NON-CONFIDENTIAL VERSION

OBSERVATIONS OF EU TRAVEL TECH ON THE DRAFT VERTICAL AGREEMENTS BLOCK EXEMPTION ORDER

1. EXECUTIVE SUMMARY

1.1 This memorandum has been prepared by eu Travel Tech ("**euTT**"), the trade association representing and promoting the interests of global distribution systems ("**GDS**") and travel booking intermediaries, including online travel agents ("**OTAs**") to relevant European stakeholders and policymakers. It constitutes euTT's response to BEIS' invitation to comment on the terms of the draft UK Vertical Agreements Block Exemption Order (the "**Draft Order**", and when adopted the "**UK Order**").[1] euTT had previously responded to the CMA's consultation in connection with its review of the existing Vertical Agreements Block Exemption Regulation, which had been retained from EU law (the "**retained VABER**"), which culminated in the CMA's recommendations to the Secretary of State as to whether the retained VABER should be renewed or varied (the "**Recommendations**").[2]

1.2 In this memorandum, euTT focuses on two specific aspects of the Recommendations which have been adopted by the Draft Order: (i) the categorization of OTAs as 'suppliers' of online intermediation services ("**OIS**"); and (ii) the proposal to include wide retail parity clauses (or Most Favoured Nation clauses – ("**MFN**"s)) within the 'blacklist' of hardcore restrictions under the UK Order.

I - Categorization of OTAs as "suppliers" of OIS

1.3 In its Recommendations to the Secretary of State, the CMA proposed that providers of OIS should be treated as "suppliers" for the purposes of the UK Order, which would have the effect of OTAs being classified as "suppliers".

1.4 The Draft Order has adopted this approach, specifying that "supplier" is defined as "*include*[ing] *an undertaking that provides online intermediation services irrespective of whether it is a party to the transaction it facilitates*".[3] This definition suggests that OTAs, which inevitably provide intermediation services in their function as agents, would cease to be categorized as "buyers" and would be exclusively considered to be "suppliers". This approach is inconsistent with the facts and lacks a solid evidential basis, as OTAs act as buyers of travel service provider services ("**TSP**") in relation to a substantial proportion of their activities.

1.5 If OTAs were exclusively treated as suppliers, TSPs would be likely to proceed on the basis that the blacklist of prohibited hardcore restrictions does not apply to their arrangements with OTAs, with the consequence that extensive pricing and marketing restrictions could be imposed on OTAs. This would prevent OTAs from providing pro-consumer benefits, such as discounts on travel fares and additional services which travel service providers cannot provide individually.

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[1] The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022, 2022 No. 0000 COMPETITION, available at the following url: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1055809/Draft__The_Competition_Act_1998__Vertical_Agreements_Block_Exemption__Order_2022__1_.pdf and Explanatory Memorandum To The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022, available at the following url: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1055802/Draft__EM_The_Competition_Act_1998__Vertical_Agreements_Block_Exemption__Order_2022.pdf.

[2] CMA's recommendation, *UK competition law: Vertical Agreements Block Exemption Regulation*, 3 October 2021, available at the following url: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1030880/VABER_Final_RecommendationOctober2021__PVedit.pdf.

[3] Draft Order, section 2.

1.6 The available data indicates that many UK consumers use OTAs to book travel services, and by classifying OTAs purely as suppliers under the UK Order, the CMA's Recommendations are likely to lead to adverse effects on UK consumers in the form of higher prices and a narrower range of travel services to choose from.

II - <u>The inclusion of wide retail MFNs in the list of hardcore restrictions</u>

1.7 In its Recommendations, the CMA proposed that "*wide retail parity obligations are treated as a hardcore restriction under the UK Order*".[4] As a consequence, these provisions would be treated as the most egregious form of restriction of competition law, which are blacklisted under the block exemption.

1.8 However, euTT submits that there is insufficient evidence or experience to support the general inclusion of wide retail MFNs on the blacklist, particularly in relation to international (cross-border) markets such as travel. In fact, these provisions can play an important role in protecting UK consumers from upward price discrimination.

1.9 The Explanatory Memorandum correctly states that "*wide parity obligations that apply to business-to-business markets will not be treated as hardcore restrictions under the new Order.*"[5] However, the distinction between wide retail and business-to-business ("**B2B**") MFNs is difficult to apply in practice, particularly in the travel industry.

1.10 In the air passenger transport sector, these provisions ensure that the same airline content (e.g. fares and additional services) is available to UK consumers on terms which are no worse than those available on other sales channels, and across all points of sale (both online and offline). Whilst the CMA acknowledges that wide retail parity provisions may be pro-competitive by suggesting that in certain circumstances they may satisfy the requirements for individual exemption, UK businesses are highly unlikely to be willing to take the risk of using these provisions once they are added to the list of blacklisted restrictions.

1.11 The inclusion of wide retail MFNs on the list of hardcore restrictions is therefore likely to be detrimental to UK consumers in particular sectors, such as international travel.

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[4] Recommendations, §5.90.

[5] Explanatory Memorandum, §7.40. In line with the CMA's Recommendations, point 5.93, a.

SECTION I - CATEGORIZATION OF OTAS AS 'SUPPLIERS' OF OIS

2. OTAS ARE LIKELY TO BE CATEGORIZED AS 'SUPPLIERS' OF OIS UNDER THE UK ORDER

2.1 In reviewing the retained VABER, the CMA recommended "*that providers of online intermediation services should be treated as suppliers for the purposes of the UK Order*."[6]

2.2 The Draft Order defines OIS as a service that "*allows undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded…*".[7]

2.3 In line with the CMA's Recommendations, the Draft Order includes within the definition of a "*supplier*" "*an undertaking that provides online intermediation services irrespective of whether it is a party to the transaction it facilitates*".[8]

2.4 OTAs facilitate direct transactions between TSPs (e.g. airlines, hotels, car rental companies, and train operators) and consumers through the OTAs' online platforms. These platforms provide consumers with the ability to search for, compare and purchase travel service products from multiple TSPs. It is important to note that in contrast with many meta search engine platforms ("**MSS**"), customers are able to purchase TSP services directly from the OTA's platform (as opposed to being directed to the TSP's website to complete the transaction). In this connection, OTAs' often superior search and booking functionalities are an important element of competition, which exert significant competitive pressure on TSPs to invest in improving their services.

2.5 Insofar as OTAs enable TSPs to offer services to consumers with a view to facilitating direct transactions between the TSP and consumers, OTAs might be regarded as "suppliers" of OIS to TSPs for the purposes of the Draft Order. On the current wording of the Draft Order, OTAs would entirely cease to be regarded as buyers, as the Draft Order does not appear to envisage the possibility that an OTA could be viewed as both a supplier of OIS to the TSPs and a buyer of the TSPs' products and services at the same time.

2.6 If this approach were taken, OTAs would cease to be regarded as buyers for the purposes of the Draft Order for some of their service offerings to consumers and, as a consequence, the provisions of the Draft Order which protect downstream buyers would no longer apply to OTAs.[9] This would have material adverse effects on UK consumers as it would enable TSPs lawfully to prevent OTAs from offering discounted prices and thereby from providing competitive offers to consumers. Similarly, the provisions prohibiting TSPs from limiting the OTAs' ability to advertise their services online (including their discounted prices) or to serve certain customer groups or geographies would no longer be considered to be hardcore restrictions insofar as they were applied in relation to OTAs.

3. IT IS INCORRECT TO TREAT OTAS AS BEING ONLY PROVIDERS OF OIS

3.1 Evidence gathered from euTT OTA members indicates that activities which fall outside the definition of OIS ("**non-OIS**" services) make up a material proportion of OTAs' activities in the UK. In relation to these non-OIS services, OTAs are acting as buyers, and it is important

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[6] Recommendations, §7.9.

[7] Draft Order, section 2.

[8] *Ibid*.

[9] Measures such as those which restrict a buyer's ability to determine its sales price are treated as 'hardcore' or 'blacklisted' provisions under the UK Order. As such measures are considered to be particularly serious restrictions of competition, these provisions are automatically excluded from the safe-harbour created by the UK Order.

to ensure that their UK customers can continue to benefit from access to competitively marketed and discounted travel products.

Non-OIS activities

3.2 Non-OIS activities include services such as:

(a) **Dynamic packages**: OTAs enable consumers to build their own package of flights, accommodation, and car rental instead of purchasing a pre-defined package. OTAs generally obtain reduced 'package-only' prices for the components making up the travel package and offer consumers a single, often significantly discounted, price covering all components of the package.

(b) **Cross faring offers**: This refers to a type of flight reservation provided by OTAs consisting of the combination of two fares on separate airlines for a single trip; an outbound fare on one airline and a return fare on another. This service is unavailable on airlines' websites, which are only able to display fares for a single airline or airlines belonging to the same group.

(c) **Virtual interlining offers**: This service closely resembles the service provided by airlines under interlining agreements. Under these agreements, airlines which carry passengers on different segments of a connecting flight agree to support and provide alternative solutions to passengers affected by delays or cancelations. The OTAs' 'virtual' interlining service provides the same guarantees to customers even in the absence of an interlining agreement between the airlines operating on the different segments of the connecting flight.

(d) **Multi-stop offers**: These services provided by OTAs enable customers to book tickets with different airlines and with different departure and arrival locations for the inbound and outbound flights (e.g. outbound between Paris-Tokyo and return between Kyoto-Paris).

(e) **Discounted prices**: OTAs also offer discounts on the consumer price of TSP tickets. The TSP receives the full asking price for the ticket and the discount is financed through the OTAs' own resources. Alternatively, the OTA receives a "net fare" from, for example, an airline which they can mark-up independently by deciding how much margin they require.

3.3 In relation to the offers mentioned at (a) above, it is clear that the OTAs are acting as buyers as they are defined as "organisers" under the relevant Package Travel/ATOL regulations,[10] making sales in their own names and bearing full liability for the packages they create. In relation to the offers mentioned at (b) to (d), the OTAs should also be regarded as buyers as they make specific investments to offer such products including investments in product creation and design (which are not available as part of airlines' offerings). It is therefore clear that offering such products, OTAs are not simply offering OIS to the airlines. In these circumstances, the OTAs are also providing specific assistance to travellers purchasing these services, in particular by creating products that are not provided by any particular airline. Finally, and particularly in relation to (e) above, the OTAs will be acting as buyers as they will provide agency services rather than simply OIS and the OTAs will also generally provide a discount financed by their own business operations (and not by the TSPs / principals).These non-OIS services represent a substantial proportion of the activities of euTT OTA members, with different OTAs focusing on different aspects of these non-OIS services.

[10] The Civil Aviation (Air Travel Organisers' Licensing) (Amendment) Regulations 2018 No. 670 (SI 2012/1017 and Directive (EU) 2015/2302 of 25 November 2015 on package travel and linked travel arrangements, OJ L 326, 11.12.2015, p. 1–33.

3.4 The tables below show data provided by two euTT OTA members, which are representative of the different models adopted by OTAs: one ("**OTA 1**") focuses on the provision of discounts on air fares and the sale of alternative combinations of air-tickets to consumers;[11] and the other ("**OTA 2**") on the sale of packages. In both cases, non-OIS activities represent a significant proportion of the OTAs' activities.

[CONFIDENTIAL] / OTA 1

3.5 In 2019,[12] one major euTT OTA member provided consumers with discounts on just [CONFIDENTIAL] of all airline bookings made through its UK registered websites.

3.6 Cross faring and virtual interlining offers (together "**Split Tickets**") also represented a similar proportion of all UK website bookings in that year ([CONFIDENTIAL]). As explained below, this figure is consistent with the data on Split Tickets provided by OTA 2. In this connection, [CONFIDENTIAL]% of OTA 1's UK website bookings in 2019 were multi-city offers.

3.7 However, packages represented a relatively [CONFIDENTIAL] of the bookings made on this OTAs' UK website in 2019 ([CONFIDENTIAL]%).

OTA 1 sales through a UK registered website in 2019	
Dynamic package:	[CONFIDENTIAL]
Cross faring offers:	[CONFIDENTIAL]
Virtual interlining offers:	[CONFIDENTIAL]
Multi-stop/multicity offers:	[CONFIDENTIAL]
Discounted prices (negative mark-up):	[CONFIDENTIAL]

3.8 Overall, just under [CONFIDENTIAL] of all bookings made through OTA 1's UK website in 2019 involved the provision of non-OIS services (even assuming that the sale of non-discounted tickets as an online agent could be viewed as the mere provision of OIS, which is far from certain as agency services are not limited to the provision of OIS).

[CONFIDENTIAL] / OTA 2

3.9 In contrast to OTA 1, package sales represented a much greater proportion of OTA 2's sales. In 2019, [CONFIDENTIAL]% of all revenue from the sale of airline tickets from an OTA 2 point of sale in the UK was generated through the sale of a package.

3.10 As noted above, the proportion of airline fares sold as Split Tickets (i.e. cross faring offers and virtual interlining offers) was similar to the figures provided for OTA 1. In 2019, approximately [CONFIDENTIAL]% of all airline tickets sold by OTA 2 from a point of sale in the UK were Split Tickets.

3.11 Revenue from the sale of airline tickets which involved the provision of a non-OIS service represented approximately [[CONFIDENTIAL]%] of all airline ticket revenue from a UK point of sale for OTA 2 in 2019. This figure does not include tickets on which OTA 2 offered a discount to consumers or marked up net rates, and therefore underestimates the overall proportion of revenue generated through the provision of non-OIS services.

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[11] The UK OTA 1's market share between 2019 and 2021 amounts to approximately [CONFIDENTIAL]%.

[12] The data provided corresponds to FY 2019, i.e. before the Covid-19 sanitary crisis, as this data is what euTT considers to be a true representation of the market.

Conclusion on non-OIS services

3.12 OTAs are in the position of a buyer with respect to a substantial proportion of the services they provide. This is particularly the case when combining a range of inputs received from different TSPs in order to provide the customer with new services and products (which are not offered by TSPs). In such cases, the OTAs incur responsibilities and costs vis-à-vis the customers and have a material impact on the prices offered to end-consumers, including by funding discounts themselves. Accordingly, they should be considered as buyers under the UK Order. euTT would further observe that the typical services of the OTAs are also provided "off-line" by "off-line" travel agents ("**bricks & mortar TAs**"). The approach adopted in the Draft Order would put OTAs in a materially different position from the bricks & mortar TAs, as bricks & mortar TAs would continue to be treated as buyers for the purposes of the Draft Order, whereas OTAs would not. There is no credible rationale and no legal or factual basis for such a distinction.

3.13 Moreover, OTAs provide their services over the phone as well as via their websites. Services provided over the phone do not constitute "online services"[13] and would not fall within the definition of OIS as set out in the Draft Order (see §2.2 above).

3.14 Consequently, an entirely different competition law regime (and different compliance rules) would apply to the commercial relationship between TSPs and OTAs depending on whether the service the OTA provides is provided over the phone or via the OTA's website. This outcome would undermine one of the core objectives of the Draft Order: providing legal certainty. euTT submits that this cannot have been the CMA's intention when drafting the Recommendations.

4. CATEGORIZING OTAS AS 'SUPPLIERS' UNDER THE DRAFT ORDER IS LIKELY TO RESTRICT THE PRO-CONSUMER SERVICES OTAS CAN OFFER

4.1 The services provided by OTAs benefit consumers, primarily in the form of lower prices on TSP fares (as a result of self-financed discounts) and by offering a wider range of services (through OTA offers which combine different services).

4.2 It is essential that OTAs continue to be covered by the provisions of the UK Order in their capacity as buyers if they are to continue to play this significant pro-consumer role.

4.3 The existence of the blacklist of hardcore restrictions which are presumed to restrict competition, has a strong deterrent effect by discouraging TSPs from engaging in practices which restrict the competitive pressure OTAs can exert on TSPs. This is particularly the case in relation to retail price maintenance ("**RPM**") and restrictions on the ability of the OTAs to market their services and products via the internet (e.g. through proposing their discounted prices on price comparison sites or by bidding for the TSPs brand on search engines).

4.4 As buyers of TSP services under the current VABER, OTAs can refer to the VABER blacklist in commercial negotiations with TSPs if TSPs attempt to impose blacklisted restrictions on them.

4.5 The VABER blacklist also considerably reduces the risk of disputes and litigation between TSPs and OTAs, as well as complaints to competition authorities. In the absence of the protection provided by these provisions OTAs would find it much harder to continue to engage in their pro-competitive activities, which directly benefit UK consumers. This is because, faced with the costs and uncertainties of having to dedicate considerably more time and resources to prevent anti-competitive measures such as those referred to above

[13] See, for example, Annex I of the Notification Directive (EU) 2015/1535 which states that services provided via voice telephony fall outside of the scope of the definition of OIS, as the 'information society services' definition excludes voice telephony services, as "*such services are not provided by electronic means*".

being imposed on them through complaints to regulators and actions in the courts, OTAs would likely curtail their pro-competitive activities in the UK.

Restriction on passive sales

4.6 One consequence of categorizing OTAs as suppliers rather than buyers for the purposes of the UK Order is that measures introduced by TSPs which directly or indirectly restrict the OTAs' ability to advertise their services online would no longer be covered by the provisions excluding restrictions on passive sales from the scope of the VABER.

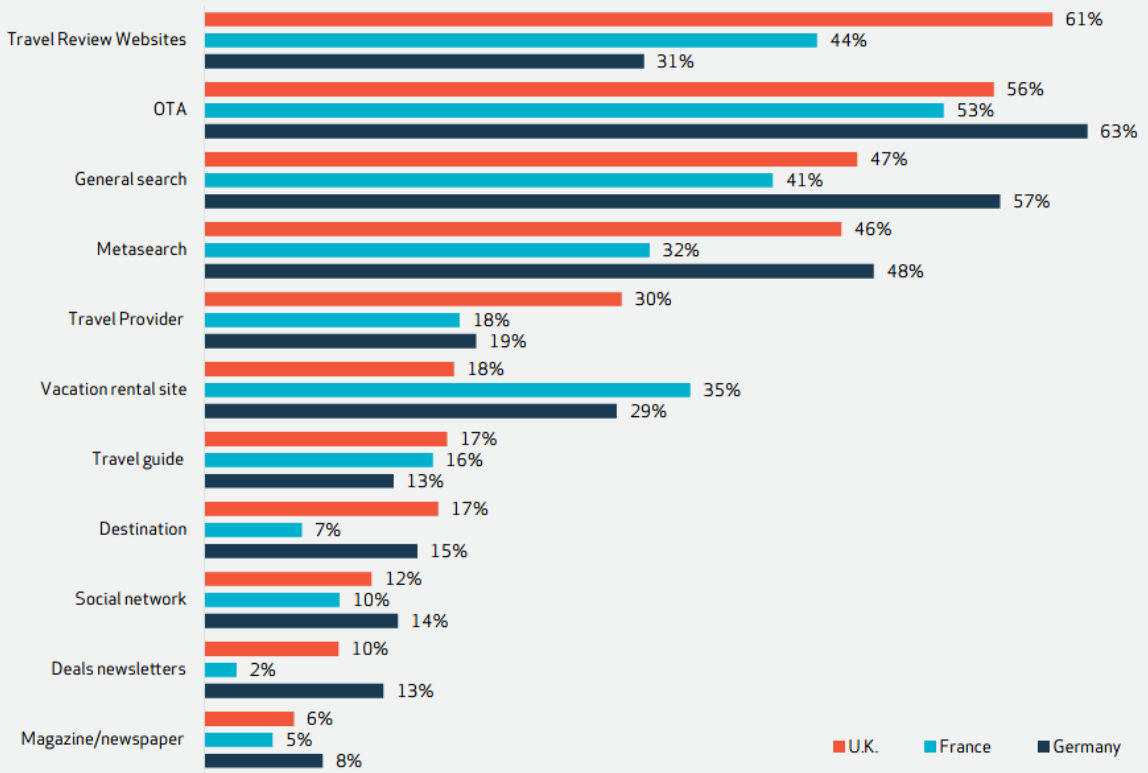
4.7 Under the retained VABER, OTAs can rely on the clear prohibition against measures introduced by TSPs (as 'suppliers' of passenger transport services), which prevent OTAs (as 'buyers and resellers' of those services) from advertising their services online (also referred to as 'passive sales').

4.8 In addition to using their own platforms, OTAs advertise their services using paid for search results on general search engines and MSS.

4.9 Research by Phocuswright (a leading data analysis company in the travel sector) in 2018 shows that both search engines and MSS are some of the most commonly used platforms by UK consumers for comparing and choosing travel products. 47% of UK participants in the study indicated that they use general search engines for comparing and choosing travel products. 46% indicated that they use MSS for the same purpose:[14]

[14] Phocuswright White Paper, Travel Tech: Creating Value and Driving Recovery, January 2022, p. 19.

Websites Used For Comparing And Choosing Travel Products



Source: Phocuswright's *Europe Consumer Travel Report 2018*

4.10 OTA evidence also confirms that these platforms are responsible for driving a significant proportion of traffic to the OTAs' websites:

(a) **Paid for search results**: data from OTA 1 indicates that traffic generated by paid for search results using an airline's brand name represented [CONFIDENTIAL]% of all of its bookings in 2019.

(b) **MSS**: sales driven by MSS advertising can represent up to [CONFIDENTIAL]% of sales for certain OTAs.

4.11 These channels are, therefore, an important means of bringing the services offered by OTAs to consumers' attention.

4.12 The provisions of the VABER, as interpreted in the Commission's decisional practice, play a critical role in ensuring that OTAs can use these channels to advertise their services.

4.13 Prior to the *Guess* decision, numerous airlines imposed brand bidding restrictions in their contracts with OTAs. Following the clarification by the Commission that brand bidding restrictions in which the clothing company engaged constitute a restriction on passive sales, and therefore a blacklisted restriction,[15] certain airlines disapplied or removed these provisions from their contracts with OTAs.

[15] Commission decision C(2018) 8455 of 17 December 2018 in Case AT.40428, *Guess*, section 6.3.2.2.

4.14 Treating OTAs as suppliers under the UK Order would effectively roll back the protections afforded to OTAs with respect to paid for search results. This, in turn, would ultimately reduce the visibility of OTA services to consumers, restricting consumer choice in the UK.

4.15 Equally, numerous airlines have attempted to impose provisions in their contracts with OTAs which prevent OTAs from advertising their offers on MSS. As a consequence, when searching for the best offers available for a certain itinerary, consumers are only presented with the airline's offering (and not the OTAs' offers). Moreover, if MSS advertising is restricted, consumers will not be presented with the additional options (e.g. Split Tickets) and discounted prices that the OTAs can provide for the consumer's preferred itinerary. As a result, UK consumers will be prejudiced.

4.16 These examples show that there is a highly credible prospect that, if the protections of the retained VABER are withdrawn from OTAs, TSPs will take measures to curb OTAs' ability to reach UK consumers through general search and MSS advertising.

Risk of RPM

4.17 As explained above, a further consequence of categorizing OTAs as suppliers for the purposes of the UK Order is that measures which directly or indirectly restrict an OTA's ability to discount TSP fares will not fall within the scope of the blacklist, which effectively prohibits RPM.

4.18 Under the retained VABER, OTAs can rely on the clear prohibition against RPM measures introduced by TSPs (as suppliers of passenger transport services), which prevent OTAs (as buyers and resellers of those services) from offering discounts to UK consumers.

4.19 euTT's OTA members are concerned that, in the absence of a clear prohibition against RPM, TSPs will seek to prevent OTAs from offering discounts to UK consumers.

4.20 euTT OTA members' experience suggests that these concerns relating to TSPs attempting to curb discounts being offered by OTAs are well founded.

4.21 For example, in 2019 Finnair imposed measures on OTAs which prevented them from advertising discounts on the airline's fares on MSS, by requiring them to advertise the airline's tickets on MSS at a price which was no lower than the indirect channel list price for the airline's tickets (published on the GDSs).

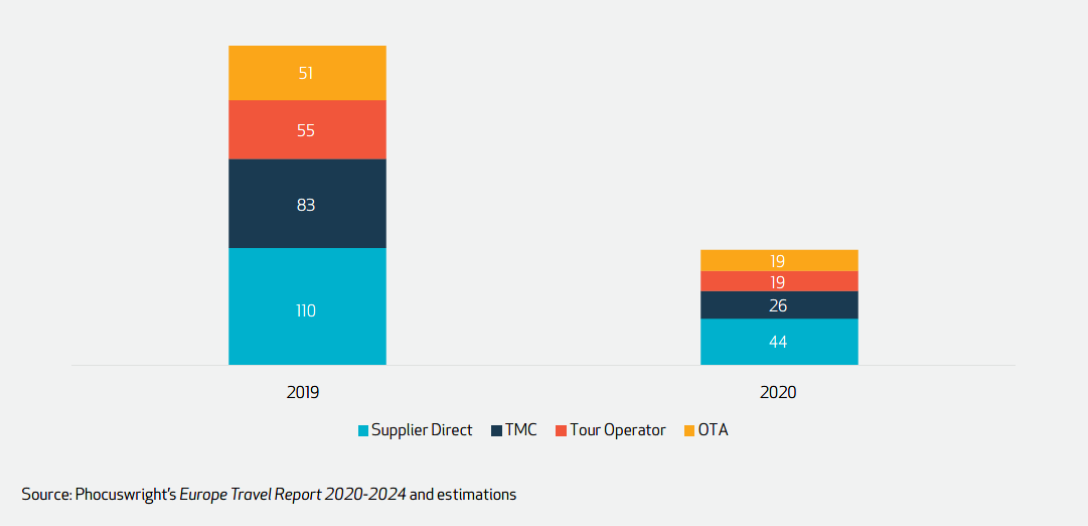
4.22 The impact of this measure is significant, as explained above, MSSs are a major source of traffic to OTA websites. These platforms allow consumers to search for and compare airline offers for a desired itinerary based on a number of criteria, the first of which is the cost of the ticket. Consumers are prevented from benefitting from the discounts OTAs can offer on Finnair flights, as the OTAs' offer will generally appear to be as or more expensive than the airline's own offer. Consumers are therefore highly unlikely to click through to the OTA's website (i.e. the stage at which the OTA would be permitted to apply the discount to Finnair's ticket price). The measure introduced by Finnair is currently under investigation by the Swedish competition authority.

4.23 Accordingly, euTT is concerned that if OTAs are no longer covered by the provisions of the UK Order as buyers, attempts by TSPs to impose fixed minimum retail prices are likely to become more direct, overt and frequent.

Impact on UK consumers

4.24 A recent Phocuswright study has shown that OTAs alone represented approximately 17% of all travel revenue in Europe in 2019 and 2020. OTAs have also facilitated approximately 20% of bookings in the European travel market during the 2020 crisis.[16]

European Travel Gross Revenues By Channel (€B), 2019-20

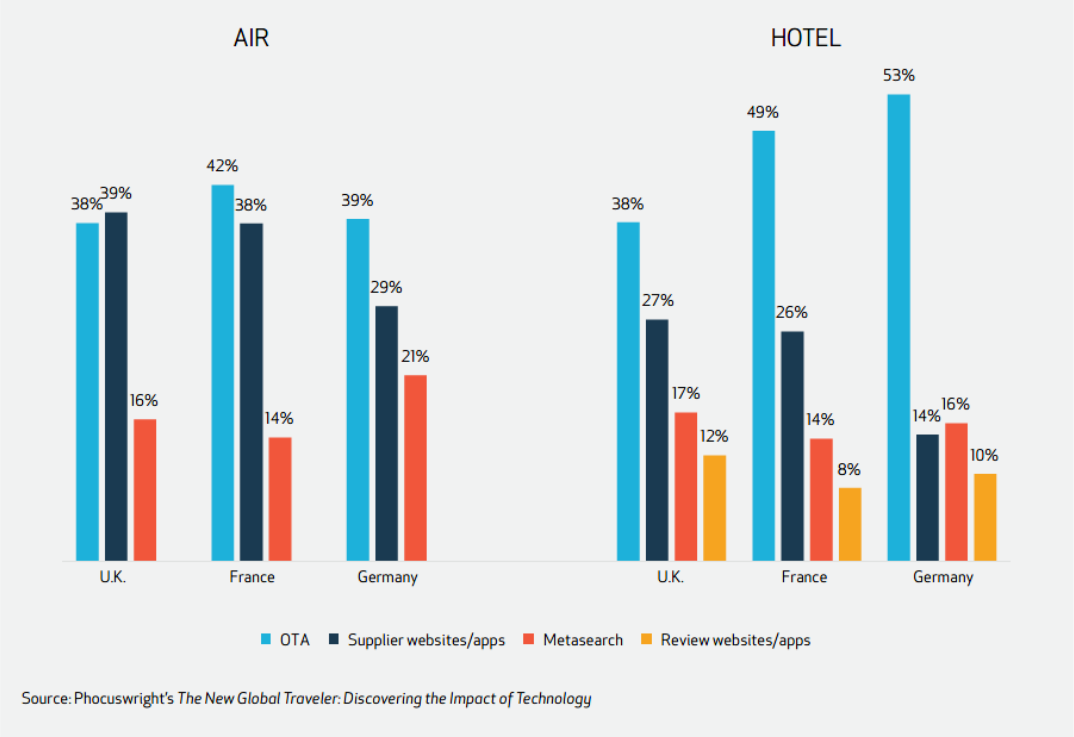


4.25 OTAs are also reported to be the second most popular website for travel bookings for UK consumers. 38% of UK participants in a recent study by Phocuswright indicated that OTAs were their preferred websites for travel bookings:[17]

[16] Phocuswright White Paper, *Travel Tech: Creating Value and Driving Recovery*, January 2022, pp. 16-17.

[17] Phocuswright White Paper, *Travel Tech: Creating Value and Driving Recovery*, January 2022, p. 20.

Preferred Websites for Travel Booking



Source: Phocuswright's *The New Global Traveler: Discovering the Impact of Technology*

4.26 This data demonstrates that OTAs provide services that are valued and regularly used by UK consumers. The changes recommended by the CMA and as set out in the Draft Order are likely to significantly reduce the benefits UK consumers obtain from these services.

5. CONCLUSION ON THE RECOMMENDATION TO CATEGORISE OTAS AS 'SUPPLIERS' OF OIS UNDER THE UK ORDER

5.1 As explained above, UK consumers derive a significant benefit from the use of OTAs both in the form of lower prices and access to services which are not available directly from TSPs.

5.2 These benefits are currently protected by the provisions of the retained VABER, as any measures which attempt to restrict the OTAs' ability to determine their sales prices or which prevent them from advertising their services online are treated as hardcore restrictions and are automatically excluded from the block exemption. This pro-competitive position would change as a result of the CMA's Recommendations (as adopted in the Draft Order) to treat OTAs as suppliers of OIS, as such practices would no longer be clearly banned by the blacklist of the VABER, and their compatibility with competition rules would become the subject of complex and lengthy debates.

5.3 The CMA's blanket recommendation, which would treat OTAs as suppliers of OIS is not grounded in evidence, as non-OIS activities make up a substantial proportion of OTAs' activities. There seems, therefore, to be little reason to treat them as suppliers of OIS to the TSPs when they are in effect essentially buyers and resellers of the TSPs services and products. Moreover, UK consumers are likely to suffer significant harm as a consequence of the likely imposition by TSPs on the OTAs of RPM clauses and limits on their ability to advertise their services, as the pro-consumer services provided by OTAs will no longer be protected by the UK Order if the Draft Order is adopted in its current form.

5.4 In view of these considerations, euTT submits that section 2 of the Draft Order should be amended as follows:[18]

> "*buyer" means the purchaser of the contract goods or services and includes an undertaking which, under an agreement to which the Chapter 1 prohibition applies, sells goods or services on behalf of another undertaking; a supplier of OIS to a particular undertaking shall not cease to be a buyer in relation to such an undertaking in so far as it purchases goods or services from such an undertaking or sells goods or services on behalf of such an undertaking.*

[18] euTT's proposed amendments have been highlighted in red below.

SECTION II - THE INCLUSION OF WIDE RETAIL MFNS WITHIN THE LIST OF BLACKLISTED RESTRICTIONS

6. THE PROPOSAL TO ADD WIDE RETAIL MFNS TO THE LIST OF BLACKLISTED RESTRICTIONS

6.1 In relation to parity obligations (MFNs), the CMA recommended to the Secretary of State that the UK Order should be drafted so "*that wide retail parity obligations are treated as a hardcore restriction under the UK Order*".[19]

6.2 A "*wide retail parity obligation*" is defined in the Draft Order as "*a restriction by reference to any of the supplier's indirect sales channels (whether online or offline, for example online platforms or other intermediaries), which ensures that the prices or other terms and conditions at which a supplier's goods or services are offered to end users on a sales channel are no worse than those offered by the supplier on another sales channel*."[20]

6.3 In line with the CMA's Recommendations, Article 8(2)(f) of the Draft Order designates "*a wide retail parity obligation or measure that has the same effect*" as a hardcore restriction.

6.4 Consistent with the CMA's Recommendations, the Explanatory Memorandum at paragraph 7.40 also notes that "*wide parity obligations that apply to business-to-business markets will not be treated as hardcore restrictions under the new Order. Although these parity obligations could potentially soften competition between intermediaries in a similar way as in business to consumer (i.e. retail) markets, the overall competitive harm and direct effect on consumers is less clear and will depend on the complexity of the vertical supply chain and the strength of competition downstream.*"

6.5 Whilst the CMA's Recommendations and the position adopted in the Draft Order with respect to wide parity obligations that apply to B2B markets is in euTT's view appropriate, euTT submits that:

(a) there is insufficient evidence or experience to support the inclusion, across all industries, and in particular the travel industry, of wide retail MFNs on the UK Order blacklist; and

(b) the distinction between wide retail and B2B MFNs is difficult to apply in the travel industry and generates an undesirable level of uncertainty.

6.6 For these reasons, as explained in more detail below, euTT believes that both retail and B2B wide MFNs should be assessed on a case-by-case basis, as the current proposal is likely to lead to a detriment to UK consumers.

7. THERE IS INSUFFICIENT EVIDENCE OR EXPERIENCE TO SUPPORT THE GENERAL INCLUSION OF WIDE RETAIL MFNS ON THE UK ORDER BLACKLIST, PARTICULARLY IN INTERNATIONAL MARKETS SUCH AS TRAVEL

7.1 Blacklisted restrictions under the retained VABER are those restrictions which are deemed by the European Commission to constitute restrictions by object,[21] i.e. those which by their very nature can be presumed to restrict competition and be harmful to consumers in all circumstances. These types of restriction, such as price fixing, market sharing and bid-rigging, as well as RPM, are considered to be the most serious types of competition law breaches and accordingly are presumed to be anticompetitive. No analysis of their effects

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[19] Recommendations, §5.90.

[20] UK Order, Article 8 (5).

[21] Commission Guidelines on the application of Art. 101(3), §23.

is required to find an infringement. Importantly, these types of restrictions can safely be presumed to be anti-competitive across all business sectors.

7.2 This *a priori* or presumptive approach to *by object* restrictions is therefore only justified where there is "*sufficiently reliable and robust experience for the view to be taken that* [an] *agreement is, by its very nature, harmful to the proper functioning of competition.*"[22]

7.3 In its Recommendations, the CMA's conclusion that wide retail MFNs should be blacklisted appears to be based primarily on its experience in cases in which these provisions have been applied in national markets, such as in its private motor insurance or home insurance investigations.[23]

7.4 There appears to be very little or indeed no evidence presented in the Recommendations on the impact of these provisions where the market at issue is international in scope, as is the case for travel services.[24] For these cross-border markets, there are credible reasons to believe that wide retail MFNs may lead to benefits for UK consumers, particularly following Brexit.

7.5 By way of illustration, prior to the UK's departure from the EU, TSPs were prevented from engaging in price discrimination between Member States by EU internal market regulations,[25] and the Geoblocking Regulation (which for instance covers online hotel booking services),[26] but also European Court of Justice competition law precedents, which prohibited restrictions on parallel trade between Member States.[27]

7.6 Post-Brexit, these rules no longer prevent TSPs from implementing higher prices for UK consumers via their own direct channels.

7.7 In general, OTAs negotiate wide retail parity provisions at a regional level (e.g. for Europe as a whole or with worldwide scope). If wide retail MFNs are blacklisted under the UK Order, OTAs will be required to implement a national carveout from these wide parity provisions for the UK.

7.8 As a consequence, not only will TSPs be able to implement an upward price discrimination strategy in the UK under their agreements with OTAs, as compared to other European countries, TSPs will also be entitled to implement upward price discrimination for indirect channels in the UK, as compared to their own direct channels.[28]

7.9 In this connection, it is important to bear in mind the limited evidence available to the CMA on the impact of wide retail MFNs in international markets (and in particular the travel industry), as well as the potential benefits of these provisions in mitigating price discrimination strategies which may prejudice UK consumers. When these factors are taken

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22 Judgment of 2 April 2020, *Budapest Bank*, C-228/18, EU:C:2020:265, §76.

23 Recommendations §5.81.

24 It is noted that the Recommendations refer to the OFT's investigation into hotel online booking at §5.81 and footnote 156 but, as noted, that case was closed on administrative priority grounds without reaching any conclusions.

25 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (Text with EEA relevance) OJ L 293, 31.10.2008, p. 3–20.

26 Regulation (EU) 2018/302 of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market, OJ L 60I , 2.3.2018, p. 1–15.

27 See in this regard the judgment of 27 September 2006, *GlaxoSmithKline Services Unlimited*, T-168/01, ECLI:EU:T:2006:265, §190.

28 Indeed, this reflects euTT members' experience in other instances in which wide retail parity provisions have been withdrawn in international markets, albeit in markets with a more diffuse supplier base. The high levels of concentration on travel markets such as air passenger transport and car hire further increase the likelihood of success of a price discrimination strategy of the kind described above.

into account, the CMA does not appear to have "*sufficiently reliable and robust experience*" confirming that these provisions are by their very nature harmful to the proper functioning of competition in the UK.

7.10 It is also necessary to bear in mind that TSPs (particularly airlines) may benefit from strong market positions in relation to certain routes or certain hubs, as demonstrated by the fact that in recent State aid decisions, the European Commission has imposed remediation measures in light of the aid recipient's large market shares in certain hubs.[29] These market positions are likely to be strengthened as may smaller TSPs become weaker or exit the market following the Covid-19 pandemic and now the war in Ukraine. The assessment of wide retail MFNs as regards consumers needs to take into account the possibility that a dominant TSP may discriminate in favour of its own online distribution platform(s) in the absence of wide retail MFNs. The CMA does not appear to have analysed the potential impact of wide retail MFNs in the context of suppliers benefitting from a local / regional dominant position in relation to very specific services such as a pair of destinations served by airflights.

7.11 euTT submits that the approach of the Draft Order to wide retail MFNs, which departs from the current position of the European Commission, may in fact lead to higher prices for UK consumers.

8. THE DISTINCTION BETWEEN WIDE RETAIL AND B2B MFNS IS DIFFICULT TO APPLY IN PRACTICE AND GENERATES AN UNDESIRABLE LEVEL OF UNCERTAINTY

8.1 The Draft Order takes a very different approach as between wide retail and B2B parity provisions, which ignores the fact that it can be difficult to draw a clear distinction between these types of provisions, particularly in the travel industry.

8.2 As a preliminary comment, euTT notes that the Explanatory Memorandum states that: "*Parity obligations can apply to retail markets (referred to as retail price parity obligations) and business-to-business markets*".[30] However, in practice, there is a considerable overlap between wide B2B MFNs and wide retail MFNs, such as in the air travel sector.

8.3 GDSs, for example, typically negotiate parity provisions in their agreements with airlines, which ensure that a GDS has access to airline content (i.e. as regards fares, inventory, rules, products and services), on no worse terms and conditions than those offered to other GDSs. These parity clauses cover, among other things, retail fares, i.e. fares which "*apply to retail markets*". As customers of the GDSs, OTAs will benefit (indirectly) from such B2B parity clauses as they will source from the GDSs the best possible conditions on the market. The OTAs also negotiate similar wide *retail* content parity provisions with airlines, which provide the OTA with access to the same content that is offered on all direct and indirect channels, on no worse terms and conditions than those offered on those channels.

8.4 In both cases (i.e. via agreements between the GDSs and TSPs which use a B2B parity clause or via direct agreements between OTAs and TSPs which use a wide retail MFN clause), the OTA is provided with the same benefit and the impact on the market is very similar, i.e. the OTAs benefit from content on terms and conditions that are no worse than those offered on all other indirect channels.[31] Moreover, the airline's content will generally be made

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29 Commission Decision C(2020) 4372 of 25 June 2020 in case SA.57153 (2020/N), *Lufthansa*.

30 Explanatory Memorandum, §7.40.

31 The fact that the wide parity provision negotiated by the OTA also covers the direct channel does affect the analysis presented above. The 'wide parity' terminology used by the CMA includes both provisions which apply to all indirect channels and provisions which apply to both direct and indirect channels (Recommendations, §5.80 and 5.92). Moreover, in practice, this type of provision is likely to increase the range of fares and ancillary services made available to consumers by OTAs – as some airlines withhold certain fares from indirect channels – and is likely prevent upward price discrimination against indirect channels.

available to the OTA in precisely the same manner in both scenarios; i.e. via a GDS or via a direct agreement with the TSP(s).[32]

8.5 In both cases, the OTA is free to decide to provide its customers with a different offer from its competitors (e.g. offering some flight-related services but not others) and is also free to offer the consumer a discount on the price of the fare. In this connection, discounts are an important part of an OTA's service offering (see sections 3 and 4 above).

8.6 The only real difference between these scenarios is that the parity provision has been negotiated by a firm operating at a different level of the travel supply chain. However, in one scenario the GDS parity provision would be covered by the UK Order block exemption whereas, in the other, the OTA parity provision would be treated as the most egregious form of restriction of competition law and would be blacklisted under the UK Order. This radical difference in treatment cannot be justified merely on the perceived basis of the level of the supply chain at which a company operates. In fact, while GDSs and OTAs operate under different business models, both perform intermediary distribution functions.

8.7 Further, many OTAs operate B2B affiliate programmes under which an OTA (***Firm A***) sources content from TSPs to make such content available to third party OTAs. To the extent that Firm A negotiates terms with a TSP with a view to making the TSP's travel services available to third party OTAs, those terms would presumably be covered by the proposed 'business- to-business markets' safe harbour. However, should Firm A make such TSP offers available to its own vertically integrated consumer OTA business, the upstream wide retail MFN would be considered to be a blacklisted restriction. Moreover, Firm A above may also supply TSP content (including retail rates) to bricks & mortar TAs (just as GDSs do).

8.8 From the perspective of the UK consumers, these parity provisions, whether negotiated at the B2B or business-to-consumer ("**B2C**") level, ensure that the same content is available to them for retail distribution on terms which are no worse than those available on other channels, and across all points of sale (both online and offline).[33]

8.9 The CMA appears to implicitly acknowledge that wide retail parity provisions may be pro-competitive, indicating that it's approach is designed to "*deter wide retail parity obligations in all but those cases where it can be shown on an individual analysis that the exemption criteria in section 9 of the Act are met.*"[34]

8.10 However, the CMA's statement ignores the fact that an individual exemption for a by object restriction is in practice a theoretical possibility. Indeed, in relation to the EU VBER which is currently part of UK law in the form of the retained VABER, the Commission noted that "[t]*he more restrictive the restraint the stricter the test under the third condition* [of the individual exemption provision, i.e. indispensability]*. Restrictions that are blacklisted in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices are unlikely to be considered indispensable*."[35] Other than in relation to airline alliances (which are a form of merger) it is difficult to think of any object restriction that has ever been found by a competition authority to benefit from an individual exemption. Indeed, as Professor Richard Whish states, "[s]*ince the adoption of Regulation 1/2003 there*

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[32] One exception to this is where OTAs have implemented a 'direct connect' with the relevant airline, which bypasses the GDSs. However, recent market studies suggest that bookings made using a GDS bypass accounted for fewer than 5 % of worldwide passenger bookings in 2018. See in this regard the CMA final report on the anticipated acquisition by Sabre Corporation Inc. of Farelogix Inc., §18.

[33] As noted above, the OTA remains free to further improve those terms by providing a discount on the list price for the airlines' tickets.

[34] Recommendations, §5.99.

[35] Commission Guidelines on the application of Art. 101(3), §79.

has not been one Commission decision in which an agreement was found to satisfy Article 101(3)".[36]

8.11 In practice, the compliance guidance that is provided to companies is to avoid including any object restrictions, including any clause blacklisted by block exemptions, in their commercial agreements. Accordingly, the policy will be to avoid wide retail MFNs in the UK at all costs. In view of the risk of fines and follow-on claims, it is highly unlikely that UK businesses would be willing to take the risk of using these provisions, even if the consumer benefits were clear.

8.12 This 'chilling effect' is all the more likely given the CMA's decision on 15 June 2021 to no longer provide short form opinions. UK businesses will not, therefore, be able to obtain comfort that a wide retail MFN which is considered likely to produce pro-consumer effects in a particular industry and circumstances, would satisfy the exemption criteria under section 9 of the Competition Act 1998 (as amended).

9. CONCLUSION ON THE RECOMMENDATION TO INCLUDE WIDE RETAIL MFNS TO THE LIST OF BLACKLISTED RESTRICTIONS

9.1 In light of the considerations set out above, euTT invites the Secretary of State to amend the Draft Order so that wide MFNs are removed from the blacklist. This is because there is insufficiently reliable and robust evidence to show that these provisions are inherently harmful to competition, across all sectors, which warrant treatment as *by object* restrictions. On the contrary, wide retail parity provisions may well be beneficial to UK consumers, for example in international markets such as the travel industry, where previously existing protections against price discrimination under EU law no longer apply.

9.2 It should be added that TSPs may have a high level of market power in relation to specific routes / specific hubs, thus leading to a real risk of price discrimination that would prejudice consumers. In such circumstances, wide MFNs would help to mitigate the risk of price discrimination which would impact negatively consumers.

9.3 Based on the CMA's recommendations, the Draft Order draws a radical distinction between, on the one hand, wide B2B parity provisions – which would benefit from the UK Order block exemption and, on the other, wide retail parity provisions – which are treated as the most egregious form of competition law restriction.

9.4 In practice, the distinction between these two types of provision is hard to maintain, which is a further reason why wide retail MFNs should be assessed on a case-by-case basis under the UK Order.

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[36] Whish and Bailey, "Competition Law", 9th edition, p. 161.

10. CONCLUSION ON EUTT'S OBSERVATIONS ON THE CMA'S RECOMMENDATIONS REGARDING THE UK VABE ORDER

10.1 In view of the above, euTT invites the Secretary of State to consider the following amendments to the UK Order:

(a) An amendment to section 2 of the Draft Order, amending the definition of a "buyer" as follows:

"buyer" means the purchaser of the contract goods or services and includes an undertaking which, under an agreement to which the Chapter 1 prohibition applies, sells goods or services on behalf of another undertaking; a supplier of OIS to a particular undertaking shall not cease to be a buyer in relation to such an undertaking in so far as it purchases goods or services from such an undertaking or sells goods or services on behalf of such an undertaking.

(b) An amendment to section 8 of the Draft Order, removing wide retail MFNs from the list of hardcore restrictions.

10.2 euTT would welcome an opportunity to discuss the contents of this memorandum with BEIS officials.