eu travel tech

Response to the CMA's consultation document on its recommendation to the Secretary of State regarding the Retained Vertical Agreement Block Exemption Regulation

I. Introduction

This document comprises eu travel tech's (formerly The European Technology and Travel Services Association – ETTSA) (***eutt***) response to the Competition and Markets Authority's (***CMA***) consultation on the proposal for a UK Vertical Agreements Block Exemption Order (***UK VABEO***) (the ***Consultation***). The proposed UK VABEO will replace the Retained Vertical Agreement Block Exemption Regulation (the ***Retained VABER***) on its expiration on 21 May 2022. It is noted that the CMA further proposes to adopt guidance to accompany the UK VABEO (***CMA VABEO Guidance***) on which the CMA proposes to consult separately in due course.

eutt was formed in 2009 to represent and promote the interests of a diverse range of travel distribution intermediaries, including global distribution systems (***GDSs***) and online travel agents (***OTAs***) towards all relevant European stakeholders from industry to policymakers.[1]

The Retained VABER, in conjunction with EU guidelines on vertical restraints (the ***Current EU Guidelines***)[2], have provided welcome legal certainty and continuity following the UK's exit from the European Union (***Brexit***) and remains an important legal point of reference for eutt members when self-assessing their vertical commercial dealings within the travel booking ecosystem in the UK. As such, the Retained VABER enhances legal certainty and contributes to efficient contracting between eutt's members and their commercial partners, such as hotels, airlines and car rental companies.

eutt is strongly in favour of the UK maintaining an automatic exemption for vertical agreements following the expiry of the Retained VABER in the legal format proposed, i.e. the UK VABEO, which would retain the general 'architecture' of the Retained VABER, including the concepts of white-listed, black-listed and excluded restrictions and a general market share threshold of 30% on relevant markets.

eutt is also strongly in favour of the CMA's proposal to seek a transitional period of one year between the expiry of the Retained VABER and the new UK VABEO to allow businesses to adjust to any changes between the two regimes. eutt also supports the CMA's proposal to allow for a mechanism which would enable the CMA to withdraw the safe harbour protection under the UK VABEO where the CMA considers (following an appropriate

1 https://eutraveltech.eu/about-us/

2 Commission Notice – Guidelines on Vertical Restraints, SEC(2010) 411

investigation which adequately protects the rights of defence of adversely impacted parties) that a particular agreement is not an agreement which is exempted from the Chapter I prohibition as a result of section 9 of the Competition Act 1998. The existence of such a 'safety valve' should also be an important consideration when assessing the need for an expansion of the category of hardcore restrictions which the CMA currently proposes in relation to indirect sales channel parity clauses. This issue is discussed further below.

eutt is further strongly in favour of maintaining an updated set of guidelines to accompany the UK VABEO, i.e. the adoption of the CMA VABEO Guidance in due course, to assist businesses with the application of the UK VABEO when self-assessing the competition law compliance of their vertical arrangements with upstream and downstream partners in the UK. eutt welcomes the CMA's proposal to consult on these later this year.

As regards the specific consultation questions posed by the CMA in the context of the Consultation, eutt wishes to limit its further responses to two areas of particular legal and commercial significance to its members, namely the issue of sales channel parity obligations and the application of the agency concept to online intermediary platforms.

II. Sales Channels Parity Obligations (or 'most favoured nation' clauses)

A. Policy questions

Question 29: What are your views on the CMA's proposed recommendation on parity (or 'most favoured nation') obligations? As part of this, you might like to consider whether indirect sales channel parity obligations[3] can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations[4] – if so, please provide evidence or examples in practice of circumstances where this may be the case.

As an overarching point, eutt welcomes the CMA's proposal to provide further clarity on the treatment of sales channel parity obligations in the UK VABEO and the CMA VABEO Guidance.

eutt agrees with the CMA that *direct* sales channel parity obligations should continue to be block exempted and that such an exemption should be codified in the UK VABEO. This position is in line with an extensive and consistent body of evidence[5] which supports the

[3] As defined at paragraph 4.63 of the Consultation.

[4] *Ibid*.

[5] In April 2015, the Swedish Competition Authority concluded its investigation of Booking.com's, lodging parity clauses, noting that "*the Competition Authority's assessment, which is supported by analyses and the above mentioned surveys supplied by Booking.com, is in view of the above that the vertical price parity substantially reduces the risk that hotels free-ride on investments made by Booking.com. This in turn allows Booking.com to receive remuneration for its search and compare services so that the services can continue to be offered on the market to the benefit of consumers*" (vertical price parity refers to direct price parity); In August 2015, the Danish Competition Authority acknowledged the free-riding concerns of online travel agents as follows: "*a lower price on the hotels' own websites may entail that the search and compare features on the*

position that such direct sales channel obligations offer legitimate legal and commercial safeguards for online intermediaries against attempts of suppliers to free-ride on the upfront investments (e.g. in the areas of marketing and technological innovation) by intermediation platforms which such suppliers choose to instruct to generate incremental sales or bookings for their products and/or services.

eutt, however, respectfully disagrees with the CMA's proposal to move away from the current position under the Retained VABER that *indirect* sales channel parity obligations are block-exempted where the parties' market shares are below 30% and to treat such indirect sales channel parity obligations instead as hardcore restrictions.[6]

eutt notes the CMA's related proposal to capture under its revised treatment of indirect sales channel parity obligations also "equivalent measures". Any such provision would require clear-cut guidance in the CMA VABEO Guidance to ensure that such a provision would not cut across legitimate practices by intermediation platforms, such as measures which incentivise travel suppliers to provide such platforms with competitive offers (including rates, conditions and availability) or the ability for platforms to freely determine their ranking algorithms, subject only to appropriate consumer law disclosures and any potentially applicable constraints under the Chapter II prohibition (abuse of dominance), all benefiting consumers.

Direct and indirect sales channel parity obligations form an important element of the fair commercial balance between intermediary booking sites and their travel supplier partners, such as accommodations and airlines and can be assumed to be unproblematic from a competition law perspective where the parties' market shares do not exceed 30%.

As the CMA is aware, it is widely accepted that intermediary booking sites, including OTAs, deliver significant benefits (efficiencies), both to: (i) travel suppliers (such as accommodations and airlines) by offering an additional, risk-free, cost effective marketing channel to generate incremental bookings at no upfront cost to the travel suppliers; and (ii) travellers (i.e. consumers) by significantly reducing their search costs and enhancing inter-brand competition between travel suppliers, through increased

booking portals are used only for scanning the market while the room is subsequently booked at a lower price on the hotels' own websites, whereby the hotels are given free access to the marketing achieved by being shown on the booking portals"; In November 2015, the Hungarian Competition Authority stated that there is a "*realistic danger*" of free-riding in Hungary and that "*it is possible that parity clauses are special features of the business model, and are required to maintain the business model, as several online travel agents have signaled. Protection of investment and avoiding free riding in this area may seem to be rational reasons […] Also considering the danger of free-riding, the narrow parity clause may be an adequate solution to market problems based on current market conditions*"; on 9 May 2019, the Swedish Patent and Market Court of Appeal dismissed a case brought by a Swedish hotel association (Visita) regarding Booking.com's remaining narrow MFN clauses holding that Visita had not shown that such clauses restrict competition in the market. Finally, the recent German Federal Supreme Court decision in the Booking.com litigation also does not distract from these findings. When explaining why the court did not consider preliminary reference proceedings to the ECJ to be necessary, the decision expressly confirms that "*the Senate does not question the* [*European*] *Commission's view that narrow best price clauses can be exempted under the currently applicable Vertical Block Exemption Regulation*"; see para. 95 of the decision.

6 eutt notes at paragraph 4.71 of the Consultation document a reference to "indirect" sales channel parity which could be read as including "direct" parity provisions. eutt understands that the CMA is simply noting in this statement that where parity obligations include both direct and indirect parity obligations, the indirect parity obligation may need to be assessed differently from the direct parity obligation. If this reading is not correct, eutt would be grateful if the CMA could clarify its position.

transparency across competing offers and channels, which drives prices down and improves the quality of offers.

As the CMA is aware, these pro-consumer effects are reflected in the conclusions reached by the CMA in its *Digital Comparison Tool* market study in 2017 where the CMA noted that intermediary marketing channels "*make it easier for people to shop around, and improve competition – which is a spur to lower prices, higher quality, innovation and efficiency*". The German competition authority came to a similar conclusion following its sector inquiry into comparison portals in Germany in 2019. In some instances, OTAs offer discounts on booking prices to compete with travel suppliers and create new products for consumers by combining products from different travel suppliers. eutt considers that there are therefore strong reasons to maintain the *status quo* for the treatment of sales channel parity obligations under the UK VABEO, i.e. that where the market shares of the parties to the agreement do not exceed 30%, all types of sales channel parity obligations should remain block-exempted.

Indeed, absent clear evidence of significant market power (dominance) concerns[7], it is reasonable to apply a general assumption that both direct and indirect sales channel parity clauses ensure that competitive terms are made available more widely to end consumers, thus enhancing competition. Put differently, these clauses make it more difficult for travel suppliers to price discriminate against less informed or less price sensitive consumers. In this regard, as noted in the Introduction, eutt considers that the current 30% threshold is an effective proxy for distinguishing between cases which can reasonably be presumed to be unproblematic from a competition law perspective and those which may require a more in-depth, case-by-case analysis.

The CMA's findings in its decision in '*Price comparison website: use of most favoured nation clauses*' (case 50505) of 19 November 2020 (the ***CTM decision***) do not detract from this position. In the CTM decision the CMA found that the market share of the relevant online intermediary platform, CompareTheMarket, "*was over 50%, well above its nearest rivals such as MoneySuperMarket, Confused and GoCompare, and a significant proportion of consumers could only be accessed by insurers by listing on CTM*"[8]. eutt makes no comments on the merits (or lack thereof) of the CTM decision, which is now on appeal. Its comments are strictly limited to the observation that the concerns identified by the CMA in this case were in relation to a firm with (according to the CMA) a market share position well above the 30% threshold of the Retained VABER and proposed to be maintained in the UK VABEO.

More generally, the CMA itself recognises that the evidence on the harms and/or potential efficiencies associated with indirect sales channel parity obligations is at best mixed.[9] It should therefore be common ground that there is no robust evidential basis for a blanket removal of the block exemption for indirect sales channel parity obligations across all sectors and for all firms where the market shares of the relevant parties are below 30%. Such a removal would adversely affect a large number of firms across a large number of

[7] The CMA's findings in its decision in '*Price comparison website: use of most favoured nation clauses*' (case 50505) of 19 November 2020 (the ***CTM decision***) do not distract from this position, as the CMA found in that case that the market share of the relevant online intermediary platform, CompareTheMarket, was "over 50%".

[8] CTM decision, at paragraph 1.8.

[9] See Annex D: Evidence Gathering of the CMA Consultation and European Commission's Evaluation of the Vertical Block Exemption Regulation, SWD (2020) 173

diverse sectors and eutt is concerned that such a policy shift would have been unduly and disproportionately influenced by the commercial interests of a small number of stakeholders (such as, for example, large hotel chain operators and large airlines) which stand to gain commercially from such a shift, at the expense of intermediaries as well as smaller rivals (such as, for example, independent hotels, smaller airlines), and ultimately consumers for whom it would become more difficult to find the most competitive offers.

Furthermore, there is already a 'safety valve' mechanism in the Retained VABER which the CMA proposes to retain as part of the UK VABEO under which the CMA would be able to remove the benefit of the UK VABEO for particular restrictions in particular markets. This provides the CMA with an effective tool to intervene where the available evidence supports a conclusion that a particular vertical restraint may operate in a manner which would be anti-competitive absent the UK VABEO.

Without prejudice to the above, eutt considers that if the CMA were to decide that a shift in the *status quo* in relation to indirect sales channel parity obligations was indeed needed, there is a strong case against classifying indirect sales channel parity obligations as hardcore restrictions and for adopting a more proportionate approach by re-classifying such restrictions as **excluded restrictions** under the UK VABEO.

First, as noted above, the evidence which emerged from the CMA's limited assessment of indirect sales channel parity obligations in specific sectors (e.g., online hotel booking services, private motor insurance, home insurance) was mixed and (rightly) highly case specific, in that the CMA's conclusions (rightly) sought to reflect the specific competitive structure and dynamics of each of these sectors. Further, the CMA's case specific assessments in relation to accommodation bookings and private motor insurance are now quite dated and its assessment in relation to home insurance (in the CTM decision) related, as noted above, to the use of such clauses by a firm who had (according to the CMA) a market share of over 50% and would in any event not have benefited from any safe harbour protections under the UK VABEO.

eutt therefore respectfully submits that it would be factually and legally misguided for the CMA to seek to rely on these analyses in support of a position that indirect sales channel parity obligations should (in practice) be presumed to be harmful to competition, irrespective of the factual and legal context in which they are applied.

By way of a specific example for the CMA's consideration, eutt notes that it is not aware, for example, of any concerns having been raised by the CMA in relation to the intermediation of the booking of air tickets or in relation to sectors outside the retail insurance segment. Looking at the air sector by way of an illustrative example of the disproportionately wide scope of the CMA's current proposal, eutt notes that sales channel parity obligations, including indirect sales channel parity obligations, play a central part in the air fare booking ecosystem because they feature not only in agreements between GDSs and airlines but also in agreements between intermediary booking sites and airlines, ensuring that competitive rates and availability can reach

consumers via the indirect marketing channels of OTAs as well as offline travel agents in competition with the direct booking channels. The loss of access to competitive rates by offline travel agents would have significant adverse effects on these businesses which have not been assessed by the CMA. Further, any assessment of the operation of parity obligations in the air ticket booking sector would need to have regard to the often strong market position of individual airlines (and also their alliance partners) in certain regions and on a city-pair basis. The *de facto* prohibition of indirect sales channel parity obligations under the CMA's current proposals is simply not based on any assessment of actual concerns. Furthermore, such a *de facto* prohibition would likely have significant knock-on effects for the entire air booking ecosystem which are unknown to the CMA as the CMA has not assessed the issue (as far as eutt is aware) to date.

In contrast, the European Commission has been assessing the air ticketing ecosystem for some time and at least since 2018, including the effects of parity clauses in the sector, both at GDS and OTA level. It is instructive for current purposes that the European Commission announced on 19 July 2021 that it has closed its investigation without any findings of anti-competitive conduct. The European Commission noted in its case closure press release that the decision to close its long-running investigation was "*based on a thorough analysis and careful assessment of all the evidence gathered during the investigation*" and that the Commission has concluded that the available evidence does not justify pursuing the case further.[10] It would be reasonable to assume that the Commission's decision not to propose to re-classify wide (indirect) parity obligations as hardcore restrictions in the revised VBER was, among many other considerations, also taken as a result of its assessment in the now closed air ticketing case.

Secondly, treating such indirect parity clauses as hardcore restrictions would increase the legal compliance burden for a significant number of firms in the absence of any consistent and compelling body of evidence in support of the proposed re-classification. In this regard, such a policy shift would be contrary to the general principles of good administration and efficient regulation of markets.

Thirdly, as alluded to above, classifying indirect sales channel parity obligations as hardcore restrictions (e.g. as opposed to an excluded restriction) would lead to a significant legal divergence from the position currently proposed by the European Commission in its public consultation on the draft revised VBER and accompanying guidelines (the ***Draft EU Guidelines***). Specifically, Article 5 of the draft revised VBER published by the European Commission on 9 July 2021 provides that 'wide' (i.e., indirect) parity obligations ought to be treated as excluded restrictions. Given the general cross-border nature of online commerce, such a fundamental divergence from the EU competition law regime would inevitably lead to significant disruption and additional compliance costs for many firms operating both across the EEA and in the UK.

[10] https://ec.europa.eu/cyprus/news/20210719_3_en

For these reasons, eutt respectfully submits that the CMA considers the case further for a less dramatic, more proportionate policy shift, should the CMA not be persuaded that the current position (which is entirely satisfactory in eutt's view) can be maintained under the UK VABEO. Classifying indirect sales channel parity obligations as excluded restrictions – while not eutt's preferred position – would at least preserve a system under which such clauses can properly be assessed on a case-by-case basis in their specific legal and factual context. For the reason set out above, a classification of such clauses as hardcore restrictions would be factually unfounded and legally misguided and therefore ultimately irrational. In practical terms, it would also give rise to very significant (avoidable) disruption and costs for businesses.

Question 30: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.

As noted above, eutt considers that there is no robust legal or evidential basis for re-classifying indirect sales channel parity obligations as hardcore restrictions for all sectors and irrespective of the market shares of the parties, which may in many instances be competitively insignificant.

Should the CMA decide to re-classify indirect sales channel parity obligations as excluded restrictions, further guidance on how businesses should self-assess such restrictions would be helpful. For example, such clauses may in particular be justified where the supplier market (e.g. air travel suppliers) is highly concentrated, to facilitate consumers continuing to be able to easily identify the best rates and availability of the relevant travel services.

B. Impact questions

Question 31: To what extent are indirect sales channel parity obligations relevant for your business's operations, or the operations of those you represent? Please explain your answer.

a) **Completely**
b) **Very much**
c) **Moderately**
d) **A little**
e) **Not at all**

As noted in the response to Question 29 above, both direct and indirect sales channel parity clauses (including those previously waived by Booking.com and Expedia Group in relation to their contracts with travel services suppliers based in the EEA/UK) deliver significant efficiencies by supporting a sustainable intermediary booking sites business

model which generates significant benefits to travel services suppliers and, importantly, also consumers.

It is important to recognise that online marketing has become an expensive and complex endeavor for suppliers, including suppliers of travel services. The costs of online marketing are substantial (that is if the property actually wishes to develop its online direct business). Service providers need to, at the very least, become experts (or pay someone) to optimize their web pages for search engines in multiple geographic markets requiring local language translations; ensure that their Google AdWords campaigns are well targeted and delivering business; post consistently and effectively on major social media channels as well as effectively and logically manage rates and availability across all channels and customer touchpoints. The increased complexity means it has become increasingly difficult for suppliers to determine which specific marketing effort actually lead to increased, incremental demand, and how these efforts (search, display, social media, OTA and others) interact, particularly without clear attribution. Online marketing channels have become incredibly opaque, competitive and saturated and, without the requisite budget and expertise, online marketing expenditure can be ineffective (and therefore wasted) for individual businesses. One thing that is certain is that the 'search' channel (effectively Google) in particular has become both very powerful and expensive. Against this backdrop, intermediary booking and marketing sites offer an expert and highly efficient marketing option, in particular for smaller suppliers (e.g. independent hotels, smaller airlines), which significantly de-risks finding incremental travellers in a crowded market place and competing more effectively against larger suppliers (e.g. hotel chains, larger airlines).

Furthermore, as the CMA is aware, hotels and airlines for example benefit from the mere listing on an intermediary booking site which drives incremental bookings to the hotel's and airline's *direct* booking channel ('billboard effect'). Also, any traveller who has made a booking with the hotel or airline via an intermediary booking site is more likely to make a subsequent booking *directly* with the hotel if the stay, or with the airline, the flight, was agreeable. This means that OTAs have a legitimate interest in being given a fair chance to attract at least the *first* booking of a traveller at a hotel or airline. Direct and indirect sales channel parity clauses seek to ensure that the intermediary booking sites have a 'fair shot' at securing such a first booking by having access to competitive rates and availability. Any reduction in the scope of such sales channel parity obligations further tilts the balance in favour of the travel supplier.

It should also be flagged in this regard that the 'free riding' concern has become more rather than less of a concern for OTAs, as the online booking ecosystem becomes more crowded and importantly Google is very significantly increasing its presence in the comparison (meta search) segment with its Google Flights and Google Hotel Search offer. As many (if not most) travellers begin their travel planning on Google and/or seek inspiration from social media, Google is in a unique position to attract and monetize travel traffic. The CMA recognised in its Final Report on the Online platforms and digital

advertising market study that not only are individual advertisers reliant on appearing within Google's search results and vulnerable to changes to its algorithm which impact user traffic; even specialised search providers are heavily reliant on user traffic from Google's search engine. The CMA found at paragraph 7.60 of that report that "*Google has entered into various specialised search markets, including flights, hotels and local searches, and is in a position to leverage market power from general search into these markets, harming rivals' ability to attract users.*" As online marketing becomes more complex and costly for travel suppliers and intermediaries alike, the incentive for suppliers to free-ride on the upfront investments of intermediaries becomes stronger and the need for protection from such free-riding becomes even more justified. This includes attempts by travel suppliers to divert bookings to less attractive, lower cost intermediaries. The free-riding rationale therefore extends beyond the direct sales channel to other third party booking sites. eutt considers that the 30% threshold under the UK VABEO and the CMA's ability to withdraw the safe harbour protection in individual cases provides sufficient safeguards that any problematic parity obligations in individual cases can be dealt with by the CMA. Conversely, eutt considers that the re-classification of indirect party clauses as hardcore restrictions would for the same reasons be disproportionate and, respectfully, irrational.

Question 32: To what extent are direct sales channel parity obligations relevant for your business's operations, or the operations of those you represent? Please explain your answer.

a) **Completely**
b) **Very much**
c) **Moderately**
d) **A little**
e) **Not at all**

Please refer to the response to Question 31. Furthermore, eutt notes that direct sales channel parity obligations constitute the foundation of the free-riding protection as it reflects a fair bargain between two businesses under which the intermediary makes considerable investments to promote the supplier's services at no upfront costs. At a minimum, the supplier should therefore be free (as a matter of competition law) to commit to making available competitive rates and availability to the intermediary, at the very least as compared to the supplier's own online sales channel. eutt welcomes the CMA's acceptance of this view which is reflected in the CMA's proposal to maintain the exemption for such direct sales channel parity obligations under the UK VABEO.

For the reasons given above in this submission, eutt further considers that the extension of such parity obligations to third party intermediary sites should equally be protected

under the UK VABEO and if this is not acceptable to the CMA, such indirect parity obligations should at least be treated as excluded restrictions to allow for an objective case-by-case assessment of such provisions in light of their legal and factual context, without any presumptions one way or another.

Question 33: Are you aware of any difficulties to your business if indirect sales channel parity obligations are treated as hardcore restrictions for the purposes of the proposed UK VABEO? Please explain your answer.

eutt respectfully submits that, for the reasons set out above, a decision by the CMA to re-classify indirect sales channel parity obligations as hardcore restrictions under the UK VABEO would be a matter of grave concern to eutt and its members. Without prejudice to the detailed points made above, eutt wishes to emphasise that (in its view) such a decision would be factually unfounded and legally flawed and therefore ultimately irrational. There simply is no consistent body of evidence which supports the position that such clauses typically generate meaningful anti-competitive effects across all sectors and in relation to businesses whose market presence may not be competitively meaningful.

Classifying indirect sales channel parity as hardcore restrictions would therefore lead to a significant welfare loss as a result of over-regulation (so-called 'Type 1' errors). This is because any such treatment would, in practice, lead to firms abandoning clauses which can deliver significant benefits or may at worst be competitively neutral, thereby restricting the ability of firms to engage freely in commercial negotiations, without any compelling reasons for such a restriction especially in the many sectors in which the effect of these indirect parity obligations have not been tested.

Such a decision would also create a significant substantive divergence from the (likely) EU law position from May 2022 onwards which – as is reasonably foreseeable already now – would give rise to significant business disruption and costs as businesses seek to adjust their business practices to accommodate a different regulatory environment in the UK when compared to the EU, such as in relation to the air travel booking ecosystem where indirect sales channel parity clauses are common across different levels of the supply chain, i.e. at the B2B and B2C level.

eutt therefore submits that for the reasons set out in this submission treating indirect sales channel parity obligations as hardcore restrictions would cause significant damage to the competitive process in many dynamic and competitive sectors, in particular in the online sector and ultimately would harm consumers by making it harder to find the best deals and reducing inter-brand competition.

III. Agency

Question 38: The CMA invites views on the above proposed recommendation in respect of agency issues and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

eutt agrees with the CMA's assessment that there is considerable legal uncertainty for businesses as to the legal classification for the purposes of EU and now also UK competition law of online intermediation platforms in the travel booking ecosystem (as well as more generally).

The existing EU case law and commentary in the Current EU Guidelines[11] on the concepts of genuine and non-genuine agency cannot readily to applied to the business model of many online intermediation platforms. Such businesses when they engage in a self-assessment of vertical restraints in their commercial agreements with their partners necessarily need to interpret these guidelines and this lack of clarity can cause complexity, delay and costs in relation to the commercial negotiations of such clauses.

eutt welcomes the CMA's recognition that additional guidance in this area would be helpful. eutt further agrees with the CMA that the appropriate framework for such additional guidance is not the UK VABEO but the CMA VABEO Guidance, on which the CMA proposes to consult later this year. However, as the CMA has invited initial comments on this issue in the context of the current Consultation, eutt wishes to make the following preliminary observations on the topic.

By way of a general, overarching comment, eutt is of the view that many online booking intermediaries meet the test for non-genuine agency under the current EU case law and the Current EU Guidance. First, as a matter of commercial reality, they typically act on behalf of travel suppliers (such as hotels and airlines) when offering travel services to consumers via their intermediation sites. Secondly, they are not engaged in a traditional sale/resale transaction for competition law purposes, as they take no legal title to any of the intermediated services.. However, when marketing the suppliers' travel services they do incur significant upfront costs which are not always necessarily reimbursed in all circumstances. These involve in particular significant IT and marketing costs. How such IT and marketing costs are to be assessed by reference to the cost categories identified in EU jurisprudence and reflected in the Current EU Guidelines[12], is a matter of ongoing debate and, as the CMA will be aware, is currently being tested by the Swedish competition authority's ongoing investigation into Finnair's commercial dealings with flight booking intermediaries.

It follows from such an analysis that travel suppliers are entitled to control the general parameters of the prices and conditions of the travel inventory they make available to intermediaries to be offered to consumers via these intermediaries' sites, while such intermediaries should remain free to use all or some of their compensation to apply

[11] Commission Notice – Guidelines on Vertical Restraints, SEC(2010) 411 at paras 12-21.

[12] See, for example, at paragraph 14.

discounts to the rates set by the suppliers, should they wish to do so. eutt considers such an assessment is legally and factually coherent and reflects the commercial reality of the online intermediary booking ecosystem.

eutt notes in this context that it would be highly desirable to arrive at an aligned position between the European Commission and the CMA on the appropriate categorisation of online intermediation platforms for the application of the revised VBER and the UK VEBEO next year and the application of the agency concept to such businesses, given the cross-border nature of most online intermediation business models. That said, eutt is currently reviewing the recently published Draft EU Guidelines, including the discussion of the agency concept. eutt notes that the European Commission's observations at paragraph 44 of the draft document are not inconsistent with eutt's view that online intermediation booking platforms could in many cases appropriately be classified as acting as non-genuine agents for travel suppliers, such as airlines and hotels.

About eu travel tech

eu travel tech represents the interests of travel technology companies. eu travel tech uses its position at the centre of the travel and tourism sector to promote a consumer-driven, innovative and competitive industry that is transparent and sustainable. Our membership spans Global Distribution Systems (GDSs), Online Travel Agencies (OTA), Travel Management Companies in business travel (TMCs) and metasearch sites.

eu travel tech's members include Amadeus, Booking.com, eDreams ODIGEO, Expedia Group, Skyscanner and Travelport. Associate members include American Express GBT, etraveli Group, Trainline and TripAdvisor. Strategic Partners include Travix, Travelgenio, and CWT.