

Anticipated merger between J Sainsbury Plc and Asda Group Ltd

Decision on relevant merger situation, substantial lessening of competition and reference

ME/6752-18

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 19 September 2018. Full text of the decision published on 27 September 2018.

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. J Sainsbury Plc (**Sainsbury's**) and Asda Group Ltd (**Asda**) have agreed to merge (the **Merger**). Sainsbury's and Asda are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of Sainsbury's and Asda is an enterprise; that these enterprises will cease to be distinct as a result of the Merger; and that the turnover test is met. Accordingly, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
3. Sainsbury's is the UK's second largest grocery retailer. It operates a network of grocery stores, petrol filling stations and an online grocery business. In addition to selling various categories of general merchandise (such as toys, electricals and clothing) in its grocery stores and online, Sainsbury's operates Argos (a multi-format general merchandise retailer) and Habitat (a retailer of furniture and homewares). Sainsbury's also offers retail banking, consumer credit, insurance and other customer financial services.

4. Asda is the UK's third largest grocery retailer. It also operates a network of grocery stores, petrol filling stations and an online grocery business, as well as selling various categories of general merchandise in its grocery stores and online. Asda offers consumer credit, insurance and other customer financial services.
5. The Parties therefore overlap in the supply or acquisition of a range of products and services in the UK, including the retail supply of groceries (both in-store and online), the procurement of groceries, the retail supply of fuel, and the retail supply of various types of general merchandise.
6. The Parties submitted a request for a fast-track reference of the Merger to an in-depth Phase 2 investigation and gave their consent to the use of the fast-track procedure. The CMA commenced its Phase 1 investigation on 23 August 2018 and issued an invitation to comment seeking views on the Parties' fast-track request.¹ For the case to be fast-tracked, the CMA must, at an early stage of its investigation, have evidence objectively justifying the belief that the test for reference to Phase 2 is met.² In addition, fast-track cases are likely to be cases where, to the extent that the CMA does find a concern with the merger, that concern would impact on the whole or substantially all of the transaction, and not just one part (that could be resolved through structural undertakings in lieu (**UILs**)).³
7. In light of the Parties' request for a fast-track reference, the CMA has focused its assessment in this Phase 1 decision solely on whether the test for reference is met in relation to a single area of overlap between the Parties (the retail supply of groceries in-store) and a single theory of harm (a loss of competition as a result of horizontal unilateral effects).
8. The CMA has concluded that the test for reference is met because there is a realistic prospect that the Merger would lead to a substantial lessening of competition (**SLC**) in the retail supply of groceries in-store and that these competition concerns would impact on substantially all of the Merger, thereby justifying the use of the fast-track procedure.
9. As the criteria for a fast-track reference are met in relation to a loss of competition as a result of horizontal unilateral effects within the retail supply of groceries in-store, it has not been necessary for the CMA to reach a

¹ The CMA also issued a preliminary invitation to comment on 18 May 2018.

² [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#), January 2014, paragraph 6.62.

³ [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#), January 2014, paragraph 6.63.

conclusion, at Phase 1, in relation to other potential competition concerns.⁴ All other areas of overlap between the Parties, and other potential theories of harm, will fall within the scope of the CMA's Phase 2 investigation, which is not limited to investigating the concerns identified in this Phase 1 decision.⁵

10. In light of the approach taken by the CMA's predecessor bodies in previous groceries cases and the evidence submitted by the Parties and third parties, the CMA has assessed the impact of the Merger on the retail supply of groceries in-store at both a national and a local level.
11. On a national basis, the Merger will result in the combination of two of the largest grocery retailers in the UK, bringing together the second and the third largest players in the market. The Merger will involve the combination of two of the so-called 'Big 4', a group of retailers that, according to the available evidence, operate similar business models and compete particularly closely with each other. While the CMA's investigation to date indicates that both Parties compete, at least to some extent, with a number of retailers, the Parties' internal documents and submissions from third parties nevertheless confirm that the Parties are an important competitive constraint to each other. The CMA therefore believes that the Merger gives rise to a realistic prospect of an SLC in the retail supply of groceries in-store at a national level.
12. At a local level, the Parties' stores overlap in several hundred local areas across the UK. The CMA believes that the Merger may give rise to a realistic prospect of an SLC in many of these local areas if Sainsbury's and Asda are insufficiently constrained by other local competitors. In light of the Parties' fast-track request, the CMA has, for the purposes of the Phase 1 decision, adopted a filtering approach using a fascia counting methodology to identify local areas where that may be the case. Based on this assessment, the CMA believes that the Merger gives rise to a realistic prospect of an SLC in 463 local areas.⁶
13. The CMA has received a substantial number of detailed third-party submissions during its investigation to date. Some of these submissions have been referred to briefly in this Phase 1 decision. Other submissions,

⁴ These potential competition concerns include, but are not limited to, the impact of the Merger on competition in the supply of groceries online, the supply of fuel, the supply of general merchandise, or the implications of the merged entity increasing its buyer power in negotiations with suppliers or the greater risk of coordination among grocery retailers.

⁵ [Merger Assessment Guidelines](#) (CC2 (Revised), OFT1254)), September 2010, paragraphs 4.2.5 and 4.2.6.

⁶ Based on information (as of February 2018) submitted by the Parties on 8 June 2018.

including those relating to product overlaps and theories of harm that it has not been necessary to considering in the CMA's Phase 1 investigation, are not referred to in this decision. These submissions will be taken into account within the CMA's Phase 2 investigation. Third parties will also have further opportunities to present their views during the Phase 2 investigation.

14. As part of their request for a fast-track reference, the Parties waived their procedural rights at Phase 1, which included their right to offer undertakings in lieu of reference (**UILs**). As a result, the CMA has not considered UILs under section 73 of the Enterprise Act 2002 (the **Act**).
15. The CMA has therefore decided to refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

ASSESSMENT

Parties

16. Sainsbury's is a UK grocery retailer which operates a chain of 606 supermarkets, 815 convenience stores, 311 petrol filling stations (the majority of which are co-located with Sainsbury's supermarkets) and an online grocery business (offering click & collect and home delivery) across the UK and Ireland. In addition to its core offering of groceries, Sainsbury's sells various categories of general merchandise (including toys, electricals and clothing) through its grocery stores, in-store and online.
17. Sainsbury's also operates: Argos, a multi-format general merchandise retailer in the UK and Ireland currently operating across 624 standalone stores, 216 concessions within Sainsbury's stores, the Argos website and Argos mobile applications; and Habitat, which sells furniture and homewares from three stand-alone Habitat stores in London and Leeds, 11 Mini Habitat stores within Sainsbury's stores, and via the Habitat website.ⁱ
18. Finally, Sainsbury's offers retail banking, consumer credit, insurance and other customer financial services through its wholly-owned subsidiary, Sainsbury's Bank.
19. The turnover of Sainsbury's in the financial year ending March 2018 was £28.5 billion worldwide, of which £[~~28~~] billion was generated in the UK.⁷
20. Asda is a UK grocery retailer which operates a network of 584 grocery stores, 317 petrol filling stations (all but 18 of which are co-located with

⁷ Both figures excluding VAT.

Asda stores), and an online grocery retail business (offering home delivery and click-and-collect). Like Sainsbury's, Asda sells various categories of general merchandise through its grocery stores, in-store and online. It also has 33 Asda Living stores, which focus primarily on the sale of general merchandise.

21. Finally, Asda also offers consumer credit, insurance and other customer financial services through Asda Money.
22. The turnover of Asda in the financial year ending 31 December 2017 was £22.2 billion in the UK.
23. Asda is a privately-held company that is wholly-owned by Walmart Inc. (**Walmart**). Walmart is a publicly-listed corporation registered in the United States with its shares traded on the New York Stock Exchange. Walmart is a multinational retail corporation that operates a chain of hypermarkets, discount department stores and grocery stores under 65 banners in 28 countries and e-commerce websites. In the UK, Walmart does not have any activities other than those carried out by Asda.ⁱⁱ

Transaction

24. On 30 April 2018, Sainsbury's and Walmart announced the proposed combination of the Parties. Pursuant to the Merger, Sainsbury's will acquire the entire issued share capital of Asda from Walmart and, in turn, Sainsbury's will issue Walmart with Sainsbury's voting ordinary shares and non-voting shares, such that Walmart group will hold 42% of the undiluted issued share capital of the merged entity, but such that it and its concert parties hold no more than 29.9% of the total number of voting shares in the merged entity (with the remainder of the 42% stake comprising of non-voting shares). Upon completion of the Merger, two Walmart representatives will join the Board of the merged entity as non-executive directors.
25. The Merger is not subject to review by any other competition authority.

Jurisdiction

26. As a result of the Merger, the enterprises of Sainsbury's and Asda will cease to be distinct. The UK turnover of Asda exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied. In addition, as indicated in paragraph 24, Walmart will acquire a 29.9% voting stake in the merged entity (ie the combined Sainsbury's and Asda) as part of the overall transaction. This voting stake, combined with its board representation,

would constitute material influence according to section 26(3) of the Act, and consequently, the enterprises of the merged entity and Walmart will also cease to be distinct. The UK turnover of the merged entity exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.

27. The CMA finds it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
28. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 24 August 2018 and the statutory 40 working day deadline for a Phase 1 decision is therefore 19 October 2018.

Fast-track reference

29. The Parties requested that the CMA make a fast-track reference of the Merger for an in-depth investigation at Phase 2 and gave their consent to use of the fast track procedure.
30. The Parties submitted that the conditions set out in paragraphs 6.61 to 6.65 of the CMA's guidance on jurisdiction and procedure are satisfied and that the test for reference under section 33 of the Act is met (ie that the CMA believes that there is a realistic prospect that the Merger will give rise to an SLC).⁸
31. As part of the request, the Parties waived their procedural rights during the Phase 1 investigation and agreed that the CMA would not be required to follow all of the procedural steps it normally follows in cases that are referred for a Phase 2 investigation.⁹
32. For the CMA to make a fast-track reference, it must, at an early stage of its investigation, have evidence objectively justifying the belief that the test for reference to Phase 2 is met.¹⁰ Fast-track cases are likely to be cases where the competition concerns identified would impact on the whole or substantially all of the transaction, and not just one part (that could be resolved through structural undertakings in lieu (**UILs**)).¹¹

⁸ [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#), January 2014.

⁹ [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#), January 2014, paragraphs 6.61, 6.62 & 6.64.

¹⁰ [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#), January 2014, paragraph 6.62.

¹¹ [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#), January 2014, paragraph 6.63.

33. The CMA has considered the Parties' request and, for the reasons set out below, finds that the Merger gives rise to a realistic prospect of an SLC in one or more markets in the UK. The CMA notes that the identified SLCs impact on the whole or substantially all of the Merger and not just one part of it. The CMA has also had regard to its administrative resources and the efficient conduct of the case.¹² In light of these considerations, the CMA decided that it was appropriate to proceed with a fast-track reference of the Merger to Phase 2.
34. The CMA's investigation to date indicates that the Parties overlap within the supply or acquisition of a range of products and services in the UK, including the retail supply of groceries (both in-store and online), the procurement of groceries, the retail supply of fuel and the retail supply of various types of general merchandise products. The CMA's investigation to date also indicates that there may be certain interactions between the Parties' offerings in separate product areas: for example, the prices offered at the Parties' petrol filling stations can be used as one way to attract customers to do their grocery shopping at a supermarket on the same site.
35. In light of the Parties' request for a fast-track reference, the CMA has focused its assessment in this Phase 1 decision solely on whether the test for reference is met in relation to a single area of overlap between the Parties (the retail supply of groceries in-store) and a single theory of harm (a loss of competition as a result of unilateral horizontal effects).
36. The CMA has concluded that the test for reference is met because there is a realistic prospect that the Merger would lead to an SLC in the retail supply of groceries in-store and that these competition concerns would impact on substantially all of the Merger (ie the concerns are connected to most of the activities that the Parties propose to combine), thereby justifying the use of the fast-track procedure.
37. As the criteria for a fast track reference are met in relation to a loss of competition as a result of horizontal unilateral effects within the retail supply of groceries in-store, it has not been necessary for the CMA to reach a conclusion, at Phase 1, in relation to other potential competition concerns. All other areas of overlap between the Parties, and other potential theories of harm, will fall within the scope of the CMA's Phase 2 investigation, which

¹² [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#), January 2014, paragraph 6.65.

is not limited to investigating the concerns identified in this Phase 1 decision.¹³

Counterfactual

38. 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 believes 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.¹⁴
39. In this case, there is no evidence supporting a different counterfactual, and the Parties and third parties have not put forward arguments in this respect. Therefore, the CMA finds the prevailing conditions of competition to be the relevant counterfactual for the purposes of this Phase 1 decision.

Frame of reference

40. The CMA considers that market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.¹⁵
41. For the reasons set out in paragraph 35 above, and for the purposes of this Phase 1 decision, the CMA has focused its assessment solely on whether the test for reference is met in respect of a single area of overlap between the Parties, namely the retail supply of groceries in-store in the UK.

¹³ [Merger Assessment Guidelines](#) (CC2 (Revised), OFT1254)), September 2010, paragraphs 4.2.5 and 4.2.6.

¹⁴ [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, from paragraph 4.3.5. The [Merger Assessment Guidelines](#) have been adopted by the CMA (see [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, Annex D).

¹⁵ [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, paragraph 5.2.2.

Retail supply of groceries

42. The CMA (and its predecessor bodies) have conducted a number of investigations into transactions involving the retail supply of groceries in recent years.¹⁶ In these cases, the definition of the relevant frame of reference has been used primarily to determine the framework for the local assessment (typically described as a filtering methodology).
43. In light of the Parties' fast-track request, the CMA has, for the purposes of this Phase 1 decision, largely based its assessment on approach applied in previous cases and investigations. For completeness, the CMA notes that the approach adopted in Phase 2 may vary (given the additional time for investigation and ability to gather further evidence) and that the approach adopted in this Phase 1 decision is therefore not intended to act as the starting point from which the Phase 2 analysis will develop.

Product scope

44. In previous cases and investigations, the CMA and its predecessors have defined grocery stores according to the size of their net sales area and considered that the competitive constraint faced by such stores is asymmetric (so that a large store constrains a smaller one but not *vice versa*).¹⁷ In this regard:
- (a) one-stop stores (**OSS**) (1,400 square metres (sqm) and larger) are constrained only by other OSS;

¹⁶ These include, among many others, [Co-operative Group / Nisa retail merger enquiry](#), CMA decision of 23 April 2018; [Henderson Retail / Martin McColl merger enquiry](#), CMA decision of 16 February 2018; [Tesco / Booker merger enquiry](#), CMA decision of 21 July 2017 (Phase 1) and Final Report of 20 December 2017 (Phase 2); [Martin McColl / Co-operative merger enquiry](#), CMA decision of 20 December 2016; [Asda stores / Co-operative Group \(5 stores\) merger inquiry](#), CMA decision of 28 November 2014; [One Stop Ltd / Alfred Jones \(Warrington\) Ltd](#), OFT decision of 18 September 2013; [Midcounties Co-operative / Harry Tuffin Investments](#), OFT decision of 18 October 2012; [J Sainsbury plc / Rontec Investments LLP](#), OFT decision of 7 June 2012; [Asda / Netto](#), OFT decision of 23 September 2010; [Co-operative Group Ltd / Somerfield Ltd](#), OFT decision of 20 October 2008; [The supply of groceries in the UK market investigation](#), Competition Commission, 30 April 2008; [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](#), Competition Commission, 2003; [Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom](#), Competition Commission, 2000.

¹⁷ For example [Co-operative Group / Nisa retail merger enquiry](#), CMA decision of 23 April 2018; [Henderson Retail / Martin McColl merger enquiry](#), CMA decision of 16 February 2018; [Tesco / Booker merger enquiry](#), CMA decision of 21 July 2017 (Phase 1) and Final Report of 20 December 2017 (Phase 2); [Martin McColl / Co-operative merger enquiry](#), CMA decision of 20 December 2016; [Asda stores / Co-operative Group \(5 stores\) merger inquiry](#), CMA decision of 28 November 2014; [The supply of groceries in the UK market investigation](#), Competition Commission, 30 April 2008.

- (b) mid-size stores (**MSS**) (280–1,400 sqm) are constrained by other MSS and by OSS; and
 - (c) convenience stores (less than 280 sqm) are constrained by other convenience stores, MSS and OSS.
45. The reasoning behind this delineation by store size has been that shoppers may not consider smaller stores to be good substitutes for larger stores, on the basis that they may not supply the full range of products which a larger store is able to offer, and therefore may be unable to cater for shopping ‘missions’ that are larger or involve a wider range of products.
46. Sainsbury’s and Asda both operate MSS, OSS and convenience stores, although Asda has a more limited number of convenience stores than Sainsbury’s.ⁱⁱⁱ
47. The Parties submitted that the CMA should reconsider the strict delineation of stores by store size. The Parties submitted that the competitive constraint of a store does not become significantly greater above any given store size boundary line but rather that there is a ‘continuous relationship’ between the size of a store and the competitive constraint that it provides. In particular, the Parties submitted that there is no ‘step change’ in constraint at 1,400 sqm, and that stores below 1,400 sqm can and do provide a significant constraint on stores above 1,400 sqm.
48. Third parties generally indicated that the frame of reference used by the CMA in previous cases involving MSS and OSS was an appropriate starting point for its analysis. One third party noted that distinctions between different types of shopping mission and different types of store had become more blurred in recent years, such that some shoppers may be willing to substitute some parts of their shopping demands between different store sizes (eg substituting parts of their ‘main shopping basket’, traditionally purchased at larger stores, to top-up or convenience purchases in smaller stores). However, that third party also submitted that this trend should not be over-exaggerated, indicating that for customers of larger stores, the next best alternative remained another larger store. Another third party agreed that smaller stores could only serve some of the missions served by stores larger than 1,400sqm (ie OSS), and that this therefore remained a relevant threshold for the CMA’s assessment.
49. In light of the Parties’ fast-track request, the Parties’ submissions will be considered along with those of third parties within the CMA’s Phase 2 investigation. For the purposes of this Phase 1 decision, the CMA considers it appropriate to follow the approach to the product frame of

reference used in its most recent cases. Accordingly, in its assessment, the CMA has distinguished between convenience stores, MSS and OSS, as set out in paragraph 44 above.

50. As most of the overlaps between the Parties arise from their respective MSS and OSS stores, the CMA has, for the purpose of the Phase 1 decision, focussed its assessment solely on the Parties' MSS and OSS stores, and accordingly has excluded from this analysis any overlaps that may arise from the Parties' convenience stores. As indicated in paragraph 37 above, the overlaps that may arise from the Parties' convenience stores will fall within the scope of the CMA's Phase 2 investigation, which is not limited to investigating the concerns identified in this Phase 1 decision. ⁱⁱⁱ

Geographic scope

51. Previous cases and investigations by the CMA (and its predecessors) involving supermarkets (including MSS and OSS stores) have found that there are both national and local aspects to competition.¹⁸
52. The CMA notes that grocery retailers compete to attract customers to their stores, competing with other stores in the local areas for those customers. The appropriate geographic area over which this local competition takes place is considered further below.
53. The CMA also notes that many factors that determine or affect competition within the supply of groceries appear to be decided centrally and applied uniformly. In particular, grocery retailers typically set their pricing policies, as well as some other key elements of their competitive offer (such as product quality, product range and own-label offering) uniformly across their stores at a national level. Both Parties (like many other grocery retailers) have strong, national brand identities and operate across a large number of local markets. The CMA therefore believes that it is appropriate to consider the effect of the Merger at a national as well as a local level. This view was supported by comments received from third parties, who indicated that key strategic factors (such as store-wide policies, branding, pricing, range, promotions, product innovation or store location) are set at the national level.

¹⁸ For example, [Asda / Netto](#), OFT decision of 23 September 2010; [Co-operative Group Ltd / Somerfield Ltd](#), OFT decision of 20 October 2008; [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](#), Competition Commission, 2003.

54. As regards the relevant geographic scope for the local assessment of competition, the CMA and its predecessors have previously adopted the following approach for OSS and MSS:¹⁹
- (i) A 10/15 minute drive time in urban/rural areas for OSS. These stores are considered to be constrained by other OSS within this catchment area; and
 - (ii) A 5/10 minute drive time in urban/rural areas for MSS, which are also constrained by OSS within a 10/15 minute drive time (in urban/rural areas).
55. The Parties submitted that the available empirical evidence supports wider geographic catchment areas (ie longer drive times) than those used by the UK competition authorities in previous cases.²⁰
56. The CMA has received limited input from third parties so far on this point. Only one third party (which indicated that the approach adopted in previous cases would be an appropriate starting point for its investigation) has submitted views on the appropriate geographic catchment areas.
57. In light of the Parties' fast-track request, the Parties' submissions in relation to catchment areas will be considered within the CMA's Phase 2 investigation. For the purposes of this Phase 1 decision, the CMA considers it appropriate to follow the approach to the geographic frame of reference used in its most recent cases. Accordingly, the CMA has assessed the impact of the Merger on each MSS and each OSS of the Parties within the geographic catchment areas described in paragraph 54 above.

Conclusion on frame of reference

58. Following previous cases in grocery retailing, the CMA has, for the purposes of this Phase 1 decision, assessed the effect of the Merger within each local area where the Parties have OSS and MSS according to the

¹⁹ [Anticipated acquisition by Tesco PLC of Booker Group plc \(ME/6677/17\)](#), Phase 1 decision, paragraph 46; [Anticipated acquisition by Co-operative Group of Nisa Retail Limited \(ME/6716/17\)](#) paragraph 34; [Anticipated acquisition by Martin McColl Ltd of 298 groceries stores from Co-operative Group Ltd \(ME/6632/16\)](#) paragraph 32; [Completed acquisition by Co-operative Foodstores Limited of eight My Local grocery stores from ML Convenience Limited and MLCG Limited \(ME/6625/16\)](#) paragraph 43, [Anticipated acquisition by Co-operative Foodstores Limited of 15 Budgens grocery stores from Booker Retail Partners \(GB\) Limited \(ME/6588/16\)](#) paragraph 37.

²⁰ This is based on the Parties' submissions of Sainsbury's loyalty card data; Asda's till survey data; the Parties' internal impacts analysis (ie how competitor openings and closures affect their own stores' sales); and econometric entry/exit analysis.

geographic catchment areas identified in paragraph 54 above. The CMA has, for the reasons set out above, also assessed the impact of the Merger at a national level.

59. In light of the Parties' request for a fast-track reference, the CMA has focused its assessment in this Phase 1 decision solely on whether the test for reference is met in relation to a single area of overlap between the Parties (the retail supply of groceries in-store) and a single theory of harm (a loss of competition as a result of unilateral horizontal effects).
60. The CMA has concluded that the test for reference is met because there is a realistic prospect that the Merger would lead to an SLC in the retail supply of groceries in-store and that these competition concerns would impact on substantially all of the Merger, thereby justifying the use of the fast-track procedure.
61. As the criteria for a fast track reference are met in relation to a loss of competition as a result of horizontal unilateral effects within the retail supply of groceries in-store, it has not been necessary for the CMA to reach a conclusion, at Phase 1, in relation to other potential competition concerns. All other areas of overlap between the Parties, and other potential theories of harm, will fall within the scope of the CMA's Phase 2 investigation, which is not limited to investigating the concerns identified in this Phase 1 decision.²¹

Competitive assessment

Horizontal unilateral effects

62. 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 to degrade quality on its own and without needing to coordinate with its rivals.²² Horizontal unilateral effects are more likely when the merging parties are close competitors.
63. For the purposes of the Phase 1 decision, the CMA has 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:

²¹ [Merger Assessment Guidelines](#) (CC2 (Revised), OFT1254)), September 2010, paragraphs 4.2.5 and 4.2.6.

²² [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, from paragraph 5.4.1.

- (i) Loss of competition as a result of horizontal unilateral effects in the retail supply of groceries in-store at a national level; and
- (ii) Loss of competition as a result of horizontal unilateral effects in the retail supply of groceries in-store at a local level.

Retail supply of groceries at a national level

64. The Parties submitted that there is no need for a separate national assessment of the Merger, on the basis that there is no national competition between the Parties that is independent of an aggregation of the local competition faced by individual stores across the Parties' store network.
65. The Parties also submitted that, if the CMA did assess a stand-alone theory of harm on the retail supply of groceries at a national level, it would not raise any competition concerns. The Parties submitted that this is the case is because:
- (a) Their combined national share (which they submitted was between 23.5% and 26.3%, depending on the information source)²³ is well below the threshold level of 35-40% normally associated with prima facie national unilateral effects concerns.
 - (b) They are not particularly close competitors, as shown by the fact that:
 - (i) customer perception data indicates that customers perceive the Parties' brands as significantly different;
 - (ii) switching data indicates that both Parties experience significantly greater losses to Aldi or Lidl rather than to each of the other; and
 - (iii) the extent of geographic overlap between the store networks of the Parties at the local level is less than that of each of them with Tesco and Aldi, and around the same as that of each of them with Morrisons and Aldi.^{iv}
 - (c) They will continue to face competitive constraint post-Merger from a wide range of competitors, including not only other traditional bricks and mortar competitors (such as Tesco, Morrisons, Aldi, Lidl, Waitrose, M&S and Co-

²³ According to the data of Kantar, Verdict and Nielsen presented by the Parties, the Parties will have a combined market share of 26.3%, 23.5% and 24.5%, respectively.

op), but also online-focused operators (Ocado and Amazon), bargain stores and convenience operators.

66. The evidence put forward by the Parties will be examined fully as part of the Phase 2 investigation. At this stage of the investigation, the CMA notes that previous cases and investigations by the CMA (and its predecessors) involving supermarkets (including MSS and OSS stores) have found that there are both national and local aspects to competition. The Parties form part of a set of national players with significant and widespread market presence. These national players can deploy different commercial and operational strategies which could have a rapid and widespread effect on consumers.
67. The CMA notes, in this regard, that the Merger will result in the combination of two of the largest retailers of groceries in the UK, bringing together the second and third largest players in the market. Market share data prepared by Kantar, a market research agency, places the Parties' combined share of supply among the nine biggest UK grocery retailers at just over 30%.²⁴ While this is below the level that would typically give rise to *prima facie* concerns,²⁵ the CMA notes that the UK groceries market is relatively concentrated, and that post-Merger the two largest players (Tesco and the merged entity) will together account for almost 60% of the market. The Parties' shares may also not fully reflect their competitive significance, as they are calculated on the basis of a total market that includes all retail suppliers of groceries, regardless of their size or commercial focus (eg on convenience retailing rather than one-stop shopping).²⁶
68. There is also evidence that Sainsbury's and Asda (along with Tesco and Morrisons) form part of a 'Big 4' (a term used frequently in both the Parties' own internal documents and industry commentary) that compete particularly closely with each other. In particular:
- (a) The Parties closely monitor and react to the performance and competitive strategy of other Big 4 players (including in relation to key strategic factors that are set at the national level). [REDACTED].
 - (b) The switching data cited by the Parties may overstate the extent to which Aldi and Lidl should be considered to be close competitors to the Parties

²⁴ These nine grocery retailers comprise: the Parties, Morrisons, Tesco, M&S, Co-op, Waitrose, Aldi and Lidl.

²⁵ [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, paragraph 5.3.5.

²⁶ In this regard, the CMA notes that the groceries market is characterised by extensive differentiation, where smaller stores may not be considered good substitutes for larger stores by consumers, and where the Parties operate similar business models as opposed to other retailers in the market.

(in particular because there is some evidence to suggest that customers lost to Aldi and Lidl store openings may not affect the Parties' incentives in the same way as customers lost to other Big 4 players).

- (c) Evidence from the Parties and third parties shows that the Big 4 players operate similar business models, being large and well-established retailers that operate a very significant number of OSS across the UK.
69. As described in paragraph 76 below, the Parties' stores overlap in a very large number of local areas, and therefore the combined effect of lost competition at the local level could give rise to a national effect (by bringing about changes in the Parties' national strategy).
70. The position that the Parties compete closely to attract shoppers was supported by submissions received from a large number of third parties, who indicated that the Parties each act as an important competitive constraint on each other. Several third parties raised concerns that the Merger would result in higher prices and would reduce choice and quality for end-consumers.
71. For the reasons set out above, the CMA believes that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the retail supply of groceries in-store at a national level. At this stage, the CMA considers that it is not necessary for the purposes of this Phase 1 decision, to consider whether any national competition concerns might arise as a result of the aggregation of local effects and/or through a 'stand-alone' theory of harm.

Retail supply of groceries at a local level

Framework for the local assessment

72. The Parties submitted that the best way to assess the competitive constraint faced by each of the Parties' stores in each local area in which they overlap is to use a 'weighted share of shop' (or WSS) methodology, through which different weights are applied to different competitor stores in each local area, according to variables such as their store locations, sizes and retailer brands. The Parties submitted detailed economic evidence on the different factors that they considered should be taken into account in such a WSS methodology and how these factors should be weighted. In particular, the Parties submitted that:
- (a) MSS should be counted as exerting a constraint on OSS (albeit with a lower 'weighting' than the constraint from other OSS);

- (b) the constraint from stores within a wider catchment area should be appropriately reflected; and
- (c) a wide pool of competitors, including discounters, bargain stores and online operators, should be taken into account (albeit with varying weights).
73. The CMA has used a WSS methodology as part of its competitive assessment, at Phase 2, in some previous retail merger cases.²⁷ A WSS methodology, which is a complex economic model that requires a significant amount of evidence-gathering and analysis, has typically not been used by the CMA in previous Phase 1 investigations. Instead, the CMA has typically used a more readily ascertainable concentration measure, such as a fascia count, in retail grocery cases at Phase 1 through which local areas are ‘screened out’ from further assessment where there will remain a sufficient number of competing retail fascia (brands) in the local area post-Merger.
74. In light of the fast-track request, the Parties’ submissions in relation to the WSS methodology will be considered within the CMA’s Phase 2 investigation. For the purposes of the Phase 1 assessment (ie to determine whether the test for reference is met), the CMA has, consistent with its established practice to Phase 1 investigations in groceries cases, used a filter based on a fascia count.
75. The CMA therefore followed the following approach to its assessment of competition at the local level.
76. First, it identified overlaps between the Parties’ stores based on the store size categories and geographic catchment areas described in paragraphs 44 and 54.²⁸ This results in 363 overlaps, when the assessment is centred on Sainsbury’s OSS and MSS stores, and 372 overlaps, when the assessment is centred on Asda’s OSS and MSS stores.²⁹
77. Second, in each of these local areas, the CMA applied a filtering methodology. A local area failed the filter where the Merger would result in a reduction in retail fascia from 4 to 3 or worse.

²⁷ [Anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited \(ME/6556/15\)](#); [Anticipated acquisition by Tesco PLC of Booker Group plc \(ME/6677/17\)](#).

²⁸ Based on information (as of February 2018) submitted by the Parties on 8 June 2018.

²⁹ The CMA usually centres catchment areas on the stores of the target and the acquirer ([Retail mergers commentary](#), 10 April 2017 (CMA62), paragraph 2.3).

78. In previous cases concerning the supply of groceries, the CMA has identified certain ‘effective competitors’ to be included for the purposes of filtering. While the CMA has included certain ‘discounters’, namely Aldi and Lidl, within the competitor set taken into account in some recent cases,³⁰ the CMA notes that the discounters were not considered to be ‘fully effective’ competitors for the purposes of those cases (because they do not sell tobacco). In addition, the CMA notes that these cases primarily concerned overlaps between convenience stores, rather than the larger MSS and OSS stores that give rise to the majority of the overlap in the Parties’ activities in this case, and that the CMA has not previously considered in detail the constraint posed by Aldi and Lidl on MSS and OSS stores. In light of the fast-track request, the CMA has, for the purposes of its Phase 1 assessment, excluded Aldi and Lidl fascia for the purposes of the filtering methodology.³¹
79. Applying these criteria, 225 Sainsbury’s stores and 238 Asda stores fail the filter.³²
80. The purpose of this filtering methodology is to establish a minimum set of criteria which, if present, means that the CMA cannot exclude a realistic prospect of an SLC. Areas that fail the filter are typically then subject to further assessment on an area-by-area basis.
81. In view of the Parties’ fast track request, and given the very large number of local areas failing the filter, the CMA has not conducted any further analysis in relation to these overlap areas. Accordingly, for the purposes of its Phase 1 assessment the CMA considers that the Merger gives rise to a realistic prospect of an SLC in each of these 463 local areas.³³
82. For completeness, the CMA notes that the methodology used for the local assessment in Phase 2 may vary (given the additional time for investigation and ability to gather further evidence). The local areas identified as giving rise to a realistic prospect of an SLC in this Phase 1 decision are therefore not intended to act as the starting point from which the Phase 2 analysis will develop.

³⁰ [Anticipated acquisition by Tesco PLC of Booker Group plc \(ME/6677/17\)](#); [Anticipated acquisition by Co-operative Group of Nisa Retail Limited \(ME/6716/17\)](#).

³¹ Therefore, the effective competitor set that the CMA has considered in this case includes the following operators: Booker, Booths, Budgens, CK Supermarkets, Co-operative societies (including Co-operative Group), Dunnes, Harry Tuffins, Longs, Marks & Spencer, McColl’s, Morrison, Proudfoot, Roys, Tesco, Waitrose, Whole Foods and the Parties.

³² Based on information (as of February 2018) submitted by the Parties on 8 June 2018.

³³ Based on information (as of February 2018) submitted by the Parties on 8 June 2018.

Conclusion on horizontal unilateral effects

83. For the reasons set out above, the CMA has found that there is a realistic prospect that the Merger would lead to an SLC as a result of horizontal unilateral effects in relation to the retail supply of groceries in-store on a national level and in 463 local areas, and therefore, the test for reference is met.
84. In light of the Parties' request for a fast-track reference, the CMA has focused its assessment in this Phase 1 decision solely on whether the test for reference is met in relation to a single area of overlap between the Parties (the retail supply of groceries in-store) and a single theory of harm (a loss of competition as a result of unilateral horizontal effects).
85. The CMA has concluded that the test for reference is met because there is a realistic prospect that the Merger would lead to an SLC in the retail supply of groceries in-store and these competition concerns would impact on substantially all of the Merger, thereby justifying the use of the fast-track procedure.
86. As the criteria for a fast track reference are met in relation to a loss of competition as a result of horizontal unilateral effects within the retail supply of groceries in-store, it has not been necessary for the CMA to reach a conclusion, at Phase 1, in relation to other potential competition concerns. All other areas of overlap between the Parties, and other potential theories of harm, will fall within the scope of the CMA's Phase 2 investigation, which is not limited to investigating the concerns identified in this Phase 1 decision.³⁴

Barriers to entry and expansion

87. 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 an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.³⁵
88. In light of the Parties' request for a fast-track reference, the CMA has not, in its Phase 1 investigation, considered any evidence that entry or

³⁴ [Merger Assessment Guidelines](#) (CC2 (Revised), OFT1254)), September 2010, paragraphs 4.2.5 and 4.2.6.

³⁵ [Merger Assessment Guidelines](#), (OFT1254/CC2), September 2010, from paragraph 5.8.1.

expansion would be sufficiently timely or likely to prevent a realistic prospect of an SLC as a result of the Merger.

Third party views

89. The CMA issued an invitation to comment on 23 August 2018 inviting interested parties to provide views on the Parties' request for a fast track reference. A significant proportion of third parties raised concerns regarding the effect of the Merger, but only one third party opposed the Parties' request for a fast-track reference. According to this third party, it would not be appropriate for the CMA to use the fast-track process in this case given that it would reduce the time for third-party consultation. Some members of the public also raised concern that the use of the fast-track process may not give the CMA sufficient time to investigate the Merger fully.
90. The CMA notes that fast-track process is a procedural efficiency which does not compromise the CMA's ability to conduct an in-depth analysis of the Merger in Phase 2. In particular, the CMA considers that the reduction of the time provided for third-party consultation in Phase 1 does not have any adverse impact on third parties because of the opportunities provided to present their views during the Phase 2 investigation. In reaching a decision about whether to use the fast-track process in this case, the CMA is also required to have regard to its administrative resources and the efficient conduct of the case. In the round, the CMA considers that the third-party submission described above does not raise any valid objection to the use of the fast-track process in this case.
91. The CMA has received a substantial number of detailed third-party submissions during its investigation to date. Some of these submissions have been referred to briefly in this Phase 1 decision. Other submissions, including those relating to product overlaps and theories of harm not addressed in this Phase 1 decision, have not been referred to (given the nature of the fast-track process). All submissions will be fully taken into account as part of the CMA's Phase 2 investigation. Third parties will also have further opportunities to fully present their views during the Phase 2 investigation, which is not restricted to investigating the concerns that have been found to give rise to a realistic prospect of an SLC at Phase 1.

Decision

92. For the reasons set out above, the CMA believes that it is or may be the case that (i) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and (ii) the creation of that situation may be expected to result in an SLC

within a market or markets in the United Kingdom. The CMA therefore believes that it is under a duty to refer under section 33(1) of the Act.

93. The Parties requested and consented to the use of the fast track process and waived their right to offer UILs. The CMA has therefore decided to refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

Sheldon Mills
Senior Director
Competition and Markets Authority
19 September 2018

ENDNOTES

ⁱ In relation to paragraph 17, the CMA notes that these numbers were correct as at 30 August 2018.

ⁱⁱ In relation to paragraph 23, the CMA notes that Walmart is a multinational retail corporation that operates chains of hypermarkets.

ⁱⁱⁱ In relation to Asda's convenience stores, the CMA notes that these stores are limited to small stores at petrol filling stations.

^{iv} Paragraph 65 (b)(iii) should be read as follows: 'The extent of geographic overlap between the store network of the Parties at the local level is less than that of each of them with Tesco and Lidl, and around the same as that of each of them with Morrisons and Aldi'.