

COMPETITIVE EDGE RETAIL & CONSUMER

May 2017

RECENT COMPETITION LAW TRENDS

- ▶ Following its e-commerce inquiry launched in May 2015 and preliminary report published in September last year (see our article in the [October edition](#) of Competitive Edge), the European Commission (Commission) recently announced that it has launched separate investigations into three potentially anti-competitive practices. The Commission Press Release is available [here](#):
- Investigation into consumer electronics manufacturers (Asus, Denon & Marantz, Philips and Pioneer) who are suspected of having prevented online retailers from setting their own prices for widely used consumer electronics products;
- Investigation into potential geo-blocking provisions in bilateral agreements between Valve Corporation (a game distribution platform supplier) and five PC video game publishers (Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax) which may prevent end customers from purchasing digital content because of their location or country of residence; and
- Investigation into suspected price discrimination clauses (based on customer nationality or country of residence) in agreements between the largest European tour operators (Kuoni, REWE, Thomas Cook and TUI), on the one hand, and, on the other, Melia Hotels.
- ▶ Under the auspices of the Commission, ten national competition authorities (including the Competition and Markets Authority (CMA) in the UK) have been assessing the effect of the various approaches to 'most favoured nation' (MFN) clauses in the hotel sector. The findings (accessible [here](#)) show that as a result of online travel agents (OTAs) such as Booking.com and Expedia switching from using 'wide' to 'narrow' price parity clauses (which allow the hotels to offer different prices to different OTAs as long as the hotel's website rates were no lower), there has been a discernible increase in price differentiation via OTAs. The CMA has therefore concluded it will not prioritise further investigation of pricing practices in the sector but will seek to raise further awareness of this recent change in pricing clauses. MFN clauses are however still under review by the CMA in reference to [digital comparison tools](#).
- ▶ The tension between web-retailers and brand owners is highlighted by the recent *Asics* and *Coty* cases. On 5 April sportshoe maker Asics lost its appeal before a German court which agreed with the German regulator that Asics had acted illegally by banning retailers from putting its products on price comparison websites. Meanwhile cosmetics giant Coty is appealing a decision of the Regional Court of Frankfurt which rejected Coty's claim that its authorised distributor (Akzente) had breached the conditions of Coty's selective distribution system by selling its products via Amazon.de. In April 2016, the German appellate court decided to [seek guidance](#) from the European Court of Justice (ECJ), and the ECJ hearing began on 30 March 2017. The case is of particular importance to both luxury brands concerned with maintaining brand image and also to the online marketplaces themselves. The decision will be issued at a later date and could dictate the future of luxury online retailing.

EXCESSIVE PRICING IN THE PHARMACEUTICAL SECTOR

- ▶ After reaffirming that competition law should not be used as a price regulator, Commissioner Vestager recently [welcomed enforcement action](#) taken by the CMA and by the [Italian competition authority](#) on pricing in the pharmaceuticals sector, stating that *"there can be times when competition rules need to do their bit to deal with excessive prices."*
- ▶ In its [December 2016 decision](#), the CMA imposed a record £84.2 million fine on pharmaceutical manufacturer Pfizer and a £5.2 million fine on distributor Flynn Pharma (Flynn) and ordered them to reduce their prices after finding they had abused their dominant position by imposing excessive and unfair prices for an anti-epilepsy drug. The price of the drug increased by up to 2,600% overnight after it was genericised and removed from price regulation. This resulted in the NHS spending about £50 million for the drug in 2013, compared with about £2 million the preceding year. The CMA rejected arguments by the parties that their change in pricing strategy was due to the fact that the drug had been loss making and concluded that there was no justification for price rises on this scale. Flynn lodged an appeal against the CMA decision in the Competition Appeal Tribunal (CAT) on 7 February. If the CMA decision is upheld on appeal, we can expect to see damages claims against the companies by the NHS and other healthcare providers in the UK.

- ▶ In a separate investigation into pricing in the pharmaceuticals sector, on 16 December 2016 the CMA sent a [statement of objections](#) to another pharmaceutical manufacturer, Actavis UK, for excessive pricing on hydrocortisone (including price increases of 12,000% on 10mg packs).
- ▶ On 27 April the Health Service Medical Supplies (Costs) Bill 2016 received royal assent, under which the Government can impose lower prices on drugs required by the NHS. As a result, this type of extreme case may become a thing of the past in the pharmaceutical sector, however there is a growing tendency for competition authorities to look more closely into pricing and price-related strategies in sectors reliant on patented products and technologies such as the information technology sector. The latter is demonstrated, for example, by the [Commission's investigations](#) into Qualcomm's pricing practices on its chipsets and into the conduct of Samsung and Motorola, respectively, in relation to standard essential patents (SEPs).

ROUND UP OF RECENT DEVELOPMENTS

MATTER	UPDATE
EU	
Audible and Apple remove exclusivity obligations	<p>On 19 January, the Commission welcomed an agreement between Apple and Amazon's subsidiary Audible to end exclusivity obligations requiring Apple to purchase exclusively from Audible and Audible not to supply music digital platforms other than Apple's iTunes. This will leave Audible free to supply third party platforms and Apple to source audiobooks from alternative suppliers, with publishers and content aggregators able to enter into distribution agreements directly with Apple. The Commission's investigation followed a complaint from the German Publishers and Booksellers Association and was conducted in close cooperation with the German Federal Cartel Office.</p> <p>The Commission's press release is available here.</p>
Asahi/AB InBev's merger approved	<p>The Commission has approved the acquisition by the Asahi Group of Japan (Asahi), a beverages and food company with a focus on beers, of the business of AB InBev in Central and Eastern Europe (AB InBev). Although the AB InBev business includes certain beer brands and assets formerly owned by SABMiller, the Commission concluded that the merger does not raise competition concerns because of the very limited increment in market share that will result, and the presence of several beer competitors in the relevant markets.</p> <p>More information is available here.</p>
Apple's appeal against Commission state aid decision	<p>Details of the appeal brought by Apple against the Commission's decision that Ireland had granted Apple illegal state aid amounting to €13 billion as a result of selective tax treatment have recently been made public.</p> <p>More information is available here.</p>
Apple and Netflix challenge Commission decision on German aid for film production	<p>Apple Distribution International (Apple) and Netflix are challenging a Commission decision from September 2016 which authorised an amendment to a previously approved German aid scheme that raises taxes from online operators to fund national subsidies for production of German language films. The Commission found that the amendments, which involved the extension of the tax from domestic video-on-demand suppliers to suppliers based outside of Germany do not discriminate against foreign suppliers. Foreign streaming services that target the German market can take advantage of the subsidies funded by the tax, but Apple and Netflix argue that the scheme is contrary to a pan-European media law which forbids such measures.</p> <p>The Commission decision is available here.</p>
European Parliament approves report banning geo-blocking	<p>The European Parliament on 25 April approved a report banning geo-blocking of online content within the EU, which would mean companies could no longer prevent consumers from purchasing from a website aimed at consumers in another</p>

MATTER	UPDATE
	<p>EU member state. There is some concern at the inclusion of copyrighted material in the proposed ban, as this could have unintended effects such as upsetting small publishers' business models or unintentionally raising prices in less affluent markets, for example in the music sector where online retailers such as Spotify typically sell music cheaply in Eastern European countries. In the upcoming talks with the European Council and the Commission, some MEPs will be pushing for the removal of copyrighted content from the ban.</p> <p>The European Parliament's press release is available here.</p>
UK	
<p>Light fittings sector: CMA issues statement of objection to Poole</p>	<p>The CMA has issued a statement of objections to Poole Lighting Limited, a light fitting supplier, provisionally finding that it has prevented its distributors from setting their own online prices and imposed minimum resale prices, which would constitute "resale price maintenance" in breach of the Chapter I prohibition. The investigation, launched in August last year, focuses on Saxby and Endon brands of domestic light fittings, including lamp shades, table lamps and wall light fittings.</p> <p>More information is available here.</p>
<p>CMA appealing tobacco decision to the Supreme Court</p>	<p>The CMA has been granted leave by the Supreme Court to appeal the July decision of the Court of Appeal requiring the CMA to pay back the fines paid by Gallaher and Somerfield to the CMA's predecessor, the Office of Fair Trading (OFT), in early resolution agreements in the OFT's tobacco investigation. The Court of Appeal ruling was made on the basis of equal treatment – in 2012 the OFT repaid the early resolution fine paid by TM Retail in the same investigation because of assurances it had given TM Retail before the settlement that, should another party successfully appeal the OFT's eventual decision in the case, it would make a corresponding reduction in the fine payable by TM Retail.</p> <p>The CMA case page provides further details of the investigation and appeal and the full decision of the Court of Appeal is available here.</p>
<p>Unilever rejects Kraft Heinz's offer</p>	<p>On 20 February, it was reported that US Kraft Heinz has withdrawn its \$143 billion bid for Anglo-Dutch company Unilever. In addition to opposition from Unilever shareholders, Kraft may have been discouraged by a hostile response from UK politicians concerned about the acquisition of another large UK company by a foreign group seven years after Kraft's take-over of Cadbury.</p> <p>More information is available here.</p>
<p>Extension of Phase 1 review in the Punch Taverns /Heineken merger</p>	<p>The CMA has extended its timetable for Phase 1 review in the anticipated acquisition of Punch Taverns Holdco (A) Limited by Heineken UK Limited as it is not satisfied with information it has received from Heineken in response to an information request by the CMA on 12 April 2017. The transaction was referred back from the Commission to the CMA for investigation following a referral request by the merging parties under article 4(4) of the EU Merger Regulation.</p> <p>More information is available here.</p>
<p>Black & Decker/ Newell merger clearance</p>	<p>On 11 April, the CMA announced that it has cleared the acquisition of the power tool accessories and hand tools and storage business of Newell Brands, Inc. by Stanley Black & Decker, Inc.</p> <p>The full text of the decision will be available in due course here.</p>
<p>Clearance of Boparan's acquisition of Bernard Matthews Limited business</p>	<p>The CMA has cleared the completed acquisition of the business of Bernard Matthews Limited by enterprises conducted by Boparan Private Office, having concluded that the transaction does not raise competition concerns.</p> <p>More information is available here.</p>
<p>CMA clears DHL acquisition of the</p>	<p>On 9 February, the CMA announced it has cleared the acquisition by DHL Supply</p>

MATTER	UPDATE
enterprise of Carlsberg Supply Company	<p>Chain Limited of the business constituted by certain secondary distribution assets and workstreams of Carlsberg Supply Company UK Limited, as part of an agreement to outsource Carlsberg's secondary distribution to DHL. The CMA concluded that, despite its unusual nature, the transaction amounted to a relevant merger subject to merger control, but found that it would not give rise to competition concerns. The horizontal unilateral effects the CMA originally identified in the supply of delivery-only services in Great Britain are no longer a concern since Carlsberg is no longer a competitive constraint in respect of those services, having ceased to provide them.</p> <p>More information is available here.</p>
CMA accepts undertakings in lieu offered by AMC	<p>On 19 April the CMA announced its acceptance of the undertakings in lieu offered by AMC (UK) Acquisition Limited (AMC) in relation to its acquisition of Odeon and UCI Cinemas Holdings Limited.</p> <p>AMC offered to divest either the AMC Great Northern cinema or the Odeon Printworks cinema with an up-front buyer condition, to avoid a Phase 2 investigation. The CMA considered that the transaction gave rise to a realistic prospect of a substantial lessening of competition as a result of the horizontal unilateral effects in the supply of cinema exhibition services in Manchester. AMC will sell the Odeon Printworks to Vue Entertainment Limited to remedy these concerns.</p> <p>More information is available here.</p>
CMA clears the Cineworld / Empire Cinemas merger	<p>Earlier this year, the CMA announced that it had cleared the acquisition of five cinemas from Empire Cinemas Limited by Cineworld Group plc (Cineworld). The CMA found that although the merging parties overlap in the supply of cinema exhibition services in the UK and at a local level, in relation to three of the five cinemas, the transaction does not raise competition concerns because it only results in a small increase in Cineworld's share of supply at national level and a number of strong national competitors will remain post-merger.</p> <p>More information is available here.</p>
Robert Wiseman Dairies released from merger undertakings	<p>The CMA has released Robert Wiseman Dairies plc from undertakings given in 1997 in relation to its acquisition of Scottish Pride Holdings plc. Given changes in the market since that time, the CMA considered that it was no longer appropriate to require Wiseman Dairies not to acquire any further interests in a milk suppliers or milk supplier assets.</p> <p>The CMA decision is available here.</p>
Undertakings in lieu accepted in the Co-operative's acquisition of 8 convenience stores	<p>In January the CMA accepted the undertakings in lieu offered by the Co-operative Foodstores Limited (the Co-operative) in relation to its acquisition of eight My Local grocery stores from ML Convenience Limited and MLCG Limited. The CMA found that the transaction might give rise to competition concerns in Widnes given that, post-merger, only one convenience store would be likely to compete effectively with the Co-operative there. The CMA considers that the Co-operative's offer to divest two of its convenience stores in Widnes to an approved buyer or buyers provides a solution that remedies the substantial lessening of competition concern.</p> <p>More information is available here.</p>
JD Sports / Go Outdoors	<p>The CMA recently granted a number of derogations from the initial enforcement order it made in December last year in its investigation of the completed acquisition by JD Sports Fashion Plc of Go Outdoors Topco Limited, to prevent integration of the merging businesses pending completion of its investigation. The deadline for the Phase 1 decision is 18 May 2017.</p> <p>More information is available here.</p>
Groceries Code Adjudicator (GCA) first newsletter of 2017	<p>In her latest newsletter, the GCA focused on her response to the consultation on payments for better positioning of goods. Her findings included that there has been a</p>

MATTER

UPDATE

change in the approach of the retailers to bring practices into line with the requirements of the Code. The GCA also provides some useful insight into how she will view certain practices:

- ▶ Demands for, or discussions of, investment and payments in return for better positioning (unless in relation to a promotion) could breach the Code unless they can be shown to form part of ordinary commercial negotiations;
- ▶ Whilst the GCA is supportive of suppliers providing category advice to improve the category and consumer offering, any requirement for payment for category captaincy or category management which results in the supplier receiving better positioning or increased space is likely to be a breach of paragraph 12 of the Code. The GCA recommends that retailers have a policy setting out how they manage supplier involvement in category management ; and
- ▶ Retailers could also consider their policies with regards to supplier participation in range reviews. Any requirement for payment to participate in a range review which results in the supplier receiving better positioning or increased space is likely to also be a breach of paragraph 12 of the Code.

More information is available [here](#).

CMA retail mergers commentary

The CMA published commentary on its approach to retail mergers, including:

- ▶ The CMA is willing to entertain the argument that customer offer is determined nationally, although it starts from the assumption that local competition applies. It will assess both local and national effects if there is evidence that the parties flex their offering at both levels; and
- ▶ An increasingly important issue is whether online retailers constrain bricks-and-mortar. In determining this, the CMA clarified that it will examine as many of the following as possible: internal documents, customer surveys and behaviour, price difference, customer search, multi-channel offers and recent sector activity.

More information is available [here](#).

OTHER NATIONAL JURISDICTIONS

Paris Court of Appeal confirms infringement decision

In 2014, the Autorité de la concurrence fined eleven producers of home and personal care products, including (among others) Colgate-Palmolive, Henkel, Unilever and Procter & Gamble, L'Oreal and Reckitt Benckiser, for coordinating their commercial policies (particularly price increases) towards supermarkets. It imposed a record total fine (at the time) of approximately €951million on the manufacturers. The infringement decision was confirmed by the Paris Court of Appeal on 27 October 2016, although it reduced the fine slightly (by €2.2 million).

The full decision of the Court of Appeal is available [here](#) (in French) and the 2014 press release is available [here](#) (in English).

Austrian competition authority fines coffee maker De'Longhi-Kenwood

On 20 February, Austria's cartel court fined De'Longhi Kenwood €650,000 for breaching Article 101 TFEU (and the equivalent Austrian provision) by agreements with its distributors which fixed minimum resale prices, restricted cross-border trade and prohibited online selling.

More information is available [here](#) (in German).

Booking.com developments 'MFN' clause

Booking.com's appeal of the [German Federal Cartel Office \(FCO\)](#)'s decision is ongoing, with Counsel for the appellant arguing that MFN clauses are necessary to avoid free-riding between the hotel owner's website and online booking websites. The 2015 FCO decision went further than the Commission's approach and banned both wide MFN clauses (which prevent a hotel from offering lower room prices on competing hotel booking platforms) and narrow MFN clauses (which prevent a hotel from offering lower prices on its own website).

On 9 February, the French Autorité de la concurrence, which permits narrow forms of MFN clauses, [published the results](#) of its intermediary assessment of the [commitments made by Booking.com in April 2015](#). It found that, as a result of the undertakings, some hotels are now varying their prices according to the online booking platforms used, however it also noted the results may be skewed by the decline in tourism sector following the series of terrorist attacks in France.

See the Recent Trends section above for more updates on MFN clauses.

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