

Online platforms – who can set the price and are most favoured nation clauses compatible with competition rules?

INTRODUCTION

The OFT announced on 31 January 2014 that it has accepted commitments in the hotel online booking investigation which allow online travel agents (“OTAs”) to discount hotel room rates to members of closed user groups. The Competition Commission has also recently come to a provisional view on the validity of most favoured nation clauses used by price comparison websites for motor and other insurance products. These cases are likely to have a significant impact for all online platforms, in particular those used for travel, insurance, music, e-books and consumer goods.

The OFT's investigation into hotel online services raised two fundamental questions about online platforms' arrangements with suppliers generally:

- (1) Whether an online platform which allows suppliers to set the prices of their goods/services sold through the online platform is engaging in resale price maintenance (“RPM”) and therefore contravening UK/EU competition law; and
- (2) Whether an obligation on suppliers to make their best prices available on a platform (a type of ‘most favoured nation’ clause (“MFN”)), is anti-competitive.

The commitments offered by the parties to the investigation (Expedia, Booking.com and InterContinental Hotels Group (“IHG”)) and accepted by the OFT seek to address these issues.

BACKGROUND

Booking.com operates an online booking platform which allows hotels to advertise room reservations and consumers to book rooms via the Booking.com website. Booking.com operates under the so-called ‘agency’ model, whereby consumers pay hotels directly for the room reservation and hotels later pay Booking.com a commission. Expedia operates under the merchant model whereby it accepts payment from consumers and then remits a net amount (the retail room rate minus its margin or commission) to the hotel.

Under both models, it is the hotel that sets the price displayed to consumers for room-only reservations. This is common to many other types of online platforms and price comparison websites including EBay, Amazon Marketplace and motor insurance comparison websites such as GoCompare.com and MoneySupermarket.com.

The OFT alleged that Booking.com and Expedia had entered into separate arrangements with IHG, which restricted the ability of the OTAs to discount the rates at which room-only bookings were offered to customers. The OFT alleged that such arrangements amounted to RPM and therefore potentially a serious breach of UK and EU competition law.

ANALYSIS

The commitments provide some guidance on the two fundamental questions raised above:

- (1) **Can sellers set the price on online platforms?** The OFT maintains that arrangements between sellers and online platforms which restrict the platform's ability to discount are potentially in breach of Chapter I of the Competition Act / Article 101(1) TFEU. However, in the case of hotels and OTAs, the OFT accepts that there are efficiencies (particularly in relation to yield management) and consumer benefits which justify hotels being able to set headline rates.

As a result, the OFT has accepted commitments which allow hotels to continue setting headline rates, provided OTAs are free to discount up to the level of their commission within closed user groups (as defined in the commitments).

Inherent in this analysis is the OFT's rejection of the argument that OTAs are genuine agents of hotels, since if OTAs were genuine agents, the hotels would be free to stipulate the end price to consumers.

- (2) **Are MFNs anti-competitive?** The OFT's hotel online booking investigation did not focus on the parties' MFNs. This is consistent with the generally held view that MFNs can be either pro- or anti-competitive, depending on the circumstances. In this case, Booking.com and Expedia have agreed not to enforce their MFNs against hotels in relation to discounts offered by other OTAs or hotels to members of closed groups which comply with the principles outlined in the commitments.

However, in the Competition Commission's ("CC") investigation into private motor insurance, the CC has provisionally found that 'wide' MFNs soften price competition between price comparison websites. 'Wide' MFNs are MFNs between price comparison websites and insurers which require parity (ie the same or better price) with all competing price comparison websites and the insurer's own direct channel. According to the CC, wide MFNs lead to "less entry, less innovation and higher commission fees, all leading to higher premiums."¹

The CC considered that 'narrow' MFNs, which require parity only with insurer's direct channel, do not have the same effect on competition and are likely to be necessary to ensure the survival of price comparison websites' business model.

The CC's analysis could provide a framework for other competition authorities who are looking into these issues.

WHAT DOES THIS MEAN FOR THE FUTURE?

The commitments bring an end to the hotel online booking case in the UK without any finding of infringement against the parties. The commitments will remain in force for two years. At the end of this period, the parties have agreed to consider extending their commitments.

It is clear that the OFT expects that all OTAs, hotels and others participants in the travel sector in the UK to comply with the principles set out in the commitments.

¹ Private Motor Insurance Market Investigation, Provisional findings report, 17 December 2013, paragraph 76.

Beyond the travel sector, there are implications for other online retailers operating on similar models which serve customers in the UK. If you think this might be relevant to your business, active consideration should be given as to what steps may need to be taken in order to comply with the principles outlined in the commitments.

BEYOND THE UK

Similar investigations focusing on MFNs in the online hotel booking sector remain on foot in Germany, France, Sweden, Hungary, Austria and Switzerland. Industry participants will no doubt be keen to see a European-wide resolution. This may be a case where the European Commission decides to intervene to avoid conflicting or inconsistent outcomes across the EU.

Notes:

The commitments are available here: [OFT Investigation into the hotel online booking sector](#).

The CC's provisional findings in relation to the Private Motor Insurance Market Investigation are available here: [CC Private Motor Insurance market investigation](#).

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