

ANTICIPATED ACQUISITION BY TOP ONLINE PARTNERS GROUP LIMITED OF MAPLE SYRUP GROUP LIMITED AND ITS SUBSIDIARIES

Issues statement

28 February 2019

The reference

1. On 16 January 2019, the Competition and Markets Authority (**CMA**), in exercise of its duty under [section 33\(1\)](#) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition by Top Online Partners Group Limited (**TopCashback**) of Maple Syrup Group Limited and its subsidiaries (**Quidco**) for further investigation and report by a group of CMA panel members (the inquiry group).¹
2. On 17 January 2019, TopCashback requested in accordance with section 39(8A) of the Act for a specified period of time to be disregarded for the purposes of determining the reference period, as there was a possibility of the arrangements which are the subject to the reference being abandoned. The CMA considered the request and, pursuant to section 39(8A) of the Act disregarded a period of three weeks for determining the reference period so it would therefore expire on 23 July 2019. On 6 February 2019 TopCashback confirmed to the CMA that it intended to proceed with the acquisition of Quidco (the **Merger**).
3. The CMA must now decide:
 - (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (b) if so, whether the creation of that situation may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.

¹ On 6 February 2019 the CMA appointed the inquiry group: Kirstin Baker (Chair), Paul Muysert and Maria Da Cunha.

4. This statement is structured as follows:
 - Background to the Merger and the products/services provided by the Parties;
 - The nature of competition in the sector and the evidence we are likely to seek to understand the potential impact of the Merger;
 - Our approach to market definition, including the markets in which we will assess the impact of the Merger;
 - The counterfactual and theories of harm we will consider;
 - Possible remedies and relevant customer benefits; and
 - How to respond to this statement.
5. We set out the main issues we are likely to consider in reaching our decisions, having had regard to the evidence gathered to date including in the CMA's phase 1 investigation. This does not preclude the consideration of any other issues which may be identified during the course of our inquiry, which may include the gathering of further evidence.
6. Throughout this document, where appropriate, we refer to Topcashback and Quidco collectively as 'the Parties'.

Background

7. TopCashback, headquartered in Staffordshire, operates the cashback website www.topcashback.co.uk in the UK. TopCashback, via the same website, also offers consumers other moneysaving content such as vouchers and price-comparison tools. In addition, TopCashback provides application programming interface-based access to affiliate marketing-based moneysaving programmes (**white label affiliate marketing services**) to third parties in the UK.
8. Quidco operates a cashback website in the UK, www.quidco.com. Quidco, via the same website, also offers consumers other moneysaving content such as vouchers and price-comparison tools. In addition, Quidco provides white label affiliate marketing services to third parties in the UK.
9. The Parties overlap in the UK in the supply of websites that allow consumers to receive cash rebates on their online shopping (**cashback websites**).² To

² The Parties also overlap in the supply of vouchers and advertising price comparison tools. The Parties offer this other moneysaving content alongside cashback and the available evidence from phase 1 indicates that there are numerous credible alternative suppliers. Therefore, we do not intend to consider these overlaps separately from the Parties' cashback proposition.

receive cashback, consumers log into the cashback website and click on specific links (affiliate links) to access a merchant's website. This is recorded via online trackers ('cookies') which register that the consumer accessed the merchant's website via that cashback website. Following a qualifying purchase, the merchant pays the cashback website a commission fee (usually via an affiliate network),³ which the cashback website passes to the consumer, in whole or in part, as cashback. There will often be a delay (sometimes of several months) between a consumer making a purchase and cashback being credited to his/her account, as merchants will typically wait until the returns period has expired before confirming that a particular purchase qualifies for cashback. Additional revenues (constituting the vast majority of cashback websites' profits) are generated through advertising paid for by merchants on the cashback website.

10. Consumers are also able to receive discounts on their online shopping through other websites such as **voucher websites**, which promote merchant voucher codes offering an immediate discount at the point of sale to consumers and receiving commissions from merchants in return, and **reward/loyalty websites** (reward websites), which offer points as a reward for shopping through them, receiving commissions from merchants in return.
11. Other money-saving websites, such as price comparison websites that allow consumers to compare different products within a relevant sector (eg insurance), money-saving content websites (such as moneysavingexpert.com) and deal-aggregators (ie websites that compile and promote deals) also make use of affiliate-marketing, earning commission when a consumer clicks through from their website to a merchant's website.
12. The Parties also overlap in the UK in the supply of white label affiliate marketing services to third parties.

Nature of competition

13. As explained in the phase 1 decision to refer the acquisition by Topcashback of Quidco and its subsidiaries for further investigation ([the phase 1 decision](#))⁴, cashback websites are two-sided in nature because they facilitate transactions between two types of customer:

³ An affiliate network is a network on which merchants publish offers of commission for sales or leads to be promoted on websites of so-called publishers (eg cashback websites, voucher websites etc).

⁴ See [phase 1 decision](#) On 7 January 2019, the CMA announced that the Merger would be referred for a phase 2 investigation unless the Parties offered acceptable undertakings to address the competition concerns identified. The full text of this decision was published on 8 February 2019 and is referred to in this document as the CMA phase 1 decision.

- a. Merchants who (usually via affiliate networks) promote cashback deals via the Parties' websites and pay for advertising on the websites; and
 - b. Consumers (users) who take advantage of the money-saving offers.
14. When assessing the effects of the Merger, we will consider the competitive constraints on the merchant-side and consumer-side of the Parties' websites.
15. We will also seek to understand how interlinked competition is between each side of these platforms, such as whether competition on one side might constrain the Parties' behaviour on the other side. More generally, we will consider how much substitution on the merchant-side depends on consumer behaviour (and vice versa). For example, merchants may seek to reach a specific set of consumers and may consider two websites to be substitutable if they can reach the same set of consumers on each website. This could be the case where some consumers shop around (multi-home) across two websites.
16. The phase 1 decision noted that merchants are attracted by cashback websites that provide a large volume of consumers (and vice versa). These are indirect network effects and we will seek to understand whether these effects lead to feedback loops. For example, if Quidco were to worsen its overall proposition, some merchants could make their best offers available on TopCashback more often. This could result in some regular users of Quidco using TopCashback more of the time, which in turn could lead to further merchants placing their best offers on TopCashback more often.
17. The feedback loop could continue and result in a greater cumulative shift in transactions from Quidco to TopCashback than any initial shift in transactions.⁵ This type of feedback loop may amplify the competitive constraints each Party has on the other. Feedback loops may also amplify the competitive constraints from other websites, provided they are sufficiently close substitutes to the Parties' websites. We will assess the strength of any feedback loops by taking into account the substitutability between different sites, the degree of multi-homing and the responsiveness of demand on one side to the number of users/range of offers on the other side.
18. In assessing the constraints on each Party, we will therefore further seek and consider evidence on:

⁵ Such a feedback loop does not necessarily lead to all merchants and consumers tipping to one site, for example if there are some merchants and/or consumers that do not substantially change their behaviour or if there are some merchants that seek to alternate their best offers between the Parties' sites.

- a. the degree of substitutability between different money-saving sites from both the merchant and consumer perspective;
- b. the degree of multi-homing by merchants and consumers; and
- c. the responsiveness of demand on one side to the number of users/range of offers on the other side.

Market definition

19. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the CMA's analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to an SLC, the CMA may take into account factors such as constraints outside the relevant market, segmentation within the relevant market, and other ways in which some constraints are more important than others.⁶ In general, we note that market definition and the analysis of competitive effects are both driven by considerations relating to the 'closeness' of substitution between the Parties' offers and those of alternatives.
20. Our current intention is to assess the impact of the Merger in the following potential markets:
 - a. supply of money-saving offers and advertising via cashback websites in the UK; and
 - b. the supply of white label affiliate marketing services to third parties in the UK.
21. The two-sided nature of cashback websites means the implementation of the hypothetical monopolist test may be more complicated.⁷ In the phase 1 decision, the CMA did not define separate markets on each side of a cashback website given that a cashback website facilitates purchase transactions between these two sides. We intend to maintain this approach and consider the combination of constraints on each side of the Parties' websites.
22. As part of the phase 1 process, the Parties submitted that the relevant product frame of reference should be, at least, the supply of affiliate marketing-based moneysaving and advertising services, ie encompassing cashback websites as well as a variety of other types of moneysaving websites including voucher

⁶ See [Merger Assessment Guidelines](#) (CC2/OFT 1254), September 2010, paragraph 5.2.2.

⁷ See [Merger Assessment Guidelines](#), paragraph 5.2.20.

websites, price comparison websites and other reward websites. We intend to assess the relative strength of the competitive constraint from these other websites. Depending on this assessment, we may consider revising the market definition.

23. We will also consider whether there is scope for price discrimination, for example, whether the Parties could:
 - a. pass-through a different amount of commission as cashback, depending on the type of merchant and/or the value of a transaction; and
 - b. charge different tenancy rates for placing promoted adverts on their websites, depending on the type of merchant.
24. As set out in the phase 1 decision, the Parties submitted that the relevant geographic market should be at least UK-wide and the CMA applied a UK-wide frame of reference in phase 1. We will use this as the starting point for our assessment of the geographic market in the phase 2 investigation.

Assessment of the competitive effects of the Merger

Counterfactual

25. We will assess the potential effects of the Merger on competition compared with the competitive conditions in the counterfactual situation (i.e. the competitive situation that would be likely to prevail absent the Merger). In making our assessment, we will consider possible alternative scenarios for the competition that might arise in the absence of the Merger and decide upon the appropriate counterfactual based on the facts available to us and the extent to which events or circumstances and their consequences are foreseeable.
26. In the phase 1 decision the CMA found that the pre-Merger situation was the appropriate counterfactual. We will examine whether this is still the appropriate counterfactual, taking account of any further information that comes to light.

Theories of harm

27. Theories of harm describe the possible ways in which an SLC could arise as a result of the merger and provide the framework for our analysis of the competitive effects of the merger. We have set out below the theories of harm which we are currently minded to investigate. However, we may revise our theories of harm as our inquiry progresses. Also, the identification of a theory of

harm does not preclude an SLC being identified on another basis following further work by us, or the receipt of additional evidence. We welcome views on all the theories of harm set out below.

28. Our current intention is to assess two horizontal theories of harm:
 - a. Horizontal unilateral effects in the supply of money-saving offers and advertising via cashback websites in the UK; and
 - b. Horizontal unilateral effects in the supply of white label affiliate marketing services to third parties in the UK.

Horizontal unilateral effects in the supply of money-saving offers and advertising via cashback websites in the UK

29. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.⁸ Horizontal unilateral effects are more likely when the merging parties are close competitors. After the Merger, it is less costly for the merged entity to raise prices or lower quality because it will recoup the profit on recaptured sales from those customers who would have switched to the offer of the other merging party.
30. We will assess whether the Merger may be expected to result in an SLC in relation to horizontal unilateral effects in the supply of money-saving offers and advertising via cashback websites in the UK.
31. In general, for this theory of harm to hold, two conditions need to be met:
 - a. the merging firms are close competitors (i.e. they are considered to be good alternatives by customers); and
 - b. other suppliers cannot replicate the competitive constraint that the merging firms exert on one another.
32. The evidence gathered during the phase 1 investigation indicated that the Parties are likely to be the closest competitors in particular because:
 - a. The Parties provide a near-identical service proposition to merchants and consumers based on a near-identical charging model (i.e. the

⁸ [Merger Assessment Guidelines](#), from paragraph 5.4.1.

receipt of commission from merchants that is passed on to consumers as well as the receipt of advertising revenue).

- b. TopCashback's website showed that they viewed Quidco as their closest competitor. For example, TopCashback's website features a standalone page titled 'Quidco vs. TopCashback' that compares TopCashback to its 'closest rival, Quidco'. The Parties' internal documents indicated that:
 - i. TopCashback and Quidco target the same customers and merchants; and
 - ii. TopCashback and Quidco primarily monitor each other (and no other competitors) and justify key strategic decisions by reference to the other Party, driving each other to compete aggressively.
- c. Almost three quarters of merchants responding to the CMA's phase 1 merger investigation indicated that the Parties compete closely or very closely.⁹

33. We will seek further evidence on the closeness of competition between the Parties' cashback websites, in particular:

- a. the extent to which the Parties take each other's actions into account in making business decisions, compared to the actions of other competitors;
- b. the extent to which merchants and consumers consider them to be alternatives; and
- c. the degree of overlap in merchants using each Party's site, and the degree of overlap in the offers of these merchants.

34. The phase 1 decision found that there will be insufficient competition post-Merger from cashback websites, voucher websites, or reward websites (whether individually or in aggregate) to constrain the merged entity. This was based on a range of evidence including:

- a. the Parties' high combined shares of supply on the basis of commissions paid;

⁹ The CMA notes that no merchants indicated that the Parties are distant competitors. Instead, some told the CMA that they did not have sufficient insight to comment or provided no comment on the closeness of competition whilst still agreeing that the Parties compete.

- b. the Parties' internal documents showing clearly and consistently that voucher websites and reward websites exercise only a limited constraint on the Parties; and
 - c. the CMA's analysis of available offers between the Parties and voucher websites, which found that in most cases a consumer would not be able to directly substitute from cashback to a voucher website.
35. The phase 1 decision also found that other categories of website listed by the Parties (price comparison websites, money-saving content websites and deal aggregator websites) are fundamentally different from cashback websites.
36. In order to understand further the nature and extent of competition between the Parties' websites and other money-saving websites, we expect to consider further evidence from:
- a. market shares, by using additional and alternative metrics to estimate the market shares of the Parties, for example the volume of tracked transactions across different types of money-saving websites and merchant segments;
 - b. the Parties' internal documents;
 - c. an online survey of the Parties' consumers and other available data on consumer behaviour; and
 - d. merchants on the Parties' websites and other third parties (affiliate networks, advertising agencies, and competitors).
37. We would welcome evidence on the behaviour of consumers and merchants that use the Parties' sites, for example data on what money-saving websites consumers are using and how they have responded to changes in the offers on money-saving websites.
38. We would also welcome analysis and evidence on the growth opportunities of each Party's website in the UK and what impact the Merger would have on competition for potential new customers, as well as analysis and evidence on the nature of such customers.

Horizontal unilateral effects in the supply of white label affiliate marketing services to third parties in the UK

39. The phase 1 decision did not find competition concerns arising from the Merger in the supply of white label affiliate marketing services, noting that the available evidence indicates that there are numerous credible alternative suppliers.

Nevertheless, we will seek to verify the credibility of the constraints from these alternative suppliers as part of our phase 2 investigation.

Countervailing factors

40. We will consider whether there are countervailing factors which are likely to prevent or mitigate any SLC that we may find.

Entry and expansion

41. We plan to investigate the likelihood of entry and expansion, and whether new competitors to the Parties are likely to emerge.
42. In order for entry and/or expansion to offset an SLC, entry and/or expansion would need to be timely, likely and sufficient.
43. To investigate this issue, we intend to collect information on:
- the history of entry, expansion and exit into the market as defined earlier;
 - the likelihood of future entry/expansion in this market;
 - the barriers to entry and expansion, including:
 - potential first mover or incumbency advantages enjoyed by the parties, for example those that arise from indirect network effects (as set out at paragraph 16)
 - the difficulty of securing venture capital backing arising from the above.
 - Consumer or merchant switching costs

Buyer power

44. In order for countervailing buyer power to offset an SLC, merchants would have to have sufficient buyer power post-merger to offset any attempt by the Parties to increase prices or reduce quality, range and/or innovation.
45. We will examine how negotiations are carried out between the Parties and their customers and how frequently these happen in order to determine if there are credible outside options for customers to switch to post-Merger and therefore exercise countervailing buyer power of a scale to be sufficient to offset an SLC. We will also assess the extent to which any countervailing buyer power held by some customers may be relied upon to protect all customers.

Efficiencies

46. We will examine any submissions and supporting evidence made in relation to efficiencies arising from the Merger. In particular, we will examine whether any potential efficiencies are rivalry-enhancing and could be expected to offset any loss of competition.

Other

47. We are not currently aware of any other countervailing factors, and none have been suggested by the Parties.

Possible remedies and relevant customer benefits

48. If we conclude provisionally that the Merger may be expected to result, in an SLC in any market(s), we will consider whether, and if so what, remedies might be appropriate, and will issue a further statement.
49. In any consideration of possible remedies, we may have regard to their effect on any relevant customer benefits in relation to the Merger and, if so, what these benefits are likely to be and which customers would benefit.
50. To count as relevant customer benefits, customers need to be better off with the merger, despite the fact that the CMA may have found an SLC, and the CMA must believe that the claimed relevant customer benefits are:
 - Merger specific (ie unlikely to accrue without the merger);
 - Timely (ie expected to accrue within a reasonable period from the merger)
 - Likely; and
 - Sufficient (ie large enough to outweigh the SLC that arises as a result of the merger)
51. The CMA welcomes submissions on this issue.

Responses to the issues statement

52. Any party wishing to respond to this issues statement should do so in writing, by no later than **5pm on 14 March 2019**.
53. Please email Topcashback.Quidco@cma.gov.uk or write to:

Project Manager
TopCashback/Quidco merger inquiry
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD