

CLA Event

CMA's retail mergers commentary – key issues  
for practitioners

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## CMA Retail Mergers Commentary – key issues

- ▶ A predictable framework but each case is looked at on its facts
- ▶ National competition – when is there likely to be a problem?
- ▶ Local competition – when is there likely to be a problem?
- ▶ Implications for remedies strategy?
- ▶ What really makes a difference in practice?

## A predictable framework but...facts, facts, facts

- ▶ The RMC clarifies theories of harm relating to national and local competition
- ▶ The CMA's "strong starting assumption" at Phase I is that there is material local competition on one or more PQRS aspects: very difficult to rebut this!
- ▶ Catchment areas and filtering:
  - ▶ Some really useful guidance on data sources and methodologies
  - ▶ BUT the CMA can cut the data in a number of different ways and will conduct a thorough sensitivity analysis – so you need to do so too!
  - ▶ Recent precedents not binding but are strongly persuasive; older precedents less so
- ▶ So lawyers and economists need to grapple with the data and internal documents at the outset and be realistic with the client on likely outcomes

## National competition – is there a problem?

- ▶ National competition
  - ▶ Effect on centrally set, uniform retail offer of loss of rivalry in areas where the parties' activities overlap (depends on closeness of competition and aggregate # of local store overlaps – e.g. *Poundland/99p*)
  - ▶ A loss of national competition not related to the aggregation of local overlap areas (e.g. where some key accounts purchase nationally – eg national accounts in *Euro Car Parts/Andrew Page / Ladbrokes/Coral*)
  - ▶ A loss of dynamic competition, where a merger results in one or both of the parties abandoning actual or potential plans for expansion into new locations (eg *Gym/Pure Gym*)
- ▶ If any Phase I remedy is available, it will be very costly!

## Local competition – is there a problem (1)?

### ▶ Catchment areas:

- ▶ 80% catchment areas are typically used BUT you need to consider what the data sources/internal documents say on drive times
- ▶ Conduct sensitivity checks – significant variations to average drive times? Note conurbation/city; city/town; and rural were used in *ECP/Andrew Page*

### ▶ Filtering:

- ▶ Effective competitor set is key and CMA need convincing on independents – depends on product range, store size, branding and opening hours (*ECP/Andrew Page*)
- ▶ Concentration measure: fascia count (if brand important) or store count (if distance important)? Weighting for distance or specific competitors?

## Local competition – is there a problem (2)?

- ▶ On your chosen methodology, which local areas are likely to fail stage 1 filter? What does your sensitivity analysis tell you?
- ▶ Are there independent competitors who stock a full range? How convincing are these competitors? Are third parties planning to enter?
- ▶ The CMA's survey methodology can now capture online constraints at a local level – might this make a difference?
- ▶ Stage 2 analysis: looking at the gross margins on the products in question, what level of diversion would be problematic at a local level?
- ▶ Output: likely stage 2 fails; probable stage 2 fails?

## Remedies strategy

- ▶ Are there significant national concerns, or is this (really) all about local overlaps?
- ▶ If local overlaps:
  - ▶ How many? Will there be a sufficient universe of suitable purchasers?
  - ▶ Can you “fix it first” (e.g. leave behind stores, if workable, or agree divestments during pre-notification)?
  - ▶ If not, will the CMA insist on an “up-front buyer” and what are the timetable implications?
  - ▶ How will you package and market the stores/outlets?
- ▶ If the “price” for Phase I clearance looks high, would Phase II be preferable (Celesio/Sainsbury's; ECP/Andrew Page; Ladbrokes/Coral)?

## What really makes a difference in practice?

- ▶ Ensure you have all of the documents (buyer and seller-side) that will be in front of the CMA: internal documents are critical
- ▶ Get hold of all responsive data – and look at it critically (remembering that the CMA is cautious at Phase I)
- ▶ “Front-load” the risk assessment: be clear on potential for divestments and how this ties into purchase price and deal timetable
- ▶ Up-front engagement with the CMA: ensure you go in well prepared
- ▶ Consider how you are going to engage with third parties on announcement
- ▶ Quality of submissions and rapport with case team: no surprises