

# Completed acquisition by Bellis Acquisition Company 3 Limited of Asda Group Limited

## Decision on relevant merger situation and substantial lessening of competition

**ME/6911/20**

The CMA's decision on reference under section 22(1) of the Enterprise Act 2002 given on 20 April 2021. Full text of the decision published on 21 May 2021.

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

### SUMMARY

1. On 16 February 2021, Mr Zuber Issa, Mr Mohsin Issa (together, the **Issa Brothers**), and investment funds managed by TDR Capital LLP (**TDR**) acquired, through Bellis Acquisition Company 3 Limited (**Bellis**), the whole of the issued ordinary share capital of Asda Group Limited (**Asda**) (the **Merger**). The Issa Brothers and TDR also jointly own EG Group Limited (**EG**). The Issa Brothers, TDR and Asda are together referred to as the **Parties**. EG, the other TDR portfolio companies and Asda are together referred to as the **Merged Entity**.
2. As a result of the Merger, the Issa Brothers and TDR acquired interests in Asda which the Competition and Markets Authority (**CMA**) considers confer on them the ability to exercise material influence over Asda.<sup>1</sup> The CMA believes that it is or may be the case that each of EG, the other TDR portfolio companies and Asda is an enterprise; that these enterprises have ceased to be distinct as a result of the Merger; and that the turnover test is met. The four-month period for a decision has not yet expired. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.

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<sup>1</sup> Within the meaning of section 26(1) of the Enterprise Act 2002 (the **Act**).

## **Frame of reference**

3. The Parties overlap in (i) the retail supply of road fuel, (ii) the retail supply of auto-LPG, and (iii) the retail supply of convenience format groceries (**convenience groceries**) in the UK.

### ***Road fuel***

4. In line with the CMA's approach in precedent cases, the CMA considered it appropriate to assess the impact of the Merger on the retail supply of road fuel (without further segmentation between petrol and diesel) at both the national and local levels. At the local level, in line with the *Sainsbury's/Asda* precedent, the CMA adopted the following catchment areas: (i) non-supermarket petrol filling stations (**PFSs**) up to 10 minutes drive-time; and (ii) supermarket PFSs up to 20 minutes drive-time.

### ***Auto-LPG***

5. In line with the CMA's approach in precedent cases, the CMA considered it appropriate to assess the impact of the Merger on the retail supply of auto-LPG (distinct from road fuel, due to limited supply and demand-side substitutability) at both the national and local levels. In relation to the local frame of reference, the CMA did not receive any evidence to support departing from its findings in previous cases and, therefore, believes that it is appropriate to assess the impact of the Merger based on the 10, 20, 30 and 40 minute drive-times adopted in *MFG/MRH*.

### ***Convenience groceries***

6. In line with the CMA's approach in precedent cases, the CMA considered it appropriate to assess the impact of the Merger on the retail supply of convenience groceries (which are constrained by other convenience groceries, mid-size stores and one-stop stores), both at the national and local level. At the local level, the CMA believes an appropriate catchment area is a 5 minute drive-time around each convenience store.

### ***Conclusion on frame of reference***

7. Accordingly, the CMA has adopted the following frames of reference:
  - (a) the retail supply of road fuel at a national and local level;
  - (b) the retail supply of auto-LPG at a national and local level; and

- (c) the retail supply of convenience groceries at a national and local level.

## Horizontal unilateral effects

### *Local assessment*

#### *Decision rules*

8. In order to assess the competitive impact of the Merger in local areas where the Parties' activities overlap based on the frames of reference set out above, the CMA sought to devise an analytical approach that:
- (a) reflects the key parameters of competition at the local level;
  - (b) is tailored to the specific features of this Merger (including the Parties' differentiated offering; EG focusses on a premium offering with convenience store and food-to-go (**FTG**) offerings at all of its PFSs while Asda's offering focuses on cost conscious customers often on a grocery shopping mission);
  - (c) assesses all areas of overlap systematically by reference to the same factors; and
  - (d) enables the efficient conduct of the CMA's investigation at Phase 1.
9. The CMA therefore adopted decision rules to establish whether the Merger results in a realistic prospect of an SLC in the retail supply of road fuel, auto-LPG or convenience groceries in any local areas.

#### *Road fuel*

10. Based on the available evidence, the CMA applied a decision rule for the retail supply of road fuel to determine whether the Merger gives rise to a realistic prospect of an SLC in any local areas that takes into account of:
- (a) different catchment areas for non-supermarket PFSs and supermarket PFSs (as explained in the frame of reference);
  - (b) the drive-time distance between the Parties' PFSs and between the Parties' PFSs and competitors' PFSs;
  - (c) the weak competitive constraint that motorway PFSs exert on non-motorway PFSs and vice versa;
  - (d) the number of alternatives available to customers in the catchment area;

- (e) whether the Parties have a significant market share in the catchment area and whether the Merger significantly strengthens this position;
  - (f) whether there are a limited number of supermarket PFSs other than Asda in the local areas where EG is present;
  - (g) the asymmetric constraint that Asda exerts on EG;
  - (h) differentiation between the Parties; and
  - (i) whether Asda considers EG's prices when setting its prices in each local area.
11. Using the decision rule, the CMA found that the Merger gives rise to a realistic prospect of an SLC in the retail supply of road fuel in 36 local areas.

#### *Auto-LPG*

12. Based on the available evidence, the CMA applied a decision rule which took into account the following: (i) location is the most important parameter of competition, followed by price; (ii) unlike in the retail supply of road fuel, supermarkets do not exert a significantly stronger constraint relative to non-supermarkets; and (iii) the Parties [X].
13. Using the decision rule, the CMA found that the Merger gives rise to a realistic prospect of an SLC in the Asda Bridge of Dee (Aberdeen) local area in the retail supply of auto-LPG.

#### *Convenience groceries*

14. Based on the available evidence, the CMA applied a decision rule which, in line with its precedent cases, adopted a weighted fascia count that is adjusted by the competitive constraint exerted by different types of convenience store (ie grocery retailers such as Tesco, Symbol stores such as Spar and independent convenience stores).
15. Using the decision rule, the CMA has not identified a realistic prospect of an SLC in any local area. On this basis, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC in any local areas in the retail supply of convenience groceries.

## **National assessment**

### *Road fuel*

16. Asda's pricing strategy in road fuel has a national dimension. Asda sometimes implements national price cap reductions in road fuel across its PFS estate in response to reductions in wholesale costs. The CMA understands that the media often refers to these price reductions as triggering 'price wars' because other supermarkets tend to follow Asda by cutting their own road fuel prices.
17. Based on the evidence gathered during its investigation, the CMA believes that Asda currently has an incentive to trigger (and publicise) these price cap reductions in order to promote its reputation as being a 'value' retailer and, therefore, increase its combined profits in road fuel and groceries (as low road fuel prices can help to increase footfall in groceries).
18. The CMA considered whether the Merger could affect Asda's incentives to trigger these national price cap reductions on the following basis:
  - (a) There is evidence that Asda acts as the price leader in road fuel, driving other supermarkets' prices down.
  - (b) Supermarket PFSs exert an important competitive constraint on all PFSs, including on EG.
  - (c) Asda's current pricing strategy may therefore have an impact on EG's road fuel margins, not just as a result of Asda's own pricing, but also as a result of other supermarkets' pricing in response to Asda.
  - (d) The Merged Entity may no longer have an incentive to continue Asda's aggressive road fuel pricing strategy, given the potential impact on the combined road fuel volumes of Asda and EG.
19. The CMA assessed whether combining Asda's and EG's PFS portfolios would change the Merged Entity's incentive to maintain Asda's current national pricing strategy in road fuel. The evidence available to the CMA suggested the following:
  - (a) The cost to the Merged Entity of maintaining Asda's current pricing strategy would increase by a relatively modest amount after adding EG's PFS portfolio (the CMA estimated that the annualised cost increase was likely to be in the region of £[redacted], compared to an existing annualised cost in the region of £[redacted]).

(b) The benefits to the Asda brand of maintaining Asda's current pricing strategy are likely to outweigh these costs. Asda is generally perceived as a value-led retailer and a price leader. Its brand and reputation could be affected if the Merged Entity were to abandon Asda's current pricing strategy in road fuel. Even a relatively small reduction (eg 1%) on Asda's groceries margins arising from this reputational impact would outweigh the costs of maintaining Asda's current road fuel pricing strategy.

20. The CMA therefore believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the retail supply of road fuel across all of Asda's PFS sites.

#### *Auto-LPG and convenience groceries*

21. With regard to the national retail supply of auto-LPG and the national retail supply of convenience groceries, on the basis of the Parties' low shares of supply at a national level and on the basis of third-party responses to the CMA's Merger investigation, the CMA found no competition concerns.

### **Decision**

22. The CMA therefore believes that the Merger gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects:

(a) in the retail supply of road fuel in 36 local areas; and

(b) in the retail supply of auto-LPG in one local area; Asda Bridge of Dee (Aberdeen).

23. The CMA is therefore considering whether to accept undertakings under section 73 of the Act. The Issa Brothers and TDR have until 27 April 2021 to offer an undertaking to the CMA. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 22(1) and 34ZA(2) of the Act.

# ASSESSMENT

## Parties

### *Issa Brothers, TDR and EG*

24. TDR is a UK-based investment management firm headquartered in London.<sup>2</sup>
25. TDR and the Issa Brothers jointly own EG.<sup>3</sup> EG is an independent operator of PFSs based in Blackburn.<sup>4</sup> In the UK, EG operates 395 PFS sites, all of which are co-located with a convenience retail offering (eg convenience stores and FTG concessions).<sup>5</sup>
26. As a result of the Merger, TDR and the Issa Brothers also own Asda through their joint ownership of Bellis, a company created on 30 September 2020 for the purposes of the Merger. Bellis is a limited company jointly owned by the Issa Brothers and investment funds (TDR Capital III Holdings L.P. and TDR Capital III Investments (2019) L.P.) managed by TDR.<sup>6</sup>

### *Asda*

27. Asda is a British supermarket retailer, headquartered in Leeds, active in the retailing of food, apparel, general merchandise products, fuel and services throughout the UK and online.<sup>7</sup> Prior to the Merger, Asda was solely controlled by Walmart Inc. (**Walmart**), a company incorporated in Delaware, United States.<sup>8</sup>
28. Asda operates a network of 637 grocery stores in the UK, mainly hypermarkets and supermarkets. It has 55 convenience stores (all of which

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<sup>2</sup> Final Merger Notice submitted by the Parties to the CMA on 1 March 2021 (**FMN**), paragraph 24.

<sup>3</sup> FMN, paragraph 4. The Issa Brothers each hold 25%, and TDR (via Optima Group Sarl) holds 50%, of the ordinary shares in [X], an indirect holding company of EG. There are a number of minority holders [X].

<sup>4</sup> FMN, paragraph 78 and footnote 6.

<sup>5</sup> FMN, paragraph 79. EG has partnerships with Starbucks, Greggs, Burger King and KFC for its core FTG and fast food offering and has recently announced a partnership with Cinnabon, and trials with NKD Pizza and Sbarro. FMN, paragraph 83.

<sup>6</sup> FMN, paragraph 23. Able Holdings Limited (Jersey) (a company jointly owned by the Issa Brothers) and Optima Group Sarl each own 50% of the ordinary shares in the ultimate holding companies of Bellis (ie, Bellis TopCo Limited and Bellis Property Newco Limited). Pursuant to a management agreement, TDR Capital manages the funds in TDR Capital III Holdings L.P and TDR Capital III Investments (2019) L.P. which wholly own Optima Group Sarl. In addition, there are [X] an affiliate of Walmart is a holder of senior shares and a special participation share in Bellis TopCo 2 Limited, another indirect holding company of Bellis.

<sup>7</sup> FMN, paragraph 31.

<sup>8</sup> FMN, paragraph 33.

are attached to a PFS). Asda operates 323 PFSs, 305 of which are co-located with a supermarket.<sup>9</sup>

## Transaction

29. On 2 October 2020, Bellis entered into an agreement to acquire all of the issued ordinary shares in the capital of Asda from Asda Holdings UK Limited which is solely controlled by Walmart.<sup>10</sup> The purchase price was approximately £6.8 billion.<sup>11</sup>
30. On 16 February 2021, the Parties completed the Merger. Simultaneously, Walmart acquired certain classes of senior equity in a newly incorporated company with an interest in Bellis, which resulted in Walmart obtaining approximately a [X] % economic interest in Asda.<sup>12</sup>
31. The Parties submitted that the Issa Brothers and TDR plan to transfer ownership of Asda's PFSs from Bellis to EG.<sup>13</sup> Bellis, Asda and EG will remain under the joint control of the Issa Brothers and TDR following this transfer (the **PFS Transfer**). Walmart will remain as a minority shareholder holding approximately a [X] % economic interest in Asda.

## Rationale for the Merger

32. The Parties submitted that the rationale for the Merger is to accelerate:
  - (a) the development of Asda's convenience retail proposition as Asda does not currently have a convenience offering comparable to its main competitors;
  - (b) the development of the types of strategic brand partnerships that have succeeded at EG PFS sites, such as branded food services, enabling Asda to address multiple consumer missions;<sup>14</sup> and
  - (c) the development of Asda's online offering.<sup>15</sup>

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<sup>9</sup> FMN, paragraph 84.

<sup>10</sup> FMN, paragraph 3.

<sup>11</sup> FMN, paragraph 3 and 6.

<sup>12</sup> [X]. Walmart, via [X] holds Senior Shares and a Special Participation Share in Bellis TopCo 2 Limited - an indirect holding company of Bellis. [X].

<sup>13</sup> Parties' White Paper submitted on 7 February 2021, Page 2.

<sup>14</sup> FMN, paragraph 10.

<sup>15</sup> Parties' response to the CMA's Issues Letter, submitted on 15 March 2021 (**Parties' Response to the Issues Letter**), paragraph 3.2 (c).



33. The Parties submitted that the rationale for the PFS Transfer is to allow EG's and Asda's management teams to focus on their respective core strengths – EG's strength being as a specialist fuel retailer (and FTG provider) and Asda's strength being as a supermarket operator.<sup>16</sup> The Parties submitted that EG will work closely with Asda management in relation to the operation of the Asda PFSs and that Asda's business model and branding will not change.<sup>17</sup>

## Procedure

34. The Merger was considered at a Case Review Meeting.<sup>18</sup>

## Jurisdiction

35. A relevant merger situation exists where two or more enterprises have ceased to be distinct and either the turnover or the share of supply test is met.<sup>19</sup> Two or more enterprises will cease to be distinct if they are brought under common ownership or control.<sup>20</sup>
36. Prior to the Merger, the Issa Brothers and TDR held interests in EG which conferred on each of them the ability to exercise material influence over EG.<sup>21</sup> EG is one of the portfolio companies which TDR manages.<sup>22</sup> The CMA believes that each of EG and the other TDR portfolio companies is an enterprise within the meaning of section 23(2)(a) of the Act.<sup>23</sup>
37. As a result of the Merger, the Issa Brothers and TDR acquired interests in Asda which the CMA believes confer on them the ability to exercise material influence over Asda.<sup>24</sup> Asda also constitutes an enterprise.

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<sup>16</sup> Parties' White Paper submitted on 7 February 2021, Page 3.

<sup>17</sup> FMN, paragraph 9.

<sup>18</sup> See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, from paragraph 7.34.

<sup>19</sup> See part 4 of [Mergers: Guidance on the CMA's jurisdiction and procedure](#).

<sup>20</sup> Section 26(1) of The Enterprise Act 2002 (the **Act**).

<sup>21</sup> In particular, the Issa Brothers and TDR have material influence over EG on account of their ownership of the ordinary shares in the ultimate holding company of EG (ie, the Issa Brothers each hold 25%, and TDR (via Optima Group Sarl) holds 50%, of the ordinary shares in [X]) and their ability to influence the company policy of the EG group (in particular, the annual budget and business plan of the EG group), clause 4(1)(a), clause 4.2-4.3 and Schedules 1 and 3.

<sup>22</sup> And thus controls for the purposes of the Act. Other portfolio companies include Algeco Group, BCA Marketplace and Buffalo Grill. Annex 3 of the Draft Merger Notice submitted to the CMA on 14 December 2020 (**DMN**), 'Share Purchase Agreement relating to the sale and purchase of shares in ASDA Group Limited'.

<sup>23</sup> An enterprise is defined under section 129(1) of the Act as the activities, or part of the activities, of a business. A business includes a professional practice and any other undertaking which is carried on for gain or reward, or which supplies goods or services otherwise than free of charge.

<sup>24</sup> Within the meaning of section 26(1) of the Act. For the purposes of deciding whether two enterprises have been brought under common ownership or common control under section 26 of the Act the CMA has, pursuant to

38. Accordingly, the CMA believes that the Merger has resulted in Asda, EG and the other TDR portfolio companies ceasing to be distinct.<sup>25</sup>
39. Asda generated UK turnover for the financial year ending 2019 of approximately £23 billion.<sup>26</sup> The CMA therefore believes that the turnover test in section 23(1)(b) of the Act is satisfied as Asda's UK turnover exceeds £70 million.
40. The Merger meets the thresholds under Council Regulation 139/2004/EU (the **EU Merger Regulation**) for review by the European Commission. The Parties submitted a reasoned submission to the European Commission on 3 November 2020 requesting referral to the CMA under Article 4(4) of the EU Merger Regulation. On 8 December 2020, the European Commission referred the Merger to the CMA for review. The preliminary assessment period for consideration of the Merger under section 34A(2) of the Act started on 9 December 2020, and following extensions under section 34A(5) of the Act,<sup>27</sup> the statutory 45 European Commission working day deadline for a decision is therefore 20 April 2021.
41. The Merger completed on 16 February 2021. The four-month deadline for a decision under section 24 of the Act is 15 June 2021.
42. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.

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section 127(1) of the Act, treated the Issa Brothers as one person by virtue of them being regarded as associated with one another as relatives within the meaning of section 127(6) of the Act. The Issa Brothers and TDR have material influence over Bellis, on account of their ownership of Able Holdings Limited (Jersey) (a company jointly owned by the Issa Brothers) and Optima Group Sarl (a TDR affiliate) that each hold 50% of the ordinary shares in the ultimate holding companies of Bellis (ie, Bellis TopCo Limited and Bellis Property Newco Limited) and their ability to influence Bellis' company policy (in particular, the annual budget, business plan and appointment of senior management of the Bellis group). clause 4(2)(a), clause 5.1-5.3 and Schedule 3. , clause 4(2)(a), clause 5.1-5.3 and Schedule 3.

<sup>25</sup> As they are each carried on by two or more bodies corporate of which one and the same person or group of persons has control in accordance with section 26(2)(b) of the Act. Asda and EG are controlled by the Issa Brothers and TDR. The other TDR portfolio companies are controlled by TDR which also controls Asda and EG.

<sup>26</sup> FMN, paragraph 46. The CMA has considered it more appropriate, owing to the impact of the COVID-19 pandemic, to consider the turnover for the earlier financial year ending 2019 for the purposes of determining turnover under Part 3 of the Act, see article 11(2)(a) of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003.

<sup>27</sup> On 11 December 2020, the CMA issued a notice to extend the preliminary assessment period mentioned in section 34A(2) of the Act because the Parties had not complied with a requirement set out in a notice under section 109 of the Act to provide certain information and documents. On 20 January 2021, the CMA issued a notice terminating this extension. On 12 January 2021, the CMA issued a notice to extend the preliminary assessment period mentioned in section 34A(2) of the Act because the Parties had not complied with a requirement set out in a notice under section 109 of the Act to provide certain information and documents. On 16 February 2021, the CMA issued a notice terminating this extension.

## Counterfactual

43. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For completed mergers, the CMA generally adopts the pre-merger conditions of competition as the counterfactual.<sup>28</sup> However, the CMA will assess a merger against an alternative counterfactual where, based on the evidence available to it, it considers that the prospect of pre-merger conditions continuing is not realistic (eg because the CMA believes that one of the merger firms would inevitably have exited from the market) or where there is a realistic prospect of a counterfactual that is more competitive than pre-merger conditions.<sup>29</sup>
44. At Phase 1, the CMA will ultimately select the most competitive counterfactual with a realistic prospect of arising absent the merger.<sup>30</sup> Where future events or circumstances are not sufficiently certain or foreseeable to include in the counterfactual, the analysis of such events can take place in the assessment of competitive effects.<sup>31</sup>

### **Road fuel and groceries**

45. The Parties submitted that following the prohibition of the *Sainsbury's/Asda* merger in April 2019, [REDACTED].<sup>32</sup> Walmart received expressions of interest from a number of bidders in addition to the Issa Brothers and TDR between April 2019 and February 2020. The CMA does not consider that [REDACTED] a sale to an alternative purchaser would have led to a more competitive counterfactual than the pre-Merger conditions of competition or to conditions of competition materially different to the pre-Merger conditions of competition. The CMA therefore believes the pre-Merger conditions of competition to be the relevant counterfactual.
46. The Parties submitted that 2020 was not a representative year due to the impact of the COVID-19 pandemic on the fuel industry at all levels of the supply chain. The Parties' submissions were, therefore, based mostly on 2019 figures. The CMA has taken account of the disruption caused by the COVID-19 pandemic on the fuel industry by relying largely on data for the period between March 2019 and March 2020 in its assessment.

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<sup>28</sup> [Merger Assessment Guidelines](#), paragraph 4.3.5.

<sup>29</sup> [Merger Assessment Guidelines](#), paragraph 4.3.5.

<sup>30</sup> [Merger Assessment Guidelines](#), paragraphs 4.3.5.

<sup>31</sup> [Merger Assessment Guidelines](#), paragraphs 4.3.2.

<sup>32</sup> FMN, paragraph 68.

## **Auto-LPG**

47. The Parties submitted that, absent the Merger, EG would have exited the auto-LPG market [REDACTED].<sup>33</sup>
48. In assessing an exiting firm scenario, the Merger Assessment Guidelines set out a three-limb framework for the CMA to consider:<sup>34</sup>
  - (a) Limb 1: Whether the firm would have exited (through failure or otherwise) absent the merger;
  - (b) Limb 2: Whether there would have been an alternative purchaser for the firm or its assets; and
  - (c) Limb 3: What the impact on competition of exit would be and how this would compare to the impact of the merger.
49. For the CMA to accept an exiting firm counterfactual, it must believe (on the basis of compelling evidence) that it is inevitable that a firm will exit the market and be confident that there is no substantially less anti-competitive purchaser for the firm or its assets.<sup>35</sup>
50. With respect to whether EG would have exited the auto-LPG market (limb 1), the Parties submitted that [REDACTED].<sup>36</sup> The Parties submitted that the UK's road fuel demand for auto-LPG amounts to approximately 0.2%.<sup>37</sup>
51. The Parties submitted that EG has not installed auto-LPG equipment [REDACTED], and that it has not installed auto-LPG equipment [REDACTED] ([REDACTED]) or [REDACTED]. The Parties said that [REDACTED].<sup>38</sup>
52. The CMA asked the Parties to provide a timeline and supporting evidence to show EG's plans to exit the auto-LPG market generally and in particular at the EG Don site (the only EG site which falls within a catchment area where the CMA has found a realistic prospect of an SLC in the supply of auto-LPG). The Parties responded that:

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<sup>33</sup> Parties' Response to the Issues Letter, paragraphs 5.13 and 5.29 and Parties' response to the CMA's Request for Information dated 17 March 2021 (Questions 1 and 4). In relation to Asda, the Parties submitted that [REDACTED]. On this basis, the CMA believes that there is not enough evidence to establish that Asda would have exited the auto-LPG market absent the Merger [REDACTED].

<sup>34</sup> [Merger Assessment Guidelines](#), from paragraph 4.3.8.

<sup>35</sup> [Merger Assessment Guidelines](#), paragraph 4.3.10.

<sup>36</sup> Parties' response to the CMA's Request for Information dated 17 March 2021.

<sup>37</sup> Parties' Response to the Issues Letter, paragraph 5.10.

<sup>38</sup> FMN, paragraph 247.

(a) [REDACTED];

(b) [REDACTED].<sup>39</sup> [REDACTED]; and

(c) [REDACTED].<sup>40</sup>

53. Considering the evidence in the round, the CMA believes that the conditions for an exiting firm counterfactual are not met. The Parties did not provide compelling evidence to show that, absent the Merger, EG would have inevitably exited its auto-LPG business at EG Don. [REDACTED].

54. The CMA therefore believes the pre-Merger conditions of competition to be the relevant counterfactual.

## Frame of reference

55. 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. The CMA may take into account 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.<sup>41</sup>

56. The Parties overlap in the retail supply of the following in the UK<sup>42</sup>:

(a) road fuel;<sup>43</sup>

(b) auto-LPG;<sup>44</sup> and

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<sup>39</sup> [REDACTED].

<sup>40</sup> Despite requests for further information from the CMA, EG was not able to provide more detailed feedback on these plans.

<sup>41</sup> *Merger Assessment Guidelines*, paragraph 5.2.2.

<sup>42</sup> The Parties also overlap in the supply of certain other services such as car washing and electric vehicle (EV) charging. However, the CMA does not believe that these overlaps give rise to a realistic prospect of an SLC independently of the SLCs considered in this Decision. In relation to EV charging, this conclusion has been reached on the basis that the proportion of EV charging facilities at PFSs and supermarkets is low compared to the total number of EV charging units available in UK; according to [Zap-Map online database](#), there are 14,589 locations across the UK (with 39,342 connectors), while the Parties submitted that there are 25 EG locations (with 30 connectors) and 122 Asda locations (with 223 connectors) (Parties' response to the CMA's Request for Information dated 8 April 2021). These overlaps are, therefore, not considered further in this decision.

<sup>43</sup> FMN, paragraph 72(a). The retail supply of fuel involves the sale of fuel (both petrol and diesel) to motorists via PFSs. These PFSs are typically owned either by the oil companies that supply the fuel (Company Owned Company Operated, COCO), by supermarkets, or by independent third parties (Dealer Owned Dealer Operated, DODO). FMN, paragraph 77.

<sup>44</sup> FMN, paragraph 72 (c).

(c) convenience groceries.

## **Product scope**

### *Retail supply of road fuel*

#### *Parties' submissions*

57. The Parties submitted that, in line with the CMA's previous decisions in *MFG/MRH*<sup>45</sup> and *Sainsbury's/Asda*<sup>46</sup>, the relevant product frame of reference is the retail supply of road fuel, without further segmentation between petrol and diesel.<sup>47</sup> The Parties submitted that, even though petrol and diesel are not demand-side substitutes, they are substitutable from the supply-side given that both fuels are sold at the same point of sale in all PFSs.<sup>48</sup>

### *Retail supply of auto-LPG*

#### *Parties' submissions*

58. The Parties submitted that, in line with the CMA's previous decisions in *MFG/MRH* and *Sainsbury's/Asda*, the relevant product frame of reference is the retail supply of auto-LPG.<sup>49</sup>
59. The Parties submitted that there is limited supply-side substitutability between auto-LPG and other road fuels because specialist equipment must be installed at PFSs in order to supply auto-LPG and, unlike petrol and diesel, the primary use of LPG is as a heating product. They also submitted that there is limited demand side substitutability, as cars need to be adapted to use auto-LPG. There are also a large number of non-forecourt retail suppliers of auto-LPG that act as a competitive constraint on forecourt sites, and which do not supply petrol or diesel. Finally, there are also significant differences between auto-LPG and other road fuels in terms of their miles-per gallon ratio and price.<sup>50</sup>

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<sup>45</sup> CMA decision of 5 October 2018, case ME/6750/18 – [Completed acquisition by CD&R Fund IX of MRH \(GB\) Limited \(MFG/MRH\)](#), (see FMN, paragraph 91).

<sup>46</sup> CMA decision of 25 April 2019, case ME/6752-18 – [J Sainsbury Plc/Asda Group Ltd, \(Sainsbury's/Asda\)](#).

<sup>47</sup> FMN, paragraph 91.

<sup>48</sup> FMN, paragraph 88.

<sup>49</sup> FMN, paragraph 101.

<sup>50</sup> FMN, paragraph 100.

## *Retail supply of convenience groceries*

### *Parties' submissions*

60. The Parties submitted that UK competition authorities have in previous decisions such as *Sainsbury's/Asda* and *Tesco/Booker*<sup>51</sup> segmented the market for the retail supply of groceries (including stores located at PFSs) according to the size of the store and determined that the competitive constraint faced by stores within each size category is asymmetric, in that large stores will constrain small stores, but not vice versa, such that:
- (a) one-stop stores (**OSS**) (those with a net sales area of more than 1,400 square metres) are competitively constrained only by other OSS;
  - (b) mid-size stores (**MSS**) (those with a net sales area of less than 1,400 square metres but more than 280 square metres) are competitively constrained by other MSS and OSS; and
  - (c) convenience stores (those with a net sales area of less than 280 square metres) are constrained by other convenience stores, MSS and OSS. This category includes convenience stores at PFSs.<sup>52</sup>
61. The Parties also submitted that in previous cases the CMA did not define a separate market for convenience stores co-located with a PFS distinct from other types of convenience stores.<sup>53</sup>
62. The Parties submitted that the only overlap between their activities in the retail supply of groceries is in the retail supply of convenience groceries.<sup>54</sup>

### *Conclusion on product scope*

63. The CMA did not receive any evidence to support departing from the product frame of reference adopted in previous cases. The CMA has therefore considered the impact of the Merger in the following product frames of reference:
- (a) The retail supply of road fuel.
  - (b) The retail supply of auto-LPG.

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<sup>51</sup> CMA decision of 12 July 2017, [case ME/6677/17 – Tesco plc/Booker Group plc \(Tesco/Booker\)](#).

<sup>52</sup> FMN, paragraph 105.

<sup>53</sup> FMN, paragraph 108: *Sainsbury's/Asda*, Final Report, paragraph 7.86 and MFG/MRH, paragraphs 39-43.

<sup>54</sup> FMN, paragraph 109.

- (c) The retail supply of convenience groceries, which are constrained by other convenience groceries, MSSs and OSSs.

## **Geographic scope**

### *Retail supply of road fuel*

#### *Parties' submissions*

64. The Parties submitted that:
- (a) in its past decisions, the CMA has considered the retail supply of road fuel at both a national and local level. At the local level, the CMA has previously identified the relevant catchment area around PFSs in drive-time isochrones: 10 minutes in urban areas and 20 minutes in rural areas; and
  - (b) there have not been any material changes in consumer behaviour and motorists' willingness to travel, to depart from the above isochrone definitions; and the CMA should assess the Merger by reference to the drive-time filters used in *MFG/MRH*, taking into consideration the CMA's conclusions in *Sainsbury's/Asda* that competition from supermarket PFSs is likely understated and a wider 20-minute urban isochrone should be used to consider that constraint.<sup>55</sup>

#### *Conclusion on retail supply of road fuel*

- *Local frame of reference*

65. The CMA believes that competition takes place mainly at a local level, as customers will consider the options available to them in a local area when they need to buy fuel. The Parties also submitted that they set their road fuel prices [redacted].<sup>56</sup>
66. The CMA therefore believes that it is appropriate to conduct the competitive assessment of the retail supply of road fuel by reference to a local frame of reference. The CMA believes that the appropriate catchment areas are those adopted by the CMA in *Sainsbury's/Asda*, which are:
- (a) non-supermarket PFSs up to 10 minutes drive-time; and

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<sup>55</sup> FMN, paragraphs 93-98.

<sup>56</sup> FMN, paragraphs 157, 159 (c), 172 and footnote 66.



(b) supermarket PFSs up to 20 minutes drive-time.

67. The catchment areas in *Sainsburys/Asda* were based on a range of evidence including a Price Concentration Analysis (**PCA**), which considered the impact of concentration on prices for both supermarket PFS and non-supermarket PFS centroids. The PCA showed that customers are willing to travel further to supermarket PFSs, and that supermarket PFSs have a greater effect on the prices of rival PFSs than non-supermarket PFSs, even when those supermarket PFSs are located further away. This finding is not relevant only to the circumstances in *Sainsbury's/Asda* (ie a merger between two supermarkets); the PCA considered both supermarket and non-supermarket PFSs as centroids and, as a result, is able to inform the CMA's understanding on the constraints imposed by supermarket and non-supermarket PFSs in the context of the current Merger.

- *National frame of reference*

68. The CMA has previously considered that certain parameters of competition in the retail supply of road fuel can be set at a national level.<sup>57</sup>

69. In this case, the Parties submitted that certain aspects of Asda's retail fuel business model have a national dimension:

(a) Supermarkets operate under their own brand and therefore want to have a degree of commonality of pricing nationally to strengthen brand loyalty.<sup>58</sup>

(b) [REDACTED].<sup>59</sup>

(c) Asda occasionally centrally announces a 'national' price ceiling or cap following reductions in wholesale fuel costs, after which Asda will not price above the cap at any local PFS for at least a week.<sup>60</sup>

(d) [REDACTED].<sup>61</sup>

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<sup>57</sup> See CMA decision of 23 December 2015, [case ME/6563/15 - on the anticipated acquisition by MRH \(GB\) Limited of 78 service stations from Esso Petroleum Company Limited \(MRH/Esso\)](#), paragraph 28; CMA decision of 16 January 2015 [case ME/6471-14 - on the completed acquisition by Motor Fuel Limited of 228 petrol stations and other assets from Murco Petroleum Limited \(MFG/Murco\)](#), paragraph 35 and 56; CMA decision of 24 September 2015, [case ME/6534/15 on the anticipated acquisition by Motor Fuel Limited of 90 petrol stations from Shell Service Station Properties Limited, Shell UK Limited and GOGB Limited \(MFL/Shell\)](#), paragraph 25 and MFG/MRH.

<sup>58</sup> FMN, paragraph 133.

<sup>59</sup> FMN, paragraph 159 (c).

<sup>60</sup> FMN, paragraph 159 (b).

<sup>61</sup> FMN, paragraph 134.

70. The Parties submitted that [REDACTED].<sup>62</sup>
71. The CMA therefore believes that it is appropriate to assess the impact of the Merger in the retail supply of road fuel also at a national level.

### *Retail supply of auto-LPG*

#### *Parties' submissions*

72. The Parties submitted that in its most recent merger decision concerning the retail supply of auto-LPG, the CMA noted that there was no clear precedent on geographic market definition. In particular:<sup>63</sup>
- (a) in *MFL/Shell*<sup>64</sup>, the CMA used 40 minute drive-time isochrones on a cautious basis because the merging parties' closest sites were located 38 minutes drive from each other;<sup>65</sup>
  - (b) in *MFG/Murco*, the CMA used 30 and 40 minute drive-time isochrones on a cautious basis (without concluding on the appropriate geographic boundaries) as the merging parties did not overlap on 10 or 20 minute drive-time isochrones;<sup>66</sup>
  - (c) in *Shell/Rontec*<sup>67</sup>, the OFT used 10, 20, 30 and 40 minute drive-time isochrones. The OFT noted that the broad consensus among third parties was that a 20 minute isochrone was the most appropriate,<sup>68</sup> and
  - (d) in *MFG/MRH*, the CMA assessed the impact of the merger, in addition to a national frame of reference, also at the local level using 10, 20, 30 and 40 minute drive-time isochrones. The CMA noted there was no clear consistency among third parties as to the appropriate drive-time isochrone.<sup>69</sup>
73. The Parties also submitted that neither Party competes on price or otherwise at a local level, as [REDACTED], submitting that:<sup>70</sup>

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<sup>62</sup> FMN, paragraphs 136 and 167.

<sup>63</sup> FMN, paragraph 102.

<sup>64</sup> [CMA decision of 24 September 2015, case ME/6534/15 – MFL/Shell \(MFL/Shell\)](#).

<sup>65</sup> FMN, paragraph 102 (a).

<sup>66</sup> FMN, paragraph 102 (b).

<sup>67</sup> [OFT decision of 12 July 2012, case ME/5191/11 – Shell/Rontec \(Shell/Rontec\)](#).

<sup>68</sup> FMN, paragraph 102 (c).

<sup>69</sup> FMN, paragraph 103.

<sup>70</sup> FMN, paragraphs 246-249.

(a) [REDACTED];<sup>71</sup> and

(b) [REDACTED].

74. In line with the CMA's approach in *MFG/MRH*, and on a conservative basis, the Parties assessed the impact of the Merger on the retail supply of auto-LPG at the national and local level (based on 10, 20, 30 and 40 minute drive-times).<sup>72</sup>

#### *Conclusion on retail supply of auto-LPG*

75. While the Parties submitted that [REDACTED], the CMA notes that EG's pricing data indicates that [REDACTED].<sup>73</sup>
76. The CMA also considers that [REDACTED] can be constrained by the degree of local competition. For example, [REDACTED] would depend to some extent on the degree of competition it faces in the relevant local area.<sup>74</sup>
77. On this basis, the CMA believes that EG may flex certain parameters of competition, such as pricing, in response to local competition.
78. The CMA therefore believes that it is appropriate to assess the impact of the Merger on the retail supply of auto-LPG at both the national and local levels. In relation to the local frame of reference, the CMA did not receive any evidence to support departing from its findings in previous cases and, therefore, believes that it is appropriate to assess the impact of the Merger based on 10, 20, 30 and 40 minute drive-times adopted in *MFG/MRH*.

#### *Retail supply of convenience groceries*

##### *Parties' submissions*

79. The Parties' submitted that the CMA has considered the retail supply of convenience stores at a national and local level. In its most recent decisions, the CMA has defined the geographic market at a local level as either a 5 minute drive-time or 1 mile radius around each convenience store, regardless of the type of store exercising the constraint.<sup>75</sup>

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<sup>71</sup> Parties' Response to the Issues Letter, paragraphs 5.14-5.19.

<sup>72</sup> FMN, paragraph 104.

<sup>73</sup> Issa Brothers and TDR Annex 96 to the FMN, 'S109\_2 Q12'.

<sup>74</sup> [REDACTED]. The CMA does not consider that this means that local competition cannot be a relevant factor in pricing, as prices could still be set having regard to the extent of competition faced in the local area.

<sup>75</sup> FMN, para 112 (b).

80. The Parties therefore assessed the impact of the Merger based on catchment areas of 5 minutes drive-time and a 1 mile radius around each convenience store.<sup>76</sup>

#### *Conclusion on the retail supply of convenience groceries*

81. Consistent with previous cases, the CMA believes that the appropriate geographic frame of reference for the retail supply of convenience groceries is local as customers will consider options available to them in a local area but that a national dimension of competition also exists. This is on the basis that certain aspects of convenience store offerings are set centrally and applied uniformly on a national basis, such as national pricing, supplier relationships and general promotional activity.<sup>77</sup>
82. At a local level, in its most recent decisions, the CMA has adopted a one mile catchment for convenience stores, on the basis of survey evidence from the Association of Convenience Stores (**ACS**), which indicates that a high proportion of customers walk to convenience stores.<sup>78</sup> In this case, where all of the Parties' convenience stores are co-located with a PFS, the CMA believes that it is more appropriate to adopt a catchment area based on drive-times, since data from the ACS indicates that the majority of PFS convenience store customers (67%) drive to the stores.<sup>79</sup> Therefore, the CMA believes that the appropriate catchment area is a 5-minute drive-time around each convenience store.

#### *Conclusion on geographic scope*

83. For the reasons set out above, the CMA has considered the impact of the Merger in the following geographic frames of reference:
- (a) For the retail supply of road fuel, both at the national and local level. At the local level, the appropriate catchment area includes: (i) non-supermarket PFSs up to 10 minutes drive-time, and (ii) supermarket PFSs up to 20 minutes drive-time.

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<sup>76</sup> FMN, para 113.

<sup>77</sup> *Sainsbury's/Asda*, Final Report, paragraphs 8.320-8.322; the CMA found that Asda operates consistent pricing across its supermarkets and its convenience stores. *Asda/Co-op*, footnote 10. *MFG/MRH*, paragraph 43.

<sup>78</sup> *Sainsbury's/Asda*, Final Report, paragraph 7.97. *Tesco/Booker* (20 December 2017), Final report, paragraph 6.24 and 6.28.

<sup>79</sup> [ACS Forecourt Report 2020](#), page 8. Evidence from the ACS in relation to convenience stores has been considered by the CMA in previous cases; for example, *Sainsbury's/Asda*, Final Report, paragraph 8.342.

- (b) For the retail supply of auto-LPG, both at the national and local level. At the local level, the assessment is based on 10, 20, 30 and 40 minute drive-times.
- (c) For the retail supply of convenience groceries, both at the national and local level. At the local level, the appropriate catchment area is a 5-minute drive-time around each convenience store.

### ***Conclusion on frame of reference***

84. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:
- (a) The retail supply of road fuel at a national and local level.
  - (b) The retail supply of auto-LPG at a national and local level.
  - (c) The retail supply of convenience groceries at a national and local level.

## **Competitive assessment**

### ***Horizontal unilateral effects***

85. 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.<sup>80</sup> Horizontal unilateral effects are more likely when the merging 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 horizontal unilateral effects in the retail supply of road fuel, auto-LPG or convenience groceries.

### ***Local assessment***

86. The concern under this theory of harm is that the removal of one Party as a competitor could allow the Parties to increase prices (or deteriorate other elements of their offering such as quality) at certain sites. After the Merger, it is less costly for the Merged Entity to raise prices (or lower quality) because it will recoup the profit on recaptured sales from those customers who would have switched to the site of the other merging Party.

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<sup>80</sup> [Merger Assessment Guidelines](#), from paragraph 5.4.1.

### *Use of decision rules*

87. In order to assess the competitive impact of the Merger in local areas where the Parties' activities overlap based on the frames of reference set out above, the CMA sought to devise an analytical approach that:
- (a) reflects the key parameters of competition at the local level;
  - (b) is tailored to the specific features of this Merger where relevant, including that one Party is a supermarket PFS and the other is a non-supermarket PFS and differentiation between the Parties' offerings;
  - (c) assesses all local areas of overlap systematically by reference to the same factors, rather than having regard to different factors in different local areas, unless there is evidence that certain factors are only applicable in certain local areas. In a number of recent CMA Phase 1 decisions, the CMA has noted the risks of adopting a filtering approach where certain parameters of competition are taken into account only in the assessment of local areas that fail a filter, rather than systematically across all local areas of overlap (as this could undermine the results of the initial filter, for example, if other areas would have failed the initial filter had those factors been taken into account);<sup>81</sup> and
  - (d) enables the efficient conduct of the CMA's investigation, having regard to the limited time available within a Phase 1 investigation to carry out a detailed competitive assessment of a large number of local areas.
88. The CMA has adopted decision rules to establish whether the Merger results in a realistic prospect of an SLC in the retail supply of road fuel, auto-LPG or convenience groceries in any local areas. The following subsections set out the CMA's decision rules, the evidence supporting each limb of the decision rules, and the results of applying the decision rules to the three frames of reference.
- *Parties' submissions*
89. The Parties submitted that:

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<sup>81</sup> CMA decision of 11 July 2017, case ME/6656-16 – [Heineken UK Limited/Punch Taverns Holdco \(A\) Limited \(Heineken/Punch\)](#), paragraphs 175-178; CMA decision of 9 October 2020, case ME/6862-19 – [Breedon Group plc/Cemex Investments Limited \(Breedon/Cemex\)](#), paragraph 176.

- (a) the application of a decision rule is inconsistent with: (i) the approach to local assessment in previous cases<sup>82</sup> as in these cases the CMA conducted a site-level assessment and took account of factors applicable or unique to certain areas; and (ii) the CMA Retail Mergers Commentary, which states that the CMA mainly uses filters to screen out overlap areas where competition concerns are unlikely and focus the assessment on the remaining areas;<sup>83</sup>
- (b) previous CMA decisions state that all relevant competitive parameters should be considered. Those capable of systematic application (distance, competitor counts within catchments) should be applied at the filtering stage. Non-systematic factors (ie factors unique to a particular area) should be taken into account in the site-level assessment, provided they are supported by sufficient evidence;<sup>84</sup>
- (c) the application of a decision rule may be more appropriate in cases where: (i) the parties have homogeneous offerings; (ii) all material competitive factors can be systematically applied; (iii) the number of overlaps preclude systematic *[sic]* review (the CMA understands this to refer to *individual* review of local areas); or (iv) within a Phase 2 inquiry, where the CMA and the parties have the time and resources to test the decision rule methodology robustly.<sup>85</sup> The Parties submitted that, in this case, their differentiated business models and customer groups means that they are distant competitors. Thus, the risks of competitive harm are reduced, and a decision rule is inherently likely to miss the more complex interactions that arise with differentiated rivals;<sup>86</sup>
- (d) if decision rules take into account only certain competitive factors (eg, number of competitors), and disregard others (eg, relative constraint exercised by different competitors, size, proximity, etc), they over-report non-existent SLCs. Filters avoid that shortcoming by a cumulative application of filters followed by site-level assessments. Decision rules cannot do this unless each limb takes into account all relevant parameters of competition, which is not the case here;<sup>87</sup>

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<sup>82</sup> Including *MFG/MRH*, *Heineken/Punch*, *Breedon/Cemex* and case ME/6842/19 – [Stonegate Pub Company Limited/Ei Group plc \(Stonegate/EI\)](#).

<sup>83</sup> Observations on the proposed decision rule, submitted by the Parties on 11 February 2021 (**Parties' Memorandum**), paragraphs 7-8, and Parties' Response to the Issues Letter, paragraphs 4.5-4.8, 4.18, and 4.90.

<sup>84</sup> Parties' Response to the Issues Letter, paragraph 4.6.

<sup>85</sup> Parties' Response to the Issues Letter, paragraph 4.15.

<sup>86</sup> Parties' Response to the Issues Letter, paragraph 4.13.

<sup>87</sup> Parties' Response to the Issues Letter, paragraph 4.12.

- (e) the decision rules which have been devised by the CMA should act as filters, with areas failing the decision rules requiring further assessment.<sup>88</sup> The Parties submitted that a broad range of factors should be taken into account in the more detailed assessment of areas failing the decision rules; and
- (f) the principle of proportionality and the duty to take account of relevant considerations require the CMA to consider the Parties' submissions on individual areas that fail the filters, and the constraints within a Phase 1 investigation are not a reason to discard these submissions.<sup>89</sup>

- *CMA's assessment*

90. In this case, the CMA has used decision rules in order to carry out a systematic local assessment of areas of overlap, which reflect the key parameters of competition in the markets where the Parties operate. The CMA considers that this approach is fair, consistent, and effective in identifying local areas where there is a realistic prospect of an SLC, in particular by ensuring that the same factors are taken into account across all local areas.
91. The CMA took into account all relevant evidence (including evidence gathered from the Parties and third parties) in formulating the decision rules, including the differentiated business models of the Parties and the fact that price and location are the two most important parameters of competition in the markets where the Parties operate.
92. The CMA considers that this approach is consistent with the principles that underpinned the local assessments in recent Phase 1 cases (notably *Heineken/Punch*, *Stonegate/El Pubs* and *Breedon/Cemex*), namely that:
- '(a) there is limited time available within a Phase 1 investigation to conduct a detailed competitive assessment of a large number of local areas;
  - (b) the enhanced filtering methodology applied by the CMA already takes into account certain specific features of the local areas ([...]);
  - (c) the competitive assessment should be based on an assessment of factors that can be systematically applied across

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<sup>88</sup> Parties' Response to the Issues Letter, paragraph 4.16.

<sup>89</sup> Parties' Response to the Issues Letter, paragraph 4.20.



all local areas (and, therefore, should not be capable of potentially undermining the position that competition concerns can be excluded in areas that have passed the filters); and

(d) any factors that cannot be systemically applied (ie factors unique to a particular area) need to be supported by sufficient evidence in order to be taken into account.<sup>90</sup>

93. The CMA notes the Parties' reference to the CMA's Merger Retail Commentary. However, that Commentary is based on an analysis of past merger cases in the retail sector and expressly states that it does not constitute guidance under section 106(1) of the Act.<sup>91</sup>
94. The Parties submitted that the CMA should adopt a filtering approach, rather than a decision rule, with areas failing the filters requiring further assessment.
95. As explained above, the decision rules in this case assess the impact of the Merger in each local area based on the key parameters of competition in the markets where the Parties operate. The decision rules take into account features of local competition, for example by taking into account drive times, differentiated offerings, and the relative strengths of different types of competitors. The CMA is satisfied, based on an assessment of the evidence taken in the round, including submissions by the Parties, that the decision rules identify those local areas which give rise to a realistic prospect of an SLC.
96. In this regard, the CMA does not consider that decision rules should only be used in mergers involving products or services that are homogeneous or undifferentiated. The CMA can take into account differentiated business models in formulating its decision rules (as it has done in this case).
97. The CMA considers that it is unnecessary and inappropriate to instead apply a two tier approach where an initial filter is applied in order to carry out a systematic local assessment of all areas of overlap, with a further more detailed local assessment being carried out only for those areas failing the filter, as advocated by the Parties, for the following reasons:

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<sup>90</sup> Breedon/Cemex, paragraph 176. See also Stonegate/EI, paragraphs 95 and 96 and Heineken/Punch, paragraphs 175-177. Examples of factors that were sufficiently unique and evidenced in previous cases include entry and exit by competitors, or extension plans. Conversely, factors such as the presence of other sources of competition or the extent of vertical integration across competitors in a local area have not been taken into account in the CMA's local analysis, when there was not sufficient evidence provided by the parties. Breedon/Cemex, paragraph 180.

<sup>91</sup> Retail Mergers Commentary, 10 April 2017, CMA62, page 2.

- (a) Some of the factors that the Parties submitted the CMA should take account of as part of a detailed assessment of areas failing the decision rules are not sufficiently material to alter the CMA's decision on the existence of a realistic prospect of an SLC in local areas failing the decision rules. For example, the Parties submitted that the availability of certain on-site facilities,<sup>92</sup> the fuel brands sold at their PFSs and the speed of refuelling are relevant parameters of competition.<sup>93</sup> While the CMA recognises that they may be relevant considerations for certain customers, as explained below in paragraphs 111 to 116 and based on the evidence gathered by the CMA, they would not materially affect the CMA's assessment at Phase 1 as to whether there is a realistic prospect of an SLC in the relevant area.
- (b) A number of factors that the Parties submitted that the CMA should have regard to as part of a detailed assessment of areas failing the decision rule are aspects of differentiation between the Parties that apply generally across their PFS estate. For example, EG has a co-located convenience store and offers FTG at all of its PFSs, and all but 18 of Asda's PFSs are co-located with a supermarket.<sup>94</sup> The CMA recognises that the availability of these services may impact on customer choice. However, the CMA had regard to these features of differentiation between the Parties (and their potential impact on diversion ratios) in setting the relevant thresholds in the decision rules. The CMA, therefore, does not consider that it is necessary to carry out a further local assessment to have regard to these factors.
- (c) The Parties' approach does not distinguish between parameters of competition that are unique to a local area (including, for example, entry/exit of competitors) and those that are capable of systematic application across all local areas. By way of example, the Parties submit that the CMA should carry out an analysis of areas failing the decision rules to take into account cases where one of the Parties' sites is located on a dual carriageway, and the other one is located off the dual carriageway in a town centre. Aside from having submitted no evidence to explain how this would impact local competition (particularly since the decision rules already reflects drive time), the Parties also fail to recognise that this could equally affect areas that would have been cleared – erroneously, under the Parties' own logic – under a filtering

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<sup>92</sup> For instance, the Parties made references to toilet facilities, electricity and gas as pre-paid top-up facilities, ATM facilities and parcel collection services as examples of differentiating factors. Parties' submission dated 19 March 2021, 'Assessment of local areas', paragraph 11.

<sup>93</sup> Parties' Response to the Issues Letter, paragraphs 4.58-4.59.

<sup>94</sup> FMN, paragraph 84.

approach (because it could affect the assessment of the competitive constraint exerted by competitors in areas cleared applying the filter).

(d) The CMA was willing to have regard to factors unique to a particular local area and not accounted for by the systematic local assessment in the decision rules, and which were capable of affecting the conclusion on whether there is a realistic prospect of an SLC in an individual area, provided that these were sufficiently well evidenced. The Parties did not make any such submissions backed up by sufficient evidence in relation to any areas that failed the decision rule.

98. Finally, the CMA does not consider that every limb of a decision rule must take into account every factor affecting competition. It is enough for each limb of a decision rule to identify local areas in which there is a realistic prospect of an SLC, based on the competitive parameters included in that limb, and which therefore warrant a more detailed Phase 2 review.

99. On this basis, the CMA has decided to apply a 'decision rule' in each of the three frames of reference discussed above, to identify local areas in which there is a realistic prospect of an SLC. The CMA believes that the thresholds in its decision rules, set out in more detail below, are robust and allow the CMA to be satisfied, on a realistic prospect standard, that each area failing the decision rules gives rise to an SLC.

#### *Retail supply of road fuel*

- *Dynamics of competition*

100. Based on the evidence received during its investigation, the CMA considers that:

(a) price and location are the two most important parameters of competition;

(b) there are other factors affecting choice, such as convenience grocery stores co-located at the PFS, but these are less important;

(c) competition is asymmetric as between supermarket and non-supermarket competitors;

(d) Asda is a particularly important competitor within the supermarket segment; and

(e) motorway PFSs do not exert a material competitive constraint on non-motorway PFSs (and *vice versa*).

101. These key features of competition have been taken into account in setting the decision rule for the retail supply of road fuel and are considered in turn in more detail below.

*Price and location*

102. The Parties submitted that fuel 'is a relatively homogeneous non-differentiated product', with location being 'a primary driver of customer choice' and that '[w]ithout any element of differentiation for other elements of the PFS offering, consumers would simply choose the cheapest site.'<sup>95</sup>
103. In *Sainsbury's/Asda*, the CMA found evidence that price and convenience of location are the main drivers of consumer choice of a PFS.<sup>96</sup> Moreover, the CMA found that supermarket PFSs tend to have lower prices, while non-supermarket PFSs tend to be more conveniently located. These findings were based on a wide range of evidence, which included a survey with customers refuelling at Sainsbury's and Asda PFSs, third party views, the PCA and analysis of pricing data from Experian Catalist.<sup>97</sup>
104. The main findings of the survey in *Sainsbury's/Asda* related to price and location are as follows:<sup>98</sup>
- (a) Price was mentioned as a reason for the choice of PFS by 48% of Sainsbury's customers and 71% of Asda customers. It was cited as the *main* reason for the choice of PFS for 29% of Sainsbury's customers and 49% of Asda customers.
  - (b) Location was mentioned as a reason for the choice of PFS by 61% of Sainsbury's customers and 60% of Asda customers. It was cited as the *main* reason for the choice of PFS by 40% of Sainsbury's customers and 32% of Asda customers. Over three-quarters of both Sainsbury's and Asda customers<sup>99</sup> said they would go to an alternative PFS within a 10 minute-drive if the PFS they were visiting was closed.
105. As for the PCA, the results indicated that PFSs have a larger impact on the prices of their rivals the closer they are to those rivals. In particular, the average impact of a supermarket PFS located within a 5 minute drive-time on

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<sup>95</sup> FMN, paragraphs 144 and 150.

<sup>96</sup> [Sainsburys/Asda Final Report](#), paragraphs 14.32-14.34, 14.48, and 14.83(a).

<sup>97</sup> [Sainsburys/Asda Final Report](#), paragraphs 14.35-14.36, 14.48, 14.83(c) and, 14.16.

<sup>98</sup> [Sainsburys/Asda Final Report](#), paragraph 14.95.

<sup>99</sup> Diverting their fuel only, rather than fuel and groceries. Over two-thirds of both Sainsbury's and Asda customers would go to an alternative within a 10-minute drive when diverting their combined fuel and supermarket spend.

the prices of a rival PFS (supermarket and non-supermarket PFS) is (i) four times that of a supermarket PFS located within 5-10 minutes drive-time; (ii) seven times that of a supermarket PFS located within 10-15 minutes drive-time; and (iii) 44 times that of a supermarket PFS located within 15-20 minutes drive-time. Non-supermarket PFSs had a statistically significant effect on supermarket and non-supermarket PFSs' prices only when located within a 5 minute drive-time from the centroid. However, the CMA recognised that estimates for the effect of non-supermarket PFSs on rivals were likely underestimated.<sup>100</sup>

106. Evidence from the Parties' internal documents is consistent with price and location being the most important factors affecting customer choice:
- (a) An EG internal document indicates that [REDACTED].<sup>101</sup>
  - (b) Asda internal documents indicate that [REDACTED].<sup>102</sup>
107. The Parties' pricing strategies also demonstrate that price and location are key parameters of competition, [REDACTED]. For more details on the Parties' pricing strategies, see paragraphs 144 to 147 below.
108. The vast majority of competitors that responded to the CMA's Merger investigation stated that location, closely followed by price are the most important factors driving consumers' choice of PFSs.<sup>103</sup> Competitors noted that convenience of location is important because customers will typically consider the options available to them in the local area and/or within their regular travel routes,<sup>104</sup> and that few customers will make special journeys to fill up.<sup>105</sup>
109. When asked what factors would be most likely to lead a rival PFS to attract a significant proportion of their customers if, for example, they raised prices, competitors ranked having the cheapest price in the local area, or being the

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<sup>100</sup> [Sainsburys/Asda Final Report, Appendix K](#), paragraph 12.

<sup>101</sup> Issa Brothers and TDR Annex 99 to the FMN, 'Management questions ahead of call – Material for discussion', page 5.

<sup>102</sup> Asda Annex 120 to the FMN, 'Petrol 2018 Plan - A look Back', page 3, 8 – 10; Asda Annex 121 to the FMN, 'Extracts from AREC Board Papers'; Asda Annex 66 to the FMN 'Asda Fuel Strategy (Asda Confidential 003)'.  
<sup>103</sup> Competitors were asked to indicate the five most important factors that drive customers' choice of a PFS and to provide a score from 1 to 5 for each of them, where 5 indicated that the factor is extremely important in driving customers' choice of a PFS, and 1 indicated that the factor is not very important in driving customers' choice. Eleven out of the 14 competitors that responded to the CMA investigation gave location a score of 4 or 5, and nine of the competitors gave price a score of 4 or 5. No other factors were given such a high rating by this many competitors.

<sup>104</sup> [REDACTED].

<sup>105</sup> [REDACTED].

closest alternative in terms of distance, significantly higher on average than any other factors.<sup>106</sup>

110. Based on the above evidence, the CMA believes that price and location are the most important parameters of competition.

*Other factors affecting customer choice*

111. In addition to price and location, the Parties submitted that customers also consider proximity to a supermarket, traffic flows and road type, facilities and on-site offering at the PFS, fuel brand and quality, fuel card acceptance, quality of service, speed of refuelling and loyalty programs when choosing a PFS.<sup>107</sup> The Parties provided little or no evidence supporting that each of these factors are important in driving customers' choice.
112. In *Sainsbury's/Asda*, the CMA found that factors other than price and location, such as co-location with a supermarket, fuel brand and non-fuel retail offering at the PFS, are less important factors driving customer choice.<sup>108</sup>
113. The Parties submitted that Asda caters to residential customers on a grocery shopping mission.<sup>109</sup> The survey evidence from *Sainsbury's/Asda* indicated that while many of Asda's customers (43%) also visited the supermarket when they purchased fuel at the Asda PFS, the majority did not do so. This suggests that co-location with a supermarket may be important for a significant minority of Asda's customers but is not important for most of them.<sup>110</sup>
114. As indicated in paragraphs 108 and 109 above, competitors that responded to the CMA's Merger investigation in this case also indicated that other factors are less important to consumers than location and price. For instance, although a significant minority of competitors considered that a convenience store co-located at the PFS is an important factor driving customer choice, with limited exceptions, competitors did not consider other factors such as FTG, fuel brand, road layout/road type (see paragraphs 141 to 143 and 158

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<sup>106</sup> Competitors were asked to rank a series of factors in terms of their likelihood of attracting a significant proportion of their PFS customers to a rival PFS if they were, for example, to raise prices. Competitors were asked to rank factors on a scale of 1 to 5 (with 1 being the least likely and 5 being the most likely). Eight out of 11 competitors that responded to this question gave being the closest alternative a score of 4 or 5 out of 5 and the same number gave having the cheapest price in the local area a score of 4 or 5 out of 5. No other factors were given such a high rating by this many respondents. The average score for these two factors was also significantly higher than for any other factors.

<sup>107</sup> FMN, paragraphs 139 and 155; Parties' Response to the Issues Letter, paragraph 4.58.

<sup>108</sup> [Sainsburys/Asda Final Report](#), paragraphs 14.32-14.34, 14.48, and 14.83(a).

<sup>109</sup> Parties' Response to the Issues Letter, paragraphs 2.7, 2.8 and 4.38.

<sup>110</sup> [Sainsburys/Asda Final Report](#), paragraphs 14.95.

for a discussion on motorway vs non-motorway PFSs), fuel card acceptance, quality of service, incentives based on loyalty programmes, speed of refuelling, and quality of service to be important factors influencing customer choice.

115. As explained above, when asked what factors would be most likely to lead a rival PFS to attract a significant proportion of their customers if they raised their prices, for example, competitors gave other factors<sup>111</sup> a significantly lower ranking on average than having the cheapest price in the local area or being the closest alternative in terms of distance.
116. Based on the evidence considered above, the CMA believes that factors such as co-location with a supermarket, road layout/type of road, branded FTG offerings, fuel brand, and fuel card acceptance while relevant, are not as important to customers as price and location.

*Competition is asymmetric as between supermarket and non-supermarket PFSs*

117. The Parties submitted that non-supermarket PFSs are typically better able to compete on convenience of location (which they submitted is a primary driver of customer choice) and that supermarket PFSs are generally constrained by the locations of their existing grocery stores, as their PFSs are almost always located in or around these stores, and do not generally enjoy direct access from the road network.<sup>112</sup> The Parties further submitted that supermarket PFSs, including Asda, 'are willing to offer fuel at low prices to create groceries footfall', while 'EG [redacted]'.<sup>113</sup>
118. The interactions between the business areas of supermarkets, including between the sale of in-store groceries, general merchandise, online delivered groceries and fuel were recognised in *Sainsbury's/Asda*. Attracting customers to a store to purchase one of these items gives rise to a probability that they will also make purchases of the other item. This may be to take advantage of increased convenience, reduced transport costs or lower search costs (the 'one-stop shopping principle') or may also arise because each transaction increases loyalty (either through explicit loyalty schemes or for non-financial reasons, such as increased familiarity with the store and its product range).

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<sup>111</sup> These other factors included whether the PFS has shorter waiting times; is unstaffed; accepts fuel cards; is attached to a large supermarket; is operated by a supermarket chain; is branded as a major oil company; is operated by an independent supplier; has a convenience grocery store offering; has a branded FTG offering; offers ancillary services such as car washes, ATMs and electric charging facilities; is located on a motorway and is located on a different type of road when compared to the respondent's PFS (eg a residential road or main road).

<sup>112</sup> FMN, paragraphs 144-145.

<sup>113</sup> FMN, paragraphs 125 and 135.

Overall, this results in a ‘halo effect’, whereby the overall performance and profitability of some business lines are strengthened by the parties being present in the other ‘adjacent’ business lines.<sup>114</sup>

119. Asda has analysed internally how having a PFS on-site or adjacent to a supermarket leads to an increase in groceries sales. For example, two of Asda’s internal documents [REDACTED].<sup>115</sup> In *Sainsbury’s/Asda*, the merging parties estimated that, on average across their PFS estates, the halo effect from grocery sales would be equivalent to earning an additional 2-2.5 ppl in margins on sales of road fuel.<sup>116</sup> An EG document indicates that [REDACTED].<sup>117</sup>
120. In relation to the differentiation between supermarket PFSs and non-supermarket PFSs in the retail supply of road fuel, in *Sainsbury’s/Asda* the CMA found that competition between supermarket PFSs and non-supermarket PFSs is asymmetric:<sup>118</sup>
- (a) Supermarket PFSs tend to have lower prices, while non-supermarket PFSs tend to be more conveniently located. This was supported by survey evidence, third parties’ views, and analysis of pricing data from Experian Catalist.
  - (b) Supermarket PFSs exert a larger constraint on rivals (both supermarket PFSs and non-supermarket PFSs aggregated) than non-supermarket PFSs located at the same distance. For example, estimates from the PCA suggest that the impact of one additional competing supermarket PFS within 5 minutes drive-time was equivalent to the impact of 12.5 additional non-supermarket PFSs within 5 minutes drive-time. While the CMA recognised that the impact of an additional non-supermarket PFS on rivals’ prices was likely underestimated, the scale of the differential was significant and the CMA considers it appropriate to take into account the potential for supermarket PFSs to act as important constraints on rivals.
  - (c) The constraint of supermarket PFSs is particularly strong at a short distance. See paragraph 105 for further details of the relative impact of a supermarket PFS on a PFS’s prices depending on the distance between the two of them.<sup>119</sup>

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<sup>114</sup> *Sainsbury’s/Asda* Final Report, paragraph 8.235.

<sup>115</sup> Asda Annex 121 to the FMN, ‘Extracts from AREC Board Papers’ and Asda Annex 83 to the FMN, ‘Fuel ICRC update’.

<sup>116</sup> [Sainsbury’s/Asda response to Provisional Findings](#), paragraph 824.

<sup>117</sup> Issa Brothers and TDR Annex 50 to the FMN, ‘Project Evergreen, Management Presentation’, page 29.

<sup>118</sup> *Sainsburys/Asda* Final Report, paragraphs 14.35-14.36, 14.48, 14.83(c), and 14.16.

<sup>119</sup> *Sainsburys/Asda* Final Report, Appendix K, paragraph 11-12.



- (d) Third parties indicated that supermarket PFSs often constrain non-supermarket PFSs from raising prices.
121. The findings above were based on a wide range of evidence, which include a survey with customers refuelling at Sainsbury's and Asda PFSs, third parties' views, an analysis of pricing data and a PCA.
122. The Parties submitted that it would be inappropriate to design a decision rule based on the PCA developed in the *Sainsbury's/Asda* merger inquiry because:<sup>120</sup>
- (a) the data and code were not made available to the Parties;
  - (b) the CMA found that the PCA was not reliable in *Sainsbury's/Asda* because the PCA was likely to underestimate the constraint exerted by non-supermarket PFSs;
  - (c) results from the Provisional Findings suggest that the impact of supermarket PFSs on the prices of all PFSs is about half of the impact on other supermarket PFSs; and
  - (d) the PCA estimates the impact of entries and exits of supermarket PFSs on all PFSs, and not specifically on non-supermarket PFSs such as EG.
123. The CMA notes that the evidence from the *Sainsbury's/Asda* merger inquiry, including the PCA, is only one of the pieces of evidence that the CMA has relied on in its assessment. The CMA's assessment of this Merger has relied on evidence submitted by the Parties, third party views as well as evidence from previous CMA cases, including *Sainsbury's/Asda* and *MFG/MRH*.
124. With respect to the data and code of the PCA developed in *Sainsbury's/Asda* not being made available to the Parties, the CMA notes that the CMA has solely relied on the published information in the PCA, which is equally available to the Parties and sufficient to allow them to make appropriate representations.
125. The CMA disagrees with the Parties that the PCA was considered unreliable in the *Sainsbury's/Asda* merger inquiry. The PCA was one of the main pieces of evidence relied upon to define asymmetric catchment areas for supermarket PFSs and non-supermarket PFSs in *Sainsbury's/Asda*.

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<sup>120</sup> Parties' Memorandum, paragraphs 7-8, Memorandum, Annex 1, p. 8, and Parties' Response to the Issues Letter, paragraphs 4.34 and 4.66.

126. The CMA recognised that the PCA was likely to underestimate the constraint from *non-supermarket PFSs* on both supermarket PFSs and non-supermarket PFSs, but it did not consider that the constraint from *supermarket PFSs* on both supermarket PFSs and non-supermarket PFSs was overestimated. Given the wide range of evidence available in *Sainsbury's/Asda*, the CMA decided to use the survey evidence in its local assessment as this was more direct evidence of customers' choices and likely to provide more accurate figures on diversion patterns, including to non-supermarket PFSs. The fact that the survey evidence was considered more reliable than the PCA for the purposes of estimating a weighted share of shops (WSS), which uses point estimates indicating the relative strength of competitors, does not imply that the PCA was not reliable. In fact, the main findings of the PCA were consistent with the findings from other pieces of evidence, such as the survey and third parties' views.<sup>121</sup>
127. With respect to the results from the Provisional Findings showing that the impact of supermarket PFSs on the pricing of all PFSs is about half of the impact on other supermarket PFSs, the CMA notes that, as with any Phase 2 merger inquiry, at the Provisional Findings stage the investigation was still ongoing and, as such, the Parties should consider as the final version the results of the PCA analysis published in the Final Report.
128. Moreover, evidence that supermarket PFSs exert a significant constraint on all PFSs, including non-supermarket PFSs such as EG, is corroborated by other pieces of evidence, as is discussed below.
129. In *MFG/MRH* (a merger of non-supermarket PFSs) the CMA found evidence that supermarket PFSs were 'particularly influential on the Parties' pricing' and were described in the parties' internal documents as 'low price, high volume sites.'<sup>122</sup>
130. In this case, the Parties' internal documents support the strength of constraint exerted by supermarket PFSs. For example, a document produced by external consultants for EG indicates that:
- (a) [redacted];<sup>123</sup> and

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<sup>121</sup> *Sainsbury's/Asda* Final Report, paragraphs 14.13 and 14.19(a).

<sup>122</sup> *MFG/MRH*, paragraph 66.

<sup>123</sup> Issa Brothers and TDR Annex 49 to the FMN 'Project Evergreen, Market & Competitive Environment', pages 5, 31 and 43.

(b) there is a price differential between supermarket PFSs and non-supermarket PFSs and that supermarket PFSs tend to have lower prices [redacted].<sup>124</sup>

131. The Parties submitted that the document referred to above summarises EG's position in the market. In particular, the Parties submitted that the document recognises that despite supermarket PFSs having lower prices and compressing industry margins (despite having increased their margins in recent years), EG has successfully created a differentiated premium offering which allows EG to earn a price premium. Therefore, the Parties submitted that the document provides no evidence that supermarket PFSs exert a strong constraint on EG.<sup>125</sup>
132. The CMA considers that the document provides evidence of the role of supermarket PFSs in constraining non-supermarket PFSs and that in response to the constraint exerted by supermarket PFSs EG has sought to differentiate itself.
133. The constraint that supermarket PFSs exert on EG is also supported by EG's pricing strategy, [redacted] (see paragraphs 145 and 147 below).
134. Competitors' responses to the CMA's investigation indicate that the constraint from supermarket PFSs and non-supermarket PFSs on Asda and EG is asymmetric. For instance, competitors' responses indicate that supermarket PFSs exert a larger constraint on EG when compared to the constraint that non-supermarkets exert on Asda.<sup>126</sup> In particular, several competitors indicated that Asda exerts a strong constraint on both supermarket PFSs and non-supermarket PFSs, including EG.
135. Based on the above evidence, the CMA believes that there is some asymmetry in the constraint exerted by PFSs of different types, with supermarket PFSs exerting a stronger constraint on non-supermarket PFSs than the constraint that non-supermarket PFSs exert on supermarket PFSs.

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<sup>124</sup> Issa Brothers and TDR Annex 49 to the FMN 'Project Evergreen, Market & Competitive Environment', page 31. See also page 36.

<sup>125</sup> Parties' Response to the Issues Letter, paragraph 4.68.

<sup>126</sup> Competitors were asked to provide a score from 1 to 5 indicating the extent to which supermarket PFSs and non-supermarket PFS compete with each of Asda and EG on the retail supply of road fuel. A score of 5 indicated that the selected alternative was a strong competitor against Asda or EG, and a score of 1 indicated that the selected alternative was a weak competitor against Asda or EG.

*Asda is a particularly important competitor within the supermarket segment*

136. EG's internal documents indicate that Asda is an important competitor within the supermarket segment. One EG document, [REDACTED].<sup>127</sup>
137. Evidence from third parties in *Sainsbury's/Asda*, indicated that while supermarkets have the lowest prices, Asda is the price leader and is perceived to be the first to cut prices.<sup>128</sup> This is consistent with the Parties' submissions that Asda's overall price strategy [REDACTED].<sup>129</sup>
138. This strategy is also supported by Asda's internal documents. One document indicates that [REDACTED].<sup>130</sup> Another Asda internal document [REDACTED].<sup>131</sup>
139. Several third parties that responded to the CMA's Merger investigation suggested that Asda is the price leader in the market.<sup>132</sup> One third party indicated that, where possible, if Asda is present in a local area, all competitors within that area try to be as close to Asda's price, stating that 'the entire market try and compete.'<sup>133</sup>
140. Based on the above evidence, the CMA believes that Asda is a particularly important supermarket PFS competitor.

*Motorway PFSs*

141. A small subset of EG's PFSs are located on motorways while Asda does not have any PFS sites located on a motorway.<sup>134</sup> The Parties submitted that EG's motorway sites tend to have higher prices than other PFS sites.<sup>135</sup>
142. A few competitors that responded to the CMA's Merger investigation indicated that they view motorway PFSs as a separate market to non-motorway PFSs.<sup>136</sup> Moreover, several competitors indicated that customers generally

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<sup>127</sup> Issa Brothers and TDR Annex 49 to the FMN 'Project Evergreen, Market & Competitive Environment', see for example pages 36 and 73.

<sup>128</sup> *Sainsbury's/Asda*, Final Report, paragraph 14.30-14.49.

<sup>129</sup> Parties' Response to the Issues Letter, paragraphs 6.2-6.4.

<sup>130</sup> [REDACTED].

<sup>131</sup> [REDACTED].

<sup>132</sup> [REDACTED].

<sup>133</sup> [REDACTED].

<sup>134</sup> FMN, footnote 37.

<sup>135</sup> Issa Brothers and TDR response to CMA's section 109 notice dated 8 January 2021, Question 19. The Parties submitted that they have not identified internal documents that support the Parties' submission that PFSs located on a motorway exert a weak constraint on PFSs located in residential areas and vice versa. Issa Brothers and TDR response to Question 6 and Asda's response to Question 2 of the CMA's section 109 notice dated 17 February 2021.

<sup>136</sup> [REDACTED].

view motorway PFSs to be at a higher price point<sup>137</sup> and, therefore, that motorway PFSs may only be attractive to customers if they provide convenience of location and additional services.<sup>138</sup>

143. Based on the above evidence and consistent with previous cases,<sup>139</sup> the CMA believes that motorway PFSs do not exert a material competitive constraint on non-motorway PFSs and *vice versa*.

- *Parties' pricing strategy*

#### *Parties' submissions*

144. In relation to Asda's pricing strategy, the Parties submitted that:<sup>140</sup>

- (a) Asda [REDACTED]. Asda's [REDACTED] pricing strategy is [REDACTED];
- (b) Asda [REDACTED];
- (c) Asda operates a national price cap policy, meaning that Asda does not price above the cap at any of its sites. When wholesale costs drop, Asda tends to announce a drop in the price cap, [REDACTED];
- (d) when Asda announces a drop in the price cap, it commits not to price above the new level of the cap at any PFS for at least one week following the announcement of the drop. However, as fuel prices are set locally depending on local competitive conditions, [REDACTED]; and
- (e) [REDACTED].<sup>141</sup>

145. In relation to EG's pricing strategy, the Parties submitted that:<sup>142</sup>

- (a) [REDACTED];

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<sup>137</sup> [REDACTED].

<sup>138</sup> [REDACTED].

<sup>139</sup> In the CMA decision of 6 October 2008, case ME/3799/08 - *Moto Hospitality/First Motorway Services*, the CMA concluded 'within each local market the strongest competitors to each MSA [Motorway Service Areas] are considered to be those MSAs (or truck stops) nearest on the same direct motorway route.' In *Shell/Rontec*, only 25 per cent of the customers responding to the CMA's market testing stated that they would have gone to a petrol station off the motorway. In *MFG/MRH*, the CMA recognised that, in some areas, motorway sites may provide some competitive constraint (although competitive constraints are likely to be asymmetric with off-motorway sites constraining motorway sites more than the other way round).

<sup>140</sup> Asda's response to Question 2 of the CMA's section 109 notice dated 24 February 2021, Asda's response to Question 1 of the CMA's section 109 notice dated 2 February 2021, and FMN paragraphs 125, 129 -131, 133, 157, 159 and footnote 66.

<sup>141</sup> [REDACTED].

<sup>142</sup> FMN, paragraphs 136, 148, and 167-184, and RBB Memorandum, '[REDACTED]'.

(b) [REDACTED];<sup>143</sup>

(c) [REDACTED];

(d) [REDACTED];

(e) [REDACTED]; and

(f) [REDACTED].

#### *CMA's assessment*

146. The CMA considers that the Parties' pricing strategies are consistent with some of the main findings from the CMA's evidence base:

(a) The Parties' prices are responsive to the prices of competing PFSs that are located in the surroundings of the Parties' PFSs (see paragraphs 106 to 107 above).

(b) The Parties consider the prices of both supermarket PFSs and non-supermarket PFSs when setting their prices (see paragraphs 130 to 133 above).

(c) Asda is a particularly important competitor for both supermarket and non-supermarket PFSs as it consistently acts as a price leader across all local areas (see paragraphs 136 to 140 above).

147. With respect to EG's price strategy, as EG generally [REDACTED]. However, the CMA considers that [REDACTED] shows that supermarket PFSs play an important role in constraining EG from raising its quality-adjusted prices.

- *Closeness of competition between the parties*

148. The Parties submitted that they have differentiated business models and, therefore, appeal to different customer groups and are not each other's closest competitors.<sup>144</sup> In particular, the Parties submitted that:

(a) Asda's PFSs are in close proximity to a large supermarket (with the exception of 18 sites that only have an on-site convenience store), offer low fuel prices to drive customers to the supermarket, and therefore cater to cost conscious customers often on a grocery shopping mission. Asda's PFSs operate under Asda's brand, and are designed to support an easy

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<sup>143</sup> For illustration purposes, [REDACTED].

<sup>144</sup> FMN, paragraphs 118-119 and 137.

and fast refuelling experience, with over half of Asda's PFSs (56%) being unmanned. Asda's PFSs do not have convenience or FTG offerings and do not accept fuel cards other than 'Allstar'. [REDACTED];<sup>145</sup>

- (b) EG's PFSs are more conveniently located and cater to transient customers and commercial traffic. EG's PFSs have a 'best-in-class fuel and non-fuel merchandise offer' through branded fuel, branded FTG (such as Greggs, Cinnabon, Sbarro, Burger King, Subway and/or Starbucks), and premium convenience offering (mainly through a Spar convenience offering).<sup>146</sup> [REDACTED];<sup>147</sup> and
- (c) PFSs in different types of locations attract different customers. Asda submitted that most of its PFS customers use the PFS because they are visiting the co-located supermarket, which is usually located in a residential area. By contrast, customers choose EG because they are more conveniently located to cater for transient traffic. A PFS located on a road with high levels of traffic has a transient customer base, for example individuals commuting to work or individuals with an immediate need for fuel.<sup>148</sup>

149. The CMA notes that evidence submitted by the Parties suggests that differences in the type of road where Asda's and EG's PFSs are located may be less stark than suggested in the Parties' submissions. Just over half of EG's PFSs are located in urban transient roads, 46% are located in residential, industry/office or rural areas, and the remainder are located on motorways. About 23% of Asda's PFSs are located in urban transient areas, with the remaining PFSs located in residential, industry/office or rural areas (Asda has no PFSs located on motorways).<sup>149</sup>

150. Nevertheless, the CMA recognises that there is some differentiation in the Parties' offerings. EG's offering has some products and services, such as branded FTG and convenience groceries, that are important for some of its customers, while Asda's offering appeals to cost conscious customers (see paragraphs 111 to 116 on the relative importance of different facilities/services). In particular, evidence from the Parties' internal documents, the Parties' pricing strategies, and actual price differences

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<sup>145</sup> FMN, paragraphs 120, 123, 133 – 134, 140 and footnote 9. Parties' Response to the Issues Letter, paragraphs 2.6, 2.7, and 4.46.

<sup>146</sup> As explained by the Parties, 359 EG's PFSs have a Spar convenience store, while Sainsbury's and Asda are at 50 and 2 of EG's PFSs, respectively. FMN, paragraph 38.

<sup>147</sup> FMN, paragraphs 135-136 and 146. Parties' Response to the Issues Letter, paragraphs 2.2-2.4 and 4.46.

<sup>148</sup> FMN, paragraph 122, 143 and 189; Asda's response to Question 6 of the CMA's section 109 notice dated 8 January 2021; and Parties' Response to the Issues Letter, paragraphs 2.3 and 2.6.

<sup>149</sup> Asda's response to Question 5 of the CMA's section 109 notice dated 8 January 2021.

between Asda and EG indicates that EG's customers are less price sensitive than Asda's customers:

- (a) An EG internal document suggests [REDACTED].<sup>150</sup> Another EG internal document [REDACTED].<sup>151</sup>
- (b) As discussed in paragraphs 144 to 147, the Parties have different pricing strategies, with Asda [REDACTED], while EG [REDACTED].
- (c) A pricing analysis submitted by the Parties indicates that EG's prices [REDACTED].<sup>152</sup>

151. Several third parties that responded to the CMA's Merger investigation suggested that Asda is a stronger constraint on EG than EG is on Asda.<sup>153</sup> The reason provided by most of these third parties was Asda's lower fuel prices, with one third party noting that Asda would likely exert a strong competitive constraint on EG and other competitors as it is the price leader in the market.<sup>154</sup> EG's constraint on Asda is considered by a number of third parties to be weaker than the constraint that Asda exerts on EG, with the reasons provided by the majority of those third parties being EG's perceived lower volume, higher margin strategy.<sup>155</sup>

152. Based on the evidence above, the CMA considers that there is some differentiation between the Parties' offerings and some difference in the constraint that each Party imposes on the other. However, the CMA believes that the Parties exert a strong constraint on each other in the local areas where they overlap given the importance of location, with Asda exerting a stronger constraint on EG when compared to the constraint that EG exerts on Asda (given that Asda's customers are likely to be more price sensitive).

- *Decision rule*

153. Considering the evidence set out above, the CMA adopted a decision rule for the retail supply of road fuel to determine whether the Merger gives rise to a realistic prospect of an SLC in any local areas that takes into account:

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<sup>150</sup> Issa Brothers and TDR Annex 99 to the FMN, 'Management questions ahead of call – Material for discussion', page 5.

<sup>151</sup> Issa Brothers and TDR Annex 49 to the FMN 'Project Evergreen, Market & Competitive Environment', pages 36, and 68-75.

<sup>152</sup> FMN, paragraph 176.

<sup>153</sup> [REDACTED].

<sup>154</sup> [REDACTED].

<sup>155</sup> [REDACTED].



- (a) different catchment areas for non-supermarket PFSs and supermarket PFSs (as explained in the frame of reference, see paragraphs 66 and 83(a));
- (b) the drive-time distance between the Parties' PFSs and between the Parties' PFSs and competitors' PFSs;
- (c) the weak competitive constraint that motorway PFSs exert on non-motorway PFSs and vice versa;
- (d) the number of alternatives available to customers in the catchment area;
- (e) whether the Parties have a significant market share in the catchment area and whether the Merger significantly strengthens this position;
- (f) whether there are a limited number of supermarket PFSs other than Asda in the local areas where EG is present;<sup>156</sup>
- (g) the asymmetric constraint that Asda exerts on EG;
- (h) differentiation between the Parties; and
- (i) whether Asda considers EG's prices when setting its prices in each local area.

154. While many of the elements set out above were taken into account in the competitive assessment in both *Sainsbury's/Asda* and *MFG/MRH*, the CMA recognises that neither of these cases is directly comparable to this Merger for various reasons, as discussed below:

- (a) *Sainsbury's/Asda* involved two supermarket PFSs while *MFG/MRH* involved two non-supermarket PFSs and, therefore, the CMA had to adapt the approach in the current Merger investigation to reflect the asymmetric constraints between supermarket PFSs and non-supermarket PFSs and differentiation between the Parties.
- (b) In *MFG/MRH* the CMA adopted a filtering approach followed by a case-by-case assessment of each of the areas that failed the primary filter. In assessing the impact of this Merger, the CMA took into account not only the factors that were considered systematically via the filter in *MFG/MRH*

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<sup>156</sup> Consistent with the approach in *Sainsbury's/Asda*, the CMA has treated Asda, Morrisons, Sainsbury's and Tesco as supermarket PFSs. This is consistent with evidence gathered in this case. Asda submitted that [redacted] and third parties indicated that Co-Op is less competitive on fuel compared to supermarket PFSs and competes more closely with non-supermarket PFSs ([redacted]).

(distance, fascia count and the parties' pricing rules),<sup>157</sup> but also most of the factors considered in the detailed assessment of areas failing the filter in *MFG/MRH* (such as market shares by volume; and the number, location, and identity of competitor sites) adjusted to the context of a decision rule.<sup>158</sup>

(c) In *Sainsbury's/Asda*, which was a Phase 2 investigation and, therefore, benefited from a longer timetable but also required a higher standard of proof to find an SLC, the CMA adopted a decision rule based on a GUPPI analysis.<sup>159</sup> A GUPPI analysis requires detailed information on diversion patterns across local areas which is usually gathered through a survey of the merging parties' customers, which is not typically feasible within the constraints of a Phase 1 timetable.

(d) In both *Sainsbury's/Asda* and *MFG/MRH* the CMA took account of the pricing rules of each party in its local assessment. While the CMA took account of Asda's pricing rules in the decision rule, the CMA believes that it would not be appropriate to consider EG's pricing rules in the current case [redacted] (see paragraphs 145 and 147). As such, the CMA considers it appropriate to use an alternative approach to take into account the loss of constraint from Asda, as a supermarket PFS, on EG.

155. The CMA has, therefore, taken elements from these decisions where relevant but has also had regard to the specific features of this Merger and the Parties' activities, and has accounted for the fact that it is adopting a decision rule (rather than a filter followed by a detailed assessment of areas failing the filter) to assess the competitive effects of the Merger.

156. The CMA has applied the following decision rule to identify whether the Merger gives rise to an SLC in local areas. Firstly, the CMA has systematically excluded motorway sites (whether operated by the Parties or their competitors) from its competitive assessment. Secondly, as explained in paragraphs 66, 83(a) and 153, the CMA has adopted different catchment areas for non-supermarket PFSs and supermarket PFSs, with non-supermarket PFSs being considered if they are located up to 10 minutes drive-time and supermarket PFSs being considered if they are located up to 20 minutes drive-time from each of the Parties' PFSs. Under the decision rule,

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<sup>157</sup> *MFG/MRH*, paragraphs 79 to 83. For the reasons set out at paragraph 154(d), the CMA did not take into account EG's pricing rules in setting the decision rule.

<sup>158</sup> *MFG/MRH*, paragraph 89.

<sup>159</sup> The gross upward pricing pressure index (**GUPPI**) is a commonly used measure which indicates the incentive the Parties may have to worsen any elements of their price, quality, range, or services in each local area as a result of the merger.

the Merger gives rise to a realistic prospect of an SLC in the retail supply of road fuel in local areas where any of the following conditions are satisfied:

(a) *Fascia count*

- (i) the Merger leads to a reduction in competing PFSs from four to three or fewer, in terms of owner; or
- (ii) EG is the centroid, Asda is located within a 5 minute drive-time, and the Merger would lead to a reduction in competing PFSs from five to four or fewer in terms of owner; or

(b) *Market shares*

- (i) the Parties' PFSs are located within a 10 minute drive-time from each other and their combined market share by volume is equal to or higher than 40%, with an increment of 5% or more; or
- (ii) the Parties are located more than a 10 minute drive-time from each other and their combined market share by volume is equal to or higher than 45%, with an increment of 5% or more;<sup>160</sup> or
- (iii) EG is the centroid, Asda is located within a 5 minute drive-time, and the Parties' combined market share by volume is equal to or higher than 30% with an increment of 5% or more; or

(c) *Supermarket PFSs*<sup>161</sup>

- (i) EG is the centroid and:
  - 1. there is at most one supermarket PFS (in terms of number of sites) other than Asda in the catchment area; or
  - 2. Asda is the only supermarket PFS within a 5 minute drive-time, there is no other supermarket PFS within a 5 minute drive-time from Asda, and there are three or fewer non-supermarket PFSs within a 5 minute drive-time from EG; or
  - 3. Asda is the only supermarket PFS within a 10 minute drive-time, there is no other supermarket PFS within a 5 minute drive-time

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<sup>160</sup> Due to the definition of catchment areas, in practice this criterion applies only in local areas where EG is the centroid.

<sup>161</sup> As explained in footnote 156 the CMA considers Asda, Morrisons, Sainsbury's, and Tesco to be supermarket PFSs.

from Asda, and there are three or fewer non-supermarket PFSs within a 10 minute drive-time from EG; or

*(d) Asda's pricing strategy*

- (i) Asda is the centroid, EG is one of the 15 closest non-supermarket PFS to the Asda PFS and the volume-weighted average difference between (i) the lowest price among the 15 closest non-supermarket PFSs and the seven closest supermarket PFS ignoring any EG PFSs that may be among the 15 closest non-supermarket PFSs; and (ii) the lowest price among the 15 closest non-supermarket PFSs and the seven closest supermarket PFS (ie the value in (i) *minus* the value in (ii)) is equal to or higher than 1 ppl over the period between January 2018 and February 2020.

- 157. The following paragraphs discuss the factors that the CMA took into account in devising the decision rule and why the CMA believes that the Merger results in a realistic prospect of an SLC if an area fails one of the limbs of the decision rule.
- 158. **Evidence that PFSs located on motorways exert a weak constraint on PFSs located off motorways and vice-versa.** In particular, the Parties submitted that where an overlap between the Parties resulted from an EG PFS located on a motorway and an Asda PFS (Asda has no PFS located on motorways), the Merger does not raise competition concerns.<sup>162</sup> The CMA agrees with the Parties, but has systematically excluded PFSs located on motorways from its competitive assessment in all local areas, including therefore rival PFSs located on motorways to ensure that the analysis is consistent across local areas (see paragraphs 141 to 143 above).
- 159. **Proximity vs convenience of location.** The CMA considers that travel time, measured by drive-time distance, is a reasonable way to identify the alternative PFSs close to each of the Parties' PFSs and to reflect the importance of location (including convenience of location) to customer choice.
- 160. The Parties submitted that the CMA's approach does not distinguish between proximity and convenience of location. In particular, they submitted that using drive-time distances does not take account of any relative inconvenience of location in relation to supermarket PFSs compared to non-supermarket PFSs, as customers will normally choose between PFSs in their local area and/or

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<sup>162</sup> Parties' Memorandum.

within their regular travel route. The Parties submitted that convenience of location should be taken into account through a site-by-site assessment.<sup>163</sup>

161. The CMA considers that using drive-time distances is a reasonable way to take account of convenience of location:
- (a) Drive times enable the distance between each of the Parties' PFS and between the Parties' PFSs and competitors' PFSs to be taken into account in a systematic way.
  - (b) Inconveniences such as having to switch between roads or go around a roundabout are taken into account as these will add to the travel time.
  - (c) Using drive times is consistent with the approach taken in *Sainsbury's/Asda*, where the CMA also used drive-times to identify the alternative PFSs around each of the merging parties' PFSs and to derive weights to alternative PFSs depending on the distance they were located from the parties' sites.<sup>164</sup>
  - (d) The alternative approach proposed by the Parties of conducting a site-by-site assessment involves making assumptions about customers' preferred travel routes without evidence to support such assumptions. For example, the Parties have suggested that customers are unlikely to switch roads to visit a PFS if there is a PFS a little further down the same road, or to travel from a residential area to an urban area (or *vice versa*).<sup>165</sup> This assumes that customers' travel routes do not take them on different roads, or through different areas, for example when travelling to and from work. Rather than relying on intuition and absent evidence on customers' regular travel routes / travel preferences, the CMA considers that drive-time distance is an appropriate objective measure of convenience of location.

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<sup>163</sup> Parties' Response to the Issues Letter, paragraphs 4.48-4.49 and 4.71.

<sup>164</sup> Similarly, in *Breedon/Cemex*, the CMA did not take account of customer heat maps provided by the parties on the basis that the CMA's enhanced filtering methodology already took into account the relative strength of the parties and their competitors in each local area through the linear weighted market shares. In this case the CMA noted that '*To the extent that the Parties do not compete because of geographic features in the local area, including local topography, the CMA considers that such factors are better reflected by, and have already been taken into account through the use of, travel times rather than straight-line radials. In these circumstances, customer location maps are therefore a less accurate tool to take into account the impact of such factors on competition in each local area, which the CMA considers is more accurately represented by the linear weighted market shares*'. *Breedon/Cemex*, paragraph 180(a)(i).

<sup>165</sup> Parties' submission dated 19 March 2021, 'Assessment of local areas'. See for example, paragraph 18 (p. 210), paragraph 19 (p.275) and paragraph 19 (p.16).

162. **Fascia count.** The CMA considers that the lower the number of alternative PFSs available to customers, the higher the likelihood that the Merger will give rise to a realistic prospect of an SLC.
163. The CMA had regard to the fascia count criteria adopted in *MFG/MRH* (and previous cases assessing the retail supply of road fuel).
164. The threshold was tightened where EG is the centroid and Asda is located within a 5 minute drive-time. This seeks to take account of the asymmetric constraint that Asda exerts on EG as a supermarket PFS (and as a particularly strong competitor within the supermarket segment) and the importance of location for customer choice, which is likely to translate to higher diversion rates the closer the Parties are (see paragraphs 102 to 110 and 136 to 140 above).
165. **Market shares.** The CMA considers that market shares will capture the relative strength of constraint of the Parties and their competitors to a greater extent than a simple fascia count criterion.<sup>166</sup>
166. To reflect the importance of location, the CMA adjusted the market share threshold depending on how closely located the Parties are from each other. In particular, the market share threshold was tightened in cases where the Parties are within 10 minutes drive-time from each other, but loosened where the Parties are more than 10 minutes drive-time away from each other.
167. As with the fascia count criteria, the threshold was tightened where EG is the centroid and Asda is located within a 5 minute drive-time.
168. The Parties submitted some observations on earlier drafts of the decision rule, in particular they submitted that:<sup>167</sup>
- (a) The market share thresholds were too conservative, especially considering the Parties' differentiated offerings, and inconsistent with previous cases. In particular, the Parties submitted that:
- (i) the CMA 'rule identifies SLCs in areas where local market features suggest competition concerns cannot be presumed', such as areas

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<sup>166</sup> The CMA calculated market shares based on volumes of fuel (petrol and diesel) sold from Experian Catalist data. According to information provided by the Parties, Experian Catalist data on volumes exclude bunkering sales and Heavy Goods Vehicle (HGV) non-bunkering sales. EG's systems [§] therefore, the Parties submitted that market shares may overestimate EG's position in the local areas where EG is present. The CMA expects this to have little or no impact on EG's market shares, as HGV sales are more likely to be relevant at motorway sites, which were excluded from the CMA's competitive assessment. Parties' submissions via emails dated 15 March 2021 at 09:12 and 12 March 2021 at 13:08.

<sup>167</sup> Parties' 'Technical Discussion' submission, dated 26 February 2021 and Parties' Memorandum and Parties' Response to the Issues Letter, paragraph 4.80-4.89.

where there are a large number of fascia in the catchment area (eg the fascia count is 10-to-9 or better post-Merger) or there are other rivals closer to the centroid than the other merging Party;

(ii) There is no mention in *MFG/MRH* of the use of differentiated market share levels depending on the proximity of the parties;

(iii) The CMA has never used market shares in filters in road fuel, and they were used jointly with other information in other cases. Market shares do not consider relative prices or relative location, the two factors the CMA has identified as the most important parameters of competition;

(b) Market shares cannot be a proxy for diversion when the Parties are differentiated as it disregards closeness of competition, location, and presence of other competitors;

(c) Asda's contribution to the combined share substantially overstates the weak nature of rivalry between EG and Asda, and that market shares based on volumes are imprecise measures of weight;

169. The CMA does not believe that the market share thresholds are too conservative or inconsistent with previous cases:

(a) In *MFG/MRH* the CMA found an SLC in local areas where the Parties had market shares as low as 10-20% and there were ten or more competitor PFSs (in terms of owner) in the catchment area post-Merger. In the six local areas that were found to result in an SLC in *MFG/MRH* after a case-by-case assessment, the merging parties had combined market shares between 10 and 20% in two areas, combined market shares between 20 and 30% in two areas and combined market shares between 30 and 40% in the remaining two areas.<sup>168</sup>

(b) The CMA disagrees that in areas where there are a significant number of competitors, such as 10 (to use the example provided by the Parties), or where there are other rivals closer to the centroid than the other merging Party there cannot be competition concerns:

(i) In a hypothetical scenario where the Parties have a combined market share of 35% and there are 10 other competitors, competitors would have, on average, a 6.5% market share each. Where there are several competitors and the Parties have a significant combined

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<sup>168</sup> *MFG/MRH*, paragraphs 92-115.

market share, the CMA considers this to be evidence that not all competitors are equal.

- (ii) In a hypothetical scenario where merging party B is located 3 minutes drive-time west from merging party A, and a third party competitor C is located 2 minutes drive-time east from A, customers switching from A are likely to choose between B and C depending on the direction of their overall journey. The CMA considers that the Parties do not need to be the locally closest competitors to be considered as alternatives by a significant proportion of customers.
  - (iii) In *MFG/MRH* in four of the six local areas where a detailed area by area assessment was carried out and an SLC found, there were eight or more competing PFSs (by owner) post-Merger, including one area where there were at least 12 competing PFSs (by owner). In five of the 29 local areas that were found to be SLCs in *MFG/MRH* the merging parties were not the closest competitors by distance.<sup>169</sup>
- (c) With respect to the Parties' submission that there is no mention in *MFG/MRH* of the use of differentiated market share levels depending on the proximity of the parties in that case, the CMA notes that, in the manual local assessment conducted in *MFG/MRH*, the CMA took account of the relative importance of market shares and proximity between the parties in that case (among other factors, see paragraph 169(a)). For example, the CMA found SLCs in two local areas where the Parties were the closest competitors (by distance) but had combined market shares between 10 and 20% only and the CMA also found an SLC in a local area where the Parties were not the closest competitors (by distance) but had combined market shares between 30 and 40%.<sup>170</sup> Therefore, in *MFG/MRH* the CMA considered the relative importance of market shares and proximity between the merging parties. The difference between the two cases is that the CMA's approach in this case considers such factors in a systematic way across all local areas, while in *MFG/MRH* such factors were taken into account only in local areas failing the filter where a more detailed assessment was conducted.
- (d) With respect to the Parties' submission that (i) the CMA has never used market shares in filters in other investigations in the retail supply of road fuel, and they were used jointly with other information, and that (ii) market

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<sup>169</sup> *MFG/MRH*, paragraphs 92-115 and Annex 1.

<sup>170</sup> *MFG/MRH*, paragraphs 93(d), 94(a), 101(b), 102(a), 105(a), and 105(c).



shares do not consider relative prices or relative location, the CMA notes that:

- (i) Market shares were used in the assessment of areas failing the filter in *MFG/MRH* and, therefore the approach in this case is not inconsistent with previous cases; and
  - (ii) The approach in this case takes account of both the level of combined market shares of the Parties and the increment in market shares as a result of the Merger and the drive-time distance between the Parties (setting more conservative thresholds when the Parties' PFSs are closer to each other). Additionally, in setting the market share thresholds for this limb, the CMA had regard to the Parties' differentiated offerings and the impact of this on likely diversion ratios. Therefore, combined market shares are not being used as a standalone factor to decide on whether the Merger gives rise to an SLC in the local areas where the Parties overlap.
- (e) Considering the decision rule based on the GUPPI approach adopted in *Sainsbury's/Asda*, the CMA found competition concerns in areas with GUPPIs of 1.5%. To the extent that Asda earns incremental margins in excess of 5%, a similar GUPPI rule would have found concerns at levels of diversion of 30% or less.<sup>171</sup> To the extent the Parties account for at least a quarter of all sales (25%) and there is evidence that the Parties are located close together (and this proximity is likely to mean they may be closer competitors than their market shares suggest), the CMA believes that there is a substantial risk that they would account for a 30% diversion ratio from the other merging Party. As such, although it is not possible to draw a precise comparison across cases, the CMA believes that the market share limb of the decision rule is not inconsistent with *Sainsbury's/Asda*, a Phase 2 case.

170. With respect to the Parties' submission that market shares cannot be a proxy for diversion where the Parties have differentiated offerings, particularly considering Asda's contribution to combined market shares, and to market shares being an imprecise measure of weight, the CMA notes that:

- (a) it considers that the higher the market share of one merging party, the larger the incentive of the other party to raise prices as it is more likely

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<sup>171</sup> In this respect, the CMA notes that (i) Asda submitted that its target gross margin is [redacted]%, and documentary evidence suggests that Asda's margin from the halo effect is valued at 2.5ppl (see paragraph 119). Comparing this value to an average price of approximately [redacted]ppl on Asda's part (see Figure 9 of *Sainsbury's/Asda Final Report, Appendix K*), the CMA considers that it is realistic that Asda's effective margin (incorporating the halo effect) would exceed [redacted]% (given 2.5ppl divided by an average price of 115ppl would exceed [redacted]%).

that a higher volume of its sales will be recaptured by the other merging party;

(b) despite the Parties having differentiated offerings they exert a competitive constraint on each other (see paragraphs 150(c) to 152, especially Asda on EG; and

(c) the CMA had regard to the Parties' differentiated offerings when setting the market share thresholds for this limb of the decision rule. In particular, the CMA recognised that, all else being equal (i) diversion from EG to Asda was likely to be lower than diversion from a supermarket rival would be and (ii) diversion from Asda to EG was likely to be lower than diversion from a non-supermarket rival would be.

171. **Supermarket PFSs.** For the reasons explained in paragraph 147, the CMA does not consider it appropriate to adopt a decision rule based on [X], but it considers that supermarket PFSs in general (and Asda in particular) have an important role in constraining EG (see paragraphs 117 to 140). The CMA, therefore, has devised a rule that considers the number of alternative supermarket PFSs around EG's PFSs that are available to customers.
172. The decision rule limb is based on the number of supermarket PFS sites rather than the number of supermarket PFS brands. Given that the CMA is concerned about local areas where the level of diversion from EG to Asda would be significant, such that an increase in prices at EG's PFSs would be profitable, the CMA believes that the number of supermarket PFS sites available to customers is a more relevant measure to quantify these concerns.
173. To reflect the importance of location, the CMA adjusted the rule to account for areas where Asda is the only supermarket PFS within a 5 or 10 minute drive-time of EG.
174. To address potential areas where there is another supermarket PFS only a short drive beyond Asda, the CMA included a cumulative condition to rule out concerns on this measure if going to a different supermarket PFS would add less than 5 minutes drive-time from Asda to the customer's journey.
175. As non-supermarket PFS also exert a constraint on EG, the CMA also included a cumulative condition to rule out concerns in local areas where there are at least four non-supermarket PFSs at a similar distance from EG as Asda even when Asda is the closest supermarket PFS.
176. The Parties submitted that the condition omits competition from supermarket PFSs within the 20 minute drive-time catchment area, although the CMA could consider supermarket PFSs within a 10 minute drive-time as this would

be consistent with the findings in *Sainsbury's/Asda* that most customers would drive an additional 10 minutes between supermarket PFSs.<sup>172</sup>

177. The CMA disagrees with the Parties' extrapolation of the findings from *Sainsbury's/Asda* to this case. In *Sainsbury's/Asda* the CMA found that most customers would divert to an alternative PFS within 10 minutes drive-time if the PFS they were visiting was closed. The findings in *Sainsbury's/Asda* do not support that most customers would drive again up to 10 minutes to a third alternative PFS if the second alternative (Asda) was closed. Considering that this limb takes account of customers diverting from EG to Asda, the CMA considers it appropriate to add a cumulative condition to rule out concerns in areas where Asda is the closest supermarket PFS to EG but there is another supermarket PFS not far away from Asda (ie within a 5 minute drive-time from Asda).
178. **Asda's pricing strategy.** Consistent with the approach in *Sainsbury's/Asda*, the CMA programmed Asda's local pricing rule to simulate whether an EG PFS was an effective constraint to an Asda PFS such that the removal of the EG PFS as a competitor would increase prices at the Asda PFS.
- (a) The CMA considers that even small increases in fuel prices would give rise to significant harm to consumers as fuel is for many consumers a non-discretionary expenditure that accounts for a significant share of household spend (3.7% of total household expenditure in the financial year ending 2018).<sup>173</sup> The CMA notes that PFSs advertise their prices in fractions of a penny, which indicates that even small differences in price matter to customers.
- (b) Therefore, the CMA believes that in any areas where the simulation indicates that the removal of EG as a competitor would lead to an increase of 1 ppl or more to Asda's predicted prices, there is a realistic prospect of an SLC.
- *Conclusion on horizontal unilateral effects in the retail supply of road fuel at the local level*
179. Using the above decision rule, the CMA believes that the Merger gives rise to a realistic prospect of an SLC in 36 local areas in the retail supply of road fuel. These areas are listed in Annex 1.

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<sup>172</sup> Parties' Response to the Issues Letter, paragraphs 4.93-4.95, 4.98, and 4.99.

<sup>173</sup> Office for National Statistics, [Detailed household expenditure as a percentage of total expenditure by disposable income decile group: Table 3.2.](#)

## *Retail supply of auto-LPG*

- *Dynamics of competition*

180. The Parties submitted that, as with road fuel, price and convenience of location are the most important drivers of customers' choice. According to the Parties, other factors that may influence customer choice include the ability of a PFS site to fulfil other customer missions (eg buying food, coffee, etc), the reliability of the auto-LPG equipment and the overall service standards at a PFS site.<sup>174</sup> The Parties also submitted that customers do not exhibit any brand loyalty with respect to auto-LPG sites.<sup>175</sup>
181. Respondents to the CMA's Merger investigation confirmed that price and location are the most important parameters of competition. Every auto-LPG competitor that responded to the CMA's investigation indicated that convenience of location is the most important driver of customer choice for auto-LPG, given the rapid decline and limited availability of auto-LPG sites across the UK. Three out of five auto-LPG suppliers that responded to the CMA's Merger investigation indicated that prices are either as important or the second most important factor for customers.<sup>176</sup> Some suppliers mentioned other factors that may influence customer choice, such as convenience groceries, FTG, opening hours, brand, safety, and number of pumps available; however, these factors were regarded as less important.
182. The evidence available to the CMA suggests that, unlike in the retail supply of road fuel (see paragraphs 117 to 135 above), supermarket auto-LPG sites do not pose a particularly strong competitive constraint relative to non-supermarket sites:
- (a) Supermarkets do not seem to use auto-LPG in order to attract footfall to their groceries business. This is confirmed to some extent by the limited presence of most supermarkets in auto-LPG: Asda only offers auto-LPG at [redacted] of its 323 PFSs, Morrisons offers auto-LPG at [redacted] of its 339 PFSs, Sainsbury's offers auto-LPG at [redacted] of its 316 PFSs and Tesco [redacted] of its 510 PFSs.
  - (b) Moreover, most auto-LPG suppliers who responded to the CMA's Merger investigation indicated that there is either no difference or little difference

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<sup>174</sup> FMN, paragraph 243-244 and Issa Brothers and TDR response to Question 16 of the CMA's section 109 notice dated 8 January 2021.

<sup>175</sup> FMN, paragraph 240.

<sup>176</sup> [redacted].

in the prices charged by supermarket suppliers of auto-LPG compared to non-supermarket suppliers.<sup>177</sup>

- *The Parties' pricing strategy*

183. The Parties submitted that their auto-LPG pricing strategies are set nationally and are not determined by local competitive factors. In particular, they submitted that:<sup>178</sup>

(a) EG [REDACTED]; and

(b) Asda [REDACTED].

184. As set out in paragraph 73(a), 76 and 183, the CMA considers that [REDACTED] can be constrained by the degree of local competition. For example, [REDACTED] would depend to some extent on the degree of competition it faces in the relevant local area. As a result, the CMA has taken into account this potential competitive constraint at a local level in its decision rule.

- *Decision rule*

185. The CMA believes that the evidence above suggests that, in relation to the retail supply of auto-LPG:

(a) location is the most important parameter of competition, followed by price;

(b) unlike in the retail supply of road fuel, supermarkets do not exert a significantly stronger constraint relative to non-supermarkets; and

(c) [REDACTED].

186. The CMA had regard to these factors when designing its decision rule for auto-LPG.

187. The CMA also took account of the CMA's approach in *MFG/MRH*, recognising that this case did not involve the use of a decision rule. In *MFG/MRH* a local area failed the filter if: (i) the merger resulted in a fascia count reduction from 5 to 4 or fewer (by brand or owner) within any of 10, 20, 30 and 40 minute drive-time catchment areas; or (ii) the merging parties' sites were the closest. Following a more detailed assessment of the conditions of competition in local overlap areas failing the filter, the CMA ruled out concerns in a number of overlap areas on the basis that they only failed the filter on the shorter drive-

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<sup>177</sup> [REDACTED].

<sup>178</sup> FMN, paragraphs 246-249, and Parties' Response to the Issues Letter, paragraphs 5.16 and 5.18-5.22.

time isochrones and there were a number of competitors in the area captured by the longer isochrones.

188. Consistent with the CMA's approach in *MFG/MRH*, the CMA has assessed the impact of the Merger on the retail supply of auto-LPG by considering the number of alternative auto-LPG sites available to customers in local areas where the Parties overlap.<sup>179</sup> Consistent with *MFG/MRH*, the decision rule takes into account the number of alternative suppliers available in *each* of the 10, 20, 30 and 40 minute drive-time catchment areas, but also has regard to the number of alternatives that are available in the next (wider) catchment area by drive-time.
189. The CMA has applied the following decision rule: the Merger results in a realistic prospect of an SLC in the retail supply of auto-LPG if it leads to a fascia count reduction from four to three or fewer, in terms of owner, in any of the 10, 20, 30 or 40 minute drive-time catchment areas, unless it leads to a fascia count reduction, in terms of owner, of six to five or more in the next (wider) catchment area.
190. Using the above decision rule, the CMA believes that the Merger gives rise to a realistic prospect of an SLC in the Asda Bridge of Dee (Aberdeen) local area in the retail supply of auto-LPG.

- *De minimis exception to the duty to refer*

191. The Parties submitted that the market size (by value) for auto-LPG in the local overlap area identified as an SLC above (Asda Bridge of Dee) means that the exception to the duty to refer applies, as the market is not of sufficient importance to justify the making of the reference (the ***de minimis exception***<sup>180</sup>). According to the Parties:<sup>181</sup>

- (a) the total market size (by value) for auto-LPG in the relevant catchment area for Asda Bridge of Dee (which overlaps with EG's site EG Don) is approximately £268,900; and

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<sup>179</sup> The CMA has not assessed the impact of the Merger on the basis of the Parties' combined market shares because there is no publicly available data on auto-LPG volumes. Given that supermarkets in general (and Asda in particular) do not appear to be comparatively stronger competitors in the supply of auto-LPG than other types of supplier, the CMA also did not consider it necessary to consider the number of alternative supermarkets in the catchment area in its competitive assessment. As [X], devising a rule based on whether one party sets its prices by reference to the other was also not an option.

<sup>180</sup> Under section 33(2)(a) of the Act.

<sup>181</sup> Parties' Response to the Issues Letter, paragraphs 5.41-5.43.

(b) a structural divestment of the entire PFSs site (and convenience store) that failed the decision rule would be disproportionate to the concerns identified by the CMA.

192. The starting point for the CMA's decision on whether to apply the *de minimis* exception is the size of the markets concerned. In all cases where the value of the markets concerned is below £15 million, the CMA will consider whether a reference, overall, would be proportionate on the basis of a broad cost/benefit analysis.<sup>182</sup>

193. As set out in the CMA's guidance on exceptions to the duty to refer, where the test for reference is met in multiple markets, the relevant figure will be the aggregate size of all such markets.<sup>183</sup> In this case, the test for reference is met in one local market for the retail supply of auto-LPG and 36 local markets for the retail supply of road fuel. The annual value in the UK of these markets is, in aggregate, considerably greater than £15 million. As a result, the CMA believes that the *de minimis* exception to the duty to refer does not apply in this case.

- *Conclusion on horizontal unilateral effects in the retail supply of auto-LPG at the local level*

194. Accordingly, the CMA believes that the Merger gives rise to a realistic prospect of an SLC in the Asda Bridge of Dee (Aberdeen) local area in the retail supply of auto-LPG.

#### *Retail supply of convenience groceries*

- *Parameters of competition*

195. In recent merger investigations, the CMA has found that the main factors that affect customers' choice of convenience groceries at a local level are location, size and brand.<sup>184</sup> In particular, the CMA has found that:

- (a) convenience of location is particularly important, as customers generally seek to minimise the time and distance they travel to and from a convenience store. Other factors, such as price and range, tend to be less relevant;<sup>185</sup> and

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<sup>182</sup> *Mergers: Exceptions to the duty to refer* (CMA64), paragraph 16.

<sup>183</sup> *Mergers: Exceptions to the duty to refer* (CMA64), paragraph 37.

<sup>184</sup> See *Tesco/Booker* and *Sainsbury's/Asda* Final Reports.

<sup>185</sup> *Sainsbury's/Asda* Final Report, paragraphs 4.23 and 8.327, and *Tesco/Booker* Final Report, paragraph 7.16.

(b) a wide range of convenience stores, including convenience stores operated by Symbol group retailers,<sup>186</sup> independent retailers,<sup>187</sup> and OSS and MSS<sup>188</sup> have the potential to act as effective competitors for convenience groceries, with stores of different brands exerting different levels of constraint. For example, in *Tesco/Booker*, the CMA found that Tesco convenience stores exerted a stronger competitive constraint on Symbol group retailers and (especially) independent retailers, than *vice versa*.

196. The Parties' internal documents in this case confirm that convenience of location is an important parameter of competition and that different brands have different strengths across different parameters of competition.<sup>189</sup> For example, one of Asda's internal documents suggests that the '[✂]'.<sup>190</sup>

- *Decision rule*

197. The CMA has applied a decision rule based on a fascia count to identify areas where the Merger gives rise to a realistic prospect of an SLC.

198. As it has done in previous merger investigations, the CMA has assessed the impact of the Merger by reference to the number of alternative convenience stores available to customers in a local area<sup>191</sup> adjusted by the competitive constraint exerted by different brands.<sup>192</sup> More specifically, the CMA has adopted a fascia count that is weighted as follows:

(a) Asda, Sainsbury's, Tesco, Morrisons, Co-Op, Waitrose, Jacks, Whole Foods, Dunnes, and McColl's were given a weight of 1 on the basis that

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<sup>186</sup> Symbol group retailers are grocery retailers which operate stores under a common brand (or symbol) and undertake common marketing activities. Stores within a Symbol group may be independently owned and use the common brand under a franchise or membership agreement or, alternatively, may be directly owned by the Symbol group or affiliated wholesalers. Symbol group retailers generally source supplies through affiliated wholesalers. The central organisation of the Symbol group undertakes joint marketing and advertising, coordinates promotions, arranges for the provision of own-label products using the Symbol group brand, and supplies support services (eg staff training, financial management and merchandising).

<sup>187</sup> The CMA considers independent retailers to be grocery retailers that are not part of a national or regional retail chain and are not part of a Symbol group.

<sup>188</sup> See *Tesco/Booker* Final Report, paragraph 6.8, and *Sainsbury's/Asda* Final Report, paragraphs 7.7 and 7.37.

<sup>189</sup> FMN, Asda Annexes to the FMN: Annex 90 'Wholesale & Convenience Steering Group'; Annex 91 'Addressable Market Approach Discussion'; and Annex 92 'Wholesale & Convenience Strategy Symbol Proposition Benchmarking'. Issa Brothers and TDR Annex 57 to the FMN 'Project Evergreen, Confidential Information Pack', page 59, 63, 78, 79, 89, 107.

<sup>190</sup> Asda Annex 91 to the FMN, 'Addressable Market Approach Discussion', page 34.

<sup>191</sup> For example, in *MFG/MRH* the CMA considered that a local area failed the filter if the merger resulted in a fascia count reduction from four to three or fewer within a 5 minute drive-time or 1-mile radius. *MFG/MRH*, paragraph 118.

<sup>192</sup> See the CMA's assessment in *Tesco/Booker* and *Sainsbury's/Asda*.



they exert a greater competitive constraint than other types of convenience retailers.<sup>193</sup>

- (b) Aldi, Lidl and Marks & Spencer were given a weight of 0.8 as these retailers do not sell tobacco products (evidence from the ACS indicates that, of the top ten product categories of sales at convenience stores co-located at PFSs, tobacco was the category producing the highest sales<sup>194</sup>) and Aldi and Lidl's lack of focus on convenience missions.<sup>195</sup>
- (c) The Symbol group stores Spar, Nisa, Booker, Londis, Premier, Budgens, Costcutter, One Stop, Central PH Retail, Key Store, Key Shop, Best One, Centra, Mace, and CK Supermarkets were given a weight of 0.8 when assessing the local areas where Asda is the centroid, or EG is the centroid and the convenience groceries brand is Sainsbury's or Asda, on the basis that Symbol group stores exert a slightly weaker constraint on those brands. The Symbol group stores were given a weight of 1 when EG is the centroid and the convenience groceries brand is Spar, on the basis that Spar is also a Symbol group brand.<sup>196</sup>
- (d) Independent retailers were given a weight of 0.5 to reflect that they exert a weaker competitive constraint than convenience grocery retailers (such as Tesco, Co-Op and Sainsbury's) and Symbol group retailers.

199. The CMA has applied the following decision rule to identify whether the Merger gives rise to an SLC in local areas in the retail supply of convenience groceries. Under the decision rule, the Merger gives rise to a realistic prospect of an SLC in the retail supply of convenience groceries in local areas where, after the Merger, there remain three or fewer (weighted) fascia in addition to the Parties' sites.<sup>197</sup>

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<sup>193</sup> Iceland was not counted as a fascia to reflect that it exerts a weak competitive constraint compared to convenience grocery retailers (such as Tesco, Co-Op and Sainsbury's) and Symbol group retailers due to its lack of focus on convenience missions and because it does not supply tobacco.

<sup>194</sup> [ACS Forecourt Report 2020](#), page 3.

<sup>195</sup> *Tesco/Booker Final Report*, paragraph 7.50.

<sup>196</sup> As explained in footnote 146, most convenience grocery stores at EG's forecourts are branded as Spar, with others being branded as Sainsbury's or Asda. As the CMA's assessment considers the Parties' sites that are currently under development, a few convenience grocery stores that will be located at EG's forecourts under development do not have a brand. In these cases, Symbol stores were given a weight of 1.

<sup>197</sup> The CMA did not have complete information on the owners/operators of Symbol group stores or independent stores. On a conservative basis, the CMA therefore treated stores under the same Symbol brand as a single fascia (even though they might have different owners/operators). Stores under different Symbol brands and independent stores were treated as individual fascias, although it is possible that they may have the same owner/operator. For Tesco, the CMA treated Tesco branded stores and Jacks branded stores as a single fascia as they are both owned and operated by Tesco.

*Conclusion on horizontal unilateral effects in the retail supply of convenience groceries at the local level*

200. Using the above decision rule, the CMA has not identified a realistic prospect of an SLC in any local area. On this basis, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC in any local areas in the retail supply of convenience groceries.

*National assessment*

*Retail supply of road fuel*

201. Asda's pricing strategy in road fuel has a national dimension. As set out in paragraph 144(c), Asda sometimes implements national price cap reductions in road fuel across its PFS estate in response to reductions in wholesale costs. The CMA understands that the media often refers to these price reductions as triggering 'price wars' because other supermarkets tend to follow Asda by cutting their own road fuel prices.
202. The CMA believes that Asda currently has an incentive to trigger (and publicise) these price cap reductions in order to promote its reputation as being a 'value' retailer and, therefore, increase its combined profits in road fuel and groceries (including because low road fuel prices can help to increase footfall in groceries).<sup>198</sup> As set out in more detail below, the Parties' submissions and internal documents confirm that this reputational benefit is part of Asda's pricing strategy.<sup>199</sup>
203. The CMA considered whether the Merger could affect Asda's incentives to trigger these national price cap reductions on the following basis:
- (a) ***Asda acts as the price leader in road fuel, driving other supermarkets' prices down.*** Asda is currently a price leader in road fuel, and other supermarkets tend to follow when Asda triggers price reductions (at least in the local areas in which Asda's price cap reductions result in actual price drops).<sup>200</sup> This dynamic is supported by Asda's internal documents:

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<sup>198</sup> While Asda may make some additional fuel profits by winning sales from rival PFSs following an announced price cap reduction, the overall impact of this may be limited to the extent rivals match or follow Asda's reductions.

<sup>199</sup> RBB Appendix in Response to Issues Letter, section 5.2.

<sup>200</sup> While these national price cap reductions [§<], the CMA understands that Asda devises and implements this strategy at the national level. FMN, paragraph 159 and Asda's response to Question 2 of the CMA's section 109 notice dated 24 February 2021.

- (i) One Asda internal document discusses [REDACTED] where Asda led price cuts for unleaded petrol [REDACTED]. The same document reproduces the media coverage of the price cuts led by Asda [REDACTED], with one excerpt stating '[REDACTED]'<sup>201</sup>
- (ii) Another Asda internal document cites [REDACTED] where Asda led price cuts [REDACTED] and provides an example of media coverage of a 'price war' led by Asda, and states that '[REDACTED]'<sup>202</sup>
- (iii) Although the CMA has seen evidence that occasionally other supermarket PFSs are the first to reduce their prices in response to wholesale cost reductions, Asda is disproportionately the first to do so. For example, the same internal document [REDACTED].<sup>203</sup> Third party submissions also suggest that Asda is generally the first to cut prices.<sup>204</sup> As set out in paragraphs 137, the CMA's findings in *Sainsbury's/Asda* were consistent with Asda's role as a price leader.
- (b) **Supermarket PFSs exert an important competitive constraint on all PFSs, including on EG.** The supermarket segment exerts an important constraint on other PFSs, including EG (see paragraphs 117 to 135). Moreover, the combined national share of supply of the supermarket PFS retailers excluding Asda is [REDACTED]%.<sup>205</sup> This suggests that other supermarkets are likely to represent an important constraint on EG, including in the areas where Asda and EG overlap.
- (c) **Asda's current pricing strategy may have an impact on EG's road fuel margins.** Asda's national price cap reductions may, therefore, result in reduced profits for EG to the extent that it also reduces its road fuel prices, both in response to Asda's lower prices, as well as in response to the lower prices offered by other supermarkets to remain competitive.
- (d) **The Merged Entity may no longer have an incentive to continue Asda's aggressive road fuel pricing strategy.** Post-Merger, this impact on EG would be internalised by the Merged Entity. The Merged Entity would have an incentive to balance the costs of triggering national price cap reductions—taking into account both Asda's and EG's significant PFS portfolios (many of which overlap<sup>206</sup>)—against the reputational benefits to

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<sup>201</sup> Asda Annex 120 to the FMN, 'Petrol 2018 Plan - A look Back.' See, for example, pages 4, 7, 11, and 12.

<sup>202</sup> Asda Annex 66 to the FMN, 'Asda Fuel strategy,' for example, pages 2 and 7.

<sup>203</sup> Asda Annex 66 to the FMN, 'Asda Fuel strategy', page 7.

<sup>204</sup> [REDACTED].

<sup>205</sup> Issa Brothers and TDR response to Question 2 of the CMA's section 109 notice dated 8 January 2021; Issa Brothers and TDR Annex 95 to the FMN, 'S109\_2 Q2'.

<sup>206</sup> The CMA's analysis suggests that 84% of EG's PFSs overlap with an Asda PFS.

Asda of engaging in this strategy. Depending on this balance, the Merged Entity might no longer have an incentive to trigger national price cap reductions across Asda's PFS sites.

- *Potential costs to the Merged Entity of Asda's current national pricing strategy*

204. The CMA sought to estimate the magnitude of the cost to the Merged Entity of maintaining this aspect of Asda's national pricing strategy. In 2019, Asda supplied approximately [X] litres of road fuel. EG supplied approximately [X] litres of road fuel in the same year and would, therefore, represent a [X] in Asda's exposure to road fuel. A reduction by 1 ppl in Asda's average annual margin, therefore, would have an annualised cost of £[X] before the Merger,<sup>207</sup> and £[X] after the Merger.<sup>208</sup> While these costs would be partially offset by an increase in volumes sold, this may be limited to the extent other PFSs tend to follow Asda and also cut their prices.
205. The Parties submitted that not all of EG's [X] litres in road fuel could be impacted by Asda's national price cap reduction strategy for the following reasons:
- (a) Approximately [X]% of EG's [X] litres are supplied via fuel cards transactions, [X].<sup>209</sup> While these volumes are physically delivered through EG sites, they represent sales made by the fuel card company with which fleet operators negotiate supply terms, rather than accruing to EG. These volumes are therefore less likely to be affected by the impact of Asda's national price cap reductions on the retail price of road fuel.
  - (b) Only around 84% of EG sites overlap with Asda PFSs within the relevant catchment areas, and nine of these are motorway sites (which do not compete with Asda's sites), further reducing the proportion of the EG estate that could be affected from 84% to 82%.
206. According to the Parties' estimates, therefore, EG's total potential exposure to Asda's national price cap reductions would only be in the region of [X]

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<sup>207</sup> Before announcing a reduction in the price cap, [X]. The Parties submitted that [X]. The CMA therefore considers that a [X]. [X].

<sup>208</sup> The CMA notes that these are not precise estimates, including because EG may not reduce its prices to the same extent as Asda, and because certain price cuts may only last for a short period of time.

<sup>209</sup> In addition to fuel card volumes, EG sites also carry bunkering volumes which are similarly not attributable to EG. EG's total site-level volume figure of [X] litres already excludes sales via bunkering agreements.

litres.<sup>210</sup> The CMA considers that this is a reasonable lower bound<sup>211</sup> and estimates that a reduction by 1 ppl in Asda's average annual margin would, therefore, have an annualised cost of £[redacted] after the Merger (which represents an annualised cost increase of £[redacted] as a result of the Merger).<sup>212</sup>

- *Potential benefits of Asda's current national pricing strategy*

207. The Parties submitted that Asda targets cost-conscious consumers and is perceived as a low-cost, value brand (a perception that it reinforces through nationally advertised promotions).<sup>213</sup> The evidence available to the CMA was consistent with the submissions that Asda is generally perceived as a value-led retailer and a price leader:

- (a) One internal document from Asda indicates that [redacted].<sup>214</sup> An EG internal document states that [redacted]. The same EG document [redacted].<sup>215</sup>
- (b) In *Sainsbury's/Asda* third parties perceived some differences between Tesco, Morrisons, Sainsbury's and Asda, with Asda generally perceived as the price leader and Sainsbury's generally perceived as having a higher quality of service and products.<sup>216</sup>
- (c) The survey evidence in *Sainsbury's/Asda* was consistent with third parties' views that Asda faces a greater threat from discounters Aldi and Lidl than Sainsbury's: 13% of Asda's customers said they would divert to Aldi if the Asda store they were visiting was closed, while 6% of Sainsbury's customers would divert to Aldi. Lidl received substantially less diversion from both merging parties (4-6%).<sup>217</sup> Greater pressure from discounters resulting from price competition may contribute to a stronger

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<sup>210</sup> The Parties submitted that this volume could be further lowered by taking account of local divestments offered by the Parties. Under the Act, however, the CMA has a duty to refer a merger to Phase 2 if it has resulted, or may be expected to result, in a substantial lessening of competition (sections 22(1) and 33(1) of the Act). It is only after the CMA makes this determination that it may, under section 73 of the Act, accept UILs to remedy, mitigate, or prevent the substantial lessening of competition. The CMA cannot take into account UILs offered by the Parties in deciding whether there is a substantial lessening of competition in the first place.

<sup>211</sup> The CMA notes that some of EG's PFS sites which do not overlap with Asda's PFS sites could also be exposed to Asda's national price cap reductions in circumstances where each of them overlaps with a common supermarket PFS that is impacted by Asda's price reduction. For the purpose of this estimate however, the CMA has not considered it necessary to estimate the proportion of sites in which this would be likely to occur.

<sup>212</sup> See footnote 210 above.

<sup>213</sup> FMN, paragraphs 125-132 and Parties' Response to the Issues Letter 7.25 and 7.26.

<sup>214</sup> Asda Annex 70 to the FMN, 'Asda (UK) 2020 Financial Budget Pack,' page 7.

<sup>215</sup> Issa Brothers and TDR Annex 45 to the FMN, 'ASDA Discussion Materials', pages 6, 8 and 11.

<sup>216</sup> *Sainsbury's/Asda* Final Report, paragraph 8.25.

<sup>217</sup> *Sainsbury's/Asda* Final Report, paragraph 8.68.

incentive for Asda to position its brand as price-competitive compared to the incentive for the other supermarkets to do the same.

208. The Parties submitted that Asda's road fuel pricing strategy and the media attention that it garners through press releases relating to price cap reductions, supports the overall Asda grocery brand and its 'every day low price' strategy.<sup>218</sup> The Parties also submitted that this reputation could be affected if the Merged Entity were to abandon Asda's current pricing strategy in road fuel, given that this is an important component of Asda's overall business strategy, and that any change would likely be picked up by the media. The evidence received by the CMA was consistent with these submissions:
- (a) An Asda press release quotes its senior fuel buyer putting the fuel pricing strategy in the context of the broader Asda brand, stating that '[w]e know how important saving money is for our customers at this time of year, so we will always aim to keep the cost of essentials down whether that's on fuel, food or fashion. Over the last two weeks we've brought fuel prices down by up to 4ppl without any vouchering requirements meaning all our customers, regardless of their budget, will benefit from a price cut at the pumps.'<sup>219</sup>
  - (b) The retail fuel market is the subject of media attention and public scrutiny. For example, the Parties submitted newspaper excerpts with headlines such as '[h]ow Morrisons, Sainsbury's and Tesco are 'cheating' drivers out of cheaper fuel prices', and '[y]ou hasda [*sic*] have an Asda for low prices at petrol pumps [...]'.<sup>220</sup> The RAC also operates a Fuel Watch programme, which states that 'we monitor wholesale and retail fuel prices daily, including those at the UK's supermarkets [...] and urge retailers to pass on cost savings to motorists when they can be made.'<sup>221</sup>
209. The Parties submitted that Asda's reputation as a low-price retailer [X]. The Parties estimated Asda's overall grocery margins to be in the region of £[X] per annum.<sup>222</sup> Therefore, if a decision by Asda to stop engaging in its strategy of announcing price cap reductions led to even a 1% reduction in Asda's grocery sales, this would cost around £[X] in profits. The CMA considers that an impact on Asda's grocery margins of at least this magnitude is plausible,

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<sup>218</sup> RBB Appendix, Parties' Response to the Issues Letter, section 5.2.

<sup>219</sup> [Asda brings festive fuel price cut to motorists](#).

<sup>220</sup> For example, Asda Annex 120 to the FMN, 'Petrol 2018 Plan - A look Back'.

<sup>221</sup> <https://www.fairfueluk.com/PumpWatch.html>.

<sup>222</sup> The Parties derived this estimate by applying the [X]% grocery margin to total non-fuel sales of £[X]. See RBB Appendix in Response to Issues Letter, section 5.2.

given that, as per the CMA's estimates set out above, Asda already incurs costs in the region of £[~~£~~] as a result of engaging in this pricing strategy and the CMA has not seen any evidence to suggest that [~~£~~]. More broadly, considering the importance of Asda's reputation as a value-led retailer, and the importance of Asda's fuel pricing strategy in that reputation, the CMA considers that, on balance, the grocery margins Asda would lose would likely outweigh any cost savings in terms of increased road fuel margins.

210. On this basis, the CMA considers that the Merger is unlikely to change Asda's incentives to maintain its current pricing strategy and, as a result, does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the retail supply of road fuel across all of Asda's PFS sites.

*Retail supply of auto-LPG and retail supply of convenience groceries*

211. On the basis of the Parties' low shares of supply at a national level<sup>223</sup> and on the basis of third party responses to the CMA's Merger investigation, the CMA found no competition concerns on a national basis for the retail supply of auto-LPG or the retail supply of convenience groceries.

*Conclusion on horizontal unilateral effects*

212. For the reasons set out above, the CMA believes that the Merger raises significant competitive concerns in relation to the:

- (a) retail supply of road fuel in the 36 local areas listed in Annex 1; and
- (b) retail supply of auto-LPG in the Asda Bridge of Dee (Aberdeen) local area.

***Barriers to entry and expansion***

213. 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.<sup>224</sup>

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<sup>223</sup> The Parties have a combined share of supply (by volume) in the retail supply of auto-LPG at the national level of [5-10]% (Issa Brothers and TDR Annex 102 to the FMN, 'S109\_3 Q5.5'). The Parties have a combined share of supply in the retail supply of convenience groceries of [10-20]% by revenue and [0-5]% by number of sites (Issa Brothers and TDR Annex 97 to the FMN, 'S109\_2 Q17').

<sup>224</sup> [Merger Assessment Guidelines](#), from paragraph 5.8.1.

214. The Parties did not provide submissions in relation to entry or expansion in the retail supply of road fuel. The CMA also notes that its local assessment for the retail supply of road fuel includes ‘open’ sites as well as sites ‘under development’, as included in the Experian Catalist data submitted by the Parties.
215. The Parties submitted that barriers to entry are minimal in the retail supply of auto-LPG and that it is easy to obtain storage and dispensing equipment for auto-LPG.<sup>225</sup> However, the Parties also submitted that the auto-LPG business is unattractive and that there is no prospect of auto-LPG becoming more attractive in the future since the fuel is no longer subsidised and the future of alternative fuels is EV charging points or hydrogen.<sup>226</sup>
216. In assessing the strength of any given set of barriers to entry or expansion, the CMA considers the conditions in the market, such as the level of demand. The CMA considers that in a market characterised by low barriers to entry and/or expansion, entrants may nevertheless be discouraged from entry by the small size of the market.<sup>227</sup> In this case, the CMA considers that the retail supply of auto-LPG is a declining market, which a number of suppliers have or are in the process of exiting.<sup>228</sup> The CMA therefore does not believe that entry in the retail supply of auto-LPG is likely.
217. The CMA therefore does not consider that entry or expansion will be timely, likely or sufficient to mitigate the realistic prospect of an SLC in the retail supply of road fuel or auto-LPG.

### Third party views

218. The CMA contacted competitors of the Parties and received a number of responses to its invitation to comment issued on 8 December 2020 inviting interested parties to provide views on the Merger. In addition, the CMA received an own-initiative representation from a campaign group, FairFuelUK. Third party comments have been taken into account where appropriate in the assessment above.
219. In addition to the issues considered in the assessment above, a small number of third parties raised concerns that the Merger would increase the Merged

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<sup>225</sup> The Parties submitted that auto-LPG equipment costs approximately £100,000 per site, or £30,000 for second hand equipment. Parties’ Response to the Issues Letter paragraph 5.40.

<sup>226</sup> Parties’ response to the CMA’s request for information dated 17 March 2021, paragraph 1.

<sup>227</sup> [Merger Assessment Guidelines](#), 5.8.4 and 5.8.8.

<sup>228</sup> Suppliers that have recently exited the auto-LPG market include Shell: [Shell terminates supply of Autogas at all of its UK forecourts](#).



Entity's buyer power in the retail supply of road fuel due to larger volume requirements and potential economies of scale, which would disadvantage competitors in the negotiation of commercial contracts. The CMA notes that the Parties have a moderate combined share of supply in the retail supply of road fuel at the national level ([10-20]% by volume).<sup>229</sup> The CMA therefore does not believe that post-Merger the Parties would have sufficient buyer power to limit competitors' ability to negotiate commercial contracts.

220. One third party also raised a foreclosure concern in relation to both the retail supply of road fuel and auto-LPG, namely that the Merged Entity may have the incentive and ability to leverage its position to encourage FTG or other franchise partners to agree to long term exclusivity agreements with the Merged Entity or less favourable terms for competitors. As discussed in paragraph 211 above, at the national level, the Parties' have a moderate combined share of supply (by volume) in the retail supply of road fuel and it is lower in the retail supply of auto-LPG ([5-10]% by volume).<sup>230</sup> The CMA notes that currently, Asda does not offer branded FTG; the Parties therefore do not currently overlap in the provision of such services. The CMA therefore does not believe that post-Merger the Parties would have sufficient buyer power to require exclusivity agreements and/or favourable contractual terms and therefore would not have the ability to foreclose competitors. The CMA also notes that there are a wide range of potential FTG and other suppliers that competitors can partner with.
221. One third party also noted that EG currently receives commercially sensitive information (**CSI**) as a result of its commercial relationships with fuel, FTG and groceries suppliers, whose products and services are offered at its PFSs. For example, the third party submitted that EG receives [REDACTED]. The third party submitted that post-Merger, EG's compliance burden would increase and that deliberate or inadvertent disclosure of CSI between competing suppliers could lead to a general softening of competition across the sector. The CMA did not receive any evidence to support these concerns. Moreover, the CMA has not seen evidence suggesting that the Merger will affect EG's compliance with its confidentiality obligations such that it would give rise to an SLC.

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<sup>229</sup> Issa Brothers and TDR Annex 95 to the FMN, 'S109\_2 Q2'.

<sup>230</sup> Issa Brothers and TDR Annex 102 to the FMN, 'S109\_3 Q5.5'.

## Conclusion on substantial lessening of competition

222. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC as a result of horizontal unilateral effects in relation to the:

- (a) retail supply of road fuel in the 36 local areas listed in Annex 1; and
- (b) retail supply of auto-LPG in the Asda Bridge of Dee (Aberdeen) local area.

## Decision

223. Consequently, the CMA believes that it is or may be the case that (i) a relevant merger situation has been created; and (iii) the creation of that situation has resulted, or may be expected to result, in an SLC within a market or markets in the United Kingdom.

224. The CMA therefore believes that it is under a duty to refer under section 22(1) of the Act. However, the duty to refer is not exercised whilst the CMA is considering whether to accept undertakings under section 73 of the Act instead of making such a reference.<sup>231</sup> The Issa Brothers and TDR have until 27 April 2021<sup>232</sup> to offer an undertaking to the CMA.<sup>233</sup> The CMA will refer the Merger for a phase 2 investigation<sup>234</sup> if the Issa Brothers and TDR do not offer an undertaking by this date; if the Issa Brothers and TDR indicate before this date that they do not wish to offer an undertaking; or if the CMA decides<sup>235</sup> by 5 May 2021 that there are no reasonable grounds for believing that it might accept the undertaking offered by the Issa Brothers and TDR, or a modified version of it.

225. The statutory four-month period mentioned in section 24 of the Act in which the CMA must reach a decision on reference in this case expires on 15 June 2021. For the avoidance of doubt, the CMA hereby gives the Issa Brothers and TDR notice pursuant to section 25(4) of the Act that it is extending the four-month period mentioned in section 24 of the Act. This extension comes into force on the date of receipt of this notice by the Issa Brothers and TDR and will end with the earliest of the following events: the giving of the undertakings concerned; the expiry of the period of 10 working days beginning with the first day after the receipt by the CMA of a notice from the

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<sup>231</sup> Section 22(3)(b) of the Act.

<sup>232</sup> Section 73A(1) of the Act.

<sup>233</sup> Section 73(2) of the Act.

<sup>234</sup> Sections 22(1) and 34ZA(2) of the Act.

<sup>235</sup> Section 73A(2) of the Act.

Issa Brothers and TDR stating that they do not intend to give the undertakings; or the cancellation by the CMA of the extension.

**Joel Bamford**  
**Senior Director, Mergers**  
**Competition and Markets Authority**  
**20 April 2021**

## ANNEX 1: LOCAL HORIZONTAL SLC SITES

**Table 1: Road fuel**

No.	Site name	EG / Asda site
1	Ashington	EG Group
2	Burscough	EG Group
3	Calcutt	EG Group
4	Churchill	EG Group
5	Dorcanway	EG Group
6	Dragon	EG Group
7	Eccleshallroad	EG Group
8	Egremont	EG Group
9	Johnadamsway	EG Group
10	Kingshill	EG Group
11	Lakeland	EG Group
12	Lammascote	EG Group
13	Maple	EG Group
14	Northerngateway	EG Group
15	Prestonway	EG Group
16	Regatta	EG Group
17	Rodbourne	EG Group
18	Regentspark	EG Group
19	Rylands	EG Group
20	Scottlane	EG Group
21	Southmarston	EG Group
22	Tibicar	EG Group
23	Thinfordnorth	EG Group
24	Turnpike	EG Group
25	Blackpool	EG Group
26	Woottenbasset	EG Group
27	Pentre	EG Group
28	Fourcross	EG Group
29	Weldblundell	EG Group
30	Thieveslane	EG Group
31	Swindon2	Asda
32	Lancaster	Asda
33	High wycombe	Asda
34	Swindon	Asda
35	Forfar	EG Group
36	Rushden	EG Group

**Table 2: Auto-LPG**

<b>No.</b>	<b>Site name</b>	<b>EG / Asda site</b>
1	Bridge of Dee	Asda