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COMPETITION AND CONSUMER DEVELOPMENTS ROUND-UP 2022 FOR THE CONSUMER SECTOR: A YEAR OF CHANGE WITH MORE TO COME

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Legal Briefings – By **Susan Black, Veronica Roberts, Kyriakos Fountoukakos and Kristien Geeurickx**

Online retail, spurious climate claims, influencers and vertical agreements all on the agenda as UK and Europe moved to upgrade competition and consumer protection rules

NEW COMPETITION RULES FOR SUPPLY CHAIN AGREEMENTS – MORE FLEXIBILITY FOR DISTRIBUTION MODELS AND ONLINE SALES RESTRICTIONS RELAXED

On 1 June 2022 new competition rules for vertical agreements came into force in the EU and UK, the first time the two have diverged in recent years and a move requiring businesses operating in the territories to comply with both regimes. The general analysis framework remains unchanged: the Vertical Agreements Block Exemption Regulation (VBER) and the UK Vertical Agreements Block Exemption Order (VABEO) provide a broad safe harbour for supply chain agreements provided parties to the agreement have less than 30% market share and the agreement does not contain any so-called hardcore restrictions. But the list of territorial and customer restrictions is now more clearly structured and there is greater protection for exclusive and selective distributors and more flexibility in the design of distribution models.

The approach to online sales restrictions has been relaxed, recognising that online sales have developed into a mature sales channel no longer requiring special protection. Dual pricing – under which the distributor is required to pay a different wholesale price for products intended to be resold online than for products resold in store – can now benefit from the safe harbour as it may incentivise or reward investment in online sales channels. In the context of selective distribution, suppliers will no longer be required to impose the same qualitative criteria for online sales as shop sales. Restrictions relating to use of certain online channels, such as online marketplaces, now also benefit from the safe harbour.

The rules have become stricter in some areas, however. This is the case for dual distribution agreements, where the supplier also sells the relevant goods and services to end customers in competition with its independent distributors at retail level. Any exchange of information between supplier and its distributors will only benefit from the safe harbour to the extent that the information is directly related to the implementation of the agreement and necessary to improve production or distribution of the contract goods or services.

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TREATMENT OF MOST FAVOURED NATION CLAUSES – STRICTER APPROACH AND MORE CLARITY NEEDED

Most favoured nation (MFN) or parity clauses, which require a business to offer the same or better conditions to its contracting party as those offered on any other sales channel, did previously benefit from the safe harbour of the VBER. As a result of an increase in the use of parity obligations across sectors, and as several national competition authorities have held that such clauses can have negative effects on competition, across-platform (ie, 'wide') parity obligations no longer benefit from automatic exemption under the new VBER and will be assessed on a case-by-case basis. A reference by the Amsterdam District Court to the Court of Justice of the European Union (CJEU) seeking clarification on the status of MFNs in the context of Booking.com litigation should shed further light on the status of such clauses.

The UK went one step further, listing wide retail parity obligations as a hardcore restriction under the VABEO, the domestic equivalent of the VBER. But in an interesting twist, the Competition Appeal Tribunal (CAT) has recently set aside the Competition and Markets Authority's (CMA's) infringement decision in its *Compare The Market* investigation relating to use of wide MFN clauses. The CAT held that wide MFNs should not be classified as 'by object' restrictions as they can have a range of outcomes, not all of which are anti-competitive. Whereas they may restrict intra-brand competition or the ability to price differentially, they do not restrict inter-brand competition, where different products compete against each other, and it is therefore necessary to consider their anti-competitive effects on a case-by-case basis. The agency's decision here precedes the VABEO regime and it is unclear to what extent the CMA can be expected to adjust its approach to wide MFNs in light of the CAT's analysis. The CAT's reasoning should at least provide a helpful framework for parties seeking to demonstrate the possible pro-competitive effects of the use of wide retail MFNs.

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CHANGES TO UK CONSUMER PROTECTION LAWS – FOCUS ON UNSCRUPULOUS PRACTICES AND GREATER CMA ENFORCEMENT POWERS

Changes to the UK's core consumer protection legislation will be included in the Digital Markets, Competition and Consumer bill which is due to go through the Parliamentary process before the end of May 2023 and expected to come into force in October 2023. Important changes will be made to the regime to ensure that consumer rights keep pace with market developments, in particular the trend towards online retail and online advertising. Consumers will benefit from enhanced protection from unscrupulous practices such as fake reviews and subscription traps.

In addition, the CMA will have direct enforcement powers under an administrative model similar to that for competition enforcement for the 'core' pieces of consumer protection legislation, such as the legislation relating to unfair commercial practices and unfair contract terms. It will be up to the CMA to determine whether a company infringes the rules, with the regulator able to impose fines of up to 10% of annual worldwide turnover for infringing businesses or fines of up to £300,000 where an individual breaks the law. As a result of these changes, businesses should ensure that consumer protection legislation is included in their internal compliance policies.

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NEW GUIDELINES ON SOCIAL MEDIA ENDORSEMENTS – BUSINESSES MAY BE LIABLE FOR NON-COMPLIANCE BY CONTENT CREATORS PROMOTING THEIR BRANDS

The CMA has published guidance for social media platforms, brands and content creators setting out how they should approach online advertising to ensure they comply with the relevant UK consumer protection legislation. Social media platforms have a duty to prevent and address unlawful practices such as hidden advertising that are facilitated through their services and businesses can be held liable for non-compliance by content creators promoting their brands.

The CMA's latest guidance signals its intent to tackle these practices and platforms, brands and content creators should take necessary steps to ensure they comply with the rules. This is particularly important in light of Government proposals to strengthen the CMA's enforcement powers for consumer protection legislation, bringing them in line with its competition law powers under which the CMA takes direct enforcement action and can impose fines of up to 10% of worldwide annual turnover of an infringing business. The proposals will be included in the Digital Markets, Competition and Consumer Bill, which has now been moved forward to the current Parliamentary year.

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EU COMMISSION AND CMA FOCUS ON COOPERATION IN THE NAME OF SUSTAINABILITY

At EU level the Commission has added a new chapter on the assessment of sustainability agreements to its draft revised Horizontal Guidelines overseeing industry competitors. Sustainability agreements are defined as "any type of cooperation agreement between competitors that genuinely pursues one or more sustainability objectives, regardless of the form of cooperation". There is a particular focus on the analysis of sustainability standardisation agreements, which are expected to be the most frequent form of cooperation for pursuing sustainability objectives. The draft also contains detailed guidance on how the parties should substantiate their claims of efficiency gains for consumers, including where the claimed benefits of the agreement apply also to consumers in the wider market.

The revised Guidelines were meant to come into force on 1 January 2023 but the Commission has extended the current regime until June 2023 to allow it to take into account a range of comments received on the draft. A summary of the draft is available. See below for link to a summary.

The VBER Guidelines also recognise that sustainability is a priority objective for the EU to which efficient supply and distribution agreements may contribute. The Guidelines provide examples of how sustainability goals can constitute efficiency. In the context of selective distribution, for example, qualitative criteria may refer to the achievement of sustainability objectives or exclusivity obligations may be used to incentivise long-term investment in sustainable technology.

In January 2021 the CMA published high level guidance on sustainability agreements and competition law, with particular focus on standard setting and information exchange. We expect further developments on this front in the UK. The CMA has established a sustainability taskforce to lead its work in this area and develop formal guidance setting out the criteria for assessing whether sustainability agreements restrict competition and may benefit from an exemption. The CMA is also recommending changes to consumer legislation to make it easier for consumers to make sustainable choices. Proposals include the introduction of legal definitions for potentially misleading terms such as 'carbon neutral', 'biodegradable', 'compostable'.

See here and here.

FOCUS ON GREENWASHING – CMA CLARIFIES RULES AROUND ENVIRONMENTAL CLAIMS

In September 2021 the CMA released the Green Claims Code, with new guidance for businesses marketing goods and services as environmentally-friendly. The guidance helps businesses understand and comply with their existing obligations under consumer protection law when they make environmental claims. Green claims may be explicit or implicit and appear in advertisements, marketing material and branding (including trading names) or packaging, and all aspects of a claim may be relevant.

Following an initial bedding-down period of the Code the CMA is now carrying out a full review of misleading green claims, both online and offline, prioritising certain sectors such as fashion, travel and transport and fast-moving consumer goods. In July 2022 the CMA launched an investigation into fashion brands ASOS, Boohoo and George at Asda, scrutinising their green claims. The regulator cited concerns over the way the brands market products to consumers, including statements and language used which may be too broad and vague, the lack of information about products included in the companies' eco ranges, and a lack of clarity as to whether the accreditation applies to particular products or to the businesses' wider practices. If the CMA concludes the companies are in breach of the Consumer Protection from Unfair Trading Regulations 2008, it may secure undertakings from the relevant companies to change the way they operate, or it can apply for an enforcement order from a civil court. Once the Digital Markets, Competition and Consumer bill is adopted, the CMA will have direct enforcement powers and be able to impose fines on companies found to have engaged in greenwashing.

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Five key issues to watch in 2023:
• EU Commission's final guidance on sustainability agreements (expected June 2023)
• CMA guidance on sustainability and competition law
• UK consumer protection legislation update with direct enforcement powers for the CMA (expected to be in force October 2023)
• CJEU Guidance on MFNs in Dutch Booking.com case
• CMA increased focus on greenwashing

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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