

## CMA RESPONSE TO THE PRELIMINARY REPORT OF THE E-COMMERCE SECTOR INQUIRY

### Overview

1. The Competition and Markets Authority (CMA) is the UK's lead competition and consumer enforcement authority which works to promote competition for the benefit of consumers, both within and outside the UK.<sup>1</sup> It is an independent, non-ministerial government department.
2. The CMA welcomes the opportunity to respond to the Preliminary Report of the European Commission's E-commerce Sector Inquiry. The Preliminary Report provides further valuable evidence and insight into the prevalence of certain (potentially restrictive) business practices relating to goods and digital content respectively, and the reasons for them.
3. This response builds upon a number of submissions the CMA has made to the Commission relating to the Digital Single Market initiative.<sup>2</sup>
4. The online commerce sector is a significant, and growing part of the UK and the EU economy, with consumers purchasing and utilising an increasingly broad range of goods and services via online channels. Effective enforcement of competition laws is vital to ensure that competition in online markets operates effectively and to the benefit of consumers. This remains a key priority that underpins much of the CMA's work.
5. The CMA's view is that the existing principles-based competition law framework is sufficient to tackle competition concerns relating to online commerce, and is capable of being applied in the new market contexts created by the digital economy. Nonetheless, it is important for competition authorities to continue to seek to understand better the way in which competition operates, in the online sphere and the competitive impact of particular agreements or conduct in those markets.
6. Accordingly, the CMA, as noted above, welcomes the insights that the Preliminary (and subsequent final) Report provides that aid such assessment. It also agrees with the Commission each case must be considered on its own

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<sup>1</sup> Further detail about the CMA can be found on the [CMA's website](#).

<sup>2</sup> <https://www.gov.uk/government/publications/cma-responses-to-consultations-on-the-digital-single-market>

merits. Where enforcement is necessary, it should be timely, well-targeted and expeditious.

7. In particular, in the CMA's view, online vertical restraints can be analysed within the current legal framework of Article 101(1) and 101(3) and Vertical Agreements Block Exemption Regulation (VABER), as interpreted together with the Verticals Guidelines. The CMA agrees with the Commission that the broad principles set out in VABER - namely that, provided that the vertical agreement/concerted practice does not include a hardcore or excluded restriction and provided that market share thresholds are not exceeded, the restrictions will be automatically exempted - remains appropriate in the current online economy.
8. However, and given the often highly specific nature and competitive impact of particular vertical restraints (both online and offline), the CMA considers on a case by case basis whether it might withdraw the benefit of VABER if appreciable anti-competitive effects occur and particular practices are not compatible with Article 101(3). Complex issues of law and economics are engaged in such analysis and the CMA assesses the appropriate response in each case based on legal and economic advice.

#### The CMA's promotion of competition in online commerce

9. As noted above, the CMA places emphasis both on undertaking targeted and effective enforcement action to investigate and address impediments to competition in online markets, and also seeking to deepen its understanding of how competition operates in those markets.<sup>3</sup>
10. We therefore set out below an overview of our relevant current and recent work and enforcement in this area, to help inform and assist the Commission's further analysis.

#### Price comparison tools (PCTs)<sup>4</sup>

11. The Preliminary Report notes the widespread use of price comparison tools (PCTs) in e-commerce and describes the main features and business models of

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<sup>3</sup> See further recent speeches by the CMA's acting Chief Executive (<https://www.gov.uk/government/speeches/andrea-coscelli-staying-ahead-in-a-digital-marketplace>) and Executive Director of Enforcement (<https://www.gov.uk/government/speeches/michael-grenfell-on-antitrust-in-the-digital-age>)

<sup>4</sup> See, in particular, sections 1.4 and 4.5

PCTs for the sale of consumer goods,<sup>5</sup> their use by consumers and businesses, and restrictions on such use.<sup>6</sup>

12. In this regard, we note that the CMA is also currently undertaking a market study<sup>7</sup> of the role of ‘digital comparison tools’ (DCTs) to enable consumers to compare products by price and other parameters.<sup>8</sup>
13. The CMA’s DCT market study has identified the following sectors to focus on as case studies: broadband, home insurance, credit cards and flights. These sectors have been selected on the basis that they seem to share the characteristics of both high search costs and the scope for significant potential gains to consumers from engaging and possibly switching (such as where annual expenditure is high and/or where there is substantial variability in price). The market study will also draw on other relevant material including the findings in the Preliminary Report and the CMA’s relevant findings and recommendations in previous markets work in other sectors (notably the retail banking<sup>9</sup> and energy<sup>10</sup> market investigations).
14. The purpose of the market study is to examine whether the sector is working well for consumers, and determine how to maximise the benefits DCTs offer. To this end, the CMA has identified the following themes to inform the study:
- Consumers’ perceptions, use and experience of DCTs
  - The impact of DCTs on competition between suppliers of the services they compare
  - Competition between DCTs
  - The regulatory environment.
15. Depending on the evidence obtained during the study, the market study may address a number of issues similar to those canvassed in the Preliminary Report, including the prevalence, use and potential impact of MFNs and other similar clauses, and whether increased use of DCTs results in an excessive focus on price.<sup>11</sup>

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<sup>5</sup> Section 1.4 (paragraphs 93 to 103). See also section 2.2 at paragraphs 121 to 122 on the main parameters of competition, and section 2.3 at paragraph 127 on pricing.

<sup>6</sup> Section 4.5 at paragraph 475ff. See also section 4.1.1. on the motivations for restrictions.

<sup>7</sup> <https://www.gov.uk/government/news/cma-launches-study-into-digital-comparison-tools>

<sup>8</sup> DCTs include price comparison tools and websites but have been defined more broadly to reflect that consumers may compare products other than on price and on websites, such as through apps.

<sup>9</sup> <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>

<sup>10</sup> <https://www.gov.uk/cma-cases/energy-market-investigation>

<sup>11</sup> Theme 2 of the [Statement of Scope](#)

16. The study was launched on 29 September 2016 and must produce a final report within a year (28 September 2017). The CMA would be happy to share emerging thinking and findings (subject to disclosure obligations) with the Commission in due course.

## Businesses' incentives to use vertical restraints

### *Oxera/Accent survey report for the CMA*

17. The Preliminary Report has provided insights into the relevance of certain factors underlying companies' motivation to employ vertical restraints in relation to e-commerce. The CMA has also undertaken research in this area. In 2015, it instructed Oxera Consulting and Accent to undertake a qualitative survey to explore businesses' incentives to use vertical restraints and the impact of the internet on these incentives.

18. Oxera's report was published in March 2016 and complements many of the provisional findings of the Preliminary Report.<sup>12</sup> Key findings included that:

- increased price transparency for customers has intensified existing price competition, making it more difficult for manufacturers and retailers to maintain price differentials between sales channels (bricks-and-mortar and online retail) as well as against rival products;
- vertical restraints (and related practices such as specifying RRP) offer ways to manage the competitive impact of increased e-commerce in many sectors. While many reasons were given as to why firms use such restraints, the main reasons stated by participants were to prevent free-riding and therefore maintain the pre- and after-sales service quality, and to protect brand image.

19. Oxera's report noted that the impact on consumers from having vertical restraints would depend on the type of restraint, the position of the relevant parties and the market context. For example, the Oxera report considered that in some cases removing restrictions would be likely to lead to some short-term price reduction and may increase availability for consumers, but that this could be at the cost of lower quality (or lower perceived quality) and service, and lower availability in the longer term.

20. Prior to the business survey, the CMA organised a roundtable discussion with legal advisers, economic consultants and representative of business organisations to discuss the same research questions. A summary of the main

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<sup>12</sup> Oxera Consulting LLP [report](#) on vertical restraints: new evidence from a business survey

views provided by participants has also been published on the CMA's webpages.<sup>13</sup>

## Parity/most favoured nation (MFN) clauses<sup>14</sup>

### *Private Motor Insurance market investigation*

21. The CMA notes that the Preliminary Report has obtained evidence on the existence and prevalence of exclusivity and most favoured nation (MFN)/parity clauses in agreements between retailers and marketplaces and/or price comparison tools.<sup>15</sup> The CMA has also investigated the effect of parity clauses in the private motor insurance (PMI) market.
22. In 2014, following an investigation into the PMI market in the UK under its market investigation powers,<sup>16</sup> it found that, among other issues, many of the contracts between motor insurers and price comparison websites (PCWs) contained 'wide' retail-MFN clauses (i.e. requiring parity both with other platforms and the insurer's own website) which gave rise to an adverse effect on competition through limiting price competition and innovation, and possibly restricting entry. The CMA did not find that 'narrow' retail-MFNs (defined as those requiring price parity with the insurance provider's website only) adopted by PCWs in relation to private motor insurance give rise to an adverse effect on competition.
23. To remedy its concerns, the CMA prohibited the use of wide MFNs by PCWs in the PMI market together with behaviours by large PCWs intended to have equivalent effect (narrow MFNs were excluded from the scope of the prohibition).

### *Hotel online booking*

24. As the Commission is aware, following enforcement cases taken by a number of Member States, the CMA is participating in a joint monitoring project in relation to MFNs in the hotel online booking sector, in partnership with nine other national competition agencies in the EU itself, and the Commission itself. In particular, the monitoring project is considering how the Europe-wide removal by online travel

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<sup>13</sup> [Summary of CMA roundtable discussion on vertical restraints](#)

<sup>14</sup> For the purposes of this paper, we refer to parity clauses as 'MFNs'.

<sup>15</sup> Section 4.7 at paragraphs 559ff. MFN/parity clauses are categorised as "wide" or "narrow" in the same sense as described below. The Preliminary Report also considers non-price parity clauses which may for instance require the retailer to offer the same (or a not narrower) product range on the marketplace (and/or price comparison tool) than on its own website, or require similar customer services.

<sup>16</sup> The CMA's market investigation powers involve an assessment of whether there is a feature or combination of features of a particular market in the UK that gives rise to an adverse effect on competition. Where the CMA finds that there is such an effect, it may put in place legally-binding remedies to remedy, mitigate or prevent the adverse effect or any associated customer detriment. Market investigations are distinct from the CMA's competition law enforcement, and do not involve a finding that competition law had been infringed.

agents Expedia and Booking.com of certain MFN clauses in their standard contracts with hotels from July 2015 has affected competition in the hotel market.<sup>17</sup>

#### *CMA's OECD paper on MFNs*

25. The CMA's approach to assessing MFNs and similar parity agreements is summarised in a paper we presented to the OECD in October 2015.<sup>18</sup>

#### *Enforcement work*

26. The CMA has also undertaken a number of recent relevant enforcement cases in relation to online sales bans and pricing restrictions.

#### *Ping (online sales ban of golf equipment)*

27. Ping Europe Limited (Ping) is a golf club manufacturer. On 9 June 2016, the CMA issued a statement of objections to Ping with a provisional finding that Ping had breached UK and EU competition law by operating an online sales ban which prevents retailers selling Ping golf clubs online.<sup>19</sup> The case is ongoing and will not necessarily lead to an infringement decision.

#### *ITW (online RPM/IMAP of commercial catering equipment)*

28. On 24 May 2016, the CMA imposed a penalty exceeding £2 million on ITW Ltd, a supplier of commercial fridges, for restricting the ability of dealers from offering online discounts contrary to Chapter I of the Competition Act 1998 (the UK equivalent of Article 101). The CMA found that ITW had imposed a 'minimum advertised price' policy restricting the price at which retailers could advertise ITW's product online, and enforced this policy with threats of higher wholesale prices or even a complete cessation of supply for 'non-compliant' retailers.<sup>20</sup>

#### *Ultra (online RPM of bathroom fittings)*

29. On 10 May 2016, the CMA imposed a fine exceeding £750,000 following a decision that Ultra Finishing Ltd had broken competition law by preventing retailers from discounting online prices of branded products from 2012 to 2014.<sup>21</sup>

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<sup>17</sup> <https://www.gov.uk/cma-cases/online-travel-agents-monitoring-of-pricing-practices>

<sup>18</sup> Further information as to the OECD's analysis of such agreements including other country contributions is available on the [OECD's website](#). In 2015, the International Competition Network (ICN) published a [special project report](#) on online vertical restraints.

<sup>19</sup> <https://www.gov.uk/government/news/cma-alleges-breach-of-competition-law-by-ping>

<sup>20</sup> <https://www.gov.uk/government/news/fridge-supplier-fined-22-million-for-restricting-online-discounts>

<sup>21</sup> <https://www.gov.uk/government/news/cma-issues-bathroom-fittings-infringement-decision-and-fine>

### *Paid online search advertising*

30. We note the Preliminary Report's finding that, under some contracts, retailers had a limited ability to use or bid upon the manufacturers' brand names to get a preferential search engine listing (such as when using Google Adwords), or else or were only allowed to bid on certain positions.
31. The CMA agrees with the Commission that retailers must be able to compete effectively online, including as to the advertising and marketing of their products and, more specifically, that in some circumstances agreements restricting bidding behaviour in paid online search advertising may have harmful effects on competition. In this regard, the CMA has recently assessed<sup>22</sup> a suspected breach of UK and EU competition law by certain price comparison websites in the energy sector in relation to negative keyword matching in paid online search advertising.<sup>23</sup> The CMA discontinued this investigation on administrative priority grounds on 6 October 2016,<sup>24</sup> but as noted above, remains vigilant to online advertising and marketing restrictions that may unlawfully restrict competition.

### *Other observations*

#### *Commercial use of consumer data*

32. Section 5 of the Preliminary Report considers the role of the collection and use of customer data. The CMA has also undertaken some work in this area and draws attention to the call for information (CFI) into the commercial use of consumer data in online (and increasingly offline) markets.
33. In the CMA's CFI final report,<sup>25</sup> the CMA noted that a significant number of consumers have fragile trust in, and express concern over their lack of control over, business data collection practices and that this may have implications for the development of competitive markets.
34. The CMA's starting point is that businesses should compete over all issues which matter to consumers including over privacy and data collection practices. The evidence gathered by the CMA in its CFI indicates that in the e-commerce sector – although a large proportion of marketplaces and price comparison sites, together with individual retailers, collect a large amount of data – such practices do not currently appear to be a significant parameter of competition.

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<sup>22</sup> The investigation was originally opened by the UK's energy regulator, Ofgem, but transferred to the CMA in June 2016.

<sup>23</sup> The use of a negative keyword in a paid for search term acts to prevent an advertisement being displayed.

<sup>24</sup> Further details of the case, and the reasons for its closure, can be found on the [case page](#) on the CMA website.

<sup>25</sup> [Commercial use of consumer data](#)

35. We note that the Preliminary Report also describes the uses to which data may be put, including optimising product listings and marketing and notes the extent to which participating retailers appear to engage in dynamic/personalised pricing “based on tracking the online behaviour of individual customers” (paragraph 128). The CMA considers it likely that this percentage will increase over time on current trends and would welcome any further analysis or observations from the Commission about the role of customer data in these markets.

### *Algorithmic collusion*

36. The e-commerce sector inquiry report also notes the role of price monitoring software which may facilitate or strengthen (both tacit and explicit) collusion between retailers by making the detection of deviations from the collusive agreement easier and more immediate.<sup>26</sup>

37. The CMA has casework experience in respect of technologies being used anti-competitively. In August 2016, the CMA issued a decision that Trod Limited and GB eye Limited (trading as ‘GB Posters’) had infringed Chapter I of the Competition Act 1998 by agreeing not to undercut each other’s prices for posters and frames sold on Amazon’s UK website.<sup>27</sup> A particularly notable feature of the case, however, was that the agreement was implemented by means of automated re-pricing software to monitor and adjust the parties’ prices, making sure that neither was undercutting the other.

### Compliance

38. Finally, the CMA recognises that most businesses operating online wish to comply with competition law and may benefit from accessible compliance advice. The CMA has accordingly been active in, for example, providing guidance to help those businesses to understand the law on resale price maintenance (RPM) and related practices that online operators [in particular] might seek to employ and which may breach competition law, including by means of short ‘easy-to-understand’ videos and ‘60 second’ advice guides.<sup>28</sup>

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<sup>26</sup> Section 4.6.5

<sup>27</sup> <https://www.gov.uk/government/news/cma-issues-final-decision-in-online-cartel-case>

<sup>28</sup> <https://www.gov.uk/government/collections/resale-price-maintenance-information-for-businesses>. The CMA has also adopted earlier guidance on vertical agreements produced by the OFT: <https://www.gov.uk/government/publications/vertical-agreements>