

# Merger control in a digital environment:

## The UK experience

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## **Part 1:**

# **The online constraint in retail mergers**



*“Retail markets are continually evolving and we note that online retailing is increasingly important”*

- **Key issues:**

- Distinguishing “diversion” from “migration” (*Ladbrokes/Coral*)
- How to evidence the online constraint?

- **Key cases:**

- *Ladbrokes/Coral* (2016) – gambling products
- *Future/Miura* (2016) – magazines (print and digital)
- *JD Sports/Go Outdoors* (2017) – outdoor clothing, shoes, and equipment
- *DFS/Sofology* (2017) – upholstered living room furniture

## *Assessing the constraint posed by online-only retailers*

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.

## **Part 2:**

# **Digital mergers – jurisdiction and substance**

# Jurisdiction: the “share of supply” test

- Based on horizontal overlap in Parties’ activities:
  - Both Parties supply or acquire goods or services of a particular description
  - Share of 25% or more post-merger in the UK as a whole or in a substantial part of it
  - Merger brings about increment in share
- In practice, provides wide discretion to the CMA:
  - Not an economic assessment but must be reasonable
  - Wide range of criterion used previously (value, cost, price, quantity, capacity, number of workers employed *etc.*)

# Jurisdiction: the “share of supply” test

- *Google/Waze (2013)*
  - “Supply of turn-by-turn navigation applications for mobile devices in the UK”
  - Jurisdiction contested by merging parties on basis that Waze had no economic activities and no meaningful connection to UK
  - But no requirement that “*gain or reward*” is current or immediate; also, advertising revenues already generated in UK
- *Facebook/Instagram (2012)*
  - “Supply of virtual networking services”
- Also provided one of bases for EU jurisdiction – pursuant to Article 4(5) – in *Facebook/Whatsapp (2016)*

# Jurisdiction: the “share of supply” test

- The UK experience:
  - Can capture acquisitions of competitively-significant businesses that don't (yet) generate significant revenues
  - Enabled CMA to look at transactions in digital sector that would not have met purely turnover-based test
  - Requires greater degree of judgment on part of regulator and merging parties
  - Works well within context of UK voluntary regime but more challenging and burdensome within mandatory system?