A Christmas carol

The state of play in the retail sector

*by **John Schmidt** and **Aiste Slezeviciute****

Christmas is a busy time in retail and the sector has seen its fair share of interest from competition authorities across Europe. While it may be a bit clichéd to put the targets of such regulatory attention into "naughty" and "nice" categories, the approaching year-end may be a good juncture to take stock of the cases and what it means for the sector.

Recent developments show that the focus of competition authorities now includes more nuanced competition law questions associated with online commerce, as well as strict enforcement with respect to the well-established (but evolving) issues such as resale price maintenance (RPM), category management and hub-and-spoke scenarios. This trend is highlighted by a number of investigations into the online retail sector at the EU and national levels, as well as the ecommerce inquiry launched by the European Commission.

In this seasonally inspired article, we examine the retail sector Ghosts of Christmas Past, Present and Yet to Come.

The Ghost of Christmas Past

RPM-type arrangements continue to be strictly enforced by the competition authorities. Undertakings throughout the supply chain are advised to take caution with respect to price communications. The lines between legal and illegal price communications are not clearly drawn, and commercial positioning and negotiation can be mistaken for overtures to agree resale prices. The investigation by the UK's Competition and Markets Authority into sports bras (Case CE/9610-12), although closed with a no grounds for action finding, demonstrates the renewed post-*Leegin* vigour with which the regulator seeks to pursue suspected RPM agreements.

The EU Commission's analysis of the food supply chain in its modern retail study, and the report published in October 2014, provide a useful overview of a number of issues, such as the level of innovation, concentration and choice in the EU retail sector and this may well serve as a basis for further action by the Commission.

The UK grocery market also found itself in the spotlight again, following a super-complaint filed with the CMA in April 2015 by the consumer body Which?. The CMA responded by issuing a report – *Pricing Practices in the Groceries Market* – in July 2015. The report made recommendations to improve unit pricing for groceries and included guidance on certain pricing and promotional practices. The CMA identified key areas for action in relation to special offers, price match schemes and unit pricing. It made a number of recommendations and intends to engage with, among others, the Chartered Trading Standards Institute, the Department for Business, Innovation and Skills and grocery retailers to address the issues.

The Ghost of Christmas Present

A number of national competition authorities across the EU are reviewing price parity or most favoured nation (MFN) clauses in the context of their investigations into platforms for online hotel bookings. The investigations scrutinised the price parity clauses in contracts between the hotels and online travel agents (OTA). These clauses require the member hotel to give all OTAs at least as good sales conditions as on any other sales channel, covering terms on room prices, as well as availability terms and cancellation conditions. Competition authorities argue that this reduces competition, as there is no competitive advantage for OTAs to lower their rates or compete on other conditions. The OTAs, for their part, argue that MFNs are crucial to the nature of their services because of the "free riding" problem, particularly taking into account instant search results that allow for an easy price comparison.

In the UK, the hotel booking case continued. In January 2014, the OFT accepted formal commitments from IHG, Booking.com and Expedia that covered the discounts offered by the hotels and travel agents, as well as the advertising of hotel room discounts. A third party, Skyscanner, the metasearch engine, successfully appealed the settlement reached by the OFT and the OTAs to the Competition Appeal Tribunal (CAT), who duly quashed it and remitted the case back to the CMA for reconsideration in September 2014 (CAT 16 (2014), *Skyscanner Ltd v CMA*). A year later, the CMA announced that it had closed its investigation on administrative priority grounds (Case CE/9320-10).

The UK investigation was one of several investigations across Europe into a range of pricing practices in the online booking sector. Competition authorities in Switzerland, Denmark, Greece, Ireland, Norway, Poland, Sweden and Italy have investigated online hotel booking platforms. Several investigations ended with a prohibition decision, namely in Germany and France. Others were settled, following revisions to the MFN restrictions that prevent hotels from offering cheaper room rates on competing online travel agents' sites than they offer on Booking.com or Expedia.

However, there is a somewhat divergent approach to MFNs emerging across Europe, which means that EU-wide online platform agreements may face different issues and constraints in different member states. One can therefore wonder whether a unified European approach would have been more appropriate. No doubt, there will be a future platform case that will give the European Commission an opportunity to develop a more coherent approach.

A number of other member states, in particular France and Germany, are also picking up the pace in their regulatory scrutiny of online sales. The French competition authority has recently closed its investigation into Adidas's online practices after the sports shoemaker addressed concerns over the alleged sales restrictions on certain platforms. Adidas faced similar scrutiny in Germany, where the Bundeskartellamt closed its investigation in July 2014, following the changes the company made to restrictions imposed in its online sales agreements.

* *Shepherd and Wedderburn LLP*

The Ghost of Christmas Yet to Come

Competition authorities are naturally concerned with competition in the consumer-facing retail sector and strict enforcement actions are to be expected. In the UK, the CMA recently opened an infringement investigation in the sports-equipment sector, with more details yet to emerge. It is also evident from recent investigations that the focus of competition authorities will now fall on ecommerce as much as on bricks-and-mortar retail.

The CMA is actively considering in a number of workshops how to deal with vertical restrictions in the retail sector, and how to take account of the evolving consumer landscape, particularly the internet, in its decision-making (including merger analysis).

The EU Commission's ongoing ecommerce sector inquiry covers a very wide range of goods and services, stretching from electronics to shoes and online content. The preliminary report is scheduled for mid-2016 and the final report for the first quarter of 2017. Judging by past sector inquiries, follow-on enforcement action is a distinct possibility.

Ebooks

Despite the commitments reached with the European Commission back in 2012 and 2013, the online sales arrangements of ebooks will continue to face scrutiny. On 16 November, the Bundeskartellamt opened an investigation into Amazon's subsidiary Audible.com and Apple Computer Inc with respect to the long-term agreement on the purchase of audiobooks by Apple from Audible for sale in Apple's download shop iTunes Store.

This follows the investigation opened by the Commission in July of this year into certain business practices by Amazon regarding the distribution of ebooks. In its press release, the Commission states that it will, in particular, investigate certain clauses included in Amazon's contracts with publishers that impose a requirement to inform Amazon about more favourable or alternative terms offered to competitors. The Commission's investigation will focus on the largest markets for ebooks in the EEA, namely ebooks in English and German.

Private enforcement

Private enforcement also plays a role in shaping competition rules concerning online sales. The Higher Regional Court in Frankfurt is scheduled to decide in December of this year whether it is necessary to refer questions to the Court of Justice of the EU regarding the alleged restrictions to selling online as part of the dispute concerning access to the distribution system. The case concerns a dispute between a manufacturer and a distributor that wanted to continue using online sales platforms, as well as a price comparison website, against the restrictions imposed by the manufacturer. If a reference is made, there may be scope for significant clarification of the law that could in turn have a significant impact on selective distribution systems.

We expect that private actions for damages will rise in the UK following recent changes introduced by the Consumer Rights Act 2015 (CRA). In the retail space, this will make it more likely that end-consumers and small businesses will bring follow-on claims against companies that have been found to have infringed competition law. Similarly, at EU level, the Directive on Antitrust Damages Actions (2014/104/EC) will align the laws of other member states so that, by the end of next year, we can expect a similar increase in consumer actions across Europe. The EU directive will make a number of important changes, including easier access to evidence and a welcomed clarification of the legal position in relation to indirect purchasers and the passing-on defence. The directive also establishes a rebuttable presumption that cartels cause harm, and introduces joint and several liability.

All these changes are designed to make it easier for end-consumers to claim damages arising from competition law infringements. With third-party funding options more readily available, we expect that the consumer-facing retail sector will see a rise in a number of damages actions, with consumer associations reportedly gearing up for action. Companies at all levels of the distribution chain involved in retail must be prepared that any infringement decision against them may lead to a follow-on class action on behalf of consumers. So it is not a bad idea to place competition compliance review as one of the New Year's top resolutions (and perhaps make it the one that is not broken!).

Similarly, there are also signs of an increased appetite for damages actions by the retailers, as illustrated by the large damages claims brought in the UK against the payment card providers, Visa and MasterCard, following the EU Commission's decision regarding the interchange fees set by the providers.

On the claimant's side, it is important to remember that limitation period considerations must be at the forefront of any litigation strategy. The complex rules involved need to be taken into account right at the very start. This can be seen from the recent High Court judgment in the UK where 30 years' and circa £500m worth of claims were struck out by the court by the application of the Limitation Act: see *Arcadia Group Brands Ltd v Visa Inc* [2014] EWHC 3561 (Comm).

Big data, price comparison and advertising

The interplay with consumer protection, privacy and competition laws will also be one of the next challenges for the competition authorities (and other agencies) as they grapple with big data. The EU Commission's position is yet to emerge, while the French, German and the UK competition authorities are teaming up in order to understand better the challenges posed by big data.

Price comparison websites are increasingly seen as a good remedy for competition issues. The old OFT tried to develop one in respect of extended warranties. Similarly, the CMA is proposing one for small businesses in its retail banking investigation. How successful regulator-inspired platforms will be, only time can tell.

We can also expect more interest in online advertising. The French competition authority continues to monitor Google's policies following a complaint filed by an advertiser whose AdWords account was suspended, although no interim measures were imposed by the authority (Decision 15-D-13, 9 September 2015). The French competition authority tackled this issue before, back in 2010 (Decision 10-D-30).

Summing it up

So in summary: there will probably be more RPM cases, a continued focus on MFNs and platform cases, combined with a renewed interest in vertical restrictions and anything online, with an added focus on private enforcement.

Bah humbug or a busy year for Santa's little helpers?