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Shop 'Til You Drop: Retail Mergers and the U.K. Competition Review Process

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I. INTRODUCTION

The use of survey evidence in retail merger reviews has been a feature of U.K. merger control for several years, particularly at first phase. What impact has this had? Two features stand out. First, it has made the outcome of the merger review process more difficult than ever to predict. Second, it has obscured the limitations of what can be achieved at first phase.

II. MORE DECISIONS, MORE EVIDENCE, LESS PREDICTABILITY?

Over the years the U.K.'s Office of Fair Trading ("OFT") and (to a lesser extent) its sister organization, the Competition Commission ("CC") have devoted a significant amount of resources to examining mergers affecting local retail markets and, as a result, there is an extensive body of casework covering a wide variety of retail markets.

Although not every type of retail activity has (yet) been reviewed by the OFT, the range of businesses covered is nevertheless impressive—grocery stores, petrol stations, building societies, builders merchants, pharmacies, funeral parlors, cinemas, bookshops, betting shops, health food stores, DIY sheds, travel agents, and sportswear shops to name but a few. Moreover, the OFT and CC have developed a more generic blueprint in the form of a commentary on retail mergers² which can be used when approaching a particular retail activity for the first time.

What is more, the overwhelming majority of retail cases are dealt with at first phase, with the OFT demonstrating that it has the appetite to take on large and complex retail transactions. Indeed, retail mergers are often considered particularly suited to being resolved at first phase, given it is normally a relatively straightforward matter to carve out and sell off individual stores in problematic areas. This means that remedies (undertakings in lieu of reference to the CC or "UIL") in retail mergers invariably meet the OFT's "clear cut and comprehensive" standard. Even so, where there is any doubt regarding the availability of suitable buyers, the OFT now routinely requires remedies to be given on an upfront buyer ("UFB") basis, meaning that should a buyer not be found in time, the OFT can simply refer the entire transaction to the CC for a detailed phase II review.

In theory, therefore, a substantial body of precedent, coupled with a well-referenced guidance document, should greatly facilitate self-assessment and enable prospective buyers to reach a pretty accurate view of how big a disposal package they may have to design and which are the likely areas of concern. Even better, where the issues only concern local markets, buyers should be reasonably confident of getting a phase I result.

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² Commentary on retail mergers, March 2011.

Is all this too good to be true? Quite probably. Although (i) there are more retail decisions than ever available to download from the OFT's website and (ii) the volume and quality of evidence on which those decisions are based have increased steadily, predicting the likely outcome is becoming more difficult, not less. Also, the increasing economic sophistication of the OFT's decisions masks some of the legal limitations of the OFT's role as a first phase regulator. This means that—just perhaps—prospective purchasers should consider whether committing to a first-phase outcome is a worthwhile use of time and resources or whether a better deal could be achieved at the CC.

III. THE INCREASING ROLE OF THE SURVEY

Before turning to the reasons why OFT decisions may be losing some of their precedent value, it is worth quickly running through the approach typically adopted by the OFT in retail mergers. The OFT will normally use a two-stage process. The first stage is conducted entirely at the desktop and invariably involves the following steps:

- Define a catchment area around each store (often by reference to the area from which 80 percent of a store's customers are drawn);
- Identify which other retail brands (fascia) are in competition with the merging parties;
- Count how many relevant competing fascia operate in the catchment area pre- and post-merger; and
- Determine what level of fascia reduction will be reasonably likely to lead to a substantial lessening of competition ("SLC") (normally 4 to 3).

Having identified a "long list" of potentially problematic areas, the OFT will then examine each area in more detail, finally arriving at a "short list" of areas where it believes there is a realistic prospect of the transaction giving rise to an SLC. If the buyer commits to sell the stores in the short-listed areas, this is normally sufficient to avoid a reference to the CC.

The issue here lies in the fact that it is the first stage of the OFT's assessment that merging parties are generally capable of replicating and which holds precedent value (so enabling potential buyers to estimate the likely number of divestments). However, the role of this first stage of analysis has been progressively diminished as the center of gravity of the OFT assessment has shifted to the second stage. This trend has been enhanced by the increasing use of survey evidence at the second stage of the OFT's assessment.

Surveys were first used by the OFT in its 2007 review of the Co-operative Group's merger with United Co-operatives³ and reached a high point in the Co-operative Group's acquisition of Somerfield⁴ the following year where over 40,000 consumers were surveyed. Surveys have been

³ Anticipated merger between Co-operative Group (CWS) Limited and United Co-operatives Limited, July 23, 2007.

⁴ Anticipated acquisition by Co-operative Group Limited of Somerfield Limited, November 17, 2008 ("CGL/Somerfield").

used almost routinely since—in many grocery retail mergers (even those involving only one or two stores)⁵ as well as mergers involving DIY sheds,⁶ builders merchants,⁷ and petrol stations.⁸

The typical survey asks a representative sample of customers at each of the buyer's and the target's stores in a given area where they would go if the store at which they had recently made a purchase was not available. The results allow the diversion ratio between the merging parties (i.e. the proportion of customers that would switch from one party to the other) to be measured. When combined with the store margins, the diversion ratio can also be used to model illustrative price rises ("IPRs") or a generalized upward pricing pressure indicator ("GUPPI") arising from the merger.

Surveys have often proven to be a powerful tool to show that, despite any initial concerns that the OFT's necessarily generalized desktop analysis might have raised, the direct evidence of customers within the specific area concerned can demonstrate that the transaction would not lead to any SLC in that area. For example, a survey can offer convincing evidence that an OFT assumption that certain competitors offer only a very weak constraint is not correct, or it may "correct" an assumption that competing stores outside the catchment area do not constrain the stores within it.

The increasing use of surveys has been happily embraced by both the regulator and regulated. The OFT likes surveys because it gets to employ sophisticated econometric techniques based on evidence from consumers in individual local areas. Advisers and their clients like them because survey evidence generally means the merging parties have to sell fewer stores.

This preference leads to a ratchet effect, as the more survey evidence that is produced by the merging parties in an attempt to shorten the OFT's first stage "long list," the less incentivized the OFT is to tighten up the first stage of its methodology, leading to longer "long lists" and, in turn, a greater incentive on parties to produce survey evidence.

IV. TOO MUCH OF A GOOD THING?

This trend for more survey use raises two particular issues around the transparency and predictability of the merger review process:

First, on the issue of transparency, surveys have introduced a significant degree of extra complexity, particularly around the question of how to use the survey responses to model potential price rises. The OFT uses a number of different methods to model price rises in horizontal mergers, all of which rely on two essential inputs—the diversion ratio between the merging parties and the margin of the stores concerned—together with certain assumptions about the nature of demand. Where the OFT's model suggests a price rise of more than a certain amount (typically 5 percent) in a given area, then this area will "fail"—requiring one or more stores to be divested. As well as looking at potential price rises, the OFT will also look at the

⁵ Anticipated acquisition by J Sainsbury plc of two stores from Cooperative Group Limited, November 9, 2009.

⁶ Completed acquisition by Home Retail Group plc of 27 leasehold properties from Focus (DIY) Ltd, April 15, 2008 ("HRG/Focus").

⁷ Completed acquisition by Jewson of Build Center, February 8, 2012 ("Jewson/Build Center").

⁸ Completed acquisition by Shell UK Limited of 253 petrol stations from Rontec Investments LLP, February 3, 2012 ("Shell/Rontec").

absolute diversion ratio—in grocery mergers, an area will normally fail if the diversion ratio exceeds 14.3 percent, although in other sectors a more generous threshold of 40 percent has been applied.⁹

Once survey evidence has been submitted, the key areas of debate between the OFT and the merging parties tend to be around narrow points of a highly technical nature. One of the big areas of debate concerns the appropriate shape of the demand curve. When modeling the likely price impact of a merger, should the OFT assume demand is linear (i.e. the demand for a product falls at a greater rate the more prices increase) or isoelastic (demand falls at a steady rate as prices rise)? Recent cases have looked at pass through (the ability of a firm to pass through firm-specific cost shocks to its customers) as a means of testing which demand assumption is the more appropriate; which, in turn, determines whether an IPR model (based on an isoelastic demand function) or the more generalized GUPPI model should be used. Other areas of debate include which cost elements should be stripped out of the margin when calculating price rises,¹⁰ how to interpret ambiguous survey responses,¹¹ and whether to apply a symmetric or an asymmetric IPR formula.¹²

These points, although presumably incomprehensible to the vast majority of consumers who took part in the survey, can have a very significant impact on the number (and identity) of the stores that may have to be divested and so are often fiercely contested by the parties. However, at a policy level, this lack of understanding raises a real question of public engagement and, ironically, these debates also shift the focus away from the specific nature of competition in individual areas and back towards more generalized concepts.

The second issue is predictability. Even armed with a set of survey results, it can be hard to predict the final outcome of the OFT process. In two recent back-to-back transactions involving petrol stations (in both of which survey evidence was submitted), the OFT looked at relative diversion ratios in one case to reduce a "long list" of five potentially problematic areas to one;¹³ but used a GUPPI model in the other to reduce a "long list" of 68 down to a "short list" of six.¹⁴

However, without the survey results, the outcome becomes almost impossible to predict. The increasing focus by the OFT on second-stage survey evidence has meant that the first stage is a less-disciplined affair. Surveys provide a rich source of evidence and, without them, the analysis seems to falter.

⁹ Jewson/Build Center and Shell/Rontec (where in some areas, a diversion ratio even higher than 40 percent was accepted).

¹⁰ Shell/Rontec.

¹¹ Jewson/Build Center.

¹² Completed acquisition by Asda Stores Limited of Netto Foodstores Limited, March 9, 2011 ("Asda/Netto").

¹³ Anticipated acquisition by Rontec Investments LLP of certain petrol forecourts, stores and other assets from Total Downstream UK plc, Total UK Limited and their affiliates, October 20, 2011.

¹⁴ Shell/Rontec.

Take groceries for example. Over the years, two CC market investigations, a number of phase II merger reviews (the various Safeway transactions and *Somerfield/Morrisons*¹⁵), plus a number of significant transactions reviewed by the OFT (*CGL/Somerfield*, *Asda/Netto*, and many others) have led to the development of a very sophisticated first-stage methodology. This methodology utilizes a defined competitor set, catchment areas varying according to the size and location of store, and re-centering analysis on individual output areas. This methodology is well-established and predictable. However, in two recent cases,¹⁶ the OFT departed from this methodology where it failed to deliver any local areas meriting a second-stage analysis. Instead, the OFT devised (in each case) a new methodology that produced a "long list" of areas for the OFT to examine in more detail.

Similarly, in relation to builders merchants, a methodology built up by the OFT in the 2010 *Travis Perkins/BSS*¹⁷ case concerning plumbing and heating merchants was put to one side a year later when the OFT reviewed a merger between two general builders merchants.¹⁸ In the *Travis Perkins* case (where no survey evidence was submitted), the OFT's long list was based on a catchment area defined by a uniform 10 mile radius around each target branch (3 miles within the M25). In the *Jewson* case (where survey evidence was submitted), the OFT's long list was based on catchment areas compiled on five different bases (10, 15, and 20 miles; 3 miles within the M25; and areas defined by reference to the location of 80 percent of a branch's customers) around both the target and acquirer branches.

V. SURVEY AND BE DAMNED?

This creates a very real dilemma for those contemplating a retail acquisition—to survey or not to survey?

To survey can mean an acquiring company cuts itself adrift from the analysis and the evidence upon which it had based its initial assessment of which areas may be at risk. Once the survey has been undertaken its results will overshadow even the most favorable documentary evidence that the company may have gathered in support of the merger.

It will also end any possibility of persuading the OFT to tighten up the assumptions on which the first-stage analysis was made and so shorten the "long list." Worse still, it may even cause the OFT to add new areas to its long list. Normally, it is the OFT's first-stage analysis at the desktop that informs which local areas should be surveyed for the purposes of the second-stage analysis. However, surveys can throw this process into reverse (as the OFT and CC retail commentary makes clear). This can have the effect of increasing the "long list" of potentially problematic areas at a stage in the process when it is too late to conduct additional surveys.

Not to survey, however, can mean going into the final stages of the OFT's review process with little or no evidence which addresses the OFT's theory of harm within specific local areas.

¹⁵ *Somerfield plc / Wm Morrison Supermarkets plc merger inquiry*, referred March 23, 2005 ("*Somerfield/Morrisons*").

¹⁶ Anticipated acquisition by One Stop Stores Limited of 76 stores of the Mills Group of companies, March 25, 2011 ("*Tesco/Mills*") and the anticipated acquisition by Co-operative Group Limited of David Sands Limited, April 16, 2012 ("*CGL/David Sands*").

¹⁷ Anticipated acquisition by Travis Perkins plc of BSS Group plc, October 26, 2010 ("*Travis Perkins/BSS*").

¹⁸ *Jewson/Build Center*.

This can be a daunting prospect, particularly when the long list of stores emerging during the OFT's first-stage analysis is longer than had been initially contemplated (as it normally is). The company may have plenty of evidence to show that competition in general is fierce, but it is unusual to be able to produce evidence that specifically refers to each individual local area on the OFT's long list.

In these circumstances, merging parties can either try to persuade the OFT to adopt a general rule that can be layered on top of its first-stage analysis, or they can produce other forms of location-specific evidence of local competition (in the form of photographs, descriptions, internal correspondence, examples of new entry, etc.). An example of the former is *Travis Perkins/BSS* in which the OFT's "long list" of 51 was whittled down to 20 through the introduction of various "mitigating factors" which allowed the OFT to treat an area with a fascia reduction count of 4 to 3 (normally sufficient for a "fail") to pass where the competing fascia were sufficiently close to the target store. An example of the latter is *Tesco/Mills*, where six areas failed the first-stage analysis and were assessed on the basis of criteria comprising local entry conditions, closeness of competition (both in terms of geographical proximity and similarity of consumer offer), and an assessment of the competitive constraint posed by individual competing stores.

VI. OFT OR CC—FORUM SHOPPING

The increased willingness of the OFT to consider survey evidence has made it much more attractive for merging parties to try and secure phase I clearance. There are two reasons:

- First, the ability of the OFT to take into account this type of evidence means that the difference between a phase I outcome and a phase II outcome (in terms of the number of stores to be divested) is (arguably) much less than it otherwise would be.
- Second, even if the OFT might require divesting slightly more than the CC, given the shorter timeframe of the phase I process and the risk of the target business deteriorating in the meantime, the OFT may still present a more attractive option.

A CC merger inquiry is not something to undertake lightly, but both of the reasons given above need to be looked at in more detail.

Turning first to the issue of timing, the OFT normally works to an administrative timetable of 40 working days, while the CC's standard review period is 24 weeks. Taken at face value, therefore, a phase II process should take 6 months longer than clearance at phase I—which is a strong disincentive for anyone contemplating seeing a deal through a phase II process. However, these figures do not tell the whole story:

- The OFT's 40 working-day timetable is non-binding and, in cases involving a lot of evidence, this timetable is frequently extended (often with the agreement of the parties to the merger). Recent retail mergers have taken much longer. *Shell/Rontec*, for example, took 6 months.¹⁹ In Edmundson's acquisition of Electrical Center, the OFT started its

¹⁹ This transaction was first notified to the European Commission and was referred back to the OFT on August 1, 2011 (at the parties request). The OFT decision is dated February 3, 2012

investigation in October 2011 and issued its decision on May 11, 2012. Although these cases may be exceptional, three months is not uncommon.²⁰

- The OFT's 40 working-day period does not take into account any additional period of time needed to discharge a UFB requirement. This is important—if the OFT requires stores to be divested on a UFB basis (which for retail mergers it very often does), the risk of a reference to the CC remains with the parties until buyers have been found for the divestment stores. In the *Sports Direct/JJB*²¹ case, the OFT referred the transaction to the CC three months after provisionally clearing it, on the basis that no buyers had been found for the five divestment stores it had identified. This period of additional uncertainty (during which the OFT will not normally allow the businesses to integrate) can last longer than a phase II process—in the recent *Carlyle/Palamon* dental merger, for example, it lasted nearly 10 months.²² A UFB requirement is also a possibility at the CC, although so far the CC has not imposed such a requirement in any retail case (although it has in other cases).
- The OFT has the ability to fast track a case to the CC at the parties' request—a process which takes 2-3 weeks. The fast track has been used only twice, but one of those cases was a retail merger, *Thomas Cook/CGL/Midlands*.²³

These three factors mean that the duration of a detailed OFT review, followed by an extended UFB period, may not be very different from a fast-tracked OFT process followed by a phase II review by the CC.

Similarly, there is a mixed picture on substance. In some cases, there is clearly merit in the notion that, with proper use of survey evidence, a company can get as good a result out of the OFT as from the CC. A good example of this is the *Somerfield/Morrisons* merger in the groceries sector, which took place before the use of survey evidence by the OFT was routine. In that case, the OFT applied its desktop methodology (without survey evidence), found 23 potentially problematic areas, and referred the transaction on the basis that Somerfield did not offer a remedy in all areas. The CC, comfortable with the use of survey evidence, found only 12 problematic areas. Thanks to the OFT's present willingness to consider survey evidence, therefore, a party to a grocery merger could arguably get the same (or similar result) at the OFT as it would get presenting essentially the same evidence at the CC, but without the additional time and cost of a phase II process.

²⁰ Recent case such as *Jewson/Build Center* and the anticipated acquisition by a merger between the Carlyle Group and Palamon Capital Partners LP of Integrated Dental Holdings Group and Associated Dental Practices, June 10, 2011 ("*Carlyle/Palamon*") each took around three months.

²¹ Completed acquisition by Sports Direct International plc of a number of stores from JJB Sports plc, May 1, 2009 ("*Sports Direct/JJB*").

²² The OFT's decision was issued on June 10, 2011, but it did not accept UIL until April 26, 2012. This period is unusually long and may have been caused by the need to secure consent to the assignment of the contracts by which the divestment businesses were able to provide the services in question.

²³ Anticipated travel business joint venture between Thomas Cook Group plc, the Co-operative Group Limited and Midlands Co-operative Society Limited, March 2, 2011 ("*Thomas Cook/CGL/Midlands*"). The other fast track case was the completed acquisition by Global Radio Holdings Limited of Real and Smooth Limited, October 11, 2012, although the OFT's reference decision in that case was delayed considerably by the decision of the Secretary of State for Culture, Media and Sport to intervene and require an assessment of the merger's impact on media plurality.

However, there is also plenty of evidence to suggest the opposite. There have been relatively few phase II merger reviews in the retail sector. Since the current legislation came into force in 2003, there have only been eight retail cases. In five cases, the CC cleared the transaction unconditionally, even though the OFT had found potential competition concerns in some (often in many) local markets.

These are set out in the table below:

Table 1: CC merger inquiries into retail mergers, 2004 to present

Transaction	Sector	Date	Outcome	OFT position
Waterstones/ Ottakars	Bookshops	December 2005	Cleared unconditionally	Loss of non-price competition locally in 35- 44 areas of overlap
Somerfield/ 115 Morrisons stores	Groceries	March 2005	Cleared with 12 divestments	Concerns in 23 local areas
Vue/Ster	Cinemas	September 2005	Cleared with 1 divestment	Concerns in 2 local areas
Game/ Game Station	Gaming hardware and software	August 2007	Cleared unconditionally	"Vast majority" of stores within 1 mile of each other
Tesco/Co-op Slough	Groceries	April 2007	Prohibition	Concern in the one local market affected
NBTY/Julian Graves	Health foods	March 2009	Cleared unconditionally	Concerns in at least 25 areas
Sports Direct/ 31 JJB stores	Sportswear	August 2009	Cleared unconditionally	Concerns in 5 areas
Thomas Cook/ Co- operative/Midlands	Travel agents	March 2011	Cleared unconditionally	Rebuttable concerns in at least 90 local areas

Over the same period, the OFT has claimed a significant number of scalps as parties to retail mergers have offered to divest sometimes large numbers of stores in order to secure phase I clearance. The table below lists only those cases where more than 10 stores were offered:

Table 2: OFT cases involving UIL in the retail sector, 2004 to present

Transaction	Sector	Date UIL accepted	No. Divestments	% of acquired business	UFB?	Varied?
CGL/Somerfield	Groceries	January 2009	133	15%	Partial	Yes (-6)
Boots/Alliance	Pharmacy	May 2006	96	10%	No	Yes (-2)
William Hill/Stanley	Betting shops	February 2006	78	14%	No	Yes (-2)
Asda/Netto	Groceries	March 2011	47	24%	Partial	Yes (-1)
Betfred/Tote	Betting shops	August 2012	25	5%	Yes	Ongoing
CGL/United	Groceries, funerals and pharmacy	November 2007	24	2%/7%/<1%	No	Yes (-1)
Jewson/Build Center	Builders merchants	April 2012	22	15%	No	-
Travis Perkins/BSS	Builders merchants	December 2010	20	6%	No	Yes (-3)
CGL/LBA	Groceries and pharmacy	May 2009	13	23%/20%	No	No
Greene King/Laurel	Pubs	October 2004	13 (in 7 areas)	3%	No	No
CGL/Fairways	Funeral parlors	November 2006	13 (in 5 areas)	26%	No	Yes (-1)
Shell/Rontec	Petrol stations	July 2012	12	5%	Partial	-
Terra Firma/United Cinemas	Cinemas	May 2005	11	34%	No	No
Carlyle/Palamon	Dentists	April 2012	11	8%	Yes	No

VII. IS THE CC THE BETTER SHOPPING FORUM?

A straightforward comparison of these two tables is misleading. There are, of course, plenty of examples of the OFT unconditionally clearing retail mergers (banks, building societies, opticians, and restaurants among others). And some of the CC's clearance decisions could easily have gone the other way (in *Game/Game Station*,²⁴ the merger was cleared only on the casting vote of the CC's chairman).

However, the fact remains that even armed with more sophisticated economics, the OFT's role as a first-phase authority limits its ability to look past the possibility that a transaction might give rise to local competitive effects. Indeed, the OFT's experience of reviewing retail mergers seems to have entrenched the notion that competition between retailers is fundamentally local in nature and that any merger must therefore result in some loss of local competition.

The guidance on retail mergers states that "the OFT's strong starting assumption on this has been that there will be material local competition on one or more aspects of price, quality, range and service."²⁵ That essentially means that the debate with the OFT in almost any retail merger is not whether or not a meaningful level of competition will take place locally, but where local competition might be lost.

Parties seeking to convince the OFT that any loss of local competition can be mitigated (or made irrelevant) by other factors have generally failed. Such factors have included, for example, a national pricing policy;²⁶ a regulatory regime under which there can be no price competition;²⁷ the role of the internet as a uniform, national constraint;²⁸ and (in the merger of specialist food retailers) the presence in every local market of "generalist" food retailers (supermarkets).²⁹

Only the CC can break this taboo and conclude that retail competition might be national or that any impact on local competition will be marginal. An example of the former is *Game/Game Station* where the CC concluded the market was national. A good example of the latter is the *Thomas Cook/CGL/Midlands* case, where the OFT indicated (albeit on a fast-tracked procedure) that there were 90 areas which gave rise to a rebuttable presumption of competition concerns, but where the CC cleared the transaction unconditionally. The CC summed up in the following terms, unimaginable in an OFT decision:

We concluded that, although we cannot rule out the possibility of some price rises (via reductions in discounts given) in certain local areas for certain customer groups, the joint venture would not be likely to result in a substantial lessening of competition (SLC). Moreover we think that any isolated price effects that were to occur would most likely be small, sporadic and eroded over time.³⁰

²⁴ GAME Group plc / Game Station Limited merger inquiry, referred August 9, 2007 ("*Game/Game Station*").

²⁵ Paragraph 3.7 of the OFT/CC commentary on retail mergers, 2011.

²⁶ HRG/Focus.

²⁷ Carlyle/Palamon.

²⁸ Thomas Cook/CGL/Midlands.

²⁹ The completed acquisition by NBTY Europe Limited of Julian Graves Limited, March 20, 2009.

³⁰ Thomas Cook/CGL/Midlands, final report, ¶ 21.

This passage neatly illustrates the stark legal reality that no amount of sophisticated economic evidence can overcome. The OFT has a much lower intervention threshold. It must intervene (to refer the transaction to the CC or accept UIL) wherever it may be the case that an SLC may be created, whereas the CC decides on a simple balance of probabilities. In other words, the OFT cannot shrug its shoulders and say "local effects are no big deal and will sort themselves out," but the CC can.

VIII. CONCLUSION

In brief, the cases which are worth fighting for at phase I are those where a company is willing to concede that (i) competition operates locally and (ii) where it is confident that in most areas it can demonstrate to a skeptical and survey-hungry OFT that—after the merger—effective competition will remain in each and every local area of overlap.

For those cases where a company needs to rely on some wider form of competitive constraint to address apparent competition concerns at a local level, or where the number of local overlaps means the risk of committing to an OFT outcome is too great, the CC may be the better option.