Chapter [●]

United Kingdom

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1. The Structure of UK Competition Law regime

1.1. The Competition Act 1998 and Other Competition Statutes in the UK

The Competition Act 1998 is a statute exclusively concerned with competition law, which takes effect across the entirety of the United Kingdom. It is not the only statute that concerns competition law – the other major piece of primary legislation is the Enterprise Act 2002, which contains the UK's merger control rules, rules on market studies and investigations, and creates a criminal "cartel offence," as well as rules on the investigation and enforcement of certain consumer law matters. The Consumer Rights Act 2015, which came into force on 1 October 2015, reformed the UK's regime for private actions in competition law, and expands the jurisdiction of the Competition Appeal Tribunal to hear stand-alone actions for damages.

The Competition Act 1998 contains two core prohibitions: the Chapter I prohibition regulates anti-competitive agreements, decisions of undertakings or concerted practices in similar terms to Article 101 of the Treaty on the Functioning of the European Union ("TFEU") - extending only to trade within the UK, not between the EU Member States. The Chapter II prohibition regulates the abuse of a dominant position within the UK in similar terms to Article 102 of the TFEU, again with emphasis on the UK. The Chapter II prohibition contains a non-exhaustive list of conduct which may amount to abuse; in principle the scope of the prohibition can expand to include other conduct.

1.2. Enforcement, concurrency and consequences of breach

In the UK, the CMA is the primary body enforcing competition law.[2] It combines the functions of the former Competition Commission and the Office of Fair Trading, which have since been abolished.[3] In addition, various sector regulators may also apply UK competition law, concurrently with the CMA. These bodies are:[4] the Office of Communications (Ofcom);[5] the Gas and Electricity Markets Authority (GEMA, often referred to as "Ofgem"); the Water Services Regulatory Authority (WSRA, often referred to as "Ofwat"); the Office of Rail Regulation (ORR); the Northern Ireland Authority for Utility Regulation (often referred to as "Ofreg"); the Civil Aviation Authority (CAA, in relation to designated airports and air traffic control); the Payment Systems Regulator (PSR, part of the Financial Conduct Authority); the Financial Conduct Authority (FCA) itself;[6] and Monitor, the health service regulator.[7]

The competition authorities have issued a substantial body of guidance on the application of competition law to regulated industries. These include: *Regulated Industries Guidance on concurrent application of competition law to regulated industries*;[8] *The Application of the Competition Act in the telecommunications sector*;[9] *Application in the energy sector;*[10] *Application to services relating to*

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[1] The author is grateful to the Competition Law Association's working group on Question A on 13 June 2017 for its valuable comments and input. Any errors remain the author's own.
[2] The CMA describes itself as an independent non-ministerial department: https://www.gov.uk/government/organisations/competition-and-markets-authority/about.
[3] Section 26(1) and (2) of the Enterprise and Regulatory Reform Act 2013, with effect from 1 April 2014.
[4] Section 54 of the Competition Act 1998.
[5] Ofcom is the successor to five separate communications regulators including the Director General of Telecommunications, which is referred to below and which previously had concurrent competition powers.
[6] In this paper, I refer to the CMA to represent the UK authorities generally, but in relation to specific cases I use the name of the actual regulator that took the decision.
[7] Health and Social Care Act 2012, section 72.
[8] CMA10 (March 2014).
[9] OFT 417 (February 2000).

railways;[11] and *Guidance on the application of the Competition Act 1998 in the water and sewerage sectors.*[12] In addition, there are several Memoranda of Understanding between the CMA and specific regulators on the exercise of concurrent powers;[13] guidelines on the use of enforcement powers;[14] and prioritisation principles.[15]

Decisions of the CMA may be appealed in the first instance to the Competition Appeal Tribunal. The CMA may hear follow-on damages cases, and under the Consumer Rights Act 2015, stand-alone damages and injunctions cases. The Chancery Division of the High Court retains its jurisdiction to hear stand-alone actions.[16]

Contravention of competition rules can lead to: (a) guilty firms being fined up to 10% of their group worldwide turnover; actions for damages from customers and/or competitors who may have suffered harm by the guilty firm's anti-competitive activities; (c) individuals being disqualified from being a company director; and (d) individuals involved in cartels, in certain circumstances, being imprisoned for up to five years and/or imposed unlimited fines.

1.3. Relationship with EU law

The interplay between EU competition law and UK competition law is mainly governed by what is often referred to as the Modernisation Regulation, which came into force on 1 May 2004.[17] Article 3 of the Modernisation Regulation requires the national competition authorities of the EU member states, when applying their national competition rules to an agreement or conduct that may appreciably affect trade between EU member states, to apply Article 101 and/or Article 102 of the TFEU at the same time, and to not prohibit such an agreement and/or conduct under its national rules if it would be permitted under the corresponding EU rules.

For instance, the CMA's guidelines on agreements and concerted practices[18] state that the application of Article 101 of the TFEU to an agreement in question will depend on its assessment on whether that agreement may have an effect on trade between EU member states. The CMA will have regard to the guidance set out in the European Commission's notice[19] when making its assessment. This means that, in practice, the CMA may choose to apply one or both of UK competition rules and EU competition rules. The CMA's guidance on penalties for infringement of competition rules, however, make it clear that in cases where an undertaking has infringed both of an EU prohibition and the corresponding UK prohibition, the undertaking will not be penalised twice for the same anti-competitive effects.[20]

However, the national competition authorities cannot, under the Modernisation Regulation, decide that that there has been no breach of EU competition rules. In 2011, the Court of Justice of the European Union ("CJEU"), following a preliminary reference from the Polish Supreme Court, ruled that allowing national competition authorities of the EU member states to decide that there has been no breach of Article 102 of the TFEU would call into question the system of co-operation established by the

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[10] OFT 428 (January 2005).
[11] OFT 430 (October 2005).
[12] OFT 422 (March 2010).
[13] See, for example, those between the CMA and: the Northern Ireland Authority for Utility Regulation (May 2014); the Financial Conduct Authority (June 2014); the Civil Aviation Authority (June 2014), the Water Services Regulation Authority (June 2014) and with Ofcom (June 2014).
[14] For example, *Ofgem, Enforcement guidelines on complaints and investigations* (June 2012); *Ofcom Enforcement Guidelines: Ofcom's guidelines for the handling on competition complaints and complaints concerning regulatory rules* (July 2012); and *Monitor Enforcement Guidance* (28 March 2013).
[15] For example, *Ofwat, Prioritisation Principles: application to the Competition Act 1998* (September 2010).
[16] See the Competition Law Practice Direction, stated to be up to date to 10 September 2013 but not reflecting Treaty of Lisbon numbering changes or recent UK competition reform legislation: http://www.justice.gov.uk/courts/procedure-rules/civil/rules/competitionlaw_pd.
[17] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 82 and 82 of the Treaty, OJ 2003, L 1, p. 1.
[18] See OFT 401, Agreements and concerted practices: Understating competition law at paragraph 4.3.
[19] See Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004, C 101, p 81.
[20] See OFT 423, OFT's guidance as to the appropriate amount of a penalty at paragraph 1.17.

Modernisation Regulation, and would also undermine the powers of the European Commission. According to the CJEU, a negative decision on the merits of the case by a national competition authority could undermine the uniform application of EU competition rules as it might prevent the European Commission from finding subsequently that the practice in question amounted to breach of EU competition rules.[21]

Moreover, the UK Courts and the relevant competition authorities are required by section 60 of the Competition Act 1998 to ensure that there is consistency between the principles applied and decisions reached by each of them and "the principles laid down by the TFEU and the European Court, and any relevant decisions of that Court".

1.4. Relevant market

Relevant market is central in determining the direction of a competition assessment of the agreement or conduct in question. The CMA notes in its guidance, "[m]arket definition is not an end in itself but a key step in identifying the competitive constraints acting on a supplier of a given product or service. Market definition provides a framework for competition analysis…[and] is usually the first step in the assessment of market power."[22] The CMA's guidance largely reflects the European Commission's Notice on market definition.[23]

Article 81 of the TFEU/Chapter I prohibition applies only to agreements which have as their object or effect an *appreciable* prevention, restriction or distortion of competition. In order to test appreciability, it is generally necessary to define a relevant market and then demonstrate the appreciable effect of the agreement on competition on that relevant market.[24] Similarly, Article 82 of the TFEU/Chapter II prohibition regulates the conduct only of dominant undertakings. Both the CMA and the European Commission would consider an undertaking to be dominant only if the relevant undertaking had substantial market power, which in turn requires the competition authority to define the relevant market.

In defining the relevant market, both authorities use what is known as the 'hypothetical monopolist' or SSNIP (small but significant non-transitory increase in price) test. The essence of the test is to determine the narrowest product group and geographic area over which a hypothetical monopolist controlling those products in that area could profitably maintain 'supra competitive' prices, i.e. prices that are at least a small but significant amount above competitive levels. This narrowest product group and geographic area is generally considered to be relevant market.

A relevant market typically involves a relevant product market and relevant geographic market. However, in certain circumstances it might be necessary to consider temporal markets as well. For instance, in certain situations it would be impossible for customers to substitute between time periods. This is usually the case in transport markets, where peak hour customers would not consider peak and off-peak tickets as substitute products. In practice, first the relevant product market is defined, and thereafter, the relevant geographic market.

However, the SSNIP test is not completely helpful in two-sided markets such as e-commerce for goods and services, or the online search engine market. As a firm active on a two-sided market sells two products or services to two different set of consumers, and demand from one type of consumers depends on the demand from the other set of consumers and vice versa. One side of the market may be subsidised or funded by the other side of the market, for instance advertisers pay search engines for the attention of users but the users do not pay the search engine for the searches made by them.

[21] CJEU, Case C-375/09 - *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. zoo, now Netia SA w Warszawie*, ECR 2011 I-3055.
[22] See OFT 401, Market definition: Understanding competition law at paragraph 2.1.
[23] European Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, p. 5.
[24] However, if an agreement has its object the prevention, restriction or distortion of competition then it is not necessary for the European Commission or the national competition authority to define the relevant market prior to finding an infringement of competition. See ECJ, Case T-62/98 *Volkswagen AG v Commission*, ECR 2000 II-2707, at paragraphs 230 to 232.

1.5. Market power

The Chapter II prohibition/ Article 102 TFEU deals with abuse of a dominant position by a dominant undertaking. To determine whether an undertaking holds a dominant position involves two steps: (a) Defining the relevant market as per above; and (b) Assessing the degree of market power, or economic strength of the undertaking in question.

There are usually three key factors to consider when assessing the degree of market power of an undertaking. First, *the market position of the undertaking itself and its competitors.* Generally, market shares of an undertaking and its competitors are good first indicators of market power/dominance. In most circumstances, a large market share equates to a dominant position. This is because "an undertaking which has a very large market share and holds it for some time by means of the volume of production and the scale of the supply which it stands for – without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share – is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which already because of this secures for it, at least during relatively long periods, that freedom of action which is the special feature of a dominant position.[25] As a rule of thumb, market shares significantly and consistently above 50% are likely to be strong indicators of dominance. Market shares above 40% may be relevant and significant for the purposes of finding dominance, depending upon changes in level over time, market share of competitors etc. Market shares between 30% and 40% indicates it is unlikely, but possible, based on other factors for there to be dominance.[26] Market shares below 30% are unlikely to raise dominance concerns in normal circumstances. However, in many cases it would also be necessary to consider other factors such as the nature of the market and the competitiveness of the other participants on that market.

Second, *barriers to entry and expansion.* This essentially means difficulties or barriers faced by competing undertakings in entering a market. These difficulties may be due to lack of technical resources/capability, intellectual property rights etc. For instance, a dominant undertaking may benefit from economies of scale where they can lower their average costs with a higher level of production.[27] Similarly, if fixed costs such as R&D or marketing, constitute a high proportion of total costs incurred by the dominant undertaking, then this is likely to be a barrier to market entry. Sometimes barriers to entry may be technical in nature. These could be patent rights or industry standards that may not be readily accessible to a potential entrant.[28]

Third, *countervailing market power.* This entails consideration of relative market power of competing firms and whether there are significant actual or potential competitors who may exert effective competitive constraints on the dominant undertaking. Moreover, it is possible for customers of an undertaking to constrain the behaviour of an undertaking in question due to their strong bargaining position. This is referred to as 'countervailing buyer power'. However, for buyer power to exist it is necessary that there are credible alternative suppliers on whom the customers could call upon or that it is possible for customers to sponsor a new entrant.[29]

Market shares are, however, not always indicative of market power in the digital market because of the relatively young and fast-growing nature of the market. For instance, the European Commission noted

[25] Case 85/76 *Hoffmann-La Roche v Commission,* [1979] ECR 461 at paragraph 41.
[26] The European Commission's view is that a market share below 40% is unlikely to amount to dominance. See Article 102 Enforcement Priorities Guidance, OJ 2009 C45/7: Vol II, App C14.
[27] In Case T-336/07 *Telefónica de Espaňa v Commission* judgment of 29 March 2012, the General Court agreed with the European Commission's decision that Telefónica de Espaňa's dominant position in the regional wholesale market in part was possible because of economies of scale and scope of magnitude not available to other operators.
[28] See Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805.
[29] See Case COMP/38113 *Prokent-Tomra,* [2009] 4 CMLR 101. In this case the products supplied by Tomra were not part of its customers' core activities and it was unlikely for customers to place strategic orders to subsidise and actively build up competing suppliers to whom they could then divert their orders. Therefore, the European Commission found there was no countervailing buyer power to affect Tomra's dominance.

in its decision to clear the WhatsApp/Facebook merger "that the consumer communications sector is a recent and fast-growing sector which is characterised by frequent market entry and short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, the Commission takes the view that in this market high marker shares are not necessarily indicative of market power...".[30] This perhaps explains why there hasn't been many abuse of dominance cases in the online sales platforms sector both at the EU and the UK level, and the competition authorities focus on the prohibition of anti-competitive agreements in regulating the online sales market.

2. Online Sales - A new challenge?

2.1. Introduction

In recent years, e-commerce i.e. sales via online channels – supplier's/retailer's own website as well as third-party marketplaces like Amazon - has experienced exponential growth around the globe. In the EU, the average annual growth rate in the online sale of goods was approximately 22% between 2000 and 2014.[31] In 2015, according to the European Commission's estimates, more than 50% of the EU population shopped online. However, only 16% of online purchasers shopped from a seller based in another EU Member State.[32]

Online sales generally involve vertical agreements between a brand manufacturer and its distributors/retailers. Generally, vertical agreements are considered to be less likely to be harmful from a competition law perspective than horizontal agreements between competitors.[33] This is because of the typically complementary relationship between the parties in a vertical agreement, where exercise of market power by one party would normally demand for sales by the other. Vertical agreements could contain a number of vertical restraints in the form of exclusive distribution agreements; selective distribution agreements; exclusive purchase obligations; franchising etc. In many circumstances, vertical restraints can lead to better investment, more efficient sales and economies of scale. They also have the potential to address "problems that arise when a manufacturer seeks to incentivise investment by the retailer in marketing the supplier's goods or in providing additional services to end-users (the 'free rider' problem) or either the supplier of the buyer has made client-specific in order to market the goods (the 'hold up' problem)". [34] However, such restraints may also result in negative effects on competition, namely: (a) anti-competitive foreclosure of access to the market, i.e. making it difficult for a new entrant to enter the market, or for an existing market player to improve its market position; (b) softening competition between a supplier and its competitor and/or facilitating collusion between suppliers; (c) softening competition between a buyer and its competitor and/or facilitating collusion between buyers etc.[35]

On 21 April 2010, the European Commission adopted Regulation 330/2010 block exempting agreements between manufacturers and distributors for the sale of products and services.[36] VABE introduced a broad approach to exemption of vertical restraints based in part on the terms of the vertical agreement in question and in part on market power of the parties. Essentially, VABE will apply if the market share of both the seller on the selling market and the buyer on the buying market does not exceed 30%, and the agreement in question does not contain 'hardcore' restrictions, such as imposition of a fixed or minimum resale price; certain territorial restrictions etc.[37]

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[30] Case No. COMP/M.7217, *Facebook/WhatsApp*, paragraph 99 available at http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

[31] Commission Staff Working Document, *Geo-blocking practices in e-commerce: Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition,* SWD(2016) 70 final.

[32] See Eurostat, *Digital Single Market: promoting e-commerce for individuals. Available at: http://ec.europa.eu/eurostat/data/database?node_code=isoc_bdek_smi*.

[33] See Commission Notice: Guidelines on Vertical Restraints, OJ 2010, C 130, p.1, paragraph 98.

[34] Bellamy &Child, European Union Law of Competition, 7th ed, Oxford University Press 2013.

[35] See note 39 above, paragraph 100.

[36] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010, L 244, p.35 ("VABE"). VABE came into force on 1 June 2010 and it applies until 31 May 2022.

[37] Where an agreement includes a hardcore restriction, the European Commission presumes that the agreement falls within Article 101(1) of the TFEU and not to fulfil the exemption criteria of Article 101(3) of the TFEU.

While VABE applies to all sectors of the economy, and applies equally to both traditional sales channels as well as the rapidly growing online sales channels, it does contain certain specific rules on online sales. For instance, Article 4(b) of VABE provides that any restriction of the territory into which, or of customers to whom, a buyer may sell the contract goods is a hardcore restriction. One of the exceptions to this is that a seller is permitted to prevent a distributor from *actively* selling into a territory or to a customer group which has been exclusively allocated to a different distributor or to the supplier itself.[38] The Vertical Guidelines state that as a general rule online sales should be considered to be passive sales so that restriction on online sales may amount to a hardcore restriction. It identifies a number of examples of such hardcore restrictions, such as the restricting access to a website by customers based in another exclusive territory, or requirement that a distributor must decline transactions over the internet if the payment details of a customer indicate that the customer is located outside the exclusive territory of the distributor. Conversely, it is possible for a distributor to restrict active selling into exclusive territories or to customer groups over the internet. For example, ban on sending unsolicited e-mails to individual customers or paying a search engine to display advertisements specifically to users in another territory is permissible under VABE.

2.2. E-commerce sector inquiry

In its Work Programme 2015 (adopted on 16 December 2014) the European Commission made the completion of a digital single market a priority. Its subsequent communication (in May 2015) on the Digital Single Market Strategy sets out various actions to achieve a digital single market.[39] The European Commission's Digital Single Market Strategy is directed at achieving three main objectives: (a) better online access to goods and services; (b) creating an environment where digital networks and services can prosper; and (c) maximising the growth potential of the digital economy. Similarly, the UK government's strategic priorities for the CMA has identified that the CMA should focus on "developments in new emerging markets, such as online digital market places and use of data…[and]…develop expertise in the impact new emerging markets are having on competition, innovation and consumer choice".[40]

To support its Digital Single Market Strategy the European Commission launched an inquiry into the e-commerce sector in May 2015 as it was concerned that businesses were restricting online sales to limit price competition and cross-border sales. The prime focus of the inquiry was on consumer goods, such as clothing, shoes, household appliances, toys, sports equipment etc, as well as on digital content such audio-visual and music products. The final report of the European Commission found "that the growth of e-commerce over the last decade had a significant impact on companies' distribution strategies and customer behaviour".[41]

The European Commission further found that in relation to consumer goods: (a) price transparency has increased with online trade, such that customers are now able to instantaneously obtain and compare product and price information online, and switch between offline and online sales channels with ease;[42] (b) price competition for both offline and online sales has increased as customers now have the ability

[38] The European Commission distinguishes between active sales and passive sales. Active sales mean actively seeking customers, for example by direct mail or media advertisement targeted at a specific territory or customer group or establishing a branch in a territory that is exclusively allocated to another distributor. Passive sales mean responding to unsolicited customer requests from customers located in a territory exclusively allocated to another distributor. See Vertical Guidelines at page 13.
[39] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Digital Single Market Strategy for Europe", COM (2015) 192, final.
[40] See Government's response to the Consultation on the Strategic Steer to the Competition and Markets Authority (December 2015). 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.
[41] See Final report on the E-commerce Sector Inquiry, COM(2017) 229 final. Available at: http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.
[42] According to the European Commission, while this allows customers to find the best deal, it could also result in *free-riding* behaviour, i.e. use of pre-sale services offered by brick and mortar shops before making an online purchase, or search and compare products online before purchasing in brick and mortar shops.

to compare prices across several online retailers. However, this may affect quality, brand and/or innovation on the markets; (c) increased price transparency enables sellers to monitor their prices more easily;[43] and (d) third-party online marketplaces give retailers, especially small retailers, easier access to customers. But this could potentially clash with distribution policy of manufacturers.

According to the European Commission, these market trends has led to an: (a) increase in competition between brand manufacturers and their own distributors as 64% of manufacturers who responded to the Commission's survey confirmed that they own online retail shops; (b) increase in set up of *selective distribution system* as around 20% of manufacturers who responded to the Commission's survey reported that they have set up new selective distribution network, and nearly 40% introduced new criteria relating to online sales; and (c) increase in vertical restraints, such as pricing restrictions, online marketplace bans, or restrictions on the use of price comparison tools, that allow for a greater control over the distribution of products.

Regarding online sales of audio-visual and music products, the European Commission found that the key determinant for competition in digital content markets is the availability of the relevant rights. To transmit copyright-protected digital content sellers are required to acquire rights to be able to lawfully market the content. These rights would typically include right to transmit via internet, broadband, or cable technologies, and to allow streaming or downloading of the content. Moreover, these rights can be licenses, either on an exclusive or a non-exclusive basis, for a certain territory and/or for certain transmission, reception and usage technologies.

The European Commission concluded that rights used in licensing agreements for digital content tend to involve three main elements: (a) *technologies and usage rights:* technologies that a digital content provider is able to use lawfully to transmit the content and allow the user to receive it; (b) *release and duration rights:* i.e. the period during which a digital content provider is lawfully entitled to offer the products – commonly referred as 'release window or windows'; and (c) *geographic rights:* i.e. geographic area or areas in which a digital content provider may lawfully offer the digital content. The European Commission noted that licensing agreements do not give unrestricted use of licensed rights, but include explicit terms and conditions – "contractual restrictions in licensing agreements are therefore not the exception but the norm in digital content markets".[44]

The main competition concerns in relation to online sales that the CMA and/or the European Commission have identified in the last decade or so are:

2.2.1. Resale Price Maintenance ("RPM")

RPM means the practice where an upstream supplier limits the freedom of downstream resellers, such as retailers or distributors, to set their resale prices, for example by requiring the retailer/distributor to sell at a particular price or only above a minimum price. This is presumed to restrict competition and to infringe the Chapter I prohibition and/or Article 101 of the TFEU.

In May 2016, the CMA found Ultra Finishing Group Limited ("Ultra") to have been guilty of RPM in the online market for bathroom fittings.[45] In reaching its conclusion, the CMA stated that

'[t]he internet is a growing sales channel for the retail sale of bathroom fittings. The internet is an important driver of price competition between sales made through both online and offline channels due to: the increased transparency of prices on the internet; and the ability of resellers using the online sales channel to sell at lower prices".[46]

[43] The European Commission found that two-thirds of the retailers used automatic software programmes that adjust their own prices based on competitors' prices. Moreover, pricing software makes it easier for brand manufacturers to police deviations from *recommended* retail prices and influence retailers' pricing policies.
[44] See n.41 above, page 7.
[45] Case CE/9857-14, Online resale price maintenance in the bathroom fittings sector (10 May 2016). Available at: https://assets.publishing.service.gov.uk/media/573b150740f0b6155b00000a/bathroom-fittings-sector-non-conf-decision.pdf.
[46] See note 51 above, at page 7.

The CMA found that Ultra's online trading guidelines prevented resellers from selling or advertising Ultra branded products online below the recommended online price.[47] Therefore, it concluded that Ultra's RPM agreements would: "reduce price competition from online sales of bathroom fittings products; reduce downward pressure on the retail price of bathroom fittings products; and thereby potentially result in higher prices to consumers".[48] The CMA imposed a fine of £826,000 on Ultra after applying a 20% settlement discount for Ultra's admission of RPM and co-operation with the CMA's investigation.

In another case on 24 May 2016, the CMA fined ITW Ltd ("ITW"), a UK-based manufacturer and supplier of commercial refrigeration products, £2.2 million for restricting its dealers' ability to offer online discounts.[49] Foster Refrigerator UK (Foster), a business division of ITW, had issued a discounting policy to its entire network of resellers, whereby the resellers were prohibited from advertising any Foster products below a minimum advertised price both online and offline – the so called "MAP Policy". The aim of MAP Policy was to improve the margins of resellers and to reduce the competitive pressure Foster's traditional brick-and-mortar dealers faced from lower prices available online. The CMA found that Foster regularly monitored resellers' websites to check that resellers were abiding by the MAP policy, and even asked its resellers to report instances of violation of its MAP Policy by other resellers. Furthermore, Foster regularly took enforcement action to compel resellers to follow the MAP Policy, which included threats to reduce terms of supply if the MAP Policy is not followed, or temporary or permanent closure of a dealer's account. The CMA took the same approach as in the Ultra case and concluded that

"…Foster's prohibition on advertising prices below the MAP genuinely restricted in practice the ability of resellers to determine their online sales prices at a price below MAP and, as such, amounted to resale price maintenance (RPM) in respect of online sales of Foster products."[50]

2.2.2. Most Favoured Nation ("MFN")

MFN or 'price parity' clauses are another way by which suppliers may control resale pricing, and in recent years, like a number of major competition authorities, the CMA has looked into the use of such clauses on online markets very closely. MFNs typically refer to an understanding between a supplier and his buyer where the supplier agrees that the buyer would favourably benefit from a lower price and/or discount the supplier would offer.[51] The CMA's and other competition authorities', main concern is that such clauses could potentially restrict competition among various distribution channels – the supplier is obliged to price match with other sales channels or at least, his own sales channel, and this could restrict the supplier's pricing freedom, soften price competition and deter market entry and/or expansions.

In September 2010, the Office of Fair Trading ("OFT"), launched an investigation into the suspected breaches of competition law by vertical agreement between online travel agents ("OTA") and hotels. The OFT subsequently issued a statement of objections to Booking.com ("Booking"), Expedia Inc. ("Expedia") and InterContinental Hotels Group plc ("IHG") in July 2012.[52] The main focus of the

[47] The CMA noted that Ultra implemented its trading guidelines through a copyright licence for the use of Ultra's images, which ensured that resellers signed up and adhered to its trading guidelines. Moreover, Ultra regularly monitored resellers' websites to check they were abiding by the trading guidelines, and threatened or took enforcement actions against non-compliant resellers, such as offering unfavourable terms of supply, ceasing or refusing to supply, or withdrawing the reseller's right to use its licensed images.
[48] See note 51 above, at page 7.
[49] Case CE/9856/14, Online resale price maintenance in the commercial refrigeration sector (24 May 2016). The CMA reduced ITW's fine by 30% for its admission and co-operating with the CMA under a settlement agreement, and agreement to set up a comprehensive competition compliance programme.
[50] See footnote 55 above, at page 6.
[51] MFNs tend to be divided into two types: First, *Wide MFNs*, where the supplier is obliged to provide the buyer with identical or better prices and terms existing through any sales channel; and second, *Narrow MFNs*, where the supplier is obliged to provide the buyer with identical rates and terms as provided on supplier's own sales channels.
[52] See the press release dated 31 July 2012 issued by the Office of Fair Trading at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2012/65-12. Both Booking and Expedia had entered into separate agreements with IHG.

OFT's investigation was on the restriction on OTAs ability to discount the rate at which room-only hotel accommodation bookings were offered to consumers. The OFT considered such restrictions were "by their very nature" anti-competitive because they eliminated price competition between OTAs. In July 2013, the parties involved offered commitments to the OFT, which were accepted in January 2014. While MFNs were not the focus of the investigations, the commitments offered by the parties did address MFN clauses, and OTAs committed to refrain from entering or enforcing any MFN clauses or similar provisions.[53]

The OFT's decision to accept commitments was later quashed by the Competition Appeal Tribunal on appeal by Skyscanner, the operator of a *meta-search* site which displays prices offered by third parties to assist consumers to compare prices.[54] Skyscanner's appeal was primarily against the OTAs' commitment to not publicise a specific level of discounts as it argued this restricted the disclosure of pricing information and would negatively impact on price transparency in the meta-search and comparison market. Consequently, the case was remitted back to the CMA, who had by then taken over the role of the OFT.

In September 2015, the CMA decided to close the case on the basis of administrative priorities. Thereafter, in July 2016, the CMA launched a monitoring project in the hotel online booking sector in partnership with the European Commission and nine other national competition authorities of the EU member states. The CMA noted that

"The questionnaires [which were sent to hotels across the UK as part of the project], which use a common approach across the 10 countries, will collect information to assess how that change [i.e. commitments from Expedia and Booking to drop MFN clauses], alongside other recent developments – including several investigations across Europe into a range of pricing practices in the online booking sector – have affected the market."[55]

However, on 6 April 2017 the CMA announced that in light of the findings of the European Commission Network report on the results of the monitoring project in the hotel online booking sector, it would not be prioritising further investigation into pricing practices in this sector at this stage. The CMA noted that the monitoring group's analysis shows a shift from wide to narrow MFNs in the UK and elsewhere coincides with a discernible increase in the levels of price differentiation between different OTAs in the last few years. According to the CMA this suggests "*hotels are increasingly taking advantage of the ability to set different prices between different OTAs and are able to do so in response to differences in the competitive offers of these OTAs".* However, the CMA did conclude that *"it is too early to reach any conclusions on whether so called 'narrow' parity clauses...should separately be regarded as giving rise to competition concerns and therefore warrant investigation by the CMA".*[56]

Separately, in November 2013 the OFT closed an investigation into price parity requirements imposed by Amazon in its agreements with third party sellers whereby they were restricted from offering lower prices on other online sales channels after Amazon agreed to drop its policy on its UK marketplace as well as across the UK. The OFT closed its investigation on the basis of administrative priority, without reaching a decision whether there had been an infringement of competition law.[57]

The CMA has also looked at MFNs in the context of private motor insurance ("PMI") market in the UK. In September 2012, the OFT made a market investigation reference under the Enterprise Act 2002 to the then Competition Commission in relation to the supply or acquisition of PMI and related goods

[53] Case CE9320/10, Hotel Online Booking (2014), Annex 1 at paragraph 21.
[54] *Skyscanner Limited v Competition and Markets Authority*, [2014] CAT 16.
[55] See press release issued by the CMA on 13 July 2016 at https://www.gov.uk/government/news/monitoring-project-launched-in-online-hotel-booking-sector.
[56] See the CMA Update dated 6 April 2017, *Online travel agents: monitoring of pricing practices results*, available at https://assets.publishing.service.gov.uk/media/58e61bd5e5274a06b00000e8/update-6-april-2017.pdf. Also, see *Private motor insurance market investigation*, Final Report (24 September 2014) at paragraph 60, where the Competition Commission, predecessor to the CMA, found that narrow MFN clauses would not raise the same concerns of softening price competition compared with wide MFN clauses.
[57] See Case CE/9692/12, *Amazon online retailer: investigation into anti-competitive practices*, available at https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-competitive-practices.

or services. The CMA's final report, published in September 2014, concluded that wide MFN clauses are likely to have an anti-competitive effect as: (a) such clauses softened price competition between price comparison websites in relation to PMI because such websites didn't face a possibility that a retail customer would find a same PMI policy at a cheaper price on a competing website; (b) there was little incentive for a price comparison website to compete with a competitor with a wide MFN clause to seek better PMI prices for their retail consumers from the insurers. Any such better price was also passed on to the competitor. Therefore, there was little reward for commission fee reductions and less disincentive against raising fees. Furthermore, according to the CMA the softening of price competition between the price comparison websites regarding their services to PMI providers likely led to less entry, less innovation and higher commission fees, which in turn resulted in higher premiums. In contrast, the CMA concluded that the narrow MFN clauses were a legitimate tool used by price comparison websites to engender customer trust in their service offering, and absence of such clauses could seriously undermine their distribution channel.[58]

2.2.3. Restriction on online sales

Online retailers are today increasingly competing with the traditional 'bricks-and-mortar' shops, and they potentially offer real competing choice to the consumers. For instance, increasingly consumers can search for a product or service online, compare prices and order the product or service without stepping into a physical shop. Therefore, typically now consumers have wider choices, and they are not restricted to shops in their local area or city like they were just a few years ago. This greater competitive choice usually equates to greater competitive pressures on price, quality, efficiency and innovation. Furthermore, as online selling does not require upfront investment in a store and many pre-sale services, they tend to exert downward pressure on and spur efficiency. However, on the other side of the coin, as noted above in section 2.2 this may give rise to the 'free-riding' problem, which in the long term may make physical stores unsustainable and lead to their closure. Ultimately, consumer choice, and quality of the retail experience may suffer, as customers may not be able to walk into a store to look and feel a product and obtain advice from a shop assistant.

Currently, under the EU and the UK competition rules generally provisions in vertical agreements between a seller and distributor/retailer that discriminate against online selling are considered as hardcore restrictions and are therefore prohibited. These restrictions include obligations on resellers to: prevent customers in other territories viewing their website; terminate internet transactions once credit card data show addresses outside the distributor's exclusive territory; to make no online sales; limit the proportions of their sales that they make online; and pay to the upstream supplier a higher price for products being resold online than for products being resold in bricks-and-mortar.[59]

However, it is permissible for a supplier to: limit a reseller/distributor from online advertising that is specifically addressed to customers in other distributors' exclusive territories; oblige a reseller to sell a minimum absolute amount - by value or volume - in bricks-and-mortar stores; oblige a reseller to observe certain quality standards for resale over the internet – for example, that the reseller must have one or more bricks-and-mortar shops or showrooms as a condition for being a member of a selective distribution system.[60]

The CMA generally distinguishes between instances on blanket bans on online sales i.e. provisions that prevent resellers from selling online at all, and ban on online platforms i.e. provisions that prevent resellers from selling through specific third party platforms such as Amazon, or eBay. The former are strictly prohibited and are seen as by 'object' restrictions of competition. On the other hand, the latter are seen as *"a restriction on how a product is sold, but without closing off an outlet – and therefore as not being an 'object' restriction, but rather one to be assessed case by case according to its effects".*[61]

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[58] See Final Report, *Private motor insurance market investigation,* 24 September 2015 at paragraphs 8.32 to 8.8.54, available at https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf.
[59] See footnote 39 above, at paragraph 52.
[60] See footnote 39 above, at paragraphs 52 to 54.
[61] Speech by Michael Grenfell, CMA Executive Director – Enforcement, 'Antitrust in the digital age', Competition Law Forum, 15 November 2016, available at https://www.gov.uk/government/speeches/michael-grenfell-on-antitrust-in-the-digital-age.

In June 2016, the CMA issued a statement of objections to Ping Europe Limited ("Ping") for an alleged breach of competition rules by operating an online sales ban, which prevents retailers selling Ping golf clubs online. The CMA stated *"[t]he internet is an increasingly important distribution channel and retailers' ability to supply via this channel should not be unduly restricted…Bans on internet trading can be a problem if they seek to prevent retailers reaching a significant proportion of customers…[the CMA will] consider any justifications put forward by Ping for the alleged conduct".*[62]

Interestingly, the CJEU is currently considering a request of the Higher Regional Court of Frankfurt for its guidance on the legality of online platform bans imposed by perfume and cosmetic maker Coty, Inc. ("Coty") on one of its authorised distributors.[63] The case arose from Coty's claim against its distributor that it had breached the conditions of their selective distribution system by selling perfume products on Amazon.de. In an earlier case, the German competition authority, Bundeskartellamt, had held such an online platform ban as likely to be an 'object' restriction.[64]

2.2.4. Licensing rights of digital content

As noted above in section 2.2, the European Commission identified contractual restrictions in licensing agreements for digital content, such as movies, music etc as the main competition concern in the online market for digital content.

The European Commission found widespread use of geo-blocking measures by digital content providers.[65] 68% of digital content providers participating in the European Commission's inquiry reported to have restricted their online digital content services from other EU member states, and 59% of them did so pursuant to contractual restrictions in their agreements with the rights holder.[66]

The Technology Transfer Block Exemption Regulation ("TTBER") adopted by the European Commission applies to licensing agreements, referred to as technology transfer agreements, where a licensor permits the licensee(s) to use the licensed technology for the production of goods or services.[67] The TTBER applies to technology transfer agreements involving licences of patents, know-how and/or software copyright.[68] It does not apply to licensing of trademarks, copyright and other intellectual property rights, unless such licensing is not the primary object of the agreement and is directly related to the production of the contract products.

Under Article 4(2) of the TTBER, a restriction in an agreement between two non-competing undertakings whereby the licensee is prohibited from passively selling into a territory or certain customer groups. There are, however, a number of exceptions to this, including the restriction of passive sales into an exclusive territory reserved for the licensor, which is permissible. The accompanying guidelines to the TTBER further states that in exceptional circumstances it may be possible to impose restriction on passive sales by licensees into an exclusive territory or customer group allocated to another licensee *"where substantial investments by the licensee are necessary to*

[62] See the CMA's press release dated 9 June 2016 available at https://www.gov.uk/government/news/cma-alleges-breach-of-competition-law-by-ping.
[63] CJEU, Case C-230/16, *Request for a preliminary ruling from Oberlandesgericht Frankfurt am main (Germany) lodged on 25 April 2016 – Coty Germany GmbH v Parfümerie Akzente GmbH* (not yet published).
[64] See ASICS running shoes: Unlawful restrictions of online sales of ASICS running shoes, Bundeskartellamt (Germany), August 2015.
[65] Geo-blocking refers to commercial practices by which online providers prevent users from accessing and/or purchasing goods or digital content offered on their website based on the user's location or country of residence. Geo-blocking, however, differs from geo-filtering, which involves online providers allowing users to access and purchase goods cross-border, but on different terms and conditions based on the location of the user.
[66] See footnote 47 above, at paragraph 66. The current TTBER came into force on 1 May 2014 and they replaced Commission Regulation 772/20004, the old TTBER.
[67] Commission Regulation 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ 2014, L.93, p.17.
[68] TTBER would only apply to technology transfer agreements where the prescribed market share thresholds are met – the combined market share of competing undertakings must not exceed 20% on the affected relevant technology and product market, or the individual market shares of non-competitors must not exceed 30% on the affected relevant technology and product markets.

start up and develop a new market, restrictions of passive sales by other licensees into such a territory fall outside Article 101(1) for the period necessary for the licensee to recoup those investments".[69]

Absolute territorial protection of intellectual property rights outside the scope of TTBER are also generally considered as a by object restriction of competition law under the EU rules. In *Consten & Grundig*, a case involving trade marks the CJEU held that *"undertakings must refrain from using rights under national trade mark law in order to set an obstacle in the way of parallel imports"*.[70] This case involved an agreement between Consten and Grundig, whereby Grundig agreed to appoint Consten as its exclusive distributor for the metropolitan territory of France, the Saar and Corsica of various electronic goods manufactured by Grundig, and carrying the GINT trademark. Grundig obtained the necessary trademarks from Consten, and registered the same in France. As per the agreement, Consten was granted absolute territorial protection, i.e. ban on both active and passive sales into its territory. According to the ECJ, the Commission was right in its decision to order Consten from using the GINT trademark to prevent parallel imports.

Similarly, in *Nungesser* the European Court of Justice considered the use of intellectual property rights to protect an exclusive jurisdiction system and reconfirmed that absolute protection granted to a licensee to restrict parallel imports leads to artificial division of national markets in the EU, in contravention of the EU rules.[71]

Then, in *Football Association Premier League Ltd/Murphy,*[72] the European Court of Justice was asked by the English High court *inter alia* to consider contractual restrictions imposed by the FA Premier League on broadcast licensees which were designed to preclude any members of the public receiving those licensees' broadcasts outside of the territory for which they held the licence. FA Premier League had earlier brought actions in the English High Court in relation to pubs who had sourced decoding equipment from abroad to enable them to screen live coverage of Premier League football matches at lower cost than had they purchased the equipment from the UK broadcast licensee.[73] The defendants in the UK courts argued that the terms of FA Premier League broadcasting licence infringed Article 101 of the TFEU. The European Court of Justice held that contractual prohibitions on sale of and use of decoder equipment for viewing football matches was a restriction of competition by object. The court

"…where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition".[74]

It further stated

"Such clauses prohibit the broadcasters from effecting any cross-border provision of services that relates to those matches, which enables each broadcaster to be granted absolute territorial exclusivity in the area covered by its licence and, thus, all competition between broadcasters in the field of those services to be eliminated".[75]

In July 2015, the European Commission issued a statement of objections to six major Hollywood film studios – Paramount, Disney, NBCUniversal, Sony, Twentieth Century Fox and Warner Bros – and

[69] Communication from the Commission, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ 2014, C.89, p.3, paragraph 126. The guidelines further state that a period of two years would usually be enough for the licensee to recoup such investment.
[70] ECJ, Cases 56&58/64 *Consten and Grundig v Commission* ECR 1966 299, paragraph 345.
[71] ECJ, Case 258/78 *Nungesser and Eisele v Commission* ECR 1983 2015, paragraph 61.
[72] ECJ, Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and others v QC Leisure and others and Derek Owen and Karen Murphy v Media Protection Services Ltd*, [2012] 1 CMLR 769.
[73] Case C-403/08 involved the suppliers of equipment that was sourced from Greece and the licensees of four pubs who had showed the coverage of Premier League matches from an Arab broadcaster. Case C-429/08 related to an appeal by a pub landlady, Karen Murphy, who had shown Premier League matches using Greek decoding equipment.
[74] See footnote 76 above, paragraph 140.
[75] See footnote 76 above, paragraph 142.

Sky UK alleging that each of the studios and Sky UK had bilaterally agreed geo-blocking restrictions in breach of EU competition rules.[76] The restrictions in the agreements: prevented Sky UK from making film content available through its online and satellite pay-TV services to consumers in other EU countries outside the UK and Ireland, i.e. its licensed territories; and required the film studios to ensure that other broadcasters were prevented from making their pay-TV services available to consumers in the UK and Ireland in competition with Sky UK.

Paramount offered commitments to the European Commission in April 2016, which were later accepted by the Commission in July 2016. Accordingly, Paramount has agreed that its film broadcasting licences with broadcasters in the European Economic Area will not include contractual obligations to: prevent or limit a broadcaster from responding to unsolicited requests from consumers within the EEA but outside of the broadcaster's licensed territory; and require it to prohibit or limit broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory.[77] The European Commission's investigation into contracts between Sky UK and other studios is still ongoing.

Furthermore, on 2 February 2017 the European Commission launched two separate investigation into geo-blocking practices in online sales of video games and hotel accommodation. First inquiry involves the largest PC games distribution platform, Steam, and its agreements with multiple video game publishers. The alleged geo-blocking in this case relates to game activation keys released by Steam in order to unlock games electronically. In this case, the activation keys are themselves geo-blocked, which means that a game purchased through Steam in one EU member state could only grant access to users in that country. The second relates to geo-blocking and price discrimination allegedly designed to hinder cross-border trade. For example, the European Commission is investigating agreements between Meliá Hotels and the largest European tour operators, which allegedly discriminate between customers based on their location.[78]

The European Commission has also proposed a regulation on addressing geo-blocking which is currently under discussion in the European Council and the European Parliament.[79]

3. Other Issues

3.1. Market definition

As noted above in section 1.4, market definition is central to a competition analysis whether under Article 101 TFEU/Chapter I prohibition, or Chapter II prohibition/Article 102 TFEU, or merger control.

The growth of online sales platforms and digital services has also had a significant effect on how a relevant market is defined. *"Are online services in the same markets as traditional services? Should we regard online services as competitive constraints on more traditional services?"*[80] Therefore, the advent of online sales platform means the relevant market today for the sale of many goods or services would be broader than local or regional or national markets in the past.

3.2. Facilitating collusion

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[76] Case AT.40023 – *Cross-border access to pay-TV*, case file available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40023.

[77] See Case AT.40023 – *Cross-border access to pay-TV: Paramount, Commitments* available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_5274_2.pdf.

[78] See press release dated 2 February 2017 issued by the European Commission, available at http://europa.eu/rapid/press-release_IP-17-201_en.htm.

[79] See Proposal for a Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on consumers' nationality, place of residence or place of establishment within the internal marker and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, SWD (2016) 173 final, available at file://wfwlofi1/users/BUDV1/Downloads/ProposalforaRegulationonaddressinggeo-blocking.pdf.

[80] See footnote 66 above.

While the main competition concerns as noted in section 2 above revolve around businesses seeking to frustrate the use of new technologies, for instance by restricting access to online sales channel, or third party online platforms, in some instances concerns may arise where businesses use digital technology to facilitate anti-competitive conduct. In August 2016, the CMA issued an infringement decision against Trod Ltd and GB eye Ltd for colluding on the market for online sales of posters and frames. In this case both companies agreed not to undercut each other's prices for posters and frames sold on Amazon Marketplace in the UK. The agreement in question was put in place using an automated repricing software that adjusted each manufacturer's prices automatically to ensure they didn't undercut each other.

Andrea Coscelli, CMA Acting Chief Executive, noted

"As competition authorities, we need to stay alive to the potential for such software to be used in ways which seek covertly to distort markets, particularly in an age of increasingly 'intelligent', 'self-learning' technologies and algorithms. As the then US Assistant Attorney General Bill Baer recently commented following an investigation by our counterparts at the Department of Justice into the anti-competitive use of algorithmic software: 'We will not tolerate anti-competitive conduct, whether it occurs in a smoke-filled room or over the internet using complex pricing algorithms".[81]

[81] Speech by Andrea Coscelli, CMA Acting Chief Executive, 'Staying ahead in digital marketplace', 9 September 2016, available at https://www.gov.uk/government/speeches/andrea-coscelli-staying-ahead-in-a-digital-marketplace.