

Completed acquisition by Asda Stores Limited of Arthur Foodstores Limited from Co-operative Group Limited

Decision on relevant merger situation and substantial lessening of competition

ME/7018/22

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

SUMMARY

1. On 30 October 2022, Asda Stores Limited (**Asda**) completed the purchase of Arthur Foodstores Limited (**Arthur**) (the **Merger**). Arthur is a special purpose transaction vehicle created by Co-operative Group Limited (**the Co-op**) to sell its 132 petrol stations, with attached grocery stores. Asda is a wholly owned subsidiary of Asda Group Limited (**Asda Group**), which is indirectly jointly controlled by Mr Zuber Issa and Mr Mohsin Issa (together, **Issa Brothers**) and investment funds managed by TDR Capital LLP (**TDR**). The Issa Brothers and TDR also jointly own EG Group Limited (**EG**), which operates petrol filling stations (**PFSs**). The Issa Brothers, TDR, Asda and Arthur are together referred to as the **Parties**. Asda, Arthur, EG, and the other TDR portfolio companies are together referred to as the **Merged Entity**.
2. The CMA believes that the Merger gives rise to a realistic prospect of a substantial lessening of competition (**SLC**):
 - (a) in the retail supply of road fuel in 11 local areas; and
 - (b) in the retail supply of groceries at mid-size stores (**MSS**) in 3 local areas.
3. The Parties have until 21 March 2023 to offer undertakings in lieu of a reference to the CMA that will remedy the competition concerns identified. If no such undertaking

is offered, then the CMA will refer the Merger pursuant to sections 22(1) and 34ZA(2) of the Enterprise 2022 (the **Act**).

The basis of the CMA's assessment

4. The Parties overlap in the retail supply of (i) road fuel, (ii) groceries (both at MSS and at convenience stores), and (iii) auto-LPG in the UK. For each of these, the CMA considered the impact of the Merger at both the national and local levels.
5. For its local assessments, the CMA examined the Merger:
 - (a) for road fuel, within up to a 10-minute drive-time for non-supermarket PFSs, and up to a 20-minute drive-time for supermarket PFSs;
 - (b) for groceries, within:
 - (i) up to a 5-minute drive-time for urban areas and up to a 10-minute drive-time for rural areas for MSS; and
 - (ii) a 5-minute drive-time around each convenience store and a 1-mile radius around each standalone convenience store; and
 - (c) for auto-LPG, within 10-, 20-, 30- and 40-minute drive times.

CMA's assessment of the effects on competition of the Merger

Local assessment

6. In order to assess the competitive impact of the Merger in local areas for the supply of road fuel, the CMA used a decision rule that has been established across a number of previous investigations in this market. Decision rules are commonly used in phase 1 investigations to enable the competitive assessment of a large number of local areas to be carried out systematically, efficiently and at proportionate cost. The decision rule used in this case, which is described in full in the CMA's decision, takes into account the number of competing PFSs in each local area, the local shares of the Merged Entity, the asymmetric constraint that Asda exerts on Arthur, and whether Asda considers the Co-op's prices when setting prices in each local area.
7. The decision rule used to assess the impact of the Merger on the retail supply of groceries takes into account the number of competing groceries brands in each local area.

8. Using these decision rules, the CMA found that the Merger gives rise to a realistic prospect of an SLC:
 - (a) in the retail supply of road fuel in 11 local areas; and
 - (b) in the retail supply of groceries at MSS in 3 local areas.
9. At the local level, the CMA did not find any competition concerns in relation to the retail supply of auto-LPG or the retail supply of groceries at convenience stores.

National assessment

10. With regard to the national retail supply of road fuel, groceries (both at MSS and convenience stores), and auto-LPG, on the basis of the Parties' limited shares of supply at a national level, and the availability of competing alternative suppliers, the CMA found no competition concerns.

Efficiencies

11. Asda submitted that the Merger will result in rivalry-enhancing efficiencies in both fuel and grocery retailing. Rivalry-enhancing efficiencies change the incentives of the merger firms and induce them to act as stronger competitors to their rivals. Rivalry-enhancing efficiencies may prevent an SLC by offsetting any anticompetitive effects.
12. A merger efficiency is not the same as a merged entity choosing to change the way it operates or integrating one merger firm into the operating model of the other merger firm. Rather, rivalry-enhancing efficiencies arise where a merger strengthens the ability and incentive of the merged entity to respond to market forces in a pro-competitive manner. Merger-specific changes that are likely to result in such a change include a reduction in the costs to produce the good or service, the bringing together of complementary research and development assets or a reduction in the costs of innovation.
13. In this case, Asda argued that its prices for both fuel and groceries are consistently lower than prices at the Arthur sites and therefore, after the Merger, prices at these sites will fall. Asda also argued that there will be some procurement efficiencies.
14. The CMA has considered Asda's submissions on efficiencies within its established framework for assessment, which includes considering whether the purported efficiencies will enhance rivalry and are specific to the Merger in question (ie whether the merger efficiencies are reliant on the merger in question or whether they could be brought about by other means). In doing so, the CMA has had regard

to the high level of confidence needed, particularly within a phase 1 investigation, to accept that any efficiencies would offset the competition concerns identified by the CMA.

15. The CMA considers that moving the Arthur fuel and grocery sites to Asda's pricing policy relates to a change in the strategy and business model of the acquired sites. This is not considered an efficiency within the CMA's established guidance. Operating models and corporate strategies can change over time, and a permanent structural change to the market (such as the one brought about by a merger) can weaken the market forces that restrain firms from, for example, raising prices.
16. The CMA has found that the purported efficiencies cannot be relied upon to enhance rivalry in the local areas where the Merger gives rise to a realistic prospect of an SLC. As these areas fail the CMA's decision rule, they are all areas in which both Parties are active at present and will face insufficient competition post-Merger. Further, the CMA considers that the purported efficiencies, including those relating to procurement, are not Merger-specific. This is because Asda is, by definition (because the decision rule is based on existing overlaps), already present in all of the relevant local areas, and because the Merger is not needed for Asda or Arthur to adopt lower prices in those local areas.
17. The CMA therefore considers that the purported efficiencies will not prevent the realistic prospect of an SLC in any of the relevant local areas.

ASSESSMENT

PARTIES

Asda, Issa Brothers, TDR and EG

18. Asda is a British supermarket, retailing food, apparel, general merchandise products, fuel, and services throughout the UK and online.¹ Asda operates 637 grocery stores in the UK, mainly in large formats (hypermarkets and supermarkets). This includes 581 supermarkets and 56 convenience stores (54 of which are attached to a PFS).² Asda operates 322 PFSs, of which 305 are co-located with a supermarket and 17 are standalone PFS (ie not co-located with a supermarket) co-located with a convenience grocery store.³ Asda has only two standalone convenience grocery stores that are not co-located with a PFS.⁴
19. Asda is a private limited company incorporated in England and a wholly-owned subsidiary of Asda Group. The Issa Brothers and TDR⁵ indirectly control Asda Group through Bellis Acquisition Company 3 Limited (**Bellis**), a private limited company incorporated in Jersey, which directly controls Asda Group.⁶
20. The Issa Brothers and TDR indirectly jointly control EG, which is currently run as a standalone business separate from Asda Group and TDR.⁷ EG is an independent operator of PFSs based in Blackburn. In the UK, EG operates 391 PFS sites, all of which are co-located with a convenience retail offering (ie PFSs with ancillary fore- and backcourt offerings).⁸

¹ Final Merger Notice submitted on 19 January 2023 (**FMN**), paragraph 134.

² FMN, paragraph 135.

³ FMN, footnote 51.

⁴ FMN, footnote 53.

⁵ TDR is a UK-based investment management firm headquartered in London. FMN, paragraph 40.

⁶ Bellis is a limited company jointly owned by the Issa Brothers and TDR created on 30 September 2020 for the purposes of acquiring all of the issued ordinary shares in the capital of Asda Group, FMN paragraph 37. Able Holdings Limited (Jersey), a company jointly owned by Mr Zuber Issa and Mr Mohsin Issa, and Optima Group Sarl have a 50/50 ownership of the ordinary shares in the ultimate holding company of Bellis (ie, Bellis TopCo Limited), [§<]. Pursuant to a management agreement, TDR manages the funds in TDR Capital III Holdings L.P and TDR Capital III Investments (2019) L.P. which hold the interests in Optima Group Sarl. In addition, a third party holds [§<] rights in respect of [§<] share capital in Bellis TopCo Limited, and an affiliate of Walmart, Inc is a holder of senior shares and a special participation share in Bellis TopCo 2 Limited, another indirect holding company of Bellis. FMN, paragraphs 27 to 34.

⁷ In this regard, the CMA notes that [§<]. Asda submitted that [§<]. Asda's response to the CMA's section 109 notice dated 1 February 2023, question 2.

⁸ FMN, paragraph 141.

Arthur and the Co-op

21. Arthur is a legal entity designed as a special purpose transaction vehicle to sell the relevant stores. It was incorporated in England on 9 March 2022 and, until completion of the transaction, was wholly owned by Co-operative Foodstores Limited, a subsidiary of the Co-op.⁹
22. Arthur has 132 PFS sites,¹⁰ 124 of which have an on-site convenience store, and 8 of which are co-located with a Co-op-branded supermarket.¹¹
23. The Co-op is a consumer co-operative, with interests across food, funerals, insurance, legal services and fuel, headquartered in Manchester.¹²

TRANSACTION

24. On 31 August 2022, Asda entered into a sale and purchase agreement (**SPA**) to purchase all of the issued shares in the capital of Arthur from Co-operative Foodstores Limited, which is ultimately controlled by the Co-op.¹³
25. The Parties completed the Merger on 30 October 2022.¹⁴ Following the Merger, Arthur is solely controlled by Asda, which is in turn ultimately controlled by the Issa Brothers and TDR.¹⁵

Rationale of the Merger

26. The Parties submitted that the rationale for the Merger is to accelerate Asda's convenience retail proposition, given that Asda does not have a convenience offering comparable to some of its main competitors (such as Sainsbury's, Tesco and Morrisons).¹⁶
27. The Parties submitted that, in line with the rationale of the Merger, the intention of TDR and the Issa Brothers is for Arthur to be integrated into Asda's business, which would remain a standalone business separate from EG.¹⁷

⁹ FMN, paragraph 1.

¹⁰ This figure includes 3 PFS pipeline sites. FMN, footnote 62.

¹¹ FMN, paragraph 151.

¹² FMN, paragraph 46.

¹³ FMN, Joint Confidential Annex 8.1, Agreement for the sale and purchase of the entire issued share capital of Arthur Foodstores Limited. FMN, paragraphs 3 and 4.

¹⁴ FMN, paragraph 9.

¹⁵ FMN, paragraph 5.

¹⁶ FMN, paragraph 20.

¹⁷ FMN, paragraph 5. The CMA notes that if [X], this may also affect the integration of Arthur into Asda.

28. The CMA considers the Parties' internal documents are broadly consistent with the Parties' submissions about the rationale for the Merger. For example, some Asda internal documents indicate that Asda will have the opportunity to grow its convenience offering through mature acquisition of existing stores. Other Asda internal documents note that Asda would potentially realise some fuel buying scale efficiencies on a national level as a result of the Merger (although this part of the rationale for the Merger is discussed only at a high level in certain documents that were specifically prepared in contemplation of the Merger).¹⁸
29. The Co-op's internal documents indicate that the sale of the Arthur business was a strategic decision, undertaken for the purpose of strengthening the Co-op's financial resilience.^{19, 20}

PROCEDURE

30. The Merger was considered at a Case Review Meeting.²¹

JURISDICTION

31. A relevant merger situation exists where two or more enterprises have ceased to be distinct and either the turnover or the share of supply test is met.²² Two or more enterprises will cease to be distinct if they are brought under common ownership or control.²³
32. Prior to the Merger, the Issa Brothers and TDR held interests in EG which conferred on each of them the ability to exercise material influence over EG.²⁴ EG is one of the portfolio companies which TDR manages.²⁵ The CMA considers that each of EG

¹⁸ See for example: FMN, Asda Confidential Annex 9.2, [3<], slide 6; FMN, Asda Confidential Annex 9.18, [3<], slide 42; FMN, Asda Confidential Annex 9.4, [3<].

¹⁹ See for example: FMN, Co-op Confidential Annex 11.29, [3<]; FMN, Co-op Confidential Annex 11.45, [3<]; FMN, Co-op Confidential Annex 11.69, [3<].

²⁰ Please see the end note on page 41.

²¹ [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2revised\)](#), January 2021, from page 43.

²² [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2revised\)](#), January 2021, part 4.

²³ Section 26 of the Act.

²⁴ In particular, each of Mr Mohsin Issa, Mr Zuber Issa and TDR have material influence over EG on account of their 25/25/50 ownership of the ordinary shares in the ultimate holding company of EG (ie [3<]) and their individual ability to influence the company policy of EG (in particular, the annual budget and business plan of EG). See Shareholders' Agreement between [3<] (EG Shareholders' Agreement), clause 4.2 to 4.3 and Schedules 1 and 3.

²⁵ And thus controls for the purposes of the Act. Other TDR portfolio companies include Aggreko, Arrow Global, BPP Holdings, Constellation Automotive Group, David Lloyd Leisure, Hurtigruten, ilke Homes, LeasePlan, Napaqaro, NKD Group, Stonegate Pub Company, and Target Hospitality. FMN, TDR Capital Confidential Annex 3.1, TDR Capital's controlled portfolio companies.

and the other TDR portfolio companies is an enterprise within the meaning of section 23(2)(a) of the Act.²⁶

33. Also, prior to the Merger, the Issa Brothers and TDR held a controlling interest over Asda Group, the parent company of Asda.²⁷ Asda also constitutes an enterprise.
34. As a result of the Merger, the Issa Brothers, TDR and Asda acquired interests which confer them a controlling interest over Arthur.²⁸ Accordingly, the CMA believes that the Merger has resulted in Asda, EG, the other TDR portfolio companies and Arthur ceasing to be distinct.²⁹
35. Arthur generated UK turnover for the financial year ending 2022 of approximately [REDACTED].³⁰ The CMA therefore considers that the turnover test in section 23(1)(b) of the Act is satisfied as Arthur's UK turnover exceeds £70 million.
36. The Merger completed on 30 October 2022. The four-month deadline for a decision under section 24 of the Act is 28 March 2023, following extension under section 25(1) of the Act.³¹
37. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.

²⁶ An enterprise is defined under section 129(1) of the Act as the activities, or part of the activities, of a business. A business includes a professional practice and any other undertaking which is carried on for gain or reward, or which supplies goods or services otherwise than free of charge.

²⁷ In particular, the Issa Brothers and TDR indirectly jointly control Asda Group, the parent company of Asda, through Bellis, which directly controls Asda Group. Each of Mr Zuber Issa, Mr Mohsin Issa and TDR have material influence over Bellis, on account of their ownership of Able Holdings Limited (Jersey) (a company jointly owned by Mr Zuber Issa and Mr Mohsin Issa) and Optima Group Sarl (a TDR affiliate) that hold 50/50 of the ordinary shares in the ultimate holding company of Bellis (ie, Bellis TopCo Limited) and their individual ability to influence Bellis's company policy (in particular, the annual budget, business plan and appointment of senior management of the Bellis group). See [REDACTED] (Bellis Shareholders' Agreement), clause 4(2)(a), clause 5.1-5.3 and Schedules 1 and 3.

²⁸ Within the meaning of section 26 of the Act. For the purposes of deciding whether two enterprises have been brought under common ownership or common control under section 26 of the Act the CMA has, pursuant to section 127(1) of the Act, treated the Issa Brothers as one person by virtue of them being regarded as associated with one another as relatives within the meaning of section 127(6) of the Act. Further to footnote 27, each of Mr Zuber Issa, Mr Mohsin Issa and TDR have material influence over Asda (a wholly-owned subsidiary of Asda Group) on account of their material influence over Bellis, through their 50/50 ownership of the ordinary shares in the ultimate holding company of Bellis. By virtue of the SPA entered into between Asda and Arthur, Asda acquired the whole issued share capital of Arthur, which in turn is now directly controlled by Asda. See FMN, Joint Confidential Annex 8.1, [REDACTED]; and Bellis Shareholders' Agreement.

²⁹ As they are each carried on by two or more bodies corporate of which one and the same person or group of persons has control in accordance with section 26(2)(b) of the Act. Asda, EG and Arthur are controlled by the Issa Brothers and TDR. The other portfolio companies are controlled by TDR which also controls Asda and EG.

³⁰ Email from the authorised representatives for Asda, Arthur, Asda Group, TDR, and the Issa Brothers to the CMA, of 13 February 2023 at 19:29.

³¹ Email from the authorised representatives for Asda, Arthur, Asda Group, TDR and the Issa Brothers to the CMA, of 23 November 2022 at 12:49; Email from the authorised representatives for the Co-op to the CMA, of 23 November 2022 at 13:15.

38. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 18 January 2023 and as such, the statutory 40 working day deadline for a decision is 14 March 2023.

COUNTERFACTUAL

39. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual).³² For completed mergers the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. The counterfactual may consist of the pre-merger conditions of competition, or conditions of competition that involve stronger or weaker competition between the merger firms than under the pre-merger conditions of competition.³³ 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.³⁴
40. 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 pre-Merger conditions of competition to be the relevant counterfactual.

FRAME OF REFERENCE

41. 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.³⁵
42. The Parties overlap in the retail supply of the following in the UK:

³² See [Merger Assessment Guidelines \(CMA129\)](#), March 2021, from paragraph 3.1.

³³ See [Merger Assessment Guidelines \(CMA129\)](#), March 2021, from paragraph 3.2.

³⁴ See [Merger Assessment Guidelines \(CMA129\)](#), March 2021, from paragraph 3.12.

³⁵ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 9.4.

- (a) road fuel;³⁶
- (b) groceries;³⁷ and
- (c) auto-LPG.³⁸

Product scope

The Parties' submissions

Retail supply of road fuel

43. The Parties submitted that, in line with the CMA's previous decisions, including *Bellis/Asda*,³⁹ the relevant product frame of reference is the retail supply of road fuel, without further segmentation between petrol and diesel. The Parties submitted that, even though petrol and diesel are not demand-side substitutes, they are substitutable from the supply-side given that both fuels are sold at the same point of sale in all PFSs.⁴⁰

Retail supply of groceries

44. The Parties submitted that, in line with the CMA's previous decisions in *Sainsbury's/Asda*,⁴¹ *Bellis/Asda*,⁴² and *Morrisons/McColl's*,⁴³ there are three broad product markets according to the size of the store, with asymmetric competition between each other, in that large stores will constrain a smaller store, but not vice versa. These are:⁴⁴
- (a) One-stop stores (**OSS**): those with a net sales area of 1,400 sq. metres or above. These stores are constrained only by other OSS.

³⁶ FMN, paragraph 99(a). The Parties submitted that the retail supply of fuel involves the sale of fuel (both petrol and diesel) to motorists via PFSs. These PFSs are typically owned either by the oil companies that supply the fuel (Company Owned Company Operated, COCO), by supermarkets, or by independent third parties (Dealer Owned Dealer Operated, DODO). FMN, paragraph 103.

³⁷ FMN, paragraph 99(c).

³⁸ FMN, paragraph 99(b).

³⁹ CMA decision of 20 April 2021, case ME/6911/20 – [Bellis Acquisition Company 3 Limited/Asda Group Limited \(Bellis/Asda\)](#).

⁴⁰ FMN, paragraph 105.

⁴¹ CMA decision of 25 April 2019, case ME/6752/18 – [J Sainsbury Plc/Asda Group Ltd Final Report \(Sainsbury's/Asda\)](#), paragraphs 7.67 to 7.69 and 7.93.

⁴² *Bellis/Asda*, paragraph 63.

⁴³ CMA decision of 8 September 2022, case ME/7002/22 – [Morrisons/McColl's \(Morrisons/McColl's\)](#), paragraphs 33 to 35.

⁴⁴ FMN, paragraph 115.

- (b) Mid-size stores (**MSS**): those with a net sales area of less than 1,400 sq. metres but above 280 sq. metres. These stores are constrained by OSS and by other MSS.
- (c) Convenience stores: those with a net sales area of less than 280 sq. metres (including those co-located with a PFS). These stores are constrained by other convenience stores, MSS and OSS.

Retail supply of auto-LPG

45. The Parties submitted that, in line with the CMA's previous decisions, including *Bellis/Asda*, the relevant product frame of reference is the retail supply of auto-LPG, which should be examined separately from the market for the retail supply of road fuel.⁴⁵

Conclusion on product scope

46. The CMA did not receive any evidence to support departing from the product frame of reference adopted in previous cases. The CMA has therefore considered the impact of the Merger in the following product frames of reference:
- (a) the retail supply of road fuel;
 - (b) the retail supply of groceries, including MSS and convenience stores; and
 - (c) the retail supply of auto-LPG.

Geographic scope

The Parties' submissions

Retail supply of road fuel

47. The Parties submitted that in its previous decisions, the CMA has considered the retail supply of road fuel at both national and local level. At the local level, the CMA has previously identified the relevant catchment area around PFSs in drive-time isochrones: (i) 10 minutes from non-supermarket PFSs; and (ii) 20 minutes from supermarket PFSs.⁴⁶

⁴⁵ FMN, paragraph 111.

⁴⁶ FMN, paragraphs 107 and 108; *Bellis/Asda*, paragraph 66.

48. The Parties did not dispute this approach and identified local overlaps based on these catchment areas, as well as providing information on a national basis.

Retail supply of groceries

49. The Parties submitted that the CMA in its previous decisions has concluded that:⁴⁷
- (a) the geographic market for large supermarkets (OSS) would be up to a 10-minute drive-time for urban areas and up to a 15-minute drive-time for rural areas.⁴⁸
 - (b) the geographic market for medium supermarkets (MSS) would be up to a 5-minute drive-time for urban areas and up to a 10-minute drive-time for rural areas.⁴⁹
 - (c) the geographic market for convenience stores is a 5-minute drive-time and/or a 1-mile radius around each convenience store. The CMA did not consider OSS and MSS outside of this catchment area.⁵⁰
50. The Parties further submitted that where convenience stores are co-located with a PFS, a catchment area based only on a 5-minute drive-time is appropriate as the majority of PFS convenience store customers drive to the stores.⁵¹
51. In line with previous cases, the Parties assessed competition within a 5-to-15-minute drive-time around each grocery store depending on the size of the store and the area in which the store is located (ie rural or urban area).⁵²

Retail supply of auto-LPG

52. In line with the CMA's approach in *Bellis/Asda* and *MFG/MRH*,⁵³ the Parties assessed the impact of the Merger on the retail supply of auto-LPG at the national and local level (based on 10-, 20-, 30- and 40-minute drive times).⁵⁴

⁴⁷ FMN, paragraph 120.

⁴⁸ *Sainsbury's/Asda*, paragraph 7.70.

⁴⁹ *Sainsbury's/Asda*, paragraph 7.70.

⁵⁰ *Sainsbury's/Asda*, paragraphs 7.97 and 7.98; CMA decision of 31 August 2018, case ME/6750/18 – [Motor Fuel Group/MRH \(GB\) Limited \(MFG/MRH\)](#), paragraphs 42 and 43; CMA decision of 23 April 2018, case ME/6716/17 – [Co-operative Group/Nisa Retail](#), paragraphs 34 and 35; CMA decision of 12 July 2017, case ME/6677/17 – [Tesco plc/Booker Group plc \(Tesco/Booker\)](#), paragraphs 46 to 48.

⁵¹ FMN, paragraph 121; *Bellis/Asda*, paragraphs 82 and 83.

⁵² FMN, paragraph 122.

⁵³ *Bellis/Asda*, paragraph 78; *MFG/MRH*, paragraph 46.

⁵⁴ FMN, paragraph 114.

Conclusion on geographic scope

53. The CMA did not receive any evidence to support departing from the geographic frame of reference adopted in previous cases. The CMA has therefore considered the impact of the Merger on the basis of the following geographic frames of reference:
- (a) for the retail supply of road fuel at a national and at a local level. At the local level, the appropriate catchment area includes: (i) non-supermarket PFSs up to 10-minutes' drive-time, and (ii) supermarket PFSs up to 20-minutes' drive-time;
 - (b) for the retail supply of groceries, at a national and at a local level. At a local level, the appropriate catchment areas are:
 - (i) for OSS, up to a 10-minute drive-time for urban areas and up to a 15-minute drive-time for rural areas;
 - (ii) for MSS, up to a 5-minute drive-time for urban areas and up to a 10-minute drive-time for rural areas;
 - (iii) for convenience stores, a 5-minute drive-time around each convenience store and a 1-mile radius around each standalone convenience store. The CMA did not consider OSS and MSS outside of this catchment area to act as a constraint; and
 - (c) for the retail supply of auto-LPG at a national and at a local level. At the local level, the assessment is based on 10-, 20-, 30- and 40-minute drive times.

Conclusion on frame of reference

54. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:
- (a) The retail supply of road fuel at a national and local level.
 - (b) The retail supply of groceries at a national and local level, at both MSS and convenience stores.⁵⁵
 - (c) The retail supply of auto-LPG at a national and local level.

⁵⁵ There is no overlap in relation to OSS, as Arthur does not have any OSS.

BACKGROUND

55. The Parties submitted that Asda's strategy is to be the lowest priced retailer [X]. Asda operates PFS forecourts focused on offering low prices to drive grocery footfall (also referred to as the 'grocery halo effect').⁵⁶ The Co-op, including the Arthur estate, follows a different business model to Asda. It considers fuel part of the retail offer, but [X].⁵⁷
56. The CMA notes that fuel and groceries account for a significant share of household spend, and that cost-of-living and inflationary pressures, including the increase in fuel prices, are a source of concern for UK consumers and businesses.⁵⁸ The CMA's annual plan stresses that where competition in a market is weak, 'the cost is borne by consumers in the form of higher prices and lower quality goods and services.' Where fewer suppliers remain in a market, and there is less innovation, consumers also suffer from reduced choice.⁵⁹ Within this context, the CMA is committed to helping mitigate the impact of cost-of-living pressures on consumers through several aspects of its ongoing work.
57. In merger investigations, the CMA will carefully consider whether a loss of competition brought about by the merger could result in higher prices or lower quality products or services for UK consumers or businesses in the markets in which the merging businesses are active. In relation to road fuel, the CMA is currently undertaking a market study into whether the retail fuel market has adversely affected consumer interests,⁶⁰ as well as a project to consider unit pricing practices online and instore in the groceries sector.⁶¹

COMPETITIVE ASSESSMENT

58. 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.⁶² 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

⁵⁶ FMN, paragraphs 178 to 189.

⁵⁷ FMN, paragraphs 190 to 193.

⁵⁸ See the CMA's [Initial update report](#) on the Supply of road fuel in the United Kingdom market study (**CMA's fuel market study**), 6 December 2022, paragraph 9.

⁵⁹ Competition and Markets Authority Annual Plan 2022/23, page 7, [Annual plan \(publishing.service.gov.uk\)](#).

⁶⁰ See [Road fuel market study - GOV.UK \(www.gov.uk\)](#).

⁶¹ See [Unit pricing - GOV.UK \(www.gov.uk\)](#).

⁶² [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 4.1.

horizontal unilateral effects in (a) the retail supply of road fuel at a local and national level; (b) the retail supply of MSS and convenience groceries at a local and national level; and (c) the retail supply of auto-LPG at a local and national level.

Retail supply of road fuel

Local assessment

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

Use of decision rules

60. In *Bellis/Asda* and *CD&R/Morrisons*,⁶³ the CMA used a decision rule to assess the competitive impact of the Merger in local areas where the parties' PFS activities overlapped.⁶⁴ In the present case, the CMA has considered overlaps between both Arthur and Asda PFSs and between Arthur and EG PFSs. The decision rule in *Bellis/Asda* took into account the competitive parameters in each local area, for example by incorporating the drive-time distance between PFSs, the number of alternatives available to customers, differentiation between the parties, and whether Asda had taken into account EG's prices when setting its own prices in a local area.
61. The CMA considered whether the decision rule set out in *Bellis/Asda* remains appropriate to assess the retail supply of road fuel in this case.⁶⁵ Specifically, the CMA considered whether the dynamics of competition as set out in *Bellis/Asda*⁶⁶ and *CD&R/Morrisons* have changed to an extent that would merit adopting a different decision rule to assess this Merger. The main dynamics of competition used to inform the *Bellis/Asda* and *CD&R/Morrisons* decision rules in relation to the retail supply of road fuel were that:⁶⁷

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

⁶³ CMA decision of 24 March 2022, case ME/6966/21 – [Clayton, Dubilier & Rice Holdings, LLC/Wm Morrison Supermarkets Limited \(CD&R/Morrisons\)](#).

⁶⁴ *Bellis/Asda*, paragraphs 153 to 156, *CD&R/Morrisons*, paragraphs 73 to 74.

⁶⁵ *Bellis/Asda*, paragraph 156.

⁶⁶ *Bellis/Asda*, paragraphs 100 to 143.

⁶⁷ *Bellis/Asda*, paragraphs 180 to 182.

- (b) there are other factors affecting choice, but these are less important;
- (c) competition is asymmetric between supermarket and non-supermarket competitors; and
- (d) motorway PFSs do not exert a material competitive constraint on non-motorway PFSs (and vice versa).

62. The CMA considers that the Parties' internal documents and, in particular, the Parties' submissions on the local pricing strategies of both Asda and Arthur, confirm that the prices of [X] and the location of [X] are [X] factors considered by the Parties [X].⁶⁸
63. The CMA's assessment of the Parties' internal documents also found an asymmetry in the constraint between supermarket PFSs and non-supermarket PFSs, similar to that outlined in *Bellis/Asda* and *CD&R/Morrisons*,⁶⁹ as Asda monitors [X].⁷⁰
64. Finally, the CMA did not receive any evidence to suggest that it should deviate from recognising that motorway PFSs do not exert a material competitive constraint on non-motorway PFSs and *vice versa*, as outlined in *Bellis/Asda*.⁷¹

The Parties' submissions on the application of the road fuel decision rule

65. The Parties did not agree with the CMA's application of the decision rule. They submitted that, while the decision rule is suitable to screen out overlap areas where competition concerns are unlikely, the CMA should undertake a more detailed local assessment in each of the areas failing the decision rule on the basis of: (a) the different factors that determine competition in each of these overlap areas, (b) the limited number of overlap areas that have failed the decision rule in the present case, and (c) the absence of time limits during the pre-notification review period to carry out such assessment.⁷²
66. The Parties submitted a local area analysis for each of the overlap areas that failed the decision rule with information on factors such as the road layout and signage in these areas, the location of the Parties' and rivals' PFS sites and the relative sizes of the attached stores. The Parties submitted that they do not compete closely in any of these overlap areas.⁷³ In addition, the Parties submitted that drive time is a

⁶⁸ FMN, paragraphs 209 and 241.

⁶⁹ *Bellis/Asda*, paragraph 135.

⁷⁰ See for example Asda [X] fuel updates, such as FMN, Issas Confidential Annex 10.11, [X].

⁷¹ *Bellis/Asda*, paragraph 143.

⁷² FMN, paragraph 248.

⁷³ FMN, Joint Confidential Annex 30, Assessment of Local Areas - Fuel.

poor proxy for convenience of location, and that in the vast majority of the local areas failing the decision rule, there are one or even two alternative competitor PFS closer to the Arthur site than Asda is, and in five out of the 11 local areas failing the decision rule (paragraph 75), the combined share of supply of the Parties post-Merger would remain below [\times]%.⁷⁴

67. The Parties further submitted that the decision rule applied by the CMA fails to take into account what they suggested were rivalry-enhancing efficiencies created by the Merger (set out in paragraphs 85 to 89). In circumstances where the CMA cannot incorporate the purported efficiencies in the decision rule, the Parties submitted that an area-by-area assessment would be more appropriate to address the synergies identified in each local area.⁷⁵ The Parties submitted that an area-by-area assessment would also be consistent with the CMA's approach in previous CMA decisions,⁷⁶ such as *MFG/MRH*, *Co-operative Group/Somerfield*,⁷⁷ and *Asda/Netto*.⁷⁸
68. In response to the Issues Letter, the Parties also argued that, by applying a decision rule, the CMA would be prevented from reviewing all evidence received from the Parties, and that doing so is required by the CMA's duty to act proportionately, to ensure the CMA's review is not disproportionately interventionist, and the CMA's duty to take account of all relevant considerations.⁷⁹

The CMA's assessment on the application of the road fuel decision rule

69. In relation to the Parties' submissions providing local analysis of each of the failing local areas, the CMA considers that the use of a decision rule is designed to assess all local areas of overlap systematically by reference to the same factors, rather than having regard to different factors in different local areas, unless there is evidence that certain factors are only applicable in certain local areas (eg imminent entry or exit).⁸⁰ The CMA notes that its approach in the current case is consistent with the principles that underpinned the local assessments in recent phase 1 cases⁸¹ and, more broadly, with the CMA's statutory duty of expedition.⁸²

⁷⁴ The Parties' response to the CMA's Issues Letter of 16 February 2023 (**Parties' response to the Issues Letter**), paragraphs 2.23 to 2.26.

⁷⁵ Parties' response to the Issues Letter, paragraphs 2.4 to 2.13.

⁷⁶ Parties' response to the Issues Letter, paragraph 2.16.

⁷⁷ Office of Fair Trading (OFT) decision of 20 October 2008, case ME/3777/08 – [Co-operative Group Limited / Somerfield Limited](#) (**Co-operative Group/Somerfield**).

⁷⁸ OFT decision of 23 September 2010, case ME/4551/10, [Asda Stores Limited / Netto Foodstores Limited](#) (**Asda/Netto**).

⁷⁹ Parties' response to the Issues Letter, paragraph 2.17.

⁸⁰ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 4.34.

⁸¹ *Bellis/Asda* and *CD&R/Morrisons*.

⁸² Enterprise Act, section 103.

70. In relation to an assessment of purported efficiencies, the CMA notes that it has discretion as to how it takes into account rivalry-enhancing efficiencies in its assessment. If the CMA finds that a merger does give rise to rivalry-enhancing efficiencies, the CMA may decide to: (i) take them into account as part of its assessment of the local areas within the decision rule, consistent with the CMA's approach in *Sainsbury's/Asda*; or (ii) take them into account after it has conducted its local assessment, to determine if the efficiencies could prevent an SLC from arising in a local area. In this case, the CMA has taken the latter approach, and an assessment of the Parties' submissions on efficiencies is set out at paragraphs 90 to 98.
71. The CMA has considered whether the evidence it has received is relevant to the application of a decision rule in this case. The CMA considers that it took into account all relevant evidence in formulating the decision rule, including the differentiated business model of the Parties and the fact that price and location are the two most important parameters of competition. In relation to specific evidence relating to specific local factors (eg signage and road layout), the CMA considers that these are not factors unique to the areas failing the decision rule, and, as the Parties have not provided the CMA with information in relation to additional factors on a systematic basis across all local areas in which the Parties overlap, there is no reason to assess these local areas independently of the decision rule. As such, the CMA considers that the use of the decision rule has not prevented it from taking into account all relevant evidence.
72. As such, the CMA believes that the decision rule set out below identifies those local areas which give rise to a realistic prospect of an SLC.

Decision rule

73. Considering the evidence set out above, the CMA applied the decision rule set out in *Bellis/Asda* to identify the number of local areas where there is a realistic prospect of an SLC.
74. On the basis of the decision rule applied by the CMA, the CMA considers that the Merger gives rise to a realistic prospect of an SLC in the retail supply of road fuel in local areas where any of the following conditions are satisfied.⁸³

⁸³ References to Asda in limbs 1b, 2c, 3a, 3b, 3c and 4 of the decision rule do not refer to EG PFSs. These limbs recognise the asymmetric competition between supermarket and non-supermarket competitors and the role of Asda within the supermarket segment (*Bellis/Asda*, paragraph 100). The CMA has considered EG PFSs as non-supermarket PFS given that (i) EG PFSs are not co-located with supermarkets and (ii) EG and Asda supermarkets are operated under different models with EG running under a 'dealer-owned' business model (see [Initial update report](#) of the CMA's fuel market study, paragraph 43), rather than a 'supermarket' model.

(a) Fascia count

- (i) the Merger leads to a reduction in competing PFSs from four to three or fewer, in terms of owner (**limb 1a**); or
- (ii) Arthur is the centroid, Asda is located within a 5-minute drive-time, and the Merger would lead to a reduction in competing PFSs from five to four or fewer in terms of owner (**limb 1b**); or

(b) Market shares

- (i) the Parties' PFSs are located within a 10-minute drive-time from each other and their combined market share by volume is equal to or higher than 40%, with an increment of 5% or more (**limb 2a**); or
- (ii) the Parties are located more than a 10-minute drive-time from each other and their combined market share by volume is equal to or higher than 45%, with an increment of 5% or more (**limb 2b**); or
- (iii) Arthur is the centroid, Asda is located within a 5-minute drive-time, and the Parties' combined market share by volume is equal to or higher than 30% with an increment of 5% or more (**limb 2c**); or

(c) Supermarket PFSs⁸⁴

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

(d) Asda's pricing strategy:

⁸⁴ The CMA considers Asda, Morrisons, Sainsbury's, and Tesco to be supermarket PFSs.

- (i) Asda is the centroid, Arthur is one of the 15 closest non-supermarket PFS to the Asda PFS and the volume-weighted average difference between (i) the lowest price among the 15 closest non-supermarket PFSs and the seven closest supermarket PFS ignoring any Arthur PFSs that may be among the 15 closest non-supermarket PFSs; and (ii) the lowest price among the 15 closest non-supermarket PFSs and the seven closest supermarket PFS (ie the value in (i) minus the value in (ii)) is equal to or higher than 1 ppl over the period between 1 January 2021 and 31 December 2021 (**limb 4**).

Results of the decision rule

- 75. Using the decision rule set out above, the CMA considers that the Merger results in a realistic prospect of an SLC in 11 local areas in relation to the retail supply of road fuel.⁸⁵ These areas are listed in Annex 1.

National assessment

- 76. The CMA considered whether the Merger could give rise to horizontal unilateral effects in the retail supply of road fuel on a national basis.
- 77. The Parties submitted that the national market for road fuel is highly competitive, with several large providers (including Tesco, Morrisons, Sainsbury's, Shell, and BP), and a large number of small providers.⁸⁶ The Parties further submitted that they have differentiated business models and offerings.⁸⁷
- 78. The Parties submitted that, post-Merger, they would have a low combined share of [X]% based on the number of PFS sites, and [X]% based on the volume of fuel sold, with an increment of a little over [X]% on both measures.⁸⁸
- 79. The CMA found that, consistent with the Parties' submissions, there are many large and small rivals present in the market for road fuel at a national level. Moreover, evidence from the Parties showed that retail prices are predominantly set at a local level, with reference to local rivals.

⁸⁵ Work undertaken by the CMA confirmed that two areas were erroneously identified by the Parties as failing limb 4 of the decision rule – Asda Tilehurst and Asda East Retford. The Parties had identified sites where the Co-op was the cheapest provider by more than 1ppl on more than 1% of days, rather than instances where the volume-weighted average difference between the cheapest site monitored by Asda was not greater than 1ppl over a year (depending on whether or not the Arthur site was included in the competitor set). After a careful analysis of the data prior to the FMN, the CMA concluded that these two local areas did not fail the decision rule.

⁸⁶ FMN, paragraph 173.

⁸⁷ FMN, paragraphs 175 to 177.

⁸⁸ FMN, Joint Confidential Annex 25, Retail Supply of Road Fuel (national) - Parties' combined shares.

80. On the basis of the Parties' limited combined national share of supply, the availability of competing alternative suppliers, and the nature of the constraint posed by Arthur at the national level, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the retail supply of road fuel at the national level.

Road fuel efficiencies

81. Asda submitted to the CMA that the Merger will result in rivalry-enhancing efficiencies. Rivalry-enhancing efficiencies change the incentives of the merger firms and induce them to act as stronger competitors to their rivals.⁸⁹ Rivalry-enhancing efficiencies may prevent an SLC by offsetting any anticompetitive effects resulting from the merger.⁹⁰ To do this, efficiencies need to enhance rivalry in a way that counteracts the effects on competition identified in the SLC assessment. Efficiencies due to the merger must be likely to strengthen the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers.⁹¹
82. As set out in the preceding paragraph, to result in rivalry-enhancing efficiencies a merger must introduce a change that induces the merged entity to act as a stronger competitor. This is not the same as a merged entity choosing to change the way it operates or integrating one merger firm into the operating model of the other merger firm. Many mergers alter the operating model of at least one of the merger firms and prices (or non-price features) can change as a result of different commercial strategies being adopted. Rather, rivalry-enhancing efficiencies arise where a merger changes the ability and the incentives of the merged entity to respond to market forces in a pro-competitive manner. Merger-specific changes that are likely to result in such a change are, for example, a reduction in their marginal (or variable) costs, the bringing together of complementary assets in research and development activities or a reduction in incremental innovation costs.⁹²
83. Although it is not uncommon for firms to make efficiency claims in merger proceedings, it is rare for a merger to be cleared on the basis of efficiencies.⁹³ This is normally because efficiencies can only form the basis for clearance where they are merger-specific and rivalry-enhancing, and because the evidence supporting those claims is difficult to verify and substantiate.⁹⁴ Given the legal test for reference is met if the CMA has a reasonable belief, objectively justified by relevant facts, that

⁸⁹ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.3

⁹⁰ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.4

⁹¹ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.9

⁹² [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraphs 8.3, 8.10 and 8.11

⁹³ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraphs 8.1 and 8.6

⁹⁴ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.6

there is a realistic prospect that the merger will give rise to an SLC, the evidence supporting any offsetting efficiencies must be such to remove any realistic prospect that an SLC could still arise.

84. This section considers the evidence on the efficiencies suggested by Asda within the applicable framework for assessment.

The Parties' submissions

85. Asda submitted that its pricing strategy and incentives are different to the Co-op's pricing incentives at the Arthur sites. Asda submitted that it operates its PFSs by considering the impact of its road fuel business on its grocery business. Asda stated that it sets fuel prices with the effect on grocery sales in mind (the halo effect), and that its pricing strategy is to be the lowest price fuel retailer [§].⁹⁵ Asda submitted that its pricing policy is no different [§]. Asda submitted that this indicates its incentives to maintain low road fuel pricing [§].⁹⁶
86. Asda submitted that post-Merger, by dint of being transferred to the Asda brand, Arthur sites will undergo a change in pricing incentives, as keeping the pre-Merger prices at Arthur sites would negatively impact Asda's brand proposition. Asda submitted that as a result of the Merger, prices at Arthur sites will be reduced, generating a rivalry-enhancing efficiency.⁹⁷ Asda also submitted that such lower prices at Arthur sites would increase local competitive constraints on rivals, which would give rise to an incentive for those rivals to reduce their prices.⁹⁸
87. In addition, Asda submitted that it plans to optimise synergies with the Arthur PFS estate, [§] to generate lower [§] costs.⁹⁹ Such synergy benefits with Arthur would include [§].¹⁰⁰
88. In response to the CMA's Issues Letter, Asda submitted that there is no clear relationship between [§]¹⁰¹.¹⁰² Asda further submitted that Arthur does not exert

⁹⁵ FMN, Joint Confidential Annex 13.1, ASDA pricing policies and consumer benefits, page 3.

⁹⁶ FMN, Joint Confidential Annex 13.1, ASDA pricing policies and consumer benefits, section 2.3, pages 7 and 8.

⁹⁷ FMN, Joint Confidential Annex 13.1, ASDA pricing policies and consumer benefits, section 2.1, pages 4 and 5.

⁹⁸ FMN, Joint Confidential Annex 14.1, Enhanced Rivalry Efficiencies – Supplemental Submission, pages 2 to 3, and 10; Parties' response to the Issues Letter, paragraph 4.13.

⁹⁹ FMN, Joint Confidential Annex 14.1, Enhanced Rivalry Efficiencies – Supplemental Submission, page 7.

¹⁰⁰ FMN, Asda Confidential Annex 9.7, 3 year plan for Arthur.

¹⁰¹ Parties' response to the Issues Letter, paragraph 4.7.

¹⁰² Parties' response to the Issues Letter, paragraph 4.46(ii). In response to the Issues Letter, Asda submitted that the evidence seen by the CMA suggesting that [§] has been misinterpreted by the CMA. Asda submitted that while [§], its policy is always to [§]. Parties' response to the Issues Letter, paragraphs 4.51 to 4.63.

any material competitive constraint on Asda, as Asda's fuel pricing policies are driven by [X], as opposed to [X].¹⁰³

89. Asda also submitted that its presence in a local area does not prevent consumer price benefits from arising at these local areas, as customers may currently choose to purchase from an Arthur site due to convenience of location (ie, proximity to their home or commuting route), and would benefit from a price reduction at their preferred station.¹⁰⁴

The CMA's assessment

90. In considering Asda's submissions, the CMA has had regard to the following:
- (a) the CMA's merger guidelines;
 - (b) the high level of confidence needed to accept efficiencies given the realistic prospect threshold for an SLC finding;¹⁰⁵ and
 - (c) the fact that merger control constitutes a one-off intervention by the CMA, such that if any claimed efficiency does not materialise, the CMA would have no ability to intervene (and therefore that the SLC would persist).
91. In considering Asda's submissions, the CMA has considered whether the proposed merger efficiencies will enhance rivalry in the supply of road fuel in the local areas in which the CMA has found an SLC; are merger-specific; will be timely, likely and sufficient to prevent the SLCs from arising; and will benefit consumers in the UK.¹⁰⁶
92. The CMA considers that Asda's submissions, in the main, relate to a change in the strategy and business model of the acquired sites rather than an efficiency arising from the merger. Asda has not submitted evidence substantiating that the purported efficiency is a result of (marginal or variable) cost savings as envisaged by the CMA's guidance (see paragraph 82).¹⁰⁷

¹⁰³ Parties' response to the Issues Letter, paragraph 4.39.

¹⁰⁴ Parties' response to the Issues Letter, paragraph 4.19.

¹⁰⁵ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraphs 8.1.

¹⁰⁶ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.8.

¹⁰⁷ The Parties failed to provide verifiable evidence to support their claims on procurement efficiencies, in line with the CMA's guidance ([Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.7) and in line with the need for 'a robust reflection of the likely level of recurring procurement savings expected to result from the Merger', as set out in *Sainsbury's/Asda* (*Sainsbury's/Asda*, paragraph 16.171). The evidence provided by the Parties on procurement efficiencies are in the form of high-level quotes from investor presentations (see for example: Parties' response to the Issues Letter, IL Asda Confidential Annex 3, Q3 2022 Trading Update Investor Presentation, page 8), a due diligence report which was prepared for the purpose of this Merger (see FMN, Joint Confidential Annex 14.2, Project Arthur Financial, Tax and Pensions Due Diligence Report, page 20), and other internal documents discussing the Merger on a

93. Notwithstanding this position, the CMA has considered the purported efficiencies within the CMA's established framework, outlined in paragraph 91.

Enhancement of rivalry

94. Asda provided evidence which, it claimed, shows that:¹⁰⁸
- (a) Asda sites were consistently cheaper than the Co-op sites in 2019 and 2021, ie both pre- and post-pandemic. This analysis included a comparison of Asda sites currently facing a similar level of competition (by fascia count) to Arthur sites post-Merger.¹⁰⁹
 - (b) Prices at the 11 Arthur sites that fail the road fuel decision rule, as well as prices throughout the Arthur estate, would be cheaper post-Merger, as a result of Asda applying its monitoring and pricing policy to these sites.¹¹⁰
 - (c) Prices were reduced and fuel volumes increased at: (i) 3 Co-op PFSs in 2014,¹¹¹ and (ii) 15 Rontec PFSs in 2015, following their acquisition by Asda.¹¹²
 - (d) Prices at the 12 standalone EG sites rebranded in 2022 as 'Asda on the Move' (**AOTM**), were cheaper than prices at the Arthur sites.¹¹³
 - (e) Asda realised synergies following the acquisition of Netto in 2010.¹¹⁴
 - (f) According to a [§<] report, Asda expects to realise [§<] synergies as a result of the Merger.¹¹⁵ Asda's intentions to realise synergies as a result of the Merger are also evidenced in its internal documents provided to the CMA.¹¹⁶
95. Asda further submitted that the increase in fuel volume, and the associated potential impact on Asda's pricing incentives, is materially lower than the increase considered by the CMA in *Bellis/Asda*, and as a result, the Merger would not be sufficient to

general basis (see for example: FMN, Asda Confidential Annex 9.7, 3 year plan for Arthur; and FMN, Asda Confidential Annex 9.2, Project Arthur Co-op Board Paper, page 6).

¹⁰⁸ See also the Parties' response to the Issues Letter, Table 7.

¹⁰⁹ FMN, Joint Confidential Annex 13.1, ASDA pricing policies and consumer benefits, section 4.

¹¹⁰ FMN, Joint Confidential Annex 13.1, ASDA pricing policies and consumer benefits, section 5.

¹¹¹ FMN, Joint Confidential Annex 13.1, ASDA pricing policies and consumer benefits, section 3.

¹¹² FMN, Joint Confidential Annex 15.1, Supplemental evidence on ASDA fuel pricing, section 3.

¹¹³ FMN, Joint Confidential Annex 15.1, Supplemental evidence on ASDA fuel pricing, section 2; and FMN, Joint Confidential Annex 15.2, Location: Accessible where we're needed.

¹¹⁴ FMN, Joint Confidential Annex 14.3, Netto Post Audit, June 2012; and FMN, Joint Confidential Annex 14.4, Synergies ASDA/Netto.

¹¹⁵ FMN, Joint Confidential Annex 14.2, Project Arthur, Financial, Tax and Pensions Due Diligence.

¹¹⁶ Parties' response to the Issues Letter, paragraph 4.32.

incentivise a change in Asda's pricing behaviour, in line with the CMA's findings in *Bellis/Asda*.¹¹⁷

96. Leaving aside whether the benefits claimed by Asda are capable of being considered as efficiencies for the purposes of merger control, the CMA notes that the evidence on the nature and extent of these benefits is mixed (and therefore does not fully support Asda's position). In particular:
- (a) Some of the evidence available to the CMA indicates that Asda's road fuel pricing varies over time and location depending on competitive conditions. For example, Asda [REDACTED].¹¹⁸ In this regard, the CMA notes that all of the local areas in which an SLC arises fail the decision rule because the local market will be concentrated post-Merger (or the Merger will otherwise give rise to the loss of an important constraint) which will lead to higher road fuel prices (absent any efficiencies) for consumers. The CMA notes that some areas (such as the areas around the Arthur PFSs at Lauder and Earlston) would be highly concentrated post-Merger (with no rivals to Asda left at all in some cases), and could therefore fall into the sub-set of Asda sites that face lower competition.¹¹⁹
 - (b) Some of the evidence available to the CMA gives rise to material doubts that the purported benefits to consumers will be as significant as stated by Asda, because any price cuts at the Arthur sites may be less than those stated by Asda and/or price rises may occur at Asda sites. In particular:
 - (i) As noted above, Asda [REDACTED] deviates from its pricing strategy, indicating that Asda's submissions may overstate the reputational costs to Asda of not significantly reducing prices. In 2021, Asda's PFSs were the lowest priced fuel seller in their local area on only [REDACTED]% of days (which also suggests that Asda's adherence to its strategy has dropped [REDACTED] from 2019, when Asda's PFSs were the lowest priced fuel seller in their local area on [REDACTED]% of days).¹²⁰
 - (ii) The evidence available to the CMA also indicates that Asda's pricing incentives at the Arthur sites will not be as significant as claimed. In particular, any 'halo effect' (through which overall profitability and performance in road fuel and grocery is linked) is likely to be more limited

¹¹⁷ Parties' response to the Issues Letter, paragraph 4.31.

¹¹⁸ FMN, Asda Confidential Annex 27, Price Gaps, sales and margin. Asda's submissions that [REDACTED].

¹¹⁹ The CMA notes that the evidence submitted by the Parties in relation to Asda's previous acquisitions of 3 Co-op sites in 2014 and 15 Rontec sites in 2010 involved sites in less concentrated areas which would not fail the decision rule currently applied by the CMA in relation to the supply of road fuel.

¹²⁰ FMN, Joint Confidential Annex 13.1, ASDA pricing policies and consumer benefits, annex A, page 21. [REDACTED] See FMN paragraph 209a.

in relation to the Arthur sites given that they are not co-located with an Asda supermarket. As such, the incentives to cut road fuel prices will largely be determined by the value this has to the overall Asda brand as a value retailer rather than the 'halo effect'.

- (iii) There is some evidence [X]. Asda is already introducing a structural/organizational change by shifting EG sites to AOTM sites, entering into the convenience sector [X], and [X].¹²¹ Further, the initial findings of the CMA's fuel market study show supermarket fuel margins have been rising, and rising faster than margins of non-supermarket PFSs. Such changes are consistent with the position that non-structural factors (eg business models) can alter the price offer to customers, particularly when the price offer is a complex combination of using fuel to drive grocery spend.¹²²

Merger-specific

97. In addition, the CMA does not consider that the benefits claimed by Asda are Merger-specific (ie reliant on the Merger in question and not capable of being brought about by other means). In particular:
- (a) Asda is, by definition, already present in each of the local areas in which the CMA has identified a realistic prospect of an SLC. On this basis, to the extent that Asda's pricing provides benefits for consumers, these benefits can already be obtained today (and competitors' pricing in those areas will already reflect competition with Asda).
 - (b) The Merger is not needed for Asda or Arthur to adopt lower prices in the local areas in which the CMA has identified a realistic prospect of an SLC. In particular, while Asda suggested that the Merger would give rise to certain procurement efficiencies, there is little evidence to suggest that these are Merger-specific. As Asda is already [X], it is not clear why [X].¹²³ In any case, the CMA notes that Asda has not substantiated or evidenced the claimed procurement efficiencies, as the evidence provided to the CMA was very limited.¹²⁴ In relation to the Arthur sites, Asda is already present in the local areas where an SLC arises, such that any procurement efficiencies at the

¹²¹ FMN, Asda Confidential Annex 9.18, New Formats and Channels, slide 52.

¹²² See [Initial update report](#) on the CMA's fuel market study, paragraphs 8.45 to 8.47, and 8.143(a).

¹²³ See for example Arthur's low increment in Asda's existing share of supply, in paragraph 78 above.

¹²⁴ See footnote 107.

overlapping Arthur sites would not provide additional benefit to motorists in the local areas.

- (c) Finally, any efficiencies as proposed by Asda are contingent on Asda maintaining its current strategy (and retaining the Arthur sites). As noted above, the evidence available to the CMA on Asda's pricing policy is mixed, to some extent, and does not fully support Asda's position that certain benefits will automatically accrue to customers in the local areas within the scope of the Merger as a result of the adoption of Asda's existing business model.

Timely, likely and sufficient, and will benefit UK consumers

98. Given the CMA's conclusions above, the CMA has not found it necessary to consider whether the efficiencies submitted by Asda will be timely, likely and sufficient, nor whether they will benefit UK consumers.

Retail supply of groceries

Local assessment – MSS groceries

Use of decision rules

99. Consistent with its recent practice in relation to mergers affecting competition in local areas, the CMA considered it appropriate to assess the effect of the Merger in the supply of MSS groceries in local areas through the use of a decision rule. The use of a decision rule allows the CMA to carry out a systematic local assessment of areas of overlap. Moreover, previous in-depth work on MSS groceries in *Sainsbury's/Asda* has helped the CMA to develop the decision rule in this case. The CMA believes that such an approach is fair, consistent, and effective in identifying local areas where there is a realistic prospect of an SLC, in particular by ensuring that the same factors are taken into account across all local areas.
100. To assess the competitive impact of the Merger in local areas where the Parties' activities overlap based in the supply of MSS groceries, the CMA sought to devise a decision rule that:
- (a) reflects the key parameters of competition at the local level;
 - (b) assesses all local areas of overlap systematically by reference to the same factors, rather than having regard to different factors in different local areas, unless there is evidence that certain factors are only applicable in certain local areas; and

- (c) enables the efficient conduct of the CMA's investigation, having regard to the limited time available within a phase 1 investigation to carry out a detailed competitive assessment of a number of local areas.

- 101. The CMA took into account all relevant evidence (including evidence gathered from the Parties and third parties) in formulating the decision rule, including the fact that price and location are the two most important parameters of competition in the retail supply of groceries. The decision rule takes into account relevant features of local competition, for example by taking into account drive times and the relative strengths of different types of competitors.
- 102. The CMA believes that the decision rule is an appropriate way of identifying those local areas which give rise to a realistic prospect of an SLC.

The Parties' submissions on the application of the MSS decision rule

- 103. The Parties submitted that the use of a decision rule is not appropriate in this case, and that the CMA should, instead, apply an initial filter and then carry out more detailed local assessments for local areas failing that filter. The Parties submitted that such an approach would be consistent with the approach set out in the CMA's Merger Assessment Guidelines given (i) the quality of data available during the pre-notification review period and (ii) the limited number of MSS overlaps (five).¹²⁵
- 104. The Parties submitted (i) a survey of customers at each of the Parties' stores in each of the local areas in which the Parties overlap, with questions on diversion and awareness of competitor stores, and (ii) a local area analysis for each overlapping catchment area with analysis of the location and sizes of the Parties' and rivals' stores. The Parties submitted that they do not compete closely in any of the local areas failing the decision rule. The Parties further submitted that the rivalry-enhancing synergies identified in each area should be taken into account in the decision rule, otherwise the CMA should conduct an area-by-area assessment of the overlaps.¹²⁶ In addition, the Parties submitted that diversion data should have been systematically taken into account in the decision rule applied by the CMA, in accordance with paragraph 4.34 of the Merger Assessment Guidelines.¹²⁷

The CMA's assessment on the application of the MSS decision rule

- 105. The CMA is required to take reasonable steps to acquaint itself with relevant information to enable it to answer the statutory questions (in this case whether the

¹²⁵ FMN, paragraph 284.

¹²⁶ Parties' response to the Issues Letter, paragraph 2.5.

¹²⁷ Parties' response to the Issues Letter, paragraph 3.6.

Merger gives rise to a realistic prospect of an SLC in any market(s) in the UK).¹²⁸

The investigations necessary to achieve this require evaluative assessments to be made by the CMA and will necessarily take account of the applicable legal threshold, the constraints of the statutory timetable and its duty of expedition. In this case, the CMA is satisfied that it has sufficient relevant evidence to design a decision rule that applies a consistent approach sufficiently capturing the key parameters of competition. This decision rule can be systematically applied to all overlaps enabling the CMA to identify those overlaps where the merger gives rise to a realistic prospect of an SLC. In light of the evidence available in this case, the CMA considers that conducting a detailed area-by-area assessment of each local area in which the Parties overlap would have involved disproportionate time and resource and is not necessary in order for it to answer the statutory questions.

106. The CMA considers that the decision rule captures the key factors of competition in the local areas where the Parties overlap (including the relative strengths and locations of different types of competitors, and by considering different weightings for competitors within the decision rule), and appropriately identifies local areas with a realistic prospect of an SLC.
107. The CMA's published guidance makes clear that surveys can be a useful source of evidence in merger reviews, particularly in phase 2 investigations.¹²⁹ But that guidance also makes clear that the way in which a survey is carried out is important for the CMA to be able to take that survey into account, with merging parties wishing to conduct a survey for a merger case being strongly encouraged to contact the CMA in the early stages of the survey process to discuss their proposed design, including a draft questionnaire (if available) and wider aspects of the survey methodology.¹³⁰
108. In this case, the CMA considers that the Parties failed to engage sufficiently at the early stages of the survey process which has, in practice, limited the weight that the CMA has been able to place on these surveys. The CMA notes that the Parties' first written submission referencing the MSS surveys was the first draft merger notice submitted on 28 October 2022. Rather than providing a proposed survey design and

¹²⁸ In *Intercontinental Exchange Inc v Competition and Markets Authority* [2017] CAT 6, paragraph 30, the CAT accepted that the principles identified in its previous judgment in *BAA Ltd v Competition Commission* [2012] CAT 3 apply in the context of a review of CMA merger decisions. This confirmed that the CMA must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it; that the extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CMA, as to which it has a wide margin of appreciation; and that the CMA must have evidence available to it of some probative value on the basis of which it could rationally reach the conclusions it did.

¹²⁹ [Good practice in the design and presentation of customer survey evidence in merger cases](#), paragraph 1.15

¹³⁰ [Good practice in the design and presentation of customer survey evidence in merger cases](#), paragraph 1.23.

methodology, the Parties simply stated that they ‘undertook’ surveys,¹³¹ provided the results for a survey which they had already completed relating to the Arthur Mytholmroyd and Asda Halifax sites in West Yorkshire¹³² and stated that the remaining surveys were in the process of being completed.¹³³ As such, the CMA does not consider that the Parties engaged with the CMA sufficiently early (for example, by providing a draft questionnaire or engaging on survey methodology before commencing field work). The Parties then finalised the results and presented the MSS survey results to the CMA on 7 December 2022. In response to the Issues Letter, the Parties submitted that the CMA could have raised its concerns with the surveys following the Parties’ presentation of the results in December.¹³⁴ The CMA notes however, that in line with the CMA’s standard approach in merger investigations, the CMA set out its preliminary views on MSS survey evidence submitted by the Parties at the state of play call held between the Parties and the CMA on 8 February 2023.

109. In addition, to the extent that the CMA has nevertheless been able to consider the survey evidence submitted by the Parties, the completed surveys do not meet the CMA standards for the design and presentation of customer survey evidence, as set out in its published guidance.¹³⁵ For instance, all of the diversion ratios from Arthur to Asda sites,¹³⁶ as calculated by the Parties, are based on sample sizes below the minimum of 100 typically required for rigorous analysis.¹³⁷ The Parties submitted that the number of completed interviews was over 100 in each case, with samples ranging from 101 to 133.¹³⁸ However, these figures include respondents who gave ambiguous responses and were thus excluded from the Parties’ analysis of diversion ratios; the sample used to calculate diversion ratios was comfortably below 100 for all three areas failing the decision rule. While the Parties submitted that their approach was ‘conservative’,¹³⁹ the CMA does not consider that excluding ambiguous customer responses is necessarily a conservative approach.¹⁴⁰

¹³¹ Draft Merger Notice submitted on 28 October 2022 (**DMN**), paragraph 222.

¹³² Joint Confidential Annex 11.7(c)

¹³³ DMN, footnote 90.

¹³⁴ Parties’ response to the Issues Letter, paragraph 1.7.

¹³⁵ [Good practice in the design and presentation of customer survey evidence in merger cases](#).

¹³⁶ In areas in which the CMA has identified concerns.

¹³⁷ [Good practice in the design and presentation of customer survey evidence in merger cases](#), paragraph 2.31. The CMA further notes that the minimum of 100 completed interviews as described in the Good practice document is set in the context of a phase 2 merger investigation. Given the survey conducted by the Parties was during a phase 1 merger investigation the CMA considers that in this context a higher number of completed interviews may be appropriate given the higher standard of proof required in a phase 2 investigation to find an SLC.

¹³⁸ Parties’ response to the Issues Letter, paragraphs 3.27 and 3.28.

¹³⁹ Because, according to the Parties, including ambiguous responses (such as ‘got my groceries near to home’ instead of naming a store that the customer would have switched to) would dilute diversion between the Parties (Issues Meeting slide deck, page 47).

¹⁴⁰ Given that ambiguous responses may have related to diversion between the Parties.

110. Furthermore, in this instance the Parties have provided limited evidence to show that the level of diversion is consistent with no SLC arising from the Merger. The Parties' survey evidence in this case estimated diversions of between [X]% and [X]%, diversion ratios which have given rise to competition concerns in some previous cases in the groceries sector.¹⁴¹

111. As a result, following consideration of this evidence, the CMA has decided that, for the reasons set out above, it would not be appropriate to place any weight on the survey evidence submitted by the Parties.

Decision rule

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

113. As it has done in previous merger investigations, the CMA has assessed the impact of the Merger by reference to the number of alternative MSS and OSS available to customers in a local area, adjusted by the competitive constraint exerted by different brands and by different sizes of store.¹⁴²

114. The CMA believes that an appropriate threshold with which to identify local areas where the Merger gives rise to a realistic prospect of an SLC in the retail supply of groceries in MSS is where, after the Merger, there is a reduction in fascia and there remain three or fewer fascia in addition to the Parties' sites.^{143, 144}

Results of the decision rule

115. Using the decision rule set out above, the CMA considers that the Merger results in a realistic prospect of an SLC in 3 local areas¹⁴⁵ in relation to the retail supply of groceries at MSS. These areas are listed in Annex 1.

¹⁴¹ See for example, *Sainsbury's/Asda* final report, paragraph 8.302. The 2.75% GUPPI threshold in *Sainsbury's/Asda* reflected efficiencies, so the critical threshold absent efficiencies would be lower than 13%.

¹⁴² See the CMA's assessment in *Tesco/Booker* and *Sainsbury's/Asda*.

¹⁴³ This is consistent with the threshold used in the CMA decision of 27 September 2018, case ME/6752/18 – *J Sainsbury Plc/Asda Group Ltd* (*Sainsbury's/Asda* phase 1 decision), paragraphs 73 to 77. It is also consistent with the threshold used for the decision rule in the competitive assessment for the retail supply of convenience groceries, as set out in paragraph 119.

¹⁴⁴ The CMA considered whether it was appropriate to weight rival fascia but found that in this case the precise weightings were not determinative of the number of SLCs identified.

¹⁴⁵ The CMA notes that one local area, Earlstown, fails both under the MSS and the road fuel decision rules.

Local assessment – convenience groceries

Decision rule

116. In line with the CMA's decisions in *Bellis/Asda* and *CD&R/Morrisons*,¹⁴⁶ the CMA has applied a decision rule based on a fascia count to identify areas where the Merger gives rise to a realistic prospect of an SLC. This decision rule adopted a weighted fascia count adjusted by the competitive constraint exerted by different types of convenience store.
117. In previous cases the CMA found that the main factors that affect customers' choice of convenience groceries at a local level are location, size/range of products, and brand.¹⁴⁷ The CMA has not received evidence to suggest that there has been any change from these main parameters of competition.
118. The evidence reviewed by the CMA has not indicated that it should deviate from the decision rule set out in *Bellis/Asda* to identify the number of local areas where there is a realistic prospect of an SLC. The CMA has adopted a fascia count that is weighted as follows:
- (a) Asda, Sainsbury's, Tesco, Morrisons/McColl's, the Co-op, Waitrose, Whole Foods and Dunnes were given a weight of 1 on the basis that they exert a greater competitive constraint than other types of convenience retailers.¹⁴⁸
 - (b) Aldi, Lidl and Marks & Spencer were given a weight of 0.8 as these retailers do not sell tobacco products,¹⁴⁹ and given Aldi and Lidl's lack of focus on convenience missions.¹⁵⁰
 - (c) The symbol group stores such as Spar, Nisa, Booker, Londis, Premier, Budgens, Costcutter, One Stop, Central PH Retail, Key Store, Key Shop, Best One, Centra, Mace, and CK Supermarkets were given a weight of 0.8 when assessing the local areas where Asda is the centroid. The symbol group stores were given a weight of 1 when Arthur is the centroid, and the convenience groceries brand is a symbol brand.

¹⁴⁶ *Bellis/Asda*, paragraphs 197 to 199, *CD&R/Morrisons*, paragraphs 91 to 93.

¹⁴⁷ See *Tesco/Booker* Final Report; *Sainsbury's/Asda*; and *Bellis/Asda*, paragraph 195.

¹⁴⁸ Iceland was not counted as a fascia to reflect that it exerts a weak competitive constraint compared to convenience grocery retailers (such as Tesco, the Co-op and Sainsbury's) and Symbol group retailers due to its lack of focus on convenience missions and because it does not supply tobacco.

¹⁴⁹ Evidence from the Association of Convenience Stores indicates that, of the top ten product categories of sales at convenience stores co-located at PFSs, tobacco was the category producing the highest sales. See [ACS Forecourt Report 2020.pdf](#), page 3.

¹⁵⁰ *Tesco/Booker* Final Report, paragraph 7.50.

- (d) Independent retailers were given a weight of 0.5 to reflect that they exert a weaker competitive constraint than convenience grocery retailers (such as Tesco, the Co-op and Sainsbury's) and symbol group retailers.

119. For the retail supply of convenience groceries, the CMA applied a decision rule by which the Merger gives rise to a realistic prospect of an SLC in the retail supply of convenience groceries in local areas where, after the Merger, there is a reduction in fascia,¹⁵¹ and there remain three or fewer (weighted) fascia in addition to the Parties' sites.¹⁵²

The Parties' submissions on the application of the convenience decision rule

120. The Parties carried out a local overlap analysis, based on the decision rule used in *Bellis/Asda* and set out above.¹⁵³ On this basis, the Parties did not identify any overlapping areas that failed the decision rule.

The CMA's assessment

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

National assessment

122. The Parties submitted that they have a different offering with respect to groceries, with Asda operating 581 large retail format stores (155 MSS and 426 OSS) and only 56 convenience stores;¹⁵⁴ compared to Arthur operating 124 convenience stores and only 8 MSS supermarket stores (with, at most, 575 square meters). However, the CMA notes that EG operates a further 365 convenience stores.¹⁵⁵

123. The Parties submitted that they have a combined share of supply by number of supermarket stores of [\times] $\%$,¹⁵⁶ with Arthur's increment representing less than

¹⁵¹ The Merger does not include all of the Co-op's grocery stores. As such, the Merger does not lead to a reduction in fascia in areas in which a non-Arthur Co-op remains. Work undertaken by the CMA prior to the FMN confirmed that two of these areas – ie, Arthur Mytholmroyd (MSS) and Arthur Pont Yates (convenience store) – were erroneously identified by the Parties as failing the decision rule.

¹⁵² The CMA did not have complete information on the owners/operators of Symbol group stores or independent stores. The CMA treated stores under the same Symbol brand as a single fascia (even though they might have different owners/operators). Stores under different Symbol brands and independent stores were treated as individual fascia, although it is possible that they may have the same owner/operator.

¹⁵³ FMN, paragraph 301.

¹⁵⁴ Excluding Asda's MSS, OSS and convenience store pipeline sites.

¹⁵⁵ FMN, paragraph 272.

¹⁵⁶ The Parties submitted that the total number of supermarket stores in the UK is estimated to be over 12,704. See FMN, paragraph 273.

[X]% at a national level. The Parties further submitted that they will continue to face strong competition from the other supermarkets, such as Tesco, Sainsbury's and Morrisons, as well as discounters and small players after the Merger.¹⁵⁷ Consistent with this evidence, the CMA found that there are a wide range of competing grocery store providers that will continue to exert a competitive constraint on the Parties post-Merger.

124. On the basis of the Parties' limited combined market position, and the availability of competing alternative suppliers, the CMA found no competition concerns in the retail supply of groceries on a national basis.

Grocery efficiencies

The Parties' submissions

125. Similar to Asda's road fuel efficiency submissions discussed in paragraphs 85 to 89, Asda submitted that it pursues a low-price brand proposition in relation to groceries, applying prices approximately [X]% lower than Co-op prices nationally.¹⁵⁸ Asda submitted evidence that its planned convenience store pricing [X] will be cheaper than the Co-op's existing prices applied to the Arthur estate.¹⁵⁹

The CMA's assessment

126. Similar to the CMA's assessment of Asda's submissions on road fuel efficiencies discussed in paragraphs 90 to 98 above, the CMA has regard to: the CMA merger guidelines; the high level of confidence needed to accept efficiencies given the realistic prospect threshold for an SLC finding;¹⁶⁰ and the fact that merger control constitutes a one-off intervention by the CMA, such that if any claimed efficiency does not materialise, the CMA would have no ability to intervene.¹⁶¹
127. As described above, the CMA considers that Asda's submissions, in the main, relate to a change in the strategy and business model of the acquired sites. Notwithstanding this position, the CMA has considered the purported grocery efficiencies within the CMA's established framework, as outlined in paragraph 91.¹⁶²

¹⁵⁷ FMN, paragraph 273.

¹⁵⁸ Parties' response to the Issues Letter, paragraphs 4.15 and 4.16.

¹⁵⁹ Parties' response to the Issues Letter, paragraph 4.16 and Table 8.

¹⁶⁰ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.1.

¹⁶¹ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.6.

¹⁶² [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.8.

Enhancement of rivalry

128. Leaving aside whether the benefits claimed by Asda are capable of being considered as efficiencies for the purposes of merger control, the CMA notes that the evidence on the nature and extent of these benefits is mixed. In particular, the local areas where an SLC arises will be highly concentrated, facing limited rivalry post-Merger,¹⁶³ which may lead to higher grocery prices or lower quality of goods and services for consumers.
129. Further, some of the evidence available to the CMA gives rise to material doubts that the purported benefits to consumers will be as significant as stated by Asda. The Merger will significantly increase Asda's presence in the market, and the CMA notes that Asda plans to [X].¹⁶⁴ Given the addition of a large number of convenience stores to Asda's estate, as well as the planned conversion of the majority of the EG estate to AOTM sites,¹⁶⁵ the strength of Asda's pricing incentives will be uncertain post-Merger.

Merger-specific

130. In addition, the CMA does not consider that the benefits claimed by Asda are Merger-specific (ie reliant on the Merger in question and not capable of being brought about by other means). In particular, Asda is, by definition, already present in these local areas; the Merger is not needed for Asda or Arthur to adopt lower prices in the local areas in which the CMA has identified a realistic prospect of an SLC; and finally, any efficiencies as proposed by Asda are contingent on Asda maintaining its current strategy (and retaining the Arthur sites).

Timely, likely and sufficient, and will benefit UK consumers

131. Given the CMA's conclusions above, the CMA has not found it necessary to consider whether the efficiencies submitted by Asda will be timely, likely and sufficient, nor whether they will benefit UK consumers.

¹⁶³ For example, the Arthur East Peckham MSS would only face one rival post-Merger.

¹⁶⁴ FMN, Asda Confidential Annex 20, Pricing: Differential Price Files.

¹⁶⁵ FMN, Asda Confidential Annex 9.18, New Formats and Channels, slide 52.

Retail supply of auto-LPG

Local assessment

Decision rule

132. Consistent with the CMA's approach in *Bellis/Asda*,¹⁶⁶ the CMA has assessed the impact of the Merger on the retail supply of auto-LPG by considering the number of alternative auto-LPG sites available to customers in local areas where the Parties overlap.
133. The CMA has applied the following decision rule: the Merger results in a realistic prospect of an SLC in the retail supply of auto-LPG if it leads to a fascia count reduction from four to three or fewer, in terms of owner, in any of the 10-, 20-, 30- or 40-minute drive-time catchment areas, unless it leads to a fascia count reduction, in terms of owner, of six to five or more in the next (wider) catchment area.

The Parties' submissions on the application of the auto-LPG decision rule

134. The Parties carried out a local overlap analysis, based on the decision rule used in *Bellis/Asda* and set out above. On this basis, the Parties did not identify any overlapping areas that failed the decision rule.¹⁶⁷

The CMA's assessment

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

National assessment

136. The Parties submitted that they have a minimal overlap in auto-LPG nationally.¹⁶⁸ Arthur operates 11 LPG sites, Asda operates 11 LPG sites and EG operates 21 LPG sites.¹⁶⁹
137. The Parties submitted that they have a combined share of supply of [5 – 10]% of the UK's 804 auto-LPG sites.¹⁷⁰ The Parties further submitted that they will continue to

¹⁶⁶ *Bellis/Asda*, paragraph 189.

¹⁶⁷ FMN, paragraphs 262 to 270.

¹⁶⁸ FMN, paragraph 252.

¹⁶⁹ FMN, footnote 107.

¹⁷⁰ FMN, paragraph 253.

face strong competition from the other auto-LPG retailers, including both PFS-located and standalone auto-LPG retailers after the Merger.¹⁷¹

138. On the basis of the Parties' limited combined market position, and the availability of competing alternative suppliers, the CMA found no competition concerns in the retail supply of auto-LPG on a national basis.

Conclusion on horizontal unilateral effects

139. For the reasons set out above, the CMA believes that the Merger raises significant competitive concerns in relation to the retail supply of road fuel in the 11 local areas listed in Annex 1 and in relation to the retail supply of groceries at MSS in the three local areas listed in Annex 1.

COUNTERVAILING FACTORS

Entry and expansion

140. Entry, or expansion of existing firms, can mitigate the initial effect of the acquisition on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent a substantial lessening of competition, the CMA considers whether such entry or expansion would be timely, likely and sufficient.¹⁷² In terms of timeliness, the CMA's guidelines indicate that the CMA will look for entry to occur within two years.¹⁷³
141. The Parties did not provide submissions in relation to entry or expansion in the retail supply of road fuel and groceries. The CMA also notes that its local assessment for the retail supply of road fuel and groceries includes the Parties' 'open' sites as well as sites 'under development'.¹⁷⁴

¹⁷¹ The Parties submitted that their main competitors by number of sites are Morrisons (~[5 – 10]%) and Motor Fuel Ltd (~[5 – 10]%). Other include Sainsbury's, Rontec, BP, Penny Petroleum, Moto, Penny Petroleum, Welcome Break Group, Petrogas, Johnston Oils, Extragas, Tesco, Calgas, Worsley Autogas Centre, MFG, Extragas, Northwest gases, Harrisgas, Sidwill Services, Orion or Smithy View. FMN, paragraph 255.

¹⁷² [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.28 and following.

¹⁷³ [Merger Assessment Guidelines \(CMA129\)](#), March 2021, paragraph 8.33.

¹⁷⁴ The CMA notes that it received evidence on 17 February 2023 from one third party, [X], that a new Tesco site may be opening in Harrogate, one of the local areas failing the road fuel decision rule (Arthur Oakdale on Ripon Road). Accordingly, the CMA considered whether Tesco's entry would be timely, likely, and sufficient to prevent a substantial lessening of competition in the relevant local area. Based on publicly available information and evidence received by the CMA, the CMA considers that Tesco's entry into the local area is not sufficiently likely at this stage to mitigate the CMA's concerns of an SLC arising in Harrogate.

THIRD PARTY VIEWS

142. The CMA contacted competitors of the Parties and received a number of responses to its invitation to comment issued on 17 January 2023 inviting interested parties to provide views on the Merger.
143. The CMA received a significant number of letters from representatives of local communities (four letters from Members of the Parliament, four from Members of the Scottish Parliament (**MSPs**)¹⁷⁵ and six from local councillors) during the course of its investigation. These letters, which were all in support of the Merger, generally emphasised Asda's lower prices, with some also suggesting that the Merger could have a positive impact on employment in certain local areas. The CMA noted similarities in the content and wording of some of the letters, and understands that they were prompted, at least to some extent, by representations made to those representatives by Asda.
144. The CMA welcomes views and evidence from representatives of local communities and has taken these submissions fully into account to the extent that they relate to considerations relevant to the assessment of the competitive effects of the Merger. The CMA's mandate in merger investigations – by law – is to assess the potential impact of a merger on competition. The assessment of any other potential effects that a merger might have, for example on employment, falls outside the CMA's statutory remit, and therefore the CMA does not take such considerations into account in its merger decisions. The weight given to third-party submissions in merger investigations varies, taking into account the nature of the evidence provided and the extent to which it is corroborated by other evidence. Third-party representations that are heavily influenced by lobbying from merging parties are typically unlikely to be given material weight in a CMA merger control investigation.
145. A number of competitors suggested that the CMA should have regard in its competitive assessment to the local areas where the Parties are located in close proximity to each other, as the Merger may result in reduced competition in those local areas.¹⁷⁶ Third party comments have been taken into account where appropriate in the competitive assessment above.

¹⁷⁵ Including one MSP letter that was provided on behalf of four other MSPs.

¹⁷⁶ Responses to the CMA's third-party questionnaires. One competitor submitted that the Merger would have an adverse impact on small retailers and convenience stores, due to their reduced buying power, which could limit their ability to compete on price with the Merged Entity. Another competitor submitted that as a result of the Merger, Asda might have the incentive and ability to engage in a full or partial foreclosure strategy to prevent other supermarkets from accessing key food or other partners, or to limit the quality of such access. The CMA has considered these third-party submissions and concluded that the Merger would not result in a realistic prospect of an SLC as a result of such

CONCLUSION ON SUBSTANTIAL LESSENING OF COMPETITION

146. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result, in a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the retail supply of (i) road fuel, and (ii) groceries at MSS, at a local level.

concerns, because the Merger would only result in a limited increment to Asda's national share of supply, and because the decision rule identifies the local areas which give result in a realistic prospect of an SLC.

DECISION

147. Consequently, the CMA believes that it is or may be the case that (i) a relevant merger situation has been created; and (iii) the creation of that situation has resulted, or may be expected to result, in an SLC within a market or markets in the United Kingdom.
148. The CMA therefore believes that it is under a duty to refer under section 22(1) of the Act. However, the duty to refer is not exercised whilst the CMA is considering whether to accept undertakings under section 73 of the Act instead of making such a reference.¹⁷⁷ Asda, Asda Group, Issa Brothers and TDR have until 21 March 2023¹⁷⁸ to offer an undertaking to the CMA.¹⁷⁹ The CMA will refer the Merger for a phase 2 investigation¹⁸⁰ if the Parties do not offer an undertaking by this date; if the Parties indicate before this date that they do not wish to offer an undertaking; or if the CMA decides¹⁸¹ by 28 March 2023 that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it.
149. The statutory four-month period mentioned in section 24 of the Act in which the CMA must reach a decision on reference in this case expires on 28 March 2023. For the avoidance of doubt, the CMA hereby gives the Parties notice pursuant to section 25(4) of the Act that it is extending the four-month period mentioned in section 24 of the Act. This extension comes into force on the date of receipt of this notice by the Parties and will end with the earliest of the following events: the giving of the undertakings concerned; the expiry of the period of 10 working days beginning with the first day after the receipt by the CMA of a notice from the Parties stating that it does not intend to give the undertakings; or the cancellation by the CMA of the extension.

Colin Raftery

¹⁷⁷ Section 22(3)(b) of the Act.

¹⁷⁸ Section 73A(1) of the Act.

¹⁷⁹ Section 73(2) of the Act.

¹⁸⁰ Sections 22(1) and 34ZA(2) of the Act.

¹⁸¹ Section 73A(2) of the Act.

ENDNOTE:

i. Following clarification from the Parties, paragraph 29 should read 'The Co-op's internal documents indicate that the sale of the Arthur business was a strategic decision, undertaken for the purpose of focusing on core convenience proposition whilst strengthening the Co-op's financial resilience.'

Senior Director, Mergers
Competition and Markets Authority
14 March 2023

ANNEX 1: LOCAL HORIZONTAL SLC SITES

Table 1: Road fuel SLC sites

No.	Site name	Asda / EG / Arthur site
1	Barnard Castle	Arthur
2	Calcutt	EG
3	Caledonian Road	Arthur
4	Earlston	Arthur
5	Gnosall (Station Road)	Arthur
6	Lauder	Arthur
7	Minsterley	Arthur
8	Oakdale (Ripon Road)	Arthur
9	Rochester (Anthony's Way)	Arthur
10	Stonehaven (Kirkton Road)	Arthur
11	Weycock Cross	Arthur

Table 2: MSS SLC sites

No.	Site name	Asda / EG / Arthur site
1	Earlston	Arthur
2	East Peckham	Arthur
3	St Columb Minor (Henver Road)	Arthur