

***Auction services* – Competition and
Markets Authority investigation under the
Competition Act 1998**

**Notice of intention to accept binding commitments
offered by ATG Media in relation to live online
platform services**

Case number 50408

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1. Introduction

- 1.1 In November 2016, the CMA opened an investigation under the Competition Act 1998 (the 'Act') into conduct, including through the use of restrictions of an exclusionary nature, by Turner Topco Limited,¹ ATG Media Holdings Limited², ATG Media Limited³ and/or Metropress Limited⁴ (together, 'ATG Media') which may amount to either or both of:
- (a) an agreement or concerted practice that might have as its object or effect an appreciable prevention, restriction or distortion of competition prohibited by section 2(1) of the Act (the 'Chapter I prohibition') and Article 101 of the Treaty on the Functioning of the European Union ('TFEU') or both;
 - (b) an abuse of a dominant position prohibited by section 18(1) of the Act (the 'Chapter II prohibition') or Article 102 TFEU or both.
- 1.2 In May 2017, ATG Media offered commitments for the purpose of addressing the CMA's competition concerns in this investigation.
- 1.3 Under section 31A of the Act, read with Schedule 6A, the CMA hereby gives notice⁵ that it proposes to accept these commitments (the 'Notice') and invites representations from interested third parties on this proposed course of action. Formal acceptance of the commitments by the CMA would result in the termination of its investigation, with no decision made on whether or not the Act or the TFEU has been infringed by the business under investigation. The text of the proposed commitments is set out in the Annex to this Notice.
- 1.4 Acceptance of the proposed commitments would not prevent the CMA from taking any action in relation to competition concerns which are not addressed by the proposed commitments. Moreover, acceptance of the proposed commitments would not prevent the CMA from continuing the investigation, making an infringement decision or giving a direction in circumstances where the CMA has reasonable grounds for:
- (a) believing that there has been a material change of circumstances since the commitments were accepted;

¹ Company number: 08968154, registered in the UK.

² Company number: 06521301, registered in the UK.

³ Company number: 06636047, registered in the UK.

⁴ Company number: 01010311, registered in the UK.

⁵ Pursuant to paragraph 2 of Schedule 6A to the Competition Act 1998.

- (b) suspecting that a person has failed to adhere to one or more of the terms of the commitments; or
 - (c) suspecting that information which led the CMA to accept the commitments was incomplete, false or misleading in a material particular.⁶
- 1.5 The CMA invites those who are likely to be affected by the commitments offered to make representations on the proposed commitments and the CMA will take into account such representations before making its final decision on whether to accept the commitments. In order to assist parties in responding to this consultation, this Notice provides information on the CMA's investigation, the key characteristics of the market and the CMA's competition concerns. The Notice then summarises the commitments offered by ATG Media and sets out why the CMA provisionally considers that the proposed commitments address its competition concerns.
- 1.6 Details of how to make representations are provided at the end of this document. The closing date for making representations is Monday 19 June 2017.

⁶ Pursuant to section 31B of the Competition Act 1998.

2. The CMA's investigation

The investigation

- 2.1 In August and September 2016, the CMA received two complaints⁷ alleging that ATG Media had engaged in anti-competitive conduct in relation to the provision of live online bidding ('LOB') auction platform services. Both complaints alleged that ATG Media had imposed on certain of its auction house customers restrictions that prevented them from using a competing LOB auction platform that offered bidders a lower price. This included requiring auction houses to offer 'no less favourable terms' to bidders introduced by ATG Media's LOB auction platform than the terms that the auction house offered to bidders using a competing third party LOB auction platform or the auction house's own LOB auction platform.
- 2.2 On 22 November 2016, the CMA commenced a formal investigation under the Act, having determined that it had reasonable grounds for suspecting ATG Media has infringed the Chapter I prohibition and Article 101 TFEU and the Chapter II prohibition and Article 102 TFEU.
- 2.3 In particular, the CMA was concerned that the following restrictions agreed or required by ATG Media in its dealings with certain of its auction house customers may (i) have an exclusionary effect and be capable of foreclosing competition and/or (ii) soften price competition between competing LOB auction platforms:
- (a) exclusivity conditions;
 - (b) clauses that require the auction house concerned to offer 'no less favourable terms' to bidders using ATG Media's LOB auction platform than those available to bidders using a competing LOB auction platform or the auction house's own LOB auction platform (referred to as 'NLFT clauses'); and
 - (c) restrictions on the advertising and promotion, by the auction house concerned, of LOB auction platform service providers that compete with ATG Media.
- 2.4 In the course of the investigation, the CMA has been considering these matters and has undertaken a number of investigative steps to gather evidence from ATG Media and a number of third parties, including auction house customers and other providers of LOB auction platform services. These

⁷ One complainant was granted formal complainant status.

steps have included an inspection at ATG Media's premises under section 27 of the Act, sending formal notices requiring documents and information under section 26 of the Act, and obtaining information voluntarily.

- 2.5 In November 2016, the CMA received an application requesting the CMA to give interim measures directions to ATG Media under section 35 of the Act, for the purpose of preventing significant damage to the applicant while the CMA completed its investigation.⁸

The commitments offer

- 2.6 Following discussions with the CMA, in April 2017 ATG Media indicated, without prejudice to its position that it has not infringed the Act nor the TFEU, an intention to offer commitments to address the CMA's competition concerns under section 31A of the Act. Accordingly, and in line with paragraph 10.19 of the CMA's guidance on its investigation procedures under the Act⁹ (the 'Procedural Guidance') and paragraph 4.18 of the guideline on competition law application and enforcement¹⁰ (the 'Enforcement Guideline'), the CMA proceeded to discuss with ATG Media the scope of any commitments which the CMA considered would be necessary to address the concerns it had identified.
- 2.7 By way of background, section 31A of the Act provides that, for the purposes of addressing the competition concerns it has identified, the CMA may accept, from such person or persons concerned as it considers appropriate, commitments to take such action (or refrain from such action) as it considers appropriate. The Procedural Guidance and the Enforcement Guideline describe the circumstances in which it may be appropriate to accept binding commitments and the process by which parties to an investigation may offer commitments to the CMA.
- 2.8 In accordance with paragraph 10.18 of the Procedural Guidance and paragraph 4.16 of the Enforcement Guideline, a business under investigation may offer commitments at any time during the course of the investigation until

⁸ Under section 35 of the Act, the CMA can require a business to comply with temporary directions (interim measures) where: (i) the investigation has been started but not yet concluded; and (ii) the CMA considers it necessary to act urgently either to prevent significant damage to a person or category of persons, or to protect the public interest. In giving interim measures directions, the CMA can act on its own initiative or in response to a request to do so.

⁹ Competition and Markets Authority, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, CMA8, March 2014.

¹⁰ Office of Fair Trading, *Competition law application and enforcement - incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments*, OFT 407, December 2004, as adopted by the CMA Board.

a decision on infringement is made. In this case, no decision on infringement has yet been made.

- 2.9 ATG Media submitted, without prejudice to its position that it has not infringed the Act nor the TFEU, a draft commitments proposal to the CMA on 8 May 2017. Following discussion with the CMA, ATG Media revised its proposal and formally offered commitments to the CMA as set out in the Annex. The offering of the commitments does not constitute an admission by ATG Media of an infringement of the Chapter I prohibition or of the Chapter II prohibition or of Article 101 TFEU or of Article 102 TFEU.
- 2.10 Having considered ATG Media's proposed commitments, the CMA is currently of the view that the commitments offered, for the reasons set out in this Notice, address its competition concerns and, as a result, it is appropriate for the CMA to exercise its discretion to close its investigation by way of a formal decision accepting the commitments. Formal acceptance of commitments would result in the CMA terminating its investigation and not proceeding to a decision on whether or not the Chapter I prohibition or Chapter II prohibition and Article 101 TFEU or Article 102 TFEU have been infringed.

The undertaking under investigation

- 2.11 Turner Topco Limited, ATG Media Holdings Limited, ATG Media Limited and Metropress Limited (together defined as ATG Media in this Notice) are private limited companies incorporated in England and Wales. ATG Media's reported group revenue for the year ended 30 September 2015 was £18.9 million.
- 2.12 ATG Media operates online auction platforms in the UK, in the rest of Europe and in the United States and Canada, which includes providing LOB online auction platform services to auction houses. These services allow bidders to bid in real time in a 'live' auction taking place at a physical site operated by an auction house.
- 2.13 ATG Media has operated LOB online auction platforms since 2006. It currently operates three LOB online auction platforms in the UK. These are:
- (a) the-saleroom.com ('The Saleroom'), which focuses on auctions of antiques, art and other collectables;
 - (b) BidSpotter.co.uk ('BidSpotter'), which focuses on industrial and insolvency auctions; and
 - (c) i-bidder.com ('i-bidder'), which focuses on auctions of construction and agricultural equipment, catering equipment and consumer goods.

- 2.14 In addition, in 2014 ATG Media acquired Auction Evo, a company that supplied cloud-based auction management software to auction houses, and subsequently launched a new auction management software product, GAP Office.
- 2.15 ATG Media also operates an auction catalogue printing business (both online and hard copy) and publishes the Antiques Trade Gazette, which is a weekly publication (available online and in hard copy) that is targeted at people interested in fine art and antiques, founded in 1971.¹¹

¹¹ See: www.antiquestradegazette.com

3. Background

- 3.1 This chapter sets out the CMA's preliminary view of the key characteristics of the market in which suppliers of LOB auction platform services operate and a description of ATG Media's conduct and arrangements with auction houses. The purpose of this chapter is therefore to provide context for chapter 4 which describes the CMA's assessment of the relevant market to date and the CMA's competition concerns.

The characteristics of LOB auction platform services

LOB auction platform services

- 3.2 Suppliers of LOB auction platform services, including ATG Media, allow bidders to bid in real time in a 'live' auction taking place at a physical site operated by an auction house.¹²
- 3.3 The platforms are online aggregators that host live auctions run by multiple auction houses. Previously, live bidding in a physical auction was only available by attending in person or by telephone.¹³
- 3.4 In advance of an auction, prospective bidders can browse catalogues of auctions that are listed on an LOB auction platform and search for items by auction house or by type of item. If a bidder identifies an auction in which it would like to participate, it can bid online in real time, with some LOB auction platform suppliers offering video or audio feeds that broadcast images and sounds from the physical auction room. The staff in the physical auction room will announce bids received from the room, from telephone bidders and from bidders using LOB auction platforms to allow each bidder to adjust its bid based on other bids received. From the perspective of an auction house, the ability for bidders to bid in its auctions using an LOB online auction platform allows the auction to reach a larger bidder customer base than if the bidders were only attending in person or by telephone.
- 3.5 In general, LOB auction platforms generate revenues in two ways: (i) by charging auction houses a regular subscription fee or listing fee for listing their live auctions on the platform, and (ii) by charging either the bidder or the auction house a commission on each item sold through the platform during

¹² Online bidding in a 'live' auction can be contrasted to online bidding in a 'timed' auction, which take place without an auctioneer calling the sale and bidders place bids at any time during a defined period by entering the maximum amount they are prepared to pay for a particular lot.

¹³ It is also possible to bid in advance by leaving a bid with the auctioneer or LOB auction platform before the start of the auction. This is called commission bidding.

the live auction (in practice, where the commission is charged to the auction house it is typically passed on by the auction house to the bidder).

- 3.6 By way of example, in the case of a bidder using ATG Media's LOB auction platform, The Saleroom, if the bidder is successful the auction house invoices the bidder for all monies owed by the bidder, including the hammer price of the auctioned item, the auction house's commission and the commission charged by the LOB auction platform supplier. The auction house then passes on the online bidding commission to ATG Media.

Two-sided nature of the market

- 3.7 Providers of LOB auction platforms operate by allowing the development of a two-sided market – bringing together bidders and auction houses. Such providers compete for customers on both 'sides' of the market, ie they compete for registrations by individual bidders as well as for auction houses to list live auctions for those bidders to bid in. In that context, there are 'network effects' that arise from the fact that the greater the number of registered bidders on a particular platform, the more attractive it is for an auction house to list its live auctions with that platform and, similarly, the greater the number (and quality) of auction houses listing live auctions on the platform, the more attractive it is for bidders to register with the platform.

Other LOB auction platforms

- 3.8 Other LOB auction platforms active in the UK include:
- (a) BidonThis,¹⁴ which launched in 2015 and has a customer base of UK-based auction houses;
 - (b) Easy Live Auctions,¹⁵ which launched in 2012, provides services to auction houses predominantly in the UK, but also has auction house customers based in Ireland and in Australia;
 - (c) Invaluable,¹⁶ which is a US-based auction platform that began providing UK auction houses with LOB auction platform services in 2007;
 - (d) Live Auctioneers,¹⁷ which is a US-based auction platform that launched in 2002 and also provides services to UK-based auction houses;

¹⁴ Operates www.bidonthis.co.uk

¹⁵ Operates www.easyliveauction.com

¹⁶ Platform can be accessed via www.invaluable.com and www.invaluable.co.uk

¹⁷ Operates www.liveauctioneers.com

- (e) Proxibid,¹⁸ which is a US-based platform that launched in 2001 and started offering services to UK auction houses in 2014;
- (f) The Auction Room,¹⁹ which launched in May 2016 and currently provides LOB auction platform services to UK auction houses; and
- (g) UK Auctioneers,²⁰ which launched in 1999 and provides LOB auction platform services to auction houses mainly in the UK, but also has a small number of auction house customers based in Ireland.

3.9 The CMA asked ATG Media's competitors to comment on their positioning and the extent to which they compete with ATG Media and other providers. In general, respondents described ATG Media as the market leader, and while they identified four or five other platforms active in the UK, they also stated that these had different positioning and were often used by auction houses alongside ATG Media's platforms rather than as a substitute for ATG Media platforms.

Auction house operated LOB auction platforms

3.10 A small number of larger auction houses, such as Christie's and Sotheby's, as well as a few smaller auction houses, have developed their own live online bidding capability – that is, they self-supply LOB auction platform services – generally using a third party software supplier to supply the technology (known as a 'white label' solution in the industry). However, a large number of auction houses in the UK use a third party LOB auction platform to enable online bidding, even where they also operate their own online bidding capability.

ATG Media's relevant conduct and arrangements with auction houses

Exclusivity

3.11 The evidence obtained by the CMA shows that ATG Media encouraged a significant number of its customers using The Saleroom, BidSpotter and i-bidder to accept ATG Media as its exclusive supplier of LOB auction platform services for the duration of their agreement with ATG Media²¹ in exchange for discounts or other incentives such as free access to mirrored bidding.²² The

¹⁸ Operates www.proxibid.com

¹⁹ Operates www.theauctionroom.com

²⁰ Operates www.ukauctioneers.com

²¹ Which ATG submits is generally around 12 months in relation to The Saleroom. In ATG's agreements, auction houses are able to terminate the agreement with ATG with one month's notice.

²² Mirrored bidding is a product offered by ATG Media that hosts the auction house's catalogues and live and timed bidding on the auctioneer's website.

evidence indicates that agreeing exclusive terms with customers was one of ATG Media's commercial objectives and was used in response to competitive threats.

'No less favourable terms' clause

- 3.12 From at least July 2016, ATG Media sought to agree the NLFT clause with 19 auction houses that are customers of The Saleroom. The evidence obtained by the CMA indicates that at least some auction houses (11) agreed to the NLFT clause.
- 3.13 The NLFT clause requires auction houses to offer 'no less favourable terms' to bidders on The Saleroom than those available to bidders using a competing third party LOB auction platform or the auction house's own LOB auction platform. In particular, if an auction house wishes to offer a competing platform alongside The Saleroom that charges a lower bidder commission, that auction house must also charge bidders using The Saleroom the same lower commission. The CMA therefore considers that the NLFT clause operates as a form of most favoured nation clause or across platform parity agreement.
- 3.14 The NLFT clause, as communicated to ATG Media's customers, reads as follows:

'Bidder Users registered with the-saleroom.com will receive no less favourable terms than bidders on your own live or other online platforms used by you as follows:

the aggregate fees that you will charge to a successful bidder at an Auction whose bid is accepted via the-saleroom.com (including the buyer's premium, any internet surcharge, and any other fees excluding payment card fees) will be no greater than the lower of the following:

- a) the aggregate of the equivalent fees that you will charge to a bidder at the Auction whose bid is accepted via your own live online auction site or a site operated for you by a third party (including sites operated by yourself, operated for you by a third party or licensed to you but presented and branded as your own site, or operated by a third party for you but in which you have a direct or indirect participation whether through shares, contract, a joint venture or partnership with others or otherwise);

b) the aggregate of the equivalent fees that you will charge to a bidder at the Auction whose bid is accepted via a third-party live online auction site. ...'

- 3.15 Correspondence between ATG Media and auction houses indicates that ATG Media expected to receive the full commission that it would usually charge to the auction house, even if bidders using ATG Media's LOB auction platform were charged a lower commission. In order to comply with the NLFT clause, if an auction house lists on another platform which charges lower commissions rates than ATG, an auction house must therefore bear an extra cost equal to the difference between the two commission rates multiplied by the number of lots sold.
- 3.16 The NLFT clause was communicated to auction houses by email and was described as a notification of change in the auction house's terms and conditions. The correspondence obtained by the CMA stated that the NLFT clause would be deemed to be accepted by the relevant auction house's ongoing use of The Saleroom.
- 3.17 In introducing the NLFT clause into its agreements with auction houses, ATG Media appears from the evidence obtained by the CMA to have generally approached auction houses that used or expressed an interest in using competing platforms charging a lower commission.

Advertising and promotion restrictions

- 3.18 In addition to agreeing the NLFT clause and exclusivity conditions with customers, ATG Media has restricted auction houses from advertising or promoting offers of competing online auction platforms. For example, evidence the CMA has obtained indicates that ATG Media asked certain of its auction house customers to remove the lower commission rate offered by a competing LOB auction platform from their websites.

4. The CMA's competition concerns

- 4.1 In this chapter, the CMA sets out its preliminary views on market definition and ATG Media's market position in the relevant market and the CMA's competition concerns arising from ATG Media's conduct.
- 4.2 The CMA's preliminary view, for the reasons outlined below, is that ATG Media is likely to have a dominant position in the market for the supply of LOB auction platform services to auction houses in the UK. The CMA is concerned that ATG Media's conduct, including through the use of restrictions of an exclusionary nature, may amount to either or both of:
- (a) an agreement or concerted practice that might have as their object or effect an appreciable prevention, restriction or distortion of competition prohibited by the Chapter I prohibition or Article 101 TFEU or both;
 - (b) an abuse of a dominant position prohibited by the Chapter II prohibition or Article 102 TFEU or both.
- 4.3 To assess whether ATG Media's conduct gives rise to competition concerns, the CMA has considered whether the following restrictions agreed or required by ATG Media in its dealings with certain of its auction house customers may (i) have an exclusionary effect and be capable of foreclosing competition or (ii) soften price competition between competing LOB auction platforms:
- (a) exclusivity conditions;
 - (b) NLFT clauses; and
 - (c) restrictions on the advertising and promotion by the auction house concerned of LOB auction platform service providers that compete with ATG Media.
- 4.4 This document explains the CMA's preliminary view of ATG Media's market position in the relevant market and the CMA's competition concerns arising from ATG Media's conduct. It should be noted that ATG Media's position is that the evidence available to the CMA does not support the competition concerns described below.

The relevant market

- 4.5 In the CMA's preliminary view, the supply of LOB auction platform services to auction houses in the UK is likely to constitute a separate relevant market.²³
- 4.6 Suppliers of LOB auction platform services operate by allowing the development of a two-sided market, as explained in chapter 3 above. The CMA has, therefore, considered the substitutability of alternative products and services available to customers on both sides of the market – ie to individual bidders and to auction houses.
- 4.7 In that context, the CMA has considered the substitutability of a range of alternative sales channels available to bidders (including alternatives for bidding in live auctions held by auction houses, such as telephone bidding, commission bidding, and bidding in person, as well as sales through online auction platforms and other online sales channels) and to auction houses in the UK, including options for self-supply and white-label solutions (where the LOB technology is provided to an auction house by a third party software supplier).
- 4.8 Based on that assessment, the CMA's preliminary view is that:
- (a) the alternative sales channels available to bidders are not readily substitutable for LOB auction platform services, as there are significant differences between each of these alternative channels and bidding live online in an auction taking place in real time at an auction house; and
 - (b) the alternative sales channels available to auction houses, namely self-supply or a white-label solution, are not readily substitutable with LOB auction platform services, given (i) the higher costs and risks involved in developing such alternative solutions; and (ii) the fact that these alternative solutions do not perform any marketing or aggregation functions (that is, they do not bring any new bidders to the auction houses).
- 4.9 As regards the geographic scope of the market, the CMA notes that nearly all the platforms offering services to UK auction houses are based in the UK (including through subsidiaries), and the evidence obtained by the CMA suggests that competitors based abroad are not an adequate alternative to a UK platform for UK-based auction houses, given their predominantly overseas bidder customer base. Accordingly, the CMA's preliminary view is that the

²³ The CMA's approach to market definition is set out in *Market definition* (OFT403, December 2004), adopted by the CMA Board.

geographic market for the supply of LOB auction platform services to auction houses is the UK.

ATG Media's market position

- 4.10 When considering whether an undertaking holds a dominant position, the CMA examines whether that undertaking has substantial market power.²⁴ The assessment of market power is a matter of degree which will depend on the circumstances of each case. In assessing the existence and degree of market power, the CMA will consider the strength of any competitive constraints that may prevent an undertaking from profitably sustaining prices above competitive levels.²⁵ Competitive constraints may include existing competitors, potential competition, and buyer power.²⁶
- 4.11 The CMA has reached the preliminary view that ATG Media is likely to have a dominant position in the relevant market. This preliminary view is based on a number of factors including ATG Media's high market share in the relevant market, the relative market positions of competing LOB auction platform services suppliers (which have significantly lower market shares than ATG Media), the views of market participants (including competing suppliers and auction house customers, which have included some auction house customers informing the CMA that they cannot afford to risk their relationship with ATG Media), ATG Media's own conduct and the views set out in certain of its internal documents. Furthermore, the CMA has reached the preliminary view that there are barriers to entry and expansion in the relevant market, such that ATG Media is currently faced with only a limited degree of potential competition, in particular because new entrants would have to invest in developing their platform and establishing a network of sufficient scale on both sides of the market.
- 4.12 Therefore, in the CMA's preliminary view, ATG Media is likely to have a dominant position in the market for the supply of LOB auction platform services to auction houses in the UK.

Competition concerns identified by the CMA

- 4.13 Given the apparent strength of ATG Media's position in the relevant market, the CMA is concerned that ATG Media's practices and contractual provisions may restrict competition by: (i) foreclosing the market to competitors and new entrants and thereby restricting the degree of competition (actual or potential)

²⁴ See: *Abuse of a dominant position* (OFT402, December 2004), adopted by the CMA, paragraph 4.11.

²⁵ *Assessment of market power* (OFT415, December 2004), adopted by the CMA, paragraph 3.2.

²⁶ *Assessment of market power* (OFT415, December 2004), adopted by the CMA, paragraph 3.3.

on the market (including by limiting their ability and incentive to grow); and (ii) softening price competition between competing platforms, reducing choice for consumers and deterring rival LOB auction platforms from competing with ATG Media on price.

4.14 In particular, with regard to ATG Media's practices and contractual restrictions, the CMA is of the preliminary view that:

- (a) The **exclusivity conditions** may be capable of foreclosing ATG Media's competitors by hindering them from selling to auction houses that are contractually obliged to use no other LOB auction platform supplier than ATG Media. Exclusivity conditions prevent even the limited use of more than one LOB auction platform while an auction house is under contract and restrict the number of auction house customers available to new entrants at any given time. The foreclosure effects are likely to be stronger if alternative LOB auction platforms are not able to replace ATG Media entirely for any individual customer's demand and, in the context of a two-sided market where network size and growth will affect the attractiveness of a new LOB auction platform, this may represent a barrier to entry even where the exclusivity is of relatively short duration.
- (b) The **NLFT clauses** may be capable of foreclosing ATG Media's competitors given that such restrictions are likely to discourage the use by auction houses of competing LOB auction platforms. The CMA's preliminary view is that the NLFT clause replicates the incentives and effects of an exclusivity condition by *de facto* imposing a financial penalty on those auction houses seeking to list auctions on a cheaper LOB auction platform, alongside ATG Media, in the following way:
 - (i) If an auction house uses a competing LOB auction platform alongside ATG Media's LOB auction platform, and is offered a lower commission rate to its bidders by that competing LOB auction platform, the effect of the NLFT clause is that the auction house must charge bidders using ATG Media's LOB auction platform the same lower commission rate as it charged those using the competing LOB auction platform, while still paying ATG Media the higher commission.
 - (ii) This extra cost, namely the difference between the two commission rates multiplied by the value of the lots bought by the bidders who continue bidding through ATG Media, therefore operates in a manner similar to a penalty for breach of exclusivity.

The CMA is of the preliminary view in this case that the risk of foreclosure is increased because a significant number of ATG Media's bidders are

likely to remain loyal to ATG Media, even if a cheaper platform is available, given the presence of strong network effects. Moreover, faced with an NLFT clause, rivals to ATG Media may instead decide to charge the same (higher) commission rates as those charged by ATG Media so as to enable the auction house to list without incurring any penalty; therefore incentives to charge lower fees could be reduced as a consequence of the operation of the NLFT clauses and this may soften competition between alternative platforms.

- (c) The **restrictions on auction houses advertising and promoting** rival LOB auction platforms may contribute to reinforcing the barriers to entry and expansion in the relevant market and further entrenching ATG Media's market position, in particular when implemented in combination with exclusivity conditions or NLFT clauses and, therefore, may exacerbate any foreclosure effects.

4.15 Finally, the CMA's preliminary view, based on the evidence obtained and, particularly, ATG Media's internal documents, is that ATG Media used its market position to agree the restrictions described above with a targeted group of its auction house customers as part of a strategy to prevent certain rival LOB auction platforms from developing into effective competitors.

5. The commitments

- 5.1 In order to address the CMA's competition concerns (as described in chapter 4), and without prejudice to its position that it has not infringed the Act nor the TFEU, ATG Media has offered formal commitments to the CMA. The proposed commitments are set out in the Annex to this Notice and are summarised below.
- 5.2 Following engagement with ATG Media and the formal complainant in this case, the CMA has reached the provisional view that its competition concerns are addressed by the commitments offered. Formal acceptance of commitments would result in the CMA terminating its investigation and not proceeding to a decision on whether the Act or the TFEU has been infringed. Accordingly, a decision by the CMA accepting binding commitments will not include any statement as to whether or not the conduct of ATG Media that is under investigation has infringed the Act or the TFEU either prior to the acceptance of the commitments or once the commitments are in place.
- 5.3 Formal acceptance of commitments would also make superfluous the giving of any interim measures directions under section 35 of the Act (see paragraph 2.5 above) and the need for the CMA to make a decision on whether to give interim measures directions.

ATG Media's proposed commitments

- 5.4 ATG Media has undertaken to act in compliance with the proposed commitments by not engaging in any conduct or entering into any agreement or arrangement that:
- (a) restricts auction houses from using or contracting with any competing supplier of LOB auction platform services;
 - (b) restricts auction houses from charging bidders using a competing supplier of LOB auction platform services fees, commissions or other forms of remuneration that are lower than those charged to bidders using an ATG Media LOB auction platform; or
 - (c) restricts auction houses from advertising or promoting the services of a competing LOB auction platform, including on/in an auction house's own website/publications or on/in any third party websites/publications (but not in/on any website/publication owned or operated by ATG Media).
- 5.5 As a consequence, ATG Media will be required, for the duration of the commitments, to refrain from agreeing exclusivity arrangements, NLFT clauses or advertising restrictions with its auction houses customer.

- 5.6 ATG Media will give effect to the commitments by informing those of its auction house customers that have been affected by the conduct outlined in paragraph 5.4 above that (i) ATG Media will not seek to enter or enforce any such agreement or arrangement and (ii) ATG Media amends any existing agreement or arrangement to ensure it complies with the commitments, or from engaging in conduct of a similar type.
- 5.7 In order for the CMA to effectively monitor ATG Media's compliance with the commitments, ATG Media will:
- (a) confirm in writing to the CMA that it has given effect to the commitments and provide a list of the auction houses that it has informed;
 - (b) provide information and documents as requested by the CMA for the purpose of monitoring the commitments;
 - (c) submit an annual compliance statement at the end of each year in which the commitments remain in force;
 - (d) inform the CMA as soon as possible of any breach of the commitments and take all actions that are reasonably required to remedy any such breach; and
 - (e) maintain and produce any records that the CMA may specify in writing that relate to the operation of the commitments.
- 5.8 ATG Media has offered the commitments for a period of five years.

The CMA's assessment of the proposed commitments

The CMA's Guidance

- 5.9 The Procedural Guidance and the Enforcement Guideline state that the CMA is likely to consider it appropriate to accept binding commitments only in cases where (a) the competition concerns are readily identifiable, (b) the competition concerns are addressed by the commitments offered, and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.²⁷
- 5.10 The CMA will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern or where the

²⁷ Paragraph 4.3 of the Enforcement Guideline and paragraph 10.16 of the Procedural Guidance.

CMA considers that not to complete its investigation and make a decision would undermine deterrence.²⁸

The CMA's assessment

- 5.11 The CMA has carefully considered ATG Media's proposed commitments, as set out in the Annex to this Notice, and whether these address its competition concerns.
- 5.12 On the basis of that assessment, the CMA considers that this is an appropriate case for commitments and that the proposed commitments address its competition concerns for the following reasons:
- **The competition concerns are readily identifiable:** As explained in chapter 4 above, the CMA is concerned that ATG Media's exclusivity conditions, NLFT clauses and other restrictions on auction houses advertising and promoting rival LOB auction platforms may be capable of restricting, and likely to restrict, competition in the relevant market by (i) foreclosing the market to competitors and new entrants and thereby restricting the degree of competition (actual or potential) on the market (including by limiting its competitors' ability to grow); and (ii) softening price competition between competing platforms, reducing choice for consumers and deterring rival LOB auction platforms from competing with ATG Media on price.
 - **The CMA has reached the provisional view that the commitments offered by the Parties address the competition concerns:** The commitments will effectively remove any exclusivity conditions, NLFT clauses and any restrictions on auction houses to advertise or promote rival LOB auction platforms on/in the auction house's own website/publications or on/in any third party websites/publications, in ATG Media's agreements or arrangements with auction houses. The commitments will also prevent ATG Media from entering into any other such agreements or arrangements, or engaging in equivalent conduct, for the duration of the commitments. The CMA's view is that, accordingly, these commitments fully address the CMA's competition concerns.
 - **The commitments offered are capable of being implemented effectively and, if necessary, within a short period of time:** ATG Media has undertaken to act in accordance with the commitments it has offered from the date the CMA notifies ATG Media of its decision to accept the commitments. ATG Media will comply with the commitments within

²⁸ Paragraph 4.5 of the Enforcement Guideline.

10 working days of being notified by the CMA of its decision to accept the commitments by informing in writing those auction house customers with which ATG Media has entered into (or sought to enter into) agreements or arrangements falling within the scope of the conduct proscribed by the commitments.

- 5.13 The CMA considers that the commitments' duration of five years will allow an opportunity for rival platforms to establish themselves and expand market share in the UK and to make any investments that may be required to ensure that they can continue to compete on the market after the expiry of the commitments. As a result the CMA considers that a duration of five years is appropriate for the commitments to address the competition concerns identified by the CMA. Furthermore, ATG Media will remain subject to competition law for the duration and after the expiry of the commitments.
- 5.14 The CMA does not consider that accepting commitments in this case would undermine deterrence. The change to ATG Media's business model practices in having to abandon its exclusivity and NLFT clauses as well as the restrictions on promotion and advertising in order to address the CMA's competition concerns will, in the CMA's view, send a strong signal to other businesses deterring them from engaging in such practices particularly where they are targeted at weakening new entrant challengers.
- 5.15 The CMA also considers that by accepting commitments in this case it is able to resolve its competition concerns quickly, which can be particularly important in online markets to facilitate entry and expansion by challengers with innovative business models and new technologies.²⁹
- 5.16 The proposed commitments do not preclude the CMA taking further enforcement action in relation to other suspected breaches of competition law or related markets which raise competition concerns and harm consumers.
- 5.17 In the light of the above, the CMA considers that this is an appropriate investigation in which to accept binding commitments from ATG Media and provisionally considers that the proposed commitments fully address its competition concerns.

²⁹ As set out in the CMA's [Annual Plan 2017/18](#), online and digital markets are a strategic priority for the CMA.

6. The CMA's intentions and invitation to comment

- 6.1 For the reasons set out in this Notice, the CMA provisionally considers that the commitments offered by ATG Media as set out in the Annex to this document are sufficient to address its competition concerns. Therefore, the CMA intends to accept the commitments by a means of a formal commitments decision.
- 6.2 As required by paragraph 2(2)(d) of Schedule 6A to the Act, the CMA now invites those who are likely to be affected by the commitments offered to make representations on the proposed commitments. The CMA will take such representations into account before making its final decision whether to accept the commitments. The CMA is particularly interested to hear from auction houses and suppliers of LOB auction platform services.
- 6.3 The CMA shall inform the European Commission no later than 30 days before the adoption of a decision accepting the commitments.³⁰

Invitation to comment

- 6.4 Any person wishing to comment on the commitments should submit written representations to the postal or email addresses given below by Monday 19 June 2017. Please quote the case reference 50408 in all correspondence related to this matter.

Cleo Alliston/Nathalie Lobel-Lastmann
Competition and Markets Authority
Victoria House
Southampton Row
WC1B 4AD

Emails:

cleo.alliston@cma.gsi.gov.uk

nathalie.lobel-Lastmann@cma.gsi.gov.uk

Confidentiality

- 6.5 The CMA does not intend to publish the responses to the consultation with any commitments decision or notice to provisionally accept any modified

³⁰ In accordance with the requirement under Article 11(4) of Council Regulation (EC) 1/2003 of 16 December 2002.

commitments. However, the information contained in the responses may be used or summarised on an anonymous basis in these documents.

- 6.6 In the event that the commitments are not accepted and the CMA is considering disclosing the information (such as in or with a statement of objections), it will revert to the provider of that information to obtain representations on confidentiality. The CMA will then consider those representations before deciding whether the information should be disclosed under Part 9 of the Enterprise Act 2002.

Annex: The proposed commitments

Case 50408: Auction services – proposed commitments

Introduction

1. ATG Media agrees to make the following Commitments, on condition that they are accepted by the CMA in a Commitments Decision.
2. The Commitments are being offered by ATG Media under section 31A CA98 in order to bring the CMA's investigation to a close by addressing the CMA's competition concerns.
3. The giving of the Commitments by ATG Media does not constitute an admission of any wrongdoing by ATG Media. In particular, ATG Media has not been the subject of any CMA infringement decision or statement of objections and nothing in these Commitments may be construed as implying that ATG Media agrees with any concerns identified by the CMA in its investigation relating to the supply of auction services, including in a Commitments Decision.
4. These Commitments are without prejudice to ATG Media's position should the CMA or any other party commence or conduct proceedings or other legal action against ATG Media.

Definitions

5. For the purposes of these Commitments the following definitions apply:
 - (a) **ATG Media** means Turner Topco Limited (Company number: 08968154) and any current or future Subsidiary, including ATG Media Holdings Limited (Company number: 06521301), ATG Media Limited (Company number: 06636047) and Metropress Limited (Company number: 01010311), that operates a Live Online Auction Platform;
 - (b) **ATG Media Live Online Auction Platform** means any Live Online Auction Platform operated by ATG Media, including, for the avoidance of doubt, the-saleroom.com, i-bidder.com and BidSpotter.co.uk;
 - (c) **Auction House** means an auction house in the UK;
 - (d) **CA98** means the Competition Act 1998;
 - (e) **CMA** means the Competition and Markets Authority;

- (f) **Commitments** means the commitments given by ATG Media hereunder pursuant to section 31A CA98;
- (g) **Commitments Decision** means a formal decision by the CMA under section 31A CA98 to accept these Commitments such that section 31B CA98 applies with respect to the CMA's investigation in Case 50408 relating to the supply of auction services;
- (h) **Competing Live Online Auction Platform** means a website providing Live Online Auction Platform Services that is not operated by ATG Media, including (for the avoidance of doubt) such a website operated by an Auction House or by a supplier of Live Online Auction Platform Services other than ATG Media;
- (i) **Compliance Statement** means the statement to be provided by ATG Media to the CMA at the end of each year in which the Commitments are in force in the format set out in the Appendix to the Commitments;
- (j) **Effective Date** means the date on which ATG Media receives formal notification of a Commitments Decision;
- (k) **Live Online Auction Platform** means a website which is primarily targeted at providing Live Online Auction Platform Services to Auction Houses and their customers;
- (l) **Live Online Auction Platform Services** means services provided via a website to:
- (i) Auction Houses, giving them the opportunity to list online the details of physical public auctions in the UK, for the purposes of receiving online bids in real time at such live auctions; and
 - (ii) online bidders, giving them the opportunity to register and bid in real time, using the internet, in a live auction taking place at a physical site in the UK operated by an Auction House;
- (m) **Subsidiary** means a subsidiary as defined in section 1159 of the Companies Act 2006; and
- (n) **Working Day** means any day other than a Saturday, Sunday or any other day that is a public holiday in England.

The commitments

6. ATG Media will not engage in any conduct or enter into any agreement or arrangement that:
 - (a) restricts any Auction House from using or contracting with any Competing Live Online Auction Platform for the provision of Live Online Auction Platform Services;
 - (b) restricts any Auction House from charging fees, commissions or any other forms of remuneration to online bidders using a Competing Live Online Auction Platform that are lower than the fees, commissions or any other forms of remuneration charged to online bidders using an ATG Media Live Online Auction Platform; or
 - (c) restricts the freedom of any Auction House to advertise or otherwise promote the services and products offered by any Competing Live Online Auction Platform, including on that Auction House's own website or in that Auction House's other publications or on any third party website or in any third party publication (but not, for the avoidance of doubt, any website or publication owned or operated by ATG Media).

7. In order to give effect to the Commitments, ATG Media will:
 - (a) within ten (10) Working Days starting from the first Working Day after the Effective Date, inform in writing each Auction House in respect of which it has engaged in any conduct or entered into (or sought to enter into) any agreement or arrangement as referred to in Clause 6 that:
 - (i) ATG Media will not seek to engage in any conduct and will no longer operate or otherwise enter into or enforce any agreement or arrangement of the type referred to in paragraphs (a) to (c) of Clause 6; and
 - (ii) ATG Media amends any existing agreement or arrangement between it and that Auction House to ensure that such agreement or arrangement complies with Clause 6;
 - (b) within fifteen (15) Working Days starting from the first Working Day after the Effective Date, confirm in writing to the CMA that it has complied with Clause 7(a) of the Commitments and provide the CMA with a list of the Auction Houses that it has informed under Clause 7(a).

Duration

8. The Commitments shall apply for a period of five (5) years commencing on the Effective Date.

Reporting and compliance

9. As of the Effective Date, ATG Media will not in any way circumvent, by actions or omissions, the Commitments, including by selling, assigning or otherwise transferring any part of ATG Media's Live Online Platform Services business to any other entity within the ATG Media corporate group as a result of which that entity would do anything that is prohibited by the Commitments.
10. ATG Media will co-operate fully with the CMA for the duration of the Commitments and in particular:
 - (a) will provide to the CMA promptly any information and documents that the CMA requests for the purposes of enabling the CMA to monitor the implementation and operation of the Commitments or, if necessary, the enforcement of the Commitments; and
 - (b) may be required by the CMA to keep, maintain and produce those records specified in writing by the CMA that relate to the operation of the Commitments or any provision of the Commitments.
11. ATG Media will deliver a Compliance Statement to the CMA at the end of each year in which the Commitments remain in force in the form set out in the Appendix to the Commitments. The first Compliance Statement shall be delivered to the CMA on the first anniversary of the Effective Date or, if that date is not a Working Day, on the first Working Day after that date. The second, third, fourth and fifth Compliance Statements shall be delivered to the CMA on the relevant anniversary of the Effective Date or, if that date is not a Working Day, on the first Working Day after that date.
12. Should ATG Media at any time become aware of any breach of any provision of the Commitments, ATG Media will:
 - (a) as soon as possible after becoming aware of any such breach, take all actions that are reasonably required to remedy the breach and to comply with the Commitments; and
 - (b) inform the CMA about the breach and provide an explanation of the circumstances in which the breach arose and the steps ATG Media has taken to remedy the breach within seven (7) Working Days starting from

the first Working Day after the date on which ATG Media became aware of the breach.

13. The CMA may take action in accordance with its statutory powers should it become aware of any non-compliance by ATG with the Commitments.
14. Any communication from ATG Media to the CMA relating to the Commitments shall be addressed to: *[insert contact/address]* or by email to *[insert email]* or such other postal or email address as the CMA may direct in writing.

Review

15. Without prejudice to the generality of section 31A(4)(b) CA98, ATG Media may request that the CMA reviews (with any such review being at the CMA's discretion) the Commitments with a view to releasing or modifying the Commitments where there has been a material change to the reasons and/or facts on which the Commitments Decision is based and where the CMA has reasonable grounds for believing that its competition concerns no longer arise.

Executed by:

Signed for and on behalf of Turner Topco Limited, ATG Media Holdings Limited, ATG Media Limited, and Metropress Limited

Signature:

Name:

Title:

Date:

Appendix: Case 50408 – Auction services
Compliance statement relating to commitments given by
ATG Media

I, *[insert name]*, confirm on behalf of Turner Topco Limited, ATG Media Holdings Limited, ATG Media Limited, and Metropress Limited (together, 'ATG Media') that:

1. Subject to any matters reported under paragraph 2 below, in the period from *[insert date]* to *[insert date]* (the 'Relevant Period'):
 - (a) ATG Media has complied with the Commitments offered by it and accepted by the CMA on *[insert Effective Date]*;
 - (b) no breach of any of the Commitments has occurred; and
 - (c) no action has been taken by ATG Media that might prejudice compliance with the Commitments.
2. As required by Clause 12 of the Commitments, the CMA has been informed of any breaches of the Commitments that have occurred during the Relevant Period.
3. ATG Media remains in full compliance with the Commitments and will continue to provide to the CMA any information and documents as the CMA may require for the purpose of monitoring or enforcing compliance with the Commitments in accordance with Clause 10 of the Commitments.

Signed for and on behalf of Turner Topco Limited, ATG Media Holdings Limited, ATG Media Limited, and Metropress Limited:

Signature:

Name:

Title:

Date: