Trouble in store(s)

The CMA's new approach to local mergers post-MAGs

Introduction

The CMA's 2021 revised Merger Assessment Guidelines ('MAGs') signalled a move away from precedents and guidance based on market shares or similar measures, towards an approach where the CMA would use its full discretion to decide on the merits of each case, with an enhanced role for closeness of competition. But, in local merger cases, structural factors play a far greater role. Specifically, the CMA has recently employed mechanistic 'decision rules' (often based entirely on market shares) and displayed an unwillingness to consider evidence on individual local areas. Its thresholds for intervention also appear low by historical standards, and we are not aware of any explanation for this policy shift.[1]

This mechanistic approach in combination with historically low thresholds for intervention mean that the prospect of local mergers giving rise to divestments is far greater than before.[2] Firms are now frequently seeking to fast-track these cases, presumably since they (or their advisors) see limited opportunity to engage meaningfully with the CMA on the substance.

And yet, despite this apparently formalistic approach, there appears to be little consistency between cases, which should be one of the CMA's goals.[3] Decision rules rely on a number of ingredients, but these are being varied from case to case with little explanation. This makes outcomes unpredictable and (unnecessarily) makes self-assessment more costly because small changes to one element of the decision rule can have large effects on outcomes.

In this article, we take stock of these developments. First, we discuss the key aspects of a local merger assessment: whether to use a decision rule or a filter; the size of the catchment area and how it should be measured; how concentration within the area should be measured, including whether different firms should be given different weights; and the threshold for concern. We explain the CMA's recent practice for each of these, and its approach to remedies.

Second, we explain our concerns with the CMA's approach and how its current practice may be improved. Notably:

- The CMA should aim to be more consistent across cases, and acknowledge and explain divergences. The CMA will, of course, want discretion to deal with the facts of each case, but we think on some topics it could give a principled approach and guidance about when it may depart from it.
- The CMA should therefore engage earlier with Parties about a possible decision rule and the reasoning behind it, so that Parties can highlight potential flaws or what may be superior alternatives before the rule is virtually set in stone in an Issues Letter. We have seen more engagement in one recent case, which helped it to run more smoothly.
- The CMA typically gives little explanation of the thresholds used. It could usefully calibrate them in each case by looking in more depth at a small selection of local areas. If areas just above the threshold are clearly not problematic then the threshold may be too low, and vice versa.

Finally, based on our recent experience of CMA decisional practice, we set out advice for firms contemplating an acquisition in markets – either retail ('B2C') or wholesale/services ('B2B') – where geographic location is relevant (e.g. because of store or warehouse networks). In particular, merging firms should:

- prepare as much data as possible on their own and competitors' sites, and be prepared for the CMA to ask them to run multiple iterations of their analyses;
- consider from an early stage what a potential decision rule may look like, and how variations to it may affect which areas are deemed problematic; and
- have a clear view of what they are willing to divest in order to get a deal cleared at Phase 1, considering which sites are their 'crown jewels' but also which they may not be able to sell due to financial issues or interdependencies between sites.

1. The CMA's Retail Mergers Commentary, published in 2017, explicitly says that "*The CMA has taken [a combined share of 40%] as a starting point when assessing the appropriate share of store threshold*" (para 3.36), although a lower threshold has been used in certain cases. As discussed below, only one case in the last three years has used a threshold as high as 40%.

2. The CMA has only cleared six local mergers unconditionally during 2021-2023, as compared to 23 with remedies, plus one merger abandoned during Phase 2 (*Forfarmers/Boparan*, 2023, which featured both horizontal and vertical concerns based on local areas) and one prohibited (*Veolia/Suez*, 2021-2022, where SLCs in local markets were only part of the case).

3. For example, in *Medivet* (2023), the CMA said: *"Where a merger is one of a potentially large number of similar mergers that could be replicated across the sector in question, the systematic approach of a decision rule ensures consistency and replicability across cases"* para 143b. It may allow technical replicability by the CMA, but not by an acquiring firm who cannot predict what catchment area will be used.

Changes to CMA procedure for local mergers

Prior to the new MAGs, the CMA was well-known for its use of filtering in most local merger investigations.[4] A filter would take some measure of competition in local areas and apply a fairly conservative threshold which would clear areas with no or low risk of competition concerns. The CMA would then examine the remaining areas in more detail, drawing on supplementary information if needed, applying its judgment in respect of the impact in each area.[5]

There were exceptions to this: in cases with very few local overlaps, the CMA might move straight to the individual assessments; and only in cases with a very large number of potentially problematic areas, it might decide that individual assessment would not be practical, and it would need a mechanistic decision rule.[6]

However, in the last three years, the CMA has used a decision rule in most local mergers it has assessed. It has given two reasons for this. First, it only wants to use information that is available systematically for every local area. This is to avoid situations where additional data used (selectively) to clear areas that would fail an initial filter might also have highlighted problematic areas that, nevertheless, passed the initial filter.[7] While this sounds reasonable in principle, as discussed in a previous RBB Brief,[8] it should not be necessary if the initial filter was set at an appropriately conservative level. In other words, only those areas with no prospect of concern should be filtered out.

The second reason is the pursuit of greater efficiency in Phase 1 reviews. This is unpersuasive for all but the largest cases, since the vast majority of work in supplying further information on filtered areas is usually undertaken by the Parties. Further, filtering can generally be done in pre-notification, leaving the CMA with the entire Phase 1 period to assess the remaining areas.

In our view, therefore, the time saving benefits for the CMA are small compared to the costs of putting aside relevant evidence. The CMA has chosen not to conduct individual assessments even in some cases with very few local areas failing its decision rules, e.g. just two local areas in a recent dental merger.[9]

The main exceptions to this decision rule approach relate to mergers involving providers of student accommodation and of office space.[10] Here the CMA has maintained a 'traditional' filtering approach. It has gathered further information on areas that have failed its filter (as many as 18 in one of these cases, which is more than the total number of sites in some decision rule cases) and has cleared some of these as a result of individual assessment. It is unclear why these cases merited a different approach, and this discrepancy creates unnecessary uncertainty for firms and advisors.[11]

In the recent case *Severn Trent/Andigestion*, the CMA said it used a filter because (a) only one local area failed the filter, and (b) the CMA had not reviewed any past cases in the industry.[12] This may be useful guidance, but is not entirely consistent with the approach taken in other cases.

The components of a decision rule

In this section we briefly explain the approach the CMA has taken to the size of the catchment area and how it is measured; how concentration within the area should be measured, including whether different firms should be given different weights; and thresholds. The same components also apply to a filtering process.

4. The CMA's Retail Mergers Commentary (2017) has a chapter devoted to filtering.

5. CMA: Merger Assessment Guidelines (2021) paras 4.32-33.

6. MAGs para 4.34. Older examples of use of a decision rule include *Thomas Cook/Midlands/Co-op* (2011), and Sainsbury's/Asda (2019). Such cases were relatively rare. Cases such as *Heineken/Punch Taverns* (2017) used a 'primary filter' and 'secondary filter', which were collectively a decision rule, but the factors in the secondary filter were not used in the primary filter.

7. For example, in a merger involving city centre pubs within a 1-mile straight line radius, it could be that one company's pub is the other side of a river from the other company's pub, with no convenient crossing point. Arguably they would not be close competitors, and so looking at a map should alleviate any concerns. However, there could also be a scenario where a filter clears a local area where both companies own pubs on the basis that there are sufficient competing pubs; but the companies' pubs might be one side of a river, and all the competitors on the other side. In this situation, the CMA would say, either it needs information on rivers for all local areas, or it will not use it in any. Not using it at all may not lead to better decisions, but it avoids cherry-picking.

8. RBB Brief 65: Fuel for thought? Developments in CMA local merger assessment (2021).

9. *Riviera/Dental Partners* (2022). However, in *Wolseley/Kooltech* (2023) the CMA used a filter and individually assessed the two areas failing the filter.

10. *Scape Living/GCP Student Living* (2021), *iQSA /GCP Student Living* (2021), *GIC/Greystar/Student Roost* (2022), and *Cheetah/Fora* (2022).

11. The answer to this is not based on precedents; the CMA has introduced a decision rule in some industries where it had previously used filtering, including dentistry and motor fuel.

12. *Severn Trent/Andigestion* (2023) para 66.

The catchment area

The size of the relevant catchment area is a key variable in local area analysis, and the number of SLCs can be highly sensitive to it: a larger catchment can increase the number of areas where the Parties overlap, but can also bring in more competitors in each area. It is therefore of great importance for risk assessment in relation to prospective mergers, but it can be a key source of uncertainty, if the CMA's approach when defining catchment areas is unpredictable.

The CMA's usual practice is to request data on the 80% catchment areas around each site (i.e. the smallest area within which 80% of customers are located, usually defined as 80% of revenue where that data is available, but sometimes number of customers, e.g. in dentistry cases). It may request separate data for separate products (e.g. different types of dental treatments). It will generally calculate the average 80% catchment across sites.

The CMA may measure distances using:

- straight line distances;[13]
- walking distances;[14]
- drivetime, which has been used in many cases; and
- driving distances.[15]

The CMA will then decide on an approach across sites, which can be:

- Individual catchments for each site. This is rare, although in *Veolia/Suez* Phase 1 the CMA used for each site the larger of the average catchment and the individual catchment. As noted below, this led to some counterintuitive results, and was dropped for Phase 2. In *Hanson/Mick George*,[16] the CMA used individual catchments for railheads and ports.
- Uniform catchments across all sites, taking the average for both firms.
- A different uniform catchment for each firm.
- Different uniform catchments for different product markets, or for types of geographic area (e.g. within M25, urban and rural for dental cases).

In our experience, the choice between the last three options generally depends on whether the catchment sizes are systematically different rather than principled reasoning.

Measures of concentration

The CMA's preference seems to be to use market share measures in its decision rules. This again goes against the grain of the new MAGs, which place more weight on closeness of competition than market shares,[17] but is probably necessary in a mechanistic decision rule.

For practical reasons, many decisions draw on publicly available data, so that the notifying Parties can provide an assessment, although the CMA will occasionally ask Parties to make estimates and correct or supplement these with data from third parties.[18]

Given that market-wide output/sales data is rarely available, the CMA generally uses some measure of capacity,[19] but will use a 'fascia count' or 'share of stores' if no other information is available.[20] Sometimes, the CMA will use both fascia count and share of stores – a decision rule may find an SLC if a local area fails on either measure, even if the other measure indicates strong competition.[21]

In some markets, primarily petrol stations, rich data is available and feeds through directly to firms' pricing. The CMA has used different decision rules in different petrol station mergers to reflect the way individual chains set their prices.

Where information is limited, or a less good guide to the relevance of the chosen share measure to competitive strength, this uncertainty is sometimes reflected in a lower threshold, other things being equal.[22]

13. Used for short distances in city centre pubs (*Admiral Taverns/Hampden Pub Estate*, 2021); a few miles for dentists (Riviera/Dental Partners and *Portman/Dentex*, 2023), pharmacies (*Bestway Panacea/Lexon and Asurex*, 2023) and car parts (*LKQ/Uni-Select*, 2023); and for long distances in poultry feed (*Forfarmers/Boparan*, 2023, although the decision is not explicit that this is straight line distances).

14.Used in student accommodation (*Scape Living/GCP Student Living*; *iQSA/GCP Student Living*; *GIC/Greystar/Student Roost*).

15. *HSH Cold Stores/Associated Cold Stores & Transport* (2023); *Veolia/Suez Phase 1*.

16. *Hanson/Mick George* (2023).

17. Especially given the lesser emphasis placed on market definition. E.g. MAGs para 9.3.

18. Notably, no public data sources exist for the number of vets, and the CMA had to gather this information from competitors in relevant overlap areas (around 40 areas in *Medivet*). The same approach was taken in *Wolseley/Kooltech*. It is questionable if this approach would be practical for a merger with more overlaps, and of course this makes self-assessment very difficult.

19. For example, processing capacity in *Veolia/Suez*, units of activity in NHS dentistry cases, number of FTE vets, number of beds in student accommodation.

20. For example, number of fascia for *Admiral Taverns/Hampden*, *Co-op funerals* (2021), *Morrisons/McColl's* (2022); number of sites for *Huws Gray/Grafton* (2021), *Bestway Panacea/Lexon and Asurex*, and private dentistry cases.

21. For example, *Huws Gray/Grafton* found an SLC where the merging firms had either 40% or more of sites or no more than 3 competing fascias in the area.

22. For example, in *Veolia/Suez* Phase 1, the CMA used a threshold of 35% in local composting markets but 30% in local incineration markets, on the grounds that in the latter "*shares, and the position of competitors, can vary from year to year*" (para 723) – the implication being that they could vary substantially, given that shares in all markets can vary to some extent from year to year. We disagree with this reasoning, given that the measure of capacity used was long-term, and it did not appear in the Phase 2 decision. In dental cases, the CMA has used a higher threshold for NHS dentistry (where capacity figures for units of treatment are available) than for private dentistry (where they are not and the CMA relied on share of sites), although other factors were also involved.

In some cases, the CMA will weight suppliers based on their brand and/or proximity to the 'centroid' site (i.e. the site on which the analysis is focused). We have seen in recent times that the CMA has weighted competitors by distance in some (though not all) B2B cases,[23] but not in most B2C cases.[24]

The CMA has used linear weighting, apparently for simplicity, where the centroid site has a weight of one and a site on the boundary has a weight of zero. This boundary has not been defined consistently. In *Breedon/Cemex* and *Veolia/Suez* Phase 1, the CMA used the catchment area. By contrast, in *Huws Gray/Grafton*, an investigation which ran at the same time as *Veolia/Suez* Phase 1, and in *Hanson/Mick George*, the CMA first multiplied the catchment by 1.5 and used this as the boundary.[25] The logic for the enlargement is that an 80% catchment will not capture all of the relevant overlapping sites (of the Parties or competitors), i.e. a competitor's site outside the catchment areas will still compete for customers in at least part of the catchment area.[26]

Thresholds

The CMA's current baseline threshold appears to be that SLCs can be found where combined shares are at or above 30%.[27] It has not explained why this is its current starting point.[28] It will consider whether a higher or lower threshold is appropriate based on case-specific factors.

The CMA's main reason for using higher thresholds seems to be cases where it believes that out-of-market constraints are stronger, and occasionally based on differentiation between the merging firms.[29] It has generally used either 30% or 35%, with only one case in the last three years using 40% (*Wolseley/Kooltech*).

It is common for the CMA to clear areas with an increment of less than 5%, but it does not always do so. In *Hanson/Mick George*, it defined a 'material increment' which would vary by area between 0.5%-5% depending on the merging firms' combined share in the area – the higher the share, the smaller the permitted increment.

In a few recent cases, the CMA has used a more complex decision rule, where it will find an SLC if shares exceed a certain threshold; or there are not enough competitors in the area, or not enough competitors of a certain size; or one merging firm is the closest site to the other merging firm.[30]

Finally, a couple of less recent cases have relied on the number of competing fascias;[31] and road fuel cases tend to use more complex rules, reflecting the factors that feed into pricing.

Remedies

The changes discussed above have not changed the CMA's approach to remedies. When it finds SLCs in local areas, the CMA is generally open to divestments in those areas to avoid a Phase 2 investigation. The CMA continues to be very strict about remedies, requiring a remedy that restores the pre-merger situation, rather than simply a remedy that prevents a threshold being exceeded.

For example, suppose the decision rule is that any area with a combined share of 30% or more is an SLC. Suppose that the acquired firm has two sites close to each other, each with a 4% share, and the acquirer has a share of 25%, creating a combined share of 33% and an SLC. If the acquirer bought either one of the two sites, there would be no SLC. In theory, therefore, divesting either one of the two sites would leave the merged firm with combined shares below 30% and should be acceptable. The CMA has rejected this in recent cases,[32] requiring the divestment of all acquired sites (or all of the acquirer's sites) in the area.[33]

23. Including *Veolia/Suez* and *Huws Gray/Grafton*, and previously *Breedon/Cemex* (2020), but not *Forfarmers/Boparan* or *Severn Trent/Andigestion*.

24. One exception was *Bestway Panacea/Lexon and Asurex*, a merger of pharmacies, which were distance weighted.

25. *Huws Gray/Grafton* para 68 and footnote 42. In *Medivet*, the CMA also multiplied some catchment areas by 1.5 when calculating shares of supply for jurisdiction purposes, but not in the competitive assessment.

26. And indeed for some customers outside the catchment area, given that (a) by definition, on average up to 20% of customers are located outside the 80% catchment area, and (b) average catchment areas will be smaller than some individual catchment areas.

27. "*...the CMA notes that a starting point of 30% to assess competition concerns is broadly consistent with the CMA's recent practice. The CMA has used higher thresholds in cases where there is significant evidence or analysis was available to support such a position and/or there was evidence of material out-of-market constraints.*" *Riviera/Dental Partners* para 97.

28. In some early 30% cases the decision has referred to a past case using 30%, although the first such reference is to incineration markets in *Veolia/Suez*, where 30% was an exception rather than a baseline – see footnote 22.

29. *Wolseley/Kooltech* para 109.

30. See *Huws Gray/Grafton*, *Cheetah/Fora*, *Bestway Panacea/Lexon and Asurex*, *Wolesely/Kooltech*, and *Hanson/Mick George*.

31. *Morrisons/McColl's*, *Co-op funerals*.

32. *GIC/Greystar/Student Roost* (which was not a strict decision rule, so it is not possible to say that a small acquisition would have been cleared); and *VetPartners/Goddard* (2022; the CMA rejected a smaller divestment on the grounds that practices operate in a hub and spoke system, which would be disrupted by the Parties' preferred divestments).

33. "*The CMA's starting point is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC*" – CMA 87, Merger remedies, para 3.30.

This approach can be criticised on the following basis: if the acquirer finds a way to buy only one site, that is unproblematic, but if it buys both and sells one, that is not acceptable, even though the outcome is the same (and the CMA has more influence over the owner of the other site in the latter case). The CMA also has a general preference for the divestment of sites belonging to only one party, but will make exceptions to this.

The CMA is also particularly alert to linkages between sites, where severing that link for a divestment may weaken a site's ability to compete. For example, if a dentist buys a practice with two sites, but both sites rely on certain equipment at the first site, then selling only the second site may not be an acceptable remedy because it would not be an effective competitor on a standalone basis. Firms should be particularly aware of this.

Similarly, the CMA may not accept a site as a suitable divestment if there are financial questions over it as a going concern. Therefore, Parties may not always be able to simply divest the less attractive of overlapping sites.

How could the CMA's practice be improved?

As discussed above, there are many things that must be considered in a local market assessment. For most of them, there is no 'right' way to do it. No two markets are the same and the CMA will, rightly, want some flexibility in how it treats different cases. However, we think that there are some things the CMA could do to produce more consistent, predictable decisions.

In this section we discuss that the CMA could:

- avoid procedural issues when using a decision rule, by engaging early with Parties;
- benefit from a principled approach;
- set out a default position (based on a principled approach);
- be mindful when departing from a precedent in the same or a similar market;
- avoid obvious inconsistencies or counter-intuitive outcomes; and
- test the appropriate threshold.

Avoid procedural issues with a decision rule

One practical problem with the decision rule approach is that it does not sit well with the CMA's Issues Letter process. The Issues Letter will generally set out the elements that make up the proposed decision rule (as discussed below) and identify the local areas that fail that rule. In principle, the Parties can then contest these elements in their response to the Issues Letter. But, in practice, it is very difficult for the CMA to adjust the rule if doing so would create SLCs in any areas not identified in the Issues Letter. So, for example, if the Issues Letter finds problems in areas 1, 2, 3 and 4, and the Parties propose an alternative decision rule that would find problems in areas 4 and 5,[34] the bar for the CMA to accept this alternative is very high: it would have to send a Supplementary Issues Letter, which is very challenging within the timescale of a Phase 1 investigation and therefore very rare. Given that the CMA is generally reluctant to discuss emerging thinking with Parties, aspects of its decision rule are likely to appear for the first time in the Issues Letter.

From a policy perspective this is problematic. For example, suppose that the Parties point out a weakness in the decision rule or that more suitable alternatives exist. Even if the CMA agrees with the Parties, at this point it is typically too late; a decision rule set out in the Issues Letter is very difficult to change. Knowing this, Parties may not even incur the costs of pushing back on the CMA's approach. Indeed, the inability to challenge SLC findings other than by challenging the decision rule itself may be one reason why, in a number of recent cases, the Parties have conceded the SLCs at the Issues Letter stage, preferring to expedite remedy discussions.[35] Both of these factors can lead to poor decisions and overly conservative (and/or harmful) precedents.[36]

Another major problem is that the choices made in relation to various elements that make up the decision rule – as discussed above – take on greater significance. With a filtering approach, the exact size of the catchment area, the approach to shares or the threshold used may not much matter, because marginal cases are reviewed individually. With a decision rule, a small and reasonable change can significantly alter the set of SLC areas (which we as advisers have seen on many cases). Counter-intuitively, this can reduce consistency and predictability.

The CMA should therefore engage earlier with Parties about a possible decision rule and the reasoning behind it, so that Parties can highlight potential flaws or what may objectively be superior alternatives before the rule is virtually set in stone in an Issues Letter.

34. This was the case in, for example, *Veolia/Suez* where reasonable adjustments to the distance weighting or the catchment size would have changed the set of SLC areas, without greatly affecting the number of SLC areas.

35. For example, *Morrisons/McColl's*, *Riviera/Dental Partners*, *Portman/Dentex*, *Bestway Panacea/Lexon and Asurex*, *GIC/Greystar/Student Roost.*

36. For example, some aspects of the Phase 1 decision rule in *Veolia/Suez* were changed in Phase 2, but the Phase 1 decision has still been cited in other cases, as discussed below.

The benefits of a principled approach

Catchment areas are not geographic markets, and the CMA generally does not define local markets.

A geographic market, like a product market, is something worth monopolising – if I own a particular store, over what area would I have to own all the competing stores in order to exercise a significant degree of market power in the central store? This is based on actual and potential customers' willingness to travel to the store (or the distance over which goods can economically be delivered, in a B2B setting).

A catchment area is the area over which (most of) a store's actual customers are distributed. A catchment area is usually smaller than a geographic market defined by the SSNIP test.[37] It can be driven by factors such as:

- The location of other stores (both of the same chain and competing stores). For example, in a town with one coffee shop, consumers probably travel further on average for coffee than a similar size town with several coffee shops.
- Population density of the area. Suppose consumers are willing to drive up to 20 miles to a cinema. For a cinema in the only large town in an area, 80% of its customers probably live close to the cinema. For a village cinema in a rural area with households widely spread, the 80% catchment area will probably be wider.

By using a catchment area as a 'bright line' in a decision rule, the CMA may fail to consider sites that would be within a geographic market defined by the SSNIP test and/or relevant to some customers (even if they are more distant competitors for others).[38] On the one hand, this is different from the CMA's usual approach to product markets, where it will typically consider all competitors within its defined market and take into account out of market competitors in its competitive assessment. On the other, it emphasises geographic closeness of competition (in line with the CMA's shift to placing more weight on 'closeness' than indicators such as market shares).

Considering firms outside the catchment area is important both because of demand side factors – customers may respond to a price increase by travelling further – and supply side factors – these firms may see an opportunity to market to consumers who are affected by price rises within the catchment area. While it will depend on the facts of the case, either of these may defeat the profitability of a price increase (or reduction in the quality of service).

Firms outside the catchment area have been important to the outcome in recent cases where the CMA has not used a decision rule. Notably, in *Wolseley/Kooltech*, the CMA cleared one local area that failed its filter partly because there were a number of additional competitors just outside the catchment area. It also took account of such competitors in the *Scape* and *iQSA* student accommodation cases.

The CMA could define geographic markets using economic principles, as it does with product markets. But even if it does not do so, similar principled considerations may help avoid some of the inconsistencies discussed in this article.

Set out a principled default position

For some aspects of the assessment, the CMA could set out the (principled) starting point that it will use absent good evidence to the contrary. This will make the assessment more predictable and consistent.

To take a simple example, the unit of measurement for a catchment area can be drivetime, driving distance,[39] walking distance, or straight-line distance. While each of these measures has pros and cons, those are rarely case-specific and it would be helpful if the CMA had a principled approach as a starting point. For example, although vets and dentists are not the same, they seem similar enough that there is no obvious reason to use drivetimes for the former and straight line distances for the latter.

Sometimes the CMA has used two different measures in a case, which is burdensome to the case team and to the Parties involved, and does not seem to add much to the substantive assessment. For example, in *Veolia/Suez*, the CMA assessed shares based on both drivetime and driving distance throughout Phase 1, with the list of SLC areas based on those that failed either metric. In Phase 2 it used only drivetimes.

However, it would be sensible to depart from the starting point if the evidence warrants it. For example, the CMA might use drivetimes as the default measure for cases where road travel is the main mode of transport; or it may be reasonable to presume that most people take the quickest route when driving (in B2C cases) and drive time is important for deliveries (B2B cases).[40] But it could make exceptions when, for example:

- both merging firms deliver their products and charge by the mile, in which case driving distance may be appropriate; or
- most consumers walk to site in question (for example, in a local bus merger, because most people walk to the bus stop).

37. As recognised in the previous version of the MAGs from 2010 (para 5.2.25): "*Catchment areas are a pragmatic approximation for a candidate market to which the hypothetical monopolist test can be applied; the use of catchment areas is not an alternative conceptual approach. However, the geographic market identified using the hypothetical monopolist test will typically be wider than a catchment area.*"

38. This does not mean that authorities should never focus on a smaller catchment area. The US horizontal merger guidelines give the example of merging plants that deliver to customers in city X and city Y, which are the closest plants to city X, whereas city Y has many other local plants. Under these circumstances, the authority may focus on an area defined around customers in city X because this is where the effects of the merger are likely to materialise.

39. As a technical point, if the driving distance is computed as the distance associated with the 'optimal' route in mapping software – usually the quickest route – it can be very sensitive to slightly different routings, i.e. a route that takes a minute less could be many miles longer. This can produce anomalous results. The driving distance used should be the shortest distance.

40. In Severn Trent/Andigestion, the CMA said that "*catchment areas are best measured using drive time rather than road miles as transportation vehicles are impacted by… travel conditions, time of day, and speed limits*" para 79.

Other good candidates for a default starting point include:

- whether to use individual or uniform catchments, and whether to use the same catchment for both firms;
- whether to weight suppliers by distance;
- whether to multiply a catchment by some factor (e.g. 1.5, especially when weighting by distance); and
- whether to require a material increment in the concentration measure, and whether the size of it will vary with combined shares.

In one respect the CMA does have a default position, which it could flex more often. It almost always uses 80% catchment areas – in other words, it identifies the smallest area within which 80% of customers are located.[41] This used to be a testable rule of thumb, but we have not seen the CMA vary its approach in recent years. This may be sensible in consumer B2C markets – the logic is to exclude outliers or special cases. For example, it may be that around 80% of customers using a shop will be local to it, whereas 20% may have travelled a longer way for other reasons, such as work or holiday, and would not be repeat purchasers, so are not usually relevant to the merger assessment. However, there can be good reasons to depart from the 80% threshold, particularly in B2B markets, and, more generally, where observations outside the 80th percentile are demonstrably not outliers. For example, if data shows that a typical site has a long-term contract with customers up to, say, the 90th percentile in terms of drivetime from the site, and regularly delivers to them, then the catchment should probably include these customers.[42] [43] In our experience, the CMA has disregarded relevant evidence of this sort in favour of its rule of thumb.[44]

Be mindful when departing from a precedent in the same or a similar market

In some cases, the CMA appears to believe that there is a catchment size that applies to the industry as a whole and can be used from case to case (e.g. supermarkets, chemists, petrol stations). In other cases, the CMA uses different sizes from case to case and sometimes for different firms in the same case, based on each firm's average 80% catchment area (e.g. dentists, vets).

There may be good reasons for this. For example, the CMA has found in the past that large supermarkets have wider catchments than convenience stores (because people travel further for their weekly shop than a top-up or impulse purchase); that chemists located in large supermarkets have wider catchments than high street chemists (because the former attract customers of the supermarket); and that veterinary hospitals have wider catchments than small animal vet sites (because there are fewer of them and they provide a specialised service).

However, it is less clear that these differences should apply to two similar chains of dentists (or vets). Consider a finding that dentist 1 has a catchment of 5 miles and dentist 2 has a catchment of 10 miles. Suppose the two are located 12 miles apart. This implies that a consumer located halfway between then would be willing to use dentist 2 (6 miles away) but not dentist 1 (also 6 miles away). If this is in fact the case, then there must be something differentiating the dentists, which should be taken into account in the merger assessment. The alternative is that the *market size* is the same for both and the catchment area is distorted by various factors discussed above. A principled approach may be useful here. The factors that cause the different sizes in catchment areas can then be taken into account as part of the competitive assessment.

The CMA should try to avoid adopting different approaches from one case to another, unless there are relevant different facts to justify doing so. As a further example, *Veolia/Suez* involved markets for the disposal of food waste via In Vessel Composting (amongst other waste disposal methods), and *Severn Trent/Andigestion* involved the disposal of food waste via Anerobic Digestion.[45] These markets are very similar, but the CMA used distance weighted shares for the former but not the latter. Its reasoning in *Veolia/Suez* was that "*location is cited as an important competitive parameter by third parties*",[46] whereas in *Severn Trent/Andigestion* the Parties suggested weighting but the CMA said it did not have "*sufficient evidence to suggest that additional drive time makes a material difference to the competitive constraint provided by a competitor*".[47] Location is by definition relevant to all local mergers, and it is not obvious that transport costs for food waste would differ substantially between these two cases.

We also think that it would be useful to both external advisers and the CMA's own internal practice if, in cases like the above, the second decision referred to the first and explained why a different approach was taken.[48] This would help future CMA case teams take principled, consistent decisions, without binding them to a particular approach.

41. Although this can be calculated as 80% of revenue (usually the CMA's preference), sales volume, or customers.

42. Unless there is something different about these customers that makes them willing to use more distant sites.

43. Following similar logic, calculating a uniform catchment area based on the average catchment of individual sites is likely to understate the appropriate size. Some sites will have smaller catchments because there are many other sites close to them – this does not mean that customers would not consider more distant sites.

44. For example, *Veolia/Suez*, where the Parties submitted evidence on the distribution of drivetimes and it was clear that most of those above the 80% mark were regular customers, not outliers.

45. Suez also provides AD services but Veolia does not (although it had in the past), so this market was mentioned but not assessed in *Veolia/Suez*.

46. *Veolia/Suez* Phase 1 decision para 417. It is unlikely that customers care about location per se, since their waste is generally transported by the likes of Veolia; it is more likely that they care about distance, which affects transport costs.

47. *Severn Trent/Andigestion* para 86.

48. *Severn Trent/Andigestion* makes no reference to *Veolia/Suez*.

Avoid obvious inconsistencies

In *Veolia/Suez*, the CMA used individual catchment areas for incineration facilities in its Phase 1 assessment.[49] In some parts of the country, Veolia and Suez contract for capacity at third party facilities. Sometimes they use the same facility. The CMA's approach meant that Veolia and Suez were deemed to have very different catchment areas in respect of one of these shared facilities. This implied that some customers – those outside the smaller catchment but within the larger – would be willing to use one of the merging firms but not the other, even though both were using the same equipment on the same site. Absent any other explanation, this appears contrary to economic logic, and the approach was changed at Phase 2.

A similar principle applies to using different catchment sizes in the same case, as discussed in the previous section with respect to dentists. Recent treatment of vets has been even more complex when the CMA has assessed multiple acquisitions by the same chain within the same case. For each separate acquisition of a target (single practice or small chain), the CMA has defined the acquirer's catchment as being the average of its practices which overlap with that target. This means that catchments can vary considerably even though all offer similar services and are operated by the same firm.[50] The approach could in theory mean that, if buying two targets which both have a site in the same area, one acquiring site could be given two different catchment sizes in the two separate analyses.

Test the appropriate threshold

The CMA could test its approach to thresholds in a case by looking more closely at marginal local areas. Do the local areas that are just failing its thresholds really look like (potential) SLCs? If not, the threshold may be too low. Conversely, do the local areas that are just passing the thresholds raise any obvious concerns, suggesting the threshold is too low? And if some failing areas look unproblematic but some cleared areas raise concerns, the decision rule itself may need to be changed. This would avoid detailed assessment of most local areas but produce a more robust decision.[51] We have not seen evidence of the CMA doing this.

Implications for merging firms

Given the well-known tight timetables involved, firms should prepare well in advance of engaging with the CMA. Merging firms should be prepared to provide detailed information to the CMA on:

- locations of their own sites and competitors' sites;
- locations of customers of each of their sites; and
- measures of sales and/or capacity by site, for themselves and competitors.

As part of this, they should include pipeline sites (new sites at an advanced stage of planning) and any sites that are expected to be moved or close. They should make sure they have evidence of inevitable closure if they wish a site to be discounted from CMA analysis.[52] Similarly, they may wish to include competitor sites that are expected to open, but should be aware that the CMA tends to discount claims of entry, in particular at Phase 1, unless these claims are backed up by CMA outreach to the relevant competitor or can be substantiated persuasively with public data.

Merging firms should make sure that they explore all public data sources, but be aware that ultimately they may be required to estimate shares – and that the CMA may later use data from competitors to adapt those share estimates, which makes outcomes difficult to predict.

Firms will also be asked to calculate catchment areas, overlaps, and shares by area, and often to repeat this based on different assumptions.

As well as the data above, it is important to gather evidence on out of market constraints and lack of close competition between the merging firms in order to justify a higher threshold.

When carrying out a risk assessment, firms should consider different scenarios, because of uncertainty over the catchment areas and other parts of the methodology that the CMA may apply. Catchment areas are crucial, but an acquirer may not have access to data on the target's catchments whereas the CMA will request this. Significantly, even a firm that has recently gone through a CMA merger in the same industry will not be able to predict exactly what catchment areas will be used in a further transaction involving a different target. When we carry out risk assessments, we often find that we can predict the *scale* of competition risk (e.g. because the number of areas likely to fail a decision rule is fairly consistent across scenarios), but the *identity* of those areas can be unpredictable.

49. The CMA actually used a hybrid system whereby each centroid catchment area was the larger of its individual measured catchment and the average of all measured catchments.

50. For example, in *Medivet*, the acquirer's catchments ranged between [0-5] minutes' and [10-20] minutes' drivetime for the same type of service (exact values redacted from decision). The same approach was used in *IVC* (2023). By contrast, in *VetPartners/Goddard*, which involved the acquisition of one chain by another, the CMA used a uniform average catchment for each chain.

51. We made a similar suggestion in Fuel for thought? Developments in CMA local merger assessment.

52. And the CMA will generally require that a decision on closure was taken and documented before the merger was in contemplation.

Finally, if the CMA does find SLCs, timetables for remedies to avoid a Phase 2 investigation are particularly tight, so remedy planning should start early. Firms should take an early view of which sites are 'crown jewels' and which they are willing to give up to secure CMA approval. But they should also consider if there are sites they cannot easily sell, because of profitability issues, contractual issues, or because of linkages to other sites (e.g. drawing on some resource at another site).

Merging firms should consider from an early stage what a potential decision rule may look like, and how variations to it may affect what they must divest to get a deal cleared. In our experience, it is wise to have a preferred option for divestment in any potentially problematic area, but also a Plan B in case the CMA raises objections to Plan A (as discussed in the *Remedies* section above). These considerations can be complex in areas with multiple sites, and where sites are linked in any way.

Conclusions

The CMA has clearly changed its approach on local mergers. Its execution of this change is difficult to predict from case to case, creating considerable uncertainty for businesses. The Annex on the next page illustrates the range of different approaches that the CMA regularly takes, and hence the several causes of uncertainty. If aims of the new approach include greater efficiency and lower self-assessment costs, the CMA should refresh its guidance in this area.

While recognising that each case is different and the CMA will wish to preserve some latitude, it could improve consistency across cases by having a principled starting point to its approach and explaining under what circumstances it will consider departing from it, to the extent foreseeable; and to explain in decisions why it has departed from a previously used approach.

Finally, we think that the CMA could share its proposed decision rules with Parties earlier in the process before they are 'set in stone'. The CMA should also be open to testing whether its 'draft' decision rules are too cautious (or not cautious enough) by considering local areas that fall just outside or inside the thresholds. This would help to produce the right rule and threshold for each case.

Be prepared

We advise merging firms to be prepared to be asked for detailed data on their own and competitors' sites, and to be asked to submit analysis on various different scenarios (e.g. various combinations of catchment areas and product markets), which can be very demanding and add to the costs and duration of pre-notification. They should not rely on precedent cases in the same industry, especially older ones, and should be aware that risk assessment is complicated by the range of ingredients that make up a decision rule. Finally, they should carefully consider what they are prepared to give up to get the deal done: with so many investigations ending in divestments, firms have very little time to decide if they can live with giving up particular sites to get a Phase 1 clearance.

Annex: components of a CMA decision

The table below shows the main components of a decision rule or filter, and the different options that the CMA has regularly used in recent local merger cases.

Catchment size	Measurement	Decision Rule/ Filter	Concentration measure	Weighted	Threshold
Uniform	Driving time	Decision Rule	Shares of output	By distance	30-40% share threshold
Individual for each firm	Driving distance	Filter	Shares of capacity	By fascia	5% increment (may vary with shares)
Individual for each site	Straight line		Shares + increment	No weighting	<3 or 4 competitiors
Varies by product	Walking distance		Fascia count		May depend on proximity
			Both shares and fascia count		Complex rules for petrol