

REFERENCE RELATING TO THE ANTICIPATED MERGER BETWEEN J SAINSBURY PLC AND ASDA GROUP LTD

Notice of possible remedies under Rule 12 of the Competition and Markets Authority Rules of Procedure¹

Introduction

1. On 19 September 2018, the Competition and Markets Authority (CMA), in exercise of its duty under [section 33\(1\)](#) of the Enterprise Act 2002 (the Act), referred the anticipated merger between J Sainsbury plc (Sainsbury's) and Asda Group Ltd (Asda), part of Walmart Inc. (Walmart) (the Merger) for further investigation and report by a group of independent panel members (the Inquiry Group). The decision to refer the Merger was made on a fast track basis, as requested by Sainsbury's and Asda (the Parties).
2. The Merger involves the combination of the second and third largest grocery retailers in the UK and two of the four largest retailers of online delivered groceries in the UK, with both Parties having significant retail activities that extend beyond groceries to also include fuel and various products such as clothing, electricals and toys (referred to as GM). Following the Merger, the merged entity would also be the largest retailer of fuel by volume in the UK.
3. In its provisional findings (the Provisional Findings) on the reference notified to the Parties on 20 February 2019, the CMA, among other things, provisionally concluded that the Merger would result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in a number of markets for goods and services in the UK.²
4. The CMA's analysis provisionally concluded that these SLCs may be expected to result in adverse effects, for example in the form of higher prices and/or lower quality of offering compared to what would otherwise be the case absent the Merger.

¹ See [Rules of procedure for merger, market and special reference groups \(CMA17\)](#).

² [Sainsbury's/Asda merger inquiry, Provisional Findings](#).

5. This Notice sets out the possible actions which the CMA considers it might take for the purpose of remedying the SLCs and/or any resulting adverse effect found in the Provisional Findings.
6. The CMA invites comments on the possible remedies by **6 March 2019**.

The SLCs

7. We provisionally found that the Merger may, on the balance of probabilities, be expected to result in an SLC in markets in the UK in the following respects:
 - (a) within every local market for the supply of groceries in supermarkets in which one or both of the Parties are present in the UK;
 - (b) within 629 of the local markets for supply of groceries in supermarkets where both Parties are present in the UK (as listed in Chapter 17 of the Provisional Findings);
 - (c) within every local market for the supply of groceries in convenience stores in which an Asda convenience store is present in the UK;
 - (d) within 65 of the local markets for the supply of groceries in convenience stores where both Parties are present in the UK (as listed in Chapter 17 of the Provisional Findings);
 - (e) within every local market for the supply of online delivered groceries in which one or both of the Parties are present in the UK;
 - (f) within 290 of the local markets for the supply of online delivered groceries in which both Parties are present in the UK (as listed in Chapter 17 of the Provisional Findings);
 - (g) within 108 local markets for the supply of online delivered groceries in which both Parties and Tesco are present in the UK (as listed in Chapter 17 of the provisional findings report); and
 - (h) within 132 local markets for the supply of fuel in which both Parties operate petrol filling stations in the UK (as listed in Chapter 17 of the Provisional Findings).

Criteria for selection of remedies

8. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLCs and any adverse effects resulting from these.³
9. To this end, the CMA will seek remedies that are effective in addressing the SLCs and their resulting adverse effects and will select the least costly and intrusive remedy(ies) that it considers to be effective.
10. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLCs and their adverse effects.⁴

Possible remedies on which views are sought

11. In merger inquiries the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring the rivalry that would be lost as a result of the merger;
 - (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
 - (c) structural remedies do not normally require ongoing monitoring and enforcement once implemented.⁵
12. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLCs or any resulting adverse effects that have been provisionally found.
13. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of

³ The Act, sections [35\(4\)](#) and [36\(3\)](#).

⁴ [Merger remedies \(CC8\)](#), paragraph 1.7. This was adopted by the CMA board. The CMA recently adopted new merger remedies guidance on 13 December 2018 ([Merger remedies \(CMA87\)](#)), which applies to merger investigations commenced after that date. However, for investigations that commenced prior to 13 December 2018, the previous guidance remains applicable. In this case the CMA is therefore applying [CC8](#).

⁵ [CC8](#), paragraph 2.14.

any such combination of measures on the SLCs or any resulting adverse effects.

Structural remedies

14. At this stage the CMA has identified two potential structural remedies:
 - (a) prohibition of the Merger; or
 - (b) requiring the divestiture to a suitable party (or parties) of assets and operations sufficient to address effectively each of the SLCs identified in the Provisional Findings.
15. In considering the merits of these two options, we will be mindful that a successful and profitable national grocery retailer, like Asda or Sainsbury's, is more than the sum of its parts. The Parties operate complex, multi-product businesses. In particular, there is considerable operational integration between in-store groceries, online delivered groceries and fuel. The retail channels are supported by large and sophisticated distribution and logistics, which are optimised to the current configuration of the Parties' store networks. Many of the stores fulfil a dual role of enabling in-store shopping and acting as a Supply Point for online delivered groceries. Furthermore, customers have affinity with the Parties' brands and familiarity with in-store and online layouts and range.
16. Both Parties have a track record of organic growth and targeted acquisition, under stable ownership, over a number of years. By contrast, a divested business would potentially comprise a new combination of operations – without that track record – under new ownership. While new retail combinations of this nature can sometimes succeed in creating a strong competitor, they can also result in a weaker rival than would have existed absent the Merger. Allowing the Merger to proceed, even with extensive divestitures, would represent a major restructuring of the UK groceries sector and its market dynamics. There is a risk, not present with prohibition, that this will result in weaker competitive pressures across the markets where the Parties operate.
17. In addition, a suitable purchaser would need to be able to demonstrate, among other things, a credible track record and capability to compete effectively in the markets in which the SLCs have been found, whilst at the same time not creating further competition concerns.
18. Bearing in mind the wide-ranging implications of a merger of this scale for grocery and fuel retail, as highlighted in paragraph 2 above, prohibition would

self-evidently be an effective and comprehensive solution to all of the SLCs that have been provisionally found.

19. In this case, the CMA's initial view is that divestiture carries a significant risk of being an ineffective remedy. Given the number of SLCs provisionally found, their interrelated nature, and the need for the divested business to be a multi-channel national retailer able to provide an effective competitive constraint, it is not clear at this stage that a suitable package of assets could be found to provide an effective and comprehensive remedy. In addition, there are further effectiveness risks associated with implementing such a package and with identifying a suitable single purchaser to operate the divested assets.
20. Notwithstanding its initial thinking set out at paragraphs 15 to 19 above, the CMA will consider any other practicable remedies that the Parties, or any interested third parties, may propose to remedy, mitigate or prevent the SLCs and/or any resulting adverse effects.

Prohibition

21. Prohibition of the Merger would result in Asda and Sainsbury's continuing to operate under separate ownership as independent competitors. It would therefore prevent an SLC from resulting in any relevant market. Given this, the CMA currently takes the view that prohibition would represent a comprehensive solution to all aspects of the SLCs it has provisionally found (and consequently any resulting adverse effects) and that the risks in terms of its effectiveness are very low. Prohibition would also avoid the risk of market distortions (both foreseeable and unforeseeable) that would be associated with other possible remedies.

Divestiture

22. The purpose of divestiture remedies in merger control is to deal with competition concerns arising from a merger, either by creating a new source of competition through disposal of assets or operations from the Parties to a new market participant, or by strengthening an existing source of competition through disposal to an existing participant independent of the Parties. A successful divestiture will effectively address, at source, the loss of rivalry resulting from the merger, by restoring or changing the structure of the market in a way that preserves the competition that would otherwise be lost.⁶
23. The CMA's experience is that divestiture is capable of effectively remedying SLCs in many mergers. Divestiture is generally considered to be less intrusive

⁶ CC8, paragraphs 2.5 and 2.6.

than prohibition in terms of its impact on the Parties' ability to implement their strategic aims.

24. However, as set out in paragraph 19 above, the CMA currently considers that there is a significant risk that a divestiture will not be effective in this particular case given the substantial scale and complexity of divestiture likely to be required, the potential impact of a divestiture of this scale on the ongoing operations of the Parties, and the practicality of the divestiture process itself.
25. In evaluating divestiture as a remedy to the SLCs it has provisionally found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view on whether to pursue a divestiture remedy, and if so how it should be specified, the CMA will have regard to the following critical elements of the design of divestiture remedies:
 - (a) the scope of the divestiture package;
 - (b) the identification of any suitable purchaser; and
 - (c) the effectiveness of the divestiture process.

Scope of the divestiture package

26. To be effective in remedying the SLCs, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable any purchaser to operate effectively as an independent competitor.
27. The CMA invites views on whether it is likely to be feasible to identify a divestiture package with an acceptable risk profile that effectively remedies all of the SLCs.
28. The CMA's initial view is that any divestiture package would need to contain the following:
 - (a) sufficient assets and operations to enable any purchaser to compete effectively as a national in-store grocery retailer, including in all of the overlap areas, and so remedy the in-store groceries SLCs;
 - (b) sufficient assets and operations to enable any purchaser to compete effectively as a national online delivered groceries retailer, including in all of the overlap areas, and so remedy the online delivered groceries SLCs; and
 - (c) one or more petrol filling stations (PFSs) in each of the 132 local fuel SLC areas.

29. The Parties operate their businesses on a national basis, with uniform prices in groceries and a single national brand and online proposition. To provide an effective competitive constraint across all the markets where SLCs have been provisionally found, any purchaser would also need sufficient scale and scope to provide similarly integrated operations to those of the Parties, as discussed in paragraph 15 above. For a divestiture remedy to be effective the CMA's initial view is that this would be likely to necessitate the whole of any divestiture package being sold to a single purchaser.
30. Furthermore, the CMA's initial view is that there are risks that the scope of a divestiture package focussed narrowly on tackling individual SLCs may be too constrained or not appropriately configured to attract a suitable purchaser, or may not allow a purchaser to replace the competitive constraint lost by the Merger. If this were the case, it would be necessary to require further divestiture of additional assets and operations, whether inside or outside the local SLC areas, sufficient to enable any purchaser to compete effectively at both a local and national level.
31. There appear to be particular challenges regarding the specification of divestiture as a remedy for the SLCs that have been found in online delivered groceries. In addition to the physical assets and supporting infrastructure required to operate such a proposition, there is the additional question of whether existing online customers would choose to remain with the divested operations, particularly if the Parties continue to operate an online offering for both brands and to deliver to those customers from different Supply Points. The CMA's initial view is that it is likely that many customers would wish to continue to use the existing web offerings regardless of the methods by which the Parties provided the service behind those offerings. This suggests that it may not be possible to achieve an effective solution to these SLCs without also divesting one or other of the Asda or Sainsbury's brands, in addition to physical assets and operations.
32. As discussed in paragraph 19 above, the CMA currently considers that there are significant risks that divestiture may not be an effective remedy. That being noted, the CMA invites views on the following additional questions relating to the specification of a potential divestiture package.
- (a) Whether divestiture of the Sainsbury's or Asda brand would be required to ensure that the package of divested assets can compete effectively. The CMA's initial view is that this would be the case, bearing in mind the need to achieve an effective remedy to the online and in-store SLCs that have been provisionally found, both in local areas and nationally.
- (b) Which assets and operations would need to be included in an effective divestiture package to remedy local online delivered groceries SLCs, and

whether this would include additional stores to those provisionally found as local online delivered groceries SLCs, which might act as alternative Supply Points.

- (c) Whether the divestiture of a store in a local in-store grocery SLC area would also require divestiture of its accompanying PFS. The CMA's initial view is that this would be the case.
 - (d) Whether the divestiture of a PFS in a local fuel SLC area would also require divestiture of its accompanying store. The CMA's initial view is that this would be the case.
 - (e) Whether divestiture of other assets such as supporting infrastructure (eg distribution centres), IT systems, or central operations (eg purchasing teams), would also be required, and if so which.
 - (f) Whether divestiture of additional stores and/or PFSs and/or online Supply Points would also be required to ensure that the package of divested assets can exploit economies of scale or density in purchasing and distribution.
33. The CMA also invites views on whether Sainsbury's and Asda should be allowed to propose which stores, PFSs and other assets required for online delivered groceries to divest in each local SLC area, subject to the consent of the CMA in each case. In general, the CMA has a preference for avoiding 'mix-and-match' divestitures, for example a combination of Asda and Sainsbury's assets as compared to assets from a single brand, which can create additional composition risks such that a divestiture package will not function effectively.⁷
34. In this case, the CMA's initial view is that giving the Parties the ability to propose which assets to divest is likely to be problematic. Any collection of divested assets (including stores) needs to be able to operate as a viable entity. There are considerable risks and concerns regarding a 'mix-and-match' approach as it would increase the complexity of the divestiture process, provide any purchaser with customers who are used to two distinct propositions, and potentially lead to divestiture of the less attractive assets in any given local SLC area, which would weaken the divestiture package. As a result, the CMA has a clear preference, at this stage, for any divestiture package to comprise solely Sainsbury's or solely Asda assets.

⁷ CC8, paragraph 3.12.

Identification of any suitable purchaser

35. The CMA's initial view is that identifying a suitable purchaser may be difficult. Any potential purchaser will need to be able to operate the divested business in an effective way. This is particularly challenging given the scale, complexity and breadth of the divestiture package that would be required to address the provisional finding of local and national SLCs across a number of markets for goods and services in the UK. Any purchaser would have to be able to replicate lost constraints across all of these markets at a local and national level.
36. As discussed in paragraph 29 above, for a divestiture remedy to be effective the CMA's initial view is that this would be likely to necessitate the whole of any divestiture package being sold to a single purchaser.
37. The CMA will wish to be satisfied that any prospective purchaser:
 - (a) is independent of the Parties;
 - (b) has the necessary capability to compete;
 - (c) is committed to competing in the relevant markets; and
 - (d) will not create further competition concerns.⁸
38. In this case, if it were possible to identify a suitable divestiture package, the CMA would need to be satisfied that any purchaser has a strong management team with a proven track record in UK groceries retailing, can demonstrate a commitment to competing across all the relevant markets, and is able to demonstrate an ability to compete effectively by reference to a credible business plan.
39. The CMA may also take into account the current scale of the purchaser's operations, in the UK and abroad, to determine whether its business (including the acquired assets) would be able to provide an effective competitive constraint and whether there might be separate competition concerns relating to the purchase of the divested assets.
40. The CMA invites views on the criteria it should adopt to determine the suitability of any purchaser of any divestiture package.

⁸ CC8, paragraph 3.15.

Effective divestiture process

41. The CMA invites views on the appropriate timescale for achieving a divestiture, should this be the CMA's preferred remedy.
42. The CMA will also consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture.
43. At this stage, the CMA expects that it will be necessary to require an up-front buyer, such that the divestiture would need to be completed before the Merger is allowed to complete.
44. The CMA invites views on the risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, and whether the Parties should be required to appoint a monitoring trustee should a divestiture remedy be pursued. The monitoring trustee's role would be to oversee the divestiture process and to ensure that the operations and assets to be divested are maintained and properly supported during the course of the process.
45. The CMA will have the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
 - (a) the Parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or
 - (b) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
46. In some cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. The CMA invites views on whether the circumstances of this merger necessitate such an approach.

Behavioural remedies

47. As noted in paragraph 11 above, in merger cases the CMA generally prefers structural remedies rather than behavioural remedies. This is because behavioural remedies may not have an effective impact on SLCs and their resulting adverse effects may create significant costly distortions in market outcomes, and may have greater ongoing monitoring and enforcement requirements.
48. The CMA's current view is that a behavioural remedy alone would not be an effective remedy to the SLCs or any resulting adverse effects that it has provisionally found. The CMA believes that the number of SLCs, the existence of SLCs in in-store groceries, online delivered groceries and fuel, and the

complexity of the Parties' operations would make a behavioural remedy or remedies that addressed all these aspects impractical.

49. However, the CMA will consider any behavioural remedies put forward as part of this consultation. In particular, the CMA invites views on whether any behavioural remedies (such as interim purchasing or distribution arrangements) would be required to support the effectiveness of any divestiture remedies.

Cost of remedies and proportionality

50. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction.
51. The CMA invites views on what costs are likely to arise in implementing each remedy option.

Relevant customer benefits

52. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.⁹
53. Relevant customer benefits are limited by the Act to benefits to customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the UK ... or
 - (b) greater innovation in relation to such goods or services'.¹⁰
54. The Act provides that a benefit is only a relevant customer benefit if:
- (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and

⁹ The Act, [section 36\(4\)](#). See also [CC8](#), paragraph 1.14.

¹⁰ The Act, [section 30\(1\)\(a\)](#). See also [CC8](#), paragraph 1.14.

(b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.¹¹

55. The CMA welcomes views on the nature of any relevant customer benefits, the scale and likelihood of such benefits, and the extent (if any) to which these would be affected by the different remedy options..

Next steps

56. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by **6 March 2019**.
57. This notice of possible actions to remedy, mitigate or prevent the SLCs or any resulting adverse effects is made having regard to the Provisional Findings announced on 20 February 2019. The Parties have until 13 March 2019 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.
58. A copy of this notice will be posted on the CMA website.¹²

Stuart McIntosh

Inquiry Group Chair

20 February 2019

¹¹ The Act, [section 30\(3\)](#). See also [CC8](#), paragraph 1.16.

¹² [Sainsbury's/Asda merger inquiry webpage](#).