OBSERVATIONS OF EU TRAVEL TECH ON THE CMA'S DRAFT VABEO GUIDANCE

1. EXECUTIVE SUMMARY

1.1 This memorandum has been prepared by eu Travel Tech ("**euTT**"), the trade association representing and promoting the interests of travel booking intermediaries, including online travel agents ("**OTAs**") and global distribution systems ("**GDS**") to all relevant European stakeholders from industry to policymakers, and constitutes euTT's response to the CMA's invitation to comment on the terms of the draft guidance to accompany the 2022 Vertical Agreements Block Exemption Order ("**Draft VABEO Guidance**").[1]

1.2 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**"), and 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] Subsequently, euTT submitted a Memorandum ("**BEIS Submission**", which is attached at **Annex 1**) in response to BEIS' invitation to comment on the terms of the draft UK Vertical Agreements Block Exemption Order (referred to in the Draft VABEO Guidance and below as the "**VABEO**").[3][4]

1.3 This memorandum focuses on the CMA's proposed approach in the Draft VABEO Guidance in relation to:

I. the categorization of online travel agents ("**OTA**"s) as "suppliers" of online intermediation services ("**OIS**");

II. the inclusion of wide retail parity clauses (or Most Favoured Nation clauses ("**MFN**"s)) within the "blacklist" of hardcore restrictions under the VABEO;

III. the approach taken to minimum advertised price polices ("**MAP**"s) in the context of online agency; and

IV. the restrictions on the use of search engines (via the prohibition of brand bidding) and the use of price comparison tools.

I - Categorization of OTAs as "suppliers" of OIS

1.4 It follows from the wording of the Draft VABEO Guidance that providers of OIS can never act as "genuine agents"[5] for the purpose of applying the Chapter I prohibition and should instead be categorised as "suppliers".[6] However, as explained below, whilst it may well be the case

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1 CMA guidance on the Vertical Agreements Block Exemption Order, 31 March 2022 CMA154.

2 CMA's recommendation, *UK competition law: Vertical Agreements Block Exemption Regulation*, 3 October 2021.

3 The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022, 2022 No. 0000 COMPETITION, and Explanatory Memorandum To The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022. The Memorandum focussed on (i) the categorization of OTAs as "suppliers" of online intermediation services; and (ii) the proposal to include wide retail parity clauses (or Most Favoured Nation clauses) within the "blacklist" of hardcore restrictions under the UK Order. See **Annex 1** in this regard.

4 euTT notes that the CMA has chosen to incorporate certain parts of the European Commission's draft revised Vertical Guidelines into its own Draft VABEO Guidance. To the extent that the CMA is considering adopting any material changes incorporated into the final version of the Vertical Guidelines in the CMA's guidance on the VABEO, euTT respectfully submits that it and other stakeholders should be provided with an opportunity to comment on those changes before the final VABEO guidance is published.

5 euTT notes that the Draft VABEO Guidance does not use the term "genuine agent". This term is however used here for ease of exposition of euTT's submissions.

6 Draft VABEO Guidance, para 6.26.

that the providers of OIS do not qualify as "genuine agents", it is clear that they can constitute "non-genuine agents",[7] and therefore "buyers" within the meaning of the VABEO.

1.5 The Draft VABEO Guidance fails to recognise this important point by asserting that "*…the undertaking providing online intermediation services cannot qualify simultaneously as a buyer within the meaning of Article 2(1) of the VABEO in relation to the transaction that it facilitates*."[8] As a result of the CMA's stance, OTAs, which provide online intermediation services in their function as ("non-genuine") agents, would cease to be categorized as "buyers", and thus would exclusively considered to be "suppliers" for the purposes of the VABEO. This approach is inconsistent with the facts, as OTAs act as "buyers" of travel service provider ("**TSP**") services in relation to a substantial proportion of their activities, as explained further below.

1.6 As a consequence of the categorization of OTAs as "suppliers", the provisions of the VABEO which protect downstream buyers would no longer apply to OTAs, and TSPs would be free to proceed with imposing restrictions on OTAs (which would otherwise be "blacklisted") on the basis that the "blacklist" of prohibited restrictions does not apply to their arrangements with OTAs.[9]

1.7 Classifying OTAs purely as "suppliers" under the VABEO, is likely to lead to adverse effects on UK consumers in the form of (i) higher prices, (ii) lower levels of customer services / booking functionality innovation and (iii) a narrower range of travel services to choose from.

1.8 In section I below, euTT explains why OTAs which might be considered to provide OIS should be categorised as "buyers", and not automatically be treated as "suppliers", for the purposes of the VABEO.

1.9 As explained further below (see paragraph 5.3 of this memorandum), euTT would suggest that the wording in paragraph 6.26 of the Draft VABEO Guidance be amended to address this issue.

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

1.10 Article 8(2)(f) of the VABEO designates "*a wide retail parity obligation or measure that has the same effect*" as a hardcore restriction. This leads to wide parity clauses being treated as the most egregious form of "object" restriction of competition law, which are "blacklisted" without any form of economic effects analysis having to be undertaken.

1.11 euTT supports the view that narrow (or direct) sales channel parity obligations[10] should continue to be exempted under the VABEO but opposes the view that wide MFNs should be treated as hardcore restrictions. In particular, euTT strongly disagrees with the statement that wide MFNs can be presumed to negatively impact competition and facilitate collusion between OIS suppliers.[11] euTT submits that wide MFNs need to be considered on an individual basis, because (i) they can lead to efficiencies which need to be assessed on a case-by-case basis (for instance, they can play an important role in protecting UK consumers from upward price discrimination in particular in international markets where such clauses are not prohibited) and
(ii) even if wide MFNs might apply to prices, prices are just one element of competition and wide MFNs will often allow for competition on the basis of other parameters.

1.12 Moreover, whilst the CMA implicitly acknowledges that wide retail parity provisions may be pro-competitive, the Draft VABEO Guidance provides no concrete insights into what these efficiencies might consist of. As a result, UK businesses are highly unlikely to be willing to take

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7 Same remark as above at footnote 5.

8 Draft VABEO Guidance, para. 6.26.

9 Measures such as those which restrict a buyer's ability to determine its sales price are treated as hardcore or "blacklisted" provisions under section 8 of 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.

10 As defined in para. 10.162 of the Draft VABEO Guidance.

11 See paras. 8.74 to 8.85 of the Draft VABEO Guidance.

the risk of including these provisions in their commercial agreements once they are included in the list of hardcore restrictions.

1.13 The Draft VABEO Guidance helpfully states that "[w]*ide parity obligations that apply to upstream business-to-business markets are not treated as hardcore restrictions.*"[12] However, the distinction between wide retail MFNs and business-to-business ("**B2B**") MFNs (which has not been defined) is difficult to apply in practice, particularly in the travel industry.

1.14 In its BEIS Submission, euTT invited BEIS to remove wide MFNs from the blacklist, which would be consistent with the approach adopted by the European Commission in the draft revised EU vertical block exemption. euTT continues to believe that this would be the most appropriate approach. In any event, euTT would encourage the CMA to amend the Draft VABEO Guidance to provide greater clarification and practical examples of the possible efficiencies which may justify the use of wide MFNs as well as an explanation as to how the B2B exemption is to be understood by reference to some real life examples.

III - <u>RPM in the context of online agency</u>

1.15 The CMA indicates in the Draft VABEO Guidance at paragraph 8.14 that "*minimum advertised price polices ('MAPs'), which prohibit retailers from advertising prices below a certain amount set by the supplier, may also amount to RPM for instance in cases where the supplier sanctions retailers for ultimately selling below the respective MAPs, requires them not to offer discounts or prevents them from communicating that the final price could differ from the respective MAP*".

1.16 Although euTT agrees with CMA's assessment of the anti-competitive nature of the use of MAPs, it fails to sufficiently reflect that in a world of increased digitalization, MAPs are a practice with very similar effects to full resale price maintenance ("**RPM**"). euTT would request the CMA to clarify the Draft VABEO Guidance that the right to set prices lower than the prices recommended by the supplier (i.e. the TSPs) also includes the right to make such lower prices effectively known to customers, including via the internet and price comparison websites. euTT submits that a limitation of the right to advertise these lower prices should be considered a hardcore restriction under the VABEO.

IV - <u>Restrictions on the use of search engines (via the prohibition of brand bidding) and the use of price comparison tools</u>

1.17 euTT welcomes the clear position taken by the CMA in the Draft VABEO Guidance against contractual provisions which limit the ability of distributors to bid on the brands of their upstream suppliers on search engines or advertise their offers on price comparison sites (provided this prohibition applies for the benefit of OTAs, which will depend on whether they are treated as "buyers" and not solely as "suppliers" of OIS).

1.18 However, euTT notes that the CMA explains at paragraph 8.39 that "*A direct or indirect prohibition referred to in 8.38(f), would include an obligation on the distributor not to use the suppliers' trade marks or brand names for bidding to be referenced in search engines, or a restriction to provide price related information to price comparison tools. While a prohibition in the use of one specific price comparison tool or search engine would typically not prevent the effective use of the internet for the purposes of selling online, as other price comparison tools or search engines could be used to raise awareness of a buyer's online sales activities, a prohibition of the use of all most widely used advertising services in the respective online advertising channel could amount to such prevention, if the remaining price comparison tools or search engines are de facto not capable of attracting customers to the buyer's online shop*".

1.19 euTT considers that this part of paragraph 8.39 should be deleted or revised. There are very few legitimate reasons why a supplier would want to impede access to a given price comparison site or search engine unless it is to render the offers of resellers or agents which qualify as a "buyer" under the VABEO ("**Buyer Agent**") less visible to consumers (i.e. with the objective

12 Draft VABEO Guidance, para. 8.84.

of reducing intra-brand competition to the detriment of customers). Except for very specific situations, euTT fails to see the justification for a prohibition imposed on resellers or Buyer Agents on using certain price comparison sites or search engines, and it submits that if the supplier can make use of a given price comparison site or search engine, the reseller or Buyer Agent should also be able to do so.

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

2. THE RULES APPLICABLE TO ONLINE MARKET PLAYERS ACTING AS AGENTS

2.1 In its Draft VABEO Guidance, the CMA recalls that Article 2(1) of the VABEO states "*that an undertaking which provides online intermediation services qualifies as a supplier under the VABEO when it is providing those services.*"[13]

2.2 "OIS" is defined in turn at Article 2(1) of the VABEO 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 and that constitutes an information society service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 …*".

2.3 The CMA states that "*in accordance with the distinction between suppliers and buyers provided by the VABEO, the undertaking providing online intermediation services cannot qualify simultaneously as a buyer within the meaning of Article 2(1) of the VABEO in relation to the transaction that it facilitates*".[14]

2.4 Moreover, the Section in the Draft VABEO Guidance entitled "*Applying the concept of agency agreements to online intermediation services*" opens with the following statement:

> "*Undertakings providing online intermediation services as defined in Article 2(1) VABEO are categorised as suppliers under the VABEO (see also paragraphs 6.23 to 6.27 of this Guidance) and in principle they therefore cannot qualify as agents for the purpose of applying the Chapter I prohibition.*"[15]

2.5 Paragraphs 4.20 and 4.21 of the Draft VABEO Guidance list the reasons why platforms providing OIS should not be considered to be "agents" within the meaning of the guidelines, citing, *inter alia*, the fact that: (i) "*Strong network effects and other features of the online platform economy can contribute to a significant imbalance in the size and bargaining power of the contract parties and result in a situation where the conditions of sale of the contract products and the commercial strategy are determined by the provider of online intermediation services rather than the sellers of the products that are intermediated*"; (ii) "*providers of online intermediation services often serve a very large number of sellers in parallel, which prevents them from effectively forming a part of any of the sellers' undertakings*"; and (iii) "*they also typically make significant market-specific investments, for example, in software, advertising and aftersales services, indicating that providers of online intermediation services bear significant financial or commercial risks associated with the contracts negotiated on behalf of the sellers using their online intermediation services*".

2.6 It follows from the wording of the Draft VABEO Guidance that OIS providers can never act as "genuine agents" for the purpose of applying the Chapter I prohibition and that OIS providers should instead be categorised as "suppliers".[16] However, it is submitted that whilst providers of OIS are unlikely to constitute "genuine agents" (a view with which euTT agrees), they should still be treated as "buyers" within the meaning of the Draft VABEO Guidance, as they clearly qualify as "non-genuine agents" for the reasons discussed below.

2.7 OTAs supply services to TSPs (e.g. airlines, hotels, car rental companies, and train operators), by distributing the TSPs' inventory, on their behalf, to travellers. While OTAs incur no inventory

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13 Draft VABEO Guidance, para 6.26. Emphasis added. The VABEO 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*". Draft Order, section 2.

14 Draft VABEO Guidance, para. 6.26. Emphasis added.

15 Draft VABEO Guidance, para. 4.19. Emphasis added.

16 Draft VABEO Guidance, para 6.26.

risks for services which are not booked, they do incur certain expenses which they may not be able to recoup in all cases in relation to their intermediation services (see Section II below for further details). If the approach currently set out in the Draft VABEO Guidance were to remain, OTAs could cease to be regarded as "buyers" for some of the services they offer, as the VABEO does not envisage the possibility that an OTA could simultaneously be viewed as both a "supplier" of OIS to the TSPs and a "buyer" of the TSPs' products and services when making these available to customers on behalf of the TSPs. As a consequence, the provisions of the VABEO which protect downstream buyers could no longer apply to OTAs.

2.8 It is, however, unclear whether OTAs should be treated as providers of OIS for the purposes of the VABEO. As noted above at 2.2, an undertaking will only be considered to be a OIS provider if the service provided constitutes an information society service ("**ISS**") within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535.[17] The European Court of Justice's recent caselaw has established that a service which otherwise meets the definition of an ISS will not be considered to be an ISS if the service "*forms an integral part of an overall service whose main component is a service coming under another legal classification*" such as services in the field of transport.[18] In the absence of guidance from the CMA as to whether the services provided by OTAs are considered to form an integral part, or are distinct from, the services provided by TSPs, it is unclear whether OTAs would be treated as "suppliers" of OIS under the VABEO. euTT therefore strongly encourages the CMA to provide further guidance on this point.

2.9 If OTAs are considered to be OIS providers, the paragraphs below explain why OIS providers in the travel industry which provide ("non-genuine") agency services to TSPs, should be categorised as "buyers" irrespective of whether they also provide OIS.

3. APPLICATION OF THE CONCEPT OF AGENCY AGREEMENTS TO OTAS

A. Characteristics of agency agreements

3.1 As indicated at paragraph 4.10 of the Draft VABEO Guidance, one of the defining features of an agent is that it is entrusted by its principal with the authority to negotiate and, sometimes also conclude, the sale or the purchase of goods or services on behalf of the principal.

3.2 The same features are acknowledged by the Bundeskartellamt in its decision of 4 December 2017 in case *CTS EVENTIM,* where it explained that "*a commercial agent's sales activities are marked by his negotiation and/or conclusion of the contracts. His participation in the negotiation and conclusion of a transaction contract are (…) significant for distinguishing (technical) platform activities from sales activities on behalf of one side of a platform*".[19]

3.3 In euTT's view, the Bundeskartellamt rightly acknowledges that an undertaking can – at the same time and in relation to the same transaction and parties – provide technical infrastructure services and agency services.

B. Divergent treatment of Online Agents and Offline Agents

3.4 All providers of "non-genuine agency" services should be treated in the same way under the Draft VABEO Guidance, whether they provide those services online ("**Online Agents**") or offline (**"Offline Agents**"). However, the current wording of the Draft VABEO Guidance,

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[17] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

[18] Judgment of 19 December 2019, *Airbnb Ireland*, C-390/18,- EU:C:2019:1112, para. 50. See also the judgment of 20 December 2017, *Asociación Profesional Elite Taxi*, C 434/15, EU:C:2017:981, para. 40.

[19] Emphasis added. In this regard, one should also consider Article 1(2) of Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC), OJ 31/12/1986, L 382/17: "*For the purposes of this Directive, 'commercial agent' shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal*." (emphasis added).

creates a significant divergence in the treatment of OTAs and the so called offline travel agents ("**bricks & mortar TAs**").

3.5 OTAs facilitate direct transactions between TSPs 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 contrary to 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).[20] Insofar as OTAs enable TSPs to offer services to consumers with a view to facilitating direct transactions between the TSP and consumers, OTAs could be regarded as "suppliers" of OIS to TSPs for the purposes of the VABEO and the Draft VABEO Guidance (subject to the points raised at paragraph 2.8 above).

3.6 However, when the services actually provided by OTAs are considered, it is clear that they include not only technical infrastructure services, but also the negotiation of the sale of the principal's goods or services or the negotiation and conclusion of transactions on behalf of and in the name of the principal.[21] This is consistent with the widely acknowledged view that offline travel agents – which provide services which are equivalent to those provided by OTAs – provide TSPs with ("non-genuine") agency services.

3.7 When considering the application of the competition rules to Online Agents such as OTAs, there is no credible reason why they should be treated differently from other (offline) travel agents. The fact that an Online Agent might also qualify as a provider of OIS is no reason to exclude the Online Agent from the normal competition rules that apply to ("non-genuine") agency agreements. Where Online Agents bear relevant risks in relation to the (agency) services provided to the principal (e.g. where transaction costs or market specific investments are not fully covered by the principal), they should, similar to their offline counterparts, be treated as "buyers". There is no reason why Online Agents should be treated differently from Offline Agents in such circumstances, as the essence and ultimate purpose of the services provided by OTAs and bricks & mortar TAs are the same, i.e. the facilitation of consumer travel bookings on behalf of (upstream) TSPs.[22]

3.8 Indeed, many offline travel agents also offer online booking services and many OTAs offer telephone booking services, which are classified as offline services.[23]

3.9 However, according to the approach set out in the Draft VABEO Guidance, OTAs would – in relation to their online booking services – be treated as "suppliers" of intermediation services to their principals under Article 2(1) of the VABEO when acting as travel agents, whereas offline brick-and-mortar TAs would be treated as "buyers" under Article 2(1) VABEO (assuming that neither group qualifies as "genuine agents").

3.10 This approach is entirely inconsistent with the principle of legal certainty as regards the legal treatment of particularly egregious forms of competitive restrictions of competition (such as RPM), which should not vary depending on the channel used by the agent to sell the principal's goods or products on a particular occasion.

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20 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.

21 In the *CTS EVENTIM* case, the Bundeskartellamt concluded on that basis that, even CTS in relation to commercialised promoters events on a platform on which end-customers could purchase tickets for the promoters' events, the company could still qualify as an agent since it had continuing authority to negotiate and conclude transaction on the behalf of its principals.

22 The inconsistencies deriving from this approach are exacerbated by the fact that OTAs sometimes also offer travel booking services via voice telephony services (e.g. through call centres). However, when selling travel services via a call centre, OTAs do not qualify as providers of OIS and should, therefore, be treated as either a "genuine agent" or as a "buyer", as the case may be. In other words, the same entity could qualify as a "supplier" or a "buyer" depending on the modalities chosen by the end-customer to make the travel booking.

23 See the Notification Regulation which states at Annex I that the ISS definition excludes voice telephony services, as "*such services are not provided by electronic means*".

3.11 Moreover, the approach taken by the CMA is particularly problematic as travel agents may, as noted above, use a variety of channels to sell goods or services on the principal's behalf (e.g. operating through physical sales desks, call centres, websites…).

C. OTAs should be considered as "buyers"

3.12 euTT submits that 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 (please refer to the BEIS Submission attached at **Annex 1** for more details).

3.13 In relation to these non-OIS services, OTAs are acting as "buyers". Examples of such non-OIS activities are:

(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.

3.14 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,[24] making sales in their own names and bearing full liability for the packages they create.

3.15 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 (which are not available as part of airlines' offerings), including investments in product creation and design. It is therefore clear that, when offering such products, OTAs are not simply offering OIS to TSPs such as airlines. In these circumstances, OTAs are also providing specific assistance to travellers purchasing these services, in particular by creating products that are not provided by any particular TSP.

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24 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.

3.16 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).

3.17 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. In its BEIS Submission, euTT provided data from two OTAs to illustrate that OTAs are in the position of a "buyer" with respect to a substantial proportion of the services they provide.[25] This is particularly the case when combining inputs received from 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 should clearly therefore be considered to be "buyers".

4. CATEGORIZING OTAS AS "SUPPLIERS" IS LIKELY TO RESTRICT THE PRO-CONSUMER SERVICES OTAS CAN OFFER AND HAVE ADVERSE EFFECTS ON UK CUSTOMERS

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 through the offer of a wider range of services (ie OTA offers which combine different services from those provided by individual TSPs). It is essential that OTAs continue to be covered by the provisions of the VABEO in their capacity as purchasers if they are to continue to play this significant pro-consumer role.

4.2 The existence of the "blacklist" hardcore restrictions which are presumed to restrict competition has a strong deterrent effect on TSPs by discouraging them from engaging in practices which restrict the competitive pressure OTAs can exert on TSPs. As euTT demonstrated with different examples in the BEIS Submission, this is particularly the case in relation to RPM and restrictions on the ability of OTAs to market their services and products via the internet (specifically through "passive sales", e.g. posting discounted prices on price comparison sites or bidding for the TSPs brand on search engines).

4.3 As "buyers" of TSP services under the current retained VABER, OTAs can refer to the retained VABER blacklist in commercial negotiations with TSPs if TSPs attempt to impose blacklisted restrictions on them. In addition, the retained VABER blacklist considerably reduces the risk of disputes and litigation between TSPs and OTAs, as well as complaints to competition authorities.

4.4 euTT notes that the better protection of UK consumers buying travel services such as package travel deals is cited as an objective in BEIS' recent response to the consultation on competition and consumer policy.[26] However, 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 TSPs (treated as "buyers") would be able to impose (previously blacklisted) restrictions on OIS suppliers, i.e. OTAs, as these restrictions would now be block-exempted. OTAs would then be 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 being imposed on them through complaints to regulators and actions in the courts.

4.5 As a result, OTAs would likely curtail their pro-competitive activities in the UK which would lead to adverse effects on UK consumers in the form of higher prices and a narrower range of travel services to choose from.

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[25] See BEIS Submission, Section I.

[26] Reforming competition and consumer policy: government response, available at the following url: https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response.

5. CONCLUSION ON THE RECOMMENDATION TO CATEGORISE OTAS AS "SUPPLIERS" OF OIS UNDER THE VABEO

5.1 In light of the above, it is submitted that OTAs and similar platforms should not automatically be treated as "suppliers" for the purposes of the VABEO if they are considered to be providers of OIS. Instead, when these platforms meet the established definition of an agent (i.e. an entity participating in the negotiation and conclusion of contracts on behalf of the principal), they should be treated as an agent (i.e. a "buyer")[27] in relation to the activities undertaken on behalf of the principal, applying the principles set out at Section 4 of the VABEO.

5.2 euTT submits that the Draft VABEO Guidance would benefit from an express acknowledgment of the distinction between the concepts of "genuine agency" and "non-genuine agency". Where OTAs provide distribution services as a "non-genuine agent" on behalf of an upstream counter-party, they should be treated as "buyers".[28] The fact that OTAs could also qualify as providers of OIS should not be an obstacle to recognition of their status as "non-genuine agents" ("buyers") when providing distribution services to their principals, such as airlines and hotels.

5.3 euTT would therefore suggest that the text of paragraph 6.26 of the Draft VABEO Guidance be clarified as follows:

> "*Article 2(1) of the VABEO states that an undertaking which provides online intermediation services qualifies as a supplier under the VABEO when it is providing those services. This means that, in accordance with the distinction between suppliers and buyers provided by the VABEO, the undertaking providing online intermediation services cannot qualify simultaneously as a buyer within the meaning of Article 2(1) of the VABEO in relation to the transaction that it facilitates. Furthermore, Article 2(1) of the VABEO makes clear that a provider of online intermediation services is a supplier under the VABEO including where it is itself also party to a transaction that it facilitates. This means that, where an undertaking provides online intermediation services and therefore falls within the scope of the definition of 'supplier' in Article 2(1) of the VABEO, this undertaking cannot circumvent its qualification as supplier of online intermediation services, for example by becoming a party to the transaction it facilitates or stipulating contractually that it is a buyer of the products supplied on the basis of such a transaction. However, if an online agent is entrusted by its principal with the authority to negotiate and / or conclude contracts for the sale or the purchase of goods or services on behalf of another person, the principal, it should be considered to be a buyer unless such agent qualifies as an agent for the purpose of applying the Chapter I prohibition. In any event, where a provider of online intermediation services, such as an online travel agent, creates and offers for sale products or packages of products that are not offered for sale or sold by the individual recipients of the online intermediation services, such a provider may be considered to be a buyer in relation to such transactions.* "

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[27] Most OTAs in most of the markets in which they operate should be considered "buyers" under Article 2(1) of the VABEO, as these Online Agents: (i) serve a large number of principals; as well as (ii) invest a considerable amount of resources to promote their principal's products and to assist the principal's customers after the sale of the principal's services (albeit without effective remuneration by the principal for these investments and services).

[28] For instance, many OTAs operate as "non-genuine agents" when distributing tickets for the airlines under the terms of agency agreements concluded with those airlines or offering hotel booking services on behalf of chains and independent hotels. There is, indeed, nothing which distinguishes the services OTAs provide in such instances from the services provided by an offline / bricks & mortar travel agent.

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

6. euTT notes the introduction of Article 8(2)(f) in the VABEO which designates "*a wide retail parity obligation or measure that has the same effect*" as a hardcore restriction. This would result in wide MFNs being treated as the most egregious form of restriction of competition law; by being blacklisted under the block exemption, wide MFNs (and the agreements which contain them) will be automatically excluded from the safe-harbour created by the VABEO.

6.1 A "*wide retail parity obligation*" is defined in the VABEO 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 products are offered to end users on a sales channel are no worse than those offered by the supplier on another sales channel*."[29] The Draft VABEO Guidance then clarifies that the term "supplier" used in Article 8(2)(f) should be understood as "product supplier", i.e. the TSP (to deal with the ambiguous "supplier" reference in the above section).

6.2 In the air passenger transport sector, wide MFNs ensure that the same airline content (e.g. fares and additional services) are available to UK consumers on terms that are no worse than those available on other sales channels, and across all points of sale (both online and offline).

6.3 Although euTT supports the view that direct (narrow) sales channel parity obligations[30] should continue to be exempted under the VABEO,[31] euTT does not believe that wide MFNs should be presumed (as an object infringement) to negatively impact competition and to facilitate collusion between OIS suppliers[32] and therefore be included on the blacklist.

6.4 In euTT's view, it is important that wide MFNs should be considered on an individual basis, because they can lead to efficiencies which need to be assessed on a case-by-case basis (for instance, they can play an important role in protecting UK consumers from upward price discrimination). It is also important to note that even if wide MFNs apply to prices price is just one element of competition and accordingly, such wide MFNs may not limit competition on the basis of other important (non-price) parameters.

6.5 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.

7. EFFICIENCIES DERIVING FROM WIDE MFN CLAUSES

A. UK consumer benefits

7.1 euTT considers that parity clauses in agreements between OTAs and TSPs, and GDSs and TSPs, are a fair and necessary element of a balanced commercial exchange of services, which safeguard the ability: (i) to enhance the availability of competitive offers to travellers; and (ii) to reduce search / transaction costs for travellers by helping them to identify TSP services that best meet their needs.

7.2 In this connection, wide MFNs allow consumers to compare the price, quality and availability of many more travel offerings than if they were to search for them on each provider's website individually. Additionally, the standardized display of e.g. flight options makes it easier for consumers to compare offers on non-price factors.

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29 VABEO, Article 8(5).

30 So-called "narrow" parity clauses, as defined in para. 10.162 of the Draft VABEO Guidance.

31 As indicated in the Draft VABEO Guidance, narrow parity clauses are instrumental to ensure that buyers - for example, accommodation providers - are not "undercutting" or free-riding on the vast IT and marketing investments made by online intermediation services. See para. 10.162 of the Draft VABEO Guidance.

32 See para. 10.141 of the Draft VABEO Guidance.

7.3 Moreover, price is not the only element of competition between TSPs, so that the latter can compete on other aspects of the "package". The inclusion of wide MFNs in OTAs' agreements thus enhances inter-brand competition, resulting in lower prices, higher quality of offered rates, and in some instances, new services / optionality which are valued by consumers.

7.4 In addition, MFNs may make it more difficult for travel suppliers to price discriminate against less informed or less price sensitive customers.

B. Reduction of the "free-riding" problem

7.5 Under the commission-based business model of OTAs, airlines only pay a fee when a customer has completed the booked travel service. As such, TSPs already benefit from the so-called "billboard effect": just being listed on an OTA or intermediary increases their sales via other distribution channels.

7.6 There is thus a substantial risk of free-riding on a platform's continued investments if customers can use the platform's search functionality to make their selection in the knowledge that the ultimate booking can be made cheaper directly through other online sales channels. Over time, this would lead to reduced transparency, and lower interbrand competition, as well as a loss of incentives to innovate for OTAs.

7.7 In addition, one should consider that TSPs are often dominant on certain routes that they serve due to the reduced number of TSPs now operating in Europe. As a consequence, a wide-MFN may be a way for OTAs to protect themselves from anticompetitive price discrimination by dominant providers of TSPs, which could otherwise steer consumers towards their own websites. As well as impeding intra-brand competition, decreased use of OTAs on routes on which TSPs are dominant may also entrench such dominant positions as new entrants, which are displayed on the OTAs website, become less visible to consumers.

C. Efficiencies for TSPs

7.8 The use of wide MFNs reduces contractual negotiation costs and delays; without wide MFNs buyers or suppliers may delay completing negotiations while they hold out for a better deal. The use of wide MFNs can avoid this delay and the associated costs, as buyers / agents know that they will benefit from better terms if a new deal is signed with their competitors.

8. THERE IS INSUFFICIENT EVIDENCE / EXPERIENCE TO SUPPORT THE GENERAL INCLUSION OF WIDE RETAIL MFNS ON THE VABEO BLACKLIST, PARTICULARLY IN INTERNATIONAL MARKETS SUCH AS TRAVEL

8.1 Blacklisted restrictions under the retained VABER are those provisions which constitute restrictions by object,[33] 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 is required to find an infringement. Importantly, these types of restrictions can safely be presumed to be anti-competitive across all business sectors.

8.2 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.*"[34]

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33 Commission Guidelines on the application of Art. 101(3), para. 23.

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

8.3 However, there is abundant evidence from various sources that parity clauses should not be presumed to be anticompetitive.[35] Empirical economic evidence , case law and endorsements from competition authorities show that parity clauses can give rise to significant efficiencies. In this connection, it is instructive that the CMA's Decision of 19 November 2020 relating to Compare the Market (case 50505) found an infringement by effect, and not by object.

8.4 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 benefits of these provisions in mitigating price discrimination strategies which may prejudice UK consumers. As such, the CMA does not appear to have "*sufficiently reliable and robust experience*" which would confirm that these provisions are by their very nature harmful to the proper functioning of competition in the UK.

8.5 This is even more so, as there are credible reasons to believe that wide retail MFNs may lead to even stronger benefits for UK consumers, particularly following Brexit. 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,[36] and the Geoblocking Regulation (which for instance covers online hotel booking services),[37] but also European Court of Justice competition law precedents, which prohibited restrictions on parallel trade between Member States.[38] Post-Brexit, these rules no longer prevent TSPs from implementing higher prices for UK consumers via their own direct channels.

8.6 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 VABEO, OTAs will be required to implement a national carveout from these wide parity provisions for the UK.

8.7 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.[39]

8.8 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.[40] 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 air flights.

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35 Ariel Ezrachi (2015) The competitive effects of parity clauses on online commerce, European Competition Journal, 11:2-3, 488-519; Bjorn Olav Johansen, Thibaud Vergé (2017), Platform Price Parity Clauses with Direct Sales, Working Papers in Economics 1:17; Svea Hovrätt Patent-och marknadsöverdomstolen 9 May 2019 – Case No. PMT 7779-18.

36 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.

37 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.

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

39 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.

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

9. INDIVIDUAL EXEMPTION IS MERELY A THEORETICAL POSSIBILITY

9.1 The CMA acknowledges that wide retail parity provisions may be pro-competitive, indicating that "*undertakings have the possibility to raise an efficiency justification under section 9(1)*".[41]

9.2 However, the CMA's statement ignores the fact that an individual exemption for a by object restriction is in practice only 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*."[42] 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 has not been one Commission decision in which an agreement was found to satisfy Article 101(3)*".[43]

9.3 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.

9.4 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).

9.5 euTT therefore invites the CMA (in addition to the request regarding the automatic qualification of OTAs as "suppliers" as discussed above) to clarify with concrete examples the cases in which efficiency justifications presented by companies will be accepted, as such guidance is necessary for UK businesses to take the risk of using wide MFNs in cases where the consumer benefits are clear.

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

10.1 The VABEO and the Draft VABEO Guidance propose to distinguish between wide retail and B2B parity provisions. However, given the lack of guidance, it is difficult for companies to understand the distinction between these types of provisions, particularly in the travel industry.

10.2 As a preliminary comment, euTT notes that the Draft VABEO Guidance correctly states that "[w]*ide parity obligations that apply to upstream business-to-business markets are not treated as hardcore restrictions.*"[44] However, in practice, there is a considerable overlap between wide B2B MFNs and wide retail MFNs, such as in the air travel sector.

10.3 GDSs, for example, typically negotiate parity provisions in their agreements with airlines, which ensure that a GDS has access to airline content for travellers (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

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41 Draft VABEO Guidance, para. 8.85

42 Commission Guidelines on the application of Art. 101(3), para. 79.

43 Whish and Bailey, "Competition Law", 9th edition, p. 161.

44 Draft VABEO Guidance, para. 8.84.

OTAs also negotiate similar wide *retail* content parity provisions directly 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.

10.4 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. Moreover, the airline's content will generally be made 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).[45]

10.5 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.

10.6 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 VABEO 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 VABEO. 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.

10.7 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 B2B 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).

10.8 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).[46]

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

11.1 In light of the considerations set out above, euTT invites the CMA to amend the Draft VABEO Guidance to provide clear guidance as to the circumstances in which countervailing efficiency justifications will be accepted, as such guidance is necessary for UK businesses to take the risk of using wide MFNs in cases where otherwise consumer detriments may arise as well as an explanation as to how the "business-to-business" exemption is to be understood and applied in practice.

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[45] 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., para. 18.

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

SECTION III - RPM IN THE CONTEXT OF ONLINE AGENCY

12. The CMA indicates in the Draft VABEO Guidance at paragraph 8.14 that "*minimum advertised price polices ('MAPs'), which prohibit retailers from advertising prices below a certain amount set by the supplier, may also amount to RPM for instance in cases where the supplier sanctions retailers for ultimately selling below the respective MAPs, requires them not to offer discounts or prevents them from communicating that the final price could differ from the respective MAP*".euTT respectfully submits that the above formulation is somewhat lenient. MAPs, especially in a world of increased digitalization, are a practice with very similar effects to full RPM. Indeed, customers tend to gather information on the best offers for a given product or service online, typically through price comparison sites. If a reseller, a Buyer Agent or an OTA qualifying as an OIS provider is prevented from informing customers, using the internet, that it is offering prices below a MAP, most customers will not be aware of the existence of that better offer. The result is thus equivalent to a prohibition on selling below the MAP, as no or only a few consumers will effectively be in a position to benefit from lower priced offers.

12.2 euTT submit that it should therefore be made very clear that the right to set prices lower than the prices recommended by the supplier also includes the right to make such lower prices effectively known to customers, including via the internet. Any limitation of the right to advertise these lower price should be considered a hardcore restriction.

12.3 Therefore, euTT would propose to modify paragraph 8.14 as follows:

> "*minimum advertised price polices ('MAPs'), which prohibit retailers from advertising prices below a certain amount set by the supplier, ~~may also amount to RPM~~ for instance in cases where the supplier sanctions retailers for ultimately selling below the respective MAPs, requires them not to offer discounts or prevents them from communicating that the final price could differ from the respective MAP, will always amount to RPM and disadvantage competition on the market*".

12.4 In this context, it should be noted that if the view is taken that OTAs should always be considered to be "suppliers", the protection against MAPs, which would only concerns "buyers", would not be applicable to them. However, OTAs clearly need access to price comparison sites to make end-consumers aware of the lower prices the OTAs might be able to offer in relation to certain routes. This is once again a demonstration of how the exclusion of OTAs from the concept of "buyers", and therefore the protection offered in the Draft VABEO Guidance, could lead to a significant reduction in consumer welfare as consumers could be left unaware of the best possible tariffs or options for a given journey. In that context, it would be helpful if the CMA could also clarify that in the context of a TSP (i.e. "buyer") and OTA (qualifying as an OIS provider - i.e. "supplier") relationship, the use of the term "supplier" in paragraph 8.14 is to be understood as referring to the "product supplier", i.e. the TSP, and the term "retailer" is intended to cover the OIS "supplier".

12.5 euTT also notes that at paragraph 8.17 the Draft VABEO Guidance explains that, where an agent should qualify as a "buyer" for the purpose of the VABEO then "*an obligation preventing or restricting the agent from sharing its commission with the customer, irrespective of whether the commission is fixed or variable, is a hardcore restriction under Article 8(2)(a) of the VABEO. The agent should be left free to reduce the effective price paid by the customer without reducing the income for the principal*". euTT has two observations on this paragraph.

12.6 First, as rightly indicated at the end of the above paragraph, the Buyer Agent should be free to reduce the effective price paid by the customer provided this does not result in a reduction of the principal's income that was agreed between the principal and the agent from the sale of its products or services. The price reduction may, however, be financed by the Buyer Agent using financial resources other than its commission. This distinction is significant considering that, for instance, OTAs do not receive any or any significant commission from many of their principals. For example, in relation to air ticket bookings intermediary booking sites may earn more commission from GDSs than the airlines with whom a booking site may have a direct agreement. There is no reason to limit the right to reduce the final price offered to the customer

to discounts financed through the Buyer Agent's commission paid by the principal, so long as the principal is receiving the agreed money from the sale of its products / services. Indeed, it would otherwise be simple for principals to avoid discounting by OTAs simply by ceasing to recognize commissions to OTAs and by remunerating them through other means.

12.7 Second, euTT considers that it may be worth stressing, even if *ad abundantiam*, in this paragraph that Buyer Agents also have the right to advertise prices lower than those set by their principals. Indeed, for the reasons discussed above, in a digital world, a price which is not advertised to the public through price comparison sites and other digital means runs the risk of remaining unknown to the public leading *de facto* to a minimum price set by the principal.

12.8 euTT would thus propose to modify paragraph 8.17 the Draft VABEO Guidance as follows:

> "*In the case of agency agreements, the principal normally establishes the sales price, as it bears the commercial and financial risks relating to the sale. However, where such an agreement cannot be categorised as an agency agreement for the purposes of applying the Chapter I prohibition (see in particular paragraphs 4.27 to 4.30 of the Guidance), an obligation preventing or restricting the agent from ~~sharing its commission with the customer, irrespective of whether the commission is fixed or variable, is a hardcore restriction under Article 8(2)(a) of the VABEO. The agent should be left free to~~ reducing the effective price paid by the customer without reducing the income for the principal, is a hardcore restriction under Article 4(a) VBER. Similarly, in such a case, the agent should be free to advertise any so reduced prices to potential customers (e.g. consumers), including through the effective use of the internet, e.g. via price comparison sites.*"

SECTION IV - RESTRICTIONS ON THE USE OF SEARCH ENGINES (VIA THE PROHIBITION OF BRAND BIDDING) AND THE USE OF PRICE COMPARISON TOOLS

13. euTT welcomes the clear position taken by the CMA in the Draft VABEO Guidance against contractual provisions which limit the ability of distributors' to bid for the brands of their upstream suppliers on search engines or advertise their offers on price comparison sites.In particular, at paragraph 8.38(f) of the Draft VABEO Guidance, the CMA explains that it will consider that provisions constitute "*a direct or indirect prohibition on using a specific online advertising channel, such as price comparison tools or advertising on search engines, or other online advertising restrictions indirectly prohibiting the use of a specific online advertising channel*", should be treated as prohibited restrictions on the use of the internet (and thus passive sales). Provided these prohibition apply for the benefit of OTAs (i.e. as distributors of the TSPs' offers), euTT firmly endorses this position.

13.2 However, euTT notes that the CMA explains at paragraph 8.39 that "[a] *direct or indirect prohibition referred to in 8.38(f), would include an obligation on the distributor not to use the suppliers' trade marks or brand names for bidding to be referenced in search engines, or a restriction to provide price related information to price comparison tools. While a prohibition in the use of one specific price comparison tool or search engine would typically not prevent the effective use of the internet for the purposes of selling online, as other price comparison tools or search engines could be used to raise awareness of a buyer's online sales activities, a prohibition of the use of all most widely used advertising services in the respective online advertising channel could amount to such prevention, if the remaining price comparison tools or search engines are de facto not capable of attracting customers to the buyer's online shop*".

13.3 euTT considers that this part of paragraph 8.39 should be deleted or revised. There are very few legitimate reasons why a product supplier would want to impede access to a given price comparison site or search engine unless it is to render the offers of resellers or Buyer Agents less visible to consumers (i.e. with the objective of reducing intra-brand competition to the detriment of customers). It may be that, in view of the specificities of the products or services of the supplier, especially in the luxury sector, the use of certain price comparison sites or search engines could be limited due to their negative impact on the luxury image of the supplier's products. However, except for such specific situations, euTT fails to see the justification for a prohibition imposed on resellers or Buyer Agents on using certain price comparison sites or search engines.

13.4 euTT would thus propose that paragraph 8.39 be amended as follows(including clarificatory references to the term "product supplier" which the CMA introduced into the Draft VABEO Guidance):

> "*A direct or indirect prohibition referred to in 8.38(f), would include an obligation on the distributor not to use the product suppliers' trade marks or brand names for bidding to be referenced in search engines, or a restriction to provide price related information to price comparison tools. ~~While a~~ A prohibition in the use of one specific price comparison tool or search engine can be justified if it is motivated by the need for the product supplier to protect the luxury or quality image of its products or services (see below …). However, the product supplier should never prohibit the use ~~would typically not prevent the effective use of the internet for the purposes of selling online, as other price comparison tools or search engines could be used to raise awareness of a buyer's online sales activities, a prohibition in the use~~ of all most widely used price comparison tools or search engines or advertising services in the respective online a~~dvertising channel could amount to such~~ prevention, if the~~ remaining price comparison tools or search engines are de facto not capable to attract customers to the buyer's online shop~~. In any event, it would not be legitimate to prohibit the use of any price comparison tool or search engine or advertising service which the product supplier itself decides to use or allows any other third party distributor of its products and services to use.*"

CONCLUSION

14. As euTT believes that several arguments set out in the BEIS Submission are equally relevant in the assessment of the CMA's Draft VABEO Guidance, euTT has attached a confidential version of the BEIS Submission to this memorandum (Annex 1). euTT invites the CMA to read this annex, as several arguments raised in this memorandum are further elaborated therein.

14.1 In view of the considerations set out in sections I to IV above as well as those set out in the BEIS Submission, euTT would welcome an opportunity to discuss the contents of its observations and its main concerns in a joint meeting with both CMA and BEIS officials.

14.2 In the interim, euTT remains at the CMA's disposal with regard to any questions it may have in relation to this matter.