFT found competition concerns arose in 47 local areas.

¹ Other limited assortment discounters operating in the UK include Aldi and Lidl.

² The turnovers of the merger parties are such that the merger would have a European Union dimension but since both parties earn more than two-thirds of their European Union turnover in the UK the case falls within the jurisdiction of the UK (Article 1(2) of the EC Merger Regulation, Council Regulation (EC) No 139/2004).

³ Anticipated acquisition by Asda Stores Limited of Netto Foodstores Limited, Case ME/4551/10, 23 September 2010.

9. To address the OFT's concerns Asda offered undertakings in lieu of a reference to divest the Netto store in each of the 47 local areas, thereby effectively removing the store overlap created by the proposed merger and resolving, in a clear cut manner, the OFT's competition concerns.
10. The OFT considered whether an up-front buyer provision was required in this case. An up-front buyer requirement means that the proposed divestment purchasers will have committed contractually, subject to formal OFT approval of the undertakings in lieu, to acquiring the relevant divestment store(s) before the OFT accepts undertakings in lieu.
11. The OFT will seek an up-front buyer where the risk profile of the remedy requires it. These types of risk are discussed further in OFT guidance.⁴ In this case, the OFT decided that, given in particular that Asda's divestment offer extended only to sale of the Netto stores (and not any overlapping Asda stores), the related purchaser divestment risk meant that, on a cautious basis, any undertakings in lieu that it accepts should include a partial up-front buyer provision in respect of 25 identified stores.
12. Following the suspension of the OFT's duty to refer, Asda entered into sale agreements (conditional upon OFT's acceptance of the undertakings in lieu and completion of the merger) relating to the Netto stores in the specified 25 areas. The 25 stores and corresponding purchasers are listed in Annexe 1. The purchasers put forward by Asda are Wm Morrison Supermarkets plc ('Morrisons'), Ugo Stores Limited ('Ugo', which is a part of the same group of companies as Haldanes Stores Limited, known collectively in this decision as 'Haldanes Group'), and Iceland Foods Limited ('Iceland'). Annexe 2 lists the non up-front buyer stores to be divested.
13. In assessing the proposed purchasers for the up-front buyer stores, the OFT has applied the criteria set out in section 4 of the

⁴ 'Mergers: exceptions to the duty to refer and undertakings in lieu of a reference guidance', OFT1122, December 2010, paragraphs 5.31–5.37.

proposed undertakings in lieu of a reference. These are reproduced below.

'4.1 For the purposes of the OFT approving a Divestment Purchaser in accordance with these undertakings, Asda shall, save as required or permitted by the OFT, satisfy the OFT that:

- (a) the acquisition by the Divestment Purchaser remedies, mitigates or prevents 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, in particular, having regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it;
- (b) the Divestment Purchaser is independent of and unconnected to Asda and the Group of Interconnected Bodies Corporate to which Asda belongs and any Associated Person or Affiliate of Asda or such Group of Interconnected Bodies Corporate;
- (c) the Divestment Purchaser has the financial resources, expertise (including the managerial, operational and technical capability), incentive and intention to maintain and operate the relevant Divestment Business as part of a viable and active business in competition with Asda and other competitors in the provision of grocery retailing;
- (d) the Divestment Purchaser is reasonably to be expected to obtain all necessary approvals, licences and consents from any regulatory or other authority including landlord's consent to the transfer of any leasehold interest; and
- (e) the acquisition by the Divestment Purchaser of the relevant Divestment Business (or Divestment Businesses) does not create a realistic prospect of a substantial lessening of competition within any market or markets in the UK.

4.2 The OFT may require Asda to provide it with such information and documentation as it may reasonably require to

satisfy the OFT that the proposed purchaser will fulfil the requirements set out in paragraph 4.1 above.'

14. The OFT considered that each of Morrisons, Haldanes Group and Iceland satisfied these criteria in relation to the stores they proposed to acquire, subject to public consultation.

CONSULTATION

15. On 12 January 2011, pursuant to Schedule 10, paragraph 2(1) of the Act, the OFT published the proposed undertakings in lieu of a reference which it was minded to accept, inviting interested parties to give their views on the proposed remedy by 17.00 2 February 2011.
16. The OFT received a number of representations on its consultation. These comments can be categorised as comments relating to the Netto store in Birtley, comments relating to the suitability of Haldanes Group and Morrisons as purchasers, and general comments.

The Birtley store

17. The majority of the responses received focused on the divestment obligation relating to the Netto store in Birtley, County Durham (row 28, Annexe 2). In particular, respondents were concerned about the future of the store and what would happen in the event that the store was unable to be sold.
18. More specifically, the OFT received representations that:
 - there is no realistic prospect of a substantial lessening of competition as a result of the proposed acquisition of Netto by Asda in the Birtley local area and therefore the OFT's finding of such is incorrect
 - Asda will not be able to find a buyer for the store and therefore the store will be closed (or a non-supermarket will take it over), and

- the safeguards present in the proposed undertakings in lieu of a reference are insufficient in preventing the store from being closed down in the event that Asda cannot find a buyer for the store.
19. The OFT received a petition with around 600 signatures asking that Asda is allowed to retain the Birtley store.
 20. The OFT notes that its legal test for reference is intentionally a cautious one; it is required to determine whether the merger in question creates a realistic prospect of a substantial lessening of competition. The OFT undertook an extensive examination of the merger. The evidence used in its analysis for the Birtley local area included customer surveys, the expenditure-weighted diversion ratio between the merger parties (to gauge to what extent Netto shoppers considered Asda to be their next best alternative) and an asymmetric 'illustrative price rise' calculation (to gauge Asda's ability and incentive to raise prices after the merger).⁵ For the reasons set out in the OFT's 23 September decision, the OFT found that a realistic prospect of a substantial lessening of competition arose as a result of the proposed merger in the Birtley local area.
 21. Moreover, the OFT's consultation exercise is intended to seek comments on whether the proposed undertakings in lieu of a reference would remedy the competition concerns as established. As such, representations on the OFT's finding of a realistic prospect of competition are not a part of the consultation process.
 22. In respect of comments pertaining to the proposed undertakings in lieu relating to the Birtley local area, the OFT notes that purchaser approval will be given in relation to divestment of the Birtley store (as with all stores) only if the OFT is satisfied that the proposed purchaser meets the criteria in paragraph 4.1(c) of the proposed undertakings in lieu of a reference, set out in paragraph 13 above.

⁵ Anticipated acquisition by Asda Stores Limited of Netto Foodstores Limited, Case ME/4551/10, 23 September 2010.

23. As such, divestment of the store in Birtley should ensure that local residents are provided with grocery retailing by the future divestment purchaser. Pending divestment of the store, Asda is required to ensure that:

'each of the Divestment Businesses is maintained as a going concern and sufficient resources are made available for the development of each of the Divestment Businesses on the basis of its pre-merger plans; ... and the nature, description, range and standard of goods and services currently supplied by the Divestment Businesses are maintained and preserved' (paragraph 10(a) and (d) of the proposed undertakings in lieu of a reference).

24. In relation to the prospects for sale of the Birtley store, the OFT considers that the provisions in the undertakings in lieu of a reference relating to the potential appointment, if necessary, of a Divestment Trustee to sell any unsold stores are sufficient to address the concerns of those who raised this issue. If, having gone through the Trustee process, a buyer cannot be found for the Birtley store Asda would not be forced to close down the store but would be allowed to operate it.⁶
25. On the basis of the above, the OFT considers that the concerns expressed as regards the situation in Birtley do not warrant a change of the proposed undertakings in lieu of a reference.

Suitability of the proposed purchasers

26. The OFT received a representation in its consultation questioning whether Haldanes Group has the ability and necessary incentives to operate the stores it proposes to acquire given Haldanes has closed three stores that it acquired from the divestments from Co-

⁶ An example of such a situation is the Competition Commission's investigation into Somerfield/Morrisons (Somerfield plc / Wm Morrison Supermarkets plc: a report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc, 2 September 2005). In this case, Somerfield was required to divest 12 stores. However, it could not find a buyer for two of the stores (in Kelso and Whitburn) even after a Divestment Trustee was appointed for around seven months. As such, Somerfield was released from its obligation to sell these two stores.

operative Group/Somerfield.⁷ Likewise, the respondent questions whether Morrisons has the incentive to run the stores that it proposes to acquire given that it, too, did not operate all of the stores which it acquired following the Co-operative Group/Somerfield divestments. The OFT's decision on all three proposed purchasers is set out below.

Haldanes Group

27. Haldanes Group submitted its business plans showing that it intends to operate all of the relevant Netto divestment stores under its discounter brand 'Ugo'. An existing Haldanes Group store (in Biddulph) has already been converted to the Ugo brand.
28. It is independent of and unconnected to Asda. It can be reasonably expected to obtain all necessary approvals, licences and consents from any regulatory or other authority including landlord's consent to the transfer of any leasehold interest.
29. Haldanes Group passes the stage one tests set out in Annexe A of the OFT's decision of 23 September 2010 and therefore the proposed divestments to Haldanes Group would not create a realistic prospect of a substantial lessening of competition.
30. In relation to Haldanes Group's financial resources, the OFT has assessed the Haldanes Group financial position which included a discussion with Haldanes Group's auditor. Further, the OFT 'stress tested' the business plan for the Netto divestment stores to ensure that a lower than expected performance of those stores would not place the Haldanes Group under financial stress. The OFT is satisfied that the Haldanes Group has the requisite financial resources to be a viable and active business in competition with Asda and other competitors.
31. Further, the OFT is satisfied that Haldanes Group has the requisite expertise. It already operates 23 stores across the UK and has

⁷ Anticipated acquisition by Co-operative Group Limited of Somerfield Limited, Case ME/3777/08, 20 October 2008.

strengthened its management team since entering the market. The relevant Netto divestment stores will be transferred to Haldanes Group quickly after Asda completes its acquisition of Netto, thereby providing an easier transition for Haldanes Group than would be the case had the transition been spread over a number of months (with the possible associated loss of goodwill of a store which Asda has little incentive to operate well).

32. In terms of assessing Haldanes Group's incentive and intention to operate the Netto divestment stores, the OFT has carefully assessed:
- the reasons for Haldanes Group's exit from the three former Co-operative Group/Somerfield stores and what those exits mean for the viability of the remaining business
 - the sale agreement and related contracts[]
 - the extent to which Haldanes Group undertook due diligence on the stores it wishes to acquire
 - the business plan for the divestment stores, and
 - the incentives facing Haldanes Group following the Netto divestments.
33. The financial forecasts contained within the business plan were prepared on a cautious basis. The OFT tested the business plan and found that the Ugo format would still be successful if sales targets were not to be met by some extent (even allowing for the cautious nature of the forecasts).
34. [].
35. Further, the OFT became aware during the consultation period of six existing Haldanes stores in Scotland which were put on the market for sale, but which were then withdrawn. This was potentially concerning because of the proportion that these six stores account for relative to the Haldanes Group estate and what the withdrawal of such a proportion (26 per cent) might imply about Haldanes Group's commitment to the marketplace.

36. The OFT therefore examined the background to these events in some detail. Haldanes Group explained that a number of the stores had performed significantly less well than expected, and that they had tested them for sale in the market as one of various options. Haldanes Group told the OFT that the stores were removed from sale in late 2010, once the sale agreement for the Netto divestment stores was signed with Asda, since the sale of the six stores was no longer considered necessary.
37. In addition, Haldanes Group argued that its actions in respect of these stores were the result of a very particular set of circumstances, and therefore the act of putting six stores on the market was not a good indicator of Haldanes Group's commitment to the market more generally. On the basis of the evidence and argument advanced by Haldanes Group, the OFT is satisfied that Haldanes Group is committed to operating the relevant divestment Netto stores in competition to Asda and other grocery retailers.
38. Therefore, the OFT is satisfied that Ugo meets the criteria set out in paragraph 4.1 of the proposed undertakings in lieu of a reference, reproduced in paragraph 13 above.

Morrisons

39. Morrisons is independent of and unconnected to Asda. It can be reasonably expected to obtain all necessary approvals, licences and consents from any regulatory or other authority including landlord's consent to the transfer of any leasehold interest.
40. Morrisons passes the stage one tests set out in Annexe A of the OFT's decision of 23 September 2010 and therefore the proposed divestments to Morrisons would not create a realistic prospect of a substantial lessening of competition.
41. Further, Morrisons has the financial resources and expertise to operate the stores in competition to Asda and other competitors.
42. In terms of assessing Morrisons' incentives and intention to operate the relevant Netto divestments stores, the OFT notes that Morrisons successfully operates around 40 mid range sized stores in the UK (in addition to the large number of one-stop stores that

Morrisons operates). The bulk of these were opened over the past 18 months. Therefore, Morrisons now has greater experience in operating mid range stores than it did at the time of the Co-operative Group/Somerfield divestments.

43. Moreover, the OFT believes that the consideration due to be paid for the stores indicates a commitment to the stores. Further, the OFT notes [] the Management Board confirmed that its intention is that all such stores would be operated if they are acquired from Asda. The OFT has also been provided with a copy of Morrisons' Investment Board's anticipated programme of refitting the stores, which sets out the plans for incorporation of the Netto divestment stores into the existing Morrisons business.
44. The OFT is satisfied that Morrisons meets the criteria to be approved as a purchaser for the Netto stores which Morrisons intends to acquire (Annexe 1).

Iceland

45. The OFT did not receive any representations on Iceland. Nevertheless, its assessment of Iceland is set out below.
46. Iceland is independent of and unconnected to Asda. It can be reasonably expected to obtain all necessary approvals, licences and consents from any regulatory or other authority including landlord's consent to the transfer of any leasehold interest.
47. Iceland passes the stage one tests set out in Annexe A of the OFT's decision of 23 September 2010 and therefore the proposed divestments to Iceland would not create a realistic prospect of a substantial lessening of competition.
48. Further, Iceland has the financial resources and expertise to operate the store in competition to Asda and other competitors. The number of stores that it is proposing to acquire (one up-front buyer store) is a small proportion of its overall estate.
49. The OFT notes that Iceland [] submitted a Board paper showing the Board's commitment to running the store in competition to Asda and other competitors. Moreover, the OFT believes that the

consideration due to be paid for the store indicates a commitment to the stores.

50. The OFT is satisfied that Iceland meets the criteria to be approved as a purchaser for the Netto store which Iceland intends to acquire (Annexe 1).

General comments

51. The OFT received two general comments about the undertakings in lieu of a reference.
52. The first questioned why paragraphs 11.2 and 12.1–12.5 of the proposed undertakings in lieu of a reference envisage allowing Asda to dispose of a store via sub-lease, thereby becoming a landlord to a competitor.⁸
53. In the proposed undertakings in lieu, as in other undertakings in lieu, 'Divestment' is defined to include, in addition to the sale of freehold property, the transfer of a leasehold interest or the grant of a long lease on normal commercial terms of not less than 25 years' duration. However, the provision in the proposed undertakings in lieu of a reference is designed to prevent Asda from obstructing the plans and strategy of competitors who hold such a sub-lease from Asda.⁹ The OFT would generally seek to obtain such clauses in undertakings in lieu of a reference in relevant cases following the Competition Commission's concerns in this issue in its report Tesco/Co-operative Group.¹⁰ The OFT has used this type

⁸ In this instance a divestment would be deemed to have occurred via the granting of a sub-lease. It is important to bear in mind that in some instances it may be that Asda takes possession of a divestment store by dint of the fact that the divestment purchaser defaults on the lease which reverts to Asda.

⁹ In addition, the obligations require Asda to make a further divestment in the event that, in its capacity as the landlord of a divestment store, it obtains possession of a divestment store in the unlikely event that the divestment purchaser defaults on the lease.

¹⁰ Competition Commission, 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, 28 November 2007, paragraph 8.25.

of clause before in undertakings in lieu of a reference (Co-op/PSW).¹¹

54. The second comment requested that the OFT strengthens its position to safeguard against purchasers who do not operate the divestment stores for a minimum period of time.
55. The OFT does not consider that it has the legal powers to require third party purchasers to operate divestment assets. Indeed, the OFT notes this in its guidance on undertakings in lieu of a reference.¹² Moreover, the OFT believes that it has been as diligent as is reasonable and practicable in assessing each of the purchaser's incentive to operate the divestment stores going forward. Indeed, the purchaser approval criteria (reproduced in paragraph 13) are designed in order to maximise the likelihood that divestment assets will be operated in competition to the merged entity.
56. The OFT is therefore satisfied that it has taken all due care in ensuring that the proposed purchasers will operate the divestment Netto stores in competition to the merged entity.

DECISION

57. The OFT's decision of 23 September 2010 concluded that the proposed merger would be referred to the Competition Commission if Asda failed to give suitable undertakings pursuant to section 73 of the Act the address the competition concerns identified in that decision.
58. The OFT considers that the undertakings offered by Asda are clear cut and appropriate to remedy, mitigate or prevent the substantial lessening of competition and adverse effects resulting from it. The

¹¹ See clause 11 of the undertakings in lieu of a reference in Anticipated acquisition by Co-operative Group Limited of Plymouth and South West Co-operatives Limited, Case ME/4160/09, 4 September 2009.

¹² 'Mergers: exceptions to the duty to refer and undertakings in lieu of a reference guidance', OFT1122, December 2010, footnote 45.

OFT has therefore decided to accept the undertakings offered by Asda.

59. As such, the proposed merger will not be referred to the Competition Commission and the undertakings, which have been signed by Asda, will come into effect from the day Asda completes its acquisition of Netto.

Annexe 1 - Stage One Divestment Businesses and corresponding

Proposed Stage One Divestment Purchasers

Number	Netto ID	Town Location	Postcode	Proposed Purchaser
1	105	Accrington	BB5 6RQ	Morrisons
2	78	Ashington	NE63 9AA	Ugo
3	89	Athersley, Barnsley	S71 3AA	Ugo
4	90	Blackburn	BB2 1EH	Ugo
5	35	Boothferry, Hull	HU3 6UU	Ugo
6	9	Bradford	BD4 9RD	Ugo
7	84	Bransholme, Hull	HU7 4EE	Morrisons
8	146	Carcroft	DN6 8DN	Ugo
9	65	Castletown	SR5 3BQ	Morrisons
10	92	Eston, Middlesbrough	TS6 8BL	Ugo
11	128	Hartlepool	TS24 0RE	Ugo
12	127	Hull	HU9 5HG	Ugo
13	133	Hull	HU3 4BG	Ugo
14	28	Kirkby	L32 8US	Ugo
15	34	Liverpool	L7 1RJ	Ugo
16	15	Lundwood, Barnsley	S71 5PN	Ugo

17	75	Monk Bretton	S71 2QR	Ugo
18	177	Nuneaton	CV11 4BL	Ugo
19	18	Retford	DN22 6AE	Ugo
20	64	Rotherham	S65 1EN	Ugo
21	168	Rugby	CV21 2DQ	Morrisons
22	57	Stanley	DH9 8AD	Ugo
23	-	Telford	TF2 8EA	Morrisons
24	184	West Bromwich	B70 7QZ	Morrisons
25	130	Wigan	WN2 5PD	Iceland

Annexe 2 - Stage Two Divestment Businesses

Number	Netto ID	Town Location	Postcode
26	66	Barrow In Furness	LA13 9RA
27	30	Bedlington	NE22 6LA
28	50	Birtley	DH3 2PF
29	117	Bolton	BL2 6QT
30	119	Boston	PE21 9BD
31	106	Burnley	BB11 1HA
32	46	Bury	BL8 1AJ
33	16	Castleford	WF10 1QX
34	164	Dunstable	LU5 5DS
35	6	Keighley	BD21 4AJ
36	25	Manchester	M16 8EE
37	14	Armthorpe	DN3 3AG
38	71	Newton Le Willows	WA12 9SE
39	176	Oldbury	B68 9HB
40	51	Ravensthorpe	WF133JR
41	45	Sheffield	S5 0QF
42	62	Sildon	DL4 1DS
43	98	Spennymoor	DL16 6YQ

44	137	Stanton Hill	NG17 3GA
45	193	Tamworth	B79 7NU
46	94	Wallasey	CH44 9DE
47	109	Worsley, Manchester	M38 0FH