

Completed acquisition by Auction Technology Group of Softwarepartner

Decision on relevant merger situation and substantial lessening of competition

ME/6754/18

The CMA's decision on reference under section 22(1) of the Enterprise Act 2002 given on 12 July 2018. Full text of the decision published on 2 August 2018.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

SUMMARY

1. On 25 February 2018, Auction Technology Group Media Holdings Limited (**ATG**) announced its acquisition of S.P.H. Softwarepartner GMBH & Co KG, trading as Lot-tissimo (**LTMO**) (the **Merger**). ATG and LTMO are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that the Parties' enterprises have ceased to be distinct and that the share of supply test is met. The four-month period for a decision, as extended, has not yet expired. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
3. The Parties overlap in the provision of live online bidding (**LOB**) auction platform services to auction houses, and bidders, for arts and antiques (**A&A**) auctions. ATG also develops LOB platform technology, which it licenses to various competing suppliers of LOB auction platform services, including LTMO. The CMA has assessed the impact of the Merger in the provision of LOB auction platform services for A&A auctions in the UK.
4. The CMA found that LTMO has very limited UK revenues. It does not compete with ATG for sales to auction houses in the UK, and does not compete to any material extent with ATG for UK bidders. The CMA

considered whether, absent the Merger, LTMO would have become a more significant competitor to ATG in the future, but found no evidence to suggest that this would have happened.

5. Given the limited presence of LTMO in the UK, the CMA also did not find any adverse vertical or conglomerate effects of the Merger in the UK.
6. The CMA therefore believes that the Merger does not give rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal, vertical or conglomerate effects.
7. The Merger will therefore **not be referred** under section 22(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties

8. ATG offers various auction services, including the publishing of the Antiques Trade Gazette and the provision of LOB auction platform services (through various platforms, including the-saleroom). It provides these services in the UK, the United States and Canada. ATG is a wholly-owned subsidiary of Topco Turner Limited. The turnover of ATG to UK customers in 2017 was £[REDACTED].
9. LTMO also offers LOB auction platform services (through its platform Lot-tissimo). It provides these services primarily in Germany, Austria and Switzerland, as well as five other European countries.¹ The turnover of LTMO to UK customers in 2017 was just £[REDACTED].
10. Prior to the Merger, the Parties had a partnership agreement (**Partnership**) under which ATG licensed its LOB software technology to LTMO for use in Germany.² The Partnership also allowed each Party's auction house customers to simultaneously list their auctions on the other party's platform. The Partnership therefore allowed ATG's UK based auction house customers to reach non-UK bidders through LTMO, and LTMO's non-UK based auction house customers to reach UK bidders through ATG. It is in this way that LTMO generated revenue in the UK.³

¹ LTMO is active in Belgium, France, Italy, the Netherlands and Spain.

² LTMO did not own any LBO technology.

³ LTMO has [REDACTED] outside of the Partnership, [REDACTED], from which LTMO derived revenue of only [REDACTED].

Transaction

11. On 20 February 2018, ATG purchased (through the newly created German subsidiary Auction Technology Group Germany GmbH) the entire share capital of LTMO for [REDACTED].
12. ATG submitted that the rationale for the Merger was to extend its portfolio of LOB platforms by adding LTMO's continental European platform to its business, and to expand ATG in Germany, where the demand for LOB services is expected to grow.

Procedure

13. The CMA's mergers intelligence function identified this transaction as warranting an investigation.⁴

Jurisdiction

14. Each of ATG and LTMO is an enterprise. As a result of the Merger, these enterprises have ceased to be distinct.
15. The turnover test is not met because the UK turnover of LTMO does not exceed £70 million.
16. ATG provides LOB auction platform services to both auction houses and bidders based in the UK. ATG questioned whether LTMO's activities overlapped with those of ATG in the UK.
17. ATG provided information on the relationship between LTMO and UK auction houses and UK bidders, including the different sources of revenue for LTMO from these customers. The CMA found that, for UK auction houses which choose to be listed on both the ATG and the LTMO platforms under the Partnership, LTMO generates revenue from a dual-listing fee.⁵ Although LTMO targets non-UK bidders, UK bidders can access auctions that are held on LTMO's platform,⁶ and LTMO generates revenue from successful UK bidders.⁷ In addition, LTMO generates revenue from successful UK and non-

⁴ See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, paragraphs 6.9-6.19 and 6.59-60.

⁵ LTMO's total UK auction house revenue amounted to [REDACTED] in 2017.

⁶ When a UK bidder signs up to bid for an auction hosted on LTMO, the bidder will be subject to LTMO's terms and conditions.

⁷ This was [REDACTED] in 2017.

UK bidders who bid through ATG's platform on non-UK auctions which it hosts.⁸

18. On the basis of this information, the CMA believes that LTMO is active in the supply of LOB auction platform services to both UK auction houses and UK bidders.⁹
19. ATG estimated that the Parties have a combined share of supply of LOB auction platform services to auction houses in the UK of approximately [30-40]% (with an increment of [0-5]% resulting from the Merger).
20. Given ATG's share of supply is substantially higher than 25%, and there is an increment to the share of supply resulting from the Merger, the CMA believes that the share of supply test in section 23 of the Act is met.
21. The Merger completed on 20 February 2018 and was first made public on 25 February 2018. The four month deadline for a decision under section 24 of the Act is 16 July 2018, following extension under section 25(2) of the Act.
22. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
23. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 15 June 2018 and the statutory 40 working day deadline for a decision would therefore be 9 August 2018. However, as the four month period under section 24 of the Act currently ends before this date, the deadline for the CMA to announce its decision whether to refer the Merger for a Phase 2 investigation is the final day of this four month period as extended, ie 16 July 2018.

Counterfactual

24. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For completed mergers the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is

⁸ LTMO's bidder revenue amounts [REDACTED].

⁹ For the purposes of the share of supply test, the CMA guidance ([para 4.58 and 4.60](#)) indicates that the key factor to determine the geographic allocation of supply is the location of the customer. This is consistent with the European Commission's guidance.

a realistic prospect of a counterfactual that is more competitive than these conditions.¹⁰

25. In the present case, the CMA considered whether, absent the Merger, LTMO would have entered the UK market or expanded its activities outside of the Partnership to compete more significantly in the UK with ATG (see paragraph 49). However, the CMA found no evidence to suggest that this would have happened. Neither the Parties nor any third party put forward any evidence to indicate a counterfactual other than the prevailing conditions of competition. Therefore, the CMA believes the pre-Merger conditions of competition to be the relevant counterfactual.

Background

26. On 29 June 2017, the CMA adopted a decision to accept binding commitments offered by ATG in relation to LOB auction platform services (**Commitments Decision**),¹¹ following an investigation under the Competition Act 1998.
27. In the present case, the CMA found that, while this former decision was made under a different statutory framework, some of the evidence gathered was relevant to its consideration of the Merger. This evidence is set out as appropriate in this decision.

Frame of reference

28. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.¹²
29. LOB is one way by which bidders can participate in auctions, in addition to attending the auction in person, bidding via telephone, or authorising an intermediary to bid on one's behalf. Providers of LOB auction platforms

¹⁰ *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

¹¹ *CMA decision to accept binding commitments offered by ATG Media in relation to live online bidding auction platform services*, case number 50408.

¹² *Merger Assessment Guidelines*, paragraph 5.2.2.

typically earn revenue both from auction houses, which conduct auctions on their platforms, and bidders, who bid and purchase from the platforms.

30. The Parties overlap in the supply of LOB auction platform services for A&A auctions in the UK.

Product scope

31. In its Commitments Decision, the CMA reached the preliminary view that the relevant market was the supply of LOB auction platform services.¹³
32. In the present case, ATG submitted that the relevant product frame of reference was the supply of LOB auction platform services for A&A auctions, given LTMO only provides LOB services for A&A auctions.
33. ATG is also active in providing LOB auction platform services for industrial and insolvency auctions, and for auctions of construction and agricultural equipment, but for these auctions it uses different platforms than for A&A. Given LTMO is not active in these services, the CMA has not considered them further in this decision. Rather, the CMA has focussed its assessment of the Merger in the frame of reference in which the Parties overlap, which is the supply of LOB auction platform services for A&A auctions.
34. The CMA considered whether it was appropriate to define narrower frames of reference, focussing on particular type of products within A&A. However, ATG submitted evidence showing that both Parties were active across all possible segments within A&A, and the CMA identified no evidence to suggest that a narrower frame of reference was appropriate. Therefore, the CMA has not identified narrower frames of reference than A&A.
35. For these reasons, the CMA has assessed the impact of the Merger in the supply of LOB auction platform services for A&A auctions.

Geographic scope

36. In its Commitments Decision, the CMA reached the preliminary view that the relevant market was UK-wide. The CMA said that “competitors based abroad are not an adequate alternative to a UK platform for UK-based auction houses, given their predominantly overseas bidder customer base.”^{14 15}

¹³ [Commitments Decision](#), par. 3.8.

¹⁴ [Commitments Decision](#), par. 3.9.

¹⁵ The CMA also notes the decision of the European Commission in the Google Shopping case, [Case AT.39740, Google Search \(Shopping\), decision dd 27 June 2017](#), par. 251-263.

37. In the present case, ATG submitted that the appropriate geographic frame of reference was UK-wide.
38. The CMA noted that LTMO has different language versions of its website for different locations, and that there are some differences in regulations between EU countries concerning the auctioning of antiques.
39. Third parties also indicated that the appropriate geographic frame of reference is national, with auction house customers suggesting that they engage different platform providers to reach bidders outside of the UK depending on the country they are seeking to reach.
40. For these reasons, the CMA has assessed the impact of the Merger in a UK-wide geographic frame of reference.

Conclusion on frame of reference

41. As set out above, the CMA has assessed the impact of the Merger in the provision of LOB auction platform services for A&A auctions in the UK.

Competitive assessment

Horizontal unilateral effects

42. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.¹⁶ Horizontal unilateral effects are more likely when the merging parties are close competitors.
43. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to horizontal unilateral effects in the provision of LOB auction platform services for A&A auctions in the UK. The CMA considered both whether the Merger might give rise to a loss of actual competition and whether it might give rise to a loss of potential competition.

Actual Competition

44. ATG submitted that LTMO has only negligible sales in the UK,¹⁷ meaning that the Merger cannot be expected to result in an SLC due to a loss of actual

¹⁶ [Merger Assessment Guidelines](#), from paragraph 5.4.1.

¹⁷ LTMO generated revenues of [§] in the UK in FY2017, representing less than [0-5]% of the supply of LOB auction platform services for A&A auctions in the UK.

competition. The Parties submitted revenue and share of supply data showing they have a combined share of supply of approximately [30-40]%, with an increment of [0-5]% resulting from the Merger.

45. The CMA believes that the Parties have underestimated ATG's share of supply, as the market size appears to include competitor revenues that are not part of the relevant frame of reference.
46. In its Commitments Decision, the CMA formed a preliminary view that ATG was likely to be dominant in the UK market.¹⁸ However, in that case, the CMA did not identify LTMO as a competitor in the UK market.¹⁹
47. The CMA notes that LTMO only supplies LOB services to UK auction houses through its Partnership with ATG. Moreover, LTMO told the CMA that it has never bid to supply LOB services to UK auction houses.²⁰ No third party provided evidence to indicate otherwise. On the basis of this evidence, the CMA believes that, prior to the Merger, the Parties did not compete in the provision of LOB auction platform services for A&A auctions in the UK.
48. With regards to UK bidders, ATG provided evidence showing the negligible number of UK bidders who accessed LOB auctions on LTMO's platform and the negligible revenue LTMO earned from these bidders. In 2017, there were 52 bidders, generating less than £5,000 for LTMO. No third party provided evidence to indicate that LTMO competed for UK bidders to LOB auctions. On the basis of this evidence, the CMA believes that, prior to the Merger, the Parties did not compete materially for UK bidders on LOB auctions.

Potential competition

49. Notwithstanding its conclusion on actual competition, the CMA considered whether, in the absence of the Merger, LTMO would have become a more significant competitor to ATG in the provision of LOB auction platform services for A&A auctions in the UK.
50. The Parties submitted that LTMO had no intention of competing in the UK for these services. To support this submission, LTMO provided a detailed account of its business strategy pre-Merger, and of the additional fixed costs and overheads which would be required for it to enter the UK.
51. The CMA also reviewed internal documents provided by ATG and did not find any evidence to suggest that the Merger would remove LTMO as a potential

¹⁸ [Commitments Decision](#), par. 3.10 – 3.13.

¹⁹ [Commitments Decision](#), par. 2.20.

²⁰ [🔍]

competitor of LOB auction services in the UK. Moreover, no third party indicated any expectation that LTMO would start competing for these services in the UK.

52. Overall, the CMA has found no evidence to suggest that LTMO would have become a more significant competitor to ATG in the future.

Conclusion on horizontal unilateral effects

53. For the reasons set out above, the CMA believes that LTMO does not compete with ATG for sales to auction houses in the UK, and does not compete to any material extent with ATG for UK bidders. The CMA does not believe that LTMO would have become a more significant competitor to ATG in the future. Accordingly, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the provision of LOB auction platform services for A&A auctions in the UK.

Vertical effects

54. Vertical effects may arise when a merger involves firms at different levels of the supply chain, for example a merger between an upstream supplier and a downstream customer or a downstream competitor of the supplier's customers.
55. Vertical mergers may be competitively benign or even efficiency-enhancing, but in certain circumstances can weaken rivalry, for example when they result in foreclosure of the merged firm's competitors. The CMA only regards such foreclosure to be anticompetitive where it results in an SLC in the foreclosed market(s), not merely where it disadvantages one or more competitors.²¹
56. In the present case, the CMA considered whether, given ATG's position as the supplier of LOB software technology to some LOB auction platform service providers, the Merger could lead to ATG foreclosing these LOB auction platform service providers from competing for UK auction house customers by refusing to licence its software.
57. The CMA's usual approach to assessing vertical theories of harm is to analyse (a) the ability of the merged entity to foreclose competitors, (b) the incentive of it to do so, and (c) the overall effect of the strategy on competition.²²

²¹ In relation to this theory of harm 'foreclosure' means either foreclosure of a rival or to substantially competitively weaken a rival.

²² [Merger Assessment Guidelines](#), paragraph 5.6.6.

58. As discussed above (see paragraphs 47 onwards), LTMO's UK operations are negligible and are not in competition with ATG. LTMO only operates in the downstream supply of LOB auction services, and not upstream in the supply of LOB software technology. Therefore, since ATG is already vertically integrated, the Merger does not increase its ability to foreclose and the Merger does not increase ATG's incentive to engage in foreclosure affecting UK customers. For this reason, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of vertical effects.

Conglomerate effects

59. Conglomerate effects may arise in mergers of firms that are active in the supply of goods or services in different markets but which are nevertheless related in some way, either because their products are complements (so that a fall in the price of one good increases the customer's demand for another) or because there are economies of scale in purchasing them (so that customers buy them together).²³
60. In the present case, the CMA considered whether, post-Merger, ATG would have an incentive to tie or bundle the merged entity's LOB auction services to other services offered by LTMO to customers in the UK.²⁴
61. One third party expressed concern that ATG would be able to use its [alleged] dominant position in the provision of LOB auction services in the UK to foreclose competitors, and the acquisition of LTMO would strengthen this position, making it harder for actual or potential competitors to act as a constraint on ATG.
62. Similar to its analysis of vertical theories of harm, the CMA's usual approach to assessing conglomerate theories of harm is to analyse (a) the ability of the merged entity to foreclose competitors, (b) the incentive of it to do so, and (c) the overall effect of the strategy on competition.²⁵
63. In the present case, the CMA believes that, as LTMO has [X] in the UK ([X] outside of the Partnership), the Merger will not give rise to any material change in the competitive conditions in the supply of non-LOB auction services in the UK. The CMA is also not aware of any evidence of LTMO engaging in tying behaviour in Germany, where it is a significant provider of both LOB and non-LOB auction services. For these reasons, the CMA

²³ [Merger Assessment Guidelines](#), paragraph 5.6.2.

²⁴ As noted in paragraph 47, LTMO offers commission bidding services in the UK outside of the Partnership. ATG does not currently offer this service in the UK or elsewhere.

²⁵ [Merger Assessment Guidelines](#), paragraph 5.6.6.

believes that the Merger does not give rise to a realistic prospect of an SLC as a result of conglomerate effects.

Third party views

64. The CMA contacted customers and competitors of the Parties. Evidence from these parties has been taken into account where appropriate in the competitive assessment above.
65. A small number of third parties raised concerns about ATG's [alleged] dominant position in the supply of LOB auction platform services in the UK. The CMA considered these concerns but did not find them to be Merger-specific as they did not indicate either actual or potential competition between ATG and LTMO in the UK.

Decision

66. Consequently, the CMA does not believe that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC within a market or markets in the UK.
67. The Merger will therefore **not be referred** under section 22(1) of the Act.

Andrew Wright
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12 July 2018