

The Law Society

Competition Section seminar: Key trends in Competition law 2018-2019

Chair:
Richard Eccles, partner, Bird & Bird

Speaker:
Professor Richard Whish, King's College

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About us - The Competition Section

The Competition Section is a subscription-based Law Society membership group. It promotes knowledge and awareness of competition law developments and addresses current issues and challenges facing competition law practitioners

For more information about the Competition Section or to join -
www.lawsociety.org.uk/competition

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Your SRA Continuing competency codes:

The Competition Section have compiled a list of competency codes in a new training tracker, to help you record your professional development.

Go to our web site > www.lawsociety.org.uk/competition and then **Home > About us > Keep track of your professional learning** to see the codes to add to your training record.

Here is a sample...

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The Competition Section covered these SRA codes between 1 November 2018 and 31 May 2019			
When	Name of product	Product type	SRA codes
Nov 2018	Competition Section webinar: The interface between public procurement and competition law	Inclusive	A2, A5, B1
Nov 2018	Competition Section seminar: UK national security law and merger control	Inclusive	A2, A4, A5, B1, C2
Nov 2018	Competition Section annual dinner and awards: Podcast of keynote speech on Brexit and the future of competition law (Audio)	Inclusive	TBC
Dec 2018	Competition Section seminar: Update on recent pharmaceutical competition cases	Inclusive	A2, A5, B1
Jan 2019	Competition Section webinar: Competition litigation reviewing 2018's key developments	Inclusive	A2, A4
Feb 2019	Competition Section seminar: Data issues and merger control	Inclusive	A2, A4, A5, B6, B7
Mar 2019	Competition Section seminar: UK mergers update	Inclusive	A2
Apr 2019	Competition Section seminar: Review of the Digital Competition Experts Panel report	Inclusive	A1, A2, A4, B1, B3
May 2019	*Competition Section annual conference:	Discounted	A2
May 2019	Competition Section webinar: Avoiding the antitrust perils of illegal information exchange	Inclusive	A2, A4

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2019 Competition Section webinars – listen again

The below are webinars are inclusive to Competition Section members and available to view now:

[Jan 2019 – Webinar: Competition Litigation - reviewing 2018's key developments](#)

- Speakers: Anna Morfey and Scott Campbell, Hausfeld

[May 2019 - Webinar: Avoiding the antitrust perils of illegal information exchange](#)

- Speaker: Graeme Young, partner, CMS

[17 July 2019 – Webinar: Dawn raids - best practices and recent developments](#)

- Speakers: Omar Shah, partner, Morgan Lewis and Jasminder Nakhwal, partner, Peters & Peters

Sept 2019 – Verticals and E-commerce

- Speaker: Richard Eccles, partner, Bird & Bird.

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Upcoming Competition Section seminars 2019 – Book/Save the date

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- Speakers: Niall Collins, Tara Kelly, Catherine Allen, partners Mason, Hayes & Curran

8 October 2019: Competition Damages Litigation

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Horsfall Turner essay question - £1,000 1st prize

The Horsfall Turner essay question for 2019 is:

'Earlier this year, experts from the European Commission (EC) and a UK Digital Competition Expert Panel both made recommendations to adapt competition law and policy to the challenges of the digital era.

Do you think the EC was right to propose a presumption of anti-competitive conduct, effectively shifting the burden of proof for pro-competitive benefits onto platform operators?'

Essays should be no more than 2,500 words in length.

The entry deadline is 12 noon on Monday 21 October.

The image shows a check from The Law Society. The text on the check includes: 'Prize winner in the Competition Section's Horsfall Turner essay contest', 'Date: 21 November 2019', 'Pay: One thousand pounds', and '£ 1,000.00'. The check is signed 'For and on Behalf The Law Society'.

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Competition Section member survey

Part 1: About your membership needs – June

Part 2: About you – understanding diversity in your profession – Sept

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KEY TRENDS IN COMPETITION LAW 2018-2019 Richard Whish King's College London



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KEY TRENDS IN COMPETITION LAW 2018-2019

STRUCTURE OF PRESENTATION

- ANTITRUST (BACK) IN THE MAINSTREAM OF ECONOMIC DEBATE
- WHAT ANTITRUST POLICY?
- ANTITRUST AND THE PLATFORMS
- SELECTING THE CORRECT THEORY OF HARM AND TOOL
- HORIZONTAL ISSUES
- VERTICAL ISSUES
- THE SINGLE MARKET IMPERATIVE
- UNILATERAL BEHAVIOUR
- DAMAGES
- AUTHORITIES TOUGHENING UP ON PROCEDURE

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KEY TRENDS IN COMPETITION LAW 2018-2019

ANTITRUST (BACK) IN THE MAINSTREAM OF ECONOMIC DEBATE

- HOW CENTRAL IS ANTITRUST TO ECONOMIC POLICY GENERALLY?
- MONOPOLY A KEY FEATURE OF THE DEBATE IN THE US 130 YEARS AGO: SHERMAN ACT 1890; CLAYTON ACT AND FTC ACT 1914
- ANTITRUST USED FOR A VARIETY OF PURPOSES IN SUBSEQUENT YEARS (SEE NEXT SLIDE)
- BUT A RETURN TO CENTRALITY IN RECENT TIMES. SEE EG
 - LINA KHAN *AMAZON'S ANTITRUST PARADOX*, YALE LAW JOURNAL 2017
 - TIM WU *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE*, COLUMBIA GLOBAL REPORTS 2018
 - JONATHAN TEPPER *COMPETITION IS DYING AND TAKING CAPITALISM WITH IT*, BLOOMBERG 2018

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KEY TRENDS IN COMPETITION LAW 2018-2019

WHAT ANTITRUST POLICY?

- FOR MANY YEARS 'CONSUMER WELFARE' HAS BEEN ASCENDANT
- THEN ALONG CAME 'HIPSTER ANTITRUST', QUESTIONING WHETHER OTHER VALUES WERE BEING MISSED
 - FAIRNESS; DISEMPOWERED CONSUMERS; LOSS OF EMPLOYEES' RIGHTS (INCLUDING WAGES); DISTRIBUTIVE JUSTICE; AVOIDING FOREIGN TAKEOVERS
- THESE ISSUES NOW ARE RECEIVING SERIOUS ATTENTION
- SPECIFICALLY, IS IT TIME TO MOVE ON FROM THE CONSUMER WELFARE STANDARD?
- MORE SPECIFICALLY, IS 'PRICE' THE KEY CONSIDERATION?

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KEY TRENDS IN COMPETITION LAW 2018-2019

ANTITRUST AND THE PLATFORMS

- 'GAFAM' AND OTHER PLATFORMS HAVE TRANSFORMED THE WORLD FOR MILLIONS OF PEOPLE
- AND TO THE CONSUMER CONSUMPTION IS OFTEN 'FREE'
- ARE THE PLATFORMS THE NEW RAILROADS, OIL TRUSTS, TELCOS IN NEED OF DISMEMBERMENT?
- OR SHOULD THIS BE LEFT TO SCHUMPETER'S PERENNIAL GALE OF CREATIVE DESTRUCTION?
- IN QUICK TIME THERE SEEMS TO HAVE BEEN A WIDESPREAD CHANGE OF VIEW AMONG POLITICIANS AND REGULATORS

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KEY TRENDS IN COMPETITION LAW 2018-2019

SELECTING THE RIGHT THEORY OF HARM AND TOOL

- WHAT THEORIES OF HARM ARISE FROM PLATFORMS?
 - LOSS OF PRIVACY? REFUSAL TO SUPPLY DATA? CONFLICT OF INTEREST (OWNERSHIP OF A PLATFORM AND SELLING ON THAT PLATFORM?)?
- IS ANTITRUST THE CORRECT ANSWER, OR SHOULD WE USE OTHER TOOLS?
 - UNFAIR CONTRACT TERMS (B TO C? B TO B?)
 - DATA PRIVACY?
 - UNFAIR COMMERCIAL PRACTICES?
- ANTITRUST CASES SOMETIMES LEAD TO USE OF OTHER TOOLS: EG MULTILATERAL INTERCHANGE FEES; BENCHMARK MANIPULATION; SUPERMARKETS/GROCERIES ADJUDICATOR
- WHAT ABOUT *FACEBOOK/BKA*? COMPETITION LAW OR PRIVACY?

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KEY TRENDS IN COMPETITION LAW 2018-2019

HORIZONTAL ISSUES

- THERE REMAINS A STEADY FLOW OF CARTEL CASES, BUT ARE LENIENCY APPLICATIONS IN DECLINE?
- COMPETITION AUTHORITIES MUST DETECT CARTELS IN OTHER WAYS, FOR EXAMPLE
 - ALGORITHMS TO DETECT BID-RIGGING; ANONYMOUS WHISTLEBLOWING TOOL (TIP OFFS); DIGITAL INVESTIGATION UNITS IN AUTHORITIES
- INCREASED INTEREST IN PURCHASING CARTELS
 - ETHYLENE, STYRENE MONOMERS; ATLANTIC SALMON; FRENCH AND BELGIAN GROCERIES
 - DISCUSSED AT THE DGS MEETING OF THE ECN?
- NON-CONVENTIONAL CARTEL: GERMAN CARS/SUPPRESSION OF TECHNOLOGY (VW, DAIMLER AND BMW)
- FORTHCOMING REVIEW OF THE R&D AND SPECIALISATION AGREEMENT BLOCK EXEMPTIONS AND THE HORIZONTAL COOPERATION GUIDELINES

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KEY TRENDS IN COMPETITION LAW 2018-2019

VERTICAL ISSUES

- FOR MANY YEARS THE COMMISSION HAD NOT ADOPTED INFRINGEMENT DECISIONS UNDER ARTICLE 101
 - *YAMAHA*, 2003; *PEUGEOT*, 2005
- BUT THEN THERE WAS THE E-COMMERCE REPORT, 2017, FOLLOWED BY
 - FOUR ONLINE RPM DECISIONS 2018
 - ONE ONLINE CROSS-BORDER RESTRICTION DECISION 2019 (*GUESS*)
 - FURTHER CASES IN THE PIPELINE (*TOUR OPERATORS*, *VIDEOGAMES*, *MERCHANDISED PRODUCTS*, *AIRLINE TICKETING*)
- NOW WE HAVE THE REVIEW OF THE VBER, UP TO 2022

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KEY TRENDS IN COMPETITION LAW 2018-2019

THE SINGLE MARKET IMPERATIVE

- NEVER FORGET THE IMPORTANCE OF THE SINGLE MARKET IMPERATIVE!
- MANY RECENT AND CURRENT CASES ARE ABOUT THE SINGLE MARKET
 - *MASTERCARD*, *ACQUIRING FEES*, 2018 (ARTICLE 101)
 - *GUESS*, *NIKE*, *HOLLYWOOD FILM STUDIOS/SKY* (ARTICLE 101)
 - *TOUR OPERATORS*, *VIDEOGAME MAKERS*, *SANRIO*, *UNIVERSAL STUDIOS* (ARTICLE 101, ONGOING)
 - *GAZPROM*, *BEH*, *TRANSGAZ*, *TENNET*, *ABINBEV* (ARTICLE 102)
 - *QATAR PETROLEUM* (ARTICLE 102, ONGOING)

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KEY TRENDS IN COMPETITION LAW 2018-2019

UNILATERAL BEHAVIOUR

- THERE HAS BEEN MUCH MORE ENFORCEMENT OF ARTICLE 102 BY THE COMMISSION IN RECENT YEARS
 - *GOOGLE SHOPPING, GOOGLE ANDROID, GOOGLE ADWORDS* (FINES OF EUROS 8.2 BILLION)
 - *QUALCOMM, BALTIC RAIL, BEH, ABINBEV*
 - *CMA/PFIZER AND FLYNN; OFCOM/ROYAL MAIL*
- NOTE THE QUEUE OF IMPORTANT CASES IN THE GENERAL COURT
 - *INTEL RENVOI, THE GOOGLE CASES, QUALCOMM, BEH*
- HOW MUCH NEW LAW IS THERE IN THESE CASES?
- AND HOW WILL THE *INTEL/EFFECTS* TEXT BE 'OPERATIONALISED'?

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KEY TRENDS IN COMPETITION LAW 2018-2019

DAMAGES AND LITIGATION

- DAMAGES CLAIMS ARE NOW OCCURRING THROUGHOUT THE EU
- NUMEROUS EXPLANATIONS
 - DAMAGES DIRECTIVE; CLAIMANT LAW FIRMS/FUNDING POSSIBILITIES; *TRUCKS* LITIGATION; COURT INITIATIVES (EG TRIALS IN ENGLISH)
- WHAT WILL HAPPEN TO COLLECTIVE PROCEEDINGS ORDERS IN THE UK?
 - *TRUCKS; GUTMANN V SOUTH WESTERN TRAINS; MERRICKS V MASTERCARD*
- INCREASING NUMBER OF STANDALONE ACTIONS IN THE CAT
 - *UNLOCKD V GOOGLE; ACHILLES INFORMATION V NETWORK RAIL; PRINKNASH BIRD AND DEER PARK V PRINKNASH ABBEY; GASCOIGNE HALMAN V AGENTS MUTUAL*

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KEY TRENDS IN COMPETITION LAW 2018-2019

AUTHORITIES TOUGHENING UP ON PROCEDURE

- COMPETITION AUTHORITIES ENFORCING MORE VIGOROUSLY AGAINST PROCEDURAL MISDEMEANOURS
 - OBSTRUCTING DAWN RAIDS
 - COMMISSION SO TO ZSSK, SLOVAKIA
 - CMA FINE OF £25000 ON *FENDER EUROPE*
 - GUN-JUMPING
 - COMMISSION FINE OF EUROS 125 MILLION ON *ALTICE*
 - FINE FOR MISINFORMATION
 - COMMISSION FINE OF EUROS 52 MILLION ON *GENERAL ELECTRIC*; CMA FINE OF £15,000 ON *AL-CO*
 - FINES FOR BREACH OF INTERIM ORDERS
 - CMA FINES ON *ELECTRO RENT*, *AUSURUS*, *VANILLA GROUP*

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KEY TRENDS IN COMPETITION LAW 2018-2019

THANK YOU FOR YOUR ATTENTION

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Q&A Session

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