14 August 2009

CT remittal
Asda comments on the provisional decision

1. Introduction

1.1 This note sets out Asda's comments on the CC's provisional decision (published 16 July 2009).

1.2 It is limited to what appears to us to be the key point of difference between Tesco and the CC – in terms of the likely factual matrix. That is the assumed replacement rate and timing of New Entrant stores/extensions following the competition test (CT) blocking an Incumbent.

1.3 We focus on new stores (section 2). However, we also consider extensions (section 3).

2. New Stores

2.1 We note that there is agreement between the CC and Tesco that blocked New Stores would be replaced by New Entrant New Stores.

2.2 The CC has found that retailers actively seek to invest in a large number of areas, including highly concentrated areas[1], and that any planning barriers apply as much to the Incumbent as the New Entrant[2].

2.3 Tesco's analysis of 2006/08 data suggests all New Stores will be replaced[3].

2.4 Asda agrees with the CC and Tesco that blocked New Stores would be replaced by New Entrant New Stores.

2.5 Where the CC and Tesco appear to disagree however is on the likely timing of such replacement.

CC case on timing of replacement

2.6 The CC has found that "in total an average period of 5 years would be a conservative estimate for the time taken by a retailer to assemble a site and construct a store[4]". That is consistent with Asda's experience[5].

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[1] Paras 4.10, 4.13, 5.57 Provisional Decision.

[2] Paras 4.13, 5.56 Provisional Decision.

[3] Table 1 Tesco note on the costs and benefits of the competition test (26 June 2009).

[4] Para 5.55 Provisional Decision.

2.7 The CC concludes that both Incumbents and potential New Entrants are in a similar position in terms of identifying the potential for a development and acquiring and developing a suitable site in any given area[6].

2.8 The CC's base case in its NPV model therefore assumes that there will be no additional delay from the Test following a short transition period.

Tesco's position on timing of replacement

2.9 Tesco's evidence on the time taken for development does not appear to be fundamentally different to that assumed by the CC[7].

2.10 It appears however that Tesco assumes that a New Entrant would lag behind a blocked Incumbent[8].

2.11 It is not entirely clear from Tesco's paper what its basis is for that assumption. It appears to be that in the relevant examples taken from 2006/08, the New Entrant had not yet submitted a planning application and as a result lags behind the Incumbent retailer[9].

2.12 However, that would be missing the point. Data on 2006/08 does not tell you how retailers would act in a world where the CT is in place and retailers are able to "internalise" it as part of their decision making. In a post CT world, the New Entrant does not need to wait for a planning decision to work out that the Incumbent would be blocked under the CT.

Asda's position on timing of replacement

2.13 Asda's experience strongly suggests that in such a post CT world (following a transitional period) there is no reason to suppose that a New Entrant would not put up a replacement store in the same time as the Incumbent:

(i) The CC has stressed that the CT will be sufficiently mechanistic and transparent for retailers to anticipate with confidence the decision that would be

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[5] FN 44 Provisional Decision: "Asda told us that the period typically varied between 2 and 6 years although it could be as long as 10 years or even longer"

[6] Para 5.56 Provisional Decision.

[7] Footnote 44 Provisional Decision.

[8] Para 1(b) Annex 2 of Tesco note on the costs and benefits of the competition test (26 June 2009).

[9] Paras 3, 4 and 5 Annex 1 of Tesco note on the costs and benefits of the competition test (26 June 2009).

taken by the OFT[10]. Asda anticipates no difficulties in "internalising" the CT – to identify those areas where it would be blocked (and also those where its competitors would be blocked). We have experience of "internalising" other tests (e.g. the Need Test) and measuring grocery areas (e.g. in the in context of our planning submissions). We therefore agree with the CC that retailers will be able to measure competitor size sufficiently accurately to predict the outcome of the CT successfully. And further that retailers will have strong incentives to do so in borderline cases[11].

(ii) There is also no reason to anticipate delay by way of "mistake" - where an Incumbent retailer assembles a site in the mistaken belief that it would pass the CT.

(iii) And – for the reasons cited by the CC - Asda does not see why a New Entrant would be disadvantaged in terms of:

(a) Planning – to the extent that there is a planning barrier, it applies equally to the Incumbent and the New Entrant[12].

(b) Site identification and assembly - indeed, as recognised by the CC, the New Entrant may have an advantage in that the Incumbent may be concerned not to site a new store too close to its existing store[13].

3. Extensions (and on-site replacement stores[14])

3.1 In relation to extensions (and on-site replacement stores), the key difference between the CC and Tesco appears to be not so much in terms of any likely delay but rather in terms of the likelihood of replacement.

3.2 Tesco's position is that 97% of blocked extensions and 100% of on-site replacements would not be replaced[15].

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[10] Para 5.53 Provisional Decision.

[11] Para 5.51 Provisional Decision.

[12] See footnotes 2 and 6 above.

[13] Para 5.56 Provisional Decision.

[14] In the case of a rebuild, the CC envisages that in applying the CT, the groceries sales area of the old store would not be included in the calculation of the market share. So rebuilds are treated in effect in the same way as extensions. And that is also how they are modelled by the CC.

[15] Table 1 Tesco note on the costs and benefits of the competition test (26 June 2009).

3.3 Asda agrees that the position for extensions is different to that of new stores. In general it is likely to be easier for an Incumbent to build an extension than for a New Entrant to build a New Store.

3.4 But it seems to us that the CC deals with this adequately by way of its sensitivity analysis. Asda notes that the breakeven probability of replacement on the CC's analysis is 61%[16] and that the CC considers that the level of entry should be well above this level - in particular, bearing in mind its finding that 85% of planned extensions were in areas where there was already a competitor fascia[17]. By definition in those areas there is a Weak Incumbent able to extend.

3.5 Again, Asda does not see why a dominant Incumbent should have an inherent advantage over a Weak Incumbent in terms of site assembly or planning for a new extension.

4. Conclusion

4.1 Asda has a long list of areas it would like to enter. The CT would facilitate its ability to build New Stores in areas of high concentration – where it might otherwise have been pre-empted by the dominant Incumbent.

4.2 It expects to be able to do this quickly and efficiently – to the benefit of consumers.

4.3 We also agree with the CC's finding that Incumbents blocked by the CT would divert the blocked investment to other areas[18]. This is consistent with Asda development practice. Where the CT bites on Asda target areas, we would expect to focus resources on non-blocked target areas which might otherwise have been lower priority.

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[16] Table 4 Annex B

[17] Para 24 Annex B.

[18] Para 5.15-5.17 Provisional Decision.