

# Anticipated acquisition by Central England Co-operative of Part of The Funeral Branches Business of The Midcounties Co-operative Limited

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

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 4 October 2021. Full text of the decision published on 10 November 2021.

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

### SUMMARY

1. Central England Co-operative Limited (**CEC**) has agreed to acquire the funeral business of the Midcounties Co-operative Limited (**MC**) (the **Merger**). CEC and MC are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) believes that the Merger does not give rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal effects.
3. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

### ASSESSMENT

#### Parties and transaction

4. CEC is part of a group that operates four principal businesses: grocery retailing through owned convenience stores, fuel retailing, funeral care, and rental of owned properties. CEC's funeral care business comprises 132 funeral homes and related assets. CEC's UK group turnover for the year ending 25 January 2021 was £867.8 million, of which approximately £40.7 million was attributable to CEC's funerals business.

5. MC is also part of a group that operates several businesses. The MC group operates businesses in grocery retailing, travel, childcare, utilities, healthcare, Post Office services, and funeral care. The turnover of MC's funeral business for the year 2020 was approximately £[X] million.
6. Pursuant to a Business Purchase Agreement dated 14 June 2021, CEC agreed to acquire 50 funeral homes and related assets from MC (the **transferring MC homes**) and MC's pre-paid funeral plan business. The transferring MC homes and the MC pre-paid funeral plan business are together referred to as the **Target Business**. For statements relating to the future, CEC and the Target Business are referred to as the Merged Entity.

## Jurisdiction

7. Each of CEC and the Target Business is an enterprise. As a result of the Merger, these enterprises will cease to be distinct.
8. Under section 23 of the Act, the share of supply test is satisfied if the merged enterprises both either supply or acquire goods or services of a particular description in the UK, and will, after the merger, supply or acquire 25% or more of those goods or services.<sup>1</sup>
9. The share of supply test may be applied to the UK as a whole or to a 'substantial part' of it. In deciding whether the relevant geographic area is a substantial part of the UK, the CMA takes into account whether the parts of the UK affected by the Merger are collectively of such a size, character and importance as to make them worth consideration for the purposes of the Act.<sup>2</sup> In making this assessment, the CMA considers such factors as: the size, population, social, political, economic, financial and geographic significance of the specified area or areas, and whether it is (or they are) special or significant in some way.<sup>3</sup>
10. In this case, the Parties' share of supply of at-need funeral services exceeds 25%<sup>4</sup> in 24 local areas, with an increment in supply being brought about by the Merger within each area, ranging from [0-5]% to [10-20]%.<sup>5</sup>

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<sup>1</sup> Section 23(2), (3) and (4) of the Act.

<sup>2</sup> *R v MMC, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 at 32B. See also Mergers: Guidance on the CMA's jurisdiction and procedure, December 2020 (CMA2) (**The J&P Guidance**), paragraphs 4.65 – 4.67.

<sup>3</sup> See Mergers: Guidance on the CMA's jurisdiction and procedure, December 2020 (**CMA2**), paragraph 4.66 and footnote 101.

<sup>4</sup> The CMA calculated the share of supply by reference to the number of branches in each local area.

<sup>5</sup> For a recent case in which the CMA found that the share of supply test to be met on the basis of aggregating local areas, see *Completed acquisition by Henderson Retail Limited of part of the Martin McColl Limited portfolio* (16 February 2018).

11. The CMA found that these local areas cumulatively contain most of the population<sup>6</sup> and territory<sup>7</sup> of the metropolitan county and combined authority of the West Midlands (comprising the metropolitan boroughs of Birmingham, Coventry and Wolverhampton, and the boroughs of Dudley, Sandwell, Solihull and Sandwell). As such, the CMA considers that this represents a substantial part of the UK for the purposes of section 23(3) of the Act, and that the share of supply test is met.
12. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
13. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 16 August 2021 and the statutory 40 working day deadline for a decision is, therefore, 11 October 2021.

## Counterfactual

14. The CMA assesses a merger's impact relative to the situation that would prevail without the merger (ie the counterfactual).<sup>8</sup> In an anticipated merger, the counterfactual may consist of the prevailing conditions of competition, or conditions of competition that involve stronger or weaker competition between the merger firms than under the prevailing conditions of competition.<sup>9</sup>
15. In determining the appropriate counterfactual, the CMA will generally focus only on potential changes to the prevailing conditions of competition where there are reasons to believe that those changes would make a material difference to its competitive assessment.<sup>10</sup>
16. In this case, the Parties submitted that the relevant counterfactual should be the prevailing conditions of competition.<sup>11</sup> The CMA found no evidence to support the use of a different counterfactual. Therefore, the CMA assessed the Merger against the prevailing conditions of competition.

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<sup>6</sup> The CMA calculated the population in these local areas by reference to 2020 ONS data.

<sup>7</sup> The CMA calculated the geographic coverage of these local areas using mapping software.

<sup>8</sup> Merger Assessment Guidelines (CMA129), 18 March 2021 (**Merger Assessment Guidelines**), paragraph 3.1.

<sup>9</sup> Merger Assessment Guidelines, paragraph 3.2.

<sup>10</sup> Merger Assessment Guidelines, paragraph 3.9.

<sup>11</sup> Final Merger Notice Part 1, submitted on 12 August 2021 (**FMN Part 1**), page 11.

## Frame of reference

### *Product scope*

17. The Parties overlap in the supply of both at-need funeral services and the provision of pre-paid funeral plans. In the CMA's Funerals Market Investigation Final Report, dated 18 December 2020 (**Funerals Market Investigation Final Report**), at-need funeral services were described as services provided by a funeral director in connection with a death that has occurred or is expected imminently.<sup>12</sup> Pre-paid funeral plans are contractual arrangements with a funeral director that allows a person to pay in advance for their own or another person's funeral.
18. In the Funerals Market Investigation Final Report, the CMA also found that at-need funeral services and pre-paid funeral plans do not constrain each other, given that:<sup>13</sup>
  - (a) On the demand side, the purchase of a pre-paid funeral plan is likely to be centred on different considerations relative to the purchase of at-need funeral services. Furthermore, a customer purchasing at-need funeral services would not have the option to purchase a pre-paid funeral plan for the deceased.
  - (b) On the supply side, the set of competitors differs to some extent in the provision of at-need funeral services and the provision of pre-paid funeral plans. Not all funeral directors offering at-need funeral services offer pre-paid funeral plans (although many do). Likewise, pre-paid funeral plans are offered by suppliers who are not necessarily at-need suppliers.
19. The Parties submitted that they agree with the CMA's findings in the Funerals Market Investigation Final Report with respect to the product scope of at-need funeral services and pre-paid funeral plans.<sup>14</sup>
20. The CMA has found no evidence to support deviating from the findings of the Funerals Market Investigation Final Report in relation to product frame of

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<sup>12</sup> See evidence from National Association of Funeral Directors at paragraph 3.35 of the Funerals Market Investigation Final Report. Such services include: guidance and support to the family and/or persons arranging the funeral; collection, storage and care of the deceased; organisation and services carried out on the day of the funeral; the supply of goods and services to facilitate the arrangements, including, for example, the coffin, hearse and limousine(s), intermediary services between the customer and third parties; and discretionary services that are provided by the funeral director directly or as an intermediary between the customer and third parties (see paragraph 4.8 of the Funerals Market Investigation Final Report).

<sup>13</sup> Paragraph 4.10 of the Funerals Market Investigation Final Report and Appendix E, paragraphs 3 to 7.

<sup>14</sup> FMN Part 1, page 12.

reference. The CMA has therefore considered the impact of the Merger on the supply of at-need funeral services and pre-paid funeral plans.

## ***Geographic scope***

### *At-need funeral services*

21. Previous decisions have suggested two ways in which the appropriate geographic frame of reference for at-need funeral services may be defined. The first is on the basis of the geographic area from within which 80 per cent of the acquired funeral director's funerals are derived. The second is on the basis of a geographic area around the acquired funeral director with a radius of two or five miles.<sup>15</sup>
22. In the Funerals Market Investigation Final Report, the CMA gathered considerable direct evidence on the appropriate catchment areas for at-need funeral services. It found that customers generally arrange a funeral to take place close to where the deceased lived and make decisions, such as which funeral director to choose, within a local area.<sup>16</sup> The CMA found that 'local markets are generally in the range of 15 to 20 minutes' drive time from the funeral director location, although they can be narrower.'<sup>17</sup>
23. The CMA has found no reason to deviate from the findings of the Funerals Market Investigation Final Report in relation to geographic market frame of reference. As such, the CMA considers that the geographic frame of reference for at-need funeral services is local and assessed the competitive constraints faced by the Parties in the merger within a 15-minute drive time.<sup>18</sup>

### *Pre-paid funeral plans*

24. The Parties also overlap in the supply of pre-paid funeral plans. The Parties submitted that, since customers predominantly buy these plans either online or by telephone, the geographic frame of reference should be national.

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<sup>15</sup> See, for example, ME/4160/09: Anticipated acquisition by Co-operative Group Limited of Plymouth and South West Co-operatives Limited (2009); ME/3953/08: Anticipated acquisition by Co-operative Group Ltd (formerly Co-operative Wholesale Society Ltd) of the funeral business of George Burgess & Son Ltd (2008); ME/3933/08: Anticipated acquisition by Co-operative Group Limited (CGL) of Lothian Borders and Angus Co-operative Society Limited (LBA) (2008); ME/3004/07: Anticipated merger between Co-operative Group (CWS) Limited and United Co-operatives Limited (2007).

<sup>16</sup> Funerals Market Investigation Final Report, paragraph 4.37.

<sup>17</sup> Funerals Market Investigation Final Report, paragraph 4.40.

<sup>18</sup> The CMA also considered any additional overlaps between a 15-minute and 20-minute drive time. The CMA found no areas of concern in these additional overlaps.

25. In the Funerals Market Investigation Final Report, the CMA did not conclude whether the supply of pre-paid funeral plans is national or local in geographic scope.
26. The CMA notes that there are national providers of pre-paid funeral plans, such as Dignity, Co-op Group, and Golden Charter.<sup>19</sup> The CMA also notes, however, that there may be local aspects to competition in the supply of pre-paid funeral plans. For example, customers also have the option of purchasing pre-paid funeral plans in their local branch, not just by telephone or online.
27. On a cautious basis, the CMA has assessed concerns at both a national and local level. However, it was not necessary for the CMA to reach a conclusion on the geographic frame of reference for the supply of pre-paid funerals since no competition concerns arise on any plausible basis.

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

28. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:
  - (a) the supply of at-need funeral services on a local basis, within a 15-minute drive time; and,
  - (b) the supply of pre-paid funeral plans on both a local basis (within a 15-minute drive time) and a national basis.

## **Competitive assessment**

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

29. Horizontal unilateral effects can 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>20</sup> After the merger, it is less costly for the merging company to raise prices (or lower quality) because it will recoup the profit on recaptured sales from those customers who would have switched to the offer of the other merging company.<sup>21</sup> Horizontal unilateral effects are more likely when the merging parties are close competitors.<sup>22</sup>

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<sup>19</sup> Final Merger Notice Part 2, submitted on 12 August 2021, page 26.

<sup>20</sup> Merger Assessment Guidelines, from paragraph 4.1.

<sup>21</sup> Merger Assessment Guidelines, paragraph 4.7.

<sup>22</sup> Merger Assessment Guidelines, paragraph 4.8.

### *Local assessment of the provision for at-need funeral services*

30. The CMA often uses a count of the number of independent fascias in a local market to measure concentration.<sup>23</sup> The CMA has often used a ‘four to three’ or ‘five to four’ fascia count threshold, depending on the sector, when identifying potentially problematic overlaps in previous retail merger cases.<sup>24</sup>
31. In this case, the CMA assessed the competitive impact of the Merger by:
  - (a) Identifying all MC funeral branches within a 15-minute drive time of a CEC funeral branch (**overlapping MC branches**), and all CEC funeral branches within a 15-minute drive time of a MC funeral branch (**overlapping CEC branches**);
  - (b) Calculating the number of fascias<sup>25</sup> within a 15-minute drive time of all overlapping MC branches which are being acquired by CEC;
  - (c) Calculating the number of fascias within a 15-minute drive time of all overlapping CEC branches; and,
  - (d) Assessing the effect of the Merger across the Parties’ overlapping funeral branches to understand whether, post-Merger, there remains a significant number of rivals in each local area.
32. In addition, the CMA assessed the Parties’ internal documents to further understand the rivals that the Parties monitor in the areas where they overlap.
33. In adopting a fascia count approach, the CMA considered whether it would be appropriate to place equal weight on each competing fascia, meaning that every rival funeral director is assumed to constrain the Parties’ branches equally for the purposes of the competitive analysis.
34. The Funerals Market Investigation Final Report found that the core range of products and services offered by funeral directors were relatively similar.<sup>26</sup> The CMA categorised funeral directors by number of branches, ranging from the largest funeral directors (chains such as Dignity, Co-op, and Funeral Partners) to smaller operators.<sup>27</sup> The CMA found that the funeral director industry was fragmented, with many family-owned and managed firms operating in the sector.<sup>28</sup> These smaller funeral directors are typically either lower priced relative to larger funeral directors, and/or they are perceived as

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<sup>23</sup> Retail mergers commentary (CMA62), 10 April 2017 ([Retail Mergers Commentary](#)), paragraph 3.22.

<sup>24</sup> [Retail Mergers Commentary](#), paragraph 3.35.

<sup>25</sup> By fascia, we mean a competitor under different ownership.

<sup>26</sup> Funerals Market Investigation Final Report, paragraph 5.48.

<sup>27</sup> Funerals Market Investigation Final Report, Table 3.

<sup>28</sup> Funerals Market Investigation Final Report, paragraph 2.72.

being better integrated into local communities.<sup>29</sup> In conducting local concentration analysis, the CMA assessed local concentration based on 2,294 funeral director fascias, which included funeral directors ranging from the smallest to the largest.<sup>30</sup> The CMA placed equal weight on each competing fascia identified.<sup>31</sup>

35. In this case, the CMA has found no reason to deviate from the approach adopted in the Funerals Market Investigation Final Report in assessing the competitive constraint exerted by each competing fascia. The Parties' internal documents show that they consistently monitor a range of competitors, ranging from the smaller to the largest competitors.<sup>32</sup> The CMA has decided, therefore, to place equal weight on each competing fascia.

*Number of fascias within a 15-minute drive time of all overlapping MC funeral branches being acquired by CEC*

36. The CMA found that there are 13 MC funeral branches being acquired by CEC that overlap with at least one CEC funeral branch within a 15-minute drive time.

37. Of these 13 MC funeral branches, the CMA found that post-merger:

(a) in 11 areas, there would remain over 10 fascias;

(b) in one area, there would be a reduction from 11 to 10 fascias; and

(c) in one area, there would be a reduction from 9 to 8 fascias.

38. In addition, none of the 13 MC branches had a CEC branch as their closest competitor by drive time. Each of the 13 MC branches had at least one rival and, in many cases, multiple rivals within a shorter drive time.

*Number of fascias within a 15-minute drive time of all overlapping CEC funeral branches*

39. The CMA found that there are 12 CEC funeral branches that overlap with at least one MC funeral branch being acquired by CEC within a 15-minute drive time.

40. Of these 12 CEC funeral branches, post-merger:

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<sup>29</sup> Funerals Market Investigation Final Report, paragraph 5.38 (c).

<sup>30</sup> Funerals Market Investigation Final Report, Appendix G, paragraph 14.

<sup>31</sup> Funerals Market Investigation Final Report, paragraph 4.54.

<sup>32</sup> Funerals Market Investigation Final Report, paragraphs 2.73 to 2.80. Examples of documents [redacted].



- (a) in eight areas, there would remain more than 10 fascias;
- (b) in two areas, there would be a reduction from 10 to 9 fascias;
- (c) in one area, there would be a reduction from 7 to 6 fascias; and
- (d) in one area, there would be a reduction from 6 to 5 fascias.

41. In addition, none of the 12 CEC branches had a MC branch as their closest competitor by drive time. Each of the 12 CEC branches had at least one rival, and in many cases, multiple rivals within a shorter drive time.

*Internal documents*

42. For each local area described above, the Parties' internal documents monitor a range of rival funeral directors and their branch openings. For example, one document indicates that [REDACTED].<sup>33</sup> Another document shows [REDACTED].<sup>34</sup>

*National and local assessment of the provision for pre-paid funeral plans*

43. On a national basis, the Parties estimated that their combined share of pre-paid funeral plans was [0-5]%, based on the total number of pre-paid funeral plans sold by Funeral Planning Authority (**FPA**) members in 2020. The CMA considers this to be a reasonable estimate of the Parties' share, given that nearly all new pre-paid funeral plans are sold by providers that are registered with the FPA.<sup>35</sup>
44. At a local level, the CMA considered, for each overlapping CEC and MC branch, the number of rival funeral directors that offer pre-paid funeral plans. The Parties provided evidence indicating that the vast majority of their local rivals supplied such plans.<sup>36</sup> As such, the CMA found that its competitive assessment of pre-paid funeral plans was substantially the same as that of at-need funeral services ie, at least five (and generally more) fascias would remain in every local area post-merger.

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<sup>33</sup> [REDACTED].

<sup>34</sup> [REDACTED].

<sup>35</sup> The [FPA website](#) indicates that, 'at the moment, 95% of all new funeral plans are sold by pre-paid funeral plan providers registered with the FPA'. The CMA also notes that the [FCA's consultation paper](#) 'Funeral Plans: Proposed Approach to Regulation' is consistent in noting this at paragraph 37.

<sup>36</sup> CMA analysis of data submitted by the Parties indicated that over 95% of rival funeral director branches within a 15-minute drive time of an overlapping CEC home offer pre-paid funeral plans.

### *Conclusion on horizontal unilateral effects*

45. For the reasons set out above, the CMA considers that, post-Merger, the Parties will continue face a significant number of rivals in all local areas in relation to both at-need funeral services and pre-paid funeral plans. Moreover, in every area, there will remain at least one—and in many cases several—rival providers within a shorter drive time than the nearest funeral branch belonging to the Merged Entity.
46. At a national level, the Parties' combined market shares in pre-paid funeral plans are very low, and the CMA considers that there will continue to be a wide range of alternative suppliers post-Merger.
47. Accordingly, the CMA does not believe there is a realistic prospect of an SLC in relation to the supply of at-need funeral services or pre-paid funeral plans as a result of the Merger.

### **Third party views**

48. The CMA invited third parties to comment on the Merger. No third parties raised concerns regarding the Merger.

### **Decision**

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

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**Competition and Markets Authority**  
**4 October 2021**