

COMPETITIVE EDGE RETAIL & CONSUMER

June 2016

RECENT COMPETITION LAW TRENDS

- ▶ In a first for the creative industries, and underlining its commitment to ensuring an effective competition culture across all industry sectors, the Competition and Markets Authority (**CMA**) is investigating alleged information exchanges by five model agencies and their trade association, which are suspected of having resulted in higher fees being charged to clients such as high street chains, online fashion retailers and consumer goods brands- see [here](#).
- ▶ Competition law based claims continue to be popular, with claimants starting to use the various approaches from the new 'toolkit' to seek redress, including the fast track procedure and opt out representative actions:
- ▶ A property developer successfully used the new fast track procedure for damages claims to bring a claim in the Competition Appeal Tribunal (**CAT**) against Tesco, alleging that its refusal to release a restrictive covenant on land was anticompetitive (this case has since settled – see [here](#)).
- ▶ A group of manufacturers of mattresses and pressure care products have brought a damages claim in the CAT based on a European Commission (**Commission**) decision against a polyurethane foam price fixing cartel. They also sought to use the new fast track procedure but the CAT decided the case was not eligible due to the level of disclosure that will likely be required and the lack of urgency of the damages claim – see [here](#); and
- ▶ The National Pensioners Convention is understood to have launched the first opt out class action in the UK, on behalf of people who paid too much for a mobility scooter from Pride, following the OFT's 2014 decision that Pride had infringed competition law by prohibiting online advertising by certain retailers of below-RRP prices – see [here](#).
- ▶ The CMA's decision in relation to Hain's acquisition of Orchard House Foods is a useful reminder of how the CMA looks at overlaps at the wholesale/retail level and own label/branded segments. Hain and Orchard were the only two suppliers to supermarkets and also two of the main suppliers to food service retailers; the parties also overlapped in the wholesale supply of own-label freshly squeezed fruit juice and prepared fruit to UK retail and food service customers. The CMA considered the impact of the merger on branded and own-label freshly squeezed juice separately, and retail and food service customers both separately and together. Hain has now offered to divest its own-label freshly squeezed fruit juice business to a suitable purchaser, to avoid a reference to a Phase 2 investigation – see [here](#).

RPM & ONLINE SALES RESTRICTIONS

- ▶ Two recent cases demonstrate the CMA's continuing focus on combating online sales restrictions. In each case the competition law infringements involved resale price maintenance (RPM). Ultra Finishing Ltd was fined £786,669 for vertical price-fixing in internet sales of its Hudson Reed and Ultra branded bathroom fittings products. ITW Ltd was fined £2,298,820 for RPM by its Foster Refrigerator division in internet sales of its Foster commercial fridges. Please click [here](#) and [here](#) for the CMA's case pages.
- ▶ Both cases involved restrictions on online resale prices. Whilst true recommendations are acceptable, Ultra had issued 'recommended' retail prices for online sales which amounted to setting minimum online prices. Ultra was found to have infringed competition law by penalising retailers if they charged below the recommended prices, including by charging the retailers higher prices, ceasing supply and withdrawing rights to use Ultra's branding. ITW had operated a 'minimum advertised price' policy and had threatened dealers with similar penalties for failure to comply, which the CMA viewed as equivalent to RPM and therefore an 'object' restriction (although other authorities have taken differing approaches to MAP clauses). The CMA found in each case that retailers and dealers, respectively, were limited in their ability to set online resale prices.
- ▶ Each of Ultra and ITW had their fines reduced (by 25% and 30% respectively) because they agreed to a settlement and to implement a comprehensive competition compliance programme. Whilst the CMA elected in both cases not to fine the other retailers or dealers involved, both retailers and dealers should be aware that it is certainly possible for them to be fined for entering into RPM arrangements with suppliers and the CMA appears to be trying to extend the impact of its decisions in more creative ways. In fact, the CMA sent warning letters to a number of other companies in both sectors that it suspected of having engaged in similar pricing practices. In the commercial catering equipment sector, recipients of the letters extended beyond other suppliers to include dealers that may have agreed to apply the supplier-imposed policies.

Such warning letters require recipients to provide the CMA with details of how they comply/intend to comply with competition law.

- ▶ The CMA has been particularly active in its anti-trust enforcement cases, concluding 15 in the last year and opening a further 10 in the past six months. Most recently, as part of its focus on ensuring that internet trading is able to operate as an effective retail channel, the CMA has issued a statement of objections to Ping Europe Limited in relation to an alleged ban on online sales of Ping golf clubs. Ping now has the opportunity to make representations to the CMA before a final decision is taken.
- ▶ The CMA's focus on this area can be expected to continue as it (along with other competition authorities) ensure that the benefits of e-commerce continue to drive innovation and competition. As a result of these cases and the publicity surrounding them, businesses should ensure their activities are competition-law compliant; as in future we would expect the CMA to treat any similar arrangements harshly.

ROUND UP OF RECENT DEVELOPMENTS

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Anheuser-Busch InBev (AB InBev) and SABMiller (SAB) merger	<p>The European Commission (Commission) has cleared the planned £71 billion 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 SAB's business in France, Italy, the UK and the Netherlands and earlier this year accepted an offer for this package of assets from Asahi. AB InBev has now also offered the entirety of SAB's assets in Central and Eastern Europe for divestment, as an additional commitment to the Commission.</p> <p>For more information click here and here.</p>
Activision Blizzard / King Digital	<p>The Commission has cleared the acquisition of <i>Candy Crush</i> maker King Digital Entertainment by Activision Blizzard (publisher of <i>Call of Duty</i> and <i>World of Warcraft</i>). The Commission found that there are a number of cheap and easily accessible supplier switching options and barriers for new competitors are low.</p> <p>Read the full decision here.</p>
Sysco Corp / Brakes Group merger	<p>The Commission has approved US food distributor Sysco Corp's acquisition of London-based food distributor Brakes Group from Bain Capital Private Equity for around \$3.1 billion. Both parties are active in "delivered wholesale" distribution across a broad variety of chilled, frozen and ambient food across all product categories and all sectors of the foodservice industry. Their activities mainly overlap in Ireland, where the Commission found that the parties are not particularly close competitors and that a number of other competitors would remain.</p> <p>For more information click here.</p>
Ball-Rexam to sell assets to Ardagh Group to fulfill merger commitments	<p>Following an in-depth review, in January 2016 the Commission approved the £4.43 billion acquisition of beverage-can manufacturer Rexam by rival Ball subject to the divestment of 12 plants in the EEA. On 20 June 2016 the Commission approved the sale by Ball and Rexam of some of their assets to the Ardagh Group (a European packaging maker).</p> <p>For more information click here and here.</p>
Netto / Grocery Store at Armitage Avenue, Little Hulton	<p>The Commission has concluded that the proposed acquisition by the supermarket chain Netto of a freehold property from Morrisons does not amount to a 'concentration' within the meaning of EU Merger regulation. The Commission found that the target in this case could not be 'considered as a business with market presence to which turnover can be attributed' as the proposed transaction was limited to the transfer of the freehold property and not a transfer of any tangible or</p>

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	<p>intangible assets, goodwill or employees.</p> <p>Read more information here.</p>
<p>The Commission fines Riberebro €5.2 million</p>	<p>The Commission has fined Riberebro, a Spanish fresh and canned vegetable company, for its participation in a price fixing cartel. The cartel was set up to stabilise the parties' market share in canned mushrooms. Riberebro were offered a settlement in June 2014 with Bonduelle, Lutèce and Prochamp (their counterparts to the cartel), but declined the offer. Riberebro received a 50% reduction of the fine for cooperating with the investigation, under the Commission's 2006 Leniency Notice, but were still fined €5.2 million.</p> <p>Read more here.</p>
<p>European Commission's report on the Digital Single Market</p>	<p>On 25 May 2016, the Commission proposed new e-commerce rules to help consumers and companies to buy and sell products and services online more easily and confidently across the EU. In aid of its Digital Single Market strategy the Commission presented a three-pronged plan to boost e-commerce by (i) tackling geoblocking, (ii) making cross-border parcel delivery more affordable and efficient and (iii) promoting customer trust through better protection and enforcement. Key measures to note include the proposal for an EU Regulation preventing unjustified geo-blocking and a Communication on online platforms and the Digital Single Market.</p> <p>For more information click here.</p>
<p>House of Lord's select committee recommends granting the Commission powers</p>	<p>The House of Lords has commented that antitrust laws have not adequately adapted to meet the new challenges that online platforms bring. Commenting on the Commission's Digital Single Market strategy and e-commerce sector inquiry, the committee recommended that the Commission should have the power "to impose legally binding sector-wide remedies as a result of a sector inquiry."</p> <p>The report summary can be found here and submitted evidence, here.</p>
<p>Celesio AG / Sainsbury's Supermarkets Limited</p>	<p>Following its phase 2 investigation the CMA has announced that the proposed acquisition by Celesio of Sainsbury's pharmacy business may be expected to result in a substantial lessening of competition in 13 areas, where the closeness of competition between the parties could lead to a reduction in the quality of customer service provided in those areas. The CMA published a notice of possible remedies, including the prohibition of the merger or the divestiture of a number of local pharmacies. The CMA has extended the statutory deadline by eight weeks to 8 August 2016 and 24 June 2016 is the cut-off point for all parties' responses.</p> <p>Read more information here.</p>
<p>Ladbrokes / Coral merger inquiry</p>	<p>The CMA has provisionally found that the merger between Ladbrokes and Coral may give rise to competition concerns in a large number of local areas. The CMA identified 659 local areas where it provisionally found that the merger may be expected to result in a substantial loss of competition. To resolve these concerns, around 350 to 400 shops may have to be sold and the CMA is considering what could amount to a minimum scale for a 'suitably qualified purchaser' of those shops.</p> <p>For more information click here.</p>
<p>Arriva Rail North Limited / Arriva plc: Northern Rail franchise award</p>	<p>On 1 April 2016, the CMA made an initial enforcement order against Arriva Rail North Limited and Arriva plc in relation to the acquisition of the Northern Rail franchise, preventing integration pending the CMA's phase 1 decision. The CMA has now referred the Northern Rail franchise award for an in-depth phase 2 investigation and an inquiry group was appointed on 23 May 2016.</p> <p>For more information click here.</p>

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Hain Frozen Foods / Orchard House	<p>The CMA announced that Hain Frozen Foods UK Limited's acquisition of Orchard House Foods Limited would be referred for an in-depth phase 2 investigation unless acceptable undertakings were offered. The two parties are the largest suppliers of freshly squeezed fruit juice to supermarkets and other retailers (e.g. cafes) in the UK and the CMA believes that the merger could lead to higher prices for retailers and consumers. Hain has offered to divest its own-label freshly squeezed fruit juice business to a suitable purchaser. This offer is under active consideration by the CMA.</p> <p>Find the press release here.</p>
Netto Limited / Co-operative Group Limited: Completed Acquisition	<p>In July 2015, the CMA concluded that the merger between Netto and Co-op, would not realistically result in a substantial lessening of competition in the retail supply of groceries. However, it later became evident that this deal had a European element and was referred to the Commission, who sent the case back to the UK on 22 January 2016. The CMA subsequently revisited their original decision of July 2015 but again found that the merger would not result in a realistic prospect of SLC as (i) at a national level the impact of the three acquired grocery stores was negligible and (ii) on a local level there were sufficient competitive constraints.</p> <p>For the CMA's decision click here.</p>
VTech Holdings Ltd / Leapfrog Enterprises Inc	<p>The CMA has issued initial enforcement orders in relation to the completed acquisition by VTech Holdings of Leapfrog Enterprises. VTech supplies electronic learning products and Leapfrog is a developer of educational entertainment for children. The CMA has ordered VTech Holdings not to take any action which may lead to the integration of Leapfrog Enterprises with the Vtech business. The CMA has not yet launched its Phase 1 review.</p> <p>For more information read here.</p>
Anti-competitive practices in the sports equipment sector	<p>On 9 June 2016 the CMA announced that it has issued a statement of objections to Ping Europe Limited in relation to an alleged ban on online sales of Ping golf clubs, which prevents retailers selling Ping golf clubs online in breach of competition law.</p> <p>For more information click here.</p>
Anti-competitive conduct in the modelling sector	<p>On 25 May 2016 the CMA issued a statement of objections alleging that 5 agencies for fashion models and their trade association, the Association of Model Agents, have breached UK and EU competition law. The CMA alleges that from April 2013 to March 2015, FM Models, Models 1, Premier, Storm and Viva agreed to exchange competitively sensitive information, including future pricing information, and in some instances agreed a common approach to pricing. It is further alleged that the AMA was also a party to the breach and that it played an important role in aspects of the alleged infringement.</p> <p>For more information click here.</p>
Commercial catering equipment sector: investigation into anti-competitive practices	<p>On May 24 2016 the CMA issued a decision that fridge supplier ITW Limited had infringed competition law and imposed a fine of £2,298,820. ITW admitted to engaging in online resale price maintenance in relation to the supply of commercial catering equipment in the UK. The CMA has also sent warning letters to 25 other suppliers and dealers in the sector which it suspects may have engaged in similar practices regarding internet sales.</p> <p>For more information click here.</p>
CMA investigation into online sales of discretionary consumer products	<p>On 29 April 2016, the CMA announced that it has decided to continue its investigation into suspected anti-competitive arrangements relating to UK online sales of licensed sport and entertainment merchandise and other consumer products. As part of its investigation the CMA conducted searches at the UK</p>

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	<p>headquarters of Trod Limited and the domestic premises of one of its officers.</p> <p>For more information click here.</p>
<p>Shahid Latif & Mohammed Waheed / Tesco Stores Limited</p>	<p>Tesco and Shahid Latif & Mohammed Abdul Waheed have settled out of court a claim against Tesco, regarding anti-competitive restrictions in the use of land. This case generated much interest as the claimants had applied to use the new fast-track procedure for damage claims at the CAT which only became available in October 2015. This is the second case to use this mechanism but both cases have settled before hearing.</p> <p>For access to the claim and withdrawal order click here.</p>
<p>Summary note of the CMA roundtable on vertical restraints</p>	<p>On 30 March 2016, the CMA published the summary of its roundtable discussion on vertical restraints. 45 participants from law firms, economic consultancies and business representative groups attended, to discuss why vertical restraints are important for businesses, how the law deals with such restraints and how the CMA can engage with businesses going forward. Motivators identified for introducing vertical restraints were: brand image/equity, free riding and market segmentation/ product availability. Legal considerations were the primary factor when deciding how to structure the vertical agreement, although agreements themselves may often be outdated and the legal framework may push manufacturers towards restrictive distribution arrangements. Uncertainty around the legal treatment of vertical restraints was thought to have a chilling effect on businesses.</p> <p>Read the full text of the roundtable summary here.</p>
<p>GCA best practice statement: Forecasting</p>	<p>The Groceries Code Adjudicator (GCA) published its forecasting best practice statement on 23 March 2016, which concluded that the 10 regulated retailers (i.e. those retailers with a UK annual turnover of more than £1 billion) all adequately complied with the Groceries Supply Code of Practice. However, the GCA did request increased transparency, which could be achieved by ensuring closer collaboration between retailers and suppliers, regularly reviewing forecasts and ensuring that the risks and costs of fluctuations in supply and demand are fairly shared, reflecting the influence and control a party has had over the forecasting.</p> <p>Read the full statement here.</p>

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