

Completed acquisition by Capital Shopping Centres Group plc of  
Broadmarsh Retail Limited Partnership

ME/5297/11

The OFT's decision on reference under section 22(1) given on 14 March 2012.  
Full text of decision published 21 March 2012.

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**Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.**

**PARTIES**

1. **Capital Shopping Centres Group plc ('CSC')** is a real-estate investment trust active in the development, ownership and management of UK regional shopping centres. Prior to this acquisition, CSC owned 14 regional shopping centres in the UK accounting for approximately 16 million square feet of retail space. CSC is the owner and manager of the Victoria Centre, a shopping centre in Nottingham that accounts for 981,000 square feet of retail space.
2. **Broadmarsh Retail Limited Partnership ('BRLP')** is a UK limited partnership that wholly owned the Broadmarsh Shopping Centre in Nottingham ('**Broadmarsh**') and certain other properties adjacent to it.<sup>1</sup> Broadmarsh is a shopping centre that is comprised of about 80 units and accounts for 487,000 square feet of retail space.
3. Broadmarsh is owned by BRLP through a 150 year head lease (of which there are 109 years remaining) from Nottingham City Council, the freeholder, to whom BRLP paid 33 per cent of the rental income. Prior to

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<sup>1</sup> As part of the completed transaction, CSC acquired 10 properties adjacent to Broadmarsh. These properties consist of office space, residential units and car parking space. Six of these units are currently vacant. CSC also acquired an option to acquire two further units, one currently used as a nightclub and the other as offices.

the acquisition, the Westfield Group ('**Westfield**'), developer, owner and operator of a global portfolio of 124 shopping centres,<sup>2</sup> had a 75 per cent partnership interest in BRLP. The remaining 25 per cent interest was held by Possfund Custodian Trustee Limited, a UK limited partnership. The UK turnover of BRLP in 2010, its last financial year, was £6.2 million.

## **TRANSACTION**

4. CSC completed its acquisition of the entire shareholding in BRLP on 1 December 2011. The OFT commenced its own investigation into this acquisition and received a satisfactory submission from the parties on 11 January 2012. The extended statutory deadline is 9 April 2012 with an administrative deadline of 14 March 2012.

## **JURISDICTION**

5. The acquisition would result in two enterprises ceasing to be distinct in accordance with Section 23(1) of the Enterprise Act 2002 (the '**Act**'). Since the annual turnover of BRLP in its last financial year was £6.2 million, the turnover test in Section 23(1)(b) of the Act is not met.

## **Share of Supply Test**

6. CSC submitted that the narrowest reasonable description of goods and services for the purposes of a share of supply test is the supply of all retail space to retailers and shoppers within a 45 minute drive-time from Broadmarsh. On the basis of this frame of reference, CSC estimated that their combined share of supply does not exceed [five -10] per cent.
7. As set out in the OFT's Jurisdictional and Procedural Guidance<sup>3</sup> at paragraph 3.55, the OFT has a wide discretion in describing the relevant goods or services for the purposes of the share of supply test as per section 23 of the Act.
8. The OFT will have regard to any reasonable description of a set of goods or services when determining whether the share of supply test is met. In this

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<sup>2</sup> Westfield has an interest in 10 shopping centres in England and Northern Ireland.

<sup>3</sup> OFT527, June 2009.

instance, the OFT considers shopping centre retail space to be a reasonable description of goods and services.

9. Section 23(4) of the Act specifies that the share of supply test applies to the UK or a substantial part of the UK. Past cases have confirmed that a substantial part of the UK refers to an area or areas of such size, character and importance as to make it worth consideration.<sup>4</sup> Greater Nottingham is defined here as Nottingham Urban Area (an Urban Area as defined by the Office for National Statistics), has a population of around 676,000, is the seventh largest Urban Area in the UK, and has an area of around 61 square miles. The OFT considers Greater Nottingham to be of a sufficient size, character and importance to be considered a substantial part of the UK.
10. CSC had an estimated share of supply of shopping centre retail space in Greater Nottingham of approximately [40-45] per cent prior to the acquisition. The parties' combined share of supply is estimated at approximately [65-70] per cent, following an increment of approximately [20-25] per cent.

### **Conclusion on Jurisdiction**

11. In light of the above, the OFT considers that, as a result of the acquisition, CSC accounts for a share of supply of shopping centre retail space in excess of 25 per cent in a substantial part of the UK. Consequently, the OFT believes that the share of supply test, as per section 23(2) of the Act, is met and that a relevant merger situation has been created.

### **FRAME OF REFERENCE**

#### **Product Scope**

12. Prior to the acquisition, CSC and BRLP overlapped in the supply of shopping centre retail space in Nottingham city centre, each owning and operating one of the two main in-town shopping centres.
13. The OFT's approach is first to consider the narrowest plausible candidate market in which the parties overlap – in this case, shopping centres – and

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<sup>4</sup> See, for example, *R. v MMC Ex p. South Yorkshire Transport Limited* [1993] 1 W.L.R. 23 at pp.32.

then whether such a narrow candidate market may be widened through, in the first instance, demand-side substitution.<sup>5</sup>

14. Shopping centres have two principal customer groups – retailers and shoppers – which are inter-dependent, forming a two-sided platform with the centre acting as an intermediary.<sup>6</sup> For example, worse contractual terms offered by the centre to retailers may reduce the demand from retailers for retail space at the centre. The shift in retailer mix will likely have a knock-on effect, reducing demand from shoppers.<sup>7</sup> As shopper 'footfall' is of value to retailers, demand for retail space may decline further and thus a feedback effect is created. The same feedback effect may be created following a diminished competitive offering to shoppers at the outset. The result in this example is to amplify the effect on revenue of a worsening of the competitive offer on one side of the platform.<sup>8</sup>
15. The OFT considers in its assessment below the potential loss of competition for both retailers (for example, the possibility of worse contractual terms) and shoppers (for example, a poorer quality of centre, service level, or retailer mix). However, the OFT considers that the incentives of the centres to maximise shoppers and footfall, may be

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<sup>5</sup> See *Merger Assessment Guidelines*, Joint publication of the Competition Commission and the OFT, September 2010, paragraphs 5.2.6 to 5.2.19.

<sup>6</sup> This is consistent with previous OFT practice in cases involving shopping centres. See Completed acquisition by Capital Shopping Centres of the Trafford Centre (*CSC/Trafford*), decision dated 21 June 2011 at paragraph 10.

<sup>7</sup> This is known as an indirect network effect, where the value of the product to one group of customers is affected by the number or type of another group of customers: the value of the centre to retailers is affected by the number and value of the shoppers drawn to the centre; and, similarly, the value of the centre to shoppers is affected by the retailers drawn to the centre. See *Merger Assessment Guidelines, supra*, paragraphs 5.2.20 and 5.7.16.

<sup>8</sup> By assessing the direct competitive constraints on the parties, any difference in the extent of demand and supply-side substitution between shopper and retailer is also considered implicitly as part of the competitive assessment.

expected to reduce the likelihood that, should competition concerns arise, these would result in a diminished offering to shoppers.<sup>9</sup>

16. Furthermore, maintaining quality and servicing of the centre is paid for by retailers in the form of an annual service charge. At the very least, the OFT considers an assessment of the effects of the merger on retailers to implicitly consider the effect on shoppers.<sup>10</sup> The OFT considers any additional effect on, or analysis relevant to, shoppers where relevant. As a result, the OFT considers the extent of demand-side substitution for retailers below.
17. In this case, the Victoria Centre and Broadmarsh represent effectively the northern and southern boundaries, respectively, of the principle shopping area in Nottingham city centre. Retail space located on the high street lies between the two centres, in particular on three main thoroughfares: Wheeler Gate and Listergate, Bridlesmith Gate and Clumber Street.
18. CSC submitted that shopping centres are purpose-built managed shopping areas of more than 50,000 square feet of total retail and leisure space. Centres can be both in-town and out-of-town and include factory outlet centres, food-store anchored district centres, open precincts and multi-layered covered centres but exclude retail parks and small arcades.
19. According to CSC, the two relevant shopping centres in this case compete with, and are competitively constrained by, retail space on the high street

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<sup>9</sup> The OFT considers the side of the platform with more price-sensitive customers will generally be charged a lower 'price' than the side of the platform where customers are less price sensitive. As greater price sensitivity is often associated with customers having more choices, it is generally the case that the side of the platform where customers have more choices is charged a lower price. The OFT considers this likely applies to shoppers in this case. As shoppers are charged a far lower price, if at all, than retailers for using the centres, this would imply that shoppers have more choices reducing the relative likelihood the merger would adversely affect them, other things being equal.

<sup>10</sup> For example, the retailer, conscious of the importance of the shopper and footfall to their business, is likely to implicitly consider the effect of the merger on competition between the centres for shoppers and the risk the acquisition may lead to a diminished offering to shoppers. The OFT has in the past, in cases involving two-sided platforms, considered that the indirect network effects and the resulting incentives on suppliers of the platform are such that competition concerns, should they arise, are more likely to arise on one side of the platform. For example, the OFT's approach to assessing media mergers has generally focused on the advertiser side (see, for example, *Review of the local and regional media merger regime: Final report*, OFT1091, June 2009).

and retail space outside Nottingham city centre for both retailers and shoppers.

20. The OFT's market investigation pointed to marked differences in the retail space provided by the landlord in a shopping centre and that on the high street. For example, shopping centres will generally levy a significant service fee on retailers for maintenance and servicing of the centre. While high street locations are subject to repair liabilities ('dilapidations') at the end of a lease, which are less likely in centres, retailers indicated that this will almost always be far less than a centre service charge.
21. Furthermore, shopping centres also commonly offer significant rental-free periods so as to formally charge a higher contractual rent. The higher rental value of units then increases the capital value of the centre. Shopping centres can offer greater incentive packages to prospective retailers – including up-front payments or capital contributions to assist with shop-fitting – although some retailers indicated these were common only with some centre landlords and only some retailers were able to point to these packages being available. Shopping centres can offer greater security while the high street offers greater control over the premises, as shopping centres can sometimes try to dictate shop presentation.
22. The vast majority of retailers in this case indicated that there were a number of areas of Nottingham city centre – in particular the three main thoroughfares, Listergate, Clumber Street and Bridlesmith Gate which competed for retail space with each of the shopping centres.
23. A number of these retailers pointed to other stores they operated on the high street in Nottingham or elsewhere in the UK. They indicated that competitiveness of location was more site dependent, and that factors such as footfall, rent, ease of access, demographics, other large stores with similar demographics in the vicinity and size of unit were taken into account rather than a straightforward distinction between shopping centre and the high street.
24. Many retailers were also able to point to some of the high street locations being used, or feasibly being used, in negotiations with the shopping centres in order to obtain better terms.

25. However, a small number of retailers highlighted a preference for locating in shopping centres or indicated that there were limits on the substitutability of the high street. The reasons for this were very mixed but included the following:
- the different offering of a centre better suited their business model and target customer
  - the guaranteed availability of car parking in a centre (or the limited availability in the high street), which they implied was important for their particular customer
  - the better overall tenancy package
  - the ease of obtaining A3 'food-usage' consent orders
  - the limited availability of feasible outlets on the high street, and
  - the recent poor performance of retail outlets on Clumber Street.
26. Internal documents provided by CSC indicated that shoppers tended to shop in both the shopping centres and other locations on the high street such as Clumber Street and Bridlesmith Gate.
27. The OFT considers that the evidence, on balance, points to a potentially strong constraint from 'high street' retail locations, as outlined above. However, as the OFT has found that the acquisition will not raise any competition concerns in the narrowest relevant candidate product market, that is, the supply of shopping centre retail space, it believes there is no need to come to a conclusion on the precise product scope.

### **Geographic Scope**

28. CSC stated that the relevant geographic scope will depend on the range of retail, catering and leisure facilities insofar as a shopper, valuing such a range, may travel further than they might if they wished to only visit an individual store. Notwithstanding this, CSC stated that shopping areas outside Nottingham, within a 45 minute drive-time catchment area around Broadmarsh, are also substitutes for the two centres for both shoppers and retailers.<sup>11</sup>

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<sup>11</sup> CSC highlighted the OFT's decision in *CSC/Trafford* in which a 60 minute drive-time was considered likely the appropriate catchment area, and on a cautious basis, an analysis was considered within Greater Manchester, (*CSC/Trafford, supra fn 6*, at paragraph 25, pp. 8)

29. Westfield also stated that retail space in Nottingham city centre faced competition for both retailers and shoppers from retail space located outside Nottingham, including Leicester's city centre and Fosse Park, and the shopping centres of Westfield Derby and Meadowhall in Sheffield. Although Westfield stated that the intensity of competition will differ from destination to destination. Westfield submitted internal marketing documents which confirmed it monitored and compared these other shopping areas to Nottingham.
30. The OFT's market investigation did not support the proposition of a competitive constraint on the Victoria Centre and Broadmarsh from retail locations outside of Nottingham. Retailers almost unanimously<sup>12</sup> stated that retail space outside of Nottingham city centre was not a substitute for retail space in the city centre. Some of the retailers indicated that the extent to which the difference in retail location involves a different city or town, these would be complementary, rather than substitutes.
31. In relation to shoppers, internal documents provided by CSC indicated that shoppers' choice of where to shop is dependent on what type of shopping trip is anticipated. For example, the internal documents suggested that shoppers visiting the Victoria Centre consider Derby as a 'big out-of-town day out'. The information provided also suggested that where the shoppers' home was located was a factor in where they may consider shopping. Overall, the information suggested that out-of-town retail locations are considered when planning a 'day out'.
32. However, further internal documentation submitted by CSC indicated that 80 per cent of shoppers to the Victoria Centre travelled an average of [25-35] minutes.<sup>13</sup>
33. In light of the above evidence, the OFT has, on a cautious basis, considered the likely effects of the acquisition on the narrowest candidate geographic market, that being Nottingham city centre, for the purposes of the competitive assessment. However, in the absence of competition concerns at the narrowest level, the precise geographic scope is left open.

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<sup>12</sup> There were two exceptions where retailers stated that retail parks located outside the city centre (but in the near vicinity) may be feasible alternatives.

<sup>13</sup> The data provided was for the years 2008, 2009 and 2010.

## **HORIZONTAL ISSUES**

34. The OFT has examined the possibility that the merged entity could unilaterally deteriorate its competitive offering. When products or services are highly differentiated, unilateral effects concerns can arise when the merger combines two close substitutes for a substantial proportion of customers and the countervailing constraints are not sufficient to mitigate the loss of competition.
35. To assess the competitive effects of the acquisition, the OFT considered the nature and extent of pre-existing competition between the shopping centres. Thereafter, the relevant counterfactual, that is, what would happen in the absence of the merger situation, is analysed. Finally, the effects of the merger are considered by comparing these two scenarios to determine whether the merger would result in a substantial lessening of competition.

### **Pre-merger competition between the Victoria Centre and Broadmarsh**

36. The Victoria Centre is comprised of 120 retail units accounting for 981,000 square feet of retail space, with John Lewis and House of Fraser as anchor tenants. Broadmarsh is comprised of 80 retail units accounting for 487,000 square feet of retail space, and is anchored by BHS, Argos, Boots and Wilkinsons. Combined, the shopping centres account for approximately [65-70] per cent of shopping centre retail space in Nottingham city centre.
37. Tenant marketing documents submitted by CSC point to competitive monitoring of, and benchmarking against, Broadmarsh, albeit alongside a number of other retail locations (such as Bridlesmith Gate, Listergate and Wheeler Gate, and Clumber Street) in Nottingham city centre.
38. CSC submitted that Broadmarsh is significantly run-down in contrast to the Victoria Centre. A range of information submitted by CSC, and discussed below, supports this proposition.
39. First, as of December 2011, Broadmarsh had [ ] units vacant (around [10-15] per cent of the total) and a further [ ] units ([15-20] per cent) held vacant for planned development. The Victoria Centre, which is almost

double the size of Broadmarsh, had [ ] held vacant for planned development. Retail landlords avoid vacant units because without a tenant – in addition to the lost rent – they must pay business rates and maintenance on the property. However, in shopping centres the values of other properties also suffer from the effect of a vacant unit. In addition to the wider appearance of a unit, vacant units do not attract shoppers and therefore do not contribute to footfall in the centre, or to fixed overheads. Consequently this can have a negative effect on the centre as a whole.

40. Second, CSC's tenant marketing documents pointed to a significantly different retailer mix in the two centres, with a greater number of discount and 'value' stores at Broadmarsh. This is supported by benchmarking metrics, for example, gross sales densities are significantly lower at Broadmarsh: CSC markets the Victoria Centre as having a gross sales density of £677 per square foot while Broadmarsh has a gross sales density of £522 per square foot (29 per cent less).
41. Third, there is little evidence that retailers were using the presence of Broadmarsh as a means to obtain better tenancy terms in negotiations with CSC at the Victoria Centre. CSC submitted that there is limited use of any alternative retailer locations in negotiations with the Victoria Centre and that which does occur refers generally to other retail locations in Nottingham city centre, or specifically to the high street rather than Broadmarsh.
42. Westfield stated that, although Broadmarsh competed with the Victoria Centre for retailers [ ] in general Westfield noted that competition between the centres was not especially strong relative to competition with other retail space in Nottingham city centre.
43. The OFT's market investigation supported the submissions of CSC and Westfield that there was limited competition between the centres prior to the acquisition for retailers or shoppers. In fact, the majority of retailers that responded to the OFT stated that they did not consider the centres to currently compete at all, pointing to them as materially different competitive offerings. There was a perception that Broadmarsh had a lower value retail mix than the Victoria Centre with a significant number of vacant units, short-term lets and discount or charity shops whereas Victoria Centre had more high-profile 'premium' tenants. The overall

impression was that the two centres offered materially different trading environments and attracted different types of shoppers.

44. The majority of retailers that responded to the OFT also stated that the presence of the other centre **in their current forms** had no impact on their tenancy negotiations.<sup>14</sup>
45. This view of limited competition was prevalent among Victoria Centre retailers, some of which indicated they had not approached Broadmarsh, nor had they been approached by the centre, at the time of signing a lease despite the presence of vacant units. One retailer indicated that Broadmarsh had simply not offered a competitive package.
46. This view was also shared by retailers of both centres who indicated, for example, that the centres served distinctly different parts of the city and different shoppers. As a result, the majority of duplicate retailers indicated that they considered the centres to be complementary rather than substitutes. The OFT asked these retailers of the extent to which partial substitution was possible across both centres; that is, the extent to which they may have varied – or threatened to do so in negotiations – the size of their stores in each centre dependent on the contractual terms offered by each centre. However, there was no evidence of this.<sup>15</sup>
47. Internal documents provided by CSC indicated that whilst shoppers viewed the two shopping centres as 'anchors' in the city, they tended to shop only at the Victoria Centre and other high street locations such as Clumber Street and Bridlesmith Gate. The documents indicated that the shoppers surveyed considered Broadmarsh a thoroughfare, that they had no reason to go there, that shopping stops just short of the Broadmarsh, and that the Broadmarsh had been going downhill for a long time and nothing was being done.

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<sup>14</sup> There were some exceptions to this but, in each case, the negotiation was dependent on the proposed redevelopment of Broadmarsh going ahead. See the section on the **Counterfactual** below.

<sup>15</sup> Again, there was an exception to this but the negotiation in that case was dependent on the proposed redevelopment of Broadmarsh going ahead. See the section on the **Counterfactual** below.

### Pre-merger competitive constraint from Nottingham high street

48. CSC submits that the two shopping centres are constrained by other retail space located on the high street in Nottingham city centre.
49. Tenant marketing documents submitted by CSC point to monitoring and awareness of a number of other high street locations in Nottingham city centre, including Wheeler Gate and Listergate, Clumber Street and Bridlesmith Gate, alongside Broadmarsh. In the same documents, while CSC market the Victoria Centre as being the leader in Nottingham on a number of metrics (total footfall, total retail sales, and gross sales density), a number of high street locations rank higher than Broadmarsh and closer to the Victoria Centre. For example:<sup>16</sup>
- (a) **Footfall:** Victoria Centre (23 million), Clumber Street (19.8 million), Broadmarsh (17 million), Wheeler Gate and Listergate (6.1 million), and Bridlesmith Gate (5.6 million)
  - (b) **Retail sales:** Victoria Centre (56 per cent of the five locations), Wheeler Gate and Listergate (19 per cent), Broadmarsh (14 per cent), Clumber Street (5.7 per cent), and Bridlesmith Gate (4.9 per cent), and
  - (c) **Gross sales densities** (which takes into account the different sizes of each retail location): Victoria Centre (£677 per square foot), Bridlesmith Gate (£672), Clumber Street (£654), Wheeler Gate and Listergate (£652), and Broadmarsh (£522).
50. Westfield noted that in general retailers regularly used terms offered by high street and city centre properties to negotiate tenancy terms in their shopping centres. Specific to Nottingham, Westfield considered that there are several strong retail locations outside of shopping centres, including Clumber Street, Listergate and Bridlesmith Gate [ ].
51. A small number of retailers highlighted a preference for locating in shopping centres or indicated that there were limits on the substitutability of the high street (such as the availability of car-parking and the ease of obtaining A3 'food-usage' consent orders).

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<sup>16</sup> Annex 1 of CSC's response, dated 13 December 2011, to an OFT request for information.

52. Nevertheless, the vast majority of retailers in this case indicated that there were a number of areas of Nottingham city centre – in particular the three main thoroughfares pointed to above, as well as Market Square – which competed for retail space with each of the shopping centres. In many cases, these high street locations offered a particularly close substitute to the Victoria Centre and were considered to be the retailer’s first or second choice, alongside the Victoria Centre, and a closer substitute than Broadmarsh.<sup>17</sup> Alternatives to Broadmarsh were even more widely available.
53. A number of these retailers pointed to other stores they operated on the high street in Nottingham or elsewhere in the UK. They indicated that competitiveness of location was more site dependent, and that factors such as footfall, rent, ease of access, demographics, other large stores with similar demographics in the vicinity and size of unit were taken into account rather than a straightforward distinction between shopping centre and the high street.
54. Many retailers were also able to point to some of the high street locations being used, or feasibly being used, in negotiations with the shopping centres in order to obtain better terms.
55. Indeed, even the small number of retailers who highlighted a preference for locating in shopping centres or who indicated that there were limits on the substitutability of the high street were, in the vast majority of cases, unconcerned by the merger or did not consider the two centres to compete closely with each other in their current form.
56. On balance, therefore, and on the basis of the above, the OFT considers there to be compelling evidence pointing to a strong competitive constraint, that will continue to be exerted on CSC post-merger, from a number of alternative retail spaces on the 'high street' in Nottingham city centre, including Listergate, Clumber Street and Bridlesmith Gate. While the OFT has been unable to determine the exact extent of the substitution between these alternative retail space locations and CSC’s shopping centres, evidence points to the constraint they exert on the shopping

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<sup>17</sup> Various reasons were given for this, including the uncertainty over future development at Broadmarsh. See the **Counterfactual** section below.

centres being equal to, or greater, than the constraint the shopping centres (in their current form) exert on each other.

### **Conclusion on competition prior to the acquisition**

57. The OFT considers shares of supply on the narrowest candidate market, that is, the supply of shopping centre retail space in Nottingham city centre, may raise prima facie competition concerns. However, the evidence before the OFT points to this overstating the degree to which the parties competed pre-acquisition.
58. In contrast, internal documents and third party evidence indicates that the two shopping centres (in their current form) were not competing closely.
59. Furthermore, internal documents and third party evidence also indicates that the parties were constrained by retail space located on the high street in Nottingham city centre (in particular, on Clumber Street, Listergate and Bridlesmith Gate).

### **COUNTERFACTUAL**

60. The OFT assesses the competitive effects of a merger by comparing the prospects for competition with the merger against the competitive situation absent the merger.<sup>18</sup> The description of the latter, the counterfactual, is affected by the extent to which events or circumstances are foreseeable. In practice, the OFT generally adopts the pre-merger situation as the counterfactual against which to assess the impact of the merger. However, the OFT will assess the merger against an alternative counterfactual where there is a realistic prospect of a counterfactual that is more competitive than prevailing conditions.
61. In this case, prior to the acquisition, both BRLP and CSC had sought planning permission for the redevelopment of Broadmarsh and Victoria Centre, respectively. CSC submitted that Broadmarsh had received planning permission for a £700 million redevelopment offering more than 220 new retail outlets. A number of retailers contacted by the OFT pointed to a redeveloped Broadmarsh as being a significantly stronger competitive offering, and a closer substitute, to the Victoria Centre than at present.

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<sup>18</sup> See *Merger Assessment Guidelines, Supra fn 5*, section 4.3.

62. Clearly, the extent to which we consider each of these redevelopment plans as foreseeable, absent the merger situation, materially affects the counterfactual in this case and so each are considered in turn.

### **Redevelopment of the Victoria Centre**

63. CSC has submitted a substantial planning application for the Victoria Centre with Nottingham City Council. This application is still pending. [ ].<sup>19</sup> The planned extension covers part of a site owned by the City Council meaning that, in addition to planning permission, the redevelopment also requires agreement from the City Council to sell its part of the site. [ ]. The planning application for the Victoria Centre proposes an increase in the size of the centre by around 591,000 square feet (an increase of around 50 per cent on the existing retail space).<sup>20</sup>
64. As planning permission is still pending and neither CSC nor the City Council have provided information on the possible outcome of the process, the OFT does not consider redevelopment of the Victoria Centre to be sufficiently certain to warrant adapting the relevant counterfactual in this case.

### **Redevelopment of the Broadmarsh Centre**

65. Nottingham City Council has approved an outline master plan submitted by BRLP for the full redevelopment of Broadmarsh. However, to secure the requisite planning permission and progress the redevelopment, BRLP is required to submit detailed plans for each of the phases to the overall development. BRPL had submitted its plans for the first phase of the development and had received planning permission subject to the negotiation and completion of section 106 agreements with the City

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<sup>19</sup> It should be noted that CSC had been granted planning permission in November 2011 to make alterations to replace the existing entrance structures and make improvements to the exterior of the Victoria Centre.

<sup>20</sup> Not all of this additional space would be allocated for retail use. The planning application sought approval for retail, leisure, and office accommodation, as well as the demolition of an existing multi-storey car park and the development of a new multi-storey car park underneath the extension.

Council.<sup>21</sup> This first phase includes limited additional retail space for which BRLP had pre-let arrangements with retailers (CSC submitted these were with [ ] although the OFT has been unable to confirm this).

66. BRLP had not submitted detailed plans for the subsequent phases of the redevelopment. CSC submitted that, prior to the acquisition, BRLP had not yet approved and was thus not yet committed to the redevelopment plans for which planning permission had been granted.
67. Westfield submitted market research, conducted on its behalf by CACI in September 2011, which considers two scenarios for the retail development that could take place in Nottingham from now until 2015: first, extension of Broadmarsh and, second, extension of Victoria Centre and Broadmarsh. The research pointed to additional retail demand (or 'headroom' for additional retail space) in Nottingham of up to 500,000 square feet. [ ].<sup>22</sup>
68. However, beyond this third party market research, Westfield did not submit any documents that point to this research having actually influenced its decision to sell the centre. Indeed, Westfield submitted that sale of the Broadmarsh reflected a wider general strategy of reducing exposure to smaller assets in the UK and redirecting capital and management resources to larger scale development opportunities that it believes will generate better long-term returns. As a result, it was, according to Westfield, public knowledge that Westfield was seeking to sell a number of properties in the UK. In this context, CSC made an unsolicited offer for Broadmarsh, which Westfield accepted. Westfield stated that the sale of Broadmarsh was due to this broader strategy and the offer received from CSC and not any decision taken by CSC to pursue an extension to the Victoria Centre or by Nottingham City Council with regards to planning.
69. The OFT's market investigation pointed to the absence of development at Broadmarsh as the principal reason that competition between the two

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<sup>21</sup> For final planning permission to be given, section 106 agreements need to be entered into by the local planning authority and a landowner. A section 106 agreement is a type of planning obligation authorised by the Town and Country Planning Act 1990 (s. 106) and is a legal agreement between the planning authority and the applicant (generally a landowner or developer), used following the granting of planning permission to, for example, secure community infrastructure to meet the needs of residents or mitigate the impact of new developments on existing community facilities. Section 106 agreements are required for a development to be deemed acceptable and given final clearance to proceed.

<sup>22</sup> [ ].

centres was limited. A number of retailers indicated that redevelopment of Broadmarsh would have made it a significantly closer substitute to the Victoria Centre for retailers and shoppers. One retailer in particular stated that the proposed Broadmarsh would be a direct competitor and close alternative to the Victoria Centre, but this was entirely dependent (as were Broadmarsh's pre-let arrangements) on the full redevelopment of Broadmarsh.

70. A number of retailers were sceptical as to the prospects for redevelopment under the previous ownership of Westfield, highlighting that redevelopment of the centre had been discussed for the past five to 10 years without any development having ever taken place. Most retailers contacted stated that it was this delay in development that led to Broadmarsh becoming relatively rundown. Indeed, a number of retailers considered that the acquisition of Broadmarsh by CSC may make redevelopment of the latter centre more likely to occur.
71. The OFT notes that BRLP had previously sought, and was granted, planning permission for redevelopment of Broadmarsh in 2004 and 2007, which would have increased its floor space considerably. These previous planning permissions expired in 2009 without any redevelopment having taken place.<sup>23</sup>
72. The OFT does not consider, on the basis of the evidence above, that the redevelopment plans for Broadmarsh were sufficiently far advanced prior to the acquisition, or that Westfield's commitment to redevelopment sufficiently certain, to warrant an alternative counterfactual to the prevailing conditions of competition.

### **Comparing the impact of the merger with the relevant counterfactual**

73. The OFT considers that the evidence points to a limited competitive constraint exerted by each of the shopping centres on the other prior to the acquisition and, in the absence of redevelopment taking place at Broadmarsh, such that there is no realistic prospect of a substantial

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<sup>23</sup> The OFT considers that, given the wider economic context over the last 10 years, and both retail rental values and property capital appreciation over that time, the prospect for redevelopment would likely have been higher in 2004, when initial planning permission was received, than when subsequent permission was sought in 2011. The OFT's market investigation also pointed to this conclusion with retailers indicating that the wider retail environment in recent years meant that the balance of negotiations had shifted towards retailers.

lessening of competition relative to the prevailing conditions prior to the acquisition.

74. Further, the OFT considers that the evidence does not point to the redevelopment of Broadmarsh taking place with sufficient certainty to warrant regarding a counterfactual different to the prevailing conditions of competition as realistic; that is, neither of the proposed redevelopments taking place.
75. Even if the proposed redevelopment of Broadmarsh was to have gone ahead, absent the merger situation, evidence suggests that retail space on the high street would have remained a strong competitive constraint to both shopping centres.

### **THIRD PARTY VIEWS**

76. Responses were received from twenty retailers, including those that had leases only at either of the centres, at both of the centres and at neither of the centres but were located in other parts of Nottingham city centre. Responses were received from two competitors and a number of shoppers.
77. The majority of retailers were unconcerned as they did not consider the shopping centres to be close alternatives or considered them complementary. Three retailers raised merger-specific concerns about the concentration of viable retail space but each of these generally appeared dependent on the redevelopment of Broadmarsh, leading to the two centres becoming materially closer substitutes. These concerns have been addressed above.
78. Some retailers, who stated that the acquisition was pro-competitive, considered that under the ownership and management of CSC, Broadmarsh was more likely to be re-developed.
79. A small number of shoppers contacted the OFT regarding the merger. One shopper expressed a concern that retailers' contractual terms would suffer post-transaction. The remaining shoppers, all of whom submitted identical submissions, stated that Broadmarsh and the Victoria Centre are entirely different environments and that this diversity should be preserved. They stated that CSC should not be permitted to own both centres in Nottingham city centre.

## ASSESSMENT

80. The parties overlap in the supply of shopping centre retail space in Nottingham city centre.
81. In light of mixed evidence gathered by the OFT in relation to the relevant frame of reference, on a cautious basis, the OFT undertook its assessment on the supply of shopping centre retail space in Nottingham city centre.
82. Evidence suggests there was limited competition between the two shopping centres prior to the acquisition. There also appears to have been a significant competitive constraint from other retail locations in Nottingham city centre, which would continue post-merger.
83. Concerns from retailers regarding the acquisition were generally dependent on the assumption that a redeveloped Broadmarsh would be a significantly closer substitute to the Victoria Centre than it is currently. However, the OFT does not consider the plans for the redevelopment of Broadmarsh sufficiently certain prior to the acquisition to warrant altering the counterfactual from the prevailing conditions of competition. Indeed, this is supported by many retailers who stated the acquisition may be pro-competitive in that it may make redevelopment of Broadmarsh more likely, making it a feasible alternative to the Victoria Centre, which it is not currently.
84. Even if the proposed redevelopment of Broadmarsh were to have gone ahead, evidence suggests that retail space on the high street would have remained a strong competitive constraint to both shopping centres.

## CONCLUSION

85. The OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## DECISION

86. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.