# Merger between Capital & Counties Properties PLC and Shaftesbury PLC

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

**ME/7008/22**

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 22 February 2023. Full text of the decision published on 5 April 2023.

Please note that [✂] 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. Capital & Counties Properties PLC (**Capco**) has agreed to acquire the whole of the issued and to be issued share capital of Shaftesbury PLC (**Shaftesbury**) (the **Merger**). Capco and Shaftesbury are together referred to as the **Parties**. For statements referring to the future, Capco and Shaftesbury are together referred to as the **Merged Entity**.

2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of Capco and Shaftesbury is an enterprise; that these enterprises will cease to be distinct as a result of the Merger; and that the turnover test is met. Accordingly, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

3. The Parties overlap in the supply of Retail and Hospitality rental space in Covent Garden (including the Opera Quarter).

4. The CMA has assessed whether it is or may be the case that the Merger may be expected to result in a substantial lessening of competition (**SLC**) as a result of:

   (a) horizontal unilateral effects in the supply of Retail rental space in Covent Garden (including the Opera Quarter); and

(b) horizontal unilateral effects in the supply of Hospitality rental space in Covent Garden (including the Opera Quarter).

5. The CMA has assessed the competitive constraints on the Parties, both within and outside Covent Garden (including the Opera Quarter), from properties in other areas within the West End and wider Central London.

6. In relation to horizontal unilateral effects in the supply of each of:

(a) Retail rental space in Covent Garden (including the Opera Quarter); and

(b) Hospitality rental space in Covent Garden (including the Opera Quarter),

the CMA found that while the Parties may compete more closely with each other than with other landlords due to the proximity and scale of their holdings, there are many alternative landlords available to tenants who are considering locating in Covent Garden (including the Opera Quarter). The Merged Entity will face competition from some large and a number of smaller landlords in the area, as well as other landlords in a number of other locations both within the West End and in more distant locations in Central London.

7. These constraints, taken together, are sufficient to ensure that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects.

8. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

# ASSESSMENT

## PARTIES

9. Capco and Shaftesbury are UK-registered Real Estate Investment Trusts (**REITs**) and landlords of lettable units in Central London.[1] The properties they own are predominantly freehold.[2] Both Parties let units out for **Retail** (eg, shops, markets, banks, supermarkets), **Hospitality** (eg, bars, cafes, public houses, and restaurants), and **Leisure** (eg, casinos, theatres, hotels, and gyms)[3] uses, as well as for office and residential uses.

10. Capco owns the Covent Garden Market Building (in the Covent Garden Piazza) and properties in surrounding streets.[4] The turnover of Capco in the financial year ended 31 December 2021 was £68m, and was entirely generated in the UK. Its shares are listed on the London Stock Exchange with a secondary listing on the Johannesburg Stock Exchange. Capco also holds a 25.2% shareholding in Shaftesbury.

11. Shaftesbury owns properties in Covent Garden (in the Coliseum area and an area it describes as the Opera Quarter[5]), Seven Dials, Carnaby,[6] parts of Soho, and Chinatown. Shaftesbury is also party to a 50/50 joint venture with the Mercers' Company (**Mercers**), known as the Longmartin JV.[7] The Longmartin JV's property interests are centered around St Martin's Courtyard, an area which bridges Capco's property holdings in Covent Garden and Shaftesbury's property holdings in Seven Dials. Shaftesbury's turnover in the financial year ended 30 September 2022 was

[1] The CMA has not found it necessary to define Central London. The Parties' definition appears to include the geographic area extending to Pimlico, Victoria and Belgravia to the southwest, Mayfair to the west (including a small part of Hyde Park), part of Marylebone (only up to Marylebone Road) to the northwest, Soho, Covent Garden, Fitzrovia, Bloomsbury, Holborn, up to Clerkenwell to the northeast, Shoreditch, Liverpool Street, and up to Tower Hill to the southeast (not including St. Katherine Docks). To the south, the area is bordered by the River Thames. Final Merger Notice submitted on 22 December 2022 (**FMN**), Figure 9.
[2] FMN, paragraph 2.18.
[3] Parties' response to the CMA's request for information dated 12 August 2022 (**RFI1**), question 23, Table 1. Parties' response to the CMA's request for information dated 14 December 2022 (**RFI6**), question 1.
[4] Capco also has a 50% share in the Lillie Square JV, a residential development located in West Brompton, with the Kwok Family Interests. FMN, footnote 4 and paragraph 1.
[5] Shaftesbury uses the term Opera Quarter to describe its holdings that are behind the Royal Opera House (between Wellington Street and Catherine Street). FMN, Annex 8, Shaftesbury property list.
[6] Carnaby is located in the area centered on Carnaby Street and extends to 13 surrounding streets. FMN, paragraph 3.25.1.
[7] The CMA considers that Shaftesbury has the ability to exercise material influence over the Longmartin JV because of its 50% shareholding, board representation, and veto rights (explained in Shaftesbury's response to the CMA's question dated 24 January 2023, paragraphs 1.1 to 1.4), such that the interests of the Longmartin JV are attributed to Shaftesbury for the purposes of the analysis contained in the competitive assessment.

£123.1m, and was entirely generated in the UK. Its shares are listed on the London Stock Exchange.

12. The map shown in Figure 1, taken from a Capco internal document, illustrates each of the Parties' property holdings, including the Longmartin JV, and the holdings of some of their competitors.[8]

**Figure 1: Property holdings of Capco and Shaftesbury (as well as of some nearby competitors)**

[✂]

## NORGES

13. Norges Bank (**Norges**) is the Central Bank of Norway, responsible for managing the Norwegian Government Pension Fund Global on behalf of the Norwegian Ministry of Finance.[9] Norges holds a 15% shareholding in Capco and a 25.75% shareholding in Shaftesbury.[10]

14. Other than its shareholdings in Capco and Shaftesbury, Norges holds interests in other property companies and joint ventures in Central London, including a 57.75% shareholding in the Pollen Estate (in Mayfair)[11] and a 25% shareholding in the Regent Street Partnership, a JV with the Crown Estate. Norges also wholly owns a number of properties in London.[12]

## TRANSACTION

15. Capco currently holds c.25.2% of the issued share capital in Shaftesbury. On 16 June 2022, Capco announced its intention to acquire the remaining 74.8% of the issued share capital in Shaftesbury. Following completion of the Merger, Capco will be renamed Shaftesbury Capital PLC (**Shaftesbury Capital**).

16. Consideration for the proposed Merger takes the form of shares in Capco. Specifically, Capco will issue 3.356 new Capco shares to Shaftesbury's

[8] Capco Annex 10.38, [✂].
[9] FMN, paragraph 2.36.
[10] FMN, paragraph 2.35.
[11] FMN, Annex 31, Analysis including Norges, paragraph 2.5.
[12] FMN, Annex 31, Analysis including Norges, paragraph 2.5.

shareholders for each Shaftesbury share held.[13] As a result, Norges' post-Merger shareholding in Shaftesbury Capital will be approximately 25.2%.[14]

17. The Merger is conditional on CMA clearance.[15]

# PROCEDURE

18. The Merger was considered at a Case Review Meeting.[16]

# LEVEL OF INFLUENCE EXERTED BY NORGES AND THE PARTIES OVER ONE ANOTHER PRE-MERGER

19. This section sets out the CMA's assessment in relation to the level of influence that: (i) Capco is able to exercise over Shaftesbury; (ii) Norges is able to exercise over Shaftesbury; and (iii) Norges is able to exercise over Capco, in each case prior to the Merger.

## Background

20. The ability to exercise material influence over another entity is the lowest level of control identified by the Enterprise Act 2002 (the **Act**).[17] Material influence exists where a person is able materially to influence policy relevant to the behaviour of another entity in the marketplace. 'Policy' in this context means the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives.[18]

21. A finding of material influence may be based on the ability to influence an entity's policy through the exercise of votes at shareholders' meetings. A shareholding above 25% is likely to confer the ability to materially influence the policy of a company. Other sources of influence may also (or additionally) lead to a conclusion that the ability to exercise material influence exists.[19] Such sources may include, for

[13] See Capco's announcement here: 220616 - Capital Counties Properties PLC and Shaftesbury PLC - Rule 2.The Scheme document in connection with the Merger (together with a circular and a prospectus for Capco) was published on 7 July 2022. See the Scheme here: 3._shaftesbury_scheme_document_7_july_2022_0.pdf. The announcement made by the Parties on 16 June 2022 pursuant to Rule 2.7 of the City Code, and the Scheme document published on 7 July 2022 (which sets out the terms on which the Merger is proposed to be implemented), together with other documents related to the Merger are available at: https://www.capitalandcounties.com/investors/investor-information/merger-shaftesbury-plc.
[14] FMN, paragraph 2.35.
[15] The Parties informed the CMA that the Merger is not subject to review by any other competition authorities.
[16] See Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2revised), December 2020, from page 46.
[17] The Act, Section 26(3).
[18] *CMA's Jurisdictional Guidance,* paragraph 4.17.
[19] *CMA's Jurisdictional Guidance*, paragraphs 4.21 to 4.32.

example, the ability to influence the board of the target, the status and expertise of a minority shareholder, and commercial or financial agreements with the company.

22. Notably, the ability materially to influence a target's policy does not necessarily imply an ability to control it. It does not amount to an ability to drive policy in a direction to which other shareholders, management or the board object. Rather, it is the ability materially to influence relevant strategic or commercial matters, either positively (ie, by persuading the company to pursue particular courses of action) or negatively (ie, by dissuading the company or its management from pursuing particular courses of action).[20]

## Level of influence exerted by Capco over Shaftesbury

### *Capco's shareholding and voting rights*

23. Capco currently holds 25.2% of Shaftesbury's shares. The CMA's Jurisdictional Guidance highlights that, where an acquirer controls sufficient votes to block a special resolution (generally, more than 25%), this will typically give rise to the ability to materially influence a company's policy.[21]

24. The shareholding currently held by Capco in Shaftesbury is sufficient to enable it to block special resolutions.[22]

25. The Parties submitted that Capco's rights do not confer the ability to materially influence Shaftesbury's market conduct or day-to-day operations,[23] and that they are typical minority investor protection rights[24] which do not go beyond those ordinarily conferred on shareholders under the Companies Act 2006,[25] so the presumption of material influence in relation to shareholdings above 25% can be rebutted.

26. The CMA notes that Capco has exercised its veto right in relation to special resolutions twice in the past three years to thwart Shaftesbury management's plans

[20] CMA's Final Report in *Amazon/ Deliveroo* dated 4 August 2020, paragraph 4.12.
[21] *CMA's Jurisdictional Guidance*, paragraphs 4.21 and 4.22.
[22] FMN, Annex 16, Capco rights in Shaftesbury, paragraph 2.3. The Parties have submitted that 'Under Shaftesbury's Articles of Association and the Companies Act 2006, the matters requiring a special resolution include amendment of the articles of association (and consequential changes to the rights attaching to shares), re-registration as a private company, reduction of the notice required for a general meeting, various dis-applications and renewals of pre-emption rights and reductions of share capital.' FMN, Annex 16, paragraph 2.4.
[23] FMN, Annex 16, Capco rights in Shaftesbury, paragraph 2.3.
[24] FMN, Annex 16, Capco rights in Shaftesbury, paragraph 2.5.
[25] FMN, Annex 16, Capco rights in Shaftesbury, paragraph 2.1.

for the business and specifically its ability to raise funds from new investors by issuing new shares.[26]

27. The CMA further notes that the use of Capco's veto right need not concern a matter of day-to-day operations for it to confer material influence. The CMA's Jurisdictional Guidance specifically states that a veto right with respect to 'decisions that typically will require a special resolution' in the context of 'a UK company' would be considered sufficient.[27]

28. The CMA considers that the existence and exercise of a veto right goes beyond the rights normally accorded to minority shareholders (which include, for example, rights in the context of a liquidation). Shareholders with smaller holdings in Shaftesbury would not benefit from a veto right in respect of matters requiring a special resolution.

***Capco's status and expertise***

29. Capco is one of two large shareholders in Shaftesbury (the other being Norges). The remaining shareholdings in Shaftesbury are significantly smaller and highly fractured, with no shareholder owning more than 6% shares.[28]

30. The Parties submitted that Capco is a 'major shareholder',[29] but also that it has no elevated status when compared to other shareholders.[30] The Parties also submitted that, as an established REIT, Shaftesbury has significant property expertise and Capco's own expertise is therefore not a unique quality that could lead Shaftesbury to place greater weight on its views.'[31]

31. The CMA considers that due to Capco's significant shareholding in the context of a public company with a highly fractured ownership base, its views may hold relative importance to Shaftesbury's management and may be expected to carry greater influence with other shareholders.

[26] Capco submitted that in both cases it voted against, and therefore blocked, proposals to grant the Shaftesbury directors authority to disapply pre-emption rights (on either a general or specific basis). FMN, Annex 16, paragraph 3.2, and footnote 6.
[27] *CMA's Jurisdictional Guidance*, paragraphs 4.21 to 4.22.
[28] FMN, Table 2.
[29] FMN, paragraph 4.40.
[30] FMN, Annex 16, Capco rights in Shaftesbury, paragraph 2.7.
[31] FMN, Annex 16, Capco rights in Shaftesbury, paragraph 2.7.

32. Evidence submitted by the Parties highlights the preferential status that Capco is afforded. For instance, as a major shareholder, Capco is notified of material matters (such as a capital raising) in connection with the operation of Shaftesbury.[32]

33. Further, the CMA considers that Capco's 'similar' expertise in West End[33] commercial property may increase the weight given to its views by Shaftesbury's management and other shareholders, as Capco is an informed industry participant rather than a purely financial investor.[34]

### *Conclusion*

34. Based on Capco's shareholding, voting rights, status and expertise in the industry, the CMA's view is that pre-Merger Capco has the ability to exercise material influence over Shaftesbury.

## Level of influence exerted by Norges over Shaftesbury

### *Norges' shareholding and voting rights*

35. Norges currently holds 25.75% of Shaftesbury's shares, which is sufficient to enable Norges to block Shaftesbury's special resolutions.[35] As explained in paragraph 23, the ability to block a special resolution will typically give rise to the ability to exercise material influence over a company's policy.[36]

36. The Parties submitted that Norges is a passive investor, '[✂]',[37] [✂].[38] In line with this, the Parties submitted that Shaftesbury's board determines its operating and investment strategies without consulting Norges.[39]

37. The Parties further submitted that the Listing Rules require listed companies to carry on an independent business at all times,[40] and that only a shareholder who acquires 30% or more of a listed company's shares is viewed as controlling and is required to enter into contractual arrangements with the company, and make an offer under the Takeover Code. In addition, the Parties submitted that most material corporate

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[32] FMN, paragraph 4.40.
[33] See paragraph 98 for the definition of the West End the CMA uses for the purpose of this Decision.
[34] Further the description of Capco in paragraphs 10 *et seq*. above.
[35] FMN, Annex 31, Analysis including Norges, paragraph 5.5.
[36] *CMA's Jurisdictional Guidance*, paragraphs 4.21 and 4.22.
[37] The Parties' response to the CMA's Issues Letter of 27 January 2023 (**Parties' response to the Issues Letter**), paragraph 3.9.3.
[38] Parties' response to the Issues Letter, paragraph 2.1.
[39] Parties' response to the Issues Letter, paragraph 3.16.2.
[40] Listing Rule 9.2.

decisions require a 50%+1 majority, whereas corporate actions requiring a special resolution are unlikely to inhibit strategy and operating matters.[41]

38. The CMA's Jurisdictional Guidance does not set out different standards for listed and unlisted companies. The rights typically conferred on a shareholder who can veto special resolutions do not differ as between listed and unlisted companies. A shareholder's veto right need not concern matters of day-to-day operations to confer material influence for the purposes of the Enterprise Act, and the CMA considers that the existence of a veto right goes beyond the rights normally accorded to minority shareholders.[42]

39. Norges is the largest shareholder in Shaftesbury (closely followed by Capco). The remaining shareholdings in Shaftesbury are considerably smaller.[43] Consistent with this, Shaftesbury [✂] engages with Norges in its capacity as a major shareholder and Shaftesbury has met with Norges [✂] times in the last three years, including for [✂].[44] The CMA has considered this evidence as one of a number of points in its assessment of the influence held by Norges over Shaftesbury as a result of its shareholding and voting rights.

***Norges' role with respect to the Merger***

40. The Parties submitted that the support of Norges as a shareholder in each of Capco and Shaftesbury was important to ensure the successful support of shareholders more broadly for the Merger, given that Norges had a large shareholding in each of Capco and Shaftesbury.[45]

41. This is supported by Capco and Shaftesbury's internal documents (including Capco board documents) which highlight the [✂] role that Norges played with respect to the Parties' ability to merge.[46] In line with the [✂] of Norges to the prospects of the

[41] Parties' response to the Issues Letter, paragraph 3.13.
[42] The CMA also notes that its conclusions as regards material influence for the purposes of the Enterprise Act are not necessarily tied to the question of control under the Listing Rules, since the latter is part of a separate regulatory regime with a differently framed legal test.
[43] FMN, Table 2.
[44] FMN, Annex 31, Analysis including Norges, paragraph 8.6 and the table beneath this. In the Parties' response to the Issues Letter, paragraph 3.16.3, the Parties submitted that this level of engagement is consistent with Shaftesbury's approach to major shareholders, and does not de facto denote material influence.
[45] FMN, Annex 31, Analysis including Norges, paragraph 7.1.
[46] See for example Capco's Annex 9.05, [✂], paragraph 2.4; and Shaftesbury's Annex 000031, [✂], page 40. With respect to the internal documents cited by the CMA, the Parties submitted that these documents were either prepared by the Parties' external advisors, or reflected the views of (Capco's) shareholders more broadly, and therefore do not accurately reflect the Parties' perception of Norges' role. Parties' response to the Issues Letter, paragraph 3.16.4.

Merger, the Parties submitted that [✂]. [✂].[47] Capco [✂] securing Norges' support for the Merger.[48]

42. Prior to the announcement of the Merger, Norges and Capco entered into an agreement (the **Side Deed**) regarding information sharing and cooperation for the purposes of securing the CMA's approval for the Merger.[49] Further to that agreement, Norges has been submitting confidential information to the Parties' external advisors for the purpose of the CMA's investigation.

43. The Parties have submitted that seeking Norges' support before entering into the transaction does not mean that Norges is involved in the decision-making process,[50] or that Norges was involved in negotiating the terms and conditions of the Proposed Transaction.[51] The Parties further submitted that the interactions between Norges and Shaftesbury are consistent with what would be expected with a large shareholder that had been 'wall-crossed'[52], and that the CMA places undue weight on the Side Deed,[53] which is purely mechanical in nature.[54]

44. The CMA's view is that Norges' support for the Merger was perceived to be crucial to Shaftesbury's ability to meet the commercial objective of merging with Capco, allowing the Merged Entity to achieve the various commercial objectives set out in

[47] See for example Capco's Annex 9.03, [✂], paragraph 2.6; and FMN, Annex 31, Analysis including Norges, Table beneath paragraph 8.6.
[48] FMN, Annex 31, Analysis including Norges, footnote 30. See also the announcement dated 7 May 2022 (which the Parties refer to as the **Leak Announcement**) which highlighted Norges' support in principle for the Merger. The Parties have submitted that they 'considered it [✂] that obtaining shareholder approval for the Proposed Transaction was [✂]'. Following the Leak Announcement, each of the Parties obtained executed irrevocable undertakings from Norges, binding it to vote in favour of the Merger. FMN, Annex 31, Analysis including Norges, paragraphs 7.3 and 7.5.
[49] The Side Deed provided, inter alia, that its signatories would: (i) not do anything outside the ordinary course of business which would materially delay or prevent the CMA granting merger control clearance (clause 2.1); (ii) cooperate with regards to communications with the CMA for the purposes of its merger control investigation (clause 2.3); (iii) provide one another with draft submissions to the CMA (insofar as they concern Norges); and (iv) afford one another an opportunity to comment on those drafts before submission. Norges has relied on information obtained from Capco pursuant to the Side Deed when responding to information requests from the CMA. See: 4._norges_bank_side_deed_16_june_2022.pdf.
[50] Parties' response to RFI1, paragraph 6.2.
[51] FMN, Annex 31, Analysis including Norges, paragraph 7.5.
[52] The CMA understands 'wall-crossing' in the context of a public M&A transaction to be the practice of a public company providing inside information legitimately to a shareholder or other third party in order to discuss that third party's views in relation to the proposed transaction. Being wall-crossed requires the third party to sign a non-disclosure agreement and agree not to deal or act on the information obtained.
[53] Parties' response to the Issues Letter, paragraph 3.16.5.
[54] The Parties submitted that the existence of the Side Deed is purely mechanical in nature, governing the provision of information for the purpose of the CMA's investigation, and should not be considered as 'evidence of any strategic (or other) alignment between Capco and Norges.' Parties' response to the Issues Letter, paragraph 3.14.

its transaction rationale. The influence arising from Norges' large shareholding in Shaftesbury is further increased by its interest in Capco.[55]

***Norges' status and expertise as a significant investor, including in commercial real estate in Central London and the West End***

45. As set out in paragraphs 13 and 14 above, as well as being one of the world's largest investment funds, Norges has significant interests in London real estate.[56]

46. The Parties submitted that Norges does not have elevated status when compared to other Shaftesbury shareholders nor any ability to influence Shaftesbury's strategic decisions. The Parties submitted that Norges has a range of investments across a number of industries, and that real estate is just one of the many areas in which Norges invests.[57] The Parties further submitted that Shaftesbury does not place greater weight on Norges' views, given its own significant expertise in the industry.[58]

47. The CMA considers that Norges' status goes beyond its identity as an institutional investor. Specifically, Norges is active as a real estate investor and landlord in and around the West End with both direct investments and indirect investments via minority shareholdings in other property companies. Its expertise in this industry may bolster the weight that its views carry with Shaftesbury management and other shareholders compared to other financial investors.

***Conclusion***

48. Accordingly, in light of its more than 25% shareholding, veto rights, role in connection with the Merger (including its related shareholding in Capco), and its status as a major shareholder with expertise in the London real estate sector, the CMA's view is that Norges pre-Merger has the ability to exercise material influence over Shaftesbury.

[55] The CMA notes, in this regard, that there been no suggestion that Capco entered into a similar contract with its other major investor, eg BlackRock.
[56] FMN, Annex 31, Analysis including Norges, paragraphs 2.5 to 2.6.
[57] FMN, Annex 31, Analysis including Norges, paragraph 6.4.
[58] Parties' response to the Issues Letter, paragraph 3.16.6.

## Level of influence exerted by Norges over Capco

### *Norges' voting rights*

49. Norges currently has a 15% shareholding in Capco. The Parties submitted that Norges does not have any rights to block special resolutions at Capco board meetings.[59]

50. In some cases, the distribution of shares among other shareholders and patterns of attendance at shareholder meetings may mean that, in practice, shareholdings of less than 25% confer sufficient voting rights to enable the acquirer to block special resolutions.[60]

51. In this case, the Parties submitted information showing that Norges has [✂].[61] On this basis, the CMA does not consider that Norges has the ability to block special resolutions at a general meeting simply by exercising the voting rights attached to its shares.

52. The CMA has also had regard to a number of other factors which may mean that, despite holding less than 25% voting rights, Norges nonetheless has the ability to exercise material influence in accordance with the CMA's Jurisdictional Guidance, including:

    (a) influence deriving from Norges' status as a major shareholder in Capco;

    (b) Norges' role with respect to the Merger; and

    (c) the ability to influence management and other shareholders in matters of policy owing to Norges' status and expertise as a significant investor, including in commercial real estate in Central London and the West End.

### *Norges' influence as a major shareholder*

53. Even where a shareholding is insufficient to enable a veto over a special resolution, that shareholding may still be relevant to an assessment of material influence.[62]

54. In this case, the Parties submitted that Norges is a 'major shareholder' in Capco.[63] Indeed, Norges is the largest shareholder in Capco, although Capco has submitted

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[59] FMN, Annex 31, Analysis including Norges, paragraph 5.4.
[60] *CMA's Jurisdictional Guidance*, paragraph 4.19.
[61] FMN, Annex 31, Analysis including Norges, paragraph 5.1.
[62] *CMA's Jurisdictional Guidance,* paragraphs 4.25 to 4.27.
[63] FMN, Annex 31, Analysis including Norges, footnote 17.

that its board determines its operating and investment strategies without consulting Norges.[64]

55. The CMA notes that while Norges has a 15% shareholding, in practice it usually exercises a greater proportion of the votes at shareholder meetings than its shareholding would suggest,[65] and the next largest shareholders are significantly smaller.[66]

56. Capco submitted that it complies with the UK Corporate Governance Code, provision 3 of which encourages 'regular engagement with major shareholders in order to understand views on governance and performance against strategy. This includes scheduling regular meetings with significant shareholders'.[67]

57. Capco's submissions show that there is regular engagement between Capco management and Norges as its largest shareholder,[68] to discuss [✂],[69] [✂]. [✂].

***Norges' role with respect to the Merger***

58. For the same reasons as set out in relation to Shaftesbury in paragraphs 40 to 44 above, the CMA's view is that Norges' support for the Merger was perceived to be crucial to Capco's ability to meet the commercial objective of merging with Shaftesbury, allowing the Merged Entity to achieve the various commercial objectives set out in its transaction rationale. The influence created by Norges' major shareholding in Capco is further increased by its more than 25% interest in Shaftesbury.[70] The CMA also notes that the Side Deed illustrates a degree of information sharing and alignment between Norges and Capco which goes beyond the typical relationship between a minority investor and an entity in which it holds shares.[71] The Parties disagree with the CMA's comments regarding the Side Deed, as set out in paragraph 43 above.

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64 Parties' response to the Issues Letter, paragraph 3.17.2.

65 FMN, Annex 31, Analysis including Norges, paragraph 5.2. [✂].

66 FMN, Table 1. The next largest shareholders are significantly smaller, with BlackRock holding 7.3%, Legal & General Investment Management holding 5.1%, and Public Investment Corporation SOC holding 5% of the shares in Capco. Beyond this, the remaining shareholdings are fragmented with each shareholder having less than 1% voting capital.

67 FMN, Annex 31, Analysis including Norges, paragraph 8.2.

68 FMN, Annex 31, Analysis including Norges, section 8. Capco met bilaterally with Norges' Portfolio Managers over [✂] times in the past three years in relation to matters not connected with the Merger.

69 [✂].

70 The CMA notes, in this regard, that there been no suggestion that Capco entered into a similar contract with its other major investor, eg BlackRock.

71 Parties' response to the Issues Letter, paragraph 3.17.3. The Parties further submitted that Capco's engagement with Norges is 'consistent with what would be expected with respect to a large shareholder that had been 'wall-crossed' with respect to a transaction.'

***Norges' status and expertise as a significant institutional investor, including in commercial real estate in Central London and the West End***

59. As set out in paragraphs 13 to 14, Norges is one of the world's largest investment funds, with investments in real estate (among other areas),[72] interests in both listed and unlisted property companies in London, and stakes in joint ventures with major landlords both within and outside the West End.

60. The Parties submitted that Norges' status and expertise is no greater than other major institutional shareholders in listed companies, and Norges cannot be said to influence other shareholders.[73]

61. For the same reasons set out in paragraphs 46 and 47 above in connection with Shaftesbury, the CMA considers that Norges' status goes beyond its identity as an institutional investor. Specifically, Norges is active as a real estate investor and landlord in and around the West End. Its expertise in this industry may bolster the weight that its views carry in relation to Shaftesbury management and other shareholders compared to other financial investors, thereby comprising one source of its influence over Shaftesbury.[i]

***Conclusion***

62. Accordingly, in light of its shareholding and role as a major shareholder, role in connection with the Merger, other connected shareholdings, and expertise in the London real estate sector the CMA's view is that pre-Merger Norges has the ability to exercise material influence over Capco.

## JURISDICTION

63. The CMA believes that the Merger (as described in paragraph 1) is sufficient to constitute arrangements in progress or contemplation for the purposes of the Act.[74]

64. Each of Capco and Shaftesbury is an enterprise. Whereas Capco currently holds a 25.2% shareholding in Shaftesbury, the Merger contemplates the acquisition by Capco of the remaining 74.8% of the issued share capital in Shaftesbury. As a result of the Merger, Capco will increase its level of control over Shaftesbury from material

[72] Norges Bank Investment Management website, www.nbim.no/en accessed on 20 January 2023.
[73] FMN, Annex 31, Analysis including Norges, paragraph 4.9.
[74] Section 33(1)(a) of the Act.

influence (see paragraphs 23 to 34 above) to full legal control, with the result that these enterprises will cease to be distinct.

65. The UK turnover of Shaftesbury exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is met.

66. 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.

67. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 28 December 2022 and the statutory 40 working day deadline for a decision is therefore 22 February 2023.

68. The following section provides reasons for the CMA's assessment that the Merger creates a relevant merger situation within the meaning of section 23 of the Act, in relation to the change in influence exerted by Capco over Shaftesbury. For completeness, the CMA also provides reasons for considering that there is no change in the level of influence exerted by Norges over Capco and Shaftesbury as a result of the Merger.

## Change in the level of influence exerted by Capco over Shaftesbury

69. As set out in paragraphs 23 to 34 above, the CMA considers that Capco's 25.2% shareholding gives it the ability to exercise material influence over Shaftesbury.

70. After the Merger, Capco (renamed Shaftesbury Capital) will own 100% shares in Shaftesbury. The CMA considers, in line with the Parties' submissions, that this shareholding confers to Shaftesbury Capital a controlling interest (ie, full legal control), which generally arises where a shareholder has more than 50% of the voting rights in a company.[75] Section 26(4) of the Act and the CMA's Jurisdictional Guidance makes clear that a relevant merger situation may arise where control is acquired in stages, for example where a shareholding that confers material influence over a company's policy subsequently increases to a controlling interest as a result of further share acquisition.[76] As such, the CMA considers that a relevant merger situation will arise as a result of the Merger.[77]

[75] *CMA's Jurisdictional Guidance*, paragraph 4.35.
[76] CMA's Jurisdictional Guidance, paragraphs 4.36 and 4.37.
[77] For the avoidance of doubt, a relevant merger situation would also arise if, as the Parties submitted in FMN paragraph 5.3, Capco currently held no material shareholding over Shaftesbury since in that case there would be an increase from

71. As a result of the relevant merger situation, Shaftesbury Capital will have a number of additional rights that will allow it to unilaterally determine Shaftesbury's commercial policy, as opposed to the ability to exercise material influence over Shaftsbury's policy which it has today. For example, Shaftesbury Capital will be in a position to pass, veto or overturn any shareholder resolutions, such as appointing and removing directors,[78] and exercising the authority to amend the company's articles of association.[79] In practice, this will allow Shaftesbury Capital to realise its transaction rationale.[80] Furthermore, Capco's internal documents suggest that Shaftesbury Capital will be in a position to consolidate its balance sheet with Shaftesbury's following the Merger.[81]

72. On this basis, the CMA concludes that the Merger will change the level of control that Capco exercises over Shaftesbury, from material influence to full control.

## Change in the level of influence exerted by Norges over Capco and Shaftesbury

73. As set out in paragraphs 35 to 62 above, the CMA considers that, pre-Merger, Norges has the ability to exercise material influence over Capco and separately over Shaftesbury.

74. After the Merger, Norges will hold an increased shareholding of 25.2% in Capco (to be renamed Shaftesbury Capital). This shareholding is at a level that will allow Norges to exercise a veto in relation to special resolutions, in addition to the other sources of influence which Norges held in Capco pre-Merger.

75. As stated in paragraph 23 above, where an acquirer controls sufficient votes to block a special resolution, this will typically give rise to the ability to materially influence a company's policy.

no control to full legal control. This analysis corresponds to the Parties' submissions as regards jurisdiction (see FMN paragraph 86).

[78] FMN, Annex 37, Capco's Articles of Association, Article 82.

[79] Section 21, Companies Act 2006.

[80] FMN, paragraphs 2.18 to 2.30. Including benefitting from a larger and more diversified portfolio of properties, having access to increased fundraising opportunities, as well as realising approximately £12m in cost synergies, due to changes in management and the reduction of financing costs in respect of existing facilities. See for example Capco Annex 9.17, [✂], page 4; and Capco Annex 9.18, [✂].

[81] The Parties' internal documents indicate [✂]. See for example Capco Annex 9.41, [✂]; Capco Annex 9.57, [✂]; Capco Annex 9.59, [✂]; Shaftesbury Annex 000152, [✂]; Capco Annex 9.22, [✂], page 11; and Capco Annex 9.28, [✂].

76. The CMA's view, therefore, is that Norges will have the ability to exercise material influence over Shaftesbury Capital after the Merger.

77. Post-Merger Shaftesbury Capital will directly control Shaftesbury, as set out in paragraph 70 above. By exercising material influence over Shaftesbury Capital, Norges will retain the ability to exercise material influence (now indirectly) over Shaftesbury.

78. As such, the Merger does not change the level of control that Norges has over the Parties. Accordingly, no second relevant merger situation arises.

## COUNTERFACTUAL

79. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.[82]

80. In this case, there is no evidence supporting a different counterfactual, and the Parties and third parties have not put forward arguments in this respect. Therefore, the CMA believes the prevailing conditions of competition to be the relevant counterfactual.

## FRAME OF REFERENCE

81. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.[83]

[82] See Merger Assessment Guidelines (CMA129), March 2021, from paragraph 3.12.
[83] Merger Assessment Guidelines (CMA129), March 2021, paragraph 9.4.

## Product scope

### *The Parties' submissions*

82. The Parties submitted that the supply of Retail, Hospitality, and Leisure rental space is the appropriate product market. The Parties submitted this was in line with the CMA's analysis in *Hammerson/Grand Central Shopping Centre*,[84] where no distinction was drawn between Retail space occupied by shops and space occupied by Hospitality businesses.[85]

83. In support of their position, the Parties submitted that since the UK Government changed the planning framework in September 2020, there has been greater flexibility to change use types without planning permission (including between shops, restaurants and cafes, and leisure).[86] The Parties also provided examples of properties being converted from Retail to Hospitality/Leisure and vice versa,[87] and pointed to two Shaftesbury documents which suggest that the changes to the planning framework were seen as [✂] for Shaftesbury.[88]

84. Notwithstanding the above, the Parties submitted that no competition concerns arise on any plausibly defined narrower product market.[89]

### *The CMA's assessment*

*Requirements of Retail, Hospitality, and Leisure tenants/units*

85. The majority of Retail, Hospitality, and Leisure property agents that responded to the CMA's questionnaire submitted that tenant and unit requirements are different between Hospitality and the other two segments. These differences included: the presence of kitchen capacity, an extract route, drainage, and ventilation systems;[90] longer leases due to higher capital expenditure required for the extensive, time-consuming, and costly fitout periods;[91] being closer to offices or areas with a nightlife scene;[92] and obtaining specific licences to operate.[93] In addition, Hospitality and Leisure tenants may have specific requirements in terms of power supply or

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84 CMA, Case ME/6597/16, Completed acquisition by Hammerson plc of the Grand Central Shopping Centre, Phase 1 decision of 28 July 2016.
85 FMN, paragraphs 13.6 to 13.8.
86 Parties' response to the Issues Letter, paragraph 7.5.
87 Parties' response to the Issues Letter, paragraph 7.4.
88 Parties' response to the Issues Letter, paragraph 7.7.
89 FMN, paragraph 13.9.
90 Response to the CMA's third-party questionnaire.
91 Response to the CMA's third-party questionnaire.
92 Response to the CMA's third-party questionnaire.
93 Such as the permission to sell alcohol within the premises and to stay open until later.

ceiling heights, as well as a preference to rent fitted units or have higher specifications on the handover condition of a property in order to minimise their risk.[94]

86. The Parties' submissions also acknowledged the different requirements between Retail and Hospitality tenants, such as the configuration of space, and the preference of Retail tenants to 'be close to other complementary and like-minded brands' and have prominent shopfronts,[95] as well as the different rent incentives that exist for Retail, Hospitality, and Leisure uses.[96] The Parties also submitted that Leisure tenants need more space, with a minimum of 5,000 sq.ft, and that hotels generally require at least around 20,000 sq.ft.[97]

*Supply-side substitutability*

87. While the boundaries of the relevant product market are generally determined by reference to demand substitution alone,[98] the CMA may widen the scope of the market where there is evidence of supply-side substitution.Therefore, the CMA considered the extent to which landlords may be able to convert properties into different use types quickly and easily.

88. The CMA received mixed evidence from third parties on the ease of conversion between Retail, Hospitality, and Leisure use types. For instance, the majority of Retail, Hospitality, and Leisure tenants submitted that they would not consider renting a space that previously had a different use (eg due to extensive conversion costs, the need for planning permission or licences, and the time needed),[99] whereas the majority of property agents suggested that previous use type is generally not a determining factor for tenants.[100] The majority of competitors submitted that conversion is easy, with the exception of converting from/into a hotel.[101]

89. Furthermore, the Parties submitted that since the planning use changes, routine permissions relating to physical alterations to buildings have remained in place and

[94] Response to the CMA's third-party questionnaire.
[95] FMN, Annex 27, Information on different types of RH&L tenants, paragraphs 3.3, 5.3 and 5.4.
[96] The Parties explained that although the negotiation process with tenants tends to be the same across Retail, Hospitality, and Leisure uses, rent incentives tend to be different. For instance, for Hospitality/Leisure tenants, rent free packages and capital contributions may be higher, 'reflecting longer lease lengths and more extensive and capital-intensive fitout periods.' FMN, Annex 22, Process re rents, negotiating, tenant mix etc, paragraphs 3.11 and 10.5.
[97] FMN, Annex 27, Information on different types of RH&L tenants, paragraphs 3.3.2 and 3.3.3.
[98] Merger Assessment Guidelines (CMA129), March 2021, paragraph 9.8.
[99] Responses to the CMA's third-party questionnaires.
[100] Responses to the CMA's third-party questionnaires.
[101] Responses to the CMA's third-party questionnaires.

that some buildings may be more suitable than others to convert, based simply on their physical layout, regardless of permissions required.[102] Similarly, a Shaftesbury board document discusses that licencing and planning requirements involved in the conversion of a property use type will still be relevant even after the introduction of a new use class.[103]

*Portfolio mix*

90. When defining markets, there are circumstances where the CMA may aggregate several narrow relevant markets, including when the same firms compete to supply these different products and the conditions of competition between the firms are the same for each product.[104]

91. The CMA considers that although the Parties appear to carefully coordinate and balance their mix of Retail and Hospitality tenants,[105] there are some differences in their respective portfolios. For instance, Retail accounts for a larger part of Capco's portfolio than Shaftesbury's.[106]

92. In addition, the Parties' internal documents suggest that they often assess and review their Retail, Hospitality, and Leisure portfolio results separately.[107] However many of the Parties' internal documents, such as those assessing competition their properties face from other locations or each other, do so without specific reference to Retail, Hospitality or other types of property, but instead conduct their analysis holistically across their entire portfolios.[108]

***Conclusion on product scope***

93. The CMA considers that the evidence is mixed as to whether it is appropriate to combine Retail, Hospitality, and Leisure. Tenant requirements for Retail and Hospitality are different, suggesting separate frames of reference. It is unclear whether supply-side substitution would be sufficient to widen each frame of

[102] Parties' response to the CMA's request for information dated 31 January 2023 (**RFI8**), question 2.
[103] Shaftesbury Annex 000019, [✂].
[104] Merger Assessment Guidelines (CMA129), March 2021, paragraph 9.8.
[105] See FMN, Annex 22, Process re rents, negotiating, tenant mix etc, section 2.
[106] Specifically, for Capco, Retail accounts for 44% of its portfolio and Hospitality and Leisure together account for 29%, by ERV. FMN, paragraphs 3.8 and 3.10. For Shaftesbury, Retail accounts for 28% of its portfolio and Hospitality and Leisure together account for 29%, by ERV. FMN, paragraphs 3.27 and 3.30.
[107] For instance, Capco's [✂] assesses Covent Garden's [✂] performance separately for Retail, Hospitality (which the Parties often refer to as 'food and beverage', or '**F&B'**), and Leisure. FMN, Annex 73, [✂] page 5. In addition, Shaftesbury's [✂] sets out Retail and Hospitality/Leisure separately in most cases, but Retail is always reviewed separately in their its [✂] documents. Shaftesbury Annex 000007, [✂].
[108] Inter alia, Capco Annex 10.22. [✂]; Capco Annex 10.18. [✂]; Shaftesbury Annex 000012, [✂]; Shaftesbury Annex 000078, [✂]; Capco Annex 9.34, [✂]; Capco Annex 10.54. [✂]; and Shaftesbury Annex 1 to RFI1 - [✂].

reference, as the CMA received mixed evidence on the ease of conversion between use types, which will also depend on the particular property. In addition, although the Parties curate their mix of tenant types and often discuss these segments together in their internal documents, other internal documents consider each segment separately. On a cautious basis, the CMA has considered the product frames of reference to be distinct.

94. On this basis the CMA has considered the impact of the Merger in the following product frames of reference:

(a) the supply of Retail rental space; and

(b) the supply of Hospitality rental space.[109]

95. Nevertheless, in this decision the CMA does not need to (and does not) reach a final view as to the product frame of reference in relation to its competition assessment. Irrespective of the CMA's views on product frames of reference (ie even on the narrowest frame of reference), the CMA considers that some level of competitive constraint will be imposed on each of Retail and Hospitality rental space as a result of supply-side substitution from a different property use type. The CMA has therefore taken into account the competitive constraints on the Parties resulting from supply-side substitution from different property use type in its competitive assessment.

## Geographic scope

### *The Parties' submissions*

96. The Parties submitted that competition for tenants within each of the candidate product markets takes place on at least a Central London-wide, if not a whole London-wide, basis.[110] The Parties also submitted that in some cases, tenants may consider locating in other cities in the UK or internationally as an alternative to London.[111]

97. However, the Parties submitted that in order to demonstrate that no competition concerns arise even on a cautious basis, the West End could be the narrowest plausible candidate market for the purpose of the FMN.[112] The Parties submitted a

[109] In relation to Leisure, the CMA notes that the Parties have a more limited presence and as such this is not discussed further.
[110] FMN, paragraph 13.15.
[111] FMN, paragraph 13.15.
[112] FMN, paragraph 13.16.

number of analyses to support their position, which are set out in the competitive assessment (paragraphs 123 to 127).

98. The Parties' definition of the West End includes Mayfair (including a small part of Hyde Park and Green Park), part of Marylebone (only up to Marylebone Road) to the northwest, Soho, Covent Garden, Fitzrovia, up to Russel Square and Kingsway to the east, Embankment, and St. James's to the south.[113] For the purpose of this Decision, 'West End' refers to this definition. The CMA has not concluded on whether this is an accurate definition, as this has not been necessary for the purpose of its assessment.

***The CMA's assessment***

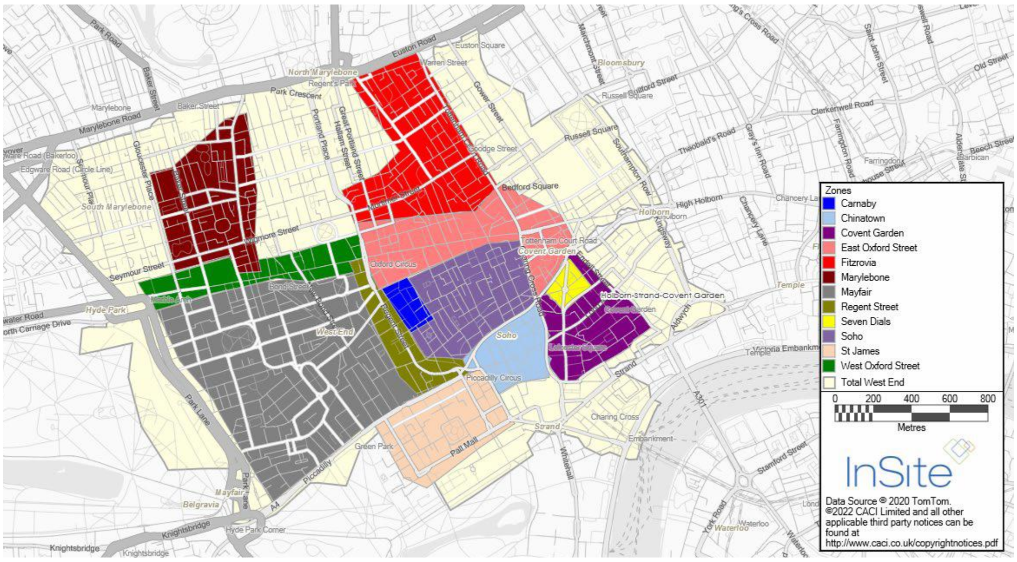
99. The closest area of overlap in the Parties' portfolios is Covent Garden (including the Opera Quarter), which is defined in paragraph 101 below.

100. The Parties submitted that there is no universally agreed definition of Covent Garden.[114] The CMA also notes that no precise demarcation arises from the Parties' strategy documents. However, the Parties also submitted that CACI's demarcation of zones shown in Figure 2 (explained in more detail in paragraph 114) is consistent with how these areas are generally perceived, subject to the caveat that there is some unavoidable ambiguity.[115] This area includes the area around the Covent Garden Market Building and the Coliseum, but does not include the Opera Quarter. In addition to CACI's demarcation, the Parties also submitted that the Opera Quarter might colloquially be referred to as being part of Covent Garden.[116] Shaftesbury's website also describes the Opera Quarter as being located in Covent Garden.[117]

101. The CMA considers that in its assessment Covent Garden should include the Opera Quarter on a cautious basis. In this decision document, the CMA therefore refers to 'Covent Garden (including the Opera Quarter)'. Where the CMA addresses the Parties' submissions, the CMA refers to 'Covent Garden (excluding the Opera Quarter)'.[118]

[113] FMN, Figure 8.
[114] Parties' response to the Issues Letter, paragraph 3.3. In addition, the Parties' economic advisors pointed out to the CMA that various organisations (such as a real estate broker,community association, and Wikipedia) suggest different geographic boundaries. Parties' presentation at the issues meeting, slides 53 to 61.
[115] The Parties also submitted the relevant postcodes. FMN, Annex 138, CACI report West End zone postcodes, Covent Garden.
[116] Parties' response to the CMA's request for information dated 21 December 2022 (**RFI7**), paragraph 2.1.
[117] https://www.shaftesbury.co.uk/en/portfolio/covent-garden.html.
[118] This reflects CACI's definition submitted by the Parties at Figure 2.

**Figure 2: CACI's demarcation of zones**




102. In most mergers, the evidence gathered as part of the competitive assessment captures the competitive dynamics more fully than formal market definition.[119] In addition, in assessing whether a merger may give rise to an SLC, the CMA may take into account constraints outside the relevant market and there is often no 'bright line' that can or should be drawn.[120]

103. The CMA considers that location is a key parameter of competition in the Retail and Hospitality rental spaces, with tenants having a range of different preferences and no clear boundaries demarcating which areas are substitutable.

104. The evidence set out in paragraphs 110 to 129 below suggests that properties in Covent Garden (including the Opera Quarter) face the strongest competitive constraints from other properties in the same area. The CMA therefore considers that Covent Garden (including the Opera Quarter) is the appropriate geographic market for the assessment of the effects of the Merger.

105. Nevertheless, the CMA notes that the precise boundaries of the geographic market for the supply of Retail and Hospitality rental space are not necessarily conclusive in relation to its competition assessment. Irrespective of the CMA's views on the scope of the geographic market, the CMA has carefully taken into account and assessed the competitive constraints on the Parties, both within and outside Covent Garden

[119] Merger Assessment Guidelines (CMA129), March 2021, paragraph 9.2.
[120] Merger Assessment Guidelines (CMA129), March 2021, paragraph 9.4.

(including the Opera Quarter), including competition from properties in other areas within the West End and wider Central London.

### Conclusion on frame of reference

106. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:

(a) horizontal unilateral effects in the supply of Retail rental space in Covent Garden (including the Opera Quarter); and

(b) horizontal unilateral effects in the supply of Hospitality rental space in Covent Garden (including the Opera Quarter).

107. In its assessment of the impact of the Merger, the CMA has also taken into account competitive constraints from outside these frames of reference.

## COMPETITIVE ASSESSMENT

### Horizontal unilateral effects

108. 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.[121] 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 supply of Retail and Hospitality rental units in Covent Garden (including the Opera Quarter).

### Theory of harm 1: The supply of Retail rental space in Covent Garden (including the Opera Quarter)

109. In order to assess this theory of harm in relation to the supply of Retail rental space, the CMA has considered

(a) geographic areas over which the Parties compete;

(b) shares of supply;

[121] Merger Assessment Guidelines (CMA129), March 2021, paragraph 4.1.

(c) closeness of competition (on factors other than geographic location); and

(d) alternative competitive constraints.

***Geographic areas over which the Parties compete***

110. The CMA has examined which areas Retail tenants would consider alternative Retail rental properties as substitutable with Retail properties in Covent Garden (including the Opera Quarter).

111. In assessing which areas are closely substitutable with Covent Garden (including the Opera Quarter), the CMA considered:

(a) the Parties' submissions;

(b) evidence from internal documents;

(c) third-parties' views; and

(d) analyses submitted by the Parties.

*The Parties' submissions*

112. The Parties submitted that in addition to where the Parties' properties are located, visitors are attracted from a wide array of places to other areas of the West End such as Oxford Street, Leicester Square, Bond Street, and Marylebone as well as to areas outside the West End such as Knightsbridge, King's Road, and the Westfield shopping centre. This means that, according to the Parties, there are various options available for Retail, Hospitality, and Leisure tenants who are seeking to rent space in a high-footfall area with a broad catchment area.[122]

113. In support of their position, the Parties submitted an analysis of other areas considered by new and potential Capco tenants,[123] showing that Retail tenants typically consider a range of options when deciding where to locate (such as [✂]), and that very few tenants overall (ie including Retail, Hospitality, or Leisure tenants)

[122] FMN, paragraph 15.19.
[123] FMN, paragraphs 13.20 to 13.26.

only considered Covent Garden (excluding the Opera Quarter) ([✂] out of [✂]).[124,125]

114. The Parties also submitted an analysis by CACI of visitor profiles and movement behaviour across various areas within the West End (described as 'West End Zones'), based on mobile geolocation data (**the CACI analysis**).[126] The Parties submitted that the CACI analysis showed there are [✂] in visitor demographics in different West End Zones and that [✂] a footfall gain [✂] which is [✂]. Further, the Parties submitted that this showed that the majority of visitors to [✂] cross-visit with other Zones, and visitors to [✂] are not more likely to also visit [✂] (and vice versa) relative to other alternatives in [✂].[127]

*Evidence from internal documents*

115. Evidence from the Parties' internal documents suggests that the strongest source of competition is from properties on the same or adjacent streets to their own properties, or within Covent Garden (including the Opera Quarter). For instance:

(a) Property agent reports submitted by both Parties, which set out evidence on comparable properties to help set the rental value of a property, always list properties on the same or nearby streets.[128]

(b) One Shaftesbury board document notes that it '[✂]'.[129] A Shaftesbury action list for its [✂] sets out that it will monitor [✂].[130]

(c) A Capco board pack shows that it monitors [✂] around Covent Garden.[131] In addition, its '[✂]' document sets out that Covent Garden (excluding the Opera Quarter) is a 'distinct, recognisable neighbourhood'.[132]

116. In addition, a number of the Parties' internal documents, or documents prepared by their advisors, suggest Capco and Shaftesbury compete closely. In turn, this suggests that Capco's properties in Covent Garden (excluding the Opera Quarter)

124 FMN, paragraph 13.26; Parties' response to the Issues Letter, paragraphs 8.32 to 8.37; and Parties' response to RFI8, question 4.
125 The Parties did not segment this figure between Retail or Hospitality tenants, but given that the figure is very low, this did not materially affect the CMA's interpretation of this evidence.
126 FMN, Annex 28, CACI consumer research.
127 FMN, paragraphs 13.27 to 13.28; Parties' response to the Issues Letter, paragraphs 8.27 to 8.31.
128 For instance, the [✂]. FMN, Annex 47, [✂]. In addition, [✂].
129 Shaftesbury Annex 000007, [✂].
130 Shaftesbury Annex 000025, [✂].
131 The extent to which Capco monitors [✂] in the Opera Quarter specifically is not clear from the document. Capco Annex 10.15, [✂].
132 Capco Annex 10.38, [✂].

compete with properties in at least some of the areas in which Shaftesbury is located, and vice versa. For instance:

(a) In the minutes of a board meeting, Capco acknowledges Shaftesbury as a '[✂]'.[133]

(b) A report prepared for Capco by [✂] sets out that the Merger rationale is '[✂]' as a reason why the geographic proximity of the portfolios enables better management of the combined portfolio.[134]

(c) A Shaftesbury [✂] presentation highlights Capco's [✂].[135]

(d) A report by [✂] prepared for Shaftesbury which examined benefits of the Merger pointed out that a potential 'synergy' of combining the portfolios would 'include [✂]'.[136]

117. Although the Parties' internal documents do not appear to mention competition with other landlords, they regularly discuss competition or similarlities with other areas, most notably Soho, Carnaby, Regent Street and Oxford Street. For instance:

(a) A Capco [✂] document[ii] lists Regent Street, Oxford Street and Carnaby as [✂] to Covent Garden (excluding the Opera Quarter) in its analysis of each area's [✂].[137]

(b) Capco board minutes compare [✂] in Covent Garden (excluding the Opera Quarter) to those in Oxford Street as well as those of Shaftesbury.[138]

(c) In a Shaftesbury strategy document, Covent Garden[139] and Soho are listed as 'F&B hubs' as well as 'Entertainment & Cultural destinations' in a diagram comparing [✂].[140]

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[133] Capco Annex 10.07, [✂].
[134] Capco Annex 9.27. [✂].
[135] Shaftesbury Annex 000083, [✂]. [✂].
[136] Shaftesbury Annex 000277, [✂].
[137] Capco Annex 10.18, [✂], page 3. In addition, another document setting out [✂] of Capco's [✂] lists the same locations: see Capco's Annex 10.22, [✂].
[138] Capco Annex 10.10, [✂].
[139] This appears to include the Opera Quarter.
[140] Shaftesbury Annex 000253, [✂].

(d) A Shaftesbury risk report states that Regent Street and Covent Garden[141] are [✂].[142]

118. The Parties' internal documents also consider properties in more distant locations as competing with their own. For instance:

(a) Capco's '[✂]' document highlights King's Cross, Cadogan and Marylebone alongside Soho, Carnaby, and Regent Street as [✂]. It also mentions Tottenham Court Road, Bond Street / Knightsbridge, Spitalfields, King's Cross, and Battersea Power Station alongside Oxford Street as [✂].

(b) An update prepared for Capco's board, monitoring the [✂], considers [✂] in Marylebone and Bond Street, as well as in Oxford Street, Regent Street and Soho.[143]

(c) A report from a [✂] working with Capco highlights Westfield London, alongside Carnaby, Seven Dials, Regent Street and Oxford Street, as [✂] to Covent Garden (excluding the Opera Quarter) in a [✂] analysis.[144]

(d) A Shaftesbury [✂] analysis highlights [✂] from Shoreditch (an [✂]) as a [✂] its Covent Garden portfolio.[145]

119. On the basis of the above, the CMA considers that internal documents show that competition is closest from properties in nearby streets but that other areas are often competing with the Parties' properties in Covent Garden (including the Opera Quarter).

*Third-parties' views*[146]

120. Tenants submitted that location is an important parameter of competition, and noted the importance of factors such as footfall, the right demographics of visitors, and commercial mix in the vicinity, when deciding on a property to rent.[147]

121. Some third parties suggested that Covent Garden is a unique location due to the combination of premium Retail, Hospitality, and Leisure sites that attracts high end

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[141] This appears to refer to Covent Garden (excluding the Opera Quarter).
[142] Shaftesbury Annex 000116, [✂].
[143] Capco Annex 10.32, [✂].
[144] Capco Annex 10.54, [✂].
[145] Shaftesbury Annex 000083, [✂], slide 17. This refers to [✂].
[146] Most third party respondents did not specify in their responses whether their views on Covent Garden included or excluded the Opera Quarter.
[147] Response to the CMA's third-party questionnaire.

customers and international tourists.[148] However, relatively few tenants indicated they would not be able to move out of Covent Garden if their lease were to end, with tenants generally mentioning options across different West End locations (such as Soho and Regent Street).

122. Competitors to the Parties identified Soho and Carnaby as areas similar to Covent Garden for retailers.[149] Property agents considered Covent Garden to be similar to Soho and Carnaby, and Seven Dials to be similar to Covent Garden.[150] Some property agents said that Covent Garden was similar to more distant locations, among which were Regent Street, New Bond Street, and Fitzrovia.

*Analyses submitted by the Parties*

123. The CMA has considered (i) the analysis of areas contemplated by new and potential tenants of Capco; and (ii) the CACI analysis put forward by the Parties.

124. With respect to the analysis of areas considered by new and potential Capco tenants, the CMA notes there are a number of limitations to this analysis. This data is [✂].[151] It is not clear how seriously different tenants in the analysis were considering the different options recorded. In addition, the analysis is limited only to those tenants who volunteered this information. Nevertheless, this does provide some evidence as to tenant views on alternative locations which could act as substitutes to locating in Covent Garden (excluding the Opera Quarter). The analysis is consistent with the observations from internal documents and third parties, that while a relatively small number of tenants indicated they were only interested in Capco's estate, there is a range of locations which tenants consider as providing an alternative to Covent Garden (including the Opera Quarter).

125. With respect to the CACI analysis, the CMA does not put significant weight on the analysis of broad demographic profiles of visitors to different West End Zones, as such profiles do not capture what visitors are interested in doing when visiting these zones or their preferences related to this.

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[148] Note of the call with a third party, dated [✂]. The respondent highlighted [✂]. See also a response to the CMA's third-party questionnaire.
[149] Response to the CMA's third-party questionnaire.
[150] When asked which area, if any, is similar to Covent Garden, the majority of the respondents indicated Soho and Carnaby but not Seven Dials. When asked which area is similar to Seven Dials, however, third parties indicated Covent Garden. Most third party respondents did not specify in their responses whether their views on Covent Garden included or excluded the Opera Quarter.
[151] Parties' response to the Issues Letter, paragraph 8.36.

126. The CMA attaches some weight to the analysis of cross-visitation by visitors between different zones in the CACI analysis, as this may indicate substitutability between zones from a visitor perspective, and so indirectly reflect substitutability for tenants insofar as they wish to attract the same visitors. This analysis shows a higher proportion of visitors [✂][152] do not visit [✂] than is true of visitors to most other zones (with [✂]% of [✂] not cross-visiting other zones, compared to an average of [✂]% across zones). However, there is still a high degree of cross-visitation between [✂] and [✂], suggesting that [✂] attract largely the same visitors as [✂].

127. The CMA considers there are still limitations to this analysis, in particular that it does not take into account the difference in size or proximity of the West End Zones and how this may influence the level of cross-visitation. In addition, this only indirectly captures tenant preferences, as footfall is not the only factor considered by tenants when choosing where to locate.[153] The CMA has therefore attached greater weight to the evidence from internal documents and third-party views, than the CACI analysis.

*Conclusion on geographic areas over which the Parties compete*

128. Taken in the round, the CMA considers that the evidence consistently shows that the strongest competitive constraints on the Parties' properties in Covent Garden (including the Opera Quarter) are likely to come from other properties in Covent Garden (including the Opera Quarter): some internal documents and some third parties indicate Covent Garden is a distinct, unique area.[154] Similarly, the Parties' analysis indicates that there are some visitors and tenants who only come to or consider Covent Garden.[155]

129. However, the evidence also shows that there is a range of other areas which impose a competitive constraint on the Parties' properties in Covent Garden (including the Opera Quarter). Internal documents reference competition from a number of other areas within the West End, as well as beyond, as did a number of third parties. This is also consistent with evidence submitted by the Parties that

[152] All references to Covent Garden according to the CACI analysis exclude the Opera Quarter, as the Opera Quarter was not included in the analysis (as a separate West End Zone or as part of Covent Garden).
[153] The CMA notes that footfall was noted to be important to tenants in response to the CMA's questionnaires.
[154] Some of these references include the Opera Quarter, some of these exclude the Opera Quarter and some are unclear.
[155] This refers to Covent Garden (excluding the Opera Quarter). The Opera Quarter was not included in the CACI analysis.

tenants contemplated a range of different locations, with significant heterogeneity in the areas considered.

***Shares of supply***

130. On the basis of the above, the CMA considers that the geographic areas over which the Parties' properties in Covent Garden compete most closely are within Covent Garden (including the Opera Quarter). Therefore, the CMA has assessed shares of supply in the Retail rental space in Covent Garden (including the Opera Quarter). The CMA also calculated shares of supply when considering other areas in the West End, given the evidence set out above that a range of other areas in the West End also exert a competitive constraint on the Parties.

*Method used to calculate shares of supply*

131. The CMA used the same method to calculate shares of supply in Retail and Hospitality. This is set out below.

132. The CMA used the GOAD dataset provided by the Parties to estimate the Parties' shares of supply (in sq. foot) in the relevant areas.[156, 157] The GOAD data was used to estimate both the numerator (the size of the Parties) and denominator (the size of the market).[158] The Parties matched the properties in their tenancy schedules to the equivalent property in the GOAD data. However, between [✂]% of Capco's or Shaftesbury's properties (by count or size) are not represented in the GOAD data. As such, with the exception of the Longmartin JV, these properties have not been taken into account in the CMA's estimates. The CMA, however, is not aware of any reason why the GOAD data would be more or less likely to omit the Parties' properties than other properties. The CMA has included the Longmartin JV on a cautious basis as it accounts for a significant proportion of properties in Covent Garden (including the Opera Quarter) in which Shaftesbury has an interest. The size of the Longmartin JV was estimated by adjusting the size of the Longmartin JV according to the Parties tenancy schedule data based on the difference between the size of the Parties' properties in their tenancy schedules and the size of the

[156] GOAD provide Retail property intelligence data and is a recognised industry standard for information on Retail properties in the UK. See Goad | Experian Business.
[157] The Parties provided shares by volume and value. Given the limitations of the value shares highlighted by the Parties, the CMA decided to produce share of supply estimates based on volume.
[158] The GOAD data estimates the size of the ground floor of a property and includes a variable identifying the number of trading floors a property has. Adjusting for the number of trading floors of a property did not materially change the results, given the very low number of properties in the GOAD data with multiple trading floors (c.2% of properties). This adjustment was applied by assuming that each additional trading floor is 70% the size of the ground floor. This adjustment was used by CBRE when handling the GOAD data based on its industry experience.

equivalent properties in the GOAD data. Given that the CMA has not included any other properties which were not present in the GOAD data, it considers these estimates may be overestimates.

133. The CMA used postcodes to differentiate between different zones in the West End. These postcodes are based on the postcodes used in the CACI analysis submitted by the Parties, as well as on the postcodes which the Parties told the CMA make up the Opera Quarter.[159, 160]

134. The CMA used a property's 'category' and 'sub-category' variables in the GOAD data combined with the Parties' submissions as to how categories and sub-categories are mapped to Retail, Hospitality, and Leisure to determine how properties should be allocated between segments.

*CMA estimates of shares of supply*

135. The CMA's estimates of the Parties' shares of supply in Covent Garden (including the Opera Quarter) and other West End areas are set out in Table 1 below. This starts from Covent Garden (including the Opera Quarter) and adds areas based on the strength of evidence as to the constraint imposed and the geographic distance from Covent Garden (including the Opera Quarter).

[159] A small number of postcodes were duplicated in the Parties' submission such that one postcode was allocated to two zones. This mostly affected Seven Dials and Covent Garden, where all Seven Dials postcodes were also listed as Covent Garden postcodes. These postcodes were allocated to Seven Dials. For the very small number of other duplicated postcodes (11 out of over 17,000), these were allocated to a zone based on the CMA's understanding.
[160] Parties' response to RFI7, question 2.

**Table 1: Parties' share of supply of Retail rental properties in Covent Garden (including the Opera Quarter) and other West End areas, added cumulatively**

| Retail | Capco SoS% | Shaftesbury SoS% | Parties' SoS% |
|---|---|---|---|
| Covent Garden (incl Opera Quarter) | [30-40]% | [10-20]% | [40-50]% |
| Seven Dials | [20-30]% | [20-30]% | [50-60]% |
| Carnaby | [20-30]% | [30-40]% | [50-60]% |
| Soho | [10-20]% | [20-30]% | [40-50]% |
| Regent Street | [10-20]% | [10-20]% | [20-30]% |
| East Oxford Street | [5-10]% | [10-20]% | [10-20]% |
| West Oxford Street | [5-10]% | [5-10]% | [10-20]% |
| Chinatown | [5-10]% | [5-10]% | [10-20]% |
| St James | [0-5]% | [5-10]% | [10-20]% |
| Mayfair | [0-5]% | [5-10]% | [5-10]% |
| Fitzrovia | [0-5]% | [5-10]% | [5-10]% |
| Marylebone | [0-5]% | [5-10]% | [5-10]% |

Source: CMA analysis based on data from GOAD, CACI and the Parties' tenancy schedules.

136. The CMA considers that the Parties' shares of supply for Retail rental properties in Covent Garden (including the Opera Quarter) are high. In Covent Garden (including the Opera Quarter), the Parties' share of supply is [40-50]% with an increment of [10-20]%. However, when accounting for other West End Zones, the Parties' shares become much lower. For example, including Seven Dials, Carnaby, Soho and Regent Street alongside Covent Garden (including the Opera Quarter), the Parties' shares fall below 30%. When considering Covent Garden (including the Opera Quarter) alongside the other West End Zones in the CACI analysis, the Parties' shares fall to [5-10]% with a [0-5]% increment.

***Closeness of competition***

137. The CMA is also examining the closeness of competition between the Parties by considering:

(a) the Parties' submissions;

(b) evidence from internal documents;

(c) third-parties' views on closeness of competition; and

(d) the similarity of the Parties' offerings.

*The Parties' submissions*

138. The Parties submitted that Capco and Shaftesbury each have separate and distinct tenant mix strategies, with Capco focussing on more high-quality, luxury brands and Shaftesbury focussing 'on mid-market, differentiated and innovative brands, and accessible casual dining experiences'.[161]

139. They also submitted that Capco has a higher average ERV per square foot in comparison to Shaftesbury for Retail, and that prices of the most valuable units in Shaftesbury's locations are generally lower compared to those of Capco and of other areas of Central London (and the West End).[162]

140. The Parties submitted that there is no evidential basis to support a finding that Capco and Shaftesbury compete closely for tenants or visitors.[163]

141. The Parties made a number of submissions in support of this position (in addition to the CACI analysis[164] discussed in paragraphs 125 and 127), specifically:

    (a) There is limited tenant overlap between the Parties' portfolios. The majority of those who overlap rent larger units on Capco's estate compared to Shaftesbury's estate, suggesting that they see the Parties' portfolios as complementary. The overlapping tenants are also typically located in many other London locations, which suggests that the Parties' portfolios are not considered unique or 'must have' locations by tenants .[165]

    (b) There is limited tenant switching between the Parties' estates: in the past five years, excluding tenants who departed due to business or branch closure, only [✂] of the [✂] Retail, Hospitality, and Leisure tenants that left Shaftesbury's properties switched to a Capco property; and [✂] of the [✂] Retail, Hospitality, and Leisure tenants that left Capco's properties switched to a Shaftesbury property.[166]

*Evidence from internal documents*

142. As discussed in paragraph 116, references to competition in the Parties' internal documents can also indicate the locations over which the Parties compete. As such,

[161] FMN, paragraphs 15.25 to 15.27.
[162] FMN, paragraphs 15.48 to 15.50.
[163] FMN, paragraph 15.23.
[164] FMN, paragraphs 15.51 to 15.52.
[165] FMN, paragraphs 15.33 to 15.37.
[166] FMN, paragraphs 15.39 to 15.42.

the majority of the Parties' internal documents relevant to competition are set out in paragraphs 115 to 119 above.

143. There were few documents which specifically referred to non-geographic competition, although one Shaftesbury [✂] analysis indicated that tenant mix is a relevant competitive factor, and highlighted [✂] as a potential threat in this regard: '[✂].[167]

*Third-parties' views on closeness of competition*[168]

144. As discussed in paragraph 116, references to competition by third parties can also indicate the locations over which the Parties compete. As such, the majority of the third-party comments relevant to competition are set out in paragraphs 120 to 122 above.

145. Some third parties commented on the similarity of the Parties' tenant mixes. The CMA received evidence from third parties that the Parties serve similar tenants: one third party noted that both serve high-end tenants, and another that they serve similar tenants in smaller streets and increasingly serve similar tenants in larger streets.[169] One third party stated Capco has historically targeted more high-end brands than Shaftesbury but this difference appears to be reducing in recent times, as the COVID-19 pandemic made renting flagship stores, which are often loss-making, less commercially viable.[170]

*The similarity of the Parties' offerings*

146. Both Parties curate clusters of properties in small geographic areas. The CMA has seen evidence that suggests that this allows them to create more value for their tenants than individual landlords. For instance:

(a) The tenant mix (such as the proportion or nature of Retail venues) can be adjusted to increase overall footfall. For example, a Shaftesbury internal document suggests that a strong Hospitality presence could create a 'halo effect on footfall, encouraging new customers to visit, increasing dwell time and driving improved trading' in their villages.[171]

[167] Shaftesbury Annex 000177, [✂].
[168] Most third party respondents did not specify in their responses whether their views on Covent Garden included or excluded the Opera Quarter.
[169] Note of call with a third party, dated [✂]; note of call with a third party, dated [✂].
[170] Note of call with a third party, dated [✂].
[171]Shaftesbury Annex 00007, [✂].

(b) Clustering enables landlords to influence the the public realm (ie common areas outside the specific properties). This benefit was explained to the CMA by third parties.[172] In addition, a Shaftesbury risk register states that, to address some risks in demand, it could draw out its benefits of '[✂].'[173,174] Further, a Shaftesbury [✂] analysis indicates that public realm investment is a relevant competitive factor, and highlighted [✂].

147. The above evidence suggests that the Parties are likely to be close competitors, as they both follow a strategy of building and curating clusters of properties (in addition to their clusters neighbouring each other).

148. The CMA recognises there are differences in the types of tenants the Parties pursue. However, the Parties acknowledge that there is some degree of overlap in their Retail tenant portfolios, with overlapping tenants representing [10-20]% of Capco's Retail portfolio and [5-10]% of Shaftesbury's Retail portfolio.[175] Differences in the size of properties these tenants rent between the Parties may reflect the space which is available in the Parties' portfolios, rather than a conscious choice by the tenant to seek to differentiate their outlets between the two locations.

149. Similarly, there are differences in the ERVs achieved by the Parties on average and between different streets across their estates, with Shaftesbury's properties generally achieving a lower ERV per square foot. However, there were some similarities in the ERVs between some of the Parties' streets, although these streets were in different areas of the West End. Moreover, differences in price by themselves are not sufficient to indicate that the Parties do not compete closely with one another.

150. The Parties' arguments regarding lack of switching between their estates is not compelling evidence that they do not compete. Switching may happen due to a change in a landlord's offering (eg a price rise). Although this can provide evidence of substitutability, the Parties did not provide evidence that switching occurred for this reason. In addition, switching to a new property is costly, and the Parties indicated that many tenants close down rather than find alternative properties.[176] Alternatively, switching may occur due to a change in the tenant's business strategy

[172] Note of a call with a third party, dated [✂].
[173] Shaftesbury Annex 000116, [✂].
[174] See also Parties' response to the Issues Letter, paragraph 5.13, which explains that owning properties on a single street enables Shaftesbury to create an overall more appealing environment for both tenants and their customers.
[175] FMN, paragraph 15.35.
[176] Parties' submission at the Issues Meeting between the Parties and the CMA, 31 January, 2023.

(which requires, for example, a larger property)[177] not because the tenant is looking for a similar property.

*Conclusion on closeness of competition*

151. Taken in the round, the CMA considers that the evidence it has seen indicates the Parties are close competitors, despite differences in their product offering and tenant mix.

***Alternative competitive constraints***

152. The CMA is assessing the constraint from other alternative landlords by taking into consideration:

(a) the Parties' submissions;

(b) third-parties' locations and offerings;

(c) third-parties' views on alternative competitors; and

(d) evidence from internal documents.

*The Parties' submissions*

153. The Parties submitted that there is a large number of other players active in the supply of Retail, Hospitality, and Leisure rental space in the West End. This includes large and small property companies/portfolios, individual landlords, tenants who sublet property, and developers of new property (eg, landlords who create new rental space from constructing new buildings or renovating existing property).[178] The Parties submitted a list of 21 'major players' in the West End.[179] They also estimated market shares of the largest of those players operating in Retail and Hospitality, which ranged between 0.1% and 6%.[180] The Parties provided further examples of competitors in Central London and London more broadly.[181]

[177] For instance, the Parties provided an example of a tenant who switched from Shaftesbury's estate to Capco's because they were looking for a much larger unit, rather than because they saw the two properties as substitutable. FMN, paragraph 15.41.
[178] FMN, paragraph 15.5.
[179] FMN, paragraph 15.6.
[180] FMN, Table 7.
[181] FMN, paragraphs 15.9 to 15.10.

*Third-parties' locations and offerings*

154. In Covent Garden (including the Opera Quarter), Mercers is the only landlord of a comparable size to the Parties. Mercers owns a portfolio of properties clustered in the Long Acre area (between Seven Dials and Covent Garden).[182] Of the other landlords identified by the Parties, described in paragraph 153, four appear to be present in Covent Garden (including the Opera Quarter) albeit with significantly smaller holdings than the Parties.[183] These are Lothbury Investment Management, Derwent, British Land, and Gascoyne Holdings. The CMA understands that the majority of remaining properties in this area are owned by smaller property companies or individual landlords.

155. As set out above 146, landlords achieve some advantages from concentrated ownership, which smaller landlords or those with more disparate portfolios cannot achieve. The smaller landlords in Covent Garden (including the Opera Quarter) may individually exert a weaker constraint on the Parties as a result, although given the number of such landlords which appear present, the CMA considers that they are likely to collectively impose a constraint on the Parties.

156. Table 1 shows that across wider areas, in particular including Seven Dials, Carnaby, Soho and Regent Street and beyond in addition to Covent Garden (including the Opera Quarter), the combined share of supply of competitors increases.

157. In addition to the large number of smaller landlords across this area, some of these competitors also have clustered portfolios. Such landlords include:

(a) Soho Estates, which has a property portfolio clustered in Soho, and focuses more on Hospitality than Retail.[184]

(b) The Crown Estate, which owns a portfolio of properties clustered around Regent Street and St James's, as well as some individual buildings outside these areas.[185]

(c) Criterion Capital, which owns a portfolio of properties clustered around Leicester Square and Piccadilly Circus.[186]

[182] As explained in footnote 7 the interests of the Longmartin JV are attributed to Shaftesbury for the purposes of the analysis contained in the competitive assessment. This is therefore not discussed in this section.
[183] CMA internal analysis.
[184] FMN, paragraph 15.6.21 and https://www.sohoestates.co.uk/.
[185] FMN, paragraph 15.6.5 and https://www.thecrownestate.co.uk/en-gb/what-we-do/in-central-london/.
[186] FMN, paragraph 15.6.4 and https://www.criterioncapital.co.uk/.

(d) The Howard de Walden Estate, which owns a clustered portfolio in Marylebone and the Harley Street Medical Area.[187]

(e) The Langham Estate which owns a mixed-use portfolio including Retail and Hospitality units clustered in Fitzrovia, and between Oxford Street and Euston Road.[188]

158. As well as facing constraints from other landlords' Retail units, the Parties are also likely to face some level of competitive constraint due to the threat of supply-side substitution from Hospitality and Leisure units, as explained in paragraphs 93 to 95.

*Third-parties' views on alternative competitors*

159. Competitors did not generally raise concerns about the Merger and indicated that tenants could find alternatives, although they did not identify any specific ones. Similarly, relatively few tenants were able to comment on the similarity of different landlords to the Parties, either not commenting or indicating they were not aware of the different competitors listed.[189] The CMA considers that this likely reflects the number of small alternative landlords which third parties may not specifically be able to name, but who nonetheless offer an alternative to the Parties.

160. One competitor, however, argued that the Merged Entity will have the power to control a vast area, attract the tenants it desires and alter the nature of the Retail, Hospitality, and Leisure markets in the West End and London in general. Similarly, one competitor noted that larger landlords have a strong negotiating position in relation to their actual or potential tenants due to their complete knowledge of all recent lettings in their estate and that the Merger will make it more difficult for tenants to negotiate rents.[190]

161. A number of third parties indicated that larger landlords with clustered holdings offer additional benefits compared to smaller landlords, such as the ability to curate the area and improve the premises.[191] However, very few tenants and property agents indicated that the size of landlord was an important factor in deciding to rent a property, with greater importance attached to factors such as the experience and

[187] FMN, paragraph 15.6.10 and https://www.hdwe.co.uk/.
[188] FMN, paragraph 15.6.12 and https://www.langhamestate.com/.
[189] Responses to the CMA's third-party questionnaires.
[190] Responses to the CMA's third-party questionnaire.
[191] Responses to the CMA's third-party questionnaires.

financial health of the landlord.[192] Overall, the majority of third parties did not express concerns over the lack of alternatives post-Merger.

*Evidence from internal documents*

162. As mentioned in paragraph 117, the Parties do not appear to monitor competition with other landlords. The Parties' internal documents do however indicate that they consider their portfolios (separately or combined) to be unique. For instance:

(a) A [✂] report attached to the minutes of a Shaftesbury board meeting describes Shaftesbury's portfolio as an 'Impossible to replicate portfolio assembled over 34 years in the best West End locations'.[193]

(b) A 'Draft Investor Presentation' attached to the minutes of a board meeting by Shaftesbury, describes the Parties' combined estates as an 'impossible to replicate portfolio in the heart of London's West End'.[194]

(c) A [✂] report to Capco describes the combined portfolio as an '[✂]'.[195]

*Conclusion on alternative competitive constraints*

163. The CMA considers that the Parties face constraints from a variety of different types of competitors, such as large and small property companies and individual landlords. Mercers will remain a large competitor in Covent Garden (including the Opera Quarter), and the Merged Entity will also continue to face constraints from smaller landlords in this area. The Parties will also face constraints from a variety of small and large landlords in other locations. On this basis, the CMA considers that there are many alternative providers who provide a strong constraint upon the Parties and will continue to constrain the Merged Entity.

***Conclusion on the supply of Retail rental space in Covent Garden (including the Opera Quarter)***

164. The CMA believes that landlords providing Retail rental space in Covent Garden (including the Opera Quarter) compete with landlords in a number of other locations both within the West End and in more distant locations in Central London. While the Parties may compete more closely with each other than with other landlords due to the proximity and scale of their holdings, there are many alternatives available to

[192] Responses to the CMA's third-party questionnaire.
[193] Shaftesbury Annex 000012, [✂].
[194] Shaftesbury Annex 000078, [✂].
[195] Capco Annex 9.34, [✂].

tenants who are considering locating in Covent Garden (including the Opera Quarter).

165. Accordingly, the CMA concludes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of Retail rental space.

## Theory of harm 2: The supply of Hospitality rental space in Covent Garden (including the Opera Quarter)

166. Much of the evidence relevant to the competitive assessment for Retail properties also applies to Hospitality properties. For instance, although they were at times analysed separately it was common for both the Parties' internal documents and evidence from third parties to refer to competitive features without specific reference to either Retail or Hospitality properties. The CMA has set out the evidence which applies to both Retail and Hospitality in its assessment of Retail rental space. Below, the CMA sets out any additional evidence relating specifically to Hospitality.

### *Geographic areas over which the Parties compete*

*The Parties' submissions*

167. The Parties did not distinguish their views on the geographic areas over which the Parties compete between Retail and Hospitality. These are set out in paragraphs 112 to 114.

168. The Parties provided a separate analysis of areas considered by Capco's new Hospitality and Leisure tenants, which the Parties submitted showed that these tenants typically consider a range of options when deciding where to locate including a number of locations (such as [✂]), and that very few tenants overall (ie including Retail, Hospitality, or Leisure tenants) only considered Covent Garden (excluding the Opera Quarter) ([✂] out of [✂]).[196] The CACI analysis did not distinguish between visitors coming to West End Zones for different purposes.

*Evidence from internal documents*

169. The CMA's assessment of evidence from internal documents relating to both Retail and Hospitality properties is included as part of paragraphs 115 to 119.

[196] FMN, paragraph 13.25.

170. The Parties' internal documents relating to Hospitality also suggest that the strongest source of competition is from properties on the same or adjacent streets to their own properties, or from within Covent Garden (including the Opera Quarter). For instance:

(a) Property agent reports received by both Parties, setting out evidence on comparable Hospitality properties to help set the rental value of a property, always list properties on the same or nearby streets.[197]

(b) A Capco board document notes that Hospitality trading conditions in Covent Garden are different to other locations in the West End: '[✂]'.[198]

171. The CMA has seen very few internal documents that discuss competition the Parties' properties face from properties in wider areas in Hospitality specifically, other than a Shaftesbury [✂] analysis which highlights [✂] from [✂] locations such as Soho and Shoreditch as [✂] its Covent Garden portfolio.[199]

*Third-parties' views*[200]

172. The majority of competitors and property agents did not distinguish their comments on the geographic areas over which the Parties compete between Retail and Hospitality. The CMA's assessment of these responses is set out in paragraphs 120 to 122.

173. The responses that did distinguish between Retail and Hospitality indicated that Soho and Carnaby were the most similar areas to Covent Garden in Hospitality, followed by Regent Street and Fitzrovia. In addition, these third parties consistently noted that the Parties are close or very close competitors.[201] A third party also submitted that some Hospitality tenants are willing to pay higher rent for their units in Covent Garden or Soho, as companies seek to establish flagship sites in these locations to develop their businesses in London and around the UK.[202]

[197] For example, [✂]. FMN, Annex 49, [✂]. Similarly, the [✂]. FMN, Annex 134, [✂].
[198] This refers to Capco's own estate and therefore excludes the Opera Quarter. Capco Annex 10.32, [✂].
[199] This refers to Shaftesbury's holdings in both the Opera Quarter and Seven Dials. Shaftesbury Annex 000083, [✂].
[200] Most third parties did not specify in their responses whether their views on Covent Garden included or excluded the Opera Quarter.
[201] Response to the CMA's third-party questionnaire.
[202] Response to the CMA's third-party questionnaire.

*Analyses submitted by the Parties*

174. The CMA's views on the analyses submitted by the Parties are set out in paragraphs 123 to 127.

*Conclusion on geographic areas over which the Parties compete*

175. Taken in the round, the CMA considers that the evidence consistently shows that the strongest competitive constraints on the Parties' properties in Covent Garden (including the Opera Quarter) are likely to come from other properties in Covent Garden (including the Opera Quarter): some internal documents and some third parties indicate Covent Garden is a distinct, unique area.[203] Similarly, the Parties' analysis indicates that there are some visitors and tenants who only come to or consider Covent Garden.[204]

176. However, the evidence also shows that there is a range of other areas which impose a competitive constraint on the Parties' properties in Covent Garden (including the Opera Quarter). Internal documents reference competition from a number of other areas within the West End, as well as beyond, as did a number of third parties. This is also consistent with evidence submitted by the Parties that tenants contemplated a range of different locations, with significant heterogeneity in the areas considered.

***Shares of supply***

177. On the basis of the above, the CMA has assessed shares of supply in Hospitality rental space over the same geographic areas as in the Retail rental space.

178. The CMA's estimates of the Parties' shares of supply in Covent Garden (including the Opera Quarter) and other West End areas are set out in Table 2 below.[205] This starts from Covent Garden (including the Opera Quarter) and adds areas based on the strength of evidence as to the constraint imposed and the geographic distance from Covent Garden (including the Opera Quarter).

[203] Some of these references include the Opera Quarter, some of these exclude the Opera Quarter, and some are unclear.
[204] This refers to Covent Garden (excluding the Opera Quarter). The Opera Quarter was not included in the CACI analysis.
[205] The CMA used the same method as described in paragraphs 131 to 134 to calculate shares of supply in Hospitality.

**Table 2: Parties' share of supply of Retail rental properties in Covent Garden (including the Opera Quarter) and other West End areas, added cumulatively[iii]**

| Hospitality | Capco SoS% | Shaftesbury SoS% | Parties' SoS% |
|---|---|---|---|
| Covent Garden (incl Opera Quarter) | [20-30]% | [20-30]% | [40-50]% |
| Seven Dials | [20-30]% | [20-30]% | [50-60]% |
| Carnaby | [20-30]% | [30-40]% | [50-60]% |
| Soho | [10-20]% | [20-30]% | [30-40]% |
| Regent Street | [5-10]% | [10-20]% | [20-30]% |
| East Oxford Street | [5-10]% | [10-20]% | [20-30]% |
| West Oxford Street | [5-10]% | [10-20]% | [20-30]% |
| Chinatown | [5-10]% | [10-20]% | [20-30]% |
| St James | [5-10]% | [10-20]% | [10-20]% |
| Mayfair | [0-5]% | [10-20]% | [10-20]% |
| Fitzrovia | [0-5]% | [10-20]% | [10-20]% |
| Marylebone | [0-5]% | [10-20]% | [10-20]% |

Source: CMA analysis based on data from GOAD, CACI and the Parties' tenancy schedules.

179. The CMA considers that the Parties' shares of supply for Hospitality rental properties in Covent Garden (including the Opera Quarter) are high. In Covent Garden (including the Opera Quarter), the Parties' share of supply is [40-50]% with an increment of [20-30]%. However, when accounting for other West End Zones, the Parties' shares become much lower. For example, including only Carnaby, Soho and Regent Street alongside Covent Garden (including the Opera Quarter), the Parties' shares fall below 30%. When considering Covent Garden (including the Opera Quarter) alongside the other West End Zones in the CACI analysis, the Parties' shares fall to [10-20]% with a [0-5]% increment.

***Closeness of competition***

*The Parties' submissions*

180. The Parties' submissions set out in paragraphs 138 to 141 largely grouped Retail, Hospitality, and Leisure together, although some analyses were provided for Hospitality and Leisure separately to Retail (such as the analysis of tenant overlaps and its ERV comparison). While the Parties' broad conclusions from these analyses did not vary between Retail and Hospitality (ie that the Parties are not close competitors), the Parties' ERV comparison did indicate that the Parties' average ERV per square foot was more similar for Hospitality/Leisure properties than for Retail properties.

*Evidence from internal documents*

181. The Parties' internal documents discussed in paragraphs 115 to 119 do not differentiate between Retail and Hospitality. Therefore, the CMA considers that these documents also show that Capco and Shaftesbury are close competitors with respect to Hospitality.

*Third-parties' views on closeness of competition*

182. Many third parties (particularly competitors and property agents) did not distinguish their comments on the competitive position of the Parties and other landlords between Retail and Hospitality. Therefore, the CMA considers that these responses show that the Parties are close competitors with respect to Hospitality for the reasons set out in paragraphs 144 to 145.

183. The responses from third parties that did distinguish between Retail and Hospitality also indicated that the Parties are close competitors. Specifically, a property agent and several tenants with expertise in the Hospitality sector consistently noted that the Parties are close or very close competitors.[206] One Hospitality tenant noted that the Parties' size afford them greater negotiating power,[207] while a property agent also indicated that the Merger could lead to a large landlord which is more difficult to negotiate with.[208]

*Conclusion on closeness of competition*

184. Taken in the round, the CMA considers that the evidence it has seen indicates the Parties are close competitors, despite differences in their product offering and tenant mix.

***Alternative competitive constraints***

*The Parties' submissions*

185. The Parties did not distinguish their views, set out in paragraph 153 above, on alternative suppliers between Retail and Hospitality.

[206] Response to the CMA's third-party questionnaire.
[207] Response to the CMA's third-party questionnaire.
[208] Response to the CMA's third-party questionnaire.

*Third-parties' locations and offerings*

186. The CMA considers that although the larger competitors described in paragraphs 153 to 155 may have different proportions of Hospitality units compared to Retail units, and the individual landlords will be different, the cumulative shares of supply of alternative landlords in different areas of the West End are similar for both Retail and Hospitality, and the constraint from supply-side substitution is similar. The CMA therefore considers that the conclusions set out in paragraphs 154 to 158 above also apply to Hospitality.

*Third-parties' views on alternative competitors*[209]

187. Many third parties (particularly competitors and property agents) did not distinguish their comments on the competitive position of the Parties and other landlords between Retail and Hospitality.[210]

188. Some Hospitality tenants noted that a landlord's size is important in so far as it allows it to control an entire area and its footfall, but also to charge higher rents, control competition between brands, and use turnover-based rents.[211] However, as with Retail, very few tenants indicated that the size of landlord was an important factor in deciding to rent a property, with greater importance attached to other factors. Similarly, one property agent [✄] said that the size of the landlord was not a distinguishing feature, and that from a tenant's perspective it was more important to have an experienced landlord, which could be large or small.

*Evidence from internal documents*

189. As noted above in paragraph 117, the Parties' internal documents do not appear to systematically or regularly monitor competition from other specific landlords.

*Conclusion on alternative competitive constraints*

190. The CMA considers that the Parties face constraints from a variety of different types of competitors, such as large and small property companies and individual landlords. Mercers will remain a large competitor in Covent Garden (including the Opera Quarter), and the Merged Entity will also continue to face constraints from smaller landlords in this area. The Parties will also face constraints from a variety of

[209] Most third parties did not specify in their responses whether their views on Covent Garden included or excluded the Opera Quarter.
[210] Response to the CMA's third-party questionnaire.
[211] Responses to the CMA's third-party questionnaires.

small and large landlords in other locations. On this basis, the CMA considers that there are many alternative providers who provide a strong constraint upon the Parties and will continue to constrain the Merged Entity.

***Conclusion on the supply of Hospitality rental space in Covent Garden (including the Opera Quarter)***

191. The CMA believes that landlords providing Hospitality rental space in Covent Garden (including the Opera Quarter) compete with landlords in a number of other locations both within the West End and in more distant locations in Central London. While the Parties may compete more closely with each other than with other landlords due to the proximity and scale of their holdings, there are many alternatives available to tenants who are considering locating in Covent Garden (including the Opera Quarter).

192. Accordingly, the CMA concludes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of Hospitality rental space.

## BARRIERS TO ENTRY AND EXPANSION

193. 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.[212]

194. The Parties submitted that there are no significant barriers to entry or expansion. Landlords can start competing by acquiring a single property, or tenants by sub-letting part of the property they are renting. The Parties further submitted that no expertise is required to enter the market, as landlords can appoint property management agents to manage a property on their behalf.[213]

195. The CMA considers that both entry and expansion are constrained by the availability of properties and the willingness of landlords to sell their existing properties (as there are relatively few new properties in the West End or Central London).

[212] Merger Assessment Guidelines (CMA129), March 2021, from paragraph 8.40.
[213] FMN, paragraph 21.1.

196. In any event, the CMA has not had to conclude on barriers to entry or expansion as the Merger does not give rise to competition concerns on any basis.

## THIRD-PARTY VIEWS

197. The CMA contacted tenants, property agents and the Parties’ competitors. The majority of third parties did not express Merger related concerns. Third-party comments have been taken into account where appropriate in the competitive assessment above.

# DECISION

198. 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.

199. The Merger will therefore not be referred under section 33(1) of the Act.

**David Stewart**
**Executive Director**
**Competition and Markets Authority**
**22 February 2023**

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[i] The last sentence of paragraph 61 refers to Capco, rather than Shaftesbury, and is corrected as follows: Its expertise in this industry may bolster the weight that its views carry in relation to Capco management and other shareholders compared to other financial investors, thereby comprising one source of its influence over Capco.
[ii] Paragraph 117(a) is corrected as follows: (a) A [✂] document reviewed by Capco's board lists Regent Street, Oxford Street and Carnaby as [✂] to Covent Garden (excluding the Opera Quarter) in its analysis of each area's [✂].
[iii] The title of Table 2 is corrected as follows: Parties' share of supply of Hospitality rental properties in Covent Garden (including the Opera Quarter) and other West End areas, added cumulatively