
Completed acquisition by the Cooperative Group (CWS) Limited of Fairways Group UK Limited

The OFT's decision on reference under section 22(1) given on 19 July 2006. Full text of decision published 26 July 2006.

Please note that square brackets indicate text or figures which have been deleted or replaced with a range at the request of the parties for reasons of commercial confidentiality.

PARTIES

1. **Cooperative Group (CWS) Limited** (CGL) is active in food retail, pharmacy, banking, travel agency and optical services. CGL is also active in the supply of funeral directing services through its Funeralcare business. Funeralcare is also active in the manufacture of coffins and the wholesaling of funeral accessories such as gowns, coffin liners and ornamentation. Funeralcare operates 602 funeral businesses across the UK and conducted 81,000 funerals in 2005.
2. **Fairways Group UK Limited** (Fairways) supplies funeral directing services. It has 49 funeral businesses located across southern England, principally in East Anglia, Hampshire and South West London. It conducted 5,400 funerals in 2005, generating a UK turnover of £14 million.

TRANSACTION

3. On 24 March 2006, CGL purchased 86 per cent of the issued share capital of Fairways, thereby acquiring sole control of Fairways (the remaining shares are held by individual directors). The administrative deadline for the case is 19 July 2006 and statutory deadline for assessing the transaction expires on 5 August 2006.

JURISDICTION

4. As a result of this transaction CGL and Fairways have ceased to be distinct. The parties overlap in the supply of funeral directing services in the UK. The parties'

combined share of supply in a number of different areas in Southern England which (the parties submit) together constitute a substantial part of the UK is 26 per cent. As a result, the share of supply test in section 23 of the Enterprise Act 2002 (the Act) is met. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

SUBSTANTIVE ANALYSIS

5. The parties overlap in the provision of funeral directing services. The majority of these services are provided to individuals. However, some large organisations such as Local Councils and Primary Care Trusts also contract with the parties to provide mortuary services. The issue of mortuary services is addressed first, before turning to the more significant concerns in funeral directing services.

MORTUARY SERVICES

Product frame

6. Mortuary services consist of the removal of the deceased from the place of death in the event of sudden or accidental death and transportation of the body to a mortuary pending collection of the body by the relatives. These services are put out for tender by large organisations such as Network Rail, the Ministry of Defence and by Primary Care Trusts or local Authorities. Contracts typically last between three and five years and are either won by one funeral business or several operating on a rota basis.
7. Third parties indicated that these services are usually provided at a very low cost or even free by the funeral director in the hope that they will win the follow-on contract with the family of the deceased to provide funeral directing services. This follow-on aspect could suggest that mortuary services could be considered to form part of the wider provision of funeral directing services.
8. In most cases, third party comments from those organising these contracts indicated that funeral directors winning contracts included a mix of independent funeral directors and chains (although one third party suggested smaller funeral businesses may be less able to bid). Third parties also suggested there were no perceived benefits from a funeral director having a wider than regional or national presence. Some third parties also stated that Primary Care Trusts and Local Authorities contracted with more than one funeral business in any one period.
9. The parties submitted that they saw no reason for mortuary services to be considered separately. They argued that the provision of these services do not form a significant or prominent part of the parties business, accounting for less than 1 per cent of revenues. They also provided a number of examples to

demonstrate that not all mortuary services are provided in the hope that the family will choose that undertaker to conduct the funeral.

10. The evidence on whether mortuary services should be considered separately from the more general provision of funeral directing services is mixed. The evidence the OFT has found indicates that suppliers have some ability to engage in supply side substitution between the two types of services. However, there is also an indication that larger funeral businesses may have an advantage in competing for mortuary service contracts. Given this, a cautious approach has been taken and for the purposes of this decision, we have considered two separate product frames of reference, one for the provision of funeral directing services to individuals and the other for the provision of mortuary services.

Geographic frame

11. Both parties compete for the regional/local Primary Care Trust and Local Authority contracts. However, Fairways does not compete for the national contracts from Network Rail and the Ministry of Defence. Third party responses suggest that coroner's contracts are often split into more localised areas by the local authority/district council. Therefore, the exact geographic scope for mortuary services would appear to vary in each local authority, with some third parties stating that local authorities divide the authority into police areas. The geographic scope (for non-national contracts) may therefore be no wider than regional but possibly, at times, narrower than the local authority level. In this instance, it is not necessary to reach a definitive conclusion on the geographic frame for mortuary services as no competition concerns arise under any reasonable definition.

Competitive assessment

12. The parties provided information about two existing national mortuary contracts. Given that these contracts (with Network Rail and the Ministry of Defence) are tendered for on a national basis and Fairways is a regional player and is consequently unable to bid for such contracts, the OFT does not consider that the merger would give rise to a substantial lessening of competition with regard to national contracts.
13. A number of third parties suggested that smaller funeral businesses are less able to bid for Local Authority contracts than regional firms. As a result, competition for these services would be reduced post-merger as both parties have a strong regional presence, with the merged entity being able to win a large part of these contracts and therefore gain an even larger share of the follow-on trade in the provision of funeral directing services than the parties market shares currently suggest. However, the parties stated that in 2005 such contracts accounted for approximately [less than 1] per cent of Fairway's revenue and [less than 1] per cent of CGL's revenue.

14. In addition, most Local Authorities and Primary Care Trusts stated that the funeral directors winning these contracts include a mix of independent funeral directors and chains and there was no perceived benefit from a funeral director having a regional or national presence or being of a particular size. Furthermore, Local Authorities and Primary Care Trusts indicated a willingness to take steps to encourage smaller funeral businesses to bid for such contracts (for example, by allowing groups of funeral businesses to bid as a collective).
15. Therefore, the OFT considers that sufficient competitive constraints will remain post-merger to prevent the parties from raising price or reducing service quality to customers for mortuary services and this sector is not considered further below.

FUNERAL DIRECTING SERVICES FOR INDIVIDUALS

Product frame

16. The parties submitted that the relevant product frame of reference was the provision of funeral directing services. The Price Commission in 1977¹ and the Monopolies and Mergers Commission (MMC) in House of Fraser² and in Plantsbrook³ also identified the provision of funeral directing services to be a separate market. The OFT found no evidence to suggest deviating from this previous conclusion. We have considered such services on an individual basis as in most instances individuals purchase funeral directing services for friends or relatives (with under 10 per cent being pre-purchased) and all elements of the service are usually provided by the same funeral business.

Geographic frame

17. In House of Fraser and Plantsbrook, the MMC concluded that competition for the provision of funeral directing services occurred on a local basis. The MMC found that customers rarely shopped around for funeral directing services because of the infrequency of purchase; the lack of experienced customers; the time pressure involved in organising a funeral; and the lack of transparency in terms of prices. Instead recommendations from family members and close friends, as well as the proximity of a funeral business to the customer were key factors informing their choice of undertaker. The MMC therefore concluded that competition should be defined in terms of the local areas within which most customers look for services.
18. The OFT's investigation in the current case confirmed that location was an important factor in the choice of funeral director. The parties provided independent

¹ Funeral Charges, Report No 22 1977, paragraph 8.4.

² Cm 229 (1987) The Cooperative Wholesale Society Limited and House of Fraser plc.

³ Cm 2880 (1995) Service Corporation International and Plantsbrook Group plc.

research which also concluded that a local presence along with some experience of the particular business were key considerations when choosing a funeral director. Third parties supported this view.

19. Previous investigations have identified several different bounds for defining the local catchment areas:
 - i) In House of Fraser, (which related to the purchase of funeral directing businesses in Scotland) the MMC considered that the normal radius of operation of a funeral business was between five and ten miles. It also considered market shares within the local authority boundaries of Glasgow City, Aberdeen City, Perthshire & Kinross, Falkirk and the City of Edinburgh.
 - ii) In Plantsbrook the MMC concluded that the market could be defined in terms of the local areas within which most customers looked for the service. Market share analysis identified that the majority of customers came from different sized local catchment areas for Inner London, Outer London and outside London. It identified that:
 - a. In Inner London, 70 per cent or more of the customers were located within one mile of the funeral business and 85 per cent were located within two miles of the funeral business.
 - b. in Outer London, the average distances between customers and funeral businesses were found to be higher, but that 65 per cent or more of funerals were still within a two mile radius
 - c. outside London, it was appropriate to assess the impact of the acquisition on competition using district council boundaries.
20. The parties focused their analysis on areas where there were overlaps within a district council or London borough. For the funeral businesses in the areas within London, the parties stated that they used the radii identified in Plantsbrook (one mile for inner London and two miles for outer London) and, centring around each Fairways funeral business, identified all postcode sectors which lay in whole or in part within the radius. Outside London, the parties identified post code areas representing 80 per cent of total funerals provided in 2005 by each of the CGL and Fairways funeral businesses and supplied maps on this basis.
21. The OFT examined the maps provided by the parties and observed that in a number of cases this approach raised serious anomalies which could undermine the reliability of the analysis. For example, in some cases the maps excluded contiguous postcode areas (such that the proposed geographic area contained

'gaps'), and, within London, some postcode areas had been excluded even though they fell inside the radial boundary.

22. The parties submitted that the methodology which they had used was consistent with the Plantsbrook, JJ Burgess and CWS/McIntosh decisions. They argued that
- i) While the one and two mile radii required under the Plantsbrook methodology in London did not exactly follow postcode boundaries (some postcode areas straddle the boundary), neither the ONS nor CGL data was sufficiently precise to identify the number of deaths on any narrower basis.
 - ii) The delineation in Plantsbrook was aimed at identifying the area from which the funeral business drew 65-85 per cent of its customers. Therefore, for these purposes it did not matter whether the boundary was a neat concentric circle or irregular ring.
 - iii) In relation to areas outside London, the shortcomings in this case of the 80 per cent catchment identified by the OFT were a reflection of actual trading patterns in 2005. They submitted that it was unreasonable to suppose that in real life every funeral business would draw its custom from a neat concentric circle and the size and shape of a funeral businesses' catchment area would depend on a range of factors such as the impact of nearby population centre, type of outlet (high street or out of town), demographics, transport links, natural topography etc.
 - iv) The 'gaps' identified by the OFT reflected postcode areas in which the parties provided no, or very few, funerals in 2005.
23. Based on the evidence available, the OFT is concerned that an inherent weakness may exist in the post code area approach used by the parties to identify and analyse local catchment areas for the supply of funeral directing services. Firstly, while the presence of a gap may be the result of no or few funerals being provided by the parties, this does not necessarily mean that it should be excluded from the catchment area. The OFT observed several instances where funeral businesses (both those of the parties and their competitors) were located in the 'gaps'. Given that location is one of the key factors in a consumers decision on which funeral business to use, it is unsurprising the parties provided relatively few funerals in these postcode areas, as the competing funeral business would be expected to be the major provider of funerals in that area. Secondly, the data used by the parties only related to deaths in one year, meaning that some post code bricks may have been excluded purely because the parties did not conduct any funerals in that postcode brick in 2005. Therefore, in both of these instances, the data may fail to reflect that the parties are indeed competing for customers within those local

areas. In particular, where a funeral business is located in the 'gap', its exclusion may in fact under or over estimate the relative competitive constraints in that local area.⁴

24. When formulating their analysis, the parties ran their catchment methodology with software that built up 'postcode bricks' and there is no suggestion at all that any elements of their approach were misleading. However, a further issue we identified in respect of the 80 per cent catchment area approach was that, absent verification, it is conceivable that the 80 per cent figure could be constructed in such a way as to provide a skewed picture, even inadvertently, of the local catchment area. For example, depending upon which 20 per cent of funeral business is excluded, the boundaries of the catchment area, and thus potentially the number of competing funeral businesses, may change.
25. One possible way to overcome the weaknesses identified above would be to examine each 'gap' individually to determine whether it should be included in the overall local area analysis. However, this would be a particularly time consuming process and in the presence of a large number of overlaps may not be possible within the timeframe of the OFT's investigation.
26. In the absence of sufficient information to support the exclusion of the postcode bricks in each area, the OFT considers that, for this particular case, there are strong reasons for considering different approaches. In this instance, a radii analysis would prove more easily verifiable and therefore a more reliable basis for determining local areas in which to assess the competitive dynamics between funeral businesses. However, throughout our analysis we have still considered the outcomes of the parties' analysis using the postcode area approach. In the vast majority of cases, the outcomes of the two approaches did not differ significantly.

⁴ That is, where the excluded funeral business is a CGL business, its exclusion could result in the parties' share of supply in the local area being underestimated. Where the excluded funeral business is a competitor this may actually result in the parties' share of supply being overestimated and may fail to take account of the actual competitive constraint imposed by that competitor.

27. The OFT's investigation confirmed that the catchment area in which funeral businesses operate is local and that the catchment area was different in Inner London, Outer London and outside London. Within London, the OFT found no evidence to suggest altering the conclusion in Plantsbrook that the catchment area for a funeral business in inner London was 1 mile and in outer London two miles. We also used 1.5 miles as a sensitivity check for both. Outside London previous cases suggest that the catchment area was more dependent on location, for example on natural geographical boundaries, and whether the area was urban or rural. Catchment areas have ranged from 4 to 10 miles, covering cities such as Edinburgh, towns such as Stevenage and rural areas such as Falkirk. Third party views varied but nonetheless a number of third parties suggested that an average radius of five miles was an appropriate rule of thumb for analysing funeral businesses outside London. A sensitivity check of two miles was also undertaken to reflect the probability that in cities such as Southampton population density means that a smaller catchment area may apply and that as suggested by one third party in small towns and villages the catchment area may not exceed the town/village boundary. The OFT only identified one local area (New Forest) where the sensitively checks performed resulted in a substantially different outcome.

Horizontal issues

Competitive dynamics

28. The OFT's analysis from this inquiry suggests two principal parameters on which firms in this sector compete: location (discussed above under geographic frame) and reputation, discussed below. In particular:
- Previous investigations⁵ have concluded that price competition in the funerals sector is muted. A funeral is a typical distress purchase where customers are not inclined to shop around (parties research indicated that [more than 75] per cent of customers only obtain one quote) and that discounts are not often given.
 - The parties' own position is that the primary focus of competition in this sector was location, service and trust (reputation).
 - The OFT considers that as most customers have little experience of purchasing funerals, factors such as recommendations from other family members, close friends, or religious or medical advisers are key in the decision-making process.
 - Unlike in certain other local retail markets, national or regional branding does not appear to be a major competitive factor. Many independent funeral

⁵ Funeral Charges, Report No 22 1977, paragraph 8.4 The Price Commission in 1977, the MMC in House of Fraser and in Plantsbrook.

directors are present in the sector and appear to be successfully competing with the chains for business. This view was confirmed by third party responses and the fact that each Fairways, and to a lesser extent CGL, generally kept their original family name rather than switching to a brand name. As a result, customers may perceive their choices to be strictly independent of each other, when they are in fact subject to common ownership.

Measuring competition

29. In Plantsbrook the MMC limited its analysis to a share of deaths⁶ and required divestments in those areas where the merged entity had a 25 per cent or greater share of deaths post-merger. The CC's reasoning for choosing a threshold of 25 per cent is not immediately clear from their published decision. As this threshold could be considered relatively low, it may be appropriate to consider additional measures of competition when assessing the relative competitive constraints in a local area. A number of possible approaches are discussed below.
30. The parties proposed a two step approach to measuring competition in a local area: first, the Plantsbrook methodology should be used as an initial screen to identify those areas where the transaction would lead to a combined share of deaths in excess of 25 per cent; second, identify those areas where the post-merger fascia count is less than three.
31. Since data for share of deaths is not available in sufficient detail to calculate shares of supply on a radii basis we considered using share of funerals as an alternative measure of local competition (based on the total number of funerals conducted by those competitors who are located within the appropriate radius).⁷ The data used to calculate these shares of supply were based on the actual number of funerals conducted by the parties and estimates provided by the parties of the number of funerals undertaken by their competitors, the majority of which the OFT were able to verify with the relevant third parties. It should be noted that in London, where the geographic areas considered using the parties methodology and those using a fixed radius were easily comparable, the outcome of a share of deaths and a share of funerals analysis were very similar.
32. In the OFT's view, both share of deaths and share of funerals may also be useful in capturing the reputational aspect of competition in this sector, the proposition being that funeral businesses undertaking a large number of funerals are likely to be winning such business due to a strong reputation, and therefore place a

⁶ That is, the number of people who had died within a given area based on the deceased's postal address, on the assumption that most people are buried near their homes, as opposed to near their relatives or the hospital.

⁷ Both share of deaths and share of funerals have room for error as the deceased may live with one area but have their funeral in another.

proportionately stronger competitive constraint on rivals than competitors with weaker reputations.

33. The parties argued that, given that most funeral businesses have excess capacity, the mere presence of a competitor was sufficient to act as a competitive constraint irrespective of how many funerals it currently undertook. This might suggest that the number of funerals conducted by a funeral director is irrelevant, and number of competing businesses or a fascia count is a more relevant measure. A fascia analysis might give different results to share data, because even a firm with a low share of deaths/funerals would count as an effective competitor on the same footing as those with higher shares.
34. However, unlike share of funerals/deaths such a measure does not allow for the importance of reputation in determining the strength of competition. Strength of reputation and proximity to a rival will affect the degree of constraint a funeral business places on a competing funeral business, and not whether that business is capacity-constrained or not. Supporting the view that capacity constraints are largely irrelevant to the analysis is the fact that most third parties confirmed that they had the capacity to carry out additional funerals.
35. As noted above, the parties advocated the use of fascia count as a secondary filter. However, branding is not a strong feature in this industry and – as is the case for Fairways' funeral businesses – many funeral businesses trade under the name of the original owner of the funeral business even though they are part of a group of businesses. Therefore if, post merger, the service levels of a funeral business decreased, (adversely affecting its reputation) or indeed if the price increased, customers diverting from this funeral business may move to a funeral business run by the same company. The fact that consumers are unlikely to be aware of whether another funeral business is part of the same fascia (commonly-owned) or a competing fascia (is truly independent) makes fascia analysis inappropriate for this sector.⁸ The parties nonetheless submitted that when selecting a funeral director consumers often sought advice from so called 'opinion formers' such as priests and doctors. They argued that these opinion formers were well aware of the ownership of each funeral business, even if the consumer was not. However, the OFT has not found sufficient evidence to demonstrate that this 'opinion former' effect would be sufficient to compensate for the lack of branding that exists in the sector. Therefore, the conclusion remains that for this particular sector fascia count is not the most appropriate filter, given also that other superior measures (availability of market share data by shares of funerals/deaths) are available and better able to capture reputational aspects of competition. Nonetheless, when conducting our analysis in this case we still consider it

⁸ This issue did not apply in respect of local pharmacies considered in *Celesio AG v OFT* ([2006] CAT 9), where branding (such as the Boots) brand is important and consumers are aware for example, of whether they are shopping at a Boots or a rival outlet.

appropriate, given the limited number of overlaps, to have regard to the relative competitive constraints imposed by the remaining competitors, albeit on a case-by-case basis in each local area, rather than by a rule of thumb such as the fascia test.

36. Given the importance of location to competition between funeral businesses, acknowledged by the parties, geographic proximity, or closeness of competition also appears to be a relevant factor when assessing the impact of an acquisition at the local level. The parties argued that buying a funeral was not an impulse purchase and that individuals did not shop around for a funeral. They further noted that geographic closeness would depend from which direction the individual approached the funeral business and would be more relevant if customers had to walk between competitors (whereas most customers travel by car or public transport). The evidence the OFT has found indicates that location is an important factor for consumers when deciding which funeral director to use and that most transactions involve a meeting with the funeral director at the funeral business. Therefore, the OFT considers that it is not unreasonable to assume that geographic closeness may be a good indicator of closeness of competition. Furthermore, the OFT considers that for marginal consumers – those customers that do shop around – the principal alternative, absent evidence to the contrary, is likely to be the closest geographic competitor.
37. Consequently, the OFT's assessment in each radii has used share of funerals as a starting point for the analysis. Although the 25 per cent threshold in Plantsbrook may be considered a cautious approach, given the lack of evidence suggesting a dynamic market with increased levels of competition in the interim, this 25 per cent figure has been taken to be the lowest point at which an area would raise concerns when examined by share of funerals alone. This methodology has been used as a first filter to identify potential areas of concern, supplemented by taking into consideration the presence of the remaining competitive constraints imposed by other funeral businesses in the area and geographic closeness of competition. Notwithstanding the OFT's concerns regarding the parties proposed approach, we have also compared our own analysis with that of the parties as a sensitivity check to our own findings.

Local analysis

38. We identified the following areas in which the merger gave rise to a combined share of funerals of greater than 25 per cent, and thus warranted further analysis:
 - i) Inner London: Hammersmith and Fulham
 - ii) outer London: Hounslow/Richmond

- iii) outside London: Southampton; New Forest; Eastleigh; Wychavon and Woking.

39. For completeness, we also examined the three additional areas in outer London (Kingston, Hillingdon and Ealing) which gave rise to an overlap but fell below the 25 per cent threshold but we found that sufficient competitive constraints remained post-merger in these areas.

Hammersmith and Fulham

40. In Hammersmith/Fulham CGL acquired one additional funeral business, taking its share of funerals to [30-35] per cent (increment [5-10] per cent) when the radii are centred around the acquired Fairways business. However, there are a number of independent funeral businesses within the local area which undertake a significant proportion of funerals in the area suggesting they have strong reputations. Hence, the share of funerals alone may not be a good guide to the impact of the merger on competition in this area. In terms of geographic closeness of competition, one of the CGL business' nearest competitor was found to be a Fairways business (although not vice versa). However, there were two other competitors located a similar distance nearby the Fairways' funeral business (and within the 1 mile radius) who could also be expected to provide a similar constraint post-merger as they are located a similar distance away. Overall, the OFT believes this indicates the remaining competitors pose sufficient constraint on the merged entity to prevent it profitably reducing service quality or raising price. Finally, the parties' analysis of share of deaths also indicates that the parties combined shares were lower (20 per cent-25 per cent) if examined using this methodology. Therefore, the OFT believes that the merger does not give rise to substantial lessening of competition for the supply of funeral directing services in the Hammersmith and Fulham area.

Hounslow/Richmond

41. When the two mile radius is centred on the two acquired Fairways funeral businesses, the merger gave rise to a combined share of funerals of [20-25] per cent and [20-25] per cent respectively, which is below the 25 per cent threshold. However, when the two mile radius was centred around one of the CGL funeral businesses, the combined share of funerals was found to be [25-30] per cent (increment [10-15] per cent). The evidence the OFT has found indicates that the parties' were not each other's closest competitors geographically and that a number of competitors located nearby appear to account for a significant amount of funerals in the area. Therefore, the OFT believes that post-merger sufficient competitive constraints exist, such that it would prevent the merged entity from reducing service quality or increasing price. When analysed on the basis of share of deaths, the parties' combined share was below 25 per cent. Therefore, the OFT

believes that the merger does not give rise to substantial lessening of competition for the supply of funeral directing services in the Hounslow/Richmond area.

Southampton

42. When centred on the Fairways funeral businesses in Southampton, the relevant five mile radius for areas outside London incorporated Eastleigh, a satellite town of Southampton. The parties argued that because a motorway divides Eastleigh and Southampton, funeral businesses on either side of the geographic feature should not be considered together. However, given the presence of bridges over the motorway, the OFT did not consider that the motorway represented a sufficient impediment to competition between Southampton and Eastleigh such that they should be considered separately. The parties also suggested that Southampton Water (which runs through the south west part of the five mile radius) was a barrier to competition. Given this stretch of water is not bridged, the OFT believes that funeral businesses on the west side of the Water do not compete materially with funeral businesses on the east side and should therefore be considered separately.
43. On this basis, the parties' combined share of funerals in Southampton is 50 per cent or higher (with increments above 20 per cent) when the radius is centred on each of the four acquired businesses. The parties would appear to account for the majority of funeral businesses in the local area. Several of the parties' funeral businesses in Southampton were also found to be each others' closest competitors geographically. The two mile sensitivity check still results in figures above 25 per cent. In addition, figures provided by the parties on share of deaths in the 80 per cent catchment area exceeded 25 per cent in all but one instance.⁹ The OFT therefore believes that the merger may give rise to a substantial lessening of competition for the supply of funeral directing services in the Southampton area.

Eastleigh

44. The parties combined share of funerals is over 40 per cent (increments 10 per cent-25 per cent) or higher for each of the four acquired funeral businesses. The parties also account for the majority of the funeral businesses in the area with some of the parties also being each others' closest competitors geographically. As they are so close, the two mile sensitivity check still results in figures above 25 per cent. Figures provided by the parties identify shares of deaths above 25 per cent for three of the five funeral businesses. The OFT therefore believes that the merger may give rise to a substantial lessening of competition for funeral directing services in the Eastleigh area.

⁹ However, Southampton was an area in which anomalies in the maps were prevalent suggesting they may be unreliable.

New Forest

45. As discussed above, the OFT considered that it was appropriate to exclude competitors from the local analysis for New Forest where they were located on the other side of Southampton Water.
46. Post-merger the parties' combined share of funerals is estimated at over 40 per cent, and 100 per cent respectively when the radius is centred around two (of three) acquired funeral businesses. Furthermore, two of the acquired funeral businesses are the closest competitors geographically to CGL. The parties combined share of funerals was also 100 per cent when the radius is centred on two of the four CGL funeral businesses.¹⁰ The third Fairways business had a share of funerals of [20-25] per cent, but was also CGL's closest competitor geographically. Figures provided by the parties also revealed shares of deaths above 25 per cent in the 80 per cent catchment areas for two of the three Fairways' funeral businesses. The two mile sensitivity check removes the overlap. However, as this is a rural area it may be that a wider catchment area is appropriate. This view was supported by the parties' catchment area maps, which indicated that all three acquired funeral businesses resulted in an overlap. The OFT considered that given the high shares of supply and the relatively low number of other competitors, the reduction in competition would not be offset by competition from other funeral businesses. The OFT therefore believes that the merger may give rise to a substantial lessening of competition for funeral directing services in the New Forest area.

Wychavon

47. In Wychavon, the parties' combined share of funerals is over 75 per cent and there is only one other competitor in the local area. The parties' are also each others' closest competitor geographically and the parties' analysis reveals high shares of deaths (over 45 per cent). As they are so close, the two mile sensitivity check still results in figures above 25 per cent. The OFT therefore believes that the merger may give rise to a substantial lessening of competition for funeral directing services in the Wychavon area.

Woking

48. The parties combined share of funerals is [25-30] per cent (increment [0-5] per cent) when the five mile radius is centred on the acquired Fairways business and they would appear to be each other's closest competitor geographically. The evidence the OFT has found indicates that there are a number of alternative funeral businesses supplying funeral directing services in the area. However, the

¹⁰ For the remaining two CGL branches the share of funerals were [20-25] per cent and [40-45] per cent respectively.

strongest competitor within the five mile radius with a share of over 35 per cent is located within a separate town (Guildford) at the edge of the radial boundary suggesting competition between the two may be limited. As a result, the merged parties' share of funerals may understate the competitive impact of the merger in Woking. The parties' data on the acquired funeral businesses' 80 per cent catchment area also supported the contention that the parties' do not compete with the funeral businesses in Guildford. It also showed that the parties combined share of deaths was between 35 per cent and 51 per cent. The two mile sensitivity check still results in figures above 25 per cent for share of funerals. The OFT therefore believes that the merger may give rise to a substantial lessening of competition for funeral directing services in the Woking area.

Conclusion

49. The OFT has identified five local areas (Southampton, New Forest, Eastleigh, Woking and Wychavon) where it believes that it is or maybe the case that the merger may be expected to give rise to a substantial lessening of competition. Based on the evidence available, the OFT does not consider that, absent low barriers to entry/expansion or countervailing buyer power, the remaining competitors in these local areas represent a sufficient competitive constraint post-merger to offset any loss of competition,

Barriers to entry and expansion

50. In Plantsbrook the MMC found that barriers to entry were high, stating that entry into the supply of funeral directing services would be severely impeded in areas where one company was dominant. The parties argued that the costs involved in setting up a new funeral business are low (approximately £20,000- £70,000) and there is a wide range of premises that would be suitable for such use. In addition, they considered that it is a relatively straightforward matter for a funeral business which is already present in a given area to increase the number of funerals it is able to conduct and that most funeral businesses have significant excess capacity. As noted earlier, the majority of third parties confirmed that they had sufficient capacity to expand the number of funerals they currently provided.
51. However, given the market is static with the number of deaths remaining relatively constant, the only way for a new entrant to gain share of supply is to take away funerals from an existing funeral business. This may be difficult in a sector where price competition is weak and customers choose funeral directors on the basis of recommendation. Reputation, in particular, may constitute a significant barrier to both new entry and expansion. Research provided by the parties pointed to trust, a long established business and possessing a well-known funeral director as important factors to gaining share in this sector. Third parties supported this view.

52. The parties submitted that many funeral businesses are set up by former employees of existing funeral businesses and are therefore able to overcome the reputational barrier by transferring goodwill to their new funeral business. While this may be the case, third parties have confirmed that even a new entrant with goodwill from a previous funeral business will begin to supply funeral directing services for a small number of funerals per year and will need to build-up an independent reputation over a number of years.
53. Therefore, while new entry and expansion may be feasible over the long term, such entry/expansion is not considered to be sufficiently timely or on a sufficient scale such that it would credibly constrain the merged entity and offset the competition concerns identified above.

Buyer power

54. As discussed above, a funeral is a typical distress purchase and customers are reluctant to shop around. Therefore, individual consumers are not considered to possess any significant countervailing buyer power in this sector.

VERTICAL ISSUES

55. CGL manufactures and sells coffins, memorials and funeral accessories. Fairways are not active in the provision of these products. Concerns were raised by one third party that post-merger CGL will provide the coffins, memorials and funeral accessories to Fairways funeral businesses, thereby removing trade from independent suppliers. However, the parties argued that the upstream markets for coffins and funeral related supplies are national and since Fairways are only a regional player, any increment at the national level would be less than 1 per cent. This suggests that any impact at a national level on the supply of coffins, memorials and funeral accessories would be minimal. The OFT therefore does not believe that the merger gives rise to any vertical concerns.

THIRD PARTY VIEWS

56. A number of third parties raised concerns that the merger would reduce consumer choice of funeral directors in certain local areas. In particular, third parties suggested one impediment to competition was the lack of transparency as to the ultimate ownership of funeral businesses preventing individuals from making an informed choice of who to engage to provide such services.

ASSESSMENT

57. The parties overlap in the supply of funeral directing services to individuals and the supply of mortuary services Primary Care Trusts and Local Authorities. In relation to the supply of mortuary services, given the existence of a number of alternative bidders, the OFT believes that the merger will not cause the merged entity to gain any particular advantage in winning such contracts and sufficient competitive constraints exist post-merger to render any deterioration in service quality or increase in price unprofitable.
58. Competition for provision of funeral directing services to individuals is considered to occur at the local level in this case. We therefore identified those local areas where the parties' share of funerals was greater than 25 per cent post-merger for further, more detailed analysis. In respect of each of these areas we considered a number of measures of competition including share of funerals; share of deaths; geographic closeness of competition and the relative size and strength of the remaining competitors in the local area.
59. On this basis the OFT identified five local areas where it believes it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition: Southampton, New Forest, Eastleigh, Woking and Wychavon. In respect of these areas, the OFT considers this loss of competition will not be offset by constraints from current competitors. It is also not expected that new entry or expansion would be sufficiently timely to deter or defeat any attempts by the merged entity to capitalise on the loss of rivalry brought about by the merger by reducing service quality or increasing price.
60. Consequently, the OFT believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

UNDERTAKINGS IN LIEU

61. Where the duty to make a reference under section 22(1) of the Act applies, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, accept from such of the parties concerned undertakings as it considers appropriate for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may result from it.
62. The OFT has therefore considered whether there might be undertakings in lieu of reference which would address the competition concerns outlined above. The OFT's guidance on undertakings in lieu of reference state that, 'undertakings in lieu of reference are appropriate only where the competition concerns raised by the

merger and the remedies proposed to address them are clear cut, and those remedies are capable of ready implementation.¹¹

63. In lieu of reference to the Competition Commission, CGL has indicated a willingness to divest a range of funeral businesses sufficient to address any competition concerns identified by the OFT. As noted above, the OFT has identified five local areas where the merger has resulted or may be expected to result in a substantial lessening of competition. In respect of all five, the OFT considers that the parties proposed divestments appear to be sufficiently clear cut to remedy the substantial lessening of competition identified in these areas.
64. Furthermore, the OFT considers that any divestment should seek to ensure that the local conditions of competition are returned to that which existed prior to the merger, especially given the importance of reputation and location. Therefore, the OFT considers that the divestment, as a going concern, of the Fairways funeral businesses in these five local areas is sufficiently clear cut to remedy or mitigate the substantial lessening of competition identified (and thus capable of restoring competition to its pre-merger level).
65. In accordance with section 73 of the Act, the OFT has therefore decided to exercise its discretion to seek undertakings in lieu of reference to the Competition Commission in relation to five local areas in respect of which it has a belief that it is or may be the case that a substantial lessening of competition has resulted or may be expected to result from the merger.

DECISION

66. The OFT's duty to refer the completed acquisition by CGL of Fairways to the Competition Commission pursuant to section 22 of the Act is suspended, because on the information currently available, the OFT is considering whether to accept undertakings in lieu of reference from CGL pursuant to section 73 of the Act.

¹¹*Mergers – substantive assessment guidance*, paragraph 8.3.