Vivienne Robinson: Competition Law Services

Response to CMA Consultation on the Procedure for Dealing with Requests to Carry Out the Test in Schedule 4 to the Groceries Market Investigation (Controlled Land) Order 2010 of 13 March 2020

To: CMA Remedies Monitoring Team

Thank you for the opportunity to comment on the above CMA consultation.

You have sought views on the following matters:

(a) the simplification of the test procedure:

The revisions to the drivetime calculation element of the Test are warmly welcomed. If the drive-time calculation is wrong, the results of the Test are compromised and the sought-after relief, which was intended to be available, is not forthcoming, to the ultimate detriment of consumers.

In my experience, the drive-time calculation methodology has not always generated accurate results, at least with respect to **urban areas**, which have more complicated choices of route between stores, traffic back spots and considerable drive-time difference depending on the day and time of travel. Results have appeared to be incorrect when applying local knowledge and/or driving the route in person. Indeed, in some instances, speed limits must be exceeded to reach identified "competing" store within 10 minutes.

Therefore, using calculations based on software, using point-to-point drive times, based on known traffic flows, rather than isochrones, should prove more accurate. This will also simplify the process and reduce legal fees.

The only point that may need clarification is the relevance of speed limits. The consultations states that, "*The routing takes account of historic data on real traffic (flow speed) and the legal speed limits in the area*." As a public policy matter the CMA should not include results that are dependent on a shopper exceeding a speed limit. Therefore, and perhaps this is already the intention, to arrive at useable average driving speeds, all historical journeys that exceeded the speed limit should be excluded when calculating the average drive-time used by the software.

While the above is to be commended, the CMA should revisit its decision, at paragraph 3.10, not to allow parties to past cases to seek to have their drive-time results recalculated using the new

procedure. The Test is a formulaic one, entitling a party to release from a restrictive covenant if there is insufficient competition *based on the number and type of stores that compete*. There are no changes to the "degree of competition" (3.10) that need to occur for a party to be entitled to a release under the law. Indeed, the Test exists precisely because such change is highly unlikely. This is particularly true in urban areas.

Most parties are unlikely to seek a review, but for some (and the consumers affected) it could be critical, and the door should be open to reassessment. Some of the known defects in the drive-time calculation process will not have been apparent to *applicants*. Therefore, it would be preferable to allow a party to ask for an informal fast track analysis of drive-times and, if there is a discrepancy, to allow a new application to be made. This would not affect past cases where covenants have been released; the option there is for a supermarket to seek to reimpose a covenant when the relevant lease is renewed (as there is currently no covenant in respect of which an application to the CMA can be made).

(i) using the single main entrance of a site or building as described:

The simplification of using a single entrance point to the sites is sensible. Short-cut pedestrian routes into a site merely confuse the picture. Given that this is a *drive*-time test, it is illogical to include pedestrian entrances. A person with local knowledge may know of a nearby street it can park in but the reality is that almost every driver visiting a supermarket will park in the store's car park, where they can load the car from a trolley easily and quickly. Therefore, the CMA should only use the main drive-in entrance.

The drive-time to the main entrance of the store itself might be the more appropriate end destination. Although this is not the place where the car will park, it takes some account of the fact that the driver has to park up and walk to that point, and this is all time that factors into the shopper's decision on which store to use, i.e., which stores compete.

Please note that a further issue arises where the grocery store is situated down a long private road. In such cases, the drive time to/from the entrance to the store's car park itself should be used, not the point at which the private road joins the public highway. The legal status of the road is not relevant.

(ii) using a single average time of day for the travel time calculation:

It is most welcome that a broader picture can now be built of the relevant drive-times. The use of a single day and set times skews results. Excluding weekday rush hours and peak school drop-off and pick-up times results in shorter actual drive-times yet these are not currently factored in.

However, while using all days as relevant seems sensible, it is still necessary to restrict the hours used for the calculation to those when shoppers are actually likely to be making the trip. Some stores are not open 24 hours and, while some supermarkets stay open 24 hours, most shoppers will attend during the day. Including the large number of night-time hours over a week would result in a larger distance that could be travelled in 10 minutes, so drawing in grocery stores that the bulk of shoppers would, or could, not consider visiting.

If it has not already done so, the CMA should consider restricting the hours to be included in the averaging as, for example, 8am to 8pm.

(b) the proposed changes to the consultation procedures on provisional test decisions:

The introduction of a single one-month response time is sensible. Disputes over covenants often arise in the context of lease renegotiations or threats by a covenantee to go to court. So, unnecessary delay should be avoided.

(c) the proposed new register of test decisions and restrictions removed and remaining in place

The fact that the Test has been requested and performed could be commercially sensitive to one or both parties. In particular, it may be disadvantageous to a lessee for third parties to realise its lease is being (re)negotiated. Similarly, a supermarket may consider the fact that a restrictive covenant exists in the lease(s) it grants is commercially sensitive and that this fact should not be published, at least when it has passed the Test.

Although the name of the lessee would not to be published under the proposed new procedure, it would sometimes be possible, in fact, to identify the requesting party, e.g., where there is only one store adjoining a relevant supermarket that could be subject to a restrictive covenant. Applicants are unlikely to want to risk their names becoming public knowledge. Supermarkets could also be concerned about reputational issues.

Therefore, in deciding what to do, it is important that the CMA balances its desire to work transparently with the availability of the Test as a way of ensuring adequate competition. In this context, it is important that lessees are not discouraged from seeking a determination by the CMA by fear of the consequences of its identity becoming known and/or the fact that it is subject to a restriction.

It is not clear that there is any major benefit to be gained from publication of individual Test determinations. They would not apply in any future cases, when drive-times would have to be recalculated.

Alternatively, only successful applications should be published. In addition, the CMA could publish just the number of cases it asked to decide each year, and on how many occasions the Test was passed or failed.

Once again, thank you for the opportunity to comment. The CMA is to be congratulated on making these important improvements, which will increase the accuracy and fairness of Test outcomes.

I confirm that the above views are my own, expressed as a competition law practitioner, and not those of any client or other third party.

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