

Boots/ UniChem at the CAT

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Caveat: Opinions are my own, not the OFT's

OFT investigation

▶ **The parties**

▶ **Alliance UniChem**

- ▶ national 'full line' wholesaler
- ▶ retail chain of 958 'Moss' / 'Alliance' pharmacies

▶ **Boots**

- ▶ 1,423 health and beauty stores (1,350 pharmacies)
- ▶ in-house 'short-line' wholesale; (contract) manufacturing

Substantive assessment (I)

▶ **Vertical theories of harm**

- ▶ UniChem already vertically integrated, and Boots' full-line supplier
- ▶ How does addition of Boots change UniChem's incentive/ ability?

▶ **Buyer power**

- ▶ No convincing theory of harm

▶ **Bargaining with the NHS**

- ▶ NHS a near-monopsony,
- ▶ With a 'control of entry' lever at a local level

Substantive assessment (II)

- ▶ **Horizontal issues in retail pharmacy: national**
 - ▶ Considered ethicals, P medicines, GSL medicines as separate
 - ▶ Market shares not very high – around 20%
 - ▶ Supermarkets are a constraint
 - ▶ Portfolio of local effects – to be picked up by local analysis

- ▶ **Horizontal issues in retail pharmacy: local**
 - ▶ One mile radius, but geographic proximity of stores matters!
 - ▶ Little evidence of local competition
 - ▶ Price and service regulation, statutory restrictions on entry
 - ▶ But internal documents suggested some competitive interaction...

Substantive assessment (III)

▶ **Conclusions on local issues**

- ▶ On a fascia count...
- ▶ Merger to monopoly is problematic
- ▶ Is 3:2 reduction in fascia a problem?
 - ▶ Lack of robust evidence to exclude competition concerns
 - ▶ Conservative approach → undertakings in lieu of a reference, c. 100 divestments

One month later...Celesio appeals!

▶ **The appellant**

- ▶ UniChem's competitor in full-line wholesale, largest pharmacy chain
- ▶ Vociferous complainant during OFT enquiry

▶ **Grounds of appeal**

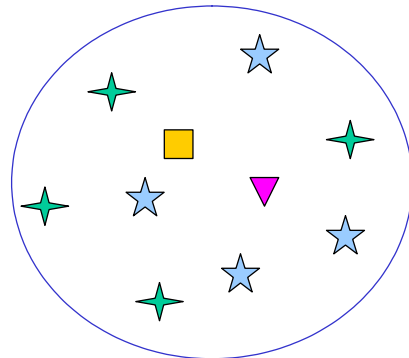
- ▶ Reliance on fascia test
- ▶ Inadequate reasoning of no SLC beyond 3:2 fascia reduction
 - ▶ Why no problem with 4:3 or 5:4?
- ▶ National issues
 - ▶ store portfolio impact if number of problem stores underestimated
- ▶ OFT therefore not entitled to accept UILs

Fascia test on trial (I)

▶ Celesio's case

- ▶ Fascia test fails to take account of particular strength of Boots
 - ▶ Although Boots not particularly strong in dispensing
- ▶ Variations of store numbers by locality: can understate market share

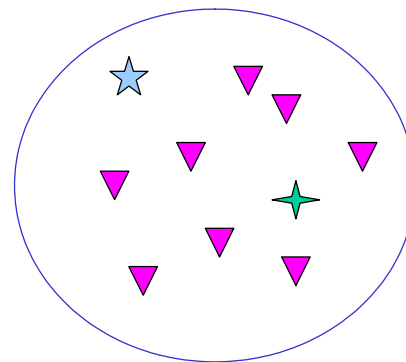
FASCIA UNDER-REPORTING



Merging parties, 40% share of stores each

 Competitors, 10% share of stores each

SHARE OF STORES UNDER-REPORTING



Merging parties, 10% share of stores each

 Competitor 80% share of stores

Fascia test on trial (II)

▶ OFT arguments

- ▶ Measures of concentration only provide a framework
- ▶ Fascia test is suitable in this case
 - ▶ Commonly owned stores standardised across key parameters
 - ▶ Significant standardisation across all stores by regulation
 - ▶ Boots and UniChem not close competitors
 - ▶ Market share by volume or value not available
- ▶ Industry endorsement



First ground of application dropped

3:2 cut-off

▶ **Celesio argued inadequate reasoning**

- ▶ 2:1s: **is** the case that SLC is likely (over 50%)
- ▶ 3:2s: **may be** the case that SLC is likely (fanciful to below 50%)
 - ▶ and for some - where geographically closest - it **is** the case

➔ So how could the OFT dismiss 4:3 (or higher?)

▶ **OFT admitted to poor drafting, but not to bad analysis or inadequate reasoning**

- ▶ 2:1 **is** the case that SLC is likely (over 50% likelihood)
- ▶ 3:2 **may be the case** that SLC *where geographically closest competitors*
 - ▶ because another competitor present not like 2:1
- ▶ Realistic prospect of SLC in all 3:2s as no clear cut way to separate them out

CAT Judgment

- ▶ **OFT arguments accepted**
- ▶ **SLC in the context of weak competition**
 - ▶ Celesio argued that when little competition there should be more, not less, scrutiny
 - ▶ CAT agreed with the OFT that the relevant test was “possible loss of rivalry”
 - ▶ What is competition loss as a result of the merger?



**Judicial Review
application dismissed**

Key lessons

- ▶ **Importance of good decision drafting**
 - ▶ Adequacy of reasoning
- ▶ **Analysing local markets**
 - ▶ Accounting for geographic proximity of stores
- ▶ **Competitor complaints in horizontal mergers**