

ANNEX A: Recent CMA work considering aspects of online platforms

The CMA's recent work has included the following (further details are provided below):

- investigations into restrictions of competition in the online distribution of goods including so called 'across platform parity agreements' and Most Favoured Nation clauses used by online platforms;¹
- reports on the Commercial Use of Consumer Data² and Online Reviews and Endorsements³ following the CMA's Calls for Information;
- analysing, together with the Autorité de la Concurrence in France, competition issues around open and closed systems⁴ and reporting our joint findings;
- in partnership with the EU Consumer Protection Network, taking enforcement action under our consumer protection powers, in relation to the role of app platforms and related operating systems to protect consumers from unauthorised in-app purchases and online or app-based games encouraging children to make purchases; and
- carrying out consumer law investigations into secondary ticket websites, group buying sites, price comparison sites, and affiliate marketing networks.

¹ A typical price-parity agreement between a supplier and a platform contains clauses providing that the platform will maintain parity with the minimum prices set by the supplier, and a 'most favoured nation' clause, providing that the lowest price offered to the public via the supplier's own website, or via competing platforms, must also be made available to the platform entering into the agreement.

² CMA Publication: Commercial use of Consumer Data (June 2015):
<https://www.gov.uk/government/consultations/commercial-use-of-consumer-data> (CMA38).

³ CMA Publication: Online Reviews and Endorsements (June 2015):
<https://www.gov.uk/government/consultations/online-reviews-and-endorsements> (CMA41).

⁴ 'Openness' in this context refers to the extent to which any firm can access and use the components of a platform or system (for example, services, data, or applications) in the providing their own services without incurring excessive costs. It is therefore closely related with the issues of interoperability and standardisation.

Restrictions in competition in the online distribution of goods including across platform parity agreements

1. The CMA receives a large volume of complaints relating to online distribution practices, including allegations of resale price maintenance (RPM), the use of internet minimum advertised pricing,⁵ online sales bans and price parity and price relativity agreements. There have also been allegations of attempts by online platforms to lock in suppliers and suppress inter-platform competition.
2. Price parity and price relativity agreements have been the focus of a number of antitrust cases domestically and internationally.⁶ Considerable attention has been directed at the use by providers of online platforms and marketplaces of so-called across-platform parity agreements, also referred to as 'retail-MFNs' (Most Favoured Nation clauses). Retail-MFN clauses enable the customer (typically a platform or reseller) to ensure that the retail prices (and/or other non-price retail terms) at which it offers a supplier's goods or services are no worse than those offered by other customers of that supplier.⁷ A retail-MFN clause effectively obliges the supplier to ensure that the retail price on its own sales channel and/or on other sales channels is not lower than the retail price offered by the party benefiting from the retail-MFN. Given the way in which they operate, retail-MFNs require the supplier to have some control over retail prices or discounting (or both) of the products it supplies thereby potentially eliminating retail price competition across multiple distribution channels.
3. In 2014, following an investigation into the functioning of the private motor insurance (PMI) market in the UK under its market investigation powers,⁸ the

⁵ In March 2014 the OFT issued infringement decisions under the CA98 in connection with online sales and advertising restrictions in the mobility aids sector (<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/mobility-aids/>)

⁶ Including investigations into hotel online booking: the CMA (among numerous international counterparts) has investigated suspected breaches of competition law relating to discounting restrictions in arrangements between hotels and online travel agents. The CMA case is now closed: <https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation>. Details of the CMA's ongoing evaluation of pricing practices in the sector are available here: <https://www.gov.uk/cma-cases/online-travel-agents-monitoring-of-pricing-practices>

⁷ Typically, to ensure that it does not breach its contract with the platform/reseller, the supplier will 'police' such parity.

⁸ 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

CMA 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. To remedy its concerns, the CMA prohibited the use of the wide MFNs by PCWs in the PMI market (and – to ensure the effectiveness of that prohibition – also prohibited behaviours by large PCWs intended to have equivalent effect).⁹

4. The CMA work in this area is summarised in its OECD paper:
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2015\)66&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)66&doclanguage=en)¹⁰

Commercial use of personal data

5. The role of data in online platforms, and the understanding and control by consumers of the collection and use of such data were considered in more detail in the CMA's report on the commercial use of consumer data.¹¹ The CMA commissioned research into three specific sectors involving online platforms: motor insurance, clothing retail and games applications.¹² The CMA found that businesses, including platforms, generally collect and use (through a range of techniques) consumer data for a number of commercial purposes including analytics, cross-selling, targeted advertising, and the development of new services. In a competitive market, this may generate efficiencies with consumers benefitting from lower prices or higher quality services.
6. The collection and use of data was found by the CMA to be complex and widespread with markets evolving rapidly. The range of consumer information

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.

⁹ The CMA found that ‘narrow MFNs’ (defined as those covering price parity with the insurance provider’s website only) adopted by PCWs in relation to private motor insurance did not give rise to an adverse effect on competition (and so were excluded from the scope of the CMA’s prohibition).

¹⁰ Further information as to the OECD’s analysis of across platform parity agreements including other country contributions are available at <http://www.oecd.org/daf/competition/competition-cross-platform-parity.htm>. In 2015, the International Competition Network (ICN) published a special project report on online vertical restraints (<http://www.icn2015.com.au/download/ICN2015-special-project-online-vertical-restraints.pdf>).

¹¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf

¹² <https://www.gov.uk/government/publications/commercial-use-of-consumer-data-factual-review>

used commercially extends beyond basic transactional data historically captured by retailers. There has been a rapid growth in third party analysis of data to identify patterns and relationships for sale to other businesses.

7. 75% of consumers expressed concern about loss, use and inappropriate onward disclosure of their personal data. The CMA also found that consumers wanted more control over 'their' data. The CMA found a disconnect between consumers' stated concerns about the use of data about them, and their actual behaviour. For example, consumers do not actively engage with certain mechanisms, e.g. cookie notices. There may be a number of reasons for this, including ignorance about the fact that the data is being collected, a sense of impotence to do anything about it anyway, or the feeling that the product being 'paid for' with the data is too essential to opt out of. Consumer behaviour may suggest consumers value convenience over privacy in certain instances when using some online platforms.
8. Platforms are sometimes 'free'¹³ at the point of use.¹⁴ The CMA found that, in 'free at point of use' platforms, businesses typically use data to target advertisements as the implicit 'price' for using the services. While, in theory, consumers should be able to discipline providers over the level of privacy or the extent to which data may be used, the CMA found that, in practice, consumers may find it difficult because of a lack of awareness that data may be used for this purpose and/or the value of the data to the platforms. As such, consumers have limited ability or incentives to discipline platforms to compete over privacy protection. Further, there is not always a direct contractual relationship between consumers and those with access to the data.
9. Consumers' personal data has become an increasingly valuable commodity to business. The CMA identified a number of positive developments in the industry, including self-regulatory initiatives, efforts to raise awareness of privacy controls and better tools to help consumers control the use of their data. However, the CMA found that consumer confidence appears to be fragile and

¹³ Users in some instances 'pay' by allowing data to be collected about them and their activities. While this is not a cost to the user in monetary terms, there is a value transfer which the platform is often able to monetise.

¹⁴ The CMA identified 3 principal models by which consumers may share data with businesses, including platforms: a. when they engage in a direct financial transaction, b. when they engage with 'free at point of use' platforms such as social networks, booking platforms, media platforms, search engines, price comparison websites, etc.; c. in a variant of the above involving limited access without charge with payment for premium content.

there are concerns that future changes in how data may be collected and used (such as more passive collection via the Internet of Things) could test how far consumers are willing to continue to provide data. Further details are provided in the CMA's report: <https://www.gov.uk/government/consultations/commercial-use-of-consumer-data>

Online reviews and endorsements

10. The CMA also carried out a Call for Information regarding online reviews and endorsements. Trust mechanisms are key features of many online platforms' business models, for instance those in the 'sharing economy' where ratings and reviews act as a form of self-regulation¹⁵. The CMA found that more than half of UK adults (54%) use online reviews before making purchases. While most buyers who used reviews and endorsements considered the product or service matched up to their expectations, the CMA found evidence of potentially misleading practices, such as fake reviews being posted on review sites, negative reviews not being published and businesses paying for endorsements without this being made clear to consumers. Further details can be found in the CMA's report: <https://www.gov.uk/government/consultations/online-reviews-and-endorsements>

Open and closed systems

11. More generally, the CMA together with the Autorité de la Concurrence has examined the nature of the economics regarding open and closed systems. The report explains the principal features of open and closed systems. There are advantages associated with each type of system.
12. Ecosystem openness is good for competition as open systems generate efficiencies: (1) they maximise network effects, (2) they maximise scale economies, (3) they enable the system owner to commit not to renegotiate ex post the access fees with the component developers once the specific investments in the system have been incurred and (4) they enable the system owner to commit not to exploit the users who have joined the system, which increases incentives to join the system.

¹⁵ Through reputational feedback mechanisms: aggregating reviews can significantly diminish the problem of asymmetric information.

13. Closed systems also generate efficiencies: they (1) ensure compatibility between components (2) avoid free-riding (3) allow user coordination, and (4) avoid the drawbacks of standardisation. Closure can be good for competition as closed systems increase inter-system competition (which can lead to fierce competition ‘for the market’) and they can lead to an increased incentive to innovate and to entry due to future profit expectations.
14. The joint report noted competition authorities may be legitimately concerned by the threat all consumers could be locked into a single unavoidable system, monopolising many markets, and considered that competition authorities could be willing to intervene to avoid ‘tipping’ or lock-in:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387718/The_economics_of_open_and_closed_systems.pdf

Platform liability issues

15. Examples of work where the issue of platform liability has arisen have included the OFT’s investigation into Groupon¹⁶, CMA work with other EU partners looking into children’s apps on Google and Apple app platforms¹⁷. This led to certain improvements being agreed with Google Play and Apple as a result of the joint action on children’s apps. For example increased transparency about which ‘free’ apps contain in app purchases; ensuring consumers’ choice is not hindered, by preventing direct exhortations to children in apps they use; giving parents control over the payments that are made by changing the default settings for in app purchase authorisations. Both companies also committed to deal swiftly with problems if brought to their attention.
16. The OFT/CMA has carried out investigations into secondary ticket websites¹⁸, and worked with international colleagues (ICPEN¹⁹) looking into the role of facilitative players such as top level domain name registries in the context of the potential mis-selling of tickets for international sporting events.

¹⁶<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/groupon/>

¹⁷ <https://www.gov.uk/cma-cases/children-s-online-games>. The EU Consumer Protection Co-operation (CPC) network carried out joint action in order to secure changes to the operating systems of Google Play and iOS due to concerns about the effectiveness of payment authorisation controls for in app purchases.

¹⁸ <https://www.gov.uk/cma-cases/secondary-ticketing-websites>

¹⁹ See paragraph 35 above for more detail on ICPEN.