

Anticipated acquisition by Netto Limited of three grocery stores from Co-operative Group Limited

ME/6529-15

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 24 July 2015. Full text of the decision published on 14 August 2015.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

SUMMARY

1. Netto Limited (**Netto**) has agreed to acquire three grocery stores (the **Target**) from the Co-operative Group Limited (**CGL**). In this decision Netto and CGL are together referred to as the **Parties** and the anticipated acquisition is referred to as the **Merger**.
2. The Competition and Markets Authority (**CMA**) considers that the Parties will cease to be distinct as a result of the Merger, that the share of supply test is met and that accordingly arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
3. The Parties overlap in the retail supply of groceries in three local areas in the UK.
4. The CMA found that the Merger will not result in a realistic prospect of a substantial lessening of competition (**SLC**) in the retail supply of groceries:
 - (i) on a national basis, due to the limited number of grocery stores being acquired and the Merger resulting in a negligible increase in national market share; and
 - (ii) on a local basis, due to there being sufficient competitive constraints in each of the local areas considered in this case.

5. The CMA considers that these constraints, taken together, are sufficient to ensure that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects.
6. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties

7. Netto is a discount supermarket that re-entered the UK market in November 2014 as a 50/50 joint venture between J Sainsbury plc (**Sainsbury's**) and Dansk Supermarked A/S (**Dansk**). Sainsbury's is a UK retailer offering groceries, general merchandise and clothing. It is also active in the retail supply of petrol and pharmacy products, retail banking and insurance services. Dansk is a Danish retailer operating in five countries.
8. CGL is a mutual business, owned by over eight million members and is active in a range of activities including grocery retailing, insurance, funeral care and legal services.
9. The Target comprises three grocery stores operated by CGL located in New Edlington (Doncaster), Hedon (Hull) and Roundhay (Leeds).

Transaction

10. On 8 April 2015, the Parties entered into a sale and purchase agreement for Netto to acquire three grocery stores from CGL. The transaction is conditional on CMA clearance.

Jurisdiction

11. As a result of the Merger, Netto and the Target will cease to be distinct. The CMA considers that the Target is sufficient to constitute an 'enterprise' for the purposes of section 23 of the Act.
12. The Parties overlap in the supply of groceries in the UK. Netto submits that as a result of the Merger the combined share of supply of groceries, based on the combined net sales area of mid-sized stores in the Doncaster local authority area would be [35–40]% (an increment [5–10]%).¹ The CMA

¹ This is based on net sales area and includes the net sales area of Sainsbury's as Netto operates as a 50/50 joint venture with Sainsbury in the UK.

considers that the Doncaster local authority area constitutes a substantial part of the UK.²

13. The CMA therefore considers that the share of supply test in section 23 of the Act is satisfied.
14. The CMA therefore believes that it is or may be the case arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
15. The initial period for consideration of the Merger under section 34ZA(3) of the Act commenced on **25 June 2015** and the statutory 40 working day deadline for a decision is therefore **19 August 2015**.

Counterfactual

16. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions as between the merging parties.³
17. In this case, there is no evidence supporting a different counterfactual, and therefore, the CMA considers the prevailing conditions of competition to be the relevant counterfactual.

Frame of reference

18. The Parties overlap in the retail supply of groceries in the UK. The CMA, the Office of Fair Trading (**OFT**) and the Competition Commission (**CC**) have conducted a number of investigations into mergers in the grocery market.⁴

² The CMA has considered the cases of Lincolnshire Co-operative Limited of a Budgens store in Holbeach, Lincolnshire, from Musgrave Retail Partners GB Limited (ME/647614); Anticipated acquisition by Asda Stores Limited of five grocery stores and three petrol stations from Co-operative Group Limited (ME/6466/14); Anticipated acquisition by Co-operative Group Limited of David Sands Limited (ME/5317/12).

³ *Merger Assessment Guidelines ('MAG')* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *MAG* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

⁴ For example, Anticipated acquisition by Asda Stores Limited of five grocery stores and three petrol stations from Co-operative Group Limited (ME/6466/14); Anticipated acquisition by Co-operative Group Limited of David Sands Limited (ME/5317/12); Anticipated acquisition by Co-operative Group Limited of David Sands Limited (ME/5317/12); Anticipated acquisition by Asda Stores Limited of Netto Foodstores Limited (ME/4551/10);

The market definition and competitive assessment conducted in this case follows the approach adopted in previous cases.

Product scope

19. In the CC's 2008 Report and previous decisions of the OFT and the CMA,⁵ grocery stores have been classified according to size as follows:
- (i) **One-stop stores (OSS)**: those with a net sales area of 1,400 square metres (**sqm**) or more. Stores in this category compete with other stores of the same size and constrain stores of a smaller size;
 - (ii) **Mid-sized stores (MSS)**: those with a net sales area of between 280 sqm and 1,400 sqm. Stores in this category compete with other stores of the same size, constrain stores of a smaller size and are constrained by OSS but do not in turn constrain them; and
 - (iii) **Convenience stores**: those with a net sales area of less than 280 sqm. Stores in this category compete with all other stores of the same size and are constrained by MSS and OSS. Convenience stores do not constrain MSS or OSS.
20. The Parties have applied the classification outlined above in their submissions. The CMA has no reason to depart from the classification in paragraph 19 above.

Geographic scope

21. Previous OFT and CMA decisions⁶ and the CC's 2008 report identified that the relevant geographic scope was essentially local but that a national dimension of competition also existed, as some competitive parameters were set centrally on a national basis.⁷ Given the limited number of grocery stores being acquired and the Merger resulting in a negligible increase in national market shares, the impact of the Merger on a national basis is not considered further in this decision.

CGL/Somerfield (ME/3777/08); The Competition Commission's Report, 'The supply of groceries in the UK' dated 30 April 2008 (the '2008 Report')

⁵ supra

⁶ supra

⁷ For example, national branding and advertising; also, prices are predominantly set uniformly on a national basis.

22. The CMA, OFT and CC⁸ have defined the geographic scope on a local level, as follows:
- (i) for **OSS**: a 10-minute drive-time in urban areas and a 15-minute drive-time in rural areas;
 - (ii) for **MSS**: a 5-minute drive-time in urban areas and a 10-minute drive-time in rural areas. These stores are also constrained by OSS within a 10-minute drive-time in urban areas or a 15-minute drive-time in rural areas; and
 - (iii) for **convenience stores**: a 5-minute drive-time and a one-mile radius in all areas. These stores are constrained by OSS within a 10-minute drive-time in urban areas or a 15 minute drive-time in rural areas and by MSS within a 5-minute drive-time in urban areas or a 10-minute drive-time in rural areas.
23. The CMA has no reason to depart from the geographic scope adopted in previous cases.

Conclusion on frame of reference

24. For the reasons set out above, the CMA has considered the impact of the Merger on the retail supply of groceries based on the classification set out in paragraph 19 above and local geographic scope as set out in paragraph 22 above.

Competitive assessment

Horizontal unilateral effects

25. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or degrade quality on its own and without needing to coordinate with its rivals.⁹ Horizontal unilateral effects are more likely when the merger parties are close competitors. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to unilateral horizontal effects in the retail supply of groceries at a local level.

⁸ Supra footnote 4

⁹ [MAG](#), paragraph 5.4.1.

26. The CMA has assessed the Merger in relation to a single theory of harm: the loss of existing competition between competing grocery retailers at a local level for each of the three target stores.

Local grocery retailing

27. Netto submitted that the methodology applied in previous cases¹⁰ assessing the retail supply of groceries should be adopted in the competitive assessment of this Merger. Accordingly, Netto has applied the following stage 1 filters:
- (i) Identified whether the target stores are located in urban or rural areas, based on small-area geographies by the Office for National Statistics.
 - (ii) Centred isochrones on each target store to identify overlaps between the Parties within the geographic frame of reference outlined in paragraph 22 above.
 - (iii) Centred a 'primary' isochrone on each of the target stores to capture constraints from other stores of the same type and other relevant store types.¹¹ The filter is failed where there is a reduction in the number of fascia¹² from four to three or fewer,¹³ within the geographic frame of reference outlined in paragraph 22 above.
 - (iv) Centred an 'acquirer' isochrone on any relevant Netto or Sainsbury's store within the target store's primary isochrones constrained by the target store. Again, the filter is failed where there is a reduction in the number of fascia from four to three or fewer.
 - (v) Re-centred isochrones on all census output areas within the primary isochrone of the target store in question. The filter is failed where 10% or more of the population would see a reduction in fascia from four to three or fewer.

¹⁰ For example, Anticipated acquisition by Asda Stores Limited of five grocery stores and three petrol stations from Co-operative Group Limited (ME/6466/14).

¹¹ The CMA has adopted a cautious basis and has not included other Limited Assortment Discounters (**LADs**) or frozen food retailers, such as Lidl and Aldi, which may provide a constraint to Netto. The CMA notes that no concerns arise even with the exclusion of LADs. (See Anticipated acquisition by Asda Stores Limited of Netto Foodstores Limited (ME/4551/10)).

¹² For the purpose of the assessment, Netto have considered Sainsbury's and Netto as a single fascia under common ownership.

¹³ See MAG, paragraph 5.3.5.

28. The CMA notes that the Parties have not adopted maximum reach isochrones in identifying whether overlaps between the parties exist prior to conducting the analysis described above.¹⁴ In its competitive assessment the CMA:
- (i) applied the maximum reach isochrone distances as outlined in Annex A to identify overlaps between the acquirer stores and the target stores, and
 - (ii) where overlaps were identified the stage 1 filters set out in paragraph 27 above were applied.
29. The analysis based on the local geographic market of each target store is considered below.

New Edlington

30. The New Edlington Co-op target store is an MSS in an urban area.¹⁵
31. The CMA has conducted maximum reach isochrone analysis on the New Edlington Co-op store and identified a Sainsbury's MSS in Doncaster, within 10 minutes of the target store. Therefore, the CMA has considered the stage 1 filtering analysis provided by the Parties.
32. The CMA notes that in the primary isochrone there are no overlaps and therefore no reduction in fascia. Following the acquisition, four competing fascia will remain in the isochrone (Asda (MSS), Marks and Spencer (OSS), Morrison's (OSS) and Tesco (OSS)). Netto submits that re-centring on census output areas, does not lead to the population in the primary isochrone experiencing a reduction in fascia of four to three or fewer.
33. The CMA does not consider that the acquisition of the New Edlington Co-op store by Netto gives rise to a realistic prospect of an SLC given that there is no overlap in the primary filter between the parties and sufficient remaining competing fascia remain post-Merger.

Hedon

34. The Hedon Co-op target store is an OSS in a rural area.

¹⁴ In CGL/Somerfield (2008), p54, the OFT used maximum reach isochrones which are more conservative than the geographic measure as they have drive times between 2 and 4 times more than the geographic frame of reference isochrones.

¹⁵ Netto submits that the New Edlington store is in a rural area. The CMA notes that ONS output areas for the postcode DN12 1BS classify the area as urban. However, the filter is passed on either urban or rural classification.

35. The CMA has conducted maximum reach isochrone analysis on the Hedon Co-op and identified a Sainsbury's store. Therefore, the CMA has considered the stage 1 filtering analysis outlined in paragraph 27 above.
36. The CMA notes that in the primary isochrone there are no overlaps and therefore no reduction in fascia. Following the acquisition, four competing fascia will remain (2 Asda stores (OSS), Marks and Spencer (OSS) and Tesco (OSS)). Netto submits that re-centring on census output areas does not lead to the population in the primary isochrone experiencing a reduction in fascia of four to three or fewer.
37. The CMA does not consider that the acquisition of the Hedon Co-op store by Netto will give rise to a realistic prospect of an SLC given that there is no overlap in the primary filter between the parties and sufficient remaining competing fascia remain post-Merger.

Roundhay

38. The Roundhay Co-op target store is an MSS in an urban area.
39. The CMA has not conducted maximum reach isochrones analysis for this target store as an overlap exists in the narrower primary isochrone.
40. The CMA notes that the primary isochrone identifies two overlaps with an OSS Sainsbury store at Moortown and a Netto store in Moortown, an estimated 9 minutes' drive-time. Following the acquisition, four competing fascia will remain in the isochrone (Asda (OSS), Marks and Spencer (OSS), Morrison's (OSS) and Tesco (OSS)). Re-centring the isochrone on an acquirer store did not lead to a reduction in fascia. When isochrones are centred on census output areas, only approximately 8.5% of the population experiences a reduction in fascia from four to three.¹⁶
41. The CMA does not consider that the acquisition of the Roundhay Co-op store by Netto will give rise to a realistic prospect of an SLC given that sufficient competing fascia remain post-Merger and no concerns were raised by third parties.

Conclusion on horizontal unilateral effects

42. As set out above, the CMA considers that sufficient competing fascia will remain post-Merger. Accordingly, the CMA finds that the Merger does not give

¹⁶ See Anticipated acquisition by Co-operative Group Limited of Somerfield Limited (ME/3777/08), p57.

rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the retail supply of groceries on a local geographic scope.

Barriers to entry and expansion

43. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent a SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.¹⁷
44. However, the CMA has not had to conclude on barriers to entry or expansion as the Merger does not give rise to competition concerns on any basis.

Third party views

45. The CMA contacted third parties. The CMA considered third party representations in the competitive assessment and no third party raised competition concerns.

Decision

46. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in a SLC within a market or markets in the United Kingdom.
47. The Merger will therefore **not be referred** under section 33(1) of the Act.

Jonathan Parker
Director of Mergers
Competition and Markets Authority
24 July 2015

¹⁷ [MAG](#), paragraph 5.8.1.

Maximum reach isochrone drive times

	Overlap if a Sainsbury's or Netto OSS is within:		Overlap if a Sainsbury's mid-size store is within:	
Target Store type	Urban	Rural	Urban	Rural
OSS	20 minutes	30 minutes	15 minutes	25 minutes
Mid-size	15 minutes	25 minutes	10 minutes	15 minutes