

HOTEL ONLINE BOOKING SECTOR: THE COMMITMENTS OF 'BOOKING' AND THE MOST FAVORED NATION CLAUSES. A CASE CONDUCTED IN COOPERATION WITH OTHER NATIONAL COMPETITION AUTHORITIES

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1. INTRODUCTION

On 21 April 2015, the Italian Competition Authority (hereinafter ICA) rendered the commitments offered by two Priceline Group companies, namely Booking.com BV and Booking.com (Italy) (hereinafter Booking) legally binding and closed. The investigation on these undertakings was opened on 7 May 2014, and the case against Expedia.Inc and Expedia Italy S.r.l. (hereinafter Expedia) is still ongoing.

The case was opened in order to investigate possible restrictions of competition related to the use of price parity and other clauses – e.g. the so-called Most Favored Nation clauses (MFN) - in contracts stipulated between Booking or Expedia (the main online travel agencies in Italy) and their hotel partners.

The investigation was conducted in cooperation with the French and Swedish Competition Authorities and with the coordination of the European Commission.

2. OTAS AND THE MFN CLAUSE

Online travel agencies (hereinafter OTAs) operate internet platforms, on which consumers can freely search for, compare and book hotel rooms. OTAs provide visibility to hotels and access to customers

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worldwide, and also provide consumers with a simple search tool to locate a large number of hotels, all with pictures and reviews by other customers. The main OTAs adopt a business model based on commissions. According to this model, commissions are paid by hotels, based on the sales price of the room, but only when the room is actually booked.

The Italian market for online hotel booking services in which the OTAs are active appears strongly concentrated. Booking and Expedia - respectively first and second operators - account for at least 70% of the market; other competitors are active on the market, but with lower shares. In 2013, online hotel bookings through OTAs represented nearly 70% of the online channel (in terms of hotel turnover), and 25-30% of total hotel reservations. Room bookings at the hotels' website represent only 5-15% of total hotel reservations.

When the proceeding was opened, all the major OTAs adopted parity clauses (hereinafter also MFN clauses) in their vertical agreements with hotel partners². Such clauses require hotels to offer OTA room prices, room availability and booking and cancellation conditions that are no less favorable than those they offer on any other sales channel (online, offline, direct and/or indirect).

3. COMPETITION CONCERNS AND COOPERATION

The Italian Competition Authority, in opening the procedure, held that MFN clauses - in contracts stipulated between Booking and Expedia and their hotel partners located in Italy - may harm competition, in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

In particular, it had concerns that these clauses might soften competition among OTAs and hinder new booking platforms from entering the market. Indeed, MFN clauses eliminate room price and room availability as parameters of competition and hence discourage OTAs from competing on the commissions they charge to hotels. As a consequence, hotels cannot reduce their room price to the particular OTA which accepts to reduce its commission, since the clause obliges them to give the same room price reduction to all OTAs (in general, hotels make their rooms available on several competing platforms). In addition, new entrants cannot attract customers with lower room prices (in return for charging low commissions to hotels), as hotels are bound by the MFN clauses of incumbents.

² At the time, only around twenty per cent of hotel bookings in Europe were made through online travel agencies and ten per cent through hotel websites. The price and condition parity clauses, however, generally extended to the remaining seventy percent of bookings, including customers who walk in off the street or book by phone (source: *Competition policy in the Digital Age* by Alexander Italianer - 47th Innsbruck Symposium- "Real sector economy and the internet – digital interconnection as an issue for competition policy").

Therefore, these clauses may increase commission rates paid by the hotels and, potentially, the prices paid by final consumers for hotel rooms; they also create a barrier to market entry or expansion.

These competition matters in the online hotel booking services were assessed in Europe by several National Competition Authorities (hereinafter NCAs) that opened investigations or informal sector enquiries. In this context, the ICA proceeding was coordinated with the competition Authorities of France and Sweden, pursuant to Regulation (EC) no. 1/2003, and the European Commission assisted them in this cooperation. In order to allow coordination of the three national parallel cases, the ICA aligned its investigation timetable and, from a procedural perspective, it operated jointly with France and Sweden mainly during its evaluation of Booking's commitments.

In particular, the national commitments procedure set by ICA was adapted to the specificities of the case and many actions, such as joint hearings with the NCA Services, were held in order to facilitate Booking efforts in dealing with several Authorities at the same time and in elaborating a common commitment package.

4. THE COMMITMENTS

Over the course of the investigation, Booking offered commitments to change the parity clauses of its agreements in order to address the competition concerns identified by the ICA. The same package of remedies was submitted to the French and Swedish Competition Authorities. On 15 December, the three NCAs jointly launched market tests to collect the comments of the stakeholders in different national contexts. As a result of market tests, the commitments were improved by Booking and they were accepted by the Italian, French and Swedish Competition Authorities on 21 April 2015.

In particular, Booking would:

1. refrain from obliging accommodations to enforce parity clauses on price and other conditions offered on any other OTA (Price Parity / Conditions Parity);
2. refrain from obliging accommodations to offer the same or a greater number of rooms, of any type on Booking, as those offered on any other OTA, or as reserved for the accommodation itself (Availability Parity);
3. allow accommodations to offer equal or better conditions on Offline Channels than those offered on Booking.com, provided that these conditions are not published online or marketed online (i.e., they are aimed at the general public);

4. refrain from restricting unpublished conditions that accommodations might offer, provided that these are not marketed online to the general public: in other words, Booking may prevent its hotel partners from offering better conditions if they are made available to the general public online³.

In their substance, the commitments significantly reduce the scope of the MFN clauses and, to such an extent, will prevent Booking from requiring that the hotels offer better or equal room prices and conditions via Booking than they do via competing OTAs. In addition, Booking cannot prevent hotels from offering lower room prices provided that these discounts are not marketed or made available to the general public online. Indeed, the revised MFN clauses only apply to prices and other conditions publicly offered by the hotels through their own direct online sales channels, leaving them free to set prices and conditions on other OTAs and on their direct offline channels, as well as in the context of their loyalty programs. Also on the basis of their commitments, Booking cannot oblige any parity of the hotels with regard to room availability. Booking's hotel partners are entirely free to manage their capacity and their availability in terms of rooms (hotels are now allowed to offer not only better room rates and conditions on the other platforms but also different numbers and types of rooms).

According to the ICA these commitments are expected to increase competition between OTAs which represent nearly 70% of the online hotel booking segment (in terms of hotel sales). In particular these measures will improve competition between OTAs on the level of commission fees requested from hotels, since lower fees for the hotels can be translated into lower room rates and better conditions offered by hotels on other platforms. Moreover, hotels have more flexibility in allocating rooms across different OTA platforms and may use this competitive variable when negotiating their commission fees with the OTAs. Furthermore, the hotels will be free to offer cheaper rates and conditions on the offline booking channels than those offered on Booking, and these channels account for about 60 – 70% of hotel reservations. In addition, the commitments allow hotels to offer more favorable terms to not only their loyalty programme customers (as initially proposed) but also to all customers, provided that these discounts are not marketed and advertised online to the general public. In particular, the ICA has considered this measure as able to limit the risk of cannibalization of sales, which was the main concern raised by hotels during the market test.⁴ Indeed, this provision was found to be appropriate in striking a balance between the promotion of direct channels by hotels and the interest of Booking in limiting the free-riding problem and protecting its investments in the online platform. In

³ In addition, Booking will not offer lower commission rates or other incentives to accommodations that observe Price Parity, Condition Parity and/or Availability Parity, which Booking has committed to abandon, such as: de-listing or threatening to de-list any accommodation; increasing commissions (or imposing any other charges); having a different treatment in Booking's ranking algorithm.

⁴ Hotels and their associations argued that they would have no incentive to offer better terms on OTA websites than those offered to their own websites (due to the risk of losing sales on the direct channel to the benefit of the OTA channel) as they are interested in promoting their online direct channels.

this context, the ICA also took into consideration that the hotel industry in Italy is very fragmented⁵ and that the hotel website channel represents only 5-15% of total (online + offline) hotel reservations and 25-35% of the sales are made via the online channel.

Furthermore, the ICA carried out an analysis based on an economic model⁶ in order to assess the impact of Booking's commitments in terms of opportunities and incentives for OTAs and hotels in differentiating fees and room rates. The exercise conducted by the ICA has shown that, when moving to a scenario with a parity clause as envisaged in the remedies package, there existed numerous pairs of commission fees and room rates which could be "credibly" pursued by OTAs and hotels.

Therefore, the ICA deems the above-mentioned commitments suitable and proportionate to address competition concerns related to Booking's behavior, since they substantially limit Booking's use of price and condition parity clauses as part of its commission-based business model and increase the hotels' margin for maneuver.

The commitments came into force on 1 July 2015 and they affect all the hotels located in the EEA that have an agreement with Booking. The parties have determined that the commitments will remain in force for a five-year period.

5. CONCLUSION

In the Booking case the unprecedented cooperation among the Italian, French and Swedish Authorities with the coordination of the European Commission has made it possible to align the decisions of the above-mentioned Agencies.

In the ICA's view, the efforts and the cooperation involved have permitted the adoption of commitments that are appropriate in striking the right balance for consumers, restoring competition, preserving user-friendly free search and comparison services and encouraging the development of innovative services in the market.

⁵ Independent hotels, which represent 85% of all hotels, are generally small in size and the majority of their direct sales occur through offline channels. Large hotel chains, on the other hand, represent only 6% of all hotels in Italy (source: *ICA decision of 21 April 2015 on case I779*).

⁶ The economic model was originally presented by Booking to the three NCAs and it was adapted by them according to the specificity of each national market structure.