
Completed acquisition by Tesco plc of the Co-operative Group (CWS) Ltd store at Uxbridge Road, Slough

The OFT's decision on reference under section 33(1) given on 19 April 2007.
Full text of decision published 9 May 2007.

PARTIES

1. Tesco plc (Tesco) is part of Tesco Group. Tesco Group operates grocery stores in Europe, Asia and the UK. Tesco is the largest grocery retailer in the UK and also sell certain non-grocery items, including petrol, tobacco and newspapers.
2. The Co-operative Group (CWS) Ltd (the Co-op) operates a variety of retail operations and services in the UK, including grocery retailing.

TRANSACTION

3. Tesco acquired a Co-op store on Uxbridge Road, Slough (the Uxbridge Road site) on 10 October 2003.¹ One reason for doing so was to facilitate the expansion of Tesco's existing site on nearby Brunel Way, Slough (the Brunel Way site) over a number of months without loss of a Tesco store for a period in Slough. Following a complaint from local consumers, the OFT launched an investigation into this acquisition.

JURISDICTION

4. As a result of this transaction, Tesco and the Uxbridge Road site in question ceased to be distinct. The parties overlapped in the supply of groceries, in particular one-stop shopping as defined in the report by the Competition Commission (CC) on the proposed bids for Safeway (Cm

¹ Tesco entered into a binding agreement to acquire the Uxbridge Road site on 16 July 2003. Completion of the acquisition took place on 10 October 2003.

5950; the Safeway report), and the share of supply test in section 23(2)(b) of the Enterprise Act 2002 (the Act) was met. A relevant merger situation had therefore been created.

BACKGROUND

The Safeway report methodology and the OFT's investigation

5. The transaction was a merger between one-stop grocery competitors that completed in October 2003. Approximately one month prior to completion, the CC published its Safeway report, which established a detailed set of fascia rules governing mergers in the one-stop grocery sector. In essence, the rules establish that local competition concerns arise when a transaction reduces the number of competing one-stop grocery store fascia below four within a relevant local area. A 'one-stop' in this context is defined as a store with a minimum 15,000 sq ft net retail floor space primarily devoted to grocery retailing. Relevant local areas are established by isochrone rules based on mapped drive-times to establish the geographic boundaries of relevant local markets - primarily around the target store and on certain other bases including competing stores and so-called population re-centering.

Decision of 2 February 2004

6. In its investigation into the Uxbridge Road acquisition, the OFT found that there was a significant prospect that the transaction breached the CC's fascia rules by reducing the number of relevant fascia in the relevant areas of Slough below critical levels of concentration. The OFT therefore concluded that it was under a duty to refer the transaction to the CC.
7. In the same decision the OFT suspended its duty to refer pursuant to section 73 of the Act because of Tesco's offer of undertakings in lieu of reference, which consisted of a proposed divestment of the Co-op store in Uxbridge Road to a suitable purchaser. A suitable one-stop competitor operating from that site would restore the fascia count reduced by the merger and appear to remedy the concerns identified. The OFT took into account Tesco's position that the Uxbridge Road site would provide a temporary trading site for Tesco while its nearby Brunel Way site was to be redeveloped and expanded, and that it was never Tesco's intention to continue trading from the Uxbridge Road site once redevelopment of its

larger Brunel Way site was complete. On the facts known to the OFT at the time, Tesco's offer to transfer the Uxbridge Road site - after temporary occupation while its Brunel Way site was redeveloped - appeared in the circumstances to be sufficiently clear-cut and capable of ready implementation in accordance with the standard established in OFT guidance.² Accordingly, the OFT deemed it appropriate to suspend the duty to refer pending negotiation of suitable undertakings from Tesco. A copy of the decision (the February 2004 Decision) is attached at Annexe 1.

8. The OFT also gave notice to Tesco under section 25(4) of the Act to extend the statutory time limit in section 24(1) of the Act on the basis that it was seeking UIL pursuant to section 73 of the Act.

Negotiation of draft undertakings and planning contingencies

9. More detailed facts became available to the OFT in subsequent undertakings negotiations, including planning consent contingencies not clearly apparent to the OFT in its deliberations leading to the February 2004 Decision.
10. The first of these contingencies related to Tesco's redevelopment of its Brunel Way site into a 100,000 sq ft Tesco Extra, for which planning consent was granted approximately eight months later, in October 2004.
11. Planning consent contingencies of greater severity arose in respect of the Uxbridge Road site. Tesco had proposed to redevelop this site on the basis that only such redevelopment would make the site commercially attractive to a proposed one-stop competitor, Waitrose, which - unlike several other one-stop operators already present in the area - would, at this time, have been an eligible purchaser under the fascia rules. Under this proposal, a retail complex would be built featuring a one-stop grocery supermarket as an anchor store alongside several other retail units. In July 2004 the OFT approved the 'Waitrose option' in principle subject to timing and the negotiation of suitable undertakings.
12. Tesco then proceeded to file a planning application for redevelopment of the Uxbridge Road site pursuant to the Waitrose option. This suffered an

² Mergers - Substantive Assessment Guidance, OFT 516, paragraph 8.3.

unforeseen setback when the application was 'called in' by the Government Office for the South East (GOSE).

13. Tesco sought to overcome concerns raised by submitting a revised planning application. However, the revised application was also called in by the GOSE.
14. The issue of planning permission lingered until it was ultimately resolved more than two years after the original OFT decision, in March 2006, when Tesco was granted consent to redevelop the Uxbridge Road site.

RECENT DEVELOPMENTS

Post-planning consent progress

15. During 2006 it had become clear to Tesco that Waitrose appeared no longer to have a commercial interest in the site. Although the 'Waitrose option' now appeared to lack its namesake, Tesco responded to the OFT's inquiries on several occasions after planning consent was granted - including in writing in May, September and November 2006 - that it was actively marketing the site and was confident of finding a suitable purchaser.
16. Despite these assurances, no progress was apparent to the OFT as late as January 2007. The OFT therefore called an urgent meeting with Tesco which took place on 29 January 2007. In the meeting, the OFT noted that it had been effectively three years since the February 2004 decision and that while much of the intervening delay had been due to planning contingencies outside Tesco's control, no buyer had been put forward by Tesco to date despite planning consent in March 2006, and no immediate resolution of the situation appeared to be in sight. This situation therefore seriously called into question whether suspension of the OFT's duty to refer remained appropriate.
17. The OFT then pressed Tesco in that meeting for the name of at least one realistic buyer that was both commercially interested and eligible from a competition perspective. Tesco was unable to do so. The OFT noted that its concerns appeared well-founded and therefore put Tesco on notice that, for the duty to refer to remain suspended, Tesco was subject to a firm but

reasonable time period in which to make satisfactory progress in respect of a buyer, according to specific terms laid out by the OFT.

The OFT's 2 February 2007 letter

18. Consequently, the OFT informed Tesco by letter of 2 February 2007 that:

- there were material and increasing doubts as to whether an eligible and interested purchaser would emerge within an appropriate period of time
- as a result, the OFT had serious concerns as to whether there were still undertaking proposals that are clear cut and capable of ready implementation, and
- it followed that the OFT should review its decision to suspend its duty to refer the transaction.
- The OFT proposed to provide Tesco with a final opportunity to establish that suitable undertakings could still be offered and accepted in accordance with the following conditions, among others:
 - Within two months –
 - the terms of the proposed undertakings must be satisfactory to the OFT and an agreed draft of the proposed undertakings ready for public consultation
 - Tesco must have identified a suitable purchaser for the grocery retailing unit (GRU) within the new complex or the undeveloped site³
 - that purchaser must be sufficiently interested or committed such that they are willing to be publicly named and consulted upon as a credible candidate buyer (without the need for a formally agreement binding on the purchaser at that stage), and

³ As the original Co-op store had previously been demolished, sale of that store on an 'as-is' basis was no longer an option.

- if the proposed suitable purchaser was a 'Tier 2' grocery retailer⁴ then Tesco must have demonstrated to the satisfaction of the OFT that no suitable 'Tier 1' purchaser for either the GRU or the undeveloped site is available, because they were either precluded under the CC's fascia and isochrone rules or had declared that they are not interested (noting also that any plans of a proposed suitable purchaser cannot themselves be subject to fresh planning permission contingencies).
 - By the beginning of month three, both the proposed undertakings and the proposed purchaser would be publicly consulted upon, assuming the above requirements were met. The consultation process would take three weeks to complete, assuming no issues of significance emerged. (Post-consultation procedures were then outlined which are no longer relevant).
19. Tesco responded to the OFT's 2 February letter on 2 March 2007, clarified by letter of 5 March, that it was prepared to adopt the approach set out in the OFT's 2 February letter. On 30 March 2007, Tesco informed the OFT that it had reached draft Heads of Terms with two proposed buyers, noting that other possible buyers would be subject to planning contingencies which the OFT had ruled out as a way forward.

Tesco's proposed purchasers

20. Under the first candidate's draft Heads of Terms, the proposed use of the grocery unit did not meet the criteria for a one stop store.⁵ In these circumstances, the OFT did not consider it appropriate to pursue this option as a clear-cut remedy to the competition concerns identified, which related to a loss of one-stop competition.
21. Unfortunately, the alternative candidate's proposal, which was of one-stop dimensions, also raised a number of material issues. The relevant suitable purchaser criteria in the relevant undertakings are modelled on standard OFT criteria, and in this case provide that a suitable purchaser -

⁴ That is, an operator outside the 'effective competitor' set for one-stop grocery retailing identified by the CC in the Safeway report, referred to as 'Tier 1' in the OFT's letter.

⁵ That is, a store with greater than 15,000 square feet of net retail floor space primarily devoted to grocery.

- is independent of Tesco
- has the financial resources, expertise and incentive to take on the GRU and to maintain and develop the GRU as a viable and active one-stop grocery shop on a lasting basis in competition with Tesco and other one-stop operators in the area, and
- that in the view of the OFT, the acquisition by that purchaser would be likely to remedy, mitigate or prevent the adverse effects underlying the February 2004 decision.

22. The following aspects gave the OFT cause for serious concern that a proposal featuring such a buyer would not constitute a remedy that was sufficiently clear-cut and capable of ready implementation in line with such criteria:

- *Experience as a one-stop grocery operator.* While the proposed operator clearly has retail grocery experience in the form of an existing outlet, the operator in question is a family business without experience of operating a one-stop grocery store. The Uxbridge site would therefore be the first one-stop grocery store for that operator, as opposed to the replication of an existing one-stop format successfully deployed elsewhere (such as the Co-op store formerly on the Uxbridge Road site).
- *Absence of up-front financing or a business plan.* The OFT had concerns that the business in question (being one or more individuals) had apparently not prepared a business plan, which the OFT could vet, for this venture; nor was there evidence of financing in place. This raised several concerns. First, absent such a plan it is difficult for the OFT to assess the precise proposed use of the relevant retailing units; in the extreme, it was possible that a business not answering to the description of a one-stop grocery store might be run from that site. Second, particularly given the lack of one-stop experience, the proposed operator might, in its inaugural one-stop venture, struggle to provide effective one-stop competition against Tesco, Sainsbury's, Asda and other one-stop grocery players in the relevant area.
- *Planning consent contingency.* Tesco confirmed that as the candidate wished to use Units 1 and 2 for the one-stop store, rather than Unit 3

which was the designated GRU under the planning application, a variation to planning consent granted in March 2006 would be required.

ASSESSMENT

23. The planning issues in relation to the Uxbridge Road site have now been resolved for over twelve months and the suspension of the OFT's duty to refer is now entering its fourth year. The time period for meeting the terms set by the OFT in its 2 February 2007 letter expired earlier this week and no suitable UIL proposal is currently on the table: as set out above, unfortunately neither of the two proposals advanced by Tesco can be considered clear cut and capable of ready implementation.
24. Tesco has requested an extension while the OFT's above concerns could be resolved pending public consultation on the draft undertakings package in conjunction with the proposal of the purchaser discussed above. Given the substantial uncertainties that still persist in relation to the one proposal potentially capable of consideration, the OFT not convinced that a short extension would allow these issues to be resolved; nor is there any clear reason why such an extension would be appropriate in light of the extensive periods from which Tesco has already benefited.
25. The OFT therefore concludes that it would be inappropriate to suspend its duty to refer any further given all the present circumstances of the case.

DECISION

26. The OFT's duty to refer is no longer suspended and the acquisition of the Co-op store in Uxbridge Road, Slough will therefore be referred to the Competition Commission under section 22(1) of the Act in accordance with the February 2004 Decision. Pursuant to section 25(5)(c) of the Act, upon reference to the Competition Commission, the ongoing extension to the duration of the statutory time limit in section 24(1) will be cancelled.