

**Retail Therapy: A cross-country  
comparison of merger control  
remedies practice and experience in  
the wholesaling and retailing sectors  
of France, Germany, Italy, the  
Netherlands, Spain and the United  
Kingdom**

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*Reprinted from European Competition Law Review*  
**Issue 4, 2009**

*Sweet & Maxwell*  
**100 Avenue Road**  
**Swiss Cottage**  
**London**  
**NW3 3PF**  
*(Law Publishers)*

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# Retail Therapy: A cross-country comparison of merger control remedies practice and experience in the wholesaling and retailing sectors of France, Germany, Italy, the Netherlands, Spain and the United Kingdom

*Thomas Hoehn, Suzanne Rab and Grant Saggars\**

 Competition policy; EC law; Economic conditions; France; Germany; Italy; Mergers; National competition authorities; Netherlands; Remedies; Retail trade; Spain

## Introduction

This article is the first in a series of articles that provide a comparative analysis of national merger remedies decisions in six major European countries from an industry perspective. The analysis builds on data collected in the course of the e-Competitions Merger Remedies Matrix project.<sup>1</sup> The project has entailed the

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<sup>1</sup> The e-Competitions Merger Remedies Matrix is sponsored by Clifford Chance LLP and PricewaterhouseCoopers LLP. For further details see <http://www.concurrences.com> [Accessed January 26, 2009].

review of over 500 merger remedy decisions across 30 European countries, including all the European Union Member States (referred to as “the Europe 30”), to examine trends in the number of interventions and types of remedies. It so far has focused only on merger cases examined by the national competition authorities and not those multinational mergers which fall exclusively within the jurisdiction of the European Commission under Regulation 139/2004 (European Community Merger Regulation (ECMR)) [2004] OJ L24/1.<sup>2</sup>

To undertake a comparative sectoral analysis, it was necessary to select a group of “European peers” with broadly similar states of economic development and with advanced merger control regimes over a long period. The detailed review therefore focused on six major European competition law regimes, which form the case studies for this article: France, Germany, Italy, the Netherlands, Spain and the United Kingdom (referred to in this article as “the Big 6”). A review of the Big 6 is interesting given that, as a block, they account for over 40 per cent of all merger remedy cases reviewed in the project, and for over 60 per cent of the 30 reviewed countries in Gross Domestic Product (GDP) terms.

As merger remedies could be likened, in many respects, to a sort of industry “restructuring” by the authorities, a sector-based approach, taking account of the specific features of the relevant market, would seem to be a productive area of inquiry. Understanding common themes and trends within a particular sector has relevance and value to market participants, deal makers and regulators in that sector. Further, this more in-depth and focused investigation allows us to tune the analysis into the process of competition that prevails in a particular sector, and to understand how that process may differ from those of other sectors.

An analysis of 172 merger remedy decisions in the Big 6 between 2000 and 2007 shows that “wholesale and retail” has been the sector with the greatest number of merger remedy cases, reflecting the importance of this sector in the relevant economies and the fact that concentration in this sector can lead to competition concerns given the local nature of the markets involved. Wholesale and retail—the focus of this article—represents a relatively “traditional” sector, where competition is effected largely on the basis of price, location, product variety and service. In a companion article we explore merger remedies in the information and communication sector. Information and communication was chosen to contrast with wholesale and retail as a more diverse and dynamic sector, where technological innovation and product

<sup>2</sup> However, some cases in our review concerned referrals back to the national authorities under art.9 of the ECMR, for example *Carrefour/Promodes*, decision of July 5, 2000 (France), and *Cie des Salins du Midi (CSME)/MDPA-SCPA-ROCK*, decision of September 1, 1999 (France).

Table 1: Merger remedies interventions—Big 6

Country	Earliest case in review	2000	2001	2002	2003	2004	2005	2006	2007	Total
France	January 26, 2000	7	7	7	6	7	7	4	6	51
Germany	May 2, 2003	n/a	n/a	n/a	6	2	5	6	8	27
Italy	February 28, 2001	n/a	1	4	2	0	2	5	4	18
Netherlands	March 13, 2000	3	1	1	1	1	1	3	1	12
Spain	May 4, 2000	2	3	3	2	3	3	6	4	26
United Kingdom	January 9, 2004	n/a	n/a	n/a	n/a	8	8	11	11	38
<b>Big 6</b>		<b>12</b>	<b>12</b>	<b>15</b>	<b>17</b>	<b>21</b>	<b>26</b>	<b>35</b>	<b>34</b>	<b>172</b>

Source: Authors' calculations based on data from Merger Remedies Matrix <http://www.concurrences.com>. Cases are categorised by decision date rather than notification date.

convergence are key drivers of the competitive process. The sector also raises issues beyond competition, notably the need to safeguard media plurality.

This article is organised as follows:

- **Section 1** provides a brief overview of the methodology used in our analysis and the merger remedies experience across the Big 6 to set the context to the sector review that follows.
- **Section 2** gives a brief overview of some of the evolving competitive experience in the wholesale and retail sector in the Big 6, and some specific economic issues that drive consolidation in this sector and which frame the assessment of mergers and merger remedies by the competition authorities.
- **Section 3** analyses the merger remedies experience in this sector.
- **Section 4** draws together the broad conclusions of the article and areas for future inquiry.
- **Annex 1** sets out the cases in our review.

## 1. Merger remedies interventions in the Big 6 by sector

Focusing on the period 2000 to 2007, our analysis includes some 172 merger remedy decisions in the Big 6. **Table 1** sets out the number of merger remedy cases in each country. It must be noted that the time-series for each country is different (this is indicated by the earliest case in our review). For example, we focused on the period 2004 onwards for the United Kingdom,

this being a natural start date given the implementation of new merger control legislation, the Enterprise Act of 2002, in 2003.

There are some interesting trends. First, bearing in mind that we do not have data for some countries in the earlier years, there is still a discernible increase in the number of merger remedy cases each year in the Big 6. This is as expected, given the peak of the merger cycle in 2006/2007. Secondly, from 2004 onwards we see that the UK competition authorities have had significantly more merger remedy cases than the other countries in the review. Thirdly, France appears to have had a stable (even marginally weakening) number of merger remedy cases.

As discussed in more detail in our Merger Remedies Matrix Synthesis Report,<sup>3</sup> our research across the Big 6 indicates a tendency to accept structural over behavioural remedies but there are some idiosyncrasies, as illustrated in **Figure 1**. Structural only remedies dominate in Germany, the Netherlands and the United Kingdom. However, the authorities in Spain, France and Italy appear to show a tendency towards behavioural commitments, often in conjunction with structural commitments.

**Figure 2** sets out the number of merger remedy cases by industry sector across the Big 6 between 2000 and 2007. It shows that the wholesale and retail sector has the highest number of merger remedy cases, reflecting the nature and importance of the sector.

Our sector review of national remedies cases is based on the classification in the UK Standard Industrial

<sup>3</sup> <http://www.concurrences.com>.

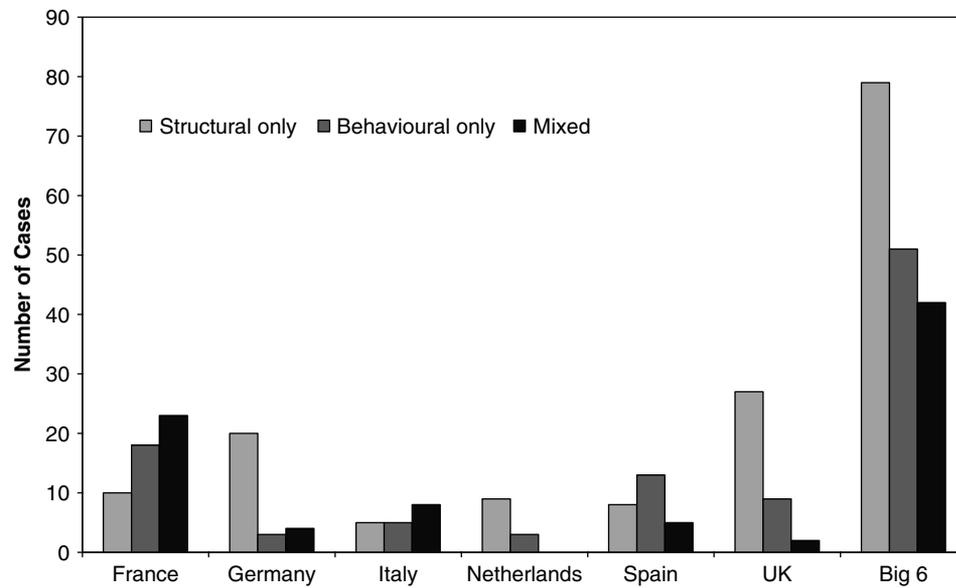


Figure 1: Merger remedies by type across the Big 6  
 Source: Authors' calculations based on data from Merger Remedies Matrix <http://www.concurrences.com>. There are different lengths of time-series for each country as per Table 1.

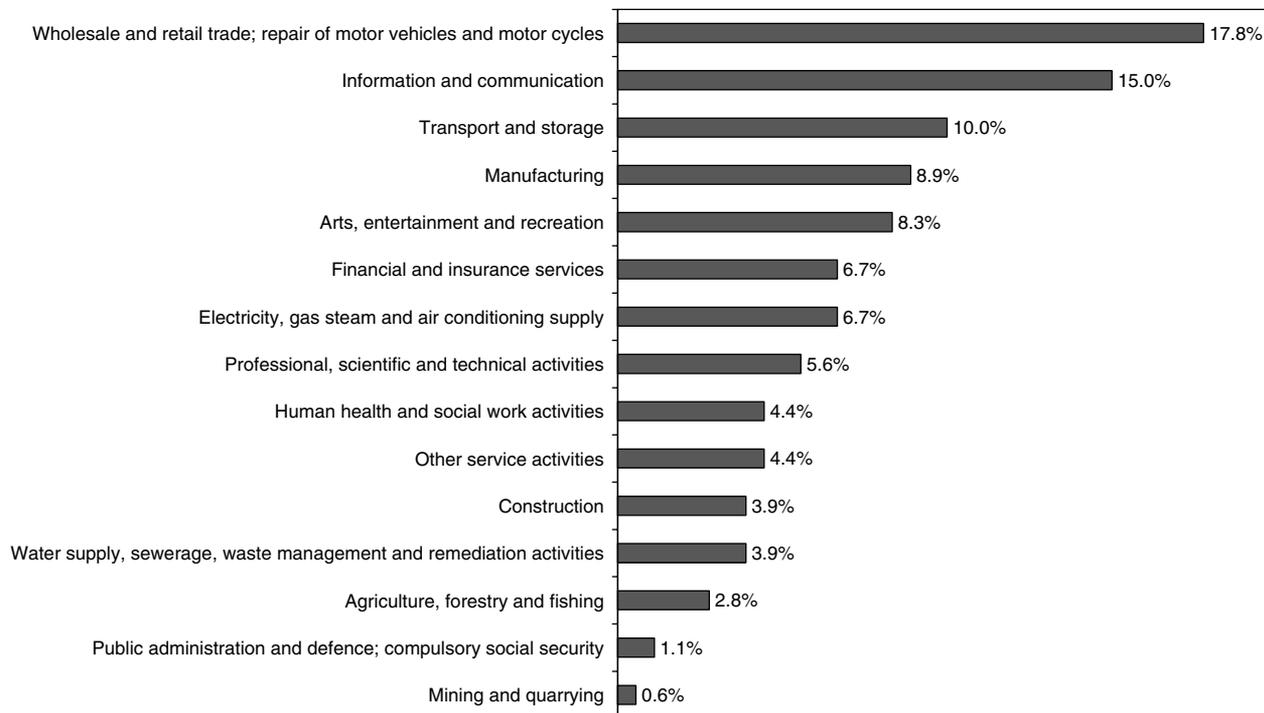


Figure 2: Merger remedies by major sector across the Big 6  
 Source: Authors' calculations based on data from Merger Remedies Matrix <http://www.concurrences.com>. Where a case spans two or more sectors, it has been counted in each.

**Table 2: Remedies interventions in wholesale and retail mergers—Big 6**

SIC division	Remedies cases
45 Wholesale and retail trade and repair of motor vehicles and motor-cycles.	2
46 Wholesale trade, except of motor vehicles and motorcycles.	9
47 Retail trade, except of motor vehicles and motorcycles.	25

Source: Authors' calculations based on data from Merger Remedies Matrix <http://www.concurrences.com>. The choice of SIC division is based on the relevant market in which the remedy was applied. Some cases cross more than one SIC division.

Classification of Economic Activities (SIC). The SIC is reasonably consistent with other international norms in this area.<sup>4</sup> However, it must be recognised that the SIC classifications by their nature are wide and that finer disaggregation would be required to examine merger remedies in a particular case.

Table 2 identifies the number of merger remedy cases in the wholesale and retail sector in the period 2000–2007 across the Big 6,<sup>5</sup> a total of 32 cases.<sup>6</sup> It is noteworthy that the majority of merger remedy cases are at the retail level rather than the wholesale level. This might be explained by, amongst other things, competition taking place in narrower (local) markets at the retail level, and the fact that wholesalers are more likely to face customers with buyer power.

## 2. Some sector specific perspectives

As a backdrop for the analysis that follows, we identify a number of important structural and competitive trends or “stylised facts” relating to the wholesale and retail markets in the Big 6, as well as some of the regulatory and competition issues that play out in this sector. These not only provide colour for our analysis but also permeate the approach of the competition authorities when looking at mergers in this sector.

4 The Standard Industrial Classification of Economic Activities (SIC) system is identical to the NACE (statistical classification of economic sectors) system at the four digit class level.

5 The reader is reminded that for Germany and the UK, the data series start in 2003 and 2004, respectively.

6 The number of remedies cases for a particular division will not necessarily correlate with the number of actual remedies cases (as cases may straddle a division), nor with the number of actual remedies (as multiple remedies may have been imposed in an individual case).

### *Some features of the sector*

#### *Role of retailers and wholesalers*

Retailers respond to the needs of the end consumer who can typically be characterised as small (a given purchase forms a small part both of the consumer's expenditure and of the retailer's total sales), immobile (unwilling to travel long distances to find cheaper products), and relatively uninformed (consumers might not know about all products on offer or the prices of these products, or be unable to easily differentiate the quality of different products).<sup>7</sup> Therefore, retailers tend to be located near the customers and compete on the basis of price, quality and service. Wholesalers, on the other hand, are more likely to face larger and better informed customers (the retailers themselves), who also control the gateway to the final consumers but provide essential logistical functions as well as bargaining power with upstream manufacturers.

#### *Retailer concentration is high within most Member States*

The retail sector is typically highly concentrated, particularly in the groceries segment. For example, research by Defra in 2004 showed that across the EU15, on average, the top five grocery retailers in a country had a combined market share of around 50 per cent, and the top three grocery retailers in a country had a market share of just under 40 per cent.<sup>8</sup> The levels of concentration (for 5-firm and 3-firm concentration ratios) in the United Kingdom, France and Germany exceed this average. Italy is a notable exception with its top five largest grocery retailers occupying only 20 per cent of the market, indicating that within Italy, the segment remains fragmented with the greater prevalence of traditional retail formats and a substantial degree of regional diversity. Similarly, the markets in the Member States that have joined the European Union more recently tend to be less mature and are usually less concentrated.

As grocery retailers expand into non-grocery product lines (toiletries, electronics, clothing), the pressure for greater efficiency and consolidation among other retailers also tends to increase.

#### *Retailer seller power may go hand in hand with buyer power*

The high degree of concentration and the sheer scale of the leading retailers afford them, potentially, a strong bargaining position against suppliers. The buyer power

7 See London Economics, “Competition in Retailing” (Research Report No.13 prepared for the UK Office of Fair Trading, London, 1997).

8 Department for Environment, Food and Rural Affairs (Defra), “Economic Note on UK Grocery Retailing” (2006), available at: <https://statistics.defra.gov.uk/esg/reports/Groceries%20paper%20May%202006.pdf> [Accessed January 26, 2009].

**Table 3: The number of countries of operation for the global top 100 retailers by sales**

Number of countries of operation	1986	1996	2004
1	53	40	29
2-4	31	25	21
5-9	11	17	18
10-19	4	13	20
20+	1	5	12
Average number of countries of operation for top 100 retailers	2.8	5.5	10.0

Source: Dawson, "Retailer internationalisation: What is being internationalised?" (Workshop on Globalizing Retail: Transnational Retail, Supply Chains and the Global Economy, University of Surrey School of Management, July 17-18, 2006), available at: [http://www.som.surrey.ac.uk/research/groups/globalizing\\_retailseminar/Dawson.pdf](http://www.som.surrey.ac.uk/research/groups/globalizing_retailseminar/Dawson.pdf) [Accessed January 26, 2009].

exercised by the large retailers is beneficial to consumer interests as long as the lower supplier prices are passed on to consumers in lower retail prices. Buyer power also encourages suppliers to be efficient, competitive and market-orientated. Nevertheless, there have been concerns that retailers may transfer excessive risk or unexpected costs on to their suppliers, which may lessen suppliers' incentives to invest in new capacity and products.<sup>9</sup>

#### *Cross-border operations are expanding*

With domestic markets often already relatively concentrated, many larger retailers in the European Union Member States (and around the globe) are increasingly looking towards cross-border expansion as a growth strategy. Table 3 shows that whereas in 1986 the top 100 retailers in the world (by sales) operated in, on average, fewer than three countries each, by 2004 this figure had risen to an average of 10. The grocery retailers Carrefour, Tesco, Aldi and Lidl have been amongst the leaders in this cross-border expansion, each significantly increasing their international presence in recent years.

#### *The role of the discounters is expanding as a competitive force*

Large discount retail chains are rapidly gaining strength in the markets across Europe. These stores can sometimes offer substantially lower prices than ordinary independent supermarkets. These larger discounters benefit

from economies of scale in purchasing, distribution and marketing, as well as more simplified store formats that offer a narrower range of choice on each product and typically the discounters' own-branded products (which are typically cheaper than the equivalent branded product). Figure 3 demonstrates the strong presence that discount stores (like Lidl and Aldi) have already achieved in Germany and Norway. With the weakening economic situation across Europe, the importance of discount retailing and the market shares of large discounters are likely to grow.

#### *Legal and regulatory framework*

In the absence of a sector-specific regulation for mergers in the wholesale and retail sector, such mergers are considered under the normal merger control rules of the Big 6. There are no specific ownership restrictions on mergers in the sector in the Big 6, albeit expansion of retail outlets may require specific planning approvals.<sup>10</sup>

It is noteworthy that the Big 6 competition authorities have also considered competition in the retail sector as part of their mainstream competition powers, quite apart from merger control proceedings. This makes for an interesting interplay between the authorities' assessment of mergers in the sector and their wider competition law enforcement.

The UK competition authorities have been particularly active in this sector outside the area of merger control, and have repeatedly put the spotlight on the grocery market through market inquiries and cartel investigations.<sup>11</sup>

In 1999, the Competition Commission's inquiry investigated public concerns that the grocery prices in the United Kingdom were significantly above prices observed in other apparently comparable countries, and that supermarkets were not passing on the reductions in farm-gate prices to their consumers. The Competition Commission found no evidence that the higher prices in the United Kingdom were a result of grocery retailers acting in an anti-competitive manner or that the lower farm prices were not in fact passed on. The Competition Commission was further concerned about the practices of below-cost selling of certain products and differential prices in different regions. However, no remedial actions were recommended to address this behaviour because all potential remedies were considered undesirable, disproportionate or impractical. The Competition Commission did, however, recommend introducing a

<sup>9</sup> See, for example, the UK Competition Commission's "Market investigation into the supply of groceries in the UK", (April 20, 2008). Available at: <http://www.competition-commission.org.uk/rep-pub/reports/2008/538grocery.htm> [Accessed January 26, 2009].

<sup>10</sup> For example, there are particular provinces in Spain in which licences are required for the opening or expansion of large retail stores.

<sup>11</sup> For example, the Office of Fair Trading has conducted in-depth investigations into alleged collusion in the sale of tobacco and in the sale of milk.

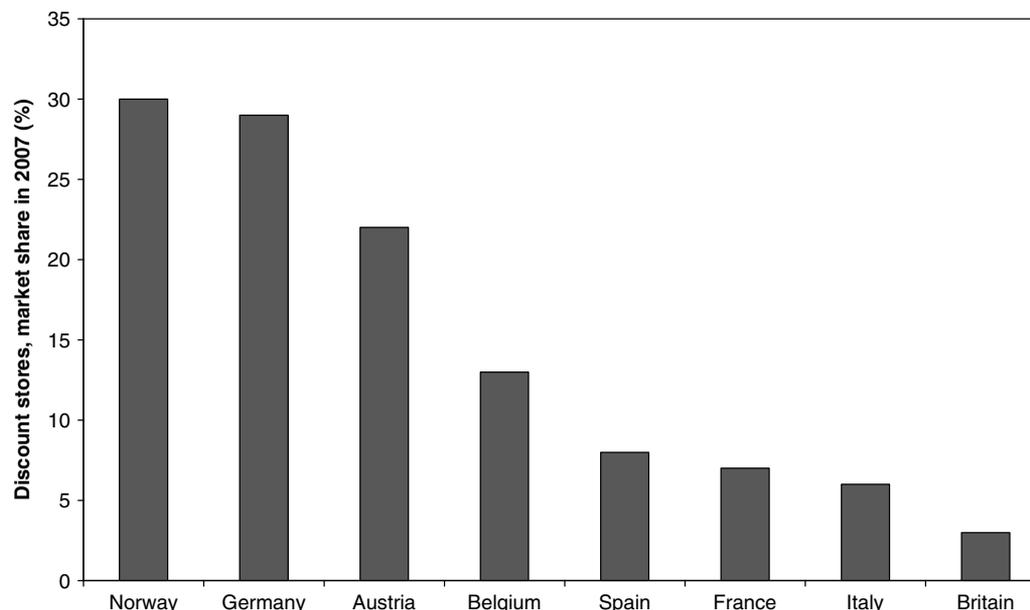


Figure 3: Market share of discount stores

Source: “The Germans are coming”, *The Economist*, August 14, 2008, available at: [http://www.economist.com/business/displaystory.cfm?story\\_id=11920665](http://www.economist.com/business/displaystory.cfm?story_id=11920665) [Accessed January 26, 2009].

Code of Practice to regulate the conduct between the supermarkets and their suppliers.

In another major inquiry into the groceries market, the Competition Commission in 2008 concluded that the market was broadly competitive, but that several grocery retailers had strong positions in a number of local markets. The Competition Commission expressed concern that entry barriers around these local markets might prevent competing grocery retailers entering these markets. The Competition Commission, therefore, required large grocery retailers to release land agreements which were likely to restrict entry of competitors in a number of local markets, and also recommended the inclusion of a “competition test” in planning decisions in relation to larger grocery stores to encourage entry of new competitors. At the time of writing, Tesco was in the process of challenging the Competition Commission’s recommendation with respect to the planning process to the Competition Appeal Tribunal.<sup>12</sup> The outcome will be informative in determining the extent to which the Competition Appeal Tribunal will review decisions of the Competition Commission on market investigations and also the scope for further consolidation among the largest retailers. This is effectively the first challenge to any decision by the Competition Commission in a market investigation under the Enterprise Act 2002.

<sup>12</sup> The main hearing in this matter took place between November 11 and 13, 2008. At the time of writing, judgment was still pending.

As in its previous investigation, the Competition Commission also found transfer of excessive risk and unexpected costs by grocery retailers to their suppliers through various supply chain practices and created a strengthened Code of Practice to protect grocery suppliers.

In Germany, the competition authorities have not recently undertaken a similar in-depth sector investigation, but have expressed concern about concentration in the retail sector.<sup>13</sup> The German competition authorities have pursued a number of cases based on complaints by affected parties into the alleged exploitation of buyer power by grocery retailers in Germany. In several cases, the German competition authorities have closed proceedings after the retailers concerned agreed to stop pressuring their suppliers to pass on to them certain refunds granted by other firms.

In France, the competition authorities have not conducted an in-depth sector review, but have examined practices within the sector through a number of cases concerning below-cost selling by grocery retailers (a practice which is prohibited in France) and discriminatory pricing by wholesalers.<sup>14</sup> As in some regions of Spain, there are regulations in France

<sup>13</sup> For example, “Der Lebensmitteleinzelhandel in Deutschland hat in den letzten Jahren einen sehr hohen Grad der Konzentration erfahren.” [Translation “During the last years the food retail sector in Germany has become highly concentrated.”] in *EDEKA/Tengelmann* (case number: B2-333/07), June 30, 2008, at 35.

<sup>14</sup> The prohibition on below-cost selling had been blamed for high food prices in France, as grocery retailers are not able to

regarding the need to acquire permission before opening a new large grocery store.

The Netherlands has not, as yet, had an in-depth market investigation into the retail and wholesale sector but has reviewed the sector in some high-profile retail mergers.

### *The economic drivers of mergers in the wholesale and retail sector*

There are a number of drivers for consolidation affecting mergers in the wholesale and retail sector. Some of the key drivers (which have permeated the cases we have reviewed) include:

#### *Buyer power*

Compared to two separate firms, a larger merged entity can be expected to have a stronger negotiating position with its suppliers. The cost savings that would be afforded to the larger firm through this increased negotiating power and access to volume discounts could enhance its profitability, either through it keeping the cost-saving for itself or by it passing some of the savings on to its customers through lower prices that allow it to gain market share. A further way in which larger size may increase the merged entity's negotiating power is through it rolling out its own private label products. The likelihood that a private label strategy would be viable tends to be increased for a larger merged firm (compared to two smaller independent operators) as size allows it to reap the benefits of increased production efficiency.

#### *Cost synergies*

As with mergers in most sectors, the merged entity could potentially realise cost savings by removing the duplication of certain expenditures. However, these cost synergies could be particularly substantial in the wholesale and retail sector, where marketing/advertising, distribution, and administrative costs are likely to be significant. The parties could expect significant cost savings to result from elimination or reduction in the cost of duplicated services. The parties to the merger may also be able to achieve some savings through closing overlapping outlets and the headquarters or other administration functions of one of the parties.

pass rebates on to customers. The *Loi Chatel*, adopted in January 2008, now allows retailers to subtract the value of all rebates and commercial services from the invoice price, which has had the effect of lowering the threshold below which below-cost selling is prohibited. In its recent report, the Attali Commission recommended the abolition of the law prohibiting below-cost selling of groceries (Sourced from UK Competition Commission, "Market investigation into the supply of groceries in the UK" 2008, p.25).

#### *Access to quality infrastructure and brand*

The ability to reach customers and compete may be affected by access to outlets/sites or distribution networks. Certain brands might also be important gateways to particular segments of customers. Therefore, a company may aim to acquire a target company that already has an existing strong infrastructure or "following" amongst customers. For example, a key advantage of the ROCK joint venture between Cie des Salins du Midi (CSME) and MDPA in France in 1999 was that it created a nationwide distribution network for de-icing salt.<sup>15</sup> De-icing salt cannot be transported over long distances, so access to storage depots in key locations is critical to any company's ability to compete. The French competition authorities cleared the joint venture subject to commitments to divest a number of storage depots and to supply competitors from ROCK's depots under certain conditions.

#### *Diversification and growth*

The retail and wholesale transactions covered in this study are mostly national in scope and involve the mergers between parties whose operations overlap in a single country. However, many acquisitions in this sector have been transnational and aimed at extending the companies' retail (or wholesale) footprint into other countries. For example, in 1999, the US giant Wal-Mart acquired Asda—a leading UK supermarket group—to bolster its presence in Europe. Such transactions enable companies to diversify their portfolio (across both products and locations) and capture growth in less mature markets.

#### *Competition issues in wholesale and retail mergers*

As discussed earlier, the merging parties may realise significant cost savings and efficiencies that make them, as a merged entity, a stronger competitor that delivers better prices and choice to consumers. Given the often concentrated national markets and in some cases vertically-integrated company structures, competition authorities are naturally sensitive to the possibility that certain mergers may lead to harm to competition and consumers. Here we comment on the issues that can arise in this sector, and which are reflected in the cases we have reviewed. This is not to comment on the extent to which such concerns are borne out in practice, merely to highlight the competition challenges that mergers in the wholesale and retail sector have tended to present.

The principal competition concerns arising from mergers in the wholesale and retail sector have been horizontal in nature.

<sup>15</sup> *Cie des Salins du Midi (CSME)/MDPA-SCPA-ROCK*, decision of September 1, 1999 (France).

### *Unilateral effects*

The bringing together of two previously direct (or potentially direct) competitors may give the merged entity the ability to unilaterally raise its prices to consumers (or equivalently, reduce the scope of choice, quality or services to consumers).

Retail markets are often narrow in geographic scope, as customers tend to be unwilling to incur the costs of searching and travelling far afield for the small volume of goods that they buy (wholesale customers may in general be willing to travel further as they will be purchasing larger volumes of product, and therefore will realise greater savings if they find marginally cheaper products from suppliers outside of their local area). For example, markets for groceries are typically defined very narrowly (often in terms of isochrones around the affected branch or store measured by kilometres or driving/walking times). These local markets may then be considered susceptible to competition problems, as consumers may be limited in their choice of stores and entrants may be limited in the available sites where they could open new stores. Mergers that bring together established competitors in these local markets could augment the merged entity's market power if the merging parties were close competitors beforehand and few alternative suppliers would remain for customers post-transaction.

A related concern is that the merged entity—if it were to become a very large presence in the local market—might also have the power to distort competition further through predatory strategies (such as below-cost pricing). These practices may exclude existing smaller competitors, and can augment barriers to entry entrenching the merged entity's incumbency.

In the local market, another barrier to entry which large, horizontally-integrated firms may be able to exploit is the shortage of available land for new stores, arising in part from the planning system. Large firms are better able to absorb the costs associated with site assembly and submitting a planning application, as well as the risk of planning applications being rejected. It is likely, also, that they will have substantially more experience of the planning system than new entrants. The incumbent wholesale or retail store owner may also buy up land that may be an attractive plot for a new entrant, directly preventing their entry into the market.

An example from Germany is the *Globus/hela Profizentren* merger, in which divestiture remedies included the transfer of the lease, goodwill, and the operating permissions of several buildings held by the parties in question to their competitors, to prevent them from gaining a dominant position in the relevant regional markets.<sup>16</sup>

A further concern about strong concentration at the retailer and wholesaler levels is that the large

retailers and wholesalers may have a great deal of buyer power in relation to their suppliers. The logic of this concern is that through their size, these wholesalers and retailers are able to buy in bulk from suppliers (who in turn benefit from greater economies of scale) and therefore negotiate lower priced goods. These firms can then pass on lower prices to consumers, whilst still retaining good profit margins, raising concerns that their smaller competitors, who cannot sell at these prices, are forced out of the market. Whilst low prices may be beneficial to consumers in the short run, over the longer term, as smaller retailers exit the market, consumers may face reduced choice and higher prices. Large retailers and wholesalers might also be able to use their favourable negotiating position to transfer excessive risks or unexpected costs to their suppliers through strict contracts. If these firms own the “gateways” to the customers of the suppliers' product, the suppliers may not have alternative ways to reach customers. This may be likely to reduce the suppliers' incentive to invest in new capacity, products and production processes. For the consumer, this may ultimately mean lower quality goods and less choice.

### *Co-ordinated effects*

Oligopolistic market structures raise the possibility that firms can co-ordinate their activity. There is also concern that in markets with only a few large players, the participating firms will recognise the interdependence of their prices and sales, and that they will find it in their common interest to avoid mutually destructive rivalry. Recognition of their common interest in such circumstances may be sufficient to lead to increased prices (or deterred price cuts) even without explicit collusion.

Mergers in oligopolistic markets may at times be scrutinised for potential co-ordinated effects.

The merger of the beer manufacturers Mahou and San Miguel in Spain in 2000 raised concerns of collective dominance for the Spanish competition authorities.<sup>17</sup> The merged entity, together with another competitor, Damm, would control over 80 per cent of the Spanish hospitality market. Given the low price elasticity of demand in the market, the homogenous nature of the product, and the existence of sizeable barriers to entry (for example, the exclusive contracts between beer producers and distributors in the hospitality sector), the Spanish authorities were concerned that the merger would give the merged entity and Damm substantial collective pricing power. The merger was ultimately approved, subject to commitments that facilitated entry into the market and enhanced the incentives of the merged entity actively to compete with Damm.

Similar concerns that concentrated markets would lead to co-ordination were at the heart of the

<sup>16</sup> *Globus/hela Profizentren*, decision of December 5, 2007 (Germany).

<sup>17</sup> *Mahou/San Miguel*, decision of October 10, 2000 (Spain).

competition authorities' assessment of the bids for the Safeway retail chain in the United Kingdom in 2003.<sup>18</sup> Safeway, the United Kingdom's fourth-largest grocery retailer, had been underperforming and was approached for takeover by each of the other large retailers in the United Kingdom—Asda Group Ltd (Asda); J Sainsbury Plc (Sainsbury); Wm Morrison Supermarkets Plc (Morrisons); and Tesco Plc (Tesco). Tesco, Sainsbury and Asda were the top three national grocery chains in the United Kingdom, while Morrisons was considered a strong regional player rather than a national player. The Competition Commission assessed each of the potential combinations with Safeway and found that mergers with Tesco, Asda, or Sainsbury would significantly enhance the potential and likelihood of co-ordinated behaviour at the national level. This was because of the already concentrated market, the high entry barriers involved in retailing, and the already high level of monitoring of competitors' price and non-price offerings by each of the big firms. Therefore, the merger between Morrisons and Safeway was allowed subject to a divestment remedy.

#### *Vertical issues*

There are a number of advantages that vertically integrated firms in the wholesale and retail market may have over their non-integrated competitors. This is mainly due to the increased control they have over their products (from factors such as design to timing of delivery), from manufacturing through to retailing. Vertical integration typically delivers efficiencies to the merging parties that can result in lower priced and better quality products to the consumer. However, in some cases where the merging entity has strong market power at a particular level of the production chain, a concern arises that it can use this power to strategically soften competition through foreclosure of rivals and potentially facilitating collusion.

Vertical concerns are highlighted in the 2003 French merger of two wholesale distributors of suspended ceilings and general construction materials, Point P, a subsidiary of Saint Gobain, and Dubois Materiaux.<sup>19</sup> The merger had both vertical and horizontal dimensions. The vertical issue concerned the possibility that the merged entity might foreclose a rival of Saint Gobain. Dubois Materiaux was a main distributor for the only significant competitor to Saint Gobain in the suspended ceiling manufacturing market. The merger could therefore potentially foreclose this competitor's access to wholesale distribution of its products.

<sup>18</sup> On March 19, 2003, the Secretary of State for Trade and Industry made four references to the Competition Commission under the Fair Trading Act 1973. Although this case was not considered under the Enterprise Act 2002, we allow ourselves a reference to it given its interest for the point at issue. See the UK Competition Commission website at <http://www.competition-commission.org.uk/inquiries/completed/2003/safeway/> [Accessed January 26, 2009].

<sup>19</sup> *Point P/Dubois Materiaux*, decision of August 7, 2003 (France).

In 2000, the retailer Casino proposed to acquire the Monoprix supermarket chain.<sup>20</sup> The French competition authorities noted that Casino might use Monoprix's links with the downstream central purchasing agency Francap and its own existing links to the other central purchasing agency Opera to reduce competition with other retailers. This indirect affiliation with a competitor was considered by the competition authority to potentially lead to collective dominance in the Paris market. To remedy this, the parties offered to renounce restrictive clauses on Francap's behaviour.

### 3. Remedies landscape

As shown in **Figure 2**, wholesale and retail mergers were the sector with the largest number of merger remedy cases in the Big 6.

For this sample of 32 cases, divestiture has been the preferred remedy to resolve competition issues. This is shown in **Figure 4**. The reason for the prevalence of structural remedies derives to a large extent from the local features of retail markets and the fact that horizontal competition issues tend to be confined to specific areas of overlap. This makes divestiture of outlets a typical remedy in our sample of cases, with examples spread across the sector and including specialist wholesale,<sup>21</sup> food retailing,<sup>22</sup> DIY retailing,<sup>23</sup> retail pharmacy,<sup>24</sup> motor vehicle retailing<sup>25</sup> and other consumer goods.<sup>26</sup>

A classic example is the merger between the two French-based multinational companies Carrefour and Promodes in 2000. Both companies were active in the retailing of daily consumer products in hypermarkets, supermarkets and discount stores in several European countries. The European Commission concluded that the operation was compatible with the Common Market, subject to commitments given by Carrefour.<sup>27</sup> At the French Government's request the European Commission referred the transaction to the French competition authorities for review of 99 local market areas identified. The French competition authorities concluded that the merger would give Carrefour strong market positions in

<sup>20</sup> *Casino/Monoprix*, decision of October 2, 2000 (France).

<sup>21</sup> For example, *DISA/Shell*, decision of December 20, 2004 (Spain).

<sup>22</sup> For example, *Galeries Lafayette/Marks and Spencer*, decision of December 24, 2001 (France).

<sup>23</sup> For example, *Leroy-Merlin/OBI*, decision of February 10, 2003 (France).

<sup>24</sup> For example, *Boots/Alliance UniChem*, decision of July 19, 2006 (UK).

<sup>25</sup> For example, *Pendragon/Reg Vardy*, decision of October 18, 2006 (UK).

<sup>26</sup> As examples, *Somerfield/Wm Morrison*, decision of September 2, 2000 (UK) and *Carrefour/Promodes*, decision of July 5, 2000 (France).

<sup>27</sup> European Commission Decision of 25 January 2000 declaring a concentration to be compatible with the Common Market according to Council Regulation (EEC) 4064/89 (COMP/M.1684- *Carrefour/Promodes*).

27 local areas, and required the parties to divest 34 stores through sales or the termination of franchise agreements, as well as a commitment to restrict the opening of new, or the expansion of existing, stores in areas in which the parties had divested stores.<sup>28</sup> The transaction was also reviewed in Spain where the Spanish competition authorities ultimately cleared the merger subject to the divestiture of hypermarkets and supermarkets in 17 geographic areas.<sup>29</sup>

We observe that although the Spanish competition authorities showed a preference for behavioural commitments overall, they have frequently used structural remedies in this sector. However, France demonstrates a bias for behavioural remedies (either standalone or mixed with a structural commitment) in this sector. Italy does not have any merger remedy cases in the wholesale and retail sector across the time-series reviewed, potentially reflecting the more fragmented and less concentrated state of its sector.

However, while divestiture of overlapping interests in affected markets may be the most effective method to restore pre-merger competition levels, the approach to the appropriate divestiture remedy and its scope may be more nuanced depending on (i) the level of existing concentration; (ii) the extent to which the merger consolidates the market; and (iii) the degree of actual or potential competition post-merger.

- In 2007 the German competition authorities approved the acquisition by Douglas of Hela, subject to divestment of one shop in Darmstadt.<sup>30</sup> The merger concerned the retail supply of perfumes and cosmetics. The geographic market was identified as encompassing a 30 km radius around Darmstadt. According to the German competition authorities, the merger would have strengthened the dominant position of Douglas in the Darmstadt area with a market share nearly three times higher than that of its closest competitor. The remedy in this case was clear-cut and confined to the specific area of overlap.

- In the DIY sector, the acquisition by Leroy Merlin of OBI was approved by the French Minister of Economy subject to a package of divestiture remedies and a commitment not to expand new sales areas.<sup>31</sup> In order to remove the overlap in two local retail markets (La Rochelle and Compiègne), the parties offered to divest the outlets owned by OBI. In a third local market, the parties committed to divest an outlet, thus reducing (but not completely removing) the competitive overlap (Strasbourg). The parties also committed not to expand their

retail sales areas in a fourth local area (Istres) as well as in Strasbourg, where the overlap remained significant even after the divestment.

- A case from the United Kingdom indicates that quite extensive divestiture remedies may be required to remove concerns in local markets. In relation to the merger between Boots and Alliance UniChem, the Office of Fair Trading considered the sectors of retail pharmacy and wholesaling of pharmaceuticals, as well as contract manufacturing of certain beauty and personal care products.<sup>32</sup> The Office of Fair Trading identified a substantial lessening of competition in 38 local overlap areas (within a one mile radius) where there would be no other competitor post-merger (2:1 overlaps) and 61 areas where there would remain only two competitors (3:2 overlaps). The Office of Fair Trading accepted the divestiture of 95 stores, most of which were owned by UniChem, to avoid a reference to the Competition Commission. Celesio AG applied to the Competition Appeal Tribunal for judicial review of the Office of Fair Trading's decision. The Competition Appeal Tribunal dismissed the application for judicial review and the Office of Fair Trading's decision stands.<sup>33</sup>

#### *Non-divestiture remedies*

While divestiture is by far the preferred remedy it is not the only one acceptable to the competition authorities in the wholesale and retail sector. Other examples, typically to support a divestiture remedy, include:

#### *Non-expansion*

Competition authorities may often feel the need to enhance divestiture remedies with commitments not to expand the parties' presence in affected markets post-merger through opening new, or extending the floor-space of existing, outlets. Examples of cases in which this type of behavioural commitment has been used are the French cases *Galerias Lafayette/Marks and Spencer*, *Carrefour/Promodes* and *Vivarte/Super Sport* and the German case *Douglas/Hela*.<sup>34</sup> While this type of commitment might reduce the possibility that the merged parties might extend their market power in an affected market, the competition authorities have exercised some caution in applying this type of commitment, as this might prevent the firms from expanding their operations for pro-competitive reasons that would benefit the consumer.

<sup>32</sup> *Boots/Alliance UniChem*, decision of July 19, 2006 (UK)

<sup>33</sup> *Celesio AG v Office of Fair Trading* (Case No.1059/4/1/06), decision of May 9, 2006, Competition Appeal Tribunal (UK).

<sup>34</sup> *Galerias Lafayette/Marks and Spencer*, decision of December 24, 2001 (France), *Carrefour/Promodes*, decision of July 5, 2000 (France), *Vivarte/Super Sport*, decision of April 30, 2008 (France), and *Douglas/Hela*, decision of March 8, 2007 (Germany).

<sup>28</sup> *Carrefour/Promodes*, decision of July 5, 2000 (France).

<sup>29</sup> *Carrefour/Promodes*, decision of May 4, 2000 (Spain).

<sup>30</sup> *Douglas/Hela*, decision of March 8, 2007 (Germany).

<sup>31</sup> *Leroy-Merlin/OBI*, decision of February 10, 2003 (France).

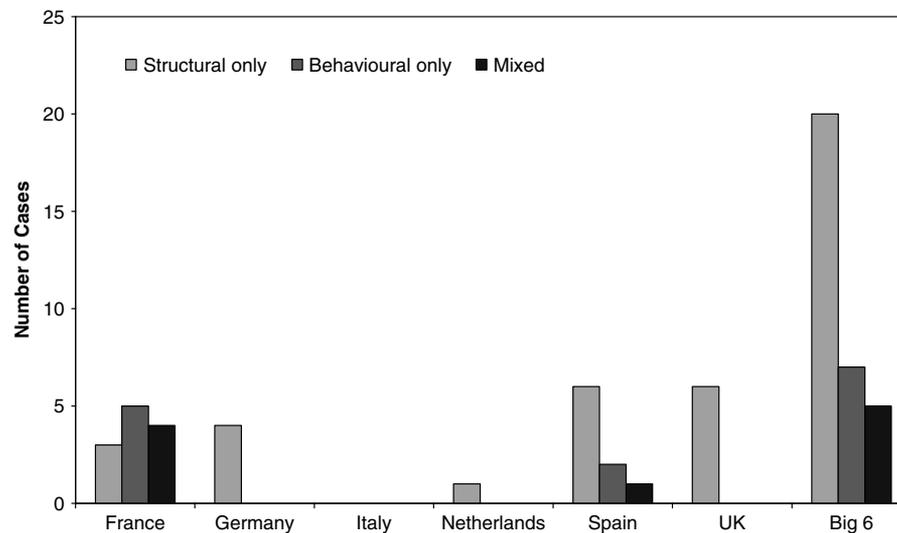


Figure 4: Merger remedies in the wholesale and retail sector (Big 6)—structural *v* behavioural  
 Source: Authors' calculations based on data from Merger Remedies Matrix <http://www.concurrences.com>.  
 Note: The German and UK data series start only in 2003 and 2004, respectively.

#### *Termination of exclusive vertical agreements*

In the *Casino/Monoprix* merger, the French authorities were concerned that Casino might use Monoprix's links with the downstream central purchasing agency Francap and its own existing links to the other central purchasing agency, Opera, to harm competition with other retailers. The merger remedy involved the parties agreeing to renounce clauses limiting the freedom of Francap to choose its suppliers.<sup>35</sup>

In 2002, the French competition authorities examined the merger between two companies active in the sale and distribution of DIY products, Mr Bricolage and Tabur, that both had networks of franchisees at the retail level.<sup>36</sup> There were 11 local markets affected by the transaction and in one in particular there was a concern that the combined market share of the parties (through their franchisees) would be over 80 per cent. To remedy the competition concern in this market, the parties committed that Tabur would terminate its franchise agreement with its franchisee in this market.

Similarly, the Spanish merger of the beer manufacturers Mahou and San Miguel in 2000 was cleared subject to a remedy (amongst others) that the parties terminate their licence agreements for the production and distribution of third-party foreign beer brands (other than the agreement with Carlsberg). This remedy was aimed at reducing market concentration and fostering entry for new rivals.<sup>37</sup>

<sup>35</sup> *Casino/Monoprix*, decision of October 2, 2000 (France).

<sup>36</sup> *Mr Bricolage/Tabur*, decision of September 29, 2002 (France).

<sup>37</sup> *Mahou/San Miguel*, decision of October 10, 2000 (Spain).

#### *Withdrawal/non-use of trade mark*

An incumbent's established and trusted trade mark may, in rare circumstances, represent an entry barrier to companies hoping to attract customers from the incumbent firm. The French decision in 1999 on the ROCK joint venture between the companies Cie des Salins du Midi (CSME) and MDPA is an interesting early case where the competition authorities attempted to ameliorate competitor entry into the French market for de-icing salt by requiring the parties to withdraw use of their trade mark.<sup>38</sup>

#### *Unenforceability of non-compete clauses*

Some takeovers or acquisitions may contain "non-compete" provisions that, for a defined period, restrict the ability of key personnel of the acquired business from leaving the merged entity post transaction and starting up their own rival company. These types of clauses may have particular relevance in markets in which the employee's know-how or contact network are key inputs into the final product. However, these clauses, while preserving the profitability of the merged business, can restrict the development of competition in that market, and therefore can attract the concern of competition authorities.

A merger remedy case involving a non-compete was the 2002 merger between the building material retailers and wholesalers Point P and Ardi. In this case the French authorities were concerned that technical skills may be a barrier to entry into the market. A commitment not to enforce the non-compete clause against

<sup>38</sup> *Cie des Salins du Midi (CSME)/MDPA-SCPA-ROCK*, decision of September 1, 1999 (France).

the Ardi staff was considered an appropriate remedy. This gave entrants the opportunity to hire qualified and experienced staff.<sup>39</sup>

#### *Non-discrimination*

Commitments not to favour the merged entity (for example, a downstream distribution company) have been adopted as merger remedies in the wholesale and retail sector. In 2004, the French competition authorities cleared a vertical merger in which a large producer of tableware, Group Arc International, acquired four specialised wholesalers/distributors of tableware products.<sup>40</sup> The authorities believed the transaction raised concerns in one segment of the French market—the provision of drinking glasses to retailers. Arc committed to maintain, for a period of two years, existing commercial relations with its other wholesaler clients, and committed to supply the quantity of products ordered (within the limits of its capacity) by these rival wholesalers on fair and non-discriminatory terms.

A Spanish case from 2005 dealt with similar issues when Shell España and CEPSA proposed a joint venture (SIS) to provide kerosene and lubricants to civil aircraft at airports.<sup>41</sup> The Spanish competition authorities were concerned that, amongst other things, the parties' rights to be served by SIS could be used to foreclose competition, to the detriment of third parties. The joint venture was approved on the condition that it did not discriminate in its service in favour of the parties.

A creative example of the use of mixed remedies is the 2004 *Lesieur/Unilever Bestfoods* case in France, where the olive oil producer Lesieur acquired a selection of olive brands from Unilever Bestfoods, France.<sup>42</sup> The merger affected the sale of olive oil to end customers in a market that spanned France, and regions of Spain and Italy. To address competition concerns raised by the transaction, Lesieur committed to divest two olive oil brands “Oli” and “Jardin d’Orante”. The divestiture was to include, amongst other things, all intellectual property (IP) rights and know-how related to the production of the two products and, especially, the drawings and models of the bottles and labels (the drawings and models for the bottles of Jardin d’Orante were excluded). The French competition authorities also attached two further behavioural conditions to the clearance. First, the parties committed to terminate the exclusive distribution contract between Lesieur and the oil distributor Carapelli in France. Secondly, Lesieur committed to stop applying its favourable commercial policy (especially non-financial advantages)

that Lesieur extended to supermarkets in exchange for better exposure of its products.

## 4. Implications and conclusions

Our review of merger remedies in the wholesale and retail sector of the “Big 6” European countries began with an overview of the economic theory of consolidation, before confronting the evidence on how the competition authorities have approached mergers in the sector. The evidence we examined was investigated in two complementary ways—a statistical analysis of the actual experience, supplemented with case studies on individual cases and countries. Our conclusions are similarly two-pronged in the sense that we identify (i) key trends in the decided cases; and (ii) areas for future inquiry.

#### *Key trends*

Our review demonstrates a number of key trends, but also that there are significant differences between the Big 6. Drawing on the insights from our remedies mapping, the more detailed review of the cases and the market analysis, a number of key themes emerge.

#### *Divestiture*

The cases demonstrate an overwhelming preference for divestiture remedies, particularly in narrowly defined local markets where the competition issues are considered to be clear-cut. The loss of the target as an independent player may be compensated by a divestiture in terms of specific outlets, if the overlap is reasonably clear and contained and the divested business can operate on a standalone basis. Divestiture remedies have varied from single store disposals (*Douglas/Hela*<sup>43</sup>) to around 100 outlets (*Boots/Alliance UniChem*<sup>44</sup>). This highlights the importance of identifying upfront the local areas that really matter from a competition perspective and providing the supporting economic analysis that will be at the analytical core of a divestiture remedy designed to solve local market overlaps.

#### *National peculiarities*

Some features of food and consumer products retailing are particularly noteworthy. France, Germany and the United Kingdom saw a large number of merger remedies cases in this area.<sup>45</sup> This may be in part related to

<sup>39</sup> *Point P/Ardi*, decision of December 13, 2002 (France).

<sup>40</sup> *Group Arc International/Callens Lesage Laurent Vachaud Piffaut*, decision of November 24, 2005 (France).

<sup>41</sup> *Shell España/CEPSA*, decision of March 9, 2005 (Spain).

<sup>42</sup> *Lesieur/Unilever Bestfoods*, decision of November 18, 2004 (France).

<sup>43</sup> *Douglas/Hela*, decision of March 8, 2007 (Germany).

<sup>44</sup> *Boots/Alliance UniChem*, decision of July 19, 2006 (UK).

<sup>45</sup> For Germany and the UK we had shorter data-series (starting in 2003 and 2004, respectively), so the total number of cases in these countries between 2000 and 2007 would have been higher.

the level of concentration of food retailing in the various countries and also the drive by the larger French and German retailers to expand their operations. It may well be the case that there will be further consolidation in retailing in the years to come. There is continuing evidence of further consolidation, which has been approved by the competition authorities, either in discrete markets or where there is a realistic prospect of potential competition serving as a countervailing force.<sup>46</sup> In Italy, by contrast, there is scope to move towards the position in countries such as France, Germany and the United Kingdom. It is worth noting that, outside our focus on the Big 6, some of the smaller countries, especially in Scandinavia, do raise similar issues.<sup>47</sup> Their small national markets inevitably lead to very high retail concentration and have been relatively immune from incursions by foreign entrants.

#### *Cross-border operations*

The national merger remedies cases already reveal a trend towards companies expanding their operations internationally. A number of cases were originally notified to the European Commission under the ECMR but then referred back to the national authorities.<sup>48</sup> This is partly explained by the nature of the markets concerned, which tend to be local in character. Multi-jurisdictional filings and analysis of national markets will need to be considered where the parties compete within smaller geographic regions even where the transaction is of such a size and scope that it falls within the jurisdiction of supra-national European Community merger control. It is also noteworthy that multi-country wholesale and retail mergers that require remedies in more than one country may see different types of remedies used in each, for example, the French competition authority may favour behavioural commitments, where the German authorities may choose structural remedies. This may affect the strategy of transaction notification, i.e. whether to try and “bump up” multi-jurisdictional transactions to the European Commission where a transaction requires filings in at least three Member States<sup>49</sup> (where a more homogenised

remedy package may be received) rather than having the competition concerns remedied in different ways by each individual national authority.

#### *Politically charged, often emotional, environment*

Wholesale and retail mergers often take place in a highly charged environment, especially where they concern consumer products. In simple terms, everything that a consumer may want to buy—food, vehicles, designer clothing, sports shoes and DIY products—can attract strong emotions and interest. Opposition may be likely from competitors, suppliers, customers and consumers. The hotly contested bid for the Safeway supermarket chain in the United Kingdom by all the major players in the UK grocery sector is a case in point. Merging parties will need to develop a careful communications strategy to ensure that all the relevant interest groups are taken into account and to ensure that appropriate remedies are found to deal with these third party concerns.

#### *Issues for further inquiry*

It is inevitable that a focused project such as this leaves open a number of avenues which other researchers, competition practitioners and the competition authorities may want to explore further. Taking a step back from the numerous and even competing sources of information, and seeking to reconstruct an integrated overview of some key themes for future inquiry, yields the following “headline” areas that may provide some pointers where competition authorities, policy makers and practitioners may want to look:

#### *Consolidation and concentration*

We have seen consolidation increasing within the wholesale and retail sector. Mergers have fallen into broad types: (i) as a means of cross-border entry for large multi-national firms; (ii) “within country” acquisitions by medium-sized competitors at the horizontal level; and (iii) mergers among national market leaders. Each of these types of consolidation raises different issues. While the latter may rightly attract close scrutiny by the national competition authorities due to a significant increase in concentration alone, the two former types require a different analytical framework, where an analysis of concentration alone will not be dispositive of all the issues raised. Other potential issues include the impact of cross-border alliances, the creation of stronger medium-sized players to challenge incumbents, and the implications for consumer choice arising from consolidation across, rather than within, retail formats (i.e. acquisitions of convenience stores by larger grocery retail operators). This confirms that a simple blanket policy to retail consolidation, as in any other sector, where a divestiture might be viewed as the preferred remedy, will often involve evaluating the trade-off

46 For example, although strictly outside of our time-series, see *Vivarte/Supersport*, decision of April 30, 2008 (France). In this case the authorities were happy that, even if the divested outlets went to a retail company that did not already operate in the parties’ relevant market of low cost shoe retail, the threat of potential competition and entry would discipline the parties’ pricing post transaction.

47 For example, Sweden, Norway and Denmark have amongst the most highly concentrated grocery markets.

48 In the European Commission decision of COMP/M.1684-*Carrefour/Promodes* (January 25, 2000), the European Commission concluded that the Europe-wide transaction would be compatible with the Common Market, subject to commitments offered by Carrefour. However, at the French Government’s request, the European Commission referred the case back to the French competition authorities to review the merger’s likely competitive effects in a large number of French local markets.

49 Using the procedure under art.4(5) of the ECMR.

between efficiencies, the potential for the exercise of market power, and local, regional and, in some cases, pan-European competition perspectives.

#### *Buyer power*

The grocery sector in Europe is characterised by concentrations within both the industry producing the products (foodstuffs) and the retail industry selling those products to final consumers. Both sectors are experiencing noticeable structural change, as noted earlier. A recurring concern raised in the merger cases, and also sector-wide competition investigations outside the merger control area, is the potential that retailer buyer power may have adverse impacts on producers (food manufacturers and farmers). Therefore, a number of areas are suggested for future evaluation:

- The role of strong retail buyers might be positive, at least in the short term, if faced by increasing concentration in manufacturing. This could have a positive impact on consumers, if reduced prices for intermediate goods lead to lower retail prices.
- The main issue is whether retailer buyer power has damaging long-run effects in reducing choice in products and retail offers. This focuses attention on barriers to entry into retailing. Recent cases have suggested that these may *not* be low for institutional reasons (including planning and zoning restrictions) and strategic aspects (including incumbency advantages arising from investments in physical and human capital and distribution logistics).
- Evidence on numbers of producers exiting and entering might prove relevant. Future research could usefully focus on structural developments in manufacturing with an emphasis on smaller producers and secondary brands.

#### *Impact on consumer welfare*

In this study we have not sought to explore the welfare implications of retail merger remedies in detail. However, section 2 noted the growth of retailer's

private label brands. These are relevant to buyer power as they change the relative bargaining positions of manufacturers of branded products and retail buyers. In the short term, they provide consumers with more choice on price and are another constraint to be taken into account when evaluating increased consolidation at the retail level. Also, some remedies cases encapsulate the inherent trade-offs raised by any increase in concentration and buyer power. In particular, a number of the French merger remedies cases have involved commitments not to expand output.<sup>50</sup> Future case studies could usefully explore the relative effects of such remedies in terms of consumer choice and in reducing prices, against seller power increasing prices. Whilst this was not the scope of our brief, such analysis could provide additional insights for the design of remedies.

#### *Remedies or prohibition*

In our analysis we have looked at those merger cases cleared subject to conditions, short of outright prohibition. It would also be productive to look at other types of decision (unconditional clearance or outright prohibition) in the wholesale and retail sector to get a better understanding of all the challenges that regulators, practitioners and merging parties face in this sector. An example of an effective prohibition decision in this sector is the UK case in which Tesco acquired a grocery store from the Co-operative Group in Slough.<sup>51</sup> This was an unusual case in that the Competition Commission ordered the divestiture of the store some three years after the acquisition had taken place. Another potentially interesting set of cases to examine, given the current tough retail environment brought about by the credit crunch and recession, is cases that have "failing firm" dimensions (i.e. that absent the merger the assets of the target would inevitably exit the market and the merger under review is the least anti-competitive outcome). In the United Kingdom, for example, the competition authorities apply very strict criteria to allowing a failing firm "defence", but have done so on one occasion in this sector.<sup>52</sup>

<sup>50</sup> See, for example, *Mr Bricolage/Tabur*, decision of September 29, 2002 (France).

<sup>51</sup> *Tesco/CWS*, decision of November 28, 2007 (UK).

<sup>52</sup> *Tesco/Kwik Save*, decision of December 11, 2007 (UK).

Annex I: Merger remedies in the wholesale and retail sector (Big 6)—overview

Case	SIC sub-division affected*	Date	Competition issue (Horizontal and/or Vertical)	Remedy
France				
<i>Carrefour/Promodes</i>	47.1 Retail sale in non-specialised stores	July 5, 2000	Horizontal	The transaction affected the retail of daily consumer goods. The European Commission concluded that the operation was compatible with the Common Market, subject to commitments given by Carrefour. At the French Government's request, the European Commission referred the transaction to the French competition authorities for review of 99 local market areas identified. The French competition authorities noted that the merger would give Carrefour strong market positions in 27 local areas, and required the parties to divest 34 stores through sales or the termination of franchise agreements, as well as a commitment to restrict the opening of new, or the expansion of existing, stores in areas in which the parties had divested stores.
<i>Casino/Monoprix</i>	47.1 Retail sale in non-specialised stores	October 2, 2000	Horizontal Vertical	The transaction affected the market for the retail of daily consumer goods. The French competition authorities observed that post-merger the new entity would hold a dominant position in two Paris districts. To remove this concern the parties offered to divest two outlets in the areas concerned. The central purchasing agency Francap, to which the competitor G20 was affiliated, was also affiliated with Casino—meaning that there were concerns of vertical foreclosure. The parties had to renounce clauses limiting the ability of Francap to choose its suppliers.
<i>Galeries Lafayette/Marks and Spencer (M&amp;S)</i>	47.1 Retail sale in non-specialised stores	December 24, 2001	Horizontal	Galeries Lafayette acquired 18 French M&S stores. The transfer of assets was limited to the building owned by M&S and therefore excluded all other liabilities and assets of M&S (including the M&S trade mark). Competition concerns arose in five local markets. These concerns were remedied with commitments by Galeries to have independent management and operation of certain stores, as well as commitments not to convert certain stores into supermarket formats and to restrict the floor space for food retailing in certain stores.

## Annex I: (Continued)

Case	SIC sub-division affected*	Date	Competition issue (Horizontal and/or Vertical)	Remedy
<i>Mr Bricolage/Tabur</i>	47.5 Retail sale of other household equipment in specialised stores	September 29, 2002	Horizontal Vertical	Both parties were active in the distribution of DIY products through integrated franchises and networks. Eleven local markets were affected by the merger, but only in one market was there substantial competition concern. The parties committed to terminate Tabur's agreement with its franchisee in this market.
<i>Point P/Ardi</i>	46.7 Other specialised wholesale	December 13, 2002	Horizontal Vertical	The transaction affected the retail market for building products and the wholesale market for insulation materials. The transaction led to a number of horizontal overlaps on the retail market and to a vertical relationship on the procurement market. To remedy concerns Saint-Gobain (Ardi's parent company) committed to supply products to any new entrant on the same competitive conditions as Point P. As technical skills were a barrier to entry in this market, the parties also agreed not to enforce the non-competition clause against the Ardi staff.
<i>Leroy Merlin/OBI</i>	47.5 Retail sale of other household equipment in specialised stores	February 10, 2003	Horizontal	The transaction affected the market for the retail sale of DIY products. The merged entity would hold a strong position in four local areas where there were found to be barriers to entry. The parties committed to divest the outlet owned by OBI in two of the four local markets affected. In the third area, the parties committed to divest a third outlet though not completely removing the overlap. In the fourth area the parties committed not to expand their floor space for three years.
<i>Carrefour/ED-Treff</i>	47.1 Retail sale in non-specialised stores	November 7, 2003	Horizontal	Carrefour had to divest one of the two retail food discount stores in the Belfort territory.

## Annex I: (Continued)

Case	SIC sub-division affected*	Date	Competition issue (Horizontal and/or Vertical)	Remedy
<i>Lactalis/Pochat Callens Lesage Laurent Varchaud</i>	47.1 Retail sale in non-specialised stores	November 5, 2004	Horizontal Vertical	Lactalis, a milk and cheese producer, purchased a small family-owned business in South East France. Both parties were active in the market for uncooked pressed cheese paste. The competition concern was that Lactalis may post-merger bundle or tie together its sales of various cheeses. Lactalis committed not to enter into these types of agreements and also to produce a yearly report on all the commercial conditions attached to the cheese Reblochon.
<i>Lesieur/Unilever Bestfoods</i>	47.1 Retail sale in non-specialised stores	November 18, 2004	Horizontal Vertical	Lesieur acquired olive oil brands from Unilever Bestfoods. The parties agreed to divest certain brands and all IP necessary to produce the bottles and labels for these brands. Lesieur committed to stop applying its favourable commercial policy (especially non-financial advantages) to supermarkets, in exchange for better exposure of its products, so as to make entry easier for other brands.
<i>Group Arc International/Callens Lesage Laurent Vachaud Piffaut</i>	46.9 Non-specialised wholesale trade	November 24, 2004	Vertical	Group Arc International, an important producer of tableware products, acquired four wholesalers specialised in the distribution of tableware products. The vertical merger raised concerns in the market for the provision of drinking glasses to retailers. Therefore, Arc committed to maintain its existing commercial relations and terms with independent wholesalers competing in this market.
<i>Parfumerie Douglas/Lavigne</i>	47.7 Retail sale of other goods in specialised stores	October 22, 2005	Horizontal	Douglas and Lavigne specialise in perfume and cosmetics marketing. The transaction raised competition concerns in two French cities. The parties committed to divest perfume shops in these two areas to remove overlaps.
<i>Carrefour/Penny Market</i>	47.1 Retail sale in non-specialised stores	November 10, 2005	Horizontal	Carrefour committed to divest eight Penny Market businesses in markets affected by the transaction, and also to divest, or contract to rental management, three further Penny Market businesses.

Annex I: (Continued)

Case	SIC sub-division affected*	Date	Competition issue (Horizontal and/or Vertical)	Remedy
<b>Germany</b>				
<i>Praktiker/Max Bahr</i>	47.5 Retail sale of other household equipment in specialised stores	January 10, 2007	Horizontal	Praktiker and Max Bahr operate in the market for building supplies and DIY products. The German competition authorities cleared the merger subject to divestiture of three Praktiker stores and one Max Bahr store in four regional markets. The purchasers of the four stores were required to be independent of Praktiker, and Praktiker was required not to re-establish links with the divested stores for a period of 10 years.
<i>Weltbild/Hugendubel—Weiland</i>	47.6 Retail sale of cultural and recreation goods in specialised stores	January 16, 2007	Horizontal	DBH is a joint venture between Weltbild (a publishing house) and Hugendubel (a retailer active in full-line bookselling). The merger was cleared subject to the divestiture of a large Weiland bookshop in Hannover. The parties were prohibited from acquiring any interest in the bookshop for a period of four years.
<i>Douglas/Hela</i>	47.7 Retail sale of other goods in specialised stores	March 8, 2007	Horizontal	Douglas and Hela are involved in retailing perfume and cosmetics. The merger would strengthen the position of the merged entity in the Darmstadt area. The merger was cleared subject to the divestiture of one shop in Darmstadt.
<i>Globus/Hela Profizentren</i>	47.5 Retail sale of other household equipment in specialised stores	December 5, 2007	Horizontal	The transaction affected the retail market for DIY products and hardware goods. The transaction raised competition concerns in certain regional markets. The merger was cleared subject to the divestiture of several shops in affected areas. These divestitures had to include the transfer of the lease, the goodwill, the operating permissions according to the applicable building laws, the interior decoration, the goods and the personnel and all assets necessary for the operation of each divested building centre.

Annex I: (Continued)

Case	SIC sub-division affected*	Date	Competition issue (Horizontal and/or Vertical)	Remedy
<b>The Netherlands</b>				
<i>Ahold/Konmar Superstores</i>	47.1 Retail sale in non-specialised stores	October 26, 2006	Horizontal	The merger involved the acquisition by Ahold of 29 Konmar supermarkets. The Dutch competition authority identified concerns in a number of markets for the sale of daily consumer goods via local supermarkets. The parties were, therefore, required to divest certain stores in the affected markets.
<b>Spain</b>				
<i>Carrefour/Promodés</i>	47.1 Retail sale in non-specialised stores	May 4, 2000	Horizontal	Carrefour and Promodés were French-based multinational companies active in the retailing of convenience products in hypermarkets, supermarkets and discount stores. The transaction would create a merged company that would be the overall market leader in Spain. The transaction raised competition concerns in a number of local markets. The parties therefore had to divest hypermarkets and supermarkets in 17 geographic areas. The acquirer of the divested assets had to be independent of any company belonging to the Carrefour group and had to have sufficient financial resources and proven experience to be an effective competitor in the market.
<i>Mahou/San Miguel</i>	47.1 Retail sale in non-specialised stores 46.3 Wholesale of food, beverages and tobacco	October 10, 2000	Horizontal Vertical	Mahou and San Miguel were two of the main beer manufacturers in the Spanish market. The Spanish competition authority blocked the merger in Phase II, but the Council of Ministers decided to reverse this decision and approve the merger with remedies. Remedies included the removal of exclusive agreements with distributors and foreign beer brands. The parties were also ordered to divest their shareholdings in their main competing beer producer Damm.

## Annex I: (Continued)

Case	SIC sub-division affected*	Date	Competition issue (Horizontal and/or Vertical)	Remedy
<i>Pio Coronado/Cemetro</i>	47.1 Retail sale in non-specialised stores 46.9 Non-specialised wholesale trade	April 27, 2001	Horizontal	Pio Coronado is a large wholesale and retail distributor on the Canary Islands. The Spanish competition authority found the product market to be self-service retailing of convenience products. Divestment was required in one municipality where the parties had a combined market share of 44 per cent. The Spanish competition authority also noted that in one municipality there were legal entry barriers for larger stores, and so the divestment of one cash and carry store was required.
<i>Logista/Burgal</i>	46.3 Wholesale of food, beverages and tobacco 46.9 Non-specialised wholesale trade	March 18, 2002	Horizontal	Logista had a monopoly in the distribution of tobacco products, stamps and official documents. In order to prevent cross-subsidisation, the Spanish competition authorities accepted account and management separation on the tobacco product distribution business as a remedy.
<i>Caprabo/Enaco</i>	47.1 Retail sale in non-specialised stores 46.9 Non-specialised wholesale trade	May 28, 2002	Horizontal	The merger affected hypermarkets, supermarkets, discount stores and smaller self-service outlets. The transaction raised competition concerns in one region where the merged entity would hold a 52 per cent market share. Regulation of retail distribution created a significant entry barrier into this market. The parties were therefore required to divest one hypermarket in this region.
<i>DISA/Shell</i>	47.6 Retail sale of cultural and recreation goods in specialised stores, (Retail distribution of fuel) 46.7 Other specialised wholesale (Wholesale of fuel and related products)	December 20, 2004	Horizontal Vertical	DISA is a group of companies active in the Canary Islands that chiefly distributes, transports and stores fuel and fuel products. DISA owns a network of petrol stations on the Islands and in mainland Spain. According to the Spanish competition authority, the acquisition of the Shell businesses would increase the likelihood of co-ordination between DISA and CEPESA (a vertically integrated oil company that was the monopolist in the upstream market for wholesale procurement of fuel products). In order to reduce the probability of collusion, the authority required the executive boards of CEPESA and DISA to remain completely independent for a period of five years.

Annex I: (Continued)

Case	SIC sub-division affected*	Date	Competition issue (Horizontal and/or Vertical)	Remedy
<i>Shell España/CEPSA</i>	19.2 Manufacture of refined petroleum products 47.6 Retail sale of cultural and recreation goods in specialised stores (Retail distribution of fuel) 46.7 Other specialised wholesale (Wholesale of fuel and related products) 52.2 Support activities for transport (sale of fuel to airports)	March 9, 2005	Horizontal Vertical	The transaction created SIS, a joint venture controlled by Shell España and CEPSA. SIS was a provider of kerosene and lubricants to civil aircraft at airports. Shell España and CEPSA were active in the distribution of refined oil products and aircraft refuelling services at airports. The remedies affected the markets for kerosene refuelling and lubricants supply services at airports, and the Spanish market for kerosene supply. The Spanish competition authority was concerned about the possible lessening of competition and co-ordinated effects in the market for kerosene supply, where CEPSA and Shell España had a significant combined market share. SIS was ordered not to market kerosene and lubricants for aircraft at airports, except for covering minimum essential technical necessities. The authorities also required the parties to remove any preferential rights of Shell España and CEPSA to be served by SIS to the detriment of third parties. This remedy was aimed at removing any risk of foreclosure as a consequence of the vertical relationship between the controlling companies and the new joint venture.
<i>Cofares/Hefame</i>	46.7 Other specialised wholesale	June 6, 2006	Horizontal Vertical	The transaction would create a new wholesale distributor of pharmacy products. In Spain, the majority of wholesalers active in the pharmacy sector (including Cofares and Hefame) are co-operatives formed by groups of pharmacy retailers. These co-operatives contain clauses that make it mandatory for members to purchase a certain proportion of their requirements each year and also that oblige members to remain part of the co-operative for at least five years. The remedies included reducing the mandatory levels of purchases from the merged entity and reducing the membership requirement to one year rather than five.

Annex I: (Continued)

Case	SIC sub-division affected*	Date	Competition issue (Horizontal and/or Vertical)	Remedy
<i>Dia/Plus</i>	47.1 Retail sale in non-specialised stores	October 30, 2007	Horizontal	Despite the fact that the merger between these discount stores triggered the ECMR, Dia requested that the transaction be examined by the Spanish competition authorities as the transaction affected competition in Spain. The merger was cleared by the Spanish competition authorities subject to the divestiture of six Plus stores and one Dia outlet.
<b>United Kingdom</b>				
<i>Somerfield/Wm Morrison</i>	47.1 Retail sale in non-specialised stores	September 2, 2005	Horizontal	The transaction affected the grocery market. The Competition Commission approved the merger subject to divestment of 12 stores in affected local markets. Somerfield's application for review of this decision was dismissed by the Competition Appeal Tribunal.
<i>Boots/Alliance UniChem</i>	47.7 Retail sale of other goods in specialised stores	February 2, 2006	Horizontal	The Office of Fair Trading accepted undertakings in lieu of reference to the Competition Commission amounting to divestiture of 95 (mostly UniChem) stores to an approved purchaser.
<i>Pendragon/Reg Vardy</i>	45.1 Sale of motor vehicles 45.2 Maintenance and repair of motor vehicles 45.3 Sale of motor vehicle parts and accessories 47.1 Retail sale in non-specialised stores	October 18, 2006	Horizontal	The transaction affected the retail market for cars. The Office of Fair Trading accepted undertakings in lieu of reference to the Competition Commission and decided that the divestiture of four car dealership businesses in four affected areas would remedy competition concerns.

Annex I: (Continued)

Case	SIC sub-division affected*	Date	Competition issue (Horizontal and/or Vertical)	Remedy
<i>Inchcape/EMH</i>	45.1 Sale of motor vehicles, 45.2 Maintenance and repair of motor vehicles	March 26, 2007	Horizontal	The transaction affected the retail market for cars. The Office of Fair Trading accepted undertakings in lieu of reference to the Competition Commission in the form of divestiture of a car dealership in one affected area.
<i>Admenta—Lloyds/IPCC</i>	47.7 Retail sale of other goods in specialised stores	June 8, 2007	Horizontal	In a decision similar to that in <i>Boots/Alliance Unichem</i> , the Office of Fair Trading accepted undertakings in lieu of reference to the Competition Commission in the form of divestiture of a store in each of four local areas.
<i>CGL/United</i>	45.1 Sale of motor vehicles 47.1 Retail sale in non-specialised stores 47.7 Retail sale of other goods in specialised stores 64.1 Monetary intermediation 64.3 Trusts, funds and similar financial entities 79.1 Travel agency and tour operator activities 96.0 Other personal service activities	July 23, 2007	Horizontal	In a decision similar to that in <i>Boots/Alliance Unichem</i> , the Office of Fair Trading accepted undertakings in lieu of reference to the Competition Commission in the form of divestiture of one retail pharmacy in two affected areas and divestiture of eight supermarkets in eight local areas. The Office of Fair Trading accepted also the divestiture of 14 funeral service branches.

\* This places the merger in the appropriate SIC sub-division based on the relevant product markets affected by competition concerns and in some instances remedies in the case.