

# COMPETITIVE EDGE RETAIL & CONSUMER

---

March 2016

# RECENT COMPETITION LAW TRENDS

- ▶ New variants of online behaviour and systems continue to be a focus as competition authorities and courts grapple with applying existing competition law principles to the continually evolving online world.
- ▶ For example, the European Court of Justice (**ECJ**) has confirmed that discounts granted through a common booking system can amount to a concerted practice in breach of competition law. The ECJ considered that there was a concerted practice between the administrator of the system and (in this case) the travel agents using the system, where the agents received notification of a cap on discounts and did not take steps to distance themselves from it, report it or apply discounts in excess of the cap. This case expands on the concept of how a concerted practice can arise. It also raises additional considerations for entities where they share systems with their competitors, to ensure that the way in which those systems are used by all parties is compliant with competition law.
- ▶ In the UK, internet advertising is a hot topic for the Competition and Markets Authority (**CMA**). It issued separate statements of objections to suppliers of bathroom fittings and commercial fridges, alleging that they imposed minimum advertised pricing restrictions on retailers, which the CMA views as a form of resale price maintenance in breach of competition law. Resale price maintenance and advertising restrictions were also a common theme in warning and advisory letters sent by the CMA during 2015 where it suspected anti-competitive practices.
- ▶ Competition in the supply of alcohol has also been in the spotlight, with the CMA clearing Heineken's acquisition of premium lager assets from Diageo; AB InBev receiving a binding offer from Asahi for SAB's stake in Peroni, Grolsch and Meantime as part of its efforts to address potential competition concerns; and the CMA reminding local authorities that schemes aimed at reducing consumption of high-strength alcohol must not breach competition law.

## GCA TURNS SPOTLIGHT ON TESCO

- ▶ Christine Tacon, the Groceries Code Adjudicator (**GCA**), found that Tesco has seriously breached binding requirements of the Groceries Supply Code of Practice (**GSCOP**) that require it to pay suppliers in accordance with contractual terms and in any event within a reasonable time.
- ▶ The GCA has required Tesco to introduce significant changes to the way it deals with payments to suppliers, including stopping Tesco from making unilateral deductions from money owed to suppliers, requiring it to pay for goods delivered in accordance with agreed terms, promptly resolving data input errors, and providing transparency and clarity in its dealings with suppliers. In addition, Tesco's buyers and finance teams must be trained on the findings of the investigation.
- ▶ Breaches of GSCOP were found to include:
  - ▶ **Delays in payment** – involving data input errors, duplicate invoicing, a focus on meeting internal financial targets, unilateral deductions made in relation to historic claims, short deliveries, service level charges and for other unknown items; and
  - ▶ **Payments for category captaincy** – the GCA found some evidence of significant payments by suppliers for "category captaincy", and considers there are risks that GSCOP could be circumvented through indirect payments for better positioning or increased shelf space.
- ▶ However, the GCA found no evidence of Tesco requiring direct **payments for better positioning or shelf space**.
- ▶ The GCA's report has helpfully provided detailed consideration of and guidance on the types of practices that breach elements of GSCOP. Although the GCA was limited to making recommendations to Tesco in this case, for breaches of GSCOP from 6 April 2015 onwards the GCA has the power to fine retailers.
- ▶ It should be noted that significant fines are anticipated when the Serious Fraud Office concludes its own investigation into Tesco.
- ▶ It is also worth noting that a GSCOP-style regulatory regime is coming into force in the Republic of Ireland. After April this year supermarkets in Ireland with a turnover of €50 million or more must have in place renewed contracts in writing with their suppliers. These contracts will be required to carry a maximum of 30 days payment terms and prohibit practices such as payments for shelf space. The Irish Competition and Consumer Protection Commission will have responsibility for enforcing these regulations, with a three month timetable for full implementation.

# ROUND UP OF RECENT DEVELOPMENTS

MATTER	UPDATE
Discounts granted through a common booking system can be a concerted practice	<p>Eturas administers an online booking system for travel agencies. In August 2009 a technical restriction on the system limited the discounts available for online bookings to 3%, which the majority of travel agents followed. The Lithuanian Competition Council found that this constituted a concerted practice by Eturas and the travel agents, in breach of Article 101(1). On appeal, the Lithuanian court referred questions to the ECJ.</p> <p>The ECJ held that where an administrator of an information system sends a message making the operators (in this case, the travel agents) aware that discounts will be capped, following which the system is updated to implement that measure, those operators will be presumed to have participated in a concerted practice where they were aware of the message unless they have publicly distanced themselves from it, reported it to the relevant authorities, or consistently applied a discount in excess of the cap.</p> <p>For the court's judgment click <a href="#">here</a></p>
Anheuser-Busch InBev / SABMiller	<p>AB InBev is in the process of acquiring SAB and has already begun to remove impediments to address competition concerns. AB InBev has agreed to buy SAB and to divest SAB's joint venture with Molson Coors Brewing. AB InBev has also received a binding offer from Asahi for SAB's stake in Peroni, Grolsch and Meantime. AB InBev's biggest battle is seen to be in China, where it is expected it will have to divest SAB's joint venture with China's largest brewer, China Resources Snow Breweries. The transaction is yet to be filed with the European Commission (the <b>Commission</b>).</p> <p>For more information click <a href="#">here</a>.</p>
Ball / Rexam	<p>The Commission has required the divestment of 12 plants in the EEA in order to clear Ball's acquisition of Rexam. Both parties are drink container suppliers to soft drinks, beer and energy drinks manufacturers. The Commission considered that the merger would have reduced competition in the already concentrated markets for beverage cans and risked increasing prices for customers. To assuage these concerns, the Commission has required divestment of most of Ball's Metal Beverage Packaging activities in Europe, and two of Rexam's can-body plants to a suitable purchaser.</p> <p>For the Commission's press release click <a href="#">here</a>.</p>
FedEx / TNT Express	<p>Following an in-depth investigation, the Commission has cleared FedEx's acquisition of TNT Express. The Commission concluded that the acquisition will not give rise to competition concerns, because FedEx and TNT are not particularly close competitors and because the merged entity will continue to face sufficient competition from its rivals in all markets concerned.</p> <p>However the companies still need to gain approval from other authorities including Brazil and China. It is believed they will achieve this before the end of 2016.</p> <p>To read the Commission's press release click <a href="#">here</a>.</p>
Staples / Office Depot	<p>Staples' acquisition of Office Depot has been cleared by the Commission, subject to the divestment of Office Depot's contract distribution business in Europe and entire business in Sweden. The merging parties are the two major suppliers of office products to business consumers. The Commission found that only Staples, Office</p>

MATTER	UPDATE
	<p>Depot and Lyreco are capable of entering into supply contracts for large business customers in Europe as they have a presence in many countries and can meet orders internationally. High barriers to entry raised concerns as limited alternative suppliers exist within national markets.</p> <p>To read the Commission's press release click <a href="#">here</a>.</p>
Coty / Procter & Gamble's beauty products business	<p>The Commission has approved Coty's acquisition of Procter &amp; Gamble's beauty brands. Coty is looking to merge the two companies' fragrances, including popular brands such as Calvin Klein and Hugo Boss. The Commission found that competition in the fragrances and also the colour cosmetics markets would remain sufficiently strong to prevent price increases for European consumers.</p> <p>To read the press release click <a href="#">here</a>.</p>
Activision Blizzard / King Digital	<p>Activision Blizzard Inc has notified its proposed acquisition of King Digital Entertainment plc to the Commission. Activision has agreed to pay \$18 in cash per share for King, valuing it at \$5.9 billion. Activision develops and publishes games mainly for PCs and consoles including Call of Duty, and King is a mobile game developer and publisher, including Candy Crush.</p> <p>For more information click <a href="#">here</a>.</p>
Netto / Grocery Store at Armitage Avenue Little Hulton	<p>Netto, a joint venture between Sainsbury's and Dansk Supermarkd, plans to acquire the freehold of a former Morrisons store. The Commission has found that this does not amount to a concentration within the meaning of the EU Merger Regulation, because it is limited to the transfer of the freehold property of the target and involves no transfer of any other tangible or intangible assets, goodwill or employees.</p> <p>To read the Commission's press release click <a href="#">here</a>.</p>
Frankfurt court declares ban on Deuter-branded rucksacks legal	<p>In December, the Frankfurt Higher Regional Court overturned part of a lower court's judgement, declaring that Deuter Sport GmbH's ban on the sale of its backpacks through online marketplaces such as Amazon marketplace was legal. The judge upheld the part of the previous ruling which stated that Deuter's prohibition on the display of its goods on price comparison websites was an infringement of German and European competition law.</p> <p>For the court's press release (in German) click <a href="#">here</a>.</p>
Bathroom and fridge suppliers issued with statements of objections	<p>Bathroom fittings supplier Ultra Finishing Limited and commercial refrigeration products supplier Foster Refrigerator, a division of ITW Ltd, have received statements of objections from the CMA after allegedly initiating minimum prices for internet sales, limiting retailers' ability to sell their products below a certain level. In the CMA's view, this constitutes a form of resale price maintenance in breach of competition law. The CMA expects to receive oral and written representations from February to May 2016.</p> <p>To read the CMA's press release click <a href="#">here</a>.</p>
Ladbrokes / Coral	<p>The CMA has fast-tracked its review of Ladbrokes' merger with Coral for a Phase 2 in-depth review, in relation to the supply of fixed odds betting products. During its Phase 1 review the CMA found that the loss of competition between Ladbrokes' and Coral's licensed betting offices (LBOs) in local areas where choice will be reduced to only one or two LBOs may lead to a worsening of their offer to customers.</p>

MATTER	UPDATE
	To read the CMA's press release click <a href="#">here</a> .
Celesio / Sainsbury's Pharmacy business	<p>During its Phase 1 investigation into the acquisition by Celesio AG of Sainsbury's UK Pharmacy Business, the CMA found that 78 local areas would be affected by a loss of competition as a result of the proposed merger. According to its issues statement, the CMA's Phase 2 investigation will look at whether the loss of competition could affect the parties' incentives in relation to pharmacy-only medicines, prescription and pharmacy-only medicines, and pharmacy services; as well as whether there could be unilateral effects from a loss of competition for NHS outsourcing contracts and/or vertical effects from a change in downstream incentives on Celesio's wholesale business. The CMA is due to report by 13 June 2016.</p> <p>To read the CMA's press release click <a href="#">here</a>.</p>
Heineken / Diageo	<p>The CMA has cleared the partially completed acquisition by Heineken N.V. of some assets associated with Diageo plc's beer business, including the manufacturing and distribution of the Red Stripe, Dragon Stout and D&amp;G Malta brands in the UK. The CMA found that the merger would result in a small increment to the parties' combined share of supply of premium lager to the on-trade and off-trade channels in Great Britain, and that the merged entity will continue to be constrained by several other premium lager brands that compete more closely with Heineken than Red Stripe.</p> <p>To read the CMA's press release click <a href="#">here</a>.</p>
Netto / Co-Operative Group	<p>The CMA has cleared the completed acquisition by Netto Limited of 3 grocery stores from Co-operative Group Limited. The CMA originally cleared the (at the time) anticipated acquisition in July 2015, after which it became clear that there was an EU dimension that required notification to the Commission. The Commission referred the case back to the CMA in January 2016, following which the CMA revoked its original decision and commenced a new review.</p> <p>To read the CMA's press release click <a href="#">here</a>.</p>
Hain Frozen Foods / Orchard House Foods	<p>The CMA is investigating the completed acquisition by Hain Frozen Foods UK Limited of Orchard House Foods Limited. The CMA has issued an initial enforcement order to prevent any integration of the parties' businesses. The date for the launch of the merger inquiry and deadline for Phase 1 decision have not yet been confirmed.</p> <p>To read the CMA's press release click <a href="#">here</a>.</p>
UK government response to EU public consultation on digital platforms	<p>The UK government has responded to a Commission consultation on digital platforms. The UK Government strongly believes regulation of such platforms should be rejected where this undermines the benefits for consumers and business. It believes that platforms are being used by businesses to adapt and survive and accordingly should not be regulated, nor would such controls be effective. Instead, any concerns should be remedied through use of the competition regime.</p> <p>To read the full response click <a href="#">here</a>.</p>
UK government response to EU public consultation on tackling unjustified geo-blocking	<p>In response to the Commission's consultation on unjustified geo-blocking, the UK government has confirmed it welcomes initiatives to tackle the differential treatment of customers based on their nationality or geographical location, to ensure that consumers fully benefit from the single market. In particular, the government does not believe customers should be stopped from seeing prices which other countries have to pay or that having to pay a different price for a different location is fair. Other</p>

MATTER	UPDATE
	<p>than price variations due to student/member discount, prices should be the same.</p> <p>To read the full response click <a href="#">here</a>.</p>
<p>Clarification on supermarket pricing issued by CMA</p>	<p>The CMA has explicitly clarified that it is not contemplating banning supermarket buy-one-get-one-free deals and special offers, following press speculation that moves by a number of supermarkets to scrap multi-buy deals were prompted by anticipated action by the CMA. In 2015, the CMA responded to a super complaint from Which? regarding pricing practices in the groceries market. Its investigation found some examples of pricing and promotional practices which had the potential to mislead or confuse consumers. The CMA has therefore been working with businesses to address these issues and expects to provide a further update in the next few weeks. Despite this clarification, Sainsbury's and Asda have both announced they are moving away from BOGOF deals in favour of lower prices on certain items.</p> <p>For more information click <a href="#">here</a>.</p>
<p>CMA reminder on high strength alcohol schemes</p>	<p>The CMA has issued a reminder to local authorities to ensure that schemes aimed at reducing consumption of high-strength alcohol must not breach competition law. Some schemes can apparently involve local authorities encouraging retailers to remove high-strength alcohol products from sale for public health and safety reasons. The CMA has previously issued guidance on this to confirm that retailers can join schemes provided that they make an independent decision to do so, not in cooperation with other retailers.</p> <p>To read the CMA's press release click <a href="#">here</a>.</p>
<p>Warning and advisory letters issued by the CMA</p>	<p>The CMA sends letters every year warning and advising companies, where it suspects anti-competitive practices. In 2015, the CMA sent 85 warning letters to undertakings in market sectors including retail and wholesale; household goods, furniture and furnishings, and the distribution and services industry. The most common potential issue was resale price maintenance, with advertising restrictions also raising concerns. The CMA sent 15 advisory letters to similar industries, with resale price maintenance again being the predominant potential issue.</p> <p>For more information click <a href="#">here</a> and <a href="#">here</a>.</p>
<p>New grocery regulations in Ireland</p>	<p>New regulations will apply from 30 April 2016 to supermarkets in Ireland with a turnover of €50 million or more worldwide. After the end of April this year all new and renewed contracts between retailers and suppliers must now be in writing. The contracts must also ensure suppliers are being paid within 30 days. The regulations will be enforced by the Competition and Consumer Protection Commission, with the aim being to create a better bond between retailers and suppliers. As this is a relatively sudden change, the Commission is allowing three months for retailers to fully implement these new procedures.</p> <p>For more information click <a href="#">here</a>.</p>
<p>Fast track stand-alone damages action against Tesco</p>	<p>Two claimants have issued a stand-alone damages claim against Tesco in the Competition Appeal Tribunal (<b>CAT</b>), alleging that a restrictive covenant over land they retained when they sold land to Tesco in 1997 constitutes a breach of competition law (Chapter I and/or Chapter II), and also a breach of the common law doctrine of restraint of trade. They are seeking an injunction as well as damages, and are making use of the new fast track procedure at the CAT.</p> <p>For a copy of the Summary of Claim click <a href="#">here</a>.</p>

# CONTACT THE ADDLESHAW GODDARD COMPETITION TEAM

**Bruce Kilpatrick**

0207 544 5214

[bruce.kilpatrick@addleshawgoddard.com](mailto:bruce.kilpatrick@addleshawgoddard.com)



**Rona Bar-Isaac**

0207 160 3357

[rona.bar-isaac@addleshawgoddard.com](mailto:rona.bar-isaac@addleshawgoddard.com)



**Al Mangan**

0207 544 5352

[al.mangan@addleshawgoddard.com](mailto:al.mangan@addleshawgoddard.com)



**Clare Walker**

0113 209 2588

[clare.l.walker@addleshawgoddard.com](mailto:clare.l.walker@addleshawgoddard.com)



To unsubscribe to this update please click [here](#)

© 2015 Addleshaw Goddard LLP. All rights reserved. Extracts may be copied with prior permission and provided their source is acknowledged.

This document is for general information only. It is not legal advice and should not be acted or relied on as being so, accordingly Addleshaw Goddard disclaims any responsibility. It does not create a solicitor-client relationship between Addleshaw Goddard and any other person. Legal advice should be taken before applying any information in this document to any facts and circumstances.

Addleshaw Goddard is an international legal practice carried on by Addleshaw Goddard LLP (a limited liability partnership registered in England & Wales and authorised and regulated by the Solicitors Regulation Authority) and its affiliated undertakings. Addleshaw Goddard operates in the Dubai International Financial Centre through Addleshaw Goddard (Middle East) LLP (registered with and regulated by the DFSA), in the Qatar Financial Centre through Addleshaw Goddard (GCC) LLP (licensed by the QFCA), in Oman through Addleshaw Goddard (Middle East) LLP in association with Nasser Al Habsi & Saif Al Mamari Law Firm (licensed by the Oman Ministry of Justice) and in Hong Kong through Addleshaw Goddard (Hong Kong) LLP (a limited liability partnership registered in England & Wales and registered and regulated as a foreign law firm by the Law Society of Hong Kong) in association with Francis & Co. In Tokyo, legal services are offered through Addleshaw Goddard's formal alliance with Hashidate Law Office. A list of members/principals for each firm will be provided upon request.

The term partner refers to any individual who is a member of any Addleshaw Goddard entity or association or an employee or consultant with equivalent standing and qualifications.

For further information please consult our website [www.addleshawgoddard.com](http://www.addleshawgoddard.com) or [www.aglaw.com](http://www.aglaw.com).