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An Economic Perspective on EU and UK Competition Policy in the Insurance Sector

Mat Hughes

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Introduction

It is relatively straightforward to advance arguments that the insurance sector should not particularly attract the attention of competition authorities on the grounds that there are typically many insurance companies across most categories of risk, and purchasers are typically repeat buyers who can readily seek advice and price quotes from brokers and price comparison websites. Nonetheless, the insurance sector has been subjected to intense scrutiny by competition authorities and there is no reason to believe that this is going to change in the foreseeable future.

There is a significant body of case law across Europe relating to agreements between insurance companies and brokers, which particularly focuses on how various cooperative agreements may have an anti-competitive object or effect under Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Member States' equivalent or similar prohibitions of anti-competitive agreements. The need for guidance and legal certainty in this sector is reflected by the fact that the insurance sector has its own block exemption, with this in turn reflecting the particular economic characteristics of the insurance sector.

The fact that certain cooperative agreements have been in place for a considerable period of time is no defence. For example, in 2007 the German Bundeskartellamt (German competition authority) prohibited an insurers' pool covering pecuniary loss liability risks for auditors and chartered accountants (i.e., insuring auditors against liability for losses suffered by their clients), notwithstanding that this dated back to a state directive from the 1930s. Although this decision was eventually overturned on the basis of flaws in the market definition adopted by the Bundeskartellamt and thus the market share calculations, it highlights the importance of insurers periodically assessing carefully whether their cooperative arrangements infringe competition law.

Cooperation agreements continue to attract the attention of competition authorities, with a good example of this being the UK Office of Fair Trading's (OFT) 2012 decision to accept binding commitments to modify a data exchange tool used by motor insurances (WhatIf? Private Motor, or "WhatIf?" for short).

Moreover, in the UK, insurance markets have been the focus of considerable attention in the context of market studies. These include the Competition Commission's (CC) investigations into extended warranties in 2003 (and various follow up investigations by the OFT since then) and payment protection insurance (PPI) in 2009, where a key issue was the extent to which each individual seller had a substantial "point of sale advantage" in selling the related insurance products such that they had substantial market power. This was the case notwithstanding that there were many sellers of these particular types of insurance.

These cases illustrate a more general point; that having more competitors in a market does not necessarily translate into better outcomes for consumers, with one of the insights of behavioural economics being that there may be predictable biases in consumer behaviour which firms may be able to exploit. This has been a point of concern in the UK Financial Conduct Authority's (FCA) ongoing investigations of insurance "add-on" products (i.e., supplemental or ancillary cover extensions purchased in connection with a basic insurance policy) and of price comparison websites (the latter of which was launched in November 2013), as well as in the CC's provisional findings in relation to its market investigation into private motor insurance which were published in December 2013.

The CC's provisional findings into private motor insurance cover a broader range of issues, including how the interaction between different parties affects insurance premiums and whether information asymmetries were leading to sub-optimal levels of repair services and high prices for insurance add-ons, and how particular restrictions in agreements between price comparison websites and insurance companies may be anti-competitive.

The points outlined above provide a natural order for discussing some themes in the current competition law issues faced by the insurance sector, namely:

- the specific characteristics of insurance markets which can affect the analysis of the competitive effects of agreements and competitive conduct;
- some of the policy considerations underpinning the European Commission's Insurance Block Exemption Regulation (Commission Regulation (EU) No. 267/2010, the "Insurance Block Exemption");
- the issues raised by the OFT's investigation of information sharing between insurance companies in the *WhatIf?* case (OFT1395);
- the CC's provisional adverse findings in relation to insurance add-ons in connection with its ongoing inquiry into private motor insurance, and the FCA's ongoing investigations of general insurance add-ons and insurance price comparison websites. These investigations are directly concerned with how consumers make their decisions and how suppliers of insurance products respond to consumer behaviour; and
- finally, the chapter concludes by considering the various other issues raised by other aspects of the CC's provisional adverse findings in connection with its ongoing inquiry into private motor insurance.

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Key Characteristics of the Insurance Sector

Obviously, individual insurance markets will all have their own particular features, but it is possible to identify a number of general characteristics. Perhaps the central theme is risk and uncertainty, both for customers (which is why they buy insurance) and also suppliers (with this also being a factor driving the extensive financial regulation of insurance companies). In the first instance, there is uncertainty about the likelihood that the insured events will come to pass and the likely cost of claims under the cover. Even when events occur sufficiently frequently to allow insurers to form a view about likelihoods, the historical data available to individual insurers as to their own historic claims may not be representative of the population as a whole, which could yield unreliable estimates of risk.

In addition, information asymmetries, whereby the two counterparties to an insurance agreement each have different information, can adversely affect the market outcome. For example, an insurer may not be able to ascertain whether a customer is a generally responsible driver and, as a result, cannot accurately assess the expected cost of the insurance. This can result in "adverse selection" and "moral hazard". **Adverse selection** stems from the fact that insurance companies cannot identify precisely customers who are more prone to making a claim (i.e., they are a worse risk) and thus cannot raise their premium selectively to these customers to reflect the increased risk. Instead, insurers will raise prices generally. This, in turn, means that a greater proportion of the insurance company's customers will consist of riskier customers, since they are willing to pay more for the insurance as they expect to benefit more from it, thus further raising the underwriting cost and hence insurance premiums. **Moral hazard** describes a situation where a person purchasing insurance modifies his behaviour because he does not bear the full cost of the consequences of his actions, again raising the expected cost of an insurance policy.

The characteristics outlined above distinguish insurance services from most other goods and services. Their impact can often be avoided or mitigated if underwriters could share information on risk profiles or if they could share or pool risk exposure. As a consequence, a number of practices that would normally be prohibited under Article 101(1) TFEU can be justified on the basis of Article 101(3) TFEU, because in broad terms they yield benefits to consumers that offset their anti-competitive effects. These considerations are key drivers of the European Commission's Insurance Block Exemption, which is addressed further below. If an agreement is outside the scope of the Insurance Block Exemption, then it will fall for consideration under general competition law, albeit that any such consideration will still have regard to the specific economic and legal context of the agreement in the insurance market in question.

A further issue considered by regulators is that many insurance products are purchased by individual consumers whose purchasing decisions may be highly imperfect. In particular, from a consumer's perspective, insurance products can be complex because they require an assessment of risk (consumers may have difficulty in appraising whether a particular event is likely to occur or its consequences) and an understanding of the precise benefits of the cover (for example, consumers may not read or understand the "small print" to insurance contracts). Accordingly, consumers may find it difficult to compare the benefit of insurance to the cost. In addition, consumers may not always "shop around", perhaps particularly where the insurance in question is ancillary to another purchase.

The FCA has emphasised that it will apply the insights of behavioural economics to assessing whether consumers' interests are being well served. Specifically, the FCA has indicated that it will use behavioural economics to analyse firms' business models, behaviour and products to inform its enforcement cases. Insurers therefore need to assess their products and how they market them in view of the insights from behavioural economics to ensure that their products are designed and marketed in a way that is in the best interests of consumers. As a result, insurers need to give careful thought to issues such as how the terms of the policy are communicated (including exceptions to the coverage) and how the policy is marketed. The FCA has in the past flagged "opt-out" policies (which require consumers to make an active decision not to purchase additional cover, as opposed to "opt-in" policies where consumers make an active decision to buy additional cover) and alarmist wording as potential sources of concern.

The Insurance Block Exemption Regulation

The Insurance Block Exemption provides an exemption for two forms of cooperation, subject to certain conditions:

- joint compilations, tables and studies of costs and risks; and
- insurance pools, whereby insurers underwrite a risk as a group rather than individually.

The joint compilations, tables and studies are valuable because they allow insurers to better assess the likely cost of insurance products, which the Commission considers is "likely to facilitate market entry and thus benefit consumers".

The Insurance Block Exemption covers the exchange of certain types of information between insurers, such as: the number of claims during a given period; the number of individual risks insured; and the total amounts paid or payable in respect of claims during the relevant period (as set out in Article 3.1 of the Insurance Block Exemption).

A condition for exemption is that these studies need to be made available to potential entrants on "reasonable, affordable and non-discriminatory terms" to insurance undertakings that are not active in the markets captured by these studies (Article 3.2.d of the Insurance Block Exemption). The European Commission considers that this makes the market more transparent to potential new suppliers of insurance and thus lowers barriers to entry and expansion, which further strengthens competition.

The Insurance Block Exemption allows insurance pools for "new risks", without any market share thresholds, for a period of three years. New risks are defined under Article 1 as risks that did not previously exist and that require "the development of an entirely new insurance product", and, in exceptional cases, risks that have changed so materially that "it is not possible to know in advance what subscription capacity is necessary" to cover such a risk (Article 1.6 of the Insurance Block Exemption).

More generally, the Insurance Block Exemption covers pools for other risks, subject to the market shares of the pool participants not exceeding certain thresholds. The aggregate market share of the insurers that comprise a pool for risks other than "new risks" cannot exceed 20 per cent for co-insurance pools and 25 per cent for co-reinsurance pools (Article 6.2 of the Insurance Block Exemption).

In applying these market share thresholds, it should be noted that the European Commission tends to define insurance markets narrowly. The Commission's Staff Working Document accompanying the Report on the Functioning of the 2003 Insurance Block Exemption noted that substitutability of demand between different types of insurance is "theoretically zero" (e.g., customers will not switch between life insurance and car insurance) and that hence supply-side substitution is a critical factor. Supply-side substitution refers, in general terms, to the ability of an insurer to

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diversify readily from one type of insurance into another. Thus the prospect of the relevant market to be defined more widely depends, *inter alia*, on the available expertise and the characteristics of the risk.

For the Insurance Block Exemption to apply there cannot be:

- any restriction or sanction on individual undertakings withdrawing from the pooling arrangements following a "reasonable period of notice" (Article 7(a));
- any restrictions on output, or allocation of geographic or product markets (Articles 7(c), (d) and (e));
- any obligations to sell through the pool (i.e., the parties must be able to sell insurance separately outside the pool (Article 7(b));
- any agreement on commercial premiums not sold through the pool (Article 7(f)); and
- any compilation and sharing of information that gives an indication on the level of commercial premiums (Article 3.2(c)).

If an agreement is outside the scope of the Insurance Block Exemption, then it does not automatically infringe competition law but is subject to individual assessment. In particular, the Commission further clarifies in its 2009 report on the functioning of the 2003 Insurance Block Exemption that "pools may be considered not to be anticompetitive, no matter how high their market share, as long as pooling is necessary to allow their members to provide a type of insurance that could not be provided by one insurance company alone".

WhatIf? Private Motor

In 2011, the OFT accepted commitments from seven of the UK's leading private motor insurance companies and two IT software providers with regard to the WhatIf? Private Motor data exchange tool. This case illustrates the importance of being cognisant of the principles that underpin the Insurance Block Exemption. WhatIf? is a market analysis tool used by brokers to provide quotations to their clients which, according to the OFT, was also used by "most insurers operating in the broker channel of private motor insurance". This tool contained pricing information on all products that participating insurers offered through brokers, which meant that it was outside the scope of the Insurance Block Exemption.

Whilst the case was settled by way of commitments, it is worth noting that the OFT expressed the view that the information exchange was an object infringement of competition law (i.e., there was, in the OFT's view, no need for the OFT to assess its effects), with the information exchange occurring not directly between insurers but via IT service providers. This view was based on the precise nature of the information exchanged and the fact that it concerned future conduct. Interestingly, the commitments still permit the exchange of extensive information (see further below).

By way of background, insurers provided detailed pricing information for the products they sold through brokers to IT service providers (e.g., SSP), who in turn supplied this information to brokers. Brokers would then use this information to provide their customers with quotes of prices and conditions. The IT providers would also supply the same pricing information to other IT service providers, in particular Experian. Experian incorporated this information into WhatIf? Private Motor, its market data analysis product. This product was targeted at the broker channel, but was also available for purchase to most insurers operating in the broker channel, and thus gave insurers the ability to access pricing information for other insurers, in addition to giving them access to their own pricing information.

The pricing information thereby distributed gave insurers access to commercially sensitive, non-public, individualised and highly disaggregated pricing data for all participating insurers. These data allowed insurers to reverse engineer their rivals' pricing model or strategy for any given risk profile, enabling them to predict competitors' behaviour more accurately.

Furthermore, WhatIf? allowed insurers to see pricing information two or three weeks in advance of these prices becoming effective. Insurers were able to adjust their own rates before they went live. These adjustments were passed through SSP and Experian and were reflected in updated WhatIf? quotations. That is, the prices distributed through WhatIf? represented pricing intentions, rather than firm commitments.

Whilst there are a number of car insurers, this information exchange rendered the market highly transparent and, in the OFT's opinion, created scope for anti-competitive coordination between insurers. In particular, the OFT considered that the information provided by WhatIf? significantly enhanced the likelihood of coordination by providing a focal point for collusion. The prices disseminated through WhatIf? also provided a signal to competitors as to pricing intentions, and the possibility of reverse engineering competitors' pricing models ostensibly allowed insurers to predict competitors' responses to their price announcements.

The OFT accepted that there may have been some benefits to providing similar pricing information to insurers. For example, it might facilitate entry by providing new entrants and smaller insurers looking to enter new product segments with information on average premiums, and hence expected risk. However, the OFT considered that the parties had not provided sufficient evidence of any efficiency gains and, in any event, not all the information supplied through WhatIf? was necessary for any pro-competitive purpose. In accepting commitments, the OFT emphasised that "in relation to writing risks where an insurer has either limited or no experience, market analysis products such as WhatIf? may result in lower barriers to entry and expansion by providing information where the insurer has little or no underwriting experience and is therefore unable accurately to rate the risk".

The data that could be provided to insurers (as opposed to brokers) as per the commitments had to be historical (at least six months old), anonymised and averaged across at least five insurers. By using historical data, the information no longer conveyed pricing intentions directly. The anonymous and averaged data also makes it much more difficult to reverse engineer individual competitors' pricing models.

The OFT did not consider these commitments to be exhaustive and effectively reserved the right to find an infringement at a future point. The need for self-assessment therefore remains, and users of WhatIf? or similar tools still need to consider whether the information they are sharing leads to an adverse effect on competition.

The OFT based its analysis of the WhatIf? platform squarely on established competition law, under Article 101 TFEU and thus the Chapter I prohibition of the UK Competition Act 1998. In terms of economic theory, exchanging price data – especially on a per-product basis and without anonymising it – is very likely to raise concerns on some level. Such data can serve to signal insurers' pricing intentions to competitors. It also allows insurers to monitor closely their rivals' prices and thus to identify and respond to any independent competition (or "cheating") by individual insurers who cut prices below a certain point. The risk of collusion is greatly heightened when firms exchange information about their pricing intentions rather than historic prices, even if there is no absolute commitment to implementing these intentions.

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Even with the commitments in place, there may still be a risk of WhatIf? facilitating collusion. For example, sophisticated econometric models, supplemented with market intelligence from other sources, might still be able to engineer much useful information to identify and respond to independent price competition (even if specific competitors cannot be identified), perhaps particularly as regards certain risk profiles where fewer insurers quote. This is a complex matter of fact question, and these possibilities should perhaps be balanced against any pro-competitive benefits. Any such assessment should have regard to the actual pro- and anti-competitive effects of the information exchange on insurers' price setting decisions and how they compete.

Nevertheless, the OFT's decision provides insights that could assist insurers who supply other categories of insurance when they assess the competition law risks of any similar information sharing agreements.

Insurance "Add-ons"

The FCA is in the process of conducting a market study on general insurance add-ons. These are insurance products that are sold on the back of "primary" products, such as an extended warranty sold with an electrical good or an insurance product that is added to a mortgage. The FCA chose five products for its initial data collection: guaranteed asset protection; home emergency; gadget; travel; and personal accident insurance. The FCA also recently concluded its investigations into Motor Legal Expense Insurance (MLEI) and mobile phone insurance. The FCA's investigations follow the CC's investigations of extended warranties and PPI, and the issues raised mirror the concerns that the CC has provisionally expressed about add-on sales in its motor insurance inquiry (see further below). Each of these cases highlights the importance of taking into account possible biases in consumers' behaviour and the manner in which firms respond to such biases in consumers' decision-making process.

The FCA highlights that the "specific context of add-on sales" can affect the extent to which competition works. Competition can break down because consumers consider that the benefit of seeking out alternatives for such add-ons does not justify the time and effort of doing so. Consumers' welfare can also be reduced when they base their decisions on the wrong measure, for instance judging the price of the insurance add-on with respect to the cost of the primary (to-be-insured) good instead of the price of relevant alternatives such as other add-on insurance products. The FCA also expressed concern that customers may have a heightened perception of risk following a purchase of a valuable item, which could lead them to overpay for insurance.

As part of its review of add-on insurance products, the FCA has recently published a report on MLEI. It found that customers generally thought that MLEI provided protection in the event of litigation against them (already covered under their motor policy) and did not understand that the product covered their legal costs of recovering uninsured losses from the at-fault driver. In addition, MLEI was generally sold on an "opt-out" basis as an add-on to motor insurance (i.e., consumers did not actively choose it, but had instead to choose actively not to purchase it). The FCA considered this to be potentially problematic because, being an opt-out product, consumers were more likely to buy this add-on even when they did not understand its benefits. The FCA has indicated that it will revisit the market in a year to see if its concerns have been addressed.

The choice between "opt-in" and "opt-out" products needs to be very carefully weighed. Behavioural economics suggests that consumers are less likely to buy a product when they actively have to opt-in. There may be instances where it is beneficial for consumers to have an opt-in regime, especially if the benefit of the product is immediately apparent to the consumer. For example, it is likely that a consumer will understand the purpose of health insurance or a pension. In the case of MLEI, the majority of customers did not understand the purpose of the product. Given that generally consumers did not know what cover their MLEI provided, and that benefiting from it requires action on their part (i.e., they need to wish to sue for uninsured losses through the courts), it is likely that at least some customers will not have benefited from the cover that they paid for.

Private Motor Insurance

The CC's provisional findings in its motor insurance inquiry provide a further insight into competition problems that can arise in insurance markets. Even though the CC found that the market was characterised by "strong rivalry in the sale to consumers of basic motor insurance", it considered that a number of aspects of how motor insurance is being supplied give rise to adverse effects on competition.

One aspect of the CC's specific provisional adverse findings related to the lack of readily available information on add-on products, such as windscreen cover, key-loss cover and MLEI. The CC considered that this lack of readily available information weakens competition and results in higher prices for these products.

As regards consumers who do not use a price comparison website, the CC considered that insurers have a point-of-sale advantage when selling add-ons because it is costly for consumers to compare the offering with the alternative of getting the add-on elsewhere. As noted earlier, this has previously been an issue in other insurance markets such as extended warranties and payment protection insurance.

The CC further considered that this concern was not entirely alleviated on price comparison websites because they provide only a generic description and a representative price for each add-on. This can differ from the actual cover terms and price that are presented to customers when they click through to the insurer website, so precise comparisons of add-ons still require visiting multiple sites.

In this case, the CC's concern is that the effort required to find alternative providers of insurance add-ons is too onerous, because comparison requires collecting and comparing information from different sources – some of which may not be directly comparable – and that insurers therefore have market power in the provision of add-on services when they sell directly to consumers. The CC considered that although add-ons are relatively low-priced products, a number were more profitable than basic motor insurance policies, but the CC acknowledged that "rivalry may mean that higher prices on add-ons enable motor insurers to offer lower prices on the basis motor insurance policy".

Price Comparison Websites

In November 2013, the FCA launched its review into price comparison websites to "gain a clearer understanding of whether the way information is presented gets consumers the fairest deal" for insurance cover. The FCA highlights that its key concern is whether the price comparison websites allow consumers to make fully informed decisions, or whether too much prominence is given to prices, leading consumers to choose products that provide cover that is less comprehensive than they thought.

In our view, this is an interesting question of balance in the sense that the prices that these websites generate should be for broadly

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comparable products (i.e., the cover is similar if not identical). However, if strictly identical terms were to be required then it must be questioned how this would be achieved in practice in a way that benefits consumers. If price comparison websites only presented consumers with policies that have identical terms, then they would offer fewer options in response to a query because some policies no longer qualify for comparison. Indeed, the whole purpose of price comparison websites is to allow consumers to easily compare prices, which is pro-competitive and it would be undesirable if this should be compromised. Such a policy might also limit the incentives to innovate, insofar as new products are not as easily presented to consumers alongside existing offerings.

Broader Issues Raised by the CC's Private Motor Insurance Inquiry

The CC has provisionally identified a series of other practices in, and market characteristics of, the private motor insurance market that it has deemed problematic, notwithstanding its conclusion that there is "strong rivalry in the sale to consumers of basic motor insurance", namely:

- the separation of cost liability and cost control resulting from the non-fault insurer charging various costs to the at-fault insurer, with the CC concluding that this results in higher costs, and hence, higher premiums;
- consumers' inability to assess the quality of repairs, resulting in an under-provision of repair services; and
- specific forms of most-favoured nation (MFN) clauses used in contracts between price comparison websites and insurers.

The "separation" of cost liability and cost control arises because in the majority of claims, the non-fault party contacts its own insurer or its agent (e.g., a claims management company) for restitution. This company provides the service to the non-fault party and then charges the at-fault insurer for the service. As a result, the CC provisionally found that claims are charged at a higher level than the actual cost incurred. For example, the CC highlighted that car hire companies or their intermediaries charge at-fault insurers more than the cost incurred in the provision of replacement cars. These companies then use the excess to compete for business from insurers and their agents via referral fees, although the CC does not appear to have considered that this competition should to some extent generate offsetting reductions in insurance costs and premiums. In addition, the CC found that some non-fault insurers charge at-fault insurers more than the cost incurred.

The CC proposes to resolve this issue by requiring that claims be dealt with by the at-fault insurer, i.e., that the party that bears the cost also controls the cost. It is not obvious that this is necessarily a better outcome for consumers, because the at-fault insurer has less incentive to provide a good service to a non-fault claimant when the latter is not a customer. The CC considers that the impact on quality would be "small". While its survey indicates that there is a clear decline in quality when the replacement car is provided by the at-fault insurer (which saves money, albeit at the expense of the non-fault claimant), it noted that there were offsetting benefits to non-fault claimants in having their claim dealt with by the at-fault insurer, such as the fact that the at-fault insurer does not require an excess to be paid by the non-fault claimant.

The CC does not explicitly take into account that at-fault insurers' incentives could change if the possibility of separation is eliminated. At-fault insurers are currently constrained as to the services they offer to non-fault claimants by the fact that if the quality of the service offered to non-fault claimants deteriorates, more non-claimants will opt to use their own insurer or a claims management company instead. Once separation is abolished, this constraint would no longer be in place.

Finally, the CC expressed concern about so-called MFN clauses in agreements between insurers and price comparison websites. The MFN clauses stipulate that an insurer will not offer the same product in a different channel at a lower price. Such restrictions are considered to limit price competition between platforms, because suppliers using low-cost platforms may otherwise be prevented from selling at lower retail prices on these platforms than on other platforms which charge insurers higher fees.

The CC identified two broad groups of MFN clauses. Wide MFN clauses prevent insurers from offering their product at a lower premium on any channel, whilst narrow MFN clauses prevent insurers from doing so only as regards their own direct sales. The CC considers that while wide MFN clauses adversely affect competition, narrow MFN clauses "may be necessary for the survival of PCWs [price comparison websites] as a business model" because they ensure that consumers cannot find the same product at a lower price on the insurer's website.

The CC's treatment of MFN clauses illustrates the importance of considering the dynamics of a market when assessing firms' behaviour. From a static perspective, even narrow MFN clauses may seem to weaken competition because they eliminate the ability of insurers to set lower prices for direct sales, even if direct sales are less costly for the insurer. However, for price comparison websites to remain a credible platform, consumers need to have certainty that they cannot get a better deal on the same product by circumventing the price comparison website. Given the benefits of price comparison websites – reduced consumer search costs, easier comparison between offerings and hence increased competition between insurers – consumers would be worse off if this business model ceased to be viable. Accordingly, narrow MFN clauses were considered by the CC to have sufficient offsetting consumer benefits, even though they limited competition between distribution channels.

It should also be noted that these particular forms of MFN clauses are addressed in an OFT research paper on Price Relationship Agreements (2012) which refers to them as "across-platforms parity agreements", and they have been subject to investigation by the OFT and the Bundeskartellamt in connection with hotel bookings and Amazon's pricing policies as to whether they adversely affect competition between platforms. The OFT and Bundeskartellamt closed their investigations of Amazon in November 2013 after Amazon removed its MFN clause from the terms for its Amazon Marketplace platform. In December 2013, the OFT consulted on revised commitments proposed by Booking.com, Expedia, and InterContinental Hotels Group, which were designed to address competition concerns in relation to the online offering of room-only hotel accommodation bookings by online travel agents. The Bundeskartellamt is currently investigating Booking.com and Expedia's use of "best price" provisions following their decision to block hotel portal HRS's use of such clauses.

Conclusions

There is no suggestion that competition law will not be vigorously enforced in the insurance sector, although some insurers may derive some comfort from the fact that the OFT chose to resolve the WhatIf? case through commitments without a formal decision that competition law was infringed – notwithstanding the OFT's view that this information exchange amounted to an object infringement of competition law. Apart from the possibility of large fines being imposed, a formal infringement decision would have provided the basis for actions for damages.

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Separately, the various market studies being carried out also indicate that the FCA will be active and highly consumer-focused. Market studies can lead to wide-reaching remedies being imposed, including extensive changes in commercial practices (as are currently being contemplated by the CC in the context of the ongoing inquiry into private motor insurance) and even divestments (as have been imposed in the context of the CC's Aggregates, cement and ready-mix concrete market study of January 2014, albeit that such remedies are less likely to be contemplated in insurance markets with many competitors).

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AlixPartners has a multi-disciplinary practice covering economics, forensic accounting, and information management services (such as e-discovery and applied data analytics). Combined with AlixPartners' industry expertise, this wide ranging expertise is very important, since robust economic analysis requires robust facts, relating to matters such as customer behaviour, prices, costs, sales and profits. The team also provides monitoring trustee services, which focus on the design and implementation of commitments.

Members of the AlixPartners team are currently acting in relation to the Competition Commission's market investigation in relation to payday loans. They have also acted in relation to the payment protection insurance market investigation before the Competition Commission and the appeal to the Competition Appeal Tribunal, and in connection with the OFT's WhatIf? Private Motor investigation.

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