

CLIENT ALERT

The UK Competition & Markets Authority Issues Recommendations for UK Insurers

October 17, 2017

AUTHORS

Philipp Girardet | Victoria Keenan

On September 26, 2017, the UK Competition & Markets Authority (**CMA**) published its final report¹ following a year-long market study into the use of online price comparison and booking sites, referred to as Digital Comparison Tools (**DCTs**). The study focused in particular on 'B2C' DCTs in the insurance, energy, broadband, flight, and credit card sectors. This note focuses on the findings of the CMA in relation to the insurance sector in the UK.

Background

The review developed the analysis undertaken by a number of regulators, including that of the UK's Financial Conduct Authority (**FCA**) over the past few years in this space. For example:

- in 2014, the CMA adopted its final report² in its private motor insurance market investigation; among other things, the CMA introduced a ban on agreements between price comparison websites and motor insurers which stop insurers from making their policies available more cheaply on other online platforms (so-called **Wide MFNs**);

¹ See [here](#) for the CMA's summary of its final report in its DCT market study.

² See [here](#) for the CMA's final report in its private motor insurance market investigation.

The UK Competition & Markets Authority Issues Recommendations for UK Insurers

- in 2015, following its general insurance add-ons market study,³ the FCA issued guidance to firms on the sale of add-ons, which included providing information on each firm's most common add-ons (i.e. at least the three most commonly purchased add-ons) in advance of the consumer proceeding to the transaction stage; and
- in 2016, after conducting a market study into credit cards,⁴ the FCA found that some consumers with higher credit risk were dissuaded from shopping around due to worries about how multiple application searches might impact their credit score. Amongst other things, the FCA announced a series of cross sector follow-up work to identify the areas where further enhancements would be helpful to consumers.

In its DCT market study, the CMA found that competition was mostly effective across the sectors it reviewed. The CMA concluded that DCTs generally save time and effort for consumers searching for the right product or service and they make suppliers compete harder to provide lower prices and better choices to consumers. The CMA therefore opted not to open a more in-depth market investigation review of the sector. However, the CMA identified certain concerns and made a number of recommendations to DCTs, the government, to other regulators and consumer bodies, which seek further to improve competition and maximize DCTs' benefits to consumers.

Recommendations made by the CMA to the FCA

The CMA was concerned that the web of regulations governing DCTs could be confusing, the clarity and accuracy of the information provided to consumers could be improved, and the safeguards regarding the use of consumer data could be strengthened.

The CMA therefore identified a new set of four high-level principles for how DCTs can increase transparency and trust in their dealings with consumers by treating them fairly, and by being Clear, Accurate, Responsible and Easy to use (**CARE**). These CARE principles reflect existing EU and UK consumer protection rules under the Directive on Unfair Commercial Practices and are designed to be consistent with the European Commission's 2016 guidance document on 'Key Principles for Comparison Tools.' The CMA noted that, together with the FCA, it will actively monitor compliance of DCTs in the financial services consumer sector with these CARE principles.

The CMA also recommended that the FCA should consider:

- how it would be possible to make it easier for people to get **quotes** from multiple DCTs, to enhance levels of meaningful shopping around (multi-homing) across different DCTs;

³ See [here](#) for the FCA's final report in its general insurance add-ons market study.

⁴ See [here](#) for the FCA's final report in its credit card market study.

The UK Competition & Markets Authority Issues Recommendations for UK Insurers

- building on the FCA's existing work to facilitate accurate like-for-like comparison that incorporates factors other than price, to safeguard against a '**hollowing-out**' of financial products which are aimed at creating low price offers while degrading non-price aspects of the offer; and
- how insurance providers and DCTs capture consumer preferences on **excesses**, how this is used in generating a quote and how it is subsequently presented, and how this may affect consumers' choice of insurance products.

More generally, the CMA noted that it would also keep the following commercial and contractual practices under review with a view to possibly taking enforcement action in due course:

- **brand-bidding restrictions** between DCTs and suppliers in relation to search engine marketing; while the CMA did not identify significant anti-competitive effects at present, it was particularly concerned about so-called 'negative matching' restrictions which prohibit a party from bidding on a search string simply because the brand name of another party was mentioned (among other terms);
- **non-resolicitation clauses** under which a DCT agrees not to contact customers who have purchased a supplier's product from that DCT for a certain period of time; the CMA found that these clauses exist in DCT contracts for around 50-60 percent of home insurance contracts; the CMA is concerned that these clauses can reduce competitive constraints on the incumbent supplier and reduce DCT innovation, while any efficiencies may not outweigh these restrictions. The concern is heightened if the relevant period of the restriction extends beyond the renewal point; and
- **Wide MFNs**: the CMA remains concerned that Wide MFNs unduly restrict competition; in contrast, the CMA accepts that narrow MFNs (which prohibit a supplier from undercutting a DCT on its direct site) may be justified. In this context, the CMA opened a formal competition law investigation into Wide MFNs in contracts between an (so far) unnamed DCT and its suppliers in the home insurance sector.

The CMA urges DCTs and suppliers to self-assess the competition law compliance of their contractual practices in relation to the above areas in light of the CMA's findings.

How will these recommendations impact UK insurers and their DCT partners?

The CMA has been generally positive about the consumer benefits which DCTs deliver in the insurance and credit card sectors. That said, it calls on the FCA to consider how 'multi-homing' across different DCT sites can be made more effective by allowing consumers to generate more easily competing equivalent quotes. It is much easier to compare hotel prices than it is to compare home insurance cover. The FCA is asked to consider ways of addressing this asymmetry.

The UK Competition & Markets Authority Issues Recommendations for UK Insurers

The CMA is also urging the FCA to keep under review how effective competition can be safeguarded between suppliers in relation to non-price factors (to avoid a 'hollowing-out' effect). The CMA considers that policy excesses are an area where suppliers and DCTs may be able to offer a more meaningful comparison service driving more competition.

Although the precise practical implications of the CMA's recommendations remain to be seen, they may provide insurers with a little more flexibility when negotiating terms with DCTs.

It is clear that DCTs will remain under close regulatory scrutiny, both from a consumer protection as well as a competition law perspective, for some time to come.

Pending the announcement of any definitive action by the FCA, insurance suppliers may wish to consider taking the following steps:

- Review their DCT contracts for the presence of:
 - Wide MFNs and raise any concerns they may have in this regard with the relevant DCTs;
 - brand bidding restrictions and how they work with their digital marketing agencies in relation to competitor brand bidding activities;
 - any non-resolicitation clauses; and
- Work with the FCA and DCT partners to consider ways to enhance price quality metrics as a basis for comparisons, in order to mitigate against the risk of 'hollowing-out.'

Clearly, insurers will want to take great care that any (direct or indirect) industry-wide discussions of the issues outlined above comply with applicable competition law at all times.

The UK Competition & Markets Authority Issues Recommendations for UK Insurers

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

Philipp Girardet

+44 203 580 4717

pgirardet@willkie.com

Victoria Keenan

+44 203 580 4840

vkeenan@willkie.com

Copyright © 2017 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.