

COMPETITIVE EDGE RETAIL & CONSUMER

October 2016

RECENT COMPETITION LAW TRENDS

- ▶ The Commission continues its efforts to tackle what it views as unfair tax advantages, particularly against big companies such as Apple (see press release [here](#)) where the amount of tax paid is very small against the profit they make. The action taken by the Commission is highly politicised and contentious – Commission President Juncker's State of the Union speech highlighted that this was the "social side" of competition law, emphasising the importance of a fair playing field (see [here](#)) – however it is notable that these issues arise because of the lack of tax harmonisation across Member States. The question at the heart of the Commission's state aid analysis is whether the tax settlements concerned can be said to be "selective" and some see the Commission as overstepping the mark in terms of what amounts to selectivity. Following allegations that the Commission was unfairly targeting US companies, particularly following its Apple decision, a European Parliament member recently announced that an investigation into a European company was on the Commission's agenda. Whilst the Commission has defended its approach and clearly has appetite to continue this line of investigations, debate will persist about whether the Commission's treatment of such tax measures is appropriate.
- ▶ A statutory review of the role of the Groceries Code Adjudicator (**GCA**) is ongoing and will cover whether the GCA is doing her job well and the continuation of her current remit, but also a wider consultation on whether her remit should be expanded e.g. to primary producers and indirect suppliers. Despite calls in the press for the GCA's remit to be extended, the GCA herself is understood to oppose any extension as this would stretch resources and make it more difficult to stay focussed and build on her successes. In any event, BIS will not have the power to make changes to the GCA's remit following its review; this would require an amendment to primary legislation or a decision by the CMA to conduct a further investigation into the sector. That said, BIS' review will hopefully bring more clarity to the GCA's role and allow the GCA to build on the high-profile work done to date, such as her investigation into Tesco.
- ▶ Online markets are once again a hot topic for the CMA. On 12 August 2016 the CMA fined Trod Limited £163,371 for infringing competition law by agreeing with GB eye Limited (trading as 'GB Posters', who received immunity from fines) not to undercut each other's prices for posters and frames sold on Amazon's UK website (see [here](#)). The parties used automated re-pricing software to implement their illegal agreement. Automated re-pricing software allows sellers to monitor competitors' prices and automatically re-price products according to price fluctuations. This type of software is typically used by Amazon marketplace sellers and is easily accessible through the internet. The case is a valuable reminder that the CMA can and will target smaller businesses where they enter into anti-competitive agreements, and particularly that online algorithms should not be used as a tool to implement such agreements. Similar cases can be expected to follow since online and digital markets are a priority area for the CMA, but competition authorities also face the wider question of whether existing rules and guidance on anti-competitive agreements are still fit for purpose in the context of algorithmic pricing.

E-COMMERCE INQUIRY

- ▶ The European Commission's [Preliminary Report](#) on its e-commerce sector inquiry, published on 15 September 2016, provides updated guidance on how certain practices in the online world should be assessed, including identifying specific practices which may limit online competition. Businesses are advised to review their current distribution practices to ensure they comply with competition law – the Commission is expected to take enforcement action once its report is finalised, and other competition authorities are likely to follow suit.
- ▶ New insight from the Commission into potentially anti-competitive practices:
 - ▶ The Commission found a significant increase in the use of **selective distribution arrangements**, with a requirement for a retailer to have at least one brick and mortar store being common (often to address the issue of free-riding by online-only retailers). The Commission has made it clear that it is doubtful that the use of selective distribution systems and the criteria they contain are always justified by the nature of the goods. It has therefore stated that it will consider withdrawing the benefit of the Vertical Restraints Block Exemption where such requirements have appreciable anti-competitive effects and in particular, that it may investigate possible anti-competitive clauses restricting online sales.
 - ▶ A retailer must be free to set their own prices independently but traditionally **RRPs** have been seen as acceptable provided they do not amount to a fixed or minimum price. However, almost a third of respondents said they complied with price indications given by a manufacturer – we expect that the Commission will pay close attention in future to distribution networks where this is prevalent, to ensure RRP's are not used as a form of resale price maintenance, for example through informal pressure to comply.

- ▶ The Commission has observed that more manufacturers are selling directly online and so are more frequently competing directly with their retailers in an online environment. This has led to new forms of restrictions which the Commission will scrutinise more closely in future. In particular, the Commission has flagged that restrictions **limiting retailers' ability to use or bid on trademarks e.g. for Google Adwords** in order to get a preferential listing on search engines may raise concerns under Article 101. On the other hand, it has indicated that restrictions on the ability to use a manufacturer trademark/brand name in the retailer's domain name may be permissible as they help avoid confusion with manufacturer websites.
- ▶ Attitudes to **bans on sales via online marketplaces** have varied, with the French and German authorities adopting a stricter approach whereas the rest of the EU has tended to view them as acceptable. The Commission has now concluded that such bans do not equate to an outright ban on internet sales and should not be considered a "hardcore" restriction, but that does not mean that all such bans will be acceptable, particularly where arrangements fall outside the Vertical Restraints Block Exemption.
- ▶ **Geo-blocking** is prevalent, particularly in the UK. Where geo-blocking is a unilateral decision by a distributor or retailer, this falls outside the remit of competition law, unless the distributor or retailer can be regarded as dominant. However, where retailers face contractual restrictions on making cross-border sales within the EEA (including those communicated informally or orally) these may breach competition law.
- ▶ What happens next?
 - ▶ The Commission's conclusions are likely to be incorporated into the next version of the Vertical Restraints Block Exemption and associated guidance, which must be replaced before it expires in 2022. Whilst the existing Vertical Restraints Block Exemption and guidance will continue to apply until then, in some instances the Commission's recent conclusions mark a departure from the existing legal framework. It is also likely that in appropriate circumstances, the Commission will consider enforcement action. It is therefore important to consider the implications of the Commission's latest thinking now, rather than waiting, particularly if your agreements fall outside of the safe harbour provided by the Vertical Restraints Block Exemption.
 - ▶ The Commission's Preliminary Report was published on 15 September 2016 following an 18 month inquiry, which is due to conclude with the Commission's final report in Q1 2017. The Preliminary Report is open for consultation until 18 November 2016.

ROUND UP OF RECENT DEVELOPMENTS

MATTER	UPDATE
Nestlé and PAI Partners joint venture	On 14 July 2016 the Commission approved the creation of Froneri, a joint venture between PAI Partners and Nestlé, which will manufacture and market ice cream products in and outside of Europe, and frozen products within Europe. As the parties are not close competitors in the EEA ice cream markets and there remains sufficient competition with other ice cream manufacturers, the Commission concluded that the joint venture would not significantly impede competition. On 3 October 2016 the parties announced that their transaction has now completed. Read the full decision here and for more information on the transaction click here .
Anheuser-Busch InBev (AB InBev) and SABMiller (SAB) merger	The Commission has cleared the merger between the world's largest beer companies, conditional on AB InBev divesting SAB's European beer business. AB InBev had offered from the outset to divest part of SAB's business to Asahi and has since also offered the entirety of SAB's assets in Central and Eastern Europe for divestment. On 29 July 2016, SAB's board backed AB InBev's revised bid of £79 billion and the transaction is now expected to go live in October this year. For more information click here and here .
Commission Competition Merger	On 1 August 2016 the Commission published its latest analysis of recent EU

MATTER	UPDATE
Brief - July 2016	<p>merger decisions. The first case to be considered is the £4.43 billion acquisition of can manufacturer Rexam by rival Ball, cleared at phase 2. The analysis focuses on the factors to be considered when assessing a large remedies package and the adoption of customer-centric catchment areas as the basis for defining the geographic market.</p> <p>For more information click here.</p>
EU Parliament publishes a Legal Perspective of the regulatory framework and challenges for franchising in the EU	<p>On 3 October 2016, the EU Parliament's Policy Department published a report on the regulatory framework and challenges for franchising in the EU, exploring how EU regulations impact upon franchising. The paper concluded that franchising in the EU was failing to fulfil its potential partly because of a dysfunctional regulatory system in the EU. Reform of the EU regulatory system was suggested via the introduction of a franchise focused European Legal Act.</p> <p>In particular, it was found that competition law places franchise chains at a disadvantage compared to corporate chains. Given that resale price maintenance is prohibited (as a hard-core restriction) and that the provision of lists of recommended/maximum prices by a franchisor to a franchisee is allowed, vertically integrated corporate chains are better positioned to offer price promises than SMEs and individuals. Corporate chains appear to be stronger brands capable of offering price consistency, unlike franchised brands.</p> <p>The study also found that vertical restraints may not be anti-competitive in situations where the franchise systems faces substantial upstream and downstream competition. It therefore suggested introducing a proposal made by the OECD to allow franchisors to use retail price maintenance in certain circumstances. Greater flexibility and control for franchisors' over internet strategy was also recommended.</p> <p>The full report is available here.</p>
Commission investigates AB InBev's practices on Belgian beer market	<p>The Commission has opened an investigation to assess whether AB InBev has abused its dominant position on the Belgian beer market by restricting imports of its beer from less expensive countries (e.g. France), to the Belgian market. The Commission will look at potentially anti-competitive practices by AB InBev such as possibly (i) altering its product packaging, making it harder to sell in other countries and (ii) limiting access to rebates and key products to non-Belgian retailers.</p> <p>For more information click here.</p>
SPAR fined €10.21 million for illegal pricing agreements	<p>The Cartel Court of Vienna has imposed a fine of €10.21 million against SPAR for entering into illegal vertical pricing agreements with suppliers in Austria between July 2002 and December 2013. The anti-competitive practices concern a range of products including beer, non-alcoholic drinks and baking products. Read the full statement (in German) here.</p> <p>This decision follows the judgment of the Austrian Supreme Court last year which increased the fine imposed on SPAR by the Austrian Cartel Court from €3 million to €30 million for illegal pricing arrangements relating to dairy products. Read full decision (in German) here.</p>
Apple investigated in Russia over alleged price-fixing	<p>Russia's Federal Anti-Monopoly Service (FAS) has opened an investigation into Apple over possible price-fixing. The FAS will be looking at whether there are signs of price setting coordination between Apple and 16 retailers of the iPhone 6s and iPhone 6s Plus, which led to fixing prices in the Russian market and the adoption of mandatory recommended prices. Apple has rejected the accusation.</p> <p>For more information click here.</p>
LEGO commits to fairer conditions for online sales	<p>Following complaints by retailers that Lego was putting sales over the internet at a disadvantage by giving higher rebates for shop sales, the German competition</p>

MATTER	UPDATE
	<p>authority initiated a probe into LEGO's discount system. In July 2016 it was announced that LEGO intended to change its online-sales conditions, to enable online retailers to obtain the same level of discount as brick-and-mortar retailers.</p> <p>For more information click here.</p>
<p>Ladbrokes / Coral phase 2 merger inquiry</p>	<p>On 26 July 2016 the CMA published its final report on the proposed merger between Ladbrokes and Coral, the second and third largest licensed betting offices in the UK by number of shops. Having considered responses to its provisional findings in May the CMA has identified 642 local areas where the merger may be expected to result in a substantial lessening of competition. To resolve these concerns, the parties must sell 350 to 400 shops to up-front buyers approved by the CMA. The CMA is currently consulting on these undertakings. On 12 September, the CMA published a notice of proposal to accept Final Undertakings and public consultation inviting any interested person to comment on the parties' proposed undertakings by 26 September 2016.</p> <p>Read the final report here and notice of proposal to accept final undertakings here.</p>
<p>Celesio / Sainsbury's Supermarkets Limited phase 2 merger inquiry</p>	<p>Following its phase 2 investigation the CMA published its final report on 29 July 2016, which concluded that the proposed acquisition by Celesio of Sainsbury's pharmacy business may be expected to result in a substantial lessening of competition in 12 local areas. However, the CMA report further states that the divestiture of certain Lloyd's stores would be an effective and proportionate remedy to address this. The CMA accepted interim undertakings made by the parties on 25 September 2016 and published a notice of proposal to accept Final Undertakings and public consultation (with interested parties invited to comment by 5pm on 15 October 2016) on 30 September 2016. The undertakings given by the parties mainly consist of divesting pharmacies to approved purchasers in specified areas and implementing certain asset management practices.</p> <p>More information is available here.</p>
<p>VTech Holdings / Leapfrog Enterprises phase 2 merger inquiry</p>	<p>The CMA's initial investigation into the completed acquisition by VTech Holdings of Leapfrog Enterprises has found that the companies compete closely in the supply of toddler electronic learning toys and child laptops/tablets in the UK. The CMA gave VTech until 25 August 2016 to offer proposals to address the CMA's competition concerns. However, as no undertakings were subsequently offered by VTech, the CMA has now referred the merger for an in-depth investigation. Following the interim order made by the CMA on 9 September 2016, VTech appointed a monitoring trustee on 19 September 2016. This followed the publication of an issues statement a few days earlier, explaining the reasons why the proposed acquisition might adversely affect competition – the CMA's theories of harm focus on the loss of competition for certain types of toys, and loss of future competition in innovation.</p> <p>For more information click here.</p>
<p>Hain Frozen Foods / Orchard House phase 1 merger inquiry</p>	<p>In May 2016 the CMA announced that Hain Frozen Food's (Hain's) acquisition of Orchard House Foods would be referred for an in-depth phase 2 investigation unless acceptable undertakings were offered. Hain has since proposed to sell its own-label freshly squeezed fruit juice business to Multiple Marketing Limited. The CMA accepted the undertakings in lieu of reference for the acquisition on 22 September 2016. It considered that the sale of Hain's own-label freshly squeezed fruit juice business was adequate to address concerns relating to the transaction.</p> <p>For more information click here.</p>
<p>Co-operative / Booker Retail Partners phase 1 merger inquiry</p>	<p>On 6 June 2016 the CMA cleared the acquisition by Co-operative Foodstores of 15 Budgens grocery stores from Booker Retail Partners. The CMA found that the acquisition will not result in a substantial lessening of competition in the retail</p>

MATTER	UPDATE
	<p>supply of groceries (a) on a national basis, due to the limited number of stores being acquired, and (b) on a local basis, due to sufficient competitive constraints, including from retailers outside of the usual competitor set considered by the CMA.</p> <p>Read the full decision here.</p>
<p>Mapil Bidco / Chain Reaction Cycles (CRC) phase 1 merger inquiry</p>	<p>On 30 June 2016 CMA cleared the acquisition of CRC and its affiliates by Mapil Bidco. The parties overlap in the online retail supply of tri-sport goods in the UK and are one of each other's closest competitors. However the CMA found that constraints from other online competitors were sufficient to alleviate horizontal competition concerns. Additionally, there were no vertical competition concerns as the combined entity would not be able to foreclose other retailers.</p> <p>Read the full decision here.</p>
<p>Sainsbury's Home Retail Group phase 1 merger inquiry</p>	<p>On 22 July 2016 the CMA cleared Sainsbury's acquisition of Home Retail Group. There had been concerns that the overlap in the retail supply of certain non-food products could lead to a substantial lessening of competition; however, due to (i) low shares of supply, (ii) little competition between the parties and (iii) sufficient competitor competition, the CMA has decided not to refer the merger for an in-depth investigation. The transaction was subsequently approved by the Financial Conduct Authority on 25 July 2016.</p> <p>Read the full decision here.</p>
<p>Hammerson plc / Grand Central phase 1 merger inquiry</p>	<p>Hammerson plc, the owner of the Bullring shopping centre in central Birmingham, acquired the Central Shopping Centre situated above Birmingham New Street train station in February 2016. On 28 July 2016 the CMA cleared the transaction as (a) the shopping centres are not considered to be close alternatives and (b) sufficient competitive constraint will remain from a range of different retail space options within Birmingham City Centre, in particular from the 'high street' offering.</p> <p>Read the full decision here.</p>
<p>Dining Club Group / Hi-Life Diners Club phase 1 merger inquiry</p>	<p>On 8 August 2016 the CMA served an initial enforcement order on Bridgepoint Group and affiliated entities in relation to the completed acquisition of Hi-Life Diners Club. While the CMA considers whether the merger has resulted or may be expected to result in a substantial lessening of competition the parties must refrain from any actions which would lead to the integration of the businesses. On 20 September 2016, the CMA announced the launch of its merger inquiry; the deadline for a phase 1 decision is on 15 November 2016.</p> <p>For more information click here.</p>
<p>Co-operative / ML Convenience and MLCG phase 1 merger inquiry</p>	<p>On 23 August 2016 the CMA announced the launch of its inquiry into the acquisition by Co-operative Foodstores of 8 or more My Local grocery stores from ML Convenience and MLCG. The phase 1 decision deadline is 19 October 2016.</p> <p>For more information click here.</p>
<p>Trod Limited / GB eye Limited cartel</p>	<p>On 12 August 2016 the CMA issued a decision finding Trod Limited and GB eye Limited had infringed competition law by agreeing (in certain circumstances) to not undercut each other's prices for posters and frames sold on Amazon's UK website. This agreement was implemented using a computer algorithm. The CMA imposed a fine on Trod of £163,371 which reflected a 20% co-operation discount. GB eye, who reported the cartel under the CMA's leniency policy, has not been fined. The non-confidential version of the decision was published on 30 September 2016 and is available on the CMA's case page.</p> <p>For more information click here.</p>
<p>Court upholds Somerfield and</p>	<p>The Court of Appeal has upheld an appeal brought by Gallaher Group and</p>

MATTER	UPDATE
Gallaher appeal	<p>Somerfield Stores against a judgment of the High Court dismissing their claims for repayment of fines paid following a decision relating to the anti-competitive pricing of tobacco. Following assurances made in 2008, the OFT (now the CMA) had made a repayment to another party to the original decision. The Court of Appeal found that the OFT's refusal to make equivalent payments to the appellants was a breach of 'the principle of fair and equal treatment' and 'not objectively justified'.</p> <p>The full judgment can be found here.</p>
CMA investigates anti-competitive practices: Light fittings sector	<p>On 16 August 2016 the CMA launched an investigation into suspected breaches of competition law in the light fittings sector. At this time there is insufficient evidence of an infringement for the CMA to issue a statement of objections. The CMA will decide whether to proceed with the investigation in November 2016.</p> <p>For more information click here.</p>
CMA report on compliance with the Groceries (Supply Chain Practices) Market Investigation Order 2009	<p>On 12 July 2016 the CMA published a report on compliance with an order requiring the UK's 10 largest grocery retailers to incorporate a Groceries Supply Code of Practice (GSCOP) into their contracts with suppliers. Notably, the CMA found that retailers' supply agreements varied greatly, from standard terms & conditions to bespoke agreements. For guidance, the CMA incorporated into the report a checklist of key points that retailers can use to ensure compliance with the order.</p> <p>Read the full report here.</p>
Groceries Code Adjudicator Annual Report 2015-2016	<p>On 28 June 2016 the GCA published its Annual Report 2015-2016 which details the actions taken by the GCA over the past year. Key events include the granting of financial penalty powers by Parliament and the GCA's investigation into Tesco. Priorities for the year ahead include launching a consultation on better shelf positioning and developing the GCA's Top 5 issues.</p> <p>Read the full report here.</p>
GSCOP clarification: requests for lump sum payments	<p>The GCA found that Morrisons had breached GSCOP by requiring suppliers to pay lump sums that were not provided for in supply agreements. These requests were made with an implication of detriment if the supplier did not make the payment. As the issue was dealt with quickly the GCA found it disproportionate to conduct a full investigation, but did provide key points of clarification: (i) requests for lump sum payments not explicitly agreed to in a supply agreement will breach GSCOP, (ii) breaches of GSCOP can be rectified promptly if referred to the GCA and (iii) swift action by the retailer can avert an investigation by the GCA.</p> <p>For more information click here.</p>
Supplementary de-listing guidance for the fresh produce sector	<p>Following the interpretative guidance issued on de-listing practice in 2014 the GCA has provided supplemental guidance to give additional clarification for retailers in the food produce sector. The guidance contains two key topics: (i) reasonable notice of de-listing with a focus on short term seasonal contracts, and (ii) genuine commercial reasons for de-listing – any volume or quality requirements should be properly documented in the supply agreement.</p> <p>For more information click here.</p>
Consultation into the expansion of GSCOP and the GCA's powers	<p>Margot James, minister for small business, consumer protection and corporate social responsibility is expected to launch an open call for evidence over whether the remit of GSCOP should be expanded to cover dairy farmers and other small-scale producers and whether the present powers of the GCA should be increased as a result. For more information click here.</p> <p>This follows the report into dairy prices published in January 2015 by the House of Commons Environment, Food and Rural Affairs Committee and calls from the National Farmer's Union for the GCA's remit to cover the relationship between</p>

MATTER	UPDATE
	supermarkets and their indirect suppliers. For more information click here .
Commission State Aid investigations	<p>On 30 August 2016, following an in-depth state aid investigation, the Commission concluded that Ireland had granted undue tax benefits of up to €13 billion to Apple and ordered Ireland to recover the illegal aid.</p> <p>Multiple breaches of the state aid rules have been discovered since the Commission started investigating tax ruling practices in 2013:</p> <ul style="list-style-type: none"> October 2015: Selective tax advantages granted to Fiat and Starbucks in Luxembourg and the Netherlands respectively were found to be illegal. January 2016: The Commission concluded that a Belgian "Excess Profit" tax scheme applicable since 2005 was illegal under EU state aid rules. The Commission has two ongoing in-depth state aid investigations into the tax treatment of Amazon and McDonald's in Luxembourg. The Commission has also faced calls by a group of European Parliament members to start a tax-avoidance investigation into IKEA (see here).

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