

Completed acquisition by Midcounties Co-operative Limited of Tuffin Investments Limited

ME/5452/12

The OFT's decision on reference under section 22 given on 18 October 2012. Full text of decision published 5 November 2012.

Please note that the square brackets indicate 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.

PARTIES

1. Midcounties Co-operative Limited (**Midcounties**) is a member-owned co-operative society that is active in the provision of a range of services including grocery retailing, travel retailing, pharmacy, child care, Post Office and funeral care. It provides these services from approximately 470 branches in the United Kingdom (**U.K.**). For the year 2011, Midcounties generated total net sales of approximately £641.1 million, of which approximately £503.3 million was from the retail supply of groceries.
2. Tuffin Investments Limited (**Harry Tuffins**) is comprised of the grocery and fuel¹ retailing business of Harry Tuffin Limited that was acquired by Midcounties.² Harry Tuffins operates 10 grocery stores, eight of which are also active in the retail supply of fuel. For the financial year ending 2011, Harry Tuffins generated total net sales of approximately £[] million, of which approximately £[] million was from the retail supply of groceries.

¹ This includes the supply of petrol, diesel and LPG.

² A water bottling business (Montgomeryshire Natural Spring Water Company) and a wildlife and country park (Churchstoke Country Park) together with certain other properties are not included in the transaction.

TRANSACTION

3. On 9 March 2012, the parties entered into an agreement whereby Midcounties would acquire the entire issued share capital of Harry Tuffins (comprising the grocery and fuel retailing activities of Harry Tuffin Limited) (the **transaction**). The parties publicised the transaction on 3 April 2012 and completed it on 30 April 2012.
4. The parties informed the OFT of this transaction prior to its completion and shortly thereafter Midcounties provided Initial Undertakings to the OFT, pursuant to section 71 of the Enterprise Act 2002 (the **Act**), for the purpose of preventing pre-emptive action. The OFT agreed to certain derogations from the Initial Undertakings as set out in two consent letters dated 3 May and 16 July, respectively.
5. The OFT commenced its administrative timeline on 20 August 2012 and the extended administrative deadline is 18 October 2012. As the transaction completed on 30 April 2012, the OFT issued a Notice to Midcounties, pursuant to section 25(2) of the Act, which had the effect of extending the statutory deadline to 29 November 2012.

JURISDICTION

6. As a result of this transaction, Midcounties and Harry Tuffins ceased to be distinct.
7. As the UK turnover of Harry Tuffins, for the last financial year was below the turnover threshold of £70 million, the turnover test contained in section 23(1)(b) of the Act is not met.

Share of supply test

8. The OFT will have regard to any reasonable description of a set of goods or services when determining whether the share of supply test as set out in section 23 of the Act is met.³

³ OFT Mergers - Jurisdictional and Procedural Guidance, OFT527, June 2009, at paragraph 3.55.

9. The parties overlap in the retail supply of groceries, which the OFT considers is a reasonable description of a supply of goods.⁴ Section 23(3) of the Act states that the share of supply test is measured on the basis of supply in a substantial part of the UK. A substantial part of the UK has been found to refer to an area of such size, character and importance as to make it worth consideration.⁵ In previous decisions considering whether an area could reasonably be described as a substantial part of the UK, the Competition Commission (**CC**) has considered such factors as population size, demographics and whether the area represents an administrative centre. Furthermore, the local nature of the markets in question has also been considered a relevant economic factor.⁶
10. The parties are both active in the retail supply of groceries in or about the area of Shropshire and the Forest of Dean. For the purposes of its assessment of jurisdiction, the OFT considered, the area of the Forest of Dean and its environs.
11. The parties stated that the population size within the Forest of Dean geographic area that they consider relevant for the assessment of jurisdiction is less than the totality of the wards under the administration of the Forest of Dean. The parties noted from the Forest of Dean District Council's website⁷ that the area has a population of 82,900. Moreover, the parties stated that from their understanding of customer grocery shopping trips within these wards, the population affected by the transaction is significantly less than that in the entire Forest of Dean District.

⁴ Also see previous decisions: ME/5317/12 Anticipated Acquisition by Co-operative Group Limited of David Sands Limited, OFT decision dated 16 April 2012 (CGL/David Sands), and ME/4810/10 Anticipated Acquisition by One Stop Stores Limited of 76 stores of the Mills Group of companies, OFT decision dated 14 March 2011 (Tesco/Mills).

⁵ R. MMC Ex p. South Yorkshire Transport Limited [1993] 1 W.L.R. 23 at pp. 32. Although this case refers to the provisions of the Fair Trading Act 1973, the OFT considers that the same principles apply.

⁶ See: A report on the acquisition of the Co-operative Group (CWS) Limited's store at Uxbridge Road, Slough by Tesco plc dated 28 November 2007, a report on the completed acquisition by Stagecoach Group plc of Preston Bus Limited dated 11 November 2009, and a report on the completed acquisition by Stagecoach Group plc of Eastbourne Buses Limited and Cavendish Motor Services Limited dated 22 October 2009.

⁷ Forest of Dean District Council's website, available at: www.fdean.gov.uk/nqcontent.cfm?a_id=6556&tt=graphic. Last accessed 15 October 2012.

12. The parties stated that they do not believe that the areas of Chepstow, Monmouth or Ross-on-Wye should be included in the assessment as, based on Midcounties customer data, less than [0-five] per cent of their customers shopping within the Forest of Dean reside in a postcode area around these areas.
13. The parties submitted that a relatively limited total population (approximately 62,000) located within the wards under the administration of the Forest of Dean District, in and around Coleford, Lydney, Cinderford, Mitcheldean and Drybrook, would be affected by the transaction. As such, the parties stated that based on their population size estimates, this area could not be considered to be a substantial part of the UK.
14. For the purposes of its jurisdictional assessment, the OFT considered an area around the Forest of Dean and its immediate environs (including the towns of Coleford, Lydney, Cinderford, Monmouth, Ross-on-Wye, Chepstow, Mitcheldean and Drybrook). The OFT does not consider it unreasonable to identify these areas collectively as they fall within an area bounded by the A40 to the North, A466 to the West and the A48 to the East of the Forest of Dean District. Given the geographical position of the Harry Tuffins' stores in Coleford and Lydney, two of the three market towns serving the area of the Forest of Dean, the OFT considers it reasonable to include in its calculation of population those wards that fall within this area, including the towns at the intersection of these roads.
15. This area covers several administrative regions, with the Forest of Dean District Council's offices located in Coleford. The estimated population for all the electoral wards within this area is approximately 118,000.⁸
16. As well as having regard to the population within the area described above, the OFT considers the retail supply of groceries in a local area to be a service of importance to both the local population and visitors to the area, and this is supported by the numerous third party comments received by the OFT where local residents expressed concerns about the effect of this transaction.

⁸ Office of National Statistics Mid-2010 population estimates for census area statistics - wards in England and Wales.

17. Taking the population size,⁹ the role of Coleford as the Forest of Dean's administrative centre, the historic nature and location of the areas identified in attracting visitors to the Forest of Dean and Wye Valley and Valley of Urs, and the local nature of the supply of groceries, the OFT considers that the area in question may reasonably be described as a substantial part of the UK.
18. Using the net sales area of the merged parties' stores in this area, the combined share of supply for all categories of grocery stores is [25-35] per cent, with an increment of approximately [five-10] per cent. Excluding convenience stores (as Harry Tuffins does not operate convenience stores in the Forest of Dean District), the parties combined share of supply still exceeds 25 per cent.¹⁰
19. In light of the above, the OFT considers that it is or may be the case that the share of supply test as per section 23(3) of the Act is met and therefore that it is or may be the case that a relevant merger situation has been created.

COUNTERFACTUAL

20. The OFT's approach to the appropriate counterfactual is outlined in section 4.3 of the Merger Assessment Guidelines. The OFT considers the effect of the merger against the most competitive counterfactual (provided that situation is realistic). In practice, the OFT generally adopts the prevailing conditions of competition as the counterfactual.¹¹

⁹ The OFT notes that the population of Slough was approximately 120,000 at the time of the CC's report, *supra*, footnote 6.

¹⁰ Given its findings, the OFT has not needed to consider alternatively whether the share of supply test would be met in relation to the supply of groceries in a substantial part of the UK comprising non-contiguous areas (for example including parts of Shropshire) (see in this respect the conclusions of the CC in its report on the acquisition by Archant Limited of the London newspapers of Independent News and Media Limited, Report dated 22 September 2004, at Appendix C).

¹¹ Merger Assessment Guidelines, joint publication of the OFT and the CC, OFT1254, dated September 2010 at paragraph 4.3.5.

21. The parties stated that the appropriate counterfactual is that the vendors would have sold the Harry Tuffins' business in its entirety to a business which shared its local community values and commitment. This, the parties stated, would have been in a timely fashion, resulting in significant changes to the ranges and pricing which reflected a modern grocery retailing practice which were not in place in Harry Tuffins. However, the parties did not provide supporting evidence to suggest that Harry Tuffins as a whole, absent the transaction, would have exited the market.
22. The OFT considers that, for Harry Tuffins as a whole, it is appropriate to take the pre-merger situation as the appropriate counterfactual. The OFT has considered, however, specific arguments in relation to counterfactual relevant to three Harry Tuffins locations – Malpas, Lydney and Machynlleth.

Counterfactual applicable to Malpas

23. Harry Tuffins has a site in Malpas, Cheshire. The Harry Tuffins' site in the area of Malpas has no store in operation but does benefit from planning permission for a petrol station and convenience store. The parties noted that Harry Tuffins indicated an intention to open a petrol station and accompanying convenience store upon the site in late 2012.
24. The OFT notes the parties' submission that it has not identified any funding within the Harry Tuffins business for the development of this site. The OFT also notes the absence of Harry Tuffins internal documents on its plans for the Malpas site. Even without identified funding or internal documents on its Malpas plans, however, the OFT considers it likely, or at least plausible, that Harry Tuffins would have opened a store on this site. Indeed, the intention to do so is made clear by an internal email to this effect and from the OFT's discussion with the vendors of Harry Tuffins.¹²
25. The OFT considers that there is insufficient evidence to support the parties' view that the Malpas site would have remained an investment. On a cautious basis, the OFT considers it appropriate to assess the merger in

¹² The internal email is dated July 2012 and confirms that building works would have commenced in mid-2012 for an opening in November 2012. Furthermore, it is noted that a quote for the building works had been received. The vendors confirmed to the OFT [].

relation to the Malpas site against the counter-factual of Harry Tuffins opening a store at this site in late 2012.¹³

Counterfactual applicable to Lydney

26. The parties also made representations about the counterfactual applicable to the analysis in the Lydney area. In this area, they pointed to the financial viability of the Harry Tuffins' store in Lydney, stating that [], a break-clause in the current lease, exercisable in [], would have been considered by Harry Tuffins in the absence of the merger. As such, the Harry Tuffins stores [] absent the merger. The OFT has confirmed the existence of the break-clause. However, the evidence available to it, following discussions with the vendors, indicates that no decision had been made to exit Lydney in [] and that there was some prospect that, depending on the financial performance of the store over the next [], it could have continued trading []. As such, the OFT does not consider that it has compelling evidence that the Lydney store would inevitably have exited the market absent the merger and considers it appropriate to examine the competitive situation in Lydney based on the existence of the Harry Tuffins store.

Counterfactual applicable to Machynlleth

27. The parties also submitted that the relevant counterfactual for the Harry Tuffins' store in Machynlleth is that, absent the transaction, the current store would have been replaced by a smaller kiosk. This is because Powys County Council requires certain building works to be undertaken at the store to comply with planning conditions. In the absence of such building works, which Midcounties stated Harry Tuffins would not have undertaken, the Council would have taken enforcement action and required demolition works upon the site to return it to its prior size as a kiosk.

28. The OFT considers that the parties have provided some evidence to substantiate this submission; however it is noted that a store would still exist at this site even if the Council's enforcement action was carried out. Furthermore, it is not clear that Harry Tuffins would not have been willing and able to take steps to avoid such enforcement action being taken had it retained ownership of the Machynlleth store. Consequently, the OFT

¹³ Merger Assessment Guidelines, *ibid*, at paragraph 4.3.19.

considers the appropriate counterfactual to be the continuation of a convenience store at the site.

Conclusion on the counterfactual

29. In light of the above comments from the parties, and on the basis of the information provided, the OFT does not consider that the conditions regarding an exiting firm are met in this case.¹⁴
30. As the OFT has not received compelling evidence in this case to demonstrate that it should depart from an assessment of the merger as against the prevailing conditions of competition pre-merger and in line with its guidance,¹⁵ the OFT has assessed the merger against the status quo ante, save for the situation in Malpas, where the OFT has assessed the merger against a counterfactual of Harry Tuffins developing the site into a convenience store with both a petrol and retail offering.

RELEVANT FRAME OF REFERENCE

Product scope

31. The parties are both active in the retail supply of fuel and groceries. Each is discussed in turn below.

Retail supply of fuel

32. The OFT has considered the retail supply of fuel in a number of recent cases where it considered the retail supply of petrol and diesel combined. In relation to auto-LPG, the OFT has previously considered this as a separate product frame of reference.¹⁶

¹⁴ *Ibid*, paragraphs 4.3.8 - 4.3.18.

¹⁵ *Ibid*, paragraph 4.3.5.

¹⁶ See case ME/5407/12, Proposed acquisition by J Sainsbury plc of 18 petrol stations from Rontec Investments LLP, OFT decision dated 7 June 2012 (Sainsbury/Rontec) case ME/5139/11, proposed acquisition by Rontec Investments LLP of petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Ltd and their affiliates, OFT decision dated 20 October 2011 (Rontec/Total) and case ME/5191/11 completed acquisition by Shell UK Limited of 253 petrol stations from Rontec Investments LLP, OFT decision dated 3 February 2012 (Shell/Rontec).

33. The OFT has not received any information to suggest that it should depart from these previous findings. In light of the limited overlap between the parties in the retail supply of fuel at a national level and the lack of local overlaps, the OFT considers that, for the purposes of its assessment of this transaction, it does not have to reach a conclusion on the precise product scope.

Retail supply of groceries

34. The parties noted the recent decisional practice of the OFT, and the conclusion of the CC in its 2008 'Groceries Report'¹⁷ that classified grocery stores according to their size, namely:

- one-stop stores: those with a net sales area of 1,400 square metres (sqm) or more. Stores in this category compete with other stores of the same size and constrain stores of a smaller size
- mid-sized stores: those with a net sales area of between 280 sqm and 1,400 sqm. Stores in this category compete with other stores of the same size, are constrained by one-stop stores but do not in turn constrain them, and
- convenience stores: those with a net sales area of less than 280 sqm. Stores in this category compete with all other stores of the same size and are constrained by mid-sized and one-stop stores. Convenience stores do not constrain mid-sized or one-stop stores.

35. No evidence was provided to suggest that the OFT should depart from its previous decisional practice by considering a different segmentation by stores to that which is set out above in paragraph 34.

Petrol Station Kiosks

36. The parties noted the possible existence of a separate relevant product market for petrol station kiosks (**kiosks**)¹⁸ as previously considered by the

¹⁷ Competition Commission Report, 'The supply of groceries in the UK' dated 30 April 2008 (Groceries Report).

OFT.¹⁹ However, for completeness, the parties confirmed that they did not consider that a one-stop store active in the retail supply of groceries and petrol may be differentiated from a one-stop store active in the retail supply of groceries only.

37. The parties provided a comparison of the estimated base linear meterage (**BLM**), that being the measurement of the internal shelf space allocated by category of product, between Harry Tuffins' stores with and without the retail supply of fuel. The parties concluded from this data that the Harry Tuffins' convenience stores active in both the retail supply of fuel and groceries have a more limited grocery offering to the mid-sized Harry Tuffins' stores. The OFT considers that a convenience store and a mid-sized store are likely to have a different product offering due to their difference in size and that this cannot be directly attributable to the presence of the retail supply of fuel.
38. Furthermore, the parties provided comparisons of the BLM for Midcounties' intended offering in the areas of Bishop's Castle and Machynlleth and that of the Co-operative Group Limited's (**CGL**) stores present.
39. The OFT considered kiosks within the groceries market in its decision in Sainsbury/Rontec²⁰ but did not consider it necessary to reach a conclusion on the precise product scope. However, for the purposes of its assessment in Sainsbury/Rontec the OFT considered the level of competition between kiosks as well as the asymmetric constraint convenience, mid-sized and one-stop stores exert on them.
40. The OFT has considered in this case whether the Harry Tuffins convenience stores operating alongside fuel stations are of a particular size, layout and carry a specific range of products such that they could be considered to be kiosks and distinct from other convenience stores.
41. Third party responses received by the OFT to date are mixed on this point with one third party suggesting that the OFT should consider the precise characteristics of the local market, with others noting that kiosks should be

¹⁸ That being a petrol forecourt station with a grocery offering.

¹⁹ Supra, (Sainsbury/Rontec).

²⁰ Ibid.

considered within the convenience store definition, and that there is no reason why a convenience store that also sells petrol should be considered outside the relevant product market.

42. The OFT considered the evidence available to it, including that provided by the parties, and whether this would support the finding of a separate product market for petrol kiosks. The OFT considers that the evidence that could be taken in support of such a distinction is not robust, and does not conclusively attribute the difference in product offerings to the presence or absence of petrol sales.
43. In the absence of sufficient evidence to suggest a segmentation of the product scope to petrol station kiosks, the OFT has considered such stores within the category of convenience store.

Internet Grocery Retailing

44. The parties stated that the rapid and continued expansion of internet grocery retailing suggested that the relevant geographic markets previously considered at a local level may be increasingly wider in scope. As explained below, the OFT considers that these arguments are more relevant to product scope.
45. The parties stated that the position has progressed from when the CC reported on this in its Groceries Report,²¹ highlighting that Asda, Sainsbury's, Tesco, Ocado and Waitrose all provide internet grocery retailing and delivery services.
46. The parties submitted that, with the exception of the area of Machynlleth, each of Asda, Sainsbury's and Tesco provide deliveries for online grocery orders in the vicinity of each of the Harry Tuffins' stores. Also, that Waitrose delivers in Cleobury Mortimer and Ocado in Holywell and Malpas.
47. The parties therefore submitted that internet grocery retailing imposes a real competitive constraint on mid-sized and one-stop stores, as customers are able to quickly and easily plan their shopping outputs, arranging delivery at a time and date which is convenient for them. This, the OFT considers, is primarily an argument on product scope as opposed to geographic scope.

²¹ Supra, paragraph 4.132 and 4.133.

48. The third party responses received to date are mixed on this issue. One suggested that internet grocery retailing imposes a degree of competitive constraint on all categories of grocery retailing, another stated that it does not impose any, and a third stated that there is no reason in principle why it should not constrain but there is no specific information to support this.
49. The OFT considers that the parties have submitted insufficient evidence to justify widening the product market definition to include internet grocery retailing. In relation to the constraint from internet retailing on mid-sized and one-stop stores, the OFT considers it more appropriate to consider this as an out-of-market constraint in its competition assessment.
50. In any event the OFT does not need to conclude on this issue as the parties carried out surveys at mid-sized and one-stop stores. These would be expected to reflect the strength, to the extent it exists, of any constraint that internet retailing exerts on these stores in a given local area.

Conclusion on relevant product scope

51. As stated above, the OFT considers that it does not need to reach a conclusion on the precise product scope for the retail supply of fuel as there is limited overlap in the activities of the parties on a national basis.
52. In relation to the retail supply of groceries, the OFT has not received sufficient evidence to suggest that the approach adopted in its previous decisional practice²² to date should be departed from and therefore, it has considered the transaction in line with the classification of the one-stop, mid-sized and convenience stores. In relation to petrol station kiosks, the OFT considers that there is insufficient evidence to support a segmentation by this category and therefore has assessed these stores alongside other convenience stores.

²² For example, ME/3777/08, anticipated acquisition by Co-operative Group Limited of Somerfield Limited, OFT decision dated 20 October 2008 (CGL/Somerfield), ME/4551/10, anticipated acquisition by Asda Stores Limited of Netto Foodstores Limited, OFT decision dated 23 September 2010 (Asda/Netto), Tesco/Mills and CGL/David Sands, *supra*.

Geographic Scope

Retail supply of fuel

53. In its most recent cases relating to the retail supply of fuel, the OFT has adopted an initial filtering approach for the purpose of local effects analysis on the basis of a 10-minute drive-time isochrone for urban areas and a 20-minute drive-time isochrone for rural areas.²³
54. The OFT has not received any information to suggest that this is not an appropriate approach. Moreover, given that the parties do not overlap at a local level, the OFT considers that it does not need to reach a conclusion on the relevant geographic scope.

Retail supply of groceries

55. The parties referred to previous OFT decisions where it has considered the effects at both a national and local level. At a local level the parties agree with the previous OFT decisional practice and the conclusions of the CC's Groceries Report, as set out below.
56. Previous OFT decisions and the CC's Groceries Report identified that the relevant geographic scope is essentially local but that national dimensions of competition exist.²⁴ The OFT has defined the geographic scope as follows:
- for **one-stop stores**: a 10-minute drive-time in urban areas and 15 minutes in rural areas
 - for **mid-sized stores**: a five-minute drive-time in urban areas and 10-minute drive-time in rural areas. These stores are also constrained by one-stop stores within a 10-minute drive-time in urban areas or a 15-minute drive-time in rural areas (although in this respect, see paragraph 58 below), and

²³ This applies to non-motorway sites. See cases Rontec/Total, Shell/Rontec and Sainsbury/Rontec, *supra*.

²⁴ Tesco/Mills, *supra*, at paragraph 13 and the Competition Commission's Groceries Report, *supra*, at paragraph 4.134.

- for **convenience stores**: a five-minute drive-time in all areas. These stores are constrained by one-stop stores within a 10-minute drive-time in urban areas or a 15-minute drive-time in rural areas and by mid-sized stores within a five-minute drive-time in urban areas or a 10-minute drive-time in rural areas (although in this respect, see paragraph 58 below).

57. Third-parties broadly agreed with the above approach.
58. With particular reference to convenience stores, the OFT considered in its decision in CGL/David Sands²⁵ that it was also appropriate to consider a one mile radius. The parties acknowledged this approach in their submission. The OFT notes that one third party did not agree with this approach.
59. The OFT only considered in CGL/David Sands the asymmetric constraint imposed on convenience stores from mid-sized and one-stop stores within the five-minute drive-time isochrone and one mile radius. For the purposes of the analysis in this case, and adopting a cautious approach, the OFT has also considered the approach taken in CGL/David Sands. This applies both in relation to the constraint from mid-sized and one-stop stores on convenience stores, as discussed above, and also in relation to mid-sized stores, where the OFT considers mid-sized stores only being constrained by one-stop stores within a five-minute drive-time in urban areas and 10 minutes' drive-time in rural areas.
60. The OFT considers that undertaking the analysis of local overlaps based on each of the geographic approaches in paragraph 56 and paragraph 59 is suitably cautious. In doing so, it has not sought to identify one of these approaches as being inherently superior or preferable to the other, but has considered the outcomes of the alternative analyses in the context of the specific facts of each overlap area in question.
61. For the purposes of the assessment of the competition effects arising from the transaction, the OFT has therefore used the geographic scope set out in paragraphs 56, 58 and 59 above. The OFT notes that these geographic boundaries are in any event less relevant in those areas where the parties have carried out surveys.

²⁵ Supra, footnote 4.

Conclusion on relevant geographic scope

62. In line with previous decisional practice, the OFT considers that the relevant geographic scope for the retail supply of fuel in this case, at a local level, may be approached on the basis of a 10-minute drive-time isochrone in urban areas and a 20-minute drive-time isochrone in rural areas. However, as there are no local area overlaps, the OFT does not consider it necessary to conclude on the precise geographic scope.
63. The geographic scope applicable to the retail supply of groceries has been set out in a number of OFT decisions to date and for the purposes of assessing the competition effects arising from this transaction, the OFT considers that its starting point is that frame of reference set out in CGL/Somerfield.²⁶ The OFT has also, on a cautious basis, considered only the asymmetric constraints imposed within the five-minute drive-time and a narrower one mile radius on convenience stores and the asymmetric constraint on mid-sized stores from one-stop stores within a five-minute drive-time in urban areas and 10-minute drive-time in rural areas.²⁷

COMPETITION ASSESSMENT

National retail supply of fuel

64. Midcounties supply fuel from four petrol stations adjoining its grocery stores. On the basis of data provided by the parties,²⁸ the combined share of supply of the merged entity in the retail supply of fuel at a national level will be less than one per cent.

Local retail supply of fuel

65. Midcounties is active in the retail supply of fuel from four areas, namely: Carterton, Chinnor, Didcot and Wombourne. All of these petrol stations are

²⁶ Supra, footnote 21.

²⁷ The OFT notes that no further areas were identified as raising competition concerns as a result of only considering the asymmetric constraint on mid-sized stores from one-stop stores within the primary isochrone.

²⁸ Experian Catalist data as presented in Forecourt Trader magazine.

located over one hour's drive-time from the nearest Harry Tuffins' store. Consequently there are no local overlaps in the retail supply of fuel.

Conclusion on the retail supply of fuel

66. In light of the above, the OFT does not have any prima facie competition concerns in relation to the retail supply of fuel on either the national or local level.

National retail supply of groceries

67. The parties referred to data compiled by Kantar Worldpanel quoted in the CGL/David Sands decision,²⁹ that estimated that total consumer spend on groceries in the 52 weeks to the week ending 25 December 2011 as approximately £104 billion on a UK-wide basis. Midcounties stated that its supply of groceries in 2011 was approximately 0.5 per cent, with Harry Tuffins having a share of approximately [less than one] per cent.

68. Consequently, the OFT does not have any concerns in relation to the retail supply of groceries on a national level.

Local retail supply of groceries

69. The Transaction involves the acquisition by Midcounties of 11 sites from Harry Tuffins. Eight of these sites are active in the retail supply of both groceries and fuel, two are active in the retail supply of groceries only, and one site is vacant with approved planning permission for a convenience store with fuel retailing.

70. The OFT follows previous decisional practice³⁰ in seeking to identify local areas where there is realistic prospect of a substantial lessening of competition (**SLC**). The OFT takes the following approach:

- **Stage one:** Identifying local overlap areas and conducting an initial filtering exercise.
- **Stage two:** Estimating diversion ratios and asymmetric illustrative price rises (where available).

²⁹ Supra, paragraph 41.

³⁰ In particular, Asda/Netto and CGL/Somerfield, supra.

- **Stage three:** Assessment of other factors.

71. From stage one to two, the OFT follows the approach taken in CGL/Somerfield and treats Midcounties and CGL as a single fascia. At stage three, and considering specifically those Harry Tuffins' stores that overlap with CGL fascia, the OFT considers the parties' arguments on whether it is appropriate to treat Midcounties and CGL as a single fascia in this case (see paragraphs 101ff below).
72. Throughout the analysis the OFT also carries out a number of sensitivity tests. This is particularly important given the uncertainty, for example, around the diversion ratio estimates.

Stage One – identifying local overlap areas and fascia count filtering exercise

73. In order to identify possible competition concerns at the local level, the parties carried out an initial filtering exercise. This first identified 'overlap' areas where any Midcounties or CGL store was within an appropriate drive-time (in line with the relevant product and geographic scope) of a Harry Tuffins' store. The parties used a deliberately long drive-time in order to capture overlaps between the parties as comprehensively as possible.
74. In areas where there was an overlap between a Harry Tuffins, Midcounties or CGL store, the next step assessed whether there were a sufficient number of other competitors (three or more) also present in the relevant geographic area to satisfy the OFT that these overlaps did not warrant further analysis. This second step not only involved centring the relevant geographic area around a Harry Tuffins' store, but also included re-centring the relevant geographic area around other points to see if this raised any concerns.

Conclusion of stage one assessment

75. On the basis of the parties' filtering, the OFT considers that there is no realistic prospect of a SLC arising from the acquisition of the Harry Tuffins' stores in the areas of Cleobury Mortimer, Holywell and Knighton. The OFT also notes that no third parties raised concerns in any of these areas.
76. The OFT was unable to rule out, after its stage one assessment, that competition concerns would not arise in or around the areas of Ludlow, Craven Arms/Church Stretton, Lydney, Coleford, Malpas, Bishop's Castle/Churchstoke and Machynlleth. On the basis of survey information

provided by the parties, the OFT proceeded to its stage two assessment for Ludlow, Craven Arms/Church Stretton, Coleford and Lydney. The parties did not provide survey evidence in relation to the other areas identified above.

Stage two assessment – estimation of diversion and asymmetric illustrative price rises

77. The OFT assesses in more detail all stores where prima facie competition concerns arise from the stage one filtering assessment (that is, where there will be a reduction in competing fascia from four to three or lower). At some of the stores where prime facie concerns were identified the parties carried out surveys. This has permitted the OFT to carry out a competition assessment for these survey stores using diversion and illustrative price rise estimates. For these stores, the OFT summarises this assessment below as the stage two assessment. For those stores that the parties did not survey, it is not possible to carry out this analysis. The OFT therefore considers these other stores at stage three of its assessment.
78. The diversion ratio from a given Harry Tuffins' store to local Midcounties or CGL store (and vice versa) offers a measure of the degree to which they are local competitors. The parties conducted a survey to help estimate these diversion ratios from one store to another.
79. The OFT considers that the parties' diversion ratio estimates raise concerns around a loss of local competition in and around the following stores: Harry Tuffins Coleford and Lydney, Midcounties Lydney, Harry Tuffins Ludlow and Midcounties Church Stretton. At each of these stores, the diversion ratio is sufficiently high to cause concerns when 'would not have purchased' responses are excluded.³¹ In previous decisional practice, the OFT has had prima facie concerns with diversion ratios of 14.3 per cent or more.³² However, the OFT considers that such a measure is merely a guide as to whether a transaction is likely to raise prime facie concerns, as opposed to a definite threshold below which no concerns would arise, in

³¹ The OFT has excluded from the diversion ratio estimates respondents that said they 'would not have purchased the store items' (no purchase responses). This is due to the concern that some of these respondents may have actually gone on to purchase the items at some point in the future

³² See CGL/Somerfield. The OFT notes that in this case the OFT only raised concerns when there was also an IPR of five per cent or more.

particular when the number of local overlaps at issue allows the OFT to consider them on an individualised basis.

Illustrative price rises (IPRs)

80. Diversion ratio estimates and gross margin data can be combined to estimate illustrative price rises (**IPRs**) anticipated as a consequence of the internalisation of pre-merger competitive constraints. It is important to note that these are not 'predicted' price increases, but simply a relative measure of potential consumer harm arising from the reduction in competitive pressure. There are alternative IPR formulae depending on whether (a) demand is assumed to be linear or isoelastic, and (b) how symmetric the diversion ratios, prices and marginal costs of the parties are.
81. The OFT has used both symmetric and asymmetric IPRs and equivalent diversion ratios in previous decisional practice.³³ The OFT considers that symmetric IPRs are particularly relevant where there are no significant asymmetries between the merging parties.
82. The parties noted that in many stores the diversion to and from each of the merging parties and their store margins were different. This reflects the fact that all the IPR estimates involved the asymmetric constraint between smaller and larger stores, and on this basis, there is good reason for placing more weight on asymmetric IPR estimates in the circumstances of the current case.
83. The OFT agrees with the parties' submission and considers that in this case it is appropriate to use asymmetric IPRs. It considers that these should be based on isoelastic demand.
84. It is relatively straightforward to apply the asymmetric IPR formulae when each merging party only has one store in a wide geographic area. However, the asymmetric IPR formulae are not primarily designed for situations where the merging parties have more than two stores in a certain area. As this is the case with the current transaction, care must be taken when applying these formulae. The OFT's estimates reflect an approach to

³³ See cases: Anticipated merger between Co-operative Group (CWS) Limited and United Co-operatives Limited, OFT decision dated 23 July 2007 (CWS/United), CGL/Somerfield, Asda/Netto and Sainsbury/Rontec, *supra*.

implementing the formulae that is more cautious than the parties' approach.³⁴

85. The OFT's asymmetric IPR estimates raise concerns around a loss of local competition in or around following stores: Harry Tuffins Coleford and Lydney, Midcounties Lydney, Harry Tuffins Ludlow and Midcounties Church Stretton. In particular, the OFT is concerned that all of the OFT's asymmetric isoelastic IPR estimates for these stores are sufficiently high to raise competition concerns.
86. Whilst the parties' asymmetric IPR estimates suggest slightly lower price rises, they still raise concerns around a loss of local competition at the Harry Tuffins' stores in Coleford and Lydney and Midcounties Lydney.
87. At the Harry Tuffins' store in Ludlow and Midcounties Church Stretton, the parties' isoelastic asymmetric IPR estimates are lower than the OFT's estimates. However, the OFT considers that the parties' estimates of [0-five] per cent and [0-five] per cent at these two stores, respectively, are still of sufficient magnitude that they may raise concerns such as to warrant closer examination of these areas. While these IPRs are below the five per cent indicator used in previous cases,³⁵ the OFT considers that this indicator is not an absolute threshold and should not be viewed as outcome determinative. The OFT notes in this respect that in CGL/Somerfield the OFT applied an IPR indicator of one and two per cent by way of sensitivity checks in addition to the five per cent threshold, albeit it found that these potentially alternative thresholds did not make any difference in that case.³⁶

³⁴ This is best described with an example, specifically considering an illustrative price rise at a Co-operative store (say at Church Stretton) where there is diversion to two Harry Tuffins stores. In this example, the parties take an average diversion ratio from these Harry Tuffins' stores to the Co-operative store in Church Stretton (and not to any other Co-operative stores). If the diversion from one of these Harry Tuffins stores is very low, this almost halves the diversion ratio from Harry Tuffins to the Co-operative. Instead, the OFT considers it appropriate to take a cautious approach and uses the diversion ratio from the Harry Tuffins' store with the highest diversion back to all Co-operative stores. As the OFT would generally expect, this Harry Tuffins store turns out to be the Harry Tuffins store closest to the Co-operative store that the OFT is estimating an IPR for.

³⁵ *Asda/Netto*, supra, at paragraph 62.

³⁶ CGL/Somerfield, supra, paragraph A.14.

88. The OFT's base case estimates used the parties preferred estimates as a starting point. However, as explained below in the area by area analysis, the OFT has also carried out a number of sensitivity tests to take account of the uncertainty in the parties' parameter estimates.

Sensitivity testing

89. The OFT has carried out a number of sensitivity tests to take account of the uncertainty in the diversion estimates, the parties' margins and the relative prices of Harry Tuffins and Midcounties/CGL. The OFT has considered whether the uncertainty around these factors could lead to higher IPR estimates than suggested under the OFT's base case. The OFT's sensitivity testing for each of the above factors is discussed in turn below.³⁷

Precision of the Diversion Estimates

90. The diversion sensitivity tests indicate the uncertainty around the diversion estimates. The OFT estimated the 95 per cent confidence intervals for diversion from each survey store to the stores in the fascia of the other merging party. Figure 1 below shows the confidence interval around the diversion estimates (based on estimates where the 'no purchase' responses have been excluded from the sample).

Figure 1 – []

91. These results reinforce the concerns the OFT has for each store already noted above. Given the confidence intervals for all the diversion estimates, the OFT considers that caution is required when interpreting the diversion and IPR estimates. The confidence intervals suggest that the diversion ratios for all customers could be significantly higher than the estimated value. These higher diversion estimates would lead to higher IPRs.

92. The OFT has had regard to these diversion sensitivity calculations when considering the loss of competition in the areas around the stores listed in paragraph 85 above.

Relative price sensitivity tests

93. The relative price of Harry Tuffins to Midcounties/CGL is a key input into the asymmetric IPR formulae. The parties' and the OFT's base case IPR

³⁷ As the OFT's margin sensitivity testing did not raise any additional areas of concern, this is not discussed further.

estimates assume that the prices at Harry Tuffins and Midcounties/CGL are the same. The parties provided evidence in support of this assumption, which showed that Harry Tuffins' basket price was nearly the same as Midcounties' basket price.

94. However, the parties' evidence shows that for some stores there is a difference in price. Moreover, the parties' evidence is only based on a comparison of 95 products. This means that for each IPR calculation there is some uncertainty over what relative prices to use. For instance, in cases where a Midcounties store is more expensive than a Harry Tuffins' store, the asymmetric IPRs of the Harry Tuffins' store will be a higher.
95. Given the uncertainty, the OFT has carried out a sensitivity check to ascertain if the asymmetric IPRs for any area would differ materially from a 10 per cent price difference either way. As a result of this price sensitivity check, no further areas were identified as raising competition concerns other than those already noted.

Conclusion of stage two assessment.

96. In light of the above, the OFT considers that the results of its stage two assessment, the IPR results may be sufficiently high to indicate competition concerns arising in or around the following stores: Harry Tuffins Coleford and Lydney, Midcounties Lydney, Harry Tuffins Ludlow and Midcounties Church Stretton.
97. The OFT notes the parties' submission that the OFT's estimates may possibly overstate the IPRs at some stores but this, the OFT considers, is considered preferable to the parties' estimates, which at some stores could underestimate the IPRs. For the stores where there are differences in the IPR estimates of the parties and the OFT, the OFT considers that it is not being overly cautious but rather it has made reasonable changes as explained below in the area by area assessment. The OFT has had regard to the parties' submission that the OFT must take care to avoid applying, in a cumulative fashion, multiple layers of caution³⁸ which individually are reasonable but which collectively produce an unrealistic outcome. The OFT has balanced the sensitivity testing it has applied against all other factors taken into account in its local area assessment when determining whether, overall, the test for reference is met in a particular local area.

³⁸ The parties state that the layers of caution are added when the OFT carries out sensitivity testing and imposes further cautious assumptions on top of others.

Stage three – assessment of other factors

98. The OFT considered the parties' submissions and supporting evidence in relation to all stores that failed the stage one filtering exercise and those where following the stage two assessment, the IPR estimates are such that would raise prima facie competition concerns post-transaction.

99. The parties made four broad arguments, which can be summarised as follows:

- Midcounties and CGL should not be treated as part of a single fascia.
- Stores that offer both the retail supply of groceries and fuel have a different product offering to those stores that are just active in the retail supply of groceries.
- Additional stores, outside of the 'effective competitor' set including Limited Assortment Discounters (LADs) should be considered to impose a competitive constraint on the merged entity post-transaction.
- Barriers to entry are low for convenience store entry.

100. The OFT has considered each of these arguments in turn below and thereafter considers each local area in further detail.

Treating Midcounties and CGL as part of a single fascia

Parties' arguments

101. During its stage one filtering exercise, the OFT treated Midcounties and CGL as a single fascia given the links that exist between them and the OFT's historic treatment of regional members of the co-operative group. However, the parties submitted that when assessing the competitive effects of the transaction, the OFT should take into consideration that the entities do in fact compete with each other notwithstanding the links between them.

102. The Co-operative Retail Trading Group (**CRTG**) is the buying group for the co-operative food business. Midcounties []. CRTG is made up of representative of other co-operative societies and is run federally on their

behalf. It negotiates with suppliers on cost prices, terms of trade, ranges and promotions. As the largest co-operative society, CGL is the representative member of CRTG and has authority to negotiate with suppliers and conclude agreements on behalf of all CRTG members.

103. CRTG has three groups as part of its governance structure, namely: a strategy group, monitoring group and working group. Midcounties is a member of each group. The parties submitted that these groups are concerned with joint purchasing but do not engage in strategies for the resale of products
104. The parties submitted that Midcounties and CGL are separate entities in terms of ownership, governance, management and accountability structure, with Midcounties having a directly elected membership strategy committee. The parties highlighted that Midcounties is represented on the CGL board but stated that Midcounties has no control over CGL or vice versa.
105. The parties referred to internal documents where CGL is noted as a competitor to Midcounties in the local areas in which they both operate. They also submitted a report [], in support of this submission.
106. In summation, the points raised by the parties in support of their submission are summarised below. The parties stressed in particular in considering these factors the change in the relationship between CGL and Midcounties that had taken place since the OFT's examination of the CGL/Somerfield transaction in 2008.
- Midcounties has successfully implemented a number of amendments to its commercial strategies in relation to pricing, ranging and services offer.
 - The new CRTG agreement, introduced in 2011, allows Midcounties more freedom in relation to ranging at its stores.
 - The number of seats on the board of CGL that are held by independent societies has reduced from [five-10] to [0-five], whereas the total number of board seats has fallen from [20-30] to [10-20]. This means the proportion of seats held by independent societies has fallen from [30-40] per cent to [20-30] per cent. The parties also noted that a standalone CGL Food Board business has been set up to manage all

strategic and operational factors of the food business of CGL. Midcounties is not represented on this board and it is submitted by Midcounties that this means it has no direct influence over the detailed creation and operational implementation of strategy within the CGL food business.

- The parties stated that since the acquisition by CGL of the Somerfield stores, there are more local overlaps between CGL and Midcounties' stores ([60-70] Midcounties' stores operate less than [0-five] miles from a CGL store). In light of this, Midcounties stated that it has started to treat CGL as more of a direct competitor and therefore reconsidered aspects of its offering to divert customers from CGL stores to its stores.
- Midcounties stated that when CRTG decided to change its recommended retail prices in 2010, gradually removing some price bands, Midcounties decided to pursue an alternative and independent approach.
- Midcounties provided price dispersion analysis that shows that for Midcounties' competitive supermarket price band, prices that were lower than CGL were on average [five-10] per cent lower and prices that were higher than CGL were [five-10] per cent higher.
- Midcounties submitted information on how it sources from suppliers outside of CRTG, which they submitted is indicative of a competitive difference between the two entities.
- Although Midcounties, as a member of CRTG, is entitled to and has historically received recommended retail prices (RRPs) from CRTG on the products it supplies, the parties stated that they did not use this information in terms of price-setting and provided evidence during the course of the OFT's investigation that they had taken steps to cease to receive such information going forward.³⁹

³⁹ Midcounties has passed a Board Resolution whereby it will stop taking RRP data from CRTG and it will engage with an independent third party to ensure that any data files received from CRTG will not contain price information. The OFT was informed that this resolution was passed by the Board of Midcounties on 1 October 2012.

OFT analysis

107. The OFT notes that Midcounties is a member of CRTG and therefore purchases products and receives volume rebates during the course of the year in relation to these purchases.
108. The OFT notes that the [] report submitted by the parties concludes that 'there is a reasonable case to treat CGL and Midcounties as partially effective competitors to one another, rather than treating them as if they were a single jointly controlled entity'. However, it states that the intensity of competition between Midcounties and CGL is unlikely to be as strong as can be expected between certain other rivals due to certain factors that are the same or very similar at both stores (for example, fascia, micro-ranging and promotions) that limit the degree of competitive pressure they can exert on one another.
109. In previous cases, the OFT has noted that CGL and regional co-operatives were only partially effective competitors.⁴⁰ The OFT was concerned at that time that there was a significant degree of explicit co-operation and similarity in retail offer between CRTG members (CGL and regional co-operatives).⁴¹ As a result of this, and in particular in the context of the analysis of a significant number of local overlaps, the OFT considered it appropriate on a cautious basis to count CRTG members as one fascia.⁴²
110. The OFT considers that much of the evidence set out on the relationship between CGL and regional co-operatives in CGL/Somerfield remains relevant, despite the new evidence submitted by the parties in the current case.
111. Taking all of the information provided to date into consideration, the OFT considers that there is insufficient evidence to conclude that Midcounties and CGL should be considered 'fully effective' competitors, that is that they are fully independent rivals to each other. The reasons for this are as follows:

⁴⁰ CGL/Somerfield, *supra*, at paragraph 95.

⁴¹ *Ibid*, at paragraph 106.

⁴² *Ibid*, at paragraph 115.

- The product range of Midcounties and CGL will be similar due to the same own-brand products and because CRTG specifies the particular product range which should be placed within a given amount of shelf space for a particular product category.
- The CRTG agreement provides that all members receive the same buying terms. This means therefore that Midcounties pays the same input price for all CRTG-sourced products as CGL and other CRTG members. It also means that Midcounties has an insight into the input price paid by CGL and other CRTG members.
- Midcounties is a member of the Strategy, Monitoring and Working groups of CRTG and is represented on the Board of CGL.
- Midcounties and CGL will frequently run common promotions and must offer any nationally advertised products at no higher than the advertised price.
- The mean percentage price difference between Midcounties convenience stores and Harry Tuffins' convenience stores (which have the same pricing across all its stores) is [0-10] per cent, whereas the mean percentage price difference between CGL and Midcounties is only [0-five] per cent.⁴³ Other price dispersion evidence submitted by the parties also indicates lower price dispersion between CGL and Midcounties compared to price dispersion between Midcounties and Harry Tuffins.
- The OFT also places weight on the conclusion of the [] report that CGL and Midcounties are 'partially effective competitors'.

112. However, whilst the OFT considers that there is insufficient evidence to support the conclusion that Midcounties and CGL should be treated as exerting a full competitive constraint upon each other, as would be the case with another competing fascia within the 'effective competitor' set, the OFT considers that there is some level of rivalry between them.

⁴³ The OFT notes the parties' argument that this price difference reflects the particular trading strategy of Harry Tuffins, which had the stores been sold to another retailer would have been different in any event and therefore the pre-merger conditions are not the appropriate counterfactual. The OFT has considered this above in paragraph 21 above.

113. In this case, the OFT has been able to assess evidence with particular regard to the Midcounties fascia which has allowed the OFT to consider that there is some level of competition such that they should be considered 'partially effective' competitors. These factors include information on Midcounties taking an alternative strategy on pricing, ranging and services offered in its stores, the introduction by Midcounties of different price bands, Midcounties use of locally sourced products, the separation of the CGL food business, and internal documents noting CGL as a competitor. In addition, the OFT notes the parties' statement that that they will no longer receive RRP data from CRTG. The OFT considers that the parties have provided evidence that the level of rivalry that exists between Midcounties and CGL is likely to be higher than at the time of the CGL/Somerfield assessment in 2008.

114. Qualifying exactly what level of competition exists, or in other words, where on the spectrum of competition they are, is difficult to assess. However, for the purposes of the OFT's assessment of this case, OFT has factored the 'partially effective' competition between Midcounties and CGL into its assessment on an area by area basis in a way that would not have been possible for the OFT in the context of a first phase assessment when considering a large number of overlaps.

Stores with and without petrol forecourts

115. The parties provided a comparison of the estimated base linear meterage (**BLM**), that being the measurement of the internal shelf space allocated by category of product, between Harry Tuffins' stores with and without the retail supply of fuel in order to show that the Midcounties' offering post-transaction in the acquired stores with petrol retail would be different from those CGL stores. The parties concluded from this data that the Harry Tuffins' stores active in both the retail supply of fuel and groceries have a more limited grocery offering.

116. Also, the parties provided comparisons of the BLM for Midcounties' intended offering in Bishop's Castle and Machynlleth and that of the CGL stores present.

117. The OFT considers that the evidence presented by the parties is not sufficient to conclude that the difference in product ranges carried by such stores is due to the petrol retailing offering present. The comparison

between Harry Tuffins sites, described in paragraph 115 above, does not consider the size of the store as a possible factor for the different product range on offer (given it compares convenience stores with mid-sized Harry Tuffins' stores). Furthermore, the BLM comparisons rely on an intended (rather than actual) offering by Midcounties at these sites, and therefore carry less evidential weight.

118. The OFT notes that internal documents provided by Midcounties refer to instances where stores active in the retail supply of fuel [].

119. The OFT considers that the evidence presented is not sufficient to conclude that stores active in both the retail supply of fuel and groceries should not be considered to be in direct competition with stores active only in the retail supply of groceries.

The competitive constraints from additional competitors outside of the 'effective competitor' set

120. Where the parties have submitted that fascia outside of the 'effective competitor' set⁴⁴ should be included in the competitive assessment, the OFT has considered each in turn in the area by area analysis below.

121. The OFT has assessed the extent to which it can rely on the parties' stores being constrained by these stores post-merger, taking into account the following characteristics: geographic proximity to the parties' stores, product offering, store size (net sales area), opening hours, parking availability and association with a multi-store operator (such as a regional chain of stores).

122. The parties provided information to support their submission that LADs would impose a sufficient competitive constraint post-transaction in specific local areas. As the OFT has not relied on any LAD store in reaching its decision on whether there will be a SLC post-transaction, the extent to which these stores exert competitive pressure on stores within the 'effective competitor' set is not considered further.

⁴⁴ See CGL/David Sand, *supra*, Annex 1.

Barriers to entry are low for convenience store entry

123. The parties stated that an important dynamic is the absence of significant barriers to entry with regard to convenience stores and that this was recognised in the CC's Groceries Report.
124. The parties stated that there are a number of large buying groups that purchase groceries for and on behalf of convenience store operators including, NISA, Palmer and Harvey Retail, Select and Save, Best-One, Spar, Premier, Londis and Costcutter, which would facilitate new entry.
125. Furthermore, the parties stated that the CC's Groceries Report and previous decisions of the OFT have concluded that there is a limited constraint imposed by the planning permission regime. The parties have presented evidence to suggest that there are public houses in the local areas where prima facie competition concerns arise that may be easily converted into convenience stores. The parties stated that certain changes in use of premise may occur without the need for planning permission. These are changes from class A2 (Financial and Professional Services), A3 (Restaurants and Cafes), A4 (drinking establishments) and A5 (hot food takeaways) to class A1 (shops).
126. Midcounties stated that it currently trades from converted public house sites in four areas and is in the process of converting three further such sites. Further examples by Tesco, Sainsbury and Spar were provided by the parties.
127. The OFT notes that in previous decisions and in the CC's Groceries Report, barriers to entry for convenience stores were considered to be low but that in the majority of these cases, no conclusions were made as either no SLC arose or barriers to entry were not considered further.⁴⁵ The OFT also notes that the CC's conclusion in Somerfield/Morrison,⁴⁶ where the barriers to entry for convenience stores were particularly assessed with respect to the

⁴⁵ Previous cases include Tesco/T&S, OFT decision dated 2003, Tesco/Administrative Stores, OFT decision dated 2004, Tesco/Morrisons, OFT decision 2005. These cases pre-date the CC groceries report. CGL/Somerfield, OFT decision dated 2008.

⁴⁶ CC's report on the acquisition by Somerfield plc of 115 stores from WM Morrison Supermarkets plc, dated September 2005.

area of Filey. In conclusion, the CC found that there was little development in the town, there was a shortage of space to develop or convert into convenience stores and the smaller sites highlighted had no parking and/or loading areas.

128. The OFT notes that as per its Merger Assessment Guidelines, in assessing whether entry or expansion can be relied on to prevent an SLC, the OFT will consider whether such entry or expansion would be timely, likely and sufficient.⁴⁷ In line with the approach of the CC in Somerfield/Morrisons, the OFT has assessed the parties' submissions in this regard on an area by area basis where applicable.

129. The OFT notes that the parties provided numerous examples of sites which could be developed into convenience stores. However, the OFT considers that information on sites that are not on the market for sale/lease is not sufficient evidence that entry will be timely, likely or sufficient as per the Guidelines. The OFT has taken into account in its analysis the availability of only those sites that are being actively marketed for sale, including public houses.

Stage Three – Assessment of the local areas

130. As stated above, there were seven areas identified as raising prima facie competition concerns following the stage one and two assessments. These areas are: Ludlow, Malpas, Machynlleth, Church Stretton/Craven Arms, Lydney, Coleford, Bishop's Castle/Churchstoke. In three of the areas identified (Malpas, Machynlleth and Bishop's Castle/Churchstoke) the overlap occurs as a result of the presence of a CGL store and not a Midcounties' store. Each local area is taken in turn.

131. The OFT considers that there is no realistic prospect of an SLC arising in each of the following three local areas:

Ludlow (Harry Tuffins convenience store overlapping with CGL mid-sized store)

132. The overlap in Ludlow, a town with a population of just over 10,000 people, is between a CGL mid-sized store and a Harry Tuffins' convenience store. Survey results were available for this area. The base case

⁴⁷ *Merger Assessment Guidelines, supra*, paragraph 5.8.3.

asymmetric isoelastic IPR estimates at Harry Tuffins Ludlow are between [0-five] (the parties' estimate) and [five-10] (the OFT's estimate) per cent when CGL is treated as the same fascia as Midcounties. However, because the overlap here principally occurs with a CGL store, treating CGL as a 'fully effective' competitor would lead to much lower IPR estimates ([0-five] per cent asymmetric isoelastic IPRs using the parties' estimates).

133. The OFT is mindful in interpreting the IPR estimates above when, in fact, it considers that there is 'partially effective' competition between Midcounties and CGL. The OFT also notes the evidence of potential marketed sites for development as convenience stores (one freehold public house and one former newsagent, café and general store), and the presence of a large number of fascia in Ludlow, with two stores present flexing just outside the one mile radius in reaching its conclusion. On this basis, the OFT believes that competition concerns can be ruled out in Ludlow.

Malpas (Harry Tuffins vacant site for development as a convenience store overlapping with CGL convenience store)

134. Although the Harry Tuffins' store in Malpas has not yet been developed, the OFT has assessed this overlap on the basis that, absent the merger, Harry Tuffins would have proceeded to open a convenience store (see paragraphs 23 to 25 above).

135. In Malpas, the overlap arises between the Harry Tuffins' site and a CGL convenience store. Midcounties is not present within the relevant frame of reference. In addition to the Harry Tuffins' site, there is a Londis and CGL convenience store, making this a three to two fascia reduction using the CGL/David Sands frame of reference. A Tesco one-stop store, approximately 10 minutes' drive-time away in Whitchurch, takes this area to a four to three fascia reduction under CGL/Somerfield. The OFT also notes the presence of Huxley's convenience store in Malpas, an additional competitor outside of the 'effective competitor' set which is supplied by the Booker Group.

136. The OFT is aware of the imminent entry by Sainsbury's with a very large one-stop shop (approximately 2,800 sqm) approximately 10-15 minutes' drive-time away in December 2012.⁴⁸

137. The OFT considers that the four to three reduction in fascia, taking account of the Huxley's store, under the CGL/David Sands frame of reference does not raise competition concerns when account is taken of the 'partially effective' nature of competition between Midcounties and CGL, the imminent entry by Sainsbury's one-stop store and the Tesco one-stop store in Whitchurch.

Machynlleth (Harry Tuffins convenience store overlapping with CGL mid-sized store)

138. Machynlleth is a small town in Powys in Wales where Harry Tuffins operates a convenience store with a petrol offering. In addition to the Harry Tuffins' store, there is a Spar convenience store and a CGL mid-sized store. The transaction will result in a loss of competing fascia from three to two under both the CGL/Somerfield and CGL/David Sands frames of references, the overlap arising with Harry Tuffins and CGL. Midcounties is not present within the relevant frame of reference.

139. The OFT has taken into account the 'partially effective' nature of competition between Midcounties and CGL and the identification of four possible sites that are currently on the market for sale (a former petrol station and convenience store, a bakery and two public houses) in reaching its decision. On this basis, the OFT believes that competition concerns can be ruled out in Machynlleth.

140. The OFT considers that there is a realistic prospect of a SLC arising post-transaction in the following local areas:

⁴⁸ Shropshire Star and Whitchurch Herald reports of 11 October 2012.

Bishop's Castle/Churchstoke (Harry Tuffins convenience store in Bishop's Castle and one-stop store in Churchstoke overlapping with CGL convenience store in Bishop's Castle)

141. In Bishop's Castle, Harry Tuffins operates a convenience store with petrol offering. It also has a one-stop store in Churchstoke approximately 10 minutes' drive-time away. Also in Bishop's Castle are a Mace and CGL convenience stores. As a result, prima facie competition concerns arise from a three to two reduction in competing fascia under both CGL/Somerfield and CGL/David Sands, the overlap being between CGL and Harry Tuffins. Midcounties is not present in this area. The OFT notes that the Harry Tuffins' one-stop store in Churchstoke would impose a competitive constraint on the CGL in Bishop's Castle under CGL/Somerfield, although it would not be counted as a constraint under the CGL/David Sands methodology.
142. The OFT notes the presence of a News Express convenience store in Bishop's Castle, an additional competitor outside of the 'effective competitor' set. Taking this additional competitor into account, there would be a reduction in competing fascia from four to three in Bishop's Castle. However, there is no further competitive constraint on the convenience stores in Bishop's Castle outside of the five-minute drive-time other than the Harry Tuffins' one-stop store in Churchstoke. Furthermore, the parties could not identify any actual sites that are available to enable convenience store entry in Bishop's Castle nor is there evidence of potential entry plans by third parties.
143. The OFT has taken into account the additional competitor of News Express and the 'partially effective' nature of competition between Midcounties and CGL. However, as there are no other competing fascia either within or outside of the five-minute drive-time isochrone and there is no evidence that entry would be timely, likely and sufficient, the OFT is unable to conclude that there would not be a realistic prospect of competition concerns arising in this area.
144. With regard to the Harry Tuffins' one-stop store in Churchstoke, the OFT considered evidence provided by the parties in support of their submission that this store did not impose a competitive constraint on the CGL convenience store in Bishop's Castle under the CGL/David Sands methodology. In support of this submission, the parties provided CTP (Convenience Tracking Programme) data compiled by him! research and

consulting firm, which the parties state is similar to the data relied on by the OFT in CGL/David Sands. The OFT also notes the parties' submission that the one-stop store has a wide and eclectic product offering including both food and non-food items (such as gardening products and parrots¹).

145. The OFT considers that the data submitted by the parties may suggest that the CGL/David Sands approach would be applicable in this area. However, it is mindful also that the results provided by the parties are not specific to this area. Without specific data to the contrary, the OFT is unable to specifically assess the competitive constraint posed by the Harry Tuffins' store in Churchstoke on Bishop's Castle. Consequently, the OFT considers that the presence of the one-stop store potentially exacerbates the competition concerns in Bishop's Castle.

146. The OFT's competition concerns in this area therefore arise from the loss of competition between the Harry Tuffins and CGL convenience stores in Bishop's Castle, potentially exacerbated by the Harry Tuffins' store in Churchstoke, where the OFT believes that the transaction gives rise to a realistic prospect of an SLC.

Craven Arms/Church Stretton (Harry Tuffins one-stop store overlapping with a Midcounties mid-size store)

147. The competition concerns arising in this area relate to the overlap between a one-stop Harry Tuffins' store in Craven Arms and a Midcounties mid-sized store in Church Stretton. Survey results were available for this area. The base case asymmetric isoelastic IPRs at Midcounties Church Stretton are between [0-five] (parties' estimate) and [five-10] (OFT estimate) per cent. Even treating CGL as a 'fully effective' competitor would lead to only a small reduction in the OFT's estimated IPR of [0-five] per cent.

148. The parties submitted that the OFT should take account of the survey results that show that diversion to [] and [] fascia is greater than diversion to the Harry Tuffins' store. Furthermore, the parties stated that the minimum spend by shoppers noted in the survey results overestimates the diversion ratio in this case. The parties also stated that the parties' IPR estimates are already sufficiently cautious and that the estimates do not taken into account specific local issues that are likely to further reduce any risk of price increases.

149. The OFT considers that in this area its asymmetric IPR estimates are not particularly cautious (see footnote 31 and 34 above for an explanation as to why the OFT and the parties' asymmetric IPR estimates differ). In this area, the OFT's asymmetric IPRs take account of all diversion from Harry Tuffins Craven Arms to both Midcounties Church Stretton and CGL Ludlow stores, not just to Midcounties Church Stretton, as the parties suggested. This is important for assessing the illustrative price increase at Harry Tuffins Craven Arms and how this feeds through into the IPR at Midcounties Church Stretton. The OFT notes that even treating Midcounties and CGL as 'fully effective' competitors would lead to an asymmetric IPR of [0-5] per cent, which the OFT still considers significant.

150. The OFT considers that the level of the asymmetric IPR estimates, irrespective of the precise actual figure, show that this area is of clear potential concern. Taking account of evidence other than the survey, the OFT notes that the transaction will result in Midcounties acquiring the Harry Tuffins' one-stop store approximately 11 minutes' drive-time away. There is a Sainsbury's one-stop store in Shrewsbury approximately 19 minutes' drive-time away and a Spar convenience store in Craven Arms approximately 12 minutes' drive-time away. In addition, the OFT considers that the limited competition between CGL and Midcounties is not sufficient to mitigate the OFT's concerns.

151. The OFT also received four area specific concerns from customers regarding the reduction in competing fascia and that competing stores are some distance away. The OFT has taken these third party concerns into account in reaching its decision. Overall, the OFT believes that the transaction gives rise to a realistic prospect of an SLC in Craven Arms/ Church Stretton.

Lydney (Harry Tuffins mid-sized store overlapping with Midcounties one-stop store)

152. The transaction would result in a reduction of competition of competing fascia from three to two under the CGL/Somerfield frame of reference. Within the primary isochrone are a Harry Tuffins mid-sized store, a Midcounties one-stop store and a Tesco one-stop store.

153. Survey results were available for this store. The base case asymmetric IPR estimates are between [10-20] and [10-20] per cent for Midcounties and

between [10-20] and [10-20] per cent for Harry Tuffins Lydney, reflecting the parties' and the OFT's estimates.

154. The parties submitted that the counterfactual in relation to the Harry Tuffins' store in Lydney is that the break-clause in the lease, exercisable in [] would be considered. As stated above in paragraph 26, the OFT considers that the store would have continued trading until at least [] and potentially beyond.

155. The parties identified two sites in Lydney where outline planning permission has been granted for one-stop stores for both Asda and Sainsbury's. The OFT notes that the sites have received planning consent but that the plans associated with them are still being developed and no planning applications have been submitted to date.

156. The OFT received a number of third party complaints with specific regard to Lydney. These third parties were concerned about the lack of choice post-transaction and the potential for increased prices.

157. The OFT has taken the following into account in reaching its decision: the high IPR estimates, the uncertainty over the entry of competing fascia and the large number of area specific third party concerns. Overall, the OFT believes that the transaction gives rise to a realistic prospect of an SLC in Lydney.

Coleford (Harry Tuffins mid-sized store overlapping with Midcounties mid-sized store)

158. The transaction would result in the reduction of competing fascia in Coleford from four to three for mid-sized stores and one-stop stores within the primary isochrone. Survey results were available for this area. The diversion ratio from Harry Tuffins mid-sized store to Midcounties mid-sized store is noted at about [50-60] per cent and the base case isoelastic asymmetric IPRs are between [20-30] per cent and [20-30] per cent, reflecting the parties' and the OFT's estimates.

159. The parties submitted that there is a mid-sized Marks and Spencer store located more than 10 minutes away which should be considered as imposing a competitive constraint. However, this is appropriately reflected in the IPR estimates at Harry Tuffins Coleford.

160. The OFT received numerous third party concerns specific to Coleford stating that the transaction would lead to a reduction in choice and an increase in prices. Third parties also noted that Midcounties is also present in Cinderford, approximately 12 minutes' drive-time away.

161. The OFT has taken the following into account in its decision: the high IPR estimates, the large number of area specific third party concerns and the absence of evidence to suggest that entry would be timely, likely and sufficient. Overall, the OFT believes that the transaction gives rise to a realistic prospect of an SLC in Coleford.

THIRD PARTY CONCERNS

162. The OFT received numerous comments from third party customers, the vast majority of which expressed concerns about the Transaction. In particular, customers highlighted that there would be a reduction in competition as a result of the transaction that would lead to higher prices and reduced choice. Where relied upon, the OFT has noted the responses from third parties in its decision.

ASSESSMENT

163. The parties are both active in the retail supply of groceries in or about the area of Shropshire and the Forest of Dean. The parties will together have [25-35] per cent of supply of groceries in the area of the Forest of Dean and its environs, namely: the towns of Coleford, Lydney, Cinderford, Monmouth, Ross-on-Wye, Chepstow, Mitcheldean and Drybrook).

164. The OFT considers that in the absence of evidence to the contrary, the appropriate counterfactual is to assess the merger as against the most competitive conditions post-transaction, that being the pre-merger conditions of competition. The OFT considers that the most appropriate counterfactual with regard to the specific areas identified are: (i) a convenience store with fuel retailing would have opened on the Malpas site in late 2012, (ii) the Harry Tuffins' store in Lydney would have continued to trade up to at least [] and potentially beyond, and (iii) a convenience store with fuel retailing would have remained on the site in Machynlleth, albeit potentially of a smaller size.

165. As the parties only overlap at a national level with regard to the retail supply of fuel, where their combined share of supply is minimal, the OFT considers that it is not necessary to reach a conclusion on the precise relevant frame of reference for the retail supply of fuel.
166. In relation to the retail supply of groceries, the OFT considers that for the purposes of assessing the competitive effects of this transaction, the appropriate product frame of reference is that as used by the CC in CGL/Somerfield. There was insufficient evidence to conclude on segmentation by petrol kiosk or to include internet retailing in this frame of reference. The OFT considers that the appropriate geographic frame of reference for the purposes of assessing this transaction is that employed in CGL/Somerfield and, on a cautious basis, that used in CGL/David Sands. The OFT also considers it appropriate for the purposes of the stage one initial filtering assessment to consider the asymmetric constraint imposed on mid-sized stores from one-stop stores within the primary isochrone only.
167. The parties overlap in the retail supply of groceries at both a national and local level but the OFT considers that there are no competition concerns arising at a national level given the minimal combined share of supply.
168. The transaction involves the acquisition of 11 Harry Tuffins' sites. In relation to three areas, Knighton, Holywell and Cleobury Mortimer, which passed the stage one filtering assessment, the OFT considers that there is no realistic prospect of a substantial lessening of competition post-transaction.
169. The OFT considers that prima facie competition concerns arise as a result of this transaction in a number of local areas as a result of the stage one and stage two assessments. These areas are Ludlow, Malpas, Machynlleth, Church Stretton/Craven Arms, Lydney, Coleford, and Bishop's Castle/Churchstoke. In three of the areas identified (Malpas, Machynlleth and Bishop's Castle/Churchstoke) the overlap occurs as a result of the presence of a CGL store and not a Midcounties' store. In assessing these areas, the OFT has had regard to the fact that there is evidence that CGL and Midcounties should be considered partially effective competitors to each other.
170. In relation the seven areas identified above as presenting prima facie competition concerns following the stage one and stage two assessments,

the OFT has considered each on an area by area basis. For the areas of Ludlow, Malpas and Machynlleth the OFT considers that there is no realistic prospect of a substantial lessening of competition post-transaction. The OFT has taken into account, as is relevant to each area and as discussed in detail in the decision above, the 'partially effective' competition between Midcounties and CGL, the presence of additional competitors outside of the 'effective competitor' set, the identification of marketed sites suitable to enable entry by convenience stores and evidence of entry by other competing fascia.

171. In relation to Bishop's Castle, Craven Arms/Church Stretton, Lydney and Coleford, the OFT considered that the following factors, as discussed in detail in the decision, were potentially applicable, dependent on the local area in question: IPR estimates of a magnitude to suggest potential concerns, lack of evidence to support the entry of a competing fascia, the removal of a close competitor (by distance and/or according to survey results), and the number of third party concerns. The OFT considers that on the basis of its competitive assessment of these areas, there is a realistic prospect of a substantial lessening of competition post-transaction in relation to these areas.

172. 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

173. 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, and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned undertakings as it considers appropriate.

174. The OFT has therefore considered whether there may be undertakings in lieu (**UILs**) of reference which would address the competition concerns outlined above. The OFT's Exceptions and Undertakings Guidance states that undertakings in lieu of reference are appropriate only where the

remedies proposed to address any competition concerns raised by the merger are clear cut and capable of ready implementation.⁴⁹

175. Midcounties indicated that in order to remedy any competition concerns identified by the OFT, and to avoid a reference to the Competition Commission, they would be prepared to offer undertakings in lieu. Specifically, Midcounties offered to divest an overlapping store in each of the local areas of Bishop's Castle, Craven Arms/Church Stretton, Lydney and Coleford.
176. Specifically, Midcounties' offer is to divest each of the Harry Tuffins' stores in Bishop's Castle, Craven Arms, Lydney and Coleford. With respect to Lydney and Coleford, the parties have offered, in the event that they cannot divest the Harry Tuffins' stores within a reasonable time, to divest the Midcounties' stores.
177. In relation to Bishop's Castle, where the Harry Tuffins' one-stop store was found potentially to exacerbate the competition concerns arising in that area (see paragraphs 145 and 146 above), the OFT notes that it would ordinarily require the divestment of both the Harry Tuffins' stores, the convenience store in Bishop's Castle and the one-stop store in Churchstoke, in order to divest the full increment arising from the merger in the local area. However, given the particular features of the overlap in this area (namely that it is CGL that overlaps with Harry Tuffins with no Midcounties previously present), requiring the sale of Harry Tuffins (now Midcounties) Churchstoke in addition to Harry Tuffins Bishop's Castle would in fact reduce the number of competing fascia in the Bishop's Castle/Churchstoke area. Consequently, the OFT considers that a clear cut remedy to the competition concerns arising in Bishop's Castle is achieved in the circumstances of this case by the divestment of the Harry Tuffins' store in Bishop's Castle.
178. As a structural remedy that will result in the removal of the overlap in each of the areas in which the OFT found that the test for reference was met, the OFT considers that the undertakings are, in principle, clear cut to resolve its concerns.

⁴⁹ See OFT Mergers – *Exceptions to the duty to refer and undertakings in lieu of reference guidance* OFT1122, paragraph 5.7.

179. The OFT has considered whether it is appropriate in the circumstances of this case to require that the relevant divestments be made in whole or in part to an upfront buyer or buyers. An upfront buyer requirement means that the proposed divestment purchasers will have committed contractually, subject to formal OFT approval of the UILs, to acquiring the relevant divestment stores(s) before the OFT accepts UILs. This means that the OFT will accept UILs only where a provisional sale in the upfront buyer areas has been agreed, thereby demonstrating that a sale to a suitable purchaser is achievable. It also means that the OFT may consult publicly on the suitability of the proposed divestment purchaser, as well as any other aspects of the draft undertakings, during the public consultation period.

180. The OFT will seek an upfront buyer where the risk profile of the remedy requires it, for example where the OFT has reasonable doubt with regard to the ongoing viability of the divestment package and/or there exists only a small number of candidate suitable purchasers.⁵⁰

181. The parties provided evidence suggesting that there are a number of credible buyers for each of the areas that raise competition concerns. The OFT also notes that the Harry Tuffins' stores in Bishop's Castle and Craven Arms are profitable and are held on a freehold basis. In relation to the Harry Tuffins' stores in Lydney and Coleford, which are held on a leasehold basis and where the financial performance of the stores has been comparatively weaker, the OFT is mindful of the fact that the parties have offered to sell the overlapping Midcounties' stores in each location in the event that a suitable purchaser(s) for the Harry Tuffins' stores is/are not located within a reasonable time.

182. On this basis, given in particular the nature of the UILs offered in relation to Lydney and Coleford, and the commercial attractiveness of the stores offered in Bishop's Castle and Craven Arms, the OFT considers there is no need to include an upfront buyer provision in this case.

DECISION

183. The OFT's duty to refer the completed acquisition by Midcounties Co-operative Limited of Tuffin Investments Limited to the Competition Commission pursuant to section 22 of the Act is suspended because the

⁵⁰ Supra, Mergers Jurisdictional and Procedural Guidance, paragraph 3.55.

OFT is considering whether to accept undertakings in lieu of reference under section 73 of the Act.

ⁱ The OFT clarifies that whilst there is a parrot at the Churchstoke store, the store does not sell parrots.