

# THE SAINSBURY'S AND ASDA MERGER INQUIRY ORDER 2019

## Explanatory Note

### This note is not a part of the Order

#### Introduction

1. On 19 September 2018, the Competition and Markets Authority (CMA), exercising its powers under [section 33](#) 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), for further investigation and report by a group of CMA panel members.
2. The CMA published '[Anticipated merger between J Sainsbury PLC and Asda Group Ltd, Final report](#)' (the Report) on 25 April 2019. In the Report, the CMA decided, in accordance with [section 36](#) of the Act, that:
  - (a) a relevant merger situation would be created as a result of the merger;
  - (b) the creation of that situation may be expected to result in a substantial lessening of competition (SLC) within the following markets:
    - (i) the retail supply of groceries in both Sainsbury's and Asda supermarkets on a national basis, ie in every local market in which one of the Parties is, or both of the Parties are, present;
    - (ii) the retail supply of groceries in supermarkets on a local basis in 537 of the local markets in which both Parties are present;
    - (iii) the retail supply of groceries in Asda convenience stores on a national basis, ie in every local market in which an Asda convenience store is present;
    - (iv) the retail supply of groceries in convenience stores on a local basis in 18 of the local markets in which both Parties are present;

- (v) the retail supply of groceries ordered online and delivered to the customer's location (online delivered groceries) for Sainsbury's and Asda on a national basis, ie in every local market served by one or both of the Parties;
  - (vi) the retail supply of online delivered groceries for Asda customers on a national basis, ie in every local market served by Asda;
  - (vii) the retail supply of online delivered groceries for Asda customers on a local basis in 143 local markets served by both Parties;
  - (viii) the retail supply of online delivered groceries on a local basis through coordinated effects in 108 delivery areas served by both Parties;
  - (ix) the retail supply of fuel on a local basis in 127 of the local markets in which both Parties operate petrol filling stations;
- (c) the CMA should take action for the purpose of remedying, mitigating or preventing the SLCs or any adverse effect which has resulted from, or may be expected to result from, each SLC; and
  - (d) the prohibition of the merger would be the only effective and proportionate remedy to the SLCs and any adverse effects which have resulted from, or may be expected to result from, each SLC.
3. The CMA published a notice on 23 May 2019 of its intention to make an order to remedy the adverse effects on competition that it had identified. The CMA did not receive any representations on that notice.
  4. On the making of this order (the Order) on 9 July 2019 the reference is finally determined.
  5. A review can be sought in relation to the Order under [section 120](#) of the Act.

### **Possible consequences of not complying with the Order**

6. [Section 94](#) of the Act places a duty on any person to whom this Order applies to comply with it. Any person who suffers loss or damage due to a breach of this duty may bring an action before the courts.
7. [Section 94](#) of the Act also provides that the CMA can seek to enforce the Order by civil proceedings for an injunction or for any other appropriate relief or remedy.

8. The CMA has power under the Order to give directions, including directions to a person in their capacity as an office holder, for the purpose of carrying out, or ensuring compliance with, the Order.
9. [Section 87](#) of the Act provides that, if there is a failure to comply with a direction under the Order, the CMA can seek to enforce the direction in court and may recover the costs or expenses of such enforcement.

### **Review of this Order**

10. The CMA has a duty under [section 92](#) of the Act to monitor the operation of the Order. This includes a duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances.

### **Status of this explanatory note**

11. Nothing in this explanatory note is legally binding. In the event of a conflict between this explanatory note and any provision of the Order, the Order shall prevail.

### **Structure of the Order**

12. The Order contains 26 Articles.
  - General provisions (Articles 1 to 11), which provide the title of the Order (Article 1), the date it comes into force and ceases to have effect (Articles 2 and 3), the scope of the Order (Articles 4 and 5) and interpretation (Articles 6 to 11) (which also apply to terms used in this explanatory note).
  - The prohibition (Articles 12 to 15), which provides Sainsbury's, and Asda and Walmart (while it continues to hold an Interest in Asda) must not merge within the Prohibition Period of ten years from the date of the Order.
  - Compliance provisions including, provision of information to the CMA (articles 16 to 19), the CMA's power to issue directions (Articles 20 to 22), and consequential provisions on severability and governing law (Articles 23 to 26).
13. This explanatory note deals with each of the articles in the Order.

### **Articles 1 to 11 – Title, commencement, application and interpretation**

14. The Commencement Date for the Order is the date on which it is made, 9 July 2019. The Order ceases to have effect on 8 July 2029.
15. The Order applies to Asda, Sainsbury's and Walmart and the Group of Interconnected Bodies Corporate to which each of them belong, and its purpose is to give effect to the Report.

### **Articles 12 to 14 – Prohibition on merger**

16. Article 12 provides that Sainsbury's may not acquire an Interest in Asda or any entity holding an Interest in Asda for ten years, with an Interest defined to mean the conferring of control within the meaning of [section 26](#) of the Act. This also applies to each of the entities within the Sainsbury's corporate group.
17. As an exception to the general prohibition, the Order provides that the CMA may grant its written consent for a transaction between Sainsbury's and Asda which would otherwise result in the creation of a relevant merger situation. Without fettering the CMA's discretion, an example of where such consent might be granted under the Order could be Sainsbury's wishing to acquire a small number of assets from Asda (eg a single store) which constituted a relevant merger situation but did not give rise to competition concerns. This provision permitting the CMA's consent to be sought in relation to a particular proposed transaction, is without prejudice to the right to request the CMA to vary or revoke the Order on the basis that there has been a change of circumstances as described in paragraph 10 of this explanatory note, and the CMA's standard merger control processes.
18. Article 13 makes the same provision for Asda in respect of Sainsbury's. This also applies to each of the entities within the Asda corporate group.
19. Article 14 makes the same provision for Walmart in respect of Sainsbury's. This only applies if Walmart (or an entity in its corporate group) holds an Interest in Asda. If Walmart were to acquire an Interest in Sainsbury's (or vice versa) at a time when Walmart no longer held an Interest in Asda, that acquisition would fall to be considered under the CMA's standard merger control processes.
20. Article 15 makes provision that requires Sainsbury's, Asda and Walmart to ensure that their Subsidiaries comply with the terms of the Order.

### **Articles 16 to 19 – Provision of Information to the CMA**

21. Article 16 requires any person to whom the Order applies to provide information so the CMA can monitor compliance with and the effectiveness of the Order and fulfil its functions.
22. Article 17 requires the production of records and provision of information in person to assist in the discharge of the CMA's functions in relation to the Order.
23. Article 18 requires the CMA to be informed immediately if a person to whom the Order applies suspects that the Order is likely to be, has or might have been breached.
24. Article 19 provides that the CMA may publish information received in connection with the Order in compliance with [Part 9](#) of the Act.

### **Articles 20 to 22 – Powers of Direction**

25. Articles 20 to 22 provides that the CMA may give written directions so as to carry out or ensure compliance with the Order.

### **Article 23 – Severability**

26. Article 22 provides that the remaining provisions of the Order shall survive if some become invalid or contrary to law.

### **Articles 24 to 26 – Governing law**

27. Article provides that the Order and contractual obligations connected with the Order are governed by English law and that any dispute connected with the Order is to be heard in the courts of England and Wales.