Price comparison websites: the UK’s CMA weighs in on the competition law, data protection and consumer protection requirements

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The UK’s competition regulator, the Competition and Markets Authority (CMA), has published a 349 page Final Report (combined with 5 Background Papers and a glossary) on its Market Study into what it refers to as Digital Comparison Tools (DCTs) – a term which includes price comparison websites, best buy tables, and other more automated services like matching services which analyse complex usage patterns, voice-based comparison tools, and reverse auction platforms. The CMA concluded that consumer experiences of these services were mostly positive, although there were concerns over:

- Competition law implications of exclusive or preferential arrangements;
• Data protection law and the use of personal data;

• Consumer protection law and the transparency of arrangements between these sites and the services that they are comparing.

This Final Report comes after a year-long market study.

While the competition assessment of price comparison tools was a part of DG Competition’s Final Report on the E-Commerce Sector Inquiry published in May 2017, this was a small part of the inquiry and important questions remained unexamined.

The CMA sets out a number of ‘Clear, Accurate, Responsible and Easy to Use’ (CARE) high level principles, and provides some relatively detailed rules on how to comply with them. However, it is not always obvious within the Report itself which recommendations are aimed at defining legal boundaries, and which are simply what the CMA regards as good practice.

While primarily addressing suppliers and DCT businesses, the CMA also offers tips to users, in addition to wanting to influence the thinking of the government and other UK regulators like Ofgem and Ofcom. The Financial Conduct Authority (FCA) is particularly singled out, given the amount of information required from customers to generate finance related comparisons.

The CMA recommends that all DCTs should follow the CARE principles – in order to help them comply with the law and to support consumer trust. Background Paper C to the Report – ‘The application of the law and regulation to digital comparison tools’ – indicates that the status of the principles reflect the CMA’s view of how general law applies in the specific case of DCTs, and what all DCTs should do to help them comply with their existing legal obligations as well as ensuring positive outcomes for consumers. The principles also provide a guide as to how the CMA will likely consider cases for enforcement action. In doing so they are said to reflect existing legal requirements, but do not create additional regulatory burdens for DCTs (a concern which had been highlighted by stakeholders at an earlier stage, by adding to regulatory burdens or complexity).

Specific recommendations include:

• All sites must be clear on how they make money, how many deals they are displaying, and how they order the results – in line with the CARE principles and to comply with UK and EU consumer protection and unfair trading laws;

• Sites must be clear on how they protect personal information, and how people can control the use of their own information – in line with the CARE principles and to comply with all obligations under data protection and privacy laws;

• DCTs and suppliers should review their use of the various restrictions identified by the CMA as a potential concern. The main area of concern is with Most Favoured Nation clauses: where the supplier is restricted from selling at a lower price, both on his own website, and especially where this involves other DCTs. Other restrictions, described as ‘ongoing areas of interest’ to the CMA, include:
• non-brand bidding: restrictions are placed on bids made by DCTs and suppliers from specified brands/other terms which limits web traffic from paid search;

• negative matching: use of the other party’s brand name is restricted as a negative keyword, so that the relevant ad will not appear in a search;

• non-re-solicitation agreements: where the DCT agrees not to contact customers which have purchased a supplier’s product from their DCT over a certain period; and

• All regulators should consider whether and how it would be possible to make it easier to get multiple quotes in order to support effective DCT competition. Consumers will benefit if it is made as easy as possible to make effective comparisons or use different sites, since this will have the effect of maximising competitive pressure on DCTs. One example given is by allowing consumers to transfer the information they put into one site into another – perhaps through an app; and, all national regulators with a stake in the area should work together to ensure people are well protected.

In recognizing that nearly two-thirds of people using a price comparison site visited more than one when shopping around, the CMA advises that all comparison site users should do so in order to ensure that they obtain the best deal. Perhaps there is a market opportunity here for someone to launch a comparison site for price comparison sites.

Finally, the CMA confirmed that as a result of its Market Study, it has opened an investigation into a price comparison website that compares home insurance, which may have entered into contracts with insurers that result in consumers being charged higher home insurance prices by other sites. The investigation will focus on the use of wide MFN clauses – which limit the insurer’s ability to offer a lower price on competing price comparison sites, potentially preventing other websites from offering the best prices. The CMA will work with the FCA on this case, the latter having concurrent competition powers in financial services.

The CMA also has an ongoing programme of consumer enforcement work in digital markets, including improving the display of information in the car hire sector, and considering potential consumer protection concerns in the hotel booking sector.

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