ADDLESHAW GODDARD

# COMPETITIVE EDGE®
# RETAIL & CONSUMER

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# RECENT COMPETITION LAW TRENDS

- On 8 October 2018 the Competition and Markets Authority (**CMA**) published its **'Economic working paper on the use of algorithms to facilitate collusion and personalised pricing**'. The CMA found evidence of widespread use of algorithms to set prices, particularly on online platforms such as Amazon. Concerns exist about whether algorithms can be used to facilitate existing coordination or lead to tacit coordination. Read the working paper here.

  Competition authorities are grappling with how to assess algorithms as part of wider developments in the treatment of e-commerce cases. There is a clear distinction between two types of cases. Actively using an algorithm to reinforce an existing coordination strategy between competitors will be treated in the same way as any other case involving collusion. However, the bigger risk for online sellers is one of tacit collusion – how can they safely use an algorithm provided by an intermediary platform, or write their own algorithm, without infringing competition law?

  The CMA's most pressing concern is around a **hub and spoke scenario**, where competing sellers use the same algorithm or data pool to determine prices and the platform is used to increase prices. This could allow tacit coordination between the sellers without them having to engage with to each other. However, the CMA also considers that the use of personalised pricing makes it less likely that algorithms could lead to tacit coordination.

  It is more difficult to assess the situation where sellers write their own algorithms – there is potential for an oligopolistic outcome resulting in higher prices where the sellers know that others are adopting the same approach, thereby creating the conditions for an oligopoly. Similarly, if sellers use a self-learning algorithm to maximise profits, who has responsibility for the results? The CMA suggests that authorities could audit an algorithm's objective function (i.e. short term vs longer term objectives) to assess the likelihood of tacit collusion.

- Following the *Coty* judgment last year (see our previous update), competition authorities have confirmed that an **absolute ban on online sales** will amount to a restriction of competition 'by object'. Manufacturers and suppliers should consider carefully how they work with retailers and any obligations they impose around online selling, but it is important to note that less restrictive requirements could still be acceptable under competition law.

  The Competition Appeal Tribunal (**CAT**) dismissed Ping's appeal against the CMA's finding that its prohibition on retailers from selling its golf clubs online breached competition law. The French competition authority also recently fined Stihl for preventing its distributors of products such as chainsaws, brushcutters, pole-saws or electric pruners from selling online.

  Both cases distinguished an outright ban on internet selling from a ban on using third party platforms. Following *Coty*, the latter will be acceptable in the context of a genuine selective distribution system. In contrast to *Coty* (which implied that, as a third party platform ban is not a hardcore restriction, it is not a restriction by object within Article 101(1)) the above cases confirm that an outright ban on internet sales will be a restriction by object.

  Ping's appeal included an argument that the CMA's decision would force it to sell a product that it does not currently sell (a non-custom fit golf club). The CAT rejected this argument, on the basis that a number of Ping's customers already bought golf clubs without custom fitting, and also that the CMA decision only prevents Ping from promoting custom fitting through an online sales ban – it is still open to Ping to promote custom fitting by other means, including by refusing to supply retailers who do not support it.

- The **Geo-blocking Regulations** came into force on 3 December 2018 and are available here. They mark a departure from previous practice, where geo-blocking restrictions had the potential to infringe competition law where they were imposed by a supplier on its distributors/retailers. Now, a unilateral decision to block access or discriminate against certain customers could be unlawful. The Regulations implement the EU Geo-blocking Regulation and prohibit:

  - Blocking access to/forced redirection away from a website based on a user's nationality or place of residence;
  - Discrimination on the basis of a customer's nationality or place of residence when they purchase goods online, electronically supplied services, or services provided in a specific physical location; and
  - Discrimination by traders against a means of payment solely on the basis of its place of issue within the EU.

# LAND AGREEMENTS?

- On 23 November 2018 the CMA published its non-confidential infringement decision finding that Heathrow Airport Limited (and its parent Heathrow Airport Holdings Limited) and Heathrow T5 Limited (and its parent Arora Holdings Limited) infringed competition law.

- Much has been made of this being the first case where the CMA has considered anti-competitive provisions in a land agreement. However, when considered closely the provision in question relates to pricing rather than land use. Whilst this case shows that the CMA is willing to investigate land agreements, it remains to be seen how the CMA may treat more 'usual' restrictions in land agreements, such as exclusivity provisions or restrictive covenants.

- In 2006 the parties had entered into an agreement under which Arora agreed to a tenant's covenant which precluded it from charging non-guests using the T5 Sofitel hotel car park rates lower than those charged at Heathrow airport's car parks. The CMA found that this infringed competition law and imposed a fine of £1.6 million on Heathrow. Arora had applied for leniency and was not fined.

- Notwithstanding the fact that the CMA did not find evidence that Heathrow had monitored compliance or enforced the covenant against Arora to prevent it charging higher rates, it found that Arora had set its prices in line with Heathrow's rates and had not sought to undercut them. In any event the CMA confirmed that proof of implementation was not required for the agreement to infringe competition law 'by object', through precluding Arora from freely competing on price.

- Prior to 6 April 2011, land agreements were excluded from the scope Chapter I of the Competition Act 1998 by virtue of a statutory order. Heathrow sought to argue that the period of infringement should have begun from 6 April 2011 rather than when the pricing restriction started in 2008, but the CMA confirmed that land agreements containing price restrictions would not have benefitted from the exclusion from the scope Chapter I of the Competition Act 1998.

- The CMA has subsequently published guidance for businesses on the application of competition law to land agreements, and recommends that businesses regularly check to ensure their agreements are compliant.

- It is important to bear in mind that if an agreement contains a 'by object' restriction then it will infringe competition law regardless of whether the restriction is historic or has been enforced. Such restrictions could include restricting the prices at which goods or services can be supplied at from the land; restricting how the land can be used with the aim of sharing or dividing up territories or customers; or restricting how the land can be used to make it harder for other businesses to compete.

# ROUND UP OF RECENT DEVELOPMENTS

| MATTER | UPDATE |
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| Investigations of Amazon's marketplaces | Both the European Commission (**Commission**) and the German competition authority have launched investigations into Amazon's European and German marketplaces, respectively. The Commission's investigation focuses on Amazon's collection and use of transaction data and whether this is to the disadvantage of marketplace sellers, whereas the German competition authority will consider whether Amazon's terms of business and practices towards sellers on its German Amazon marketplace will amount to an abuse of Amazon's dominant position.<br><br>Read the press release here. |
| Review of Vertical Block Exemption Regulation | On 8 November 2018 the Commission published its evaluation and fitness roadmap for its review of the Vertical Block Exemption Regulation, which expires in May 2022. The evaluation will check whether the Regulation is still effective, |

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| | efficient, relevant, in line with other EU legislation and adds value. The Commission will use the evaluation to decide whether to let the Regulation lapse, to prolong or to revise it, including to take account of developments in e-commerce. The public consultation is scheduled for Q1 2019. |
| Cross-border access to pay-TV | On 25 October 2018 Disney offered commitments to address the Commission's competition concerns relating to contractual clauses in certain bilateral agreements between six major film studios and the pay-TV broadcaster Sky UK. Disney has offered not to (re)introduce contractual obligations which prevent or limit a pay-TV broadcaster from responding to unsolicited requests from consumers within the EEA but outside the broadcaster's licensed territory and not to prohibit or limit a pay-TV broadcaster located outside the broadcaster's licensed territory from responding to unsolicited requests from consumers within the licenced territory. The Commission launched a market test of the proposed commitments on 9 November 2018; the deadline for comments is 9 December 2018.<br><br>For more information click here. |
| Google and Alphabet v Commission | On 18 July 2018 the Commission announced that it had fined Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine. On 9 October 2018 Google lodged an appeal against this decision at the General Court. |
| Sharp / Skytec UMC Phase 1 merger | On 4 December 2018 the Commission announced that it had cleared the acquisition of sole control of Skytec UMC by Sharp. Both parties produce consumer electronics products, including TVs. No competition concerns arose as Sharp already has joint control over Skytec UMC, and this will change to sole control following the transaction.<br><br>Read the press release here, the full text decision is yet to be published. |
| Pepsico / Sodastream International | On 30 November 2018 the Commission announced that it had cleared the acquisition of SodaStream by PepsiCo. The acquisition raised no competition concerns because there are no or only limited overlaps and links between the parties' activities. In addition the Commission found that conglomerate effects are unlikely due to the specific characteristics of SodaStream's home carbonation systems, which are designed to work with all alternatives offered by competitors.<br><br>Read the press release here, the full text decision is yet to be published. |
| TCCC / Costa Phase 1 merger | On 20 November 2018 the Commission announced that it is investigating the proposed acquisition of Costa Limited and its subsidiaries by The Coca-Cola Company. The deadline for the Commission's decision is 4 January 2019.<br><br>For more information click here. |
| Haier / Candy Phase 1 merger | On 8 November 2018 the Commission announced that it is investigating the proposed acquisition of Candy by the Haier group. Both parties are active in the supply of domestic appliances. The deadline for the Commission's decision is 13 December 2018. |

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| | For more information click here. |
| Michael Kors / Gianni Versace Phase 1 merger | On 7 November 2018 the Commission announced that it had cleared the acquisition of Gianni Versace SpA by Michael Kors under the simplified procedure.<br><br>Read the final decision here. |
| Hammerson / M&G / Highcross Phase 1 merger | On 7 November 2018 the Commission announced that it had cleared the acquisition by Hammerson plc and M&G Limited of joint control of the whole of the Highcross shopping centre in Leicester, under the simplified procedure.<br><br>Read the final decision here. |
| The Walt Disney Company / Twenty-First Century Fox, Inc Phase 1 merger | On 6 November 2018 the Commission announced that it had approved Disney's acquisition of parts of Fox (including its film and television studios and its cable and international television businesses), subject to certain conditions. The Commission found that the proposed transaction would have eliminated competition between two strong suppliers of "factual channels" in several EEA Member States. To remove the overlap, Disney committed to divest its interest in all factual channels that it controls in the EEA, namely: History, H2, Crime & Investigation, Blaze and Lifetime channels.<br><br>Read the press release here, the full text decision is yet to be published. |
| Mars / Anicura Phase 1 merger | On 29 October 2018 the Commission announced that it had cleared Mars' acquisition of AniCura, a veterinary clinic chain, subject to conditions. Mars is in the dietetic pet food segment via its Royal Canin brand. The Commission was concerned that the transaction would enable Mars to shut out its dietetic pet food competitors from downstream retail channels, namely the AniCura veterinary clinics and the VetFamily member clinics. To remedy the Commission's concerns, Mars will divest AniCura's VetFamily business in its entirety in the whole of Europe.<br><br>Read the press release here, the full text decision is yet to be published. |
| Booking Holdings / Hotels Combined Phase 1 merger | On 23 October 2018 the Commission confirmed that it had cleared the acquisition of sole control over HotelsCombined by Booking Holdings. The Commission found that the increase in the companies' combined market share would be very small, the merged entity will face competition from several other global operators, and the companies are not close competitors and they will not have the ability and incentive to restrict their competitors' access to essential input or to a sufficient customer base.<br><br>Read the press release here, the full text decision is yet to be published. |
| JAB / Pret a Manger Phase 1 merger | On 6 September 2018 the Commission announced that it had cleared the acquisition of Pret a Manger by JAB. The acquisition raised no competition concerns in the UK, Denmark and the Netherlands, given the companies' limited overlap in food and drink retail, the fact that they are not close competitors, and the presence of a large number of competitors. The potential vertical relationship between JAB's wholesale activities and Pret A Manger's retail coffee sales did not raise competition concerns either, due to the minimal presence of Pret A Manger in countries where JAB is strong. |

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| | Read the decision here. |
| Funerals market study | On 29 November 2018 the CMA published its interim report and consultation on the funerals market. The CMA has proposed that the funerals market should be referred to a CMA Group for a market investigation reference. The CMA's initial findings are that problems with the market have led to above inflation price rises for well over a decade, for both funeral director services and crematoria services. The scale of these price rises does not currently appear to be justified by cost increases or quality improvements.<br><br>Read the interim report and consultation here. |
| Price comparison sites – ComparetheMarket | On 2 November 2018 the CMA announced that it had issued a statement of objections to ComparetheMarket. The CMA provisionally found that MFNs could be causing customers to miss out on better home insurance deals, by preventing rival comparison sites and other channels from trying to win home insurance customers by offering cheaper prices than ComparetheMarket. Home insurance companies are also more likely to pay higher commission rates to comparison sites, with the extra costs potentially being passed on to customers.<br><br>Read the press release here. |
| Royal Mail PLC v Ofcom | On 19 October 2018 the Competition Appeal Tribunal (**CAT**) published a notice of appeal by Royal Mail against Ofcom's £50 million fine and decision that Royal Mail had abused its dominant position for bulk mail delivery services in the UK by applying a price differential between different categories of downstream access customers. Ofcom imposed a fine. The CAT has granted Whistl permission to intervene in support of Ofcom. The hearing is listed for five weeks in June/July 2019.<br><br>Further information is available here. |
| Sports equipment sector: anti-competitive practices | On 7 September 2018 the CAT published its judgment dismissing an appeal by Ping Europe Limited, a golf club manufacturer, against the CMA's decision to fine it for breaching competition law by prohibiting retailers from selling its golf clubs online. The CAT imposed a revised fine of £1.25 million. Ping must now allow retailers to sell online, though it may require them to meet certain conditions before doing so.<br><br>Read the CAT's judgment here. |
| J Sainsbury plc / Asda Group Phase 2 merger inquiry | On12 December 2018 Sainsbury's and Asda made an application to the CAT for judicial review of the CMA's investigation, seeking an order to extend the period of time to respond to working papers and for oral hearings. The CMA published a press release in response, making clear that an extension to the timetable would jeopardise its ability to complete its investigation by the required deadline. A hearing has been set for 14 December 2018.<br><br>On 16 October 2018 the CMA published its issues statement in its investigation of the Sainsbury's / Asda merger. The CMA will scrutinise the merger across a number of areas including the supply of groceries (both in store and online), fuel, and general merchandise such as toys, small electricals and children's clothing, and will examine the merger at both a national and local level. The CMA will consider the merger could result in increased prices or reduced range and service |

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| | to customers, and whether it could increase the parties' buyer power. The CMA has also signalled that it is open taking account of the impact of growing retailers such as Aldi and Lidl when assessing the level of competition in the market.<br><br>Read the CMA's issues statement here. |
| PepsiCo Inc / Pipers Crisps Limited Phase 1 merger inquiry | On 14 December 2018 the CMA announced that it had opened an investigation into the anticipated acquisition by PepsiCo Inc. of Pipers Crisps Limited. The deadline for the CMA's decision is 13 February 2019.<br><br>For more information click here. |
| Valeo Foods / Tangerine Confectionery Phase 1 merger inquiry | On 5 December 2018 the CMA announced that it had cleared the completed acquisition by Valeo Foods (via its subsidiary Rowse Honey Limited) of Taurus 3 Limited (a holding company of Tangerine Confectionery Group Limited.<br><br>For more information click here, the full text decision will be available shortly. |
| Tobii AB / Smartbox Assistive Technology and Sensory Software Phase 1 merger inquiry | On 27 November 2018 the CMA announced the launch of its inquiry into the completed acquisition by Tobii AB of Smartbox and Sensory Software, which are providers of communication software. The phase 1 decision deadline is 25 January 2019. On 28 September 2018 the CMA served an initial enforcement order on the parties, who must refrain from any actions which would lead to the integration of the businesses while the CMA conducts its investigation.<br><br>For more information click here. |
| Lakeland Dairies / LacPatrick Dairies Co-Operative Society Limited Phase 1 merger inquiry | On 23 November 2018 the CMA served an initial enforcement order on Lakeland Dairies and LacPatrick Dairies Co-Operative Society. 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. The CMA's investigation is yet to be launched therefore the deadline for the phase 1 decision is yet to be announced.<br><br>For more information click here. |
| Samworth Brothers Limited / Boparan Holdings Limited Phase 1 merger inquiry | On 23 November 2018 the CMA announced the launch of its inquiry into the anticipated acquisition by Samworth Brothers Limited of the Manton Wood Manufacturing Site of Boparan Holdings Limited (2 Sisters Food Group). The phase 1 decision deadline is 23 January 2019.<br><br>For more information click here. |
| Tayto Group Limited / The Real Pork Crackling Company Limited Phase 1 merger inquiry | On 13 November 2018 the CMA cleared the completed acquisition by Tayto Group Limited of The Real Pork Crackling Company Limited. Whilst the CMA found that the parties have high combined shares of supply (over 70%) and that they compete closely in the supply of pork snacks, no competition concerns arose because the merged entity will continue to be constrained by at least four credible competitors, customers have considerable negotiating power and exhibit little loyalty to a supplier, and the parties will continue to be constrained by other savoury snacks suppliers. |

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| | Read the full decision here. |
| Barry Callebaut AG / Burton's Foods Limited Phase 1 merger inquiry | On 8 November 2018 the CMA announced that it has cleared the anticipated acquisition by a subsidiary of Barry Callebaut AG of certain assets of the industrial chocolate production business of Burton's Foods Limited. The CMA found that no competition concerns would arise, on the basis that the parties' combined share for the purchase of semi-finished cocoa products in the EEA would be below 20% and the parties do not compete closely for the supply of industrial chocolate in the UK.<br><br>Read the full decision here. |
| Stars UK / Sky Betting and Gaming Phase 1 merger inquiry | On 11 October 2018 the CMA announced that it has cleared the completed acquisition by The Stars Group of the Sky Betting and Gaming group. The parties overlap in the supply of online gambling services to customers in the UK, particularly for online poker where their combined share exceeded at least 40%. The CMA found that the merger would not result in a substantial lessening of competition, on the basis that the parties do not compete closely for customers, their poker services are differentiated and the merged entity will face strong competitive constraints from a range of established players.<br><br>Read the full decision here. |
| Groceries Supply Code of Practice – Ocado and B&M Homestores | On 1 November 2018, the CMA announced that Ocado and B&M Homestores must now comply with the Groceries Supply Code of Practice (the **Code**), due to the retailers' annual groceries turnover now exceeding £1bn.<br><br>For more information click here. |

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