
Completed Acquisition by J Sainsbury plc of Jacksons Stores Ltd

The OFT's decision on reference under section 22(1) given on 26 October 2004

PARTIES

1. **J Sainsbury plc** (Sainsbury's) is one of the UK's largest grocery retailers, with 500 stores. **Jacksons Stores Ltd** (Jacksons) is an independent retailer operating 114 stores in Yorkshire and the North Midlands of which 112 are 'convenience' stores and 2 are 'mid-range' stores. Jacksons' UK turnover for the financial year ending April 2004 was £143 million.

TRANSACTION

2. Sainsbury's acquired Jacksons by way of a private share agreement on 15 August 2004. The four month statutory deadline expires on 14 December 2004. The 40 working day administrative deadline for the OFT's decision in this case is 26 October 2004.

JURISDICTION

3. As a result of this transaction Sainsbury's and Jacksons have ceased to be distinct. The UK turnover of Jacksons exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is the case that a relevant merger situation has been created.

RELEVANT MARKET

Product market

4. The parties overlap in grocery retailing, principally in convenience grocery retailing. In recent years the grocery retailing sector has been examined on a number of occasions both by the Competition Commission's (CC) and the OFT.¹ No new

¹ See the CC's Supermarkets Report (2000, Cm 4842), the CC's report on the proposed acquisitions of Safeway plc and Asda Group Limited (owned by Wal-mart Stores Inc); Wm

evidence emerged in the course of this investigation that was sufficiently material to justify departing from the approach developed in previous cases.

5. Grocery retailers cater for a complex range of grocery shopping needs. The range of types of grocery shopping recognised in previous cases includes: convenience shopping, where a few emergency or impulse items are purchased, usually for consumption within 2 hours of purchase; secondary or top-up shopping, where a top-up of regular purchases is made; and one-stop shopping, which can include a major replenishment of supplies. To analyse the competitive constraints on an individual grocery store, one must therefore identify the types of shopping undertaken in that store.
6. Small stores (i.e., those generally below 280 square metres) can only carry a limited range of products. Because of this, they predominantly meet customers' needs for convenience shopping. However, convenience shopping is undertaken by customers in a wide range of retail outlets including mid-range and large stores. Evidence from the CC's Safeway Report and our own investigations indicates that mid-range and large stores represent a competitive constraint on small stores for convenience shopping.
7. Not all small stores fall within the category of 'convenience store' as defined by Mintel and IGD.² In particular, while specialist stores such as butchers and bakers might provide some local competition to 'convenience stores', the strength of this competition is likely to be limited by their more restricted opening hours and product range.
8. Accordingly, as in previous cases, the focus of our analysis for considering the competitive constraints on small stores would appear therefore to be convenience shopping in all grocery outlets, but excluding smaller specialist shops that do not meet the Mintel/IGD criteria.
9. Mid-range stores typically cater for a wider range of shopping trips than small stores. In its Safeway Report, the CC considered that there was likely to be a continuum of competitive constraints moving from stores close to 1,400 square metres (for which the issues would be similar to the issues set out for its one-stop shop analysis), to stores close to 280 square metres (for which the issues would be more similar to the issues pertaining to convenience stores).³

Morrison Supermarkets PLC; J Sainsbury plc and Tesco plc – A report on the mergers in contemplation (Cmnd 5950) (the Safeway Report), the Deputy Director-General of Fair Trading's advice 9 December 2002 on the proposed acquisition by Tesco plc of T&S Stores Limited (Tesco / T&S) and the OFT's decision 5 March 2004 on the anticipated acquisition by Tesco plc of 45 stores from Adminstore Ltd (Tesco/Adminstore).

² Defined as stores (of less than 3,000 square foot (280 square metres)): (i) with extended opening hours (including Sundays); (ii) offering a range of products; and (iii) serving a local community.

³ Para. 5.344 Safeway Report.

10. One-stop shopping has been used by the CC to mean large, typically weekly shopping trips in grocery stores of 1,400 square metres and above which require a large range of groceries to be on offer. The CC recognised that mid-range stores in some areas may act as 'one-stop stores', but more generally place a limited constraint on 'one-stop stores'⁴. For its analysis of mid-range stores, the CC cautiously concluded that a limited number of fascia were effective competitors for one another in these range of stores.⁵ The competitor set for convenience shopping includes a much wider set of retailers.
11. Large stores cater for the full range of grocery shopping trips, including convenience shopping and one-stop shopping. Typically in a local area, only large stores cater for one-stop shopping, and thus are not generally constrained effectively by mid-range and small stores for customers of this type of shopping. On the other hand, a large store is very likely to compete effectively with small and mid-range stores for the shopping types such stores offer.
12. It has been put to us that, in contrast to the position taken in earlier cases, it is inappropriate to analyse competition between stores according to the differing types of grocery shopping outlined above. In particular, it is said that the growth of 'repertoire shopping' – in which customers do not confine themselves to one type of shopping – has blurred distinctions between convenience, secondary/top-up and one-stop shopping. Although some limited evidence has been put to us to support this contention, it is not sufficiently persuasive to warrant departing from the approach set out above.
13. Overall the available evidence suggests that, while larger stores do appear to provide a competitive constraint on small stores, the reverse is generally less likely to be the case, especially in light of the differences in catchment area for different sizes of store (see below) and the fact that the proportion of one-stop shopping in large stores is much greater than in small stores.
14. In the current case, only two of the 114 Jacksons stores have a retail area of over 280 square metres. Therefore, in light of the above, the focus of our analysis of the competitive constraints for the 112 small stores is convenience shopping and for the two mid-range stores is competitors who cater for the same types of shopping as these stores. In any event, the substantive analysis would not differ in this case even if the focus of our store analysis were to be the supply of all groceries.

⁴ Para. 5.11 Safeway Report.

⁵ The CC defined effective competitors for Safeway's mid-range stores for the purposes of the first stage of its local competitive analysis as Asda, Booths, Budgens, Co-op, Iceland, Sainsbury's, Safeway, Somerfield (including Kwik-Save), Morrison, Tesco and Waitrose.

Geographic market

15. There are both national and local elements to competition among grocery retailers. Sainsbury's and other major grocery retailers undertake much of their procurement and set many of their competitive strategies (e.g. core product ranges, some or all prices, branding and advertising) at national level. At a local level, however, stores appear to tailor their offerings in response to demographic and other factors in a number of ways, including local variations in opening hours, ranges, or promotional offers. The scope of local competition in types of grocery retailing depends, to some extent, on the distance consumers are able or willing to travel to shop for groceries, which depends to a degree on the type of shopping trip to be undertaken (which in part is related to the size of store in question).
16. The evidence in previous cases indicates that, in general, the catchment area for a convenience store is up to one mile from the store. However, as observed in the Tesco/Adminstore case⁶, a half mile radius may be more appropriate in densely populated areas. As a result, the parties provided customer mapping evidence both on a one mile and half mile radius around the relevant stores.
17. In the Safeway Report, the CC analysed local competition in mid-range stores on a five-minute drive time isochrone in urban areas and a ten-minute drive time in rural areas. The OFT has seen no evidence to justify departing from this approach.

Conclusion on relevant frame of reference

18. The focus of our analysis for each store has therefore been the constraints placed on that store by its competitors, more specifically: (a) for small stores, convenience shopping (in all grocery stores) nationally and within one mile and half a mile radii; and (b) for mid-range stores, the alternative fora for the shopping trips such stores cater for nationally and within 5 and 10 minute drive-time isochrones for urban and rural areas respectively.

HORIZONTAL ISSUES

National competition

19. In the year to 18 July 2004 Sainsbury's share of all grocery retailing in Great Britain was around 17 per cent according to TNS till roll data. Jacksons does not report to TNS but Sainsbury's estimates that the share attributable to Jacksons using comparable IGD data would be around 0.2 per cent. Sainsbury's estimates their share of convenience shopping through all grocery stores as around 6 per cent, with Jacksons accounting for around 0.3 per cent. On each of these measures, the increment from this transaction to Sainsbury's national share is very

⁶ see Tesco/Adminstore.

low and would not lead to a significant HHI increment in the context of its existing shares and the concentration in these sectors. On this basis, no national concerns arise as a result of this transaction.

Local competition

Small stores

20. In the Safeway Report, the CC identified that potential competition concerns arise in local areas where, post-merger, there will be two or fewer fascia competing with the merged parties (i.e. a 4 to 3 or less). There are 17 local areas where a Jacksons' store overlaps with a Sainsbury's store (of any size) on either a one mile or half mile radius. Local overlap analysis provided by the parties demonstrated that for each of these overlap areas, there will be three or more fascia (including small stores, mid-range stores and large stores) competing with the parties post merger. On this basis, no local competition concerns arise.

Mid-range stores

21. Neither of the two mid-range Jacksons stores overlaps with a Sainsbury's store (of any size) on the basis of either a 5 or 10 minute drive-time isochrone. Given this, no local competition concerns arise.

Barriers to entry and expansion

22. Previous investigations by the OFT have concluded that, while there might be differences between different geographic locations, in general, barriers to entry for small stores are not at present substantial.
23. No new evidence has been put to us in this case to suggest that the position has changed in terms of site availability and no third parties raised specific issues about barriers to entry in any of the overlap areas.
24. Local planning regulations might in principle create barriers to entry. There is no evidence, however, to suggest that this is an issue in this case.
25. Some third parties have argued that small independent retailers might find entry less attractive than larger retailers, first because property prices for suitable stores are being increasing beyond the means of the smaller retailers because of the entry of the majors and second, because the larger retailers have significant buying advantages (in respect of grocery purchases). No persuasive evidence has been provided in support of these assertions, however, to demonstrate the strength of these effects nor to show that this creates significant barriers to entry, when taking all retailers into account. Certainly, on the basis of the evidence before the OFT, growth in the convenience sector appears to be strong, with convenience

stores continuing to be opened in areas where they face competition from the large national chains.

26. Weighing up all the evidence before it and taking all potential entrants into account, the OFT believes that, in relation to the relevant localities in this case, actual and potential entry is currently capable of exerting an important competitive constraint. There is no need to conclude whether the barriers to entry in relation to the two mid-range stores are substantial given that no horizontal concerns have arisen in this case.

VERTICAL ISSUES

27. Trade associations have raised a number of concerns regarding the vertical effects of the merger. These have also been reflected in responses from a small number of individual suppliers, though the majority of suppliers contacted did not raise any vertical issues. Three main concerns were raised, namely that:
- Sainsbury's will enjoy an 'unfair' buying advantage, constituting 'an abuse of its buyer power' that harms the supply base and, ultimately, reduces the choice of products available to consumers
 - because Sainsbury's sells more own-label products than Jacksons, access of brands – especially 'second tier' brands – to retail outlets will be reduced, resulting in longer-term damage to the range of brands supplied, and
 - suppliers (manufacturers and wholesalers) will suffer financially if their contracts with the former Jacksons stores are made less profitable or are discontinued. Some might go out of business and those that remain would, it was argued, have to recoup lost revenues through charging higher prices to smaller retailers. Doing so would, however, make those retailers even less price competitive with the larger chains, adding to consolidation pressures in the sector and further strengthening the major retailers.
28. On the first point, there is evidence to show that Sainsbury's is able to secure better terms in relation to price from Jacksons' suppliers. However, Jacksons' annual spend on groceries is only around 1 per cent of Sainsbury's purchases and therefore the OFT does not believe that this increment will materially increase Sainsbury's negotiating strength. Furthermore, there is only one product supplier where Jacksons represents a significant proportion of that supplier's total sales. Therefore, the argument that the transaction could have a substantial adverse impact on Jackson's supply base as a whole appears to be unfounded.
29. With respect to the remaining two points, no substantive evidence has been put to us to support the contention that adverse effects will flow from this transaction, let alone show that they will be significant. Specifically, no data on the effects from previous analogous transactions have been put to us, nor any analysis that

takes into account the fact that, while some suppliers might lose volume, others are likely to gain. The argument that some individual suppliers might be worse off does not of itself provide a basis for concluding that competition will be harmed.

30. Overall, the increment to the parties' purchasing power as a result of the transaction is small. Moreover, the evidence before the OFT does not, in its view, support the contention that this transaction might impact on suppliers to any material degree so as to cause significant harm to competition. On this basis, no vertical concerns are considered to arise as a result of this merger.

THIRD PARTY VIEWS

31. A number of third parties expressed concerns about this merger. However, many of these concerns related to Sainsbury's existing size and the wider trends in convenience retailing, rather than to this merger specifically. The main concerns raised by third parties are addressed above. The Consumers Association welcomed the merger, which it believes will be beneficial to consumers.

ASSESSMENT

32. The parties overlap in grocery retailing, primarily convenience retailing. Due to the small increment, no national concerns arise as a result of this merger. No local areas have been identified where, as a result of the merger, there will be three or fewer fascia competing with the merged entity post-merger. On this basis, there are not considered to be horizontal competition concerns. Furthermore, in the relevant localities where the parties' activities overlap in the convenience store sector, the OFT believes, having weighed up all the evidence before it, that actual and potential entry is capable of exerting an important competitive constraint on the parties post-merger. No conclusion has been drawn whether the barriers to entry in relation to the two mid-range stores are substantial given that no horizontal concerns have arisen in this case.
33. The acquisition will lead to only a tiny increment to Sainsbury's upstream buyer power. Although third parties have expressed concerns about Sainsbury's existing purchasing power, any change in its position in this respect as a result of this acquisition is negligible. Furthermore, the evidence before the OFT does not support the argument that the transaction will have an adverse effect on suppliers to any material degree so as to cause significant harm to competition.
34. Consequently, the OFT does not believe 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.

DECISION

35. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.