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The CMA's interim report on digital comparison tools

The UK's Competition and Markets Authority ('CMA') is currently conducting a market study into the use of digital comparison tools for the purchase of home insurance, broadband, credit cards and flights. Becket McGrath, Partner at Cooley (UK) LLP, provides an overview of the study, the recent CMA update paper and the possible competition issues that could arise.

The CMA has identified both 'consumers' access to markets and barriers to decision-making' and 'online and digital markets' as priority areas for its work in the year ahead¹. Its ongoing market study on 'digital comparison tools' (or 'DCTs') addresses each of these areas². As such, the CMA's recent 'update paper' on the market study provides an interesting snapshot of its thinking³.

Given the importance of market transparency and consumer choice for the competitive process, the CMA is unsurprisingly keen on promoting the use of DCTs. Recent CMA cases have suggested that DCTs have their limitations, however, and the terms on which they are operated can reduce their effectiveness or even create new competition issues.

While the update paper confirms that the CMA will not be making a market investigation reference in relation to the supply of DCTs (confirmed in a formal decision issued the same day⁴), it does highlight a number of consumer protection and competition concerns that in the CMA's view justify further work. While (for the time being, at least) this work will take place within the somewhat looser framework of a market study, the CMA has identified some areas in which specific enforcement action may prove necessary.

Scope of study

The CMA formally launched its DCTs market study on 29 September 2016. The CMA defines DCTs as 'web-based, app-based or other digital intermediary services used by consumers to compare and/or switch between a range of products or services from a range of businesses.' While this description is extremely broad, potentially encompassing a wide range of online services including for example retail marketplaces and estate agent sites, the CMA has made it clear that it is primarily focusing on the role of 'classic' price comparison sites in specific sectors where it has relevant experience of the role of DCTs or has promoted their use through remedies.

For example, the CMA has recently considered the role of DCTs in private motor insurance⁵, energy⁶, retail banking⁷ and legal services⁸. The role of DCTs also arose in the CMA's competition investigation of hotel online booking⁹ and its market investigation of payday lending¹⁰. The CMA's predecessor enforcement body, the Office of Fair Trading ('OFT') issued a report on price comparison sites in 2012 and their role also featured in a number of earlier investigations by the OFT and the Competition Commission ('the CC,' now also merged into the CMA)¹¹. More recently, the UK Regulators Network has published its own report on the regulatory framework for price comparison sites in financial services, telecoms and energy¹².

As a result, there was no shortage of relevant material for the CMA to draw on.

To avoid spreading its efforts too thinly, the CMA has focused in this study on the role of DCTs in the utility, financial services and travel sectors, choosing to undertake detailed case studies on their use for purchasing home insurance, broadband, credit cards and flights. Taking these four 'case study' areas, the CMA has undertaken an extensive consumer survey and mystery shopping exercise to gather primary evidence, as well as consulting with a range of stakeholders.

Key issues

The update paper confirms the CMA's view that DCTs can offer significant benefits to consumers by making it easier for them to search available offers and switch suppliers. These benefits are likely to be most evident in sectors where consumers would be otherwise uninclined to engage and where significant money is at stake. The CMA has identified four conditions that must be met for these benefits to be maximised, namely:

1. consumers need to have enough confidence and understanding to use DCTs effectively;
2. DCTs need access to the right information to be able to offer effective comparisons;
3. competition between DCTs (and

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continued

- between DCTs and suppliers, where they also offer products directly to consumers) needs to be effective; and
4. regulation of DCTs needs to be appropriate.
 5. The update paper examines each of these conditions and sets out further action that may be needed to ensure that they are met.

Consumer confidence

The CMA's research identified widespread awareness and usage of DCTs, as well as a high degree of satisfaction, with 85% of respondents surveyed having used a DCT and over 90% of recent users saying they were either fairly or very satisfied with the DCTs they used. The CMA has nevertheless suggested that there is room for improvement in the transparency of sites, especially concerning their market coverage, business models and ranking methods. The CMA has also noted consumer concerns over how DCTs use personal information and a lack of information on consumers' remedies, if they are unhappy with a DCT.

To address these concerns, the CMA is considering taking enforcement action under its consumer protection powers against any DCT operator that has actively misled consumers (a relatively high threshold). It is also considering whether regulation could be used to improve industry practice around transparency and data use.

DCT inputs

The CMA has identified three key inputs for DCTs, namely access to product information; access to consumer usage information; and integration with suppliers to allow consumers to complete purchases. While the update paper does not identify any over-riding issues in this area, discrete issues may arise in particular sectors, for example access to complete information on broadband speed, access to sufficient consumer information to enable tailored insurance quotes and availability of or access to a consumer's credit history for consumer credit products. The CMA notes that other regulators including Ofcom and the Financial Conduct Authority ('FCA') are already undertaking work to address these concerns in their respective sectors and it will continue its engagement with

regulators and Government to explore potential for remedies in this area.

Competition

The update paper's analysis of competition concerns is particularly interesting. The CMA notes that DCTs operate in 'two-sided markets,' in which DCT operators seek to attract both suppliers and consumers to their sites. As such, positive consumer outcomes depend on both effective competition between DCTs to attract consumers and the terms of the negotiations between DCTs and suppliers. (For the purposes of this market study, the role of 'primary' competition between suppliers to serve consumers is largely ignored.)

Overall, the CMA considers that competition between DCTs is 'generally fairly effective, and serves consumers well,' while acknowledging that there is some variation between sectors. While it notes that a single DCT may be particularly strong in certain sectors, the identity of the leading DCT varies between sectors and this feature does not seem to overly concern the CMA.

The CMA has, however, identified four contractual practices that may raise competition concerns:

1. the use of 'wide' most favoured nation ('MFN') or parity clauses in agreements between suppliers and DCTs that prohibit suppliers from offering a product or service at a cheaper price on its own website or on a rival DCT;
2. the use of 'narrow' MFNs, which only prohibit lower prices on the supplier's own channel but allow divergent pricing on other DCTs;
3. the use of terms that limit bidding for online search terms ('non-brand bidding' and 'negative matching arrangements'); and
4. agreements by DCTs not to re-contact customers for a specific period to offer a new comparison for a service for which they have facilitated a sale ('non resolicitation agreements').

While the potential effect of wide and narrow MFNs on competition has been the subject of significant antitrust scrutiny in recent years¹³, the impact of agreements that limit search term

bidding is relatively new territory for UK competition enforcement¹⁴. Specifically, the CMA is concerned that agreements that restrict bidding for adverts on comparison sites, which are commonly placed below or alongside DCT results listings, may restrict competition. The CMA identifies, in particular:

- agreements by an advertiser not to bid for another advertiser's brand name when a search term either equals the brand name ('narrow non-brand bidding') or includes that brand name with other words ('wide non-brand bidding'); and
- agreements by an advertiser to add another advertiser's brand name to its negative keywords list, thereby ensuring that its ads will not appear when the search term includes that brand name ('negative matching').

While the CMA's preliminary view is that these agreements have the potential to reduce competition and lead to consumer harm, it is not yet clear how material such harm may be. As such, the CMA is seeking further submissions on the impact of such agreements before deciding whether targeted competition enforcement action is justified¹⁵.

The CMA seems to be less convinced over claims that so-called 'hollowing out' (unbundling and separately pricing elements of a wider offering or focusing on one element, typically price, to the exclusion of other features) raises competition concerns¹⁶. It will nevertheless seek further evidence before reaching a final view on this point.

Regulation

The paper notes that, in addition to the general law on such matters as consumer contracts, DCTs may be subject to additional regulations or quasi-regulatory measures in certain sectors. For example, DCTs for financial products may need to be authorised by the FCA if their offering amounts to 'regulated intermediation activity,' whereas energy DCTs may be accredited under an Ofgem voluntary 'confidence code' (which includes a requirement that DCTs include all available offers on the market - the 'whole of market' requirement). The CMA recognises that the



regulatory picture is overly complex and inconsistent, which has the potential to distort competition, for example by raising barriers to entry for new competitors. The CMA also raises concerns over the potential of 'whole of market' requirements to distort competition, as the obligation on DCTs to list all available offers on a market weakens their negotiating position *vis-à-vis* suppliers. The CMA is considering the potential for greater consistency in the regulation of DCTs across regulated sectors through the adoption of 'cross-sector principles'

and is continuing to engage with sectoral regulators on this subject.

Next steps

The CMA will now consider stakeholder comments on the update paper, including responses to the specific questions it has set out in the paper, before producing its final market study report, which is due by 28 September 2017. The only certain outcome at this time is that a market investigation can be ruled out. While various recommendations and calls for incremental improvements are likely, particularly in regulated

sectors, it is unclear at this stage whether the market study will lead to concrete enforcement proceedings.

It will be particularly interesting to see whether the CMA opens new antitrust investigations into MFNs and restrictions on online search bidding, given the widespread adoption of such practices well beyond the DCT sector. In the meantime, it is likely that the CMA's work on DCTs will continue to feed into its wider work on online markets¹⁷ and vice versa.

1. See CMA Annual Plan 2017/18, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604425/cma-annual-plan-17-18-print-ready.pdf. See also the Government's 'strategic steer' to the CMA (available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481040/BIS-15-659-government-response-governments-strategic-steer-to-the-competition-and-markets-authority.pdf), which recommends the CMA focus on 'developments in new emerging markets.'
2. The CMA has a broad power under Section 131 of the Enterprise Act 2002 (EA02) to investigate any UK market if it suspects that a 'feature' of the market prevents, restricts or distorts competition. If such a market investigation reveals that its concerns are justified, the CMA has extensive powers to impose remedies to address its concerns. While the market investigation procedure can be effective at identifying and addressing market failures, it is highly resource intensive and can be rather rigid. As an alternative, the OFT and CMA developed a more flexible and open ended market study procedure, which enables general studies of markets where competition 'may not be working well' for a variety of reasons, including regulatory context and consumer or business behaviour.
3. The update paper (which was published on 28 March 2017) and other key case documents are available on the CMA's market study web page, at <https://www.gov.uk/cma-cases/digital-comparison-tools-market-study>
4. Available at: <https://assets.publishing.service.gov.uk/media/58d9f703e5274a06b0000026/dcts-notice-of-decision-not-to-make-a-reference-28.3.17.pdf>
5. The CMA concluded a full market investigation of private motor insurance in 2014; see <https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation>. The remedies implemented following that investigation included prohibiting pricing restrictions affecting DCT listings.
6. The CMA concluded its energy market investigation in 2016 - see <https://www.gov.uk/cma-cases/energy-market-investigation>. The CMA also undertook a short-lived Competition Act investigation into price comparison websites in 2016 - see <https://www.gov.uk/cma-cases/energy-price-comparison-websites-suspected-anti-competitive-agreements>
7. The CMA issued its retail banking market investigation report in August 2016. Its wide-ranging remedies package included measures to make it easier for customers to search for suitable alternatives to their current bank - see <https://www.gov.uk/government/news/cma-paves-the-way-for-open-banking-revolution>
8. See the December 2016 final report of the CMA's market study of legal services, at: <https://www.gov.uk/cma-cases/legal-services-market-study>
9. See case page at: <https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation>
10. See <https://www.gov.uk/cma-cases/payday-lending-market-investigation>
11. Relevant past work by the OFT, CC and CMA is summarised at Appendix 2 to the DCT report: <https://assets.publishing.service.gov.uk/media/58d9310940f0b606e7000036/dcts-update-paper-appendices.pdf>
12. The UKRN is a network of the UK's 13 sectoral regulators. Its report on price comparison websites is available at: <http://www.ukrn.org.uk/news/today-we-have-published-our-report-on-price-comparison-websites/>
13. See, in particular, work by a number of national competition authorities coordinated through the European Competition Network (on which, see: http://ec.europa.eu/competition/ecn/index_en.html) on the impact of MFNs in the hotel online booking sector, as well as investigations by the OFT and German Federal Cartel Office on online marketplace price parity restrictions.
14. Bans on retailers bidding for a supplier's brand name as an advertising keyword have been investigated - see for example the ruling by the German Federal Cartel Office that such terms imposed by running shoe manufacturer ASICS infringed EU and German competition law, as did its ban on the use of price comparison sites (English language summary available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/27_08_2015_ASICS.html?nn=3591568).
15. The CMA is adopting a similar approach to non-resolicitation agreements, where the evidence is also mixed.
16. Since the UKRN recommended scrutiny of this issue, the CMA could not ignore it.
17. As evidenced most recently by the CMA's publication on 7 April 2017 of a detailed review of the available literature on online search - see Online Search: Consumer and Firm Behaviour, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607077/online-search-literature-review-7-april-2017.pdf