

# **The CMA's Retail Mergers Commentary: Practical Application and Recent Developments**

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# The CMA's "Local" Mergers Caseload (2017)

Case	Outcome
Euro Car Parts / Andrew Page	Phase 2 clearance with divestments in 9 local areas
Cygnet/Cambian	Phase 2 clearance with divestment in 1 local area
Tesco/Booker	Phase 2 clearance
Cardtronics/DCP	Phase 2 clearance
David Lloyd Club/Virgin Active Gyms	Phase 1 clearance with undertaking in 2 local areas
Vision Express/Tesco Opticians	Phase 1 clearance with divestment in 3 local areas
Origin/Bunn	Phase 1 clearance with divestment in 1 local area
Heineken/Punch	Phase 1 clearance with divestment in 33 local areas
FC Oval/Bupa	Phase 1 clearance
MSV Group/Donington Park	Phase 1 clearance
JD Sports/Go Outdoors	Phase 1 clearance
Bupa Finance/Oasis Healthcare	Phase 1 clearance
Steven Eagell/Toyota Dealerships	Phase 1 clearance
DFS/Sofology	Phase 1 clearance

# Key policy considerations for regulators

- Consistency and transparency:
  - Support ability to self-assess within voluntary regime
  - Balance against differences in competitive dynamics and in data available to businesses
- Proportionate burden on merging parties:
  - Time, cost, and business impact of merger control review
- Proportionate burden for regulator:
  - Phase 1 vs. Phase 2: differences in substantive test and timing
  - In-depth review vs. “industrialising” competitive assessment
  - Complexity of remedies packages
- Capture evolving commercial dynamics
- Inspire business and consumer confidence

# Retail Mergers Commentary: background

- OFT and CC first published a joint Commentary on Retail Mergers in 2011
- Intended to address questions frequently raised in retail mergers and explain techniques applied in previous investigations
- Updated in 2017 following wide consultation with advisory community and with retailers:
  - Reflects experience in cases involving activities including grocery stores, mobile phone shops, pubs, betting shops, pharmacies, and DIY retailers
  - Evolving markets – particularly increased importance of online retailing
- Likely to be relevant in cases characterised by:
  - Multiple “bricks-and-mortar” outlets visited by consumers (often with increasing internet presence)
  - Often supply range of goods sourced from numerous (unrelated) suppliers
  - Consumer-facing businesses

# Retail Mergers Commentary: scope

- Summarises principles that CMA has applied in previous mergers in relation to:
  - Local and national competition
  - Catchment areas
  - Filtering
  - Bricks-and-mortar and online retail
  - Diversion ratios and price pressure indices
  - Econometric evidence

## Overview

- Acquisition by JD Sports (Blacks, Millets, Ultimate Outdoors, Tiso Group, George Fisher) of Go Outdoors
- Both UK-based bricks-and-mortar and online retailers of outdoor clothing, footwear, and equipment
- Moderate combined presence at national level (in relation to both bricks-and-mortar sales and online-only sales)
- Significant number of overlaps on local basis:
  - 52 Go Outdoor stores within 30-minute drive of JD Outdoor store
  - 93 JD Outdoor stores within 30-minute drive of Go Outdoors store
- In-depth assessment of 14 catchment areas failing initial (5→4) filter, with 5 areas considered at Case Review Meeting
- Unconditional clearance decision issued on 3 May 2017

## Assessing the constraint imposed by online-only retailers

- Key issue: distinguishing “diversion” from “migration” (*Ladbrokes/Coral*)

Evidence	“For”	“Against”
<b>Commercial strategy</b>	<ul style="list-style-type: none"> <li>▪ Same pricing in-store and online</li> <li>▪ Significant “price-matching” against online-only retailers</li> </ul>	<ul style="list-style-type: none"> <li>▪ Expansion plans for bricks-and-mortar stores not affected by material increases in online sales in recent years</li> </ul>
<b>Internal documents</b>	<ul style="list-style-type: none"> <li>▪ Consistently reference online-only retailers</li> </ul>	<ul style="list-style-type: none"> <li>▪ Emphasis typically on other bricks-and-mortar retailers</li> </ul>
<b>Third party views</b>	<ul style="list-style-type: none"> <li>▪ Similar competitor views on business model and on competitor set</li> </ul>	<ul style="list-style-type: none"> <li>▪ Highlighted importance of physical interaction with products and assistance from expert in-store staff</li> </ul>
<b>Customer surveys</b>	<ul style="list-style-type: none"> <li>▪ Parties’ own survey: showed 60-70% of customers had browsed the internet prior to visiting the store</li> <li>▪ CMA survey: about 20-30% of JD Outdoor customers and 30-40% of Go Outdoors customers would switch to online retailer if usual store closed</li> </ul>	<ul style="list-style-type: none"> <li>▪ Parties’ survey provides limited insight into diversion</li> <li>▪ CMA survey based on relatively low sample size (and large number of “don’t knows” also reduce weight that can be placed on it)</li> </ul>

## *CMA's findings on the constraint imposed by online-only retailers*

- Evidence didn't sufficiently support a single relevant market for bricks-and-mortar and online sales
- But online sales treated as constraint on Parties when considering merger effects at local level

48. As explained above, the evidence submitted by the Parties and third parties is consistent with the online channel representing a significant constraint within this sector. There is, however, some evidence to suggest that there may be limits to the competitive interaction between the different distribution channels, in particular because some customers value the expert service provided in stores and may not regard online stores as an effective alternative. The CMA notes, in addition, that most of the available evidence does not address the question of whether customers would switch to an online retailer in the event of a SSNIP.

173. The Parties are part of a relatively limited bricks-and-mortar competitor set within Lincoln and compete directly with each other at present. The available evidence indicates, however, that the merged entity will not only be constrained by the two remaining bricks-and-mortar retailers post-Merger, but also by the presence of a wide set of online retailers.

174. For these reasons, the CMA believes that there will be sufficient post-Merger competitive constraints to ensure that rivalry continues to discipline the commercial behaviour of the merged entity. The CMA therefore believes that the Merger does not give rise to a realistic prospect of an SLC in relation to outdoor clothing or outdoor footwear in the local area of Lincoln.

## ***Background***

- Acquisition by Heineken of part of Punch Taverns portfolio
- Both GB-based operators of pubs
- Moderate combined presence at national level
- Significant number of overlaps on local basis:
  - Around 1,000 overlap areas
  - 73 areas of *prima facie* concern following application of primary filter
  - 33 areas of concern following application of secondary filter and further investigation
- SLC decision identifying competition concerns in 33 local areas issued on 13 June 2017
- UILs accepted on 23 August 2017

## *Consistency with previous cases*

- Recent precedent – *Greene King/Spirit* (2015) – provides “*starting point*” for assessment
- But *Greene King/Spirit* mainly concerned “dry-led” pubs, whereas *Heineken/Punch* involved “wet-led” pubs
- Was the evidence in the earlier case “*sufficiently informative*” to be used in the new case?
  - Survey evidence: “Relatively low” sample size for wet-led pubs
  - Third party evidence: Competitor views (supported by internal documents and data) consistently indicated narrower catchment areas for wet-led pubs
  - Internal documents: Little meaningful insight but, to the extent relevant, tended to be consistent with narrower catchment areas for wet-led pubs
  - Other evidence: Analysis of internal Wi-Fi data (which suggested no difference in catchment areas of wet and dry-led pubs) had very limited probative value

## *Consistency with previous cases*

- “*Starting point*” was position adopted in *Greene King/Spirit*
- But available evidence at Phase 1 supported alternative approach

157. For the reasons set out above, the CMA considers that the available evidence supports the use of different catchment areas for dry-led and wet-led pubs. The CMA has therefore analysed the local effects of the Merger against catchment areas based on the following isochrones:

- (a) City Centre – 0.5 miles for both wet-led and dry-led pubs;
- (b) Urban – 5 minute drive-time for wet-led pubs and 10 minute drive-time for dry-led pubs; and
- (c) Rural – 10 minute drive-time for wet-led pubs and 15 minute drive-time for dry-led pubs.

## *After filtering: what happens next?*

- Two rounds of filtering applied based on approach adopted in *Greene King/Spirit*
- Proposed “sensitivity” analysis based on increasing and decreasing catchment area by 20% in urban and rural catchment areas
- Intended to reflect that competition concerns did not arise on basis of:
  - Proximity – *i.e.*, pubs located just outside catchment area
  - Transport links – *i.e.*, pubs located on “main transport routes”
  - Asymmetric constraint – *i.e.*, pubs located in town/village near sparsely populated rural area
  - Traffic systems – *i.e.*, driving times don’t reflect geographic proximity
- But, no evidence provided to support these positions (some of which were already reflected in the approach to filtering)

## *After filtering: what happens next?*

- Relatively high bar for inclusion of additional competitors post-filtering
- Limited scope for in-depth local assessment on area-by-area basis where *prima facie* concerns identified in large number of local areas

175. The CMA notes that the threshold for including additional competitors in a local area is high in a phase 1 investigation. Additional competitors (whether additional fasciae or sites outside the catchment area used for a primary filter) are only likely to be included where clear and convincing evidence, relating to a set of objectively-defined criteria, can be provided to support their inclusion.<sup>69</sup>
176. There is limited time available within a phase 1 investigation to conduct a detailed competitive assessment of a large number of local areas and/or to verify the submissions made by the merging parties in relation to these areas, particularly given the number of pubs acquired in this case.<sup>70</sup>

## *After filtering: what happens next?*

- Can additional factors for assessment by analysed “systematically”?
- Are they supported by relevant evidence?
- Do they undermine original filters?

177. The CMA notes that competitive assessment will typically be based on an assessment of factors (the relevance of which is sufficiently established by the available evidence) that can be systematically applied across all local areas, rather than an in-depth assessment of the varied indicators of competition (such as those put forward by the Parties in this case) on an area-by-area basis. The CMA is also of the view that it would not be appropriate to consider systematic factors of competition, such as those submitted by Heineken and referred to in paragraph 168, where these could undermine the initial filters used by the CMA. In this case, the CMA has used two initial filters (supported by relevant evidence) to dismiss competition concerns. The CMA is unable to assess whether competition concerns would arise within these areas (or differently calibrated areas) if the additional parameters suggested by Heineken were to be applied across all areas (because these parameters have only been considered within the areas that failed the initial filtering). The CMA will therefore typically be unable to take such parameters into account where their application has not been considered across all local areas (leaving aside whether such parameters are supported by the evidence available to the CMA).

## *After filtering: what happens next?*

- Are points of differentiation relevant to competition assessment?

178. In relation to non-systematic factors submitted by the Parties, the CMA has not received sufficient evidence to support the relevance of such factors to competitive assessment. In this regard, Heineken has provided extensive examples of differentiation between the Parties' pub offerings (eg the provision of quiz nights or live music events, the availability of outdoor seating or off-road parking facilities, whether a pub is 'well-lit' or 'dimly-lit', whether a pub is 'dog-friendly', the availability of facilities for disabled customers *etc.*). However, Heineken has not explained why such factors are relevant to competitive assessment.

# A look ahead?

- Evaluating the online constraint?
- National vs. local competition?
- Dynamic market features?