

# **Hotel online booking: Decision to accept commitments to remove certain discounting restrictions for Online Travel Agents**

31 January 2014

OFT1514dec

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Annexe 1 – Final Commitments

Annexe 2 – Efficiency arguments put forward by the Parties

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# 1 EXECUTIVE SUMMARY

- 1.1. This decision ('Decision') is addressed to Booking.com B.V. ('Booking.com') and its ultimate parent company priceline.com Incorporated ('Priceline'); Expedia, Inc ('Expedia'); InterContinental Hotels Group plc ('IHG') and Hotel Inter-Continental London Limited ('IH London') (the former owner of the Intercontinental London-Park Lane hotel ('ILPL')) (the 'Parties' and each a 'Party').
- 1.2. Following the launch of a formal investigation in September 2010, on 31 July 2012, the Office of Fair Trading ('OFT') issued a Statement of Objections alleging that Booking.com and its ultimate parent company Priceline; Expedia; IHG and IH London (the then owner of ILPL) have infringed Chapter I of the Competition Act 1998 (the 'Act') and Article 101 of the Treaty on the Functioning of the European Union ('TFEU') in relation to the online offering of 'Room-Only'<sup>1</sup> hotel accommodation bookings by online travel agents ('OTAs').
- 1.3. The Statement of Objections alleged that Booking.com and Expedia each entered into separate arrangements with IHG and ILPL which restricted each OTA's ability to discount the rate at which Room-Only hotel accommodation bookings are offered to consumers.

## The OFT's competition concerns

- 1.4. The OFT's competition concerns as set out in its Statement of Objections are as follows:
  - **Current restrictions on discounting limit competition on room rates:** when OTAs face the current restrictions on discounting a hotel's Room-Only accommodation, there is likely to be limited, if any, competition on the offer of room rates to consumers between OTAs

<sup>1</sup> 'Room-Only' means hotel accommodation that is offered on a standalone and/or individually priced basis, that is, not as part of a Package (see further paragraph 4.11 below). 'Room-Only' can include ancillary non-travel offers, such as breakfast. 'Room-Only' does not include hotel accommodation which is offered on an opaque basis, including where the accommodation booking offered on an opaque basis is offered on a standalone and/or individually priced basis (see further paragraph 4.13 below).

and between OTAs and the hotel's direct online sales channel for those hotel accommodation bookings (that is, intra-brand competition).

- **Current restrictions on discounting may increase barriers to entry:** the current restrictions on discounting may create barriers to entry to the extent that they prevent new OTAs from entering the market, and/or achieving sufficient scale (with discounted rates for Room-Only hotel accommodation).
- **To the extent that similar discounting restrictions are replicated currently in the market, then any prevention, restriction or distortion of competition is further exacerbated:** although the OFT has not investigated the extent to which similar discounting restrictions are replicated in the market, the OFT understands that the alleged practices are potentially widespread in vertical distribution arrangements in the industry. In principle, a market in which discounting restrictions are prevalent is likely to be characterised by significant limits to price competition and barriers to entry.

## The public consultations

- 1.5. In order to address the competition concerns of the OFT and assist with bringing the investigation to a close, the Parties offered commitments (the 'Commitments') to the OFT that they would modify their behaviour in accordance with certain principles. The OFT, pursuant to section 31A of the Act, conducted a consultation exercise (the 'First Consultation') to seek views on the Commitments offered by the Parties. This took the form of publication of a Notice to accept binding commitments issued on 9 August 2013 (OFT1500).<sup>2</sup>
- 1.6. In the light of the representations submitted to the OFT pursuant to the First Consultation and further developments (including the OFT's further consideration of the sector), the OFT requested from the Parties, and received, amendments to the Commitments (the 'Amendments' and,

<sup>2</sup>[www.of.gov.uk/shared\\_of/ca-and-cartels/oft1500.pdf](http://www.of.gov.uk/shared_of/ca-and-cartels/oft1500.pdf)

combined with the Commitments, the 'Final Commitments').<sup>3</sup> The Amendments related to (i) hotel discounting; (ii) geographic scope; and (iii) duration.

- 1.7. The OFT conducted a second consultation exercise (the 'Second Consultation') to seek views on its intention to accept the Final Commitments offered by the Parties. This took the form of publication of a Notice of intention to accept revised commitments issued on 20 December 2013 (OFT1514).<sup>4</sup>
- 1.8. The OFT, having taken account of representations made during the Second Consultation, considers that the Final Commitments offered by the Parties address the OFT's competition concerns in this case.

## The Final Commitments

- 1.9. The text of the Final Commitments is set out at **Annexe 1** to this decision. In summary, the Parties have committed to modify their behaviour to comply with the following key Principles:<sup>5</sup>
  - **Hotel room discounts offered by OTAs:** OTAs will be free to offer reductions off headline room rates,<sup>6</sup> for example by way of discounts, vouchers, rewards and/or cash back, funded by their commission revenue or margin to members of a 'closed group', for instance in the context of membership or loyalty schemes.<sup>7</sup>

<sup>3</sup> The Parties offered the Final Commitments in the understanding that the OFT would close its investigation in this case without any finding of infringement and the offering of the Final Commitments by the Parties does not constitute an admission of wrongdoing by the Parties.

<sup>4</sup> [www.offt.gov.uk/shared\\_offt/ca-and-cartels/OFT1514.pdf](http://www.offt.gov.uk/shared_offt/ca-and-cartels/OFT1514.pdf) .

<sup>5</sup> 'Principles' means the principles as set out in Annexe 1 to this decision.

<sup>6</sup> Under the Final Commitments, 'headline room rate' means the room-only headline hotel room rates set by the relevant hotel partner for its rooms. It refers to the published retail rate for a room at a hotel on a particular night at a given point in time.

<sup>7</sup> Joining a closed group is intended to be a relatively low threshold, which may require only the entry of certain personal details online. This means that consumers will not be disincentivised from joining several groups due to onerous joining mechanisms. Unless the OTA offering the

Eligibility for such discounts is dependent on the end-user making the booking having joined the closed group and having made a single previous booking (which is/has become non-refundable) after the effective date of the Final Commitments of any hotel room with that OTA.

- **Hotel room discounts offered by hotels:** Hotels will also be free to offer reductions off their own headline rates to closed group members on the same basis as OTAs.<sup>8</sup>
- **Advertising of hotel room discounts:** OTAs will be free to publicise information regarding the availability of discounts in a clear and transparent manner, including to price comparison websites and meta-search sites (that is, to members and non-members). However, OTAs cannot publicise information regarding the specific level or extent of discounts for any IHG hotel room, or any other information which would allow a discounted retail rate to be calculated (including, for the avoidance of doubt, the discounted rate itself), to non-members. Similarly, other (non-IHG) hotels may prevent OTAs from publicising such information for their hotel rooms to non-members.

1.10. Other restrictions, such as retail rate most-favoured nation provisions ('MFN provisions'),<sup>9</sup> have not been considered by the OFT and are not the subject of the Final Commitments. This is save to the extent that

closed group membership scheme unilaterally decides to impose stricter requirements than those set out in the Principles, no purchase will be required to join the closed group itself (as opposed to being eligible for discounts).

<sup>8</sup> However, there is no form of financial 'cap' or limitation on the extent of the discounts that hotels can offer to closed group members, unlike OTAs.

<sup>9</sup> Under such MFN provisions, a hotel agrees to provide an OTA with access to a room reservation (for the OTA to offer to consumers) at a booking rate which is no higher than the lowest booking rate displayed by any other online distributor. This is also known as 'Rate Parity'. This guarantees the OTA the lowest booking rate at least in relation to other OTAs (that is, it cannot be undercut).

such restrictions could prevent<sup>10</sup> either hotels or OTAs from offering such discounts as are allowed for by the Final Commitments.<sup>11</sup> This is to ensure the efficacy of the Final Commitments and avoid the potential for any distortive effects. Thus, under the Final Commitments Expedia and Booking.com may not prevent hotels from operating on the basis of arrangements which are consistent with the Principles, that is, from offering discounts in an equivalent manner to OTAs.

- 1.11. The Final Commitments apply to bookings made by EEA residents<sup>12</sup> for rooms in hotels located in the UK, and will remain in force for a period of two years.
- 1.12. The OFT, having taken account of representations made during the First Consultation and the Second Consultation, considers that the Final Commitments as set out in Annexe 1 of this document address its competition concerns in this case and it has therefore decided to accept the Final Commitments. Accordingly, the OFT has closed its file in respect of this investigation. This decision by the OFT to accept the Final Commitments does not amount to or imply any finding as to the legality or otherwise of the conduct by the Parties either prior to acceptance of the Final Commitments or once the Final Commitments are in place.

<sup>10</sup> This could be indirect, for example if a hotel is required to offer an OTA the same discounted booking rate as the hotel or another OTA is offering to closed group customers.

<sup>11</sup> The adjustment of MFN or equivalent provisions required by the Final Commitments is a minimum standard only. The Final Commitments do not affect any existing contractual arrangements under which a hotel can offer discounts, or allow its other OTA partners to do so. For the avoidance of doubt, this means, amongst other things, that if discounting by that hotel or discounting by other OTAs of that hotel's accommodation is currently outside the scope of any MFN provisions, this would be unaffected by the Final Commitments. The Final Commitments also do not affect the ability of hotels and OTAs to agree additional discounting rights (or additional rights for the OTA to advertise its specific discounts) and adjustment of MFN or equivalent provisions that go beyond the Principles set out in the Final Commitments.

<sup>12</sup> Under the Final Commitments, 'EEA resident' means a consumer who has an EEA address, an EEA telephone number or an EEA registered credit or debit card. For the avoidance of doubt, the nationality or legal residency or tax status of the individual is irrelevant.



## 2 INTRODUCTION

- 2.1. In this decision, the OFT accepts the Final Commitments offered by the Parties and set out at **Annexe 1**. Formal acceptance of the Final Commitments by the OFT results in the termination of the investigation, with no decision made on whether or not Chapter I of the Act or Article 101 TFEU has been infringed by any of the Parties. For the avoidance of doubt, the decision by the OFT to accept the Final Commitments does not amount to or imply any finding as to the legality or otherwise of the conduct by the Parties either prior to acceptance of the Final Commitments or once the Final Commitments are in place.
- 2.2. **Annexe 2** to this decision contains a description of the efficiency arguments advanced by the Parties.
- 2.3. **Annexe 3** to this decision contains an overview of the responses made to the First Consultation and the Second Consultation and a description of how the OFT has taken them into account.
- 2.4. The remainder of this document describes the OFT's investigation, the market context in which the investigation has been carried out, and which parties were involved. The OFT's competition concerns are then set out. The document then summarises the Final Commitments offered by the Parties, the responses to the First Consultation and the Second Consultation, and the Amendments to the Commitments. The document concludes by setting out why the OFT considers that the Final Commitments address its competition concerns.

### **3 THE OFT'S INVESTIGATION**

- 3.1. In April 2010, the OFT received information suggesting that there are vertical arrangements between hotels and OTAs that may be in breach of the Chapter I prohibition of the Act and Article 101 of the TFEU.
- 3.2. In September 2010, the OFT launched a formal investigation under section 25 of the Act, on the basis that it had reasonable grounds to suspect that the Chapter I prohibition of the Act and Article 101 of the TFEU had been infringed in the hotel online booking sector, in particular in relation to specific vertical arrangements between hotels and OTAs.
- 3.3. On 31 July 2012, the OFT issued a Statement of Objections in accordance with Rule 4 of the OFT Rules<sup>13</sup> alleging that Booking.com and its ultimate parent company Priceline; Expedia; IHG and IH London (the then owner of ILPL) have infringed UK and EU competition law in relation to the online offering of Room-Only hotel accommodation bookings at ILPL by OTAs.
- 3.4. The OFT limited the scope of its investigation to a small number of major companies, with a view to achieving a swift and effective outcome. However, the alleged practices are potentially widespread in vertical distribution arrangements in the industry.

#### **Process**

- 3.5. In September 2010, the OFT launched a formal investigation under section 25 of the Act, having established reasonable grounds for suspecting that Chapter I of the Act and Article 101 of the TFEU had been infringed and having considered the extent to which the initiation of a formal investigation would be consistent with the OFT's prioritisation principles.
- 3.6. During the course of its investigation, the OFT sent formal notices requiring documents and information under section 26 of the Act to a number of parties.

<sup>13</sup> The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751) (the 'OFT Rules'). Available on the OFT's website at [www.offt.gov.uk](http://www.offt.gov.uk).

- 3.7. In addition, the OFT met in person and conducted teleconferences with various parties and their representatives to gather further substantive evidence.
- 3.8. On 31 July 2012, the OFT issued a Statement of Objections alleging that Booking.com and its ultimate parent company Priceline, Expedia, IHG and IH London have infringed UK and EU competition law in relation to the online offering of Room-Only hotel accommodation bookings at ILPL by OTAs.
- 3.9. Following a series of separate meetings and discussions between the OFT and the Parties, each Party (including IH London, via IHG; and Priceline, via Booking.com) indicated its proposal to offer commitments to address the OFT's competition concerns. Accordingly, further to paragraph 4.18 of OFT407 (*Enforcement*) (the 'OFT Guidance') and paragraph 10.19 of OFT1263rev (*A guide to the OFT's investigation procedures in competition cases*) (the 'Procedural Guidance'), the OFT proceeded to discuss with each Party the scope of any commitments which it considered would be necessary to address the concerns it had identified.
- 3.10. By way of background, the OFT notes that it has the power to accept commitments offered to it pursuant to section 31A of the Act where it is satisfied that the commitments offered address its competition concerns. The OFT Guidance describes the circumstances in which it may be appropriate to accept binding commitments, and the process by which parties to an investigation may offer commitments to the OFT.
- 3.11. In accordance with paragraph 4.16 of the OFT Guidance and paragraph 10.18 of the Procedural Guidance, a business under investigation can offer commitments at any time during the course of that investigation, until a decision on infringement is made.
- 3.12. In this case, no infringement decision has been made. The Parties did not formally respond to the Statement of Objections (but the period for formal responses to the Statement of Objections had not elapsed at the time the Parties offered the Commitments). However, the Parties did make some submissions: (i) prior to the publication of the Statement of

Objections on the OFT's preliminary legal assessment;<sup>14</sup> and (ii) after the publication of the Statement of Objections, on the OFT's competition concerns for the purposes of offering commitments, including in respect of potential efficiencies associated with the restrictions on discounting that were the subject of the OFT's Statement of Objections.<sup>15</sup> Following receipt of these submissions, the OFT (pursuant to the OFT Guidance) further discussed with the Parties the form and content of the commitments that would be acceptable to the OFT.

- 3.13. Without prejudice to the Parties' position as regards the OFT's preliminary legal assessment in this investigation, the Parties offered formal commitments to the OFT on 7 August 2013. The offering of the Commitments by the Parties does not constitute an admission of wrongdoing by the Parties.
- 3.14. On 9 August 2013, the OFT issued a Notice of intention to accept binding commitments (*OFT1500*)<sup>16</sup> in which it invited interested third parties to make representations on the Commitments. This, the First Consultation, closed on 13 September 2013.
- 3.15. In the light of the representations submitted to the OFT pursuant to the First Consultation and further developments (including the OFT's further consideration of the sector), the OFT requested from the Parties, and received on 27 November 2013, the Amendments. The Amendments related to (i) hotel discounting; (ii) geographic scope; and (iii) duration. The Amendments combined with the Commitments constitute the Final Commitments. The offering of the Amendments and the Final Commitments by the Parties does not constitute an admission of wrongdoing by the Parties.
- 3.16. In order to seek views on its intention to accept the Final Commitments offered by the Parties, the OFT conducted the Second Consultation. This took the form of publication of a Notice of intention to accept revised

<sup>14</sup> For example, in relation to how these arrangements should be characterised for the purposes of UK and EU competition law.

<sup>15</sup> The efficiency arguments put forward by the Parties are set out in Annexe 2.

<sup>16</sup> [www.offt.gov.uk/shared\\_offt/ca-and-cartels/oft1500.pdf](http://www.offt.gov.uk/shared_offt/ca-and-cartels/oft1500.pdf).

commitments (*OFT1514*) on 20 December 2013.<sup>17</sup> The Second Consultation closed on 17 January 2014.

- 3.17. Having taken account of representations made during the First Consultation and the Second Consultation, the OFT considers that the Final Commitments as set out in Annexe 1 of this document address its competition concerns in this case and it has therefore decided to accept the Final Commitments. Accordingly, the OFT has closed its file in respect of this investigation.

## **The Parties**

### **IHG and ILPL**

- 3.18. IHG is the largest hotel company world-wide (by number of rooms) and is headquartered in the UK. IHG manages, franchises, owns or leases 4,602 hotels across the world offering 675,982 rooms.<sup>18</sup> In the UK, IHG manages or franchises 293 IHG-branded hotels offering 41,340 rooms. IHG's portfolio of nine hotel brands includes InterContinental, Crowne Plaza, Holiday Inn, Holiday Inn Express, Hotel Indigo and Staybridge Suites. IHG generated revenue of \$1.8 billion in 2012.
- 3.19. ILPL is the largest IHG-branded hotel in the UK in terms of revenue. It has 447 rooms and is located in central London. It is managed by IH London, a wholly-owned subsidiary of IHG.

### **Expedia**

- 3.20. Expedia is a globally operating OTA headquartered in the US, with localised websites for over 25 countries, including the UK. Expedia's UK subsidiary, Expedia.com Limited, provides marketing and support services for various Expedia brands and divisions. Consumers can book hotel accommodation, airline tickets, car rentals and package holidays on Expedia's websites. Expedia has a portfolio of websites which have operations concerning customers located in the UK, primarily [expedia.co.uk](http://expedia.co.uk) and the [hotels.com](http://hotels.com) UK site. Expedia acquired a 61.6 per

<sup>17</sup> [www.of.gov.uk/shared\\_of/ca-and-cartels/OFT1514.pdf](http://www.of.gov.uk/shared_of/ca-and-cartels/OFT1514.pdf).

<sup>18</sup> As at 31 December 2012.

cent equity position in a price comparison website, Trivago GmbH, in 2013. The Expedia group generated revenue of \$4.0 billion in 2012.

### **Booking.com and Priceline**

- 3.21. Booking.com is an OTA headquartered in Amsterdam. It is, indirectly, wholly-owned by Priceline, its ultimate parent company. Booking.com owns and operates the website booking.com. In addition to the booking.com website, Booking.com owns certain other domain names including activehotels.com, which redirect to the Booking.com website (although web traffic from those other websites is negligible).
- 3.22. Priceline is the ultimate parent company of Booking.com and runs the website priceline.com. Priceline is based in the US. The Priceline Group has four main OTA websites that can be accessed across the globe, including booking.com (hotel reservations), priceline.com (reservations for hotel, airfare, car hire and vacation packages), agoda.com (hotel reservations) and rentalcars.com (car hire reservations). Each of booking.com, priceline.com, and agoda.com offer hotel reservations. Booking.com is the company that is responsible for the vast majority of hotel room bookings made by the Priceline Group in Europe and the UK. Priceline acquired Kayak Software Corporation, which operates principally as a price comparison website, in 2013. Priceline generated revenue of \$5.3 billion in 2012.

## **4 BACKGROUND – THE HOTEL ONLINE BOOKING SECTOR**

### **Industry background and the Parties' activities**

#### **Supply of hotel accommodation**

- 4.1. Hotel accommodation is supplied by (that is, available from) both independent hotels and branded hotels, such as IHG-branded hotels, including ILPL.

#### **Wholesale distribution of hotel accommodation**

- 4.2. Wholesalers source and distribute hotel accommodation to the travel trade, which may include other wholesalers, travel agents (both offline and online) and tour operators.

#### **End-user distribution channels**

- 4.3. Hotel accommodation bookings are offered to end-users through a number of competing channels, in particular through OTAs, through hotel direct sales (that is, hotel websites such as ihg.com), and through traditional (that is, offline) travel agents. The OFT notes that OTAs do not take title or hold inventory to hotel accommodation. For this reason, the OFT, when describing the OTAs' activities in this decision, describes OTAs as being a vertical distribution channel providing booking services for Room-Only hotel accommodation, rather than using words such as 'selling', 'supplying' or 'retailing' Room-Only hotel accommodation.
- 4.4. At the top level, ILPL, which is managed by IHG, and the other IHG-branded hotels which operate under franchise and management agreements with IHG, or are owned by IHG, supply hotel accommodation.
- 4.5. IHG-branded hotels offer accommodation for booking to wholesalers, OTAs and traditional offline travel agents, as well as directly to consumers. Insofar as direct sales to end-users are concerned, IHG offers hotel accommodation through IHG-branded websites as well as call centres. In addition, bespoke deals with major corporate customers are negotiated centrally or on a hotel by hotel basis.
- 4.6. Expedia and Booking.com are active in the online offering of hotel accommodation bookings, including IHG-branded hotel accommodation. Neither Expedia nor Booking.com purchase nor rent hotel accommodation prior to offering such accommodation to end-users for

booking. Rather, hotel accommodation is made available to Booking.com and Expedia by hotels and wholesalers on certain terms for the purposes of offering this accommodation to end-customers for booking.

- 4.7. Other OTAs are also active in the online offering of hotel accommodation bookings to end-users. Like Booking.com and Expedia, other OTAs do not purchase or rent hotel accommodation themselves. However, smaller OTAs are more likely to (have to) rely more heavily on wholesalers making hotel accommodation available to them rather than contracting directly with the hotels.

### **Hotel accommodation pricing**

- 4.8. Different types of distribution and pricing strategies are used in relation to the supply of hotel accommodation to end-users, in relation to which different rules and restrictions apply. These strategies manifest themselves in different types of rates for hotel accommodation that are made available to OTAs by hotels, in particular Room-Only Rates, Package rates (both defined below) and rates for hotel accommodation sold on an opaque basis.

#### **Room-Only**

- 4.9. A Room-Only Rate is the rate for hotel accommodation bookings on a standalone basis ('Room-Only Rate'). This means the hotel accommodation is not offered as part of a package together with other travel products, such as car hire and/or airline flights. In addition, 'Room-Only' can include certain ancillary non-travel products, such as breakfast, but does not include hotel accommodation which is offered on an opaque basis (including where the accommodation offered on an opaque basis is offered on a standalone and/or individually priced basis). Both Booking.com and Expedia have access to Room-Only Rates and offer hotel accommodation bookings on a Room-Only basis.<sup>19</sup>
- 4.10. As set out in more detail below, the OFT's competition concerns relate to the current restrictions on Booking.com and Expedia offering

<sup>19</sup> Depending on the OTA's business model, the Room-Only Rate is paid by the end-user either to the OTA at the time of booking (under what is sometimes referred to as the merchant model) or directly to the hotel following the stay at the hotel (under what is sometimes referred to as the commission-based model).



discounts on Room-Only hotel accommodation bookings at ILPL, for instance by restricting OTAs from sharing their commission or margin with the customer.

### **Packages**

- 4.11. Hotel accommodation bookings are also offered as part of a 'package' together with other travel products, such as car hire and/or airline flights ('Package') where the price of the hotel accommodation component included in the Package is not discernible to the end-user. A Package rate is a rate for hotel accommodation made available by a hotel to an OTA for the purposes of offering hotel accommodation bookings to end-users as part of a Package ('Package Rate'), that is, not for Room-Only bookings. Expedia has access to Package Rates and offers hotel accommodation bookings as part of a Package, whereas Booking.com offers hotel accommodation bookings on a Room-Only basis only.
- 4.12. In relation to Package bookings, it is the OTA that determines the rate for the overall Package (for example hotel accommodation and car rental). From the end-user's perspective, the only rate that is visible is the rate which covers the whole Package. The end-user is therefore not usually in a position to compare the Package Rate that has been made available to the OTA with Room-Only Rates as displayed on an OTA's or hotel's website in any meaningful way.

### **Opaque**

- 4.13. Hotel accommodation bookings are also offered on an opaque basis, meaning that the identity of the hotel remains undisclosed to the end-user until after the booking is completed. An end-user making an 'opaque' booking is able to see the room rate for hotel accommodation and general details of the hotel property (for example, star rating and general location, such as a three star hotel in Birmingham), but the end-user cannot see details which would allow him or her to identify the specific hotel property in question.
- 4.14. OTAs have the ability to independently determine the room rate offered to end-users for hotel accommodation bookings in circumstances where the OTA offers such bookings to end-users on an opaque basis. However, as with Package Rates, the end-users cannot compare in advance of booking the Room-Only Rates provided on an opaque basis with the Room-Only Rates displayed on that particular hotel's own

website, given that the identity of the hotel is hidden and not disclosed until the purchase is completed.

- 4.15. In light of OTAs' ability to independently determine the room rates offered to end-users for hotel accommodation relating to Package Rates and opaque distribution, these two forms of distribution have not been included in the OFT's investigation. For the purposes of this decision, references to hotel accommodation are therefore references to Room-Only hotel accommodation unless specifically stated otherwise.<sup>20</sup>

### **Rate Parity**

- 4.16. Under MFN provisions a hotel agrees to provide an OTA with access to a room reservation (for the OTA to offer to consumers) at a booking rate which is no higher than the lowest booking rate displayed by any other online distributor. This is also known as 'Rate Parity'. This guarantees the OTA the lowest booking rate at least in relation to other OTAs (that is, it cannot be undercut). Vertical agreements which include restrictions on the OTA offering discounts to consumers for Room-Only hotel accommodation may also include such an MFN provision. Whilst the OFT has investigated restrictions on discounting, the OFT has not, however, assessed MFN provisions as part of its investigation.

### **Expedia and Booking.com's business models**

- 4.17. The OFT understands that there are two main business models on the basis of which OTAs offer hotel accommodation bookings, namely, what are sometimes referred to as the merchant model and the commission-based model.

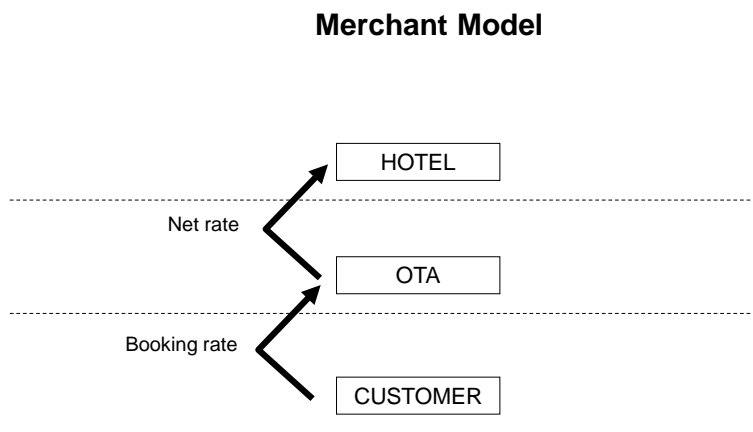
#### **Expedia**

- 4.18. Expedia operates predominantly under the 'merchant model', although, to a lesser extent, it also offers end-users hotel accommodation booking services on a commission-based model, described further in paragraph 4.20 below. Under the merchant model, the OTA offers hotel

<sup>20</sup> That is where 'Room-Only' means hotel accommodation that is offered on a standalone and/or individually priced basis, that is, not as part of a Package. 'Room-Only' can include ancillary non-travel offers, such as breakfast. 'Room-Only' does not include hotel accommodation which is offered on an opaque basis, including where the accommodation booking offered on an opaque basis is offered on a standalone and/or individually priced basis.

accommodation bookings online at a mark-up against the 'net rate' paid by the OTA to the hotel or hotels' group. The OTA does not take title to the room.

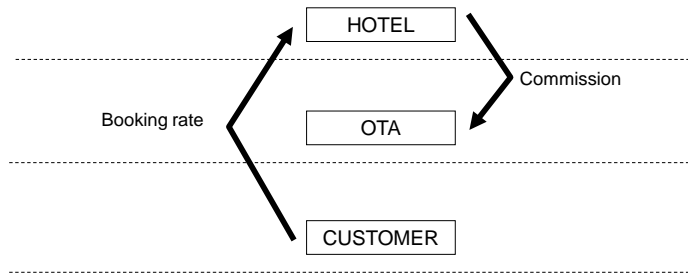
- 4.19. The OTA is the merchant of record and end-users pay the OTA directly typically at the point in time the booking is made. The difference between the room rate paid by the end-user and the net rate which the OTA needs to remit back to the hotel constitutes the OTA's revenue from the booking. Absent any restriction to the contrary, an OTA operating on the basis of the merchant model has the ability to 'flex' or reduce its margin with a view to, for instance, increasing bookings and its market share. The merchant model is illustrated by the diagram below.



### **Booking.com**

- 4.20. Booking.com utilises a 'commission-based' model. Under the commission-based model, the hotel is the merchant of record and is paid for the room directly by the end-user (typically on the end-user's departure following the stay at the hotel). The hotel pays the OTA a commission for each consummated booking, which is typically a percentage of the hotel accommodation booking rate paid by the end-user to the hotel. This forms the OTA's revenue from the booking. The commission-based model is illustrated by the diagram below.

### Commission-based Model



4.21. The OFT considers that from the end-user's perspective, the differences between the merchant model and the commission-based model are largely confined to the point in time at which payment is made by the consumer (under the merchant model upon making the booking; under the commission-based model following the stay at the hotel).<sup>21</sup> The OFT also notes that Expedia's recently introduced Traveler Preference (ETP) program offers end-users the choice to pay either at the time of booking or upon check out at the hotel directly.<sup>22</sup>

#### IHG's hotel operation models

- 4.22. IHG-branded hotels in the EU are generally operated under franchise and management agreements with IHG: 520 hotels operate under a franchise agreement; 98 operate under a management agreement, including ILPL. One IHG-branded hotel in the EU is owned by IHG.
- 4.23. Under the 'managed' model, the hotel is owned by a third party and IHG has little or no capital investment. It will usually supply the hotel with, at a minimum, a General Manager and will assume operational responsibility over the hotel. In addition to receiving a proportion of

<sup>21</sup> The Parties have made submissions about additional differences between the merchant model and the commission-based model.

<sup>22</sup> As at 4 October 2012, more than 13,000 hotels had signed up for the ETP program, including large global and regional chains as well as many independent hotels.

revenues (as under the franchise model), IHG also receives a proportion of each managed hotel's profit. IHG has contractual responsibilities in respect of setting Room-Only Rates. However, the OFT understands that the Room-Only Rate is determined at each individual IHG-branded hotel.

- 4.24. Under the franchise model, IHG has no capital investment in the hotel and is not involved in the day-to-day management or operation of the hotel. The hotel is owned, and staff employed, by the third party-franchisee. IHG's income from franchised hotels is based on a percentage of the franchisee's room revenue. Again, the OFT understands that the Room-Only Rate is determined at each individual IHG-branded hotel.
- 4.25. Under the owned model, where IHG owns (or leases) hotels, it will make a high capital investment and will be responsible for employing staff members, but will, in return, receive the totality of the hotel's revenue. Again, the OFT understands that the Room-Only Rate is determined at each individual IHG-branded hotel.
- 4.26. Hotels under all three operation models are covered<sup>23</sup> by umbrella distribution agreements concluded between IHG and each of Expedia and Booking.com. Under these agreements, hotels load room rates onto an automated interface and these are then accessed directly by OTAs.

<sup>23</sup> Provided that they have not opted out of the arrangements.

## 5 THE OFT'S COMPETITION CONCERNS

### The OFT's competition concerns

- 5.1. In the Statement of Objections, the OFT alleged that Expedia, IHG and ILPL were parties to an agreement under which Expedia agreed to offer hotel accommodation at ILPL at a day-to-day room rate set and/or communicated by ILPL and not to offer rooms at a lower rate, for instance by funding a promotion or discount from its own margin or commission (hereafter referred to as the 'Expedia Price Agreement').
- 5.2. Similarly, in the Statement of Objections, the OFT alleged that Booking.com, IHG and ILPL were parties to an agreement under which Booking.com agreed to offer hotel accommodation at ILPL at the day-to-day room rate set by ILPL and not to offer rooms at a lower rate, for instance by funding a promotion or discount from its own margin or commission (hereafter referred to as the 'Booking.com Price Agreement' and, together with the Expedia Price Agreement, the 'Relevant Price Agreements').
- 5.3. The OFT took the provisional view in the Statement of Objections that the Relevant Price Agreements each constituted an agreement and/or concerted practice that had as its object the prevention, restriction or distortion of competition in breach of the Chapter I prohibition and Article 101 of the TFEU. As such, the OFT considered that it was not necessary to demonstrate that the Relevant Price Agreements did, in fact, have anti-competitive effects in order to establish an infringement of the Chapter I prohibition and Article 101(1) TFEU.
- 5.4. For completeness, the OFT sets out below, in overview, its provisional concerns as to how arrangements such as the Relevant Price Agreements, in the legal and economic context, prevent, restrict or distort competition.

### **Current restrictions on discounting limit competition on room rates**

- 5.5. The OFT is concerned that restrictions on discounting have as their object the limitation of price competition between OTAs and between OTAs and hotels' own online platforms. In general, a restriction requiring OTAs not to offer bookings of Room-Only hotel accommodation at a

rate lower than that specified by that hotel, might be expected to result in consumers paying higher rates for accommodation at that hotel than would otherwise be the case, all else being equal.

- 5.6. Nevertheless, given the high degree of price transparency and the low costs associated with price search on the internet, certain OTAs may want the option to offer discounted rates for bookings of Room-Only hotel accommodation, for example by foregoing a part of their margin or commission in order to attract a larger number of customer bookings through their websites.
- 5.7. The incentive for OTAs to engage in discounting is evidenced by, for example, the use of voucher schemes that OTAs such as Hotels.com offer in relation to bookings at certain hotels.<sup>24</sup> It is also evidenced by the discounting that already takes place in relation to smaller sub-segments of the marketplace where OTAs retain the ability to discount. Examples include instances where: (i) hotel accommodation is offered as part of a package (for example, including car rental and flight); and (ii) the identity of the hotel remains unknown at the time of booking (in the opaque distribution channel).<sup>25</sup> In other words, discounts can be and typically are granted in circumstances where end-users are not able to compare different rates for specific Room-Only hotel accommodation. This indicates that OTAs are prepared to sacrifice some of their commissions or margins to attract price sensitive customers to their sites through discounted hotel rates.
- 5.8. When OTAs face the current restrictions on discounting a hotel's Room-Only accommodation, there is likely to be limited, if any, competition on the offer of room rates to consumers between OTAs and between OTAs and the hotel's direct online sales channel for those hotel accommodation bookings (that is, intra-brand competition).

<sup>24</sup> But which, in the case of certain discount coupons offered by Hotels.com, cannot be utilised against IHG-branded hotels (as well as a wide range of other hotels) according to the relevant terms and conditions.

<sup>25</sup> The package and opaque distribution of hotel accommodation is described in more detail at paragraphs 4.11 to 4.15 above. The OFT understands that hotels often discount via these channels as well as OTAs.

## **Current restrictions on discounting may increase barriers to entry**

- 5.9. The current restrictions on discounting may create barriers to entry to the extent that they prevent new OTAs from entering the market, and/or achieving sufficient scale (with discounted rates for Room-Only hotel accommodation). In the face of discounting restrictions, new entrants with potentially more innovative or efficient business models are unable to pass any efficiencies directly through to consumers in the form of lower hotel rates thereby winning market share.

## **To the extent that similar discounting restrictions are replicated currently in the market, then any prevention, restriction or distortion of competition is further exacerbated**

- 5.10. The OFT has not investigated the extent to which similar discounting restrictions are replicated in the market and made no findings in this respect in the Statement of Objections.
- 5.11. Nevertheless, the OFT understands that the alleged practices are potentially widespread in vertical distribution arrangements in the industry and that to the extent that similar arrangements do exist between IHG and other OTAs, between Booking.com and Expedia and other hotels and between other hotels and other OTAs, then any prevention, restriction or distortion of competition arising from the current restrictions on discounting in the Relevant Price Agreements will be wider-reaching. In principle, a market in which discounting restrictions are prevalent is likely to be characterised by significant limits to price competition and barriers to entry.
- 5.12. In conclusion, the OFT's investigation has sought to establish whether the current restrictions on discounting in the Relevant Price Agreements raise competition concerns. On the basis of the above analysis, the OFT has concerns that the restrictions on discounting imposed on OTAs in the Relevant Price Agreements may limit retail price competition and create barriers to entry, that is, that they prevent, restrict or distort competition.

## **Effect on trade**

- 5.13. The OFT is obliged to apply Article 101 TFEU when it applies national competition law to agreements or concerted practices between



undertakings or decisions by associations of undertakings that may affect trade between EU Member States.<sup>26,27</sup> Based on the information available, the OFT considers that the Relevant Price Agreements restrict the rates at which Room-Only hotel accommodation bookings are offered to consumers both in the UK and outside the UK. This suggests that trade between Member States is affected by the Relevant Price Agreements.<sup>28</sup>

- 5.14. The OFT considers that, since the Final Commitments offered by the Parties address the OFT's competition concerns under Chapter I of the Act, they also address its competition concerns under Article 101 TFEU. Accordingly, the OFT is taking this decision to accept the Final Commitments by reference to Article 101 TFEU as well as Chapter I of the Act.

<sup>26</sup> Article 3(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p1) ('Regulation 1/2003').

<sup>27</sup> Where an effect on trade between EU Member States is found, as well as being obliged to apply EU law, the OFT is also obliged to comply with certain procedural requirements. In this case, Article 11(4) of Regulation 1/2003 required the OFT to inform the European Commission no later than 30 days before the adoption of the decision accepting the Final Commitments. This notification to the European Commission took place concurrently with the Second Consultation.

<sup>28</sup> For the purposes of assessing whether an agreement or concerted practice may affect trade between EU Member States the OFT follows the approach set out in the European Commission's published guidance: *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, Commission Notice 2004/C101/07, OJ C101/81.

## 6 COMMITMENTS

### Appropriate case for commitments

- 6.1. Section 31A of the Act provides that, for the purposes of addressing the competition concerns it has identified, the OFT may accept, from such person or persons concerned as it considers appropriate, commitments to take such action (or refrain from such action) as it considers appropriate. The OFT Guidance (OFT 407 (*Enforcement*)) and the Procedural Guidance (OFT1263rev (*A guide to the OFT's investigation procedures in competition cases*)) state that the OFT is likely to consider it appropriate to accept binding commitments only in cases where (a) the competition concerns are readily identifiable; (b) the competition concerns are fully addressed by the commitments offered; and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.<sup>29</sup>
- 6.2. In accordance with the OFT Guidance, the OFT will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern, and/or where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.<sup>30</sup>

### OFT assessment of the appropriateness of this case for commitments

- 6.3. The OFT considers that this is an appropriate case for commitments for the following reasons:
- **Identifiable competition concerns:** the OFT is concerned that the restrictions of discounting in the Relevant Price Agreements limit price competition and may increase barriers to entry. Its concerns are set out in detail in paragraphs 5.1 to 5.11 above.
  - **Competition concerns are addressed by the Final Commitments:** the Final Commitments enable OTAs to offer certain discounts to end-users using 'closed group' schemes. An explanation of why the

<sup>29</sup> Paragraph 4.3 of the OFT Guidance and paragraph 10.16 of the Procedural Guidance.

<sup>30</sup> Paragraph 4.5 of the OFT Guidance.

Final Commitments address the OFT's concerns, by increasing price competition and potentially lowering barriers to entry, is set out in paragraphs 6.43ff below.

- **The Final Commitments are capable of being implemented effectively and, if necessary, within a short period of time:** the Parties have informed the OFT that they can implement amendments to their existing commercial arrangements with each other (that is, the existing arrangements between IHG and Expedia, and IHG and Booking.com) within one month so that they comply with the Principles,<sup>31</sup> and that the Parties can use their reasonable endeavours to implement clarifications or amendments to their existing commercial arrangements with third parties within three months.

- 6.4. Finally, the OFT does not consider that accepting commitments in this case would undermine deterrence: in fact, it considers that this decision will assist in promoting a culture of competition law compliance in any vertical distribution arrangements in the hotel online booking sector, and potentially beyond. To the extent that this is not the case going forward, the OFT may decide to take further enforcement action in relation to other vertical distribution arrangements and/or related markets which raise competition concerns.
- 6.5. In light of the above, therefore, the OFT's conclusion is that this is an appropriate case for it to accept binding commitments from the Parties.

### **The Final Commitments**

- 6.6. The paragraphs below summarise the Final Commitments offered by the Parties and accepted by the OFT.

#### **Joint commitments from IHG and Booking.com**

- 6.7. IHG and Booking.com have committed to amend any existing commercial arrangements between IHG and Booking.com to ensure that these arrangements comply with the Principles, and to ensure that for the duration of the Final Commitments, any new commercial arrangements between IHG and Booking.com comply with the Principles. This includes a commitment to omit, clarify or amend as necessary any

<sup>31</sup> For an explanation of capitalised terms used in this section, see Annexe I Definitions.

provisions in arrangements between them that currently prevent other OTAs, for instance new entrants, and/or IHG, from taking advantage of the discounting opportunities provided for by the Final Commitments. Such a commitment is an anti-avoidance measure to ensure that the discounting ability envisaged by the Final Commitments is not undermined.

#### **Joint commitments from IHG and Expedia**

- 6.8. IHG and Expedia have committed to amend their existing commercial arrangements between IHG and Expedia to ensure that these arrangements comply with the Principles, and to ensure that for the duration of the Final Commitments, any new commercial arrangements between IHG and Expedia comply with the Principles. This includes a commitment to omit, clarify or amend as necessary any provisions in arrangements between them that currently prevent other OTAs, for instance new entrants, and/or IHG, from taking advantage of the discounting opportunities provided for by the Final Commitments. Such a commitment is an anti-avoidance measure to ensure that the discounting ability envisaged by the Final Commitments is not undermined.

#### **Commitments from IHG**

- 6.9. To facilitate industry-wide roll-out, IHG has also committed to ensure that its existing and future arrangements with other OTAs comply with the Principles, including to omit, clarify or amend as necessary any provisions that currently prevent other OTAs, for instance new entrants, and/or IHG, from taking advantage of the discounting opportunities provided for by the Final Commitments. To the extent that IHG's ability to make such changes to existing commercial arrangements requires the consent of the respective counterparty, IHG has committed to use reasonable endeavours to procure such consent.

#### **Commitments from Booking.com**

- 6.10. To facilitate industry-wide roll-out, Booking.com has committed to ensure that its existing and future arrangements with other hotels comply with the Principles, including to omit, clarify or amend as necessary any provisions that currently prevent other OTAs, for instance new entrants, and/or other hotels, from taking advantage of the discounting opportunities provided for by the Final Commitments. To the extent Booking.com's ability to make such changes to existing

commercial arrangements requires the consent of the respective counterparty, Booking.com has committed to use reasonable endeavours to procure such consent.

#### **Commitments from Expedia**

- 6.11. To facilitate industry-wide roll-out, Expedia has committed to ensure that its existing and future arrangements with other Hotels comply with the Principles, including to omit, clarify or amend as necessary any provisions that currently prevent other OTAs, for instance new entrants, and/or other hotels, from taking advantage of the discounting opportunities provided for by the Final Commitments. To the extent that Expedia's ability to make such changes to existing commercial arrangements requires the consent of the respective counterparty, Expedia has committed to use reasonable endeavours to procure such consent.

#### **The Hotel Online Booking Principles**

- 6.12. The Parties have committed to modify their behaviour to comply with the following key Principles:
- OTAs will be free to offer reductions off headline room rates, for example by way of discounts, vouchers, rewards and/or cash back, funded by their commission revenue or margin to 'closed groups', for instance in the context of membership or loyalty schemes. Eligibility for such discounts is dependent on the end-user making the booking having joined the closed group and having made a single previous booking (which is/has become non-refundable) after the effective date of the Final Commitments of any hotel room with that OTA.
  - Hotels will also be free to offer reductions off their own headline room rates to closed group members on the same basis as OTAs. Specifically, OTAs shall not enter into or enforce any MFN or equivalent provisions in respect of reductions off headline room rates by hotels to their closed group members who have made at least one prior booking directly with that hotel. This is subject to the condition that the hotel does not publicise information regarding the specific level or extent of reductions for any hotel room, or any other information which would allow a discounted retail rate to be

calculated, to non-members, including on the hotel's own public website and via price comparison websites and meta-search sites.<sup>32</sup>

- OTAs will be free to publicise information regarding the availability of discounts in a clear and transparent manner, including to price comparison websites and meta-search sites (that is, to members and non-members); however, OTAs cannot publicise information regarding the specific level of discounts for any IHG hotel room to non-members (for example, the amount/percentage discount offered which would allow a discounted rate to be calculated). Similarly, other (non-IHG) hotels may prevent OTAs from publicising information regarding the specific level of discounts for a particular hotel room to non-members. If an OTA and IHG/any other hotel agree or have agreed to a contractual right for IHG or any other hotel to match a Reduction displayed to consumers who are non-members, the Final Commitments shall not restrict the enforceability of that right.

6.13. The Final Commitments apply to bookings made by EEA residents<sup>33</sup> for rooms in hotels located in the UK, and will remain in force for a period of two years.

6.14. For the purposes of the Final Commitments, 'closed group' means a group where membership is not automatic and where: (i) consumers actively opt in to become a member; (ii) any online or mobile interface used by closed group members is password protected; and (iii) closed group members have completed a customer profile. The definition of 'closed group' means that membership in a closed group would not result from the fact that the consumer has (a) previously made a booking with that OTA or made a purchase from any other entity; (b) subscribed to a mailing list with the OTA or any other party; (c) registered with the OTA to manage his or her booking; (d) visited the

<sup>32</sup> Under the Final Commitments, there is no form of financial 'cap' or limitation on the extent of the discounts that hotels can offer to closed group members without MFN or equivalent provisions being enforced against them.

<sup>33</sup> Under the Final Commitments, 'EEA resident' means a consumer who has an EEA address, an EEA telephone number or an EEA registered credit or debit card. For the avoidance of doubt, the nationality or legal residency or tax status of the individual is irrelevant.

OTA's website; (e) registered a credit card with the OTA; (f) logged on to the OTA's website through Facebook or other social media; (g) had a cookie dropped onto his computer by the OTA or any other party; or (h) downloaded an app or similar relating to the OTA.

- 6.15. The Final Commitments also provide that hotels may not impose accounting requirements on OTAs in relation to the commission or margin level cap that may restrict OTAs from being able to offer discounts within the meaning of the Final Commitments.
- 6.16. To monitor the effectiveness of the Final Commitments, the Parties will be required to report to the OFT each year on the implementation of the Final Commitments.
- 6.17. The Final Commitments also contain provisions relating to compliance according to which the Parties and other hotels and OTAs may write to the OFT regarding alleged non-compliance by Expedia, Booking.com and/or IHG with the Final Commitments. The Parties may also write to the OFT regarding contractual arrangements of other hotels and/or OTAs which may be incompatible with the Principles.
- 6.18. It is set out in the Final Commitments for the avoidance of doubt that they do not in any way restrict the ability of hotels to set the headline room rates for their respective hotel rooms, or benefits available to members of OTAs' and hotels' existing loyalty schemes prior to the date of this decision.

## **Responses to the Public Consultations**

### **First Consultation**

- 6.19. The OFT conducted the First Consultation pursuant to section 31A of the Act to seek views on the Commitments offered by the Parties. This took the form of publication of a Notice to accept binding commitments and invitation to comment issued on 9 August 2013 (*OFT1500*).
- 6.20. The First Consultation ran for five weeks and closed on 13 September 2013. The OFT received over 35 responses from a range of respondents including independent hotels, hotel chains, OTAs, industry associations and other interested third parties.
- 6.21. The OFT contacted a wide range of participants in the hotel online booking sector to seek their views. Views were sought on the Commitments in general, as well as on the efficiency arguments put

forward by the Parties.<sup>34</sup> The potential respondents contacted by the OFT included hotel chains, OTAs, and industry associations. The OFT also contacted organisations in other markets with experience in areas relevant to the Commitments, such as the use of yield management techniques. The OFT held follow-up calls and meetings with a number of respondents.

6.22. In addition, the OFT was interested to understand how consumers would perceive the operation of the Commitments in practice, for example, membership of closed groups and the prior booking requirement. Therefore, the OFT engaged a market research agency to conduct consumer focus groups and report on areas of consumer-related interest arising at those consumer focus groups.

6.23. The respondents to the First Consultation made submissions mainly relating to the following:

- **Rate parity/MFN provisions:** The Commitments do not address rate parity and other types of MFN provisions directly. Some respondents urged the OFT to investigate the effect of such provisions. In addition, the OFT received a number of queries with regard to the extent to which the Commitments have an impact on the ability of hotels to offer discounts to closed groups, if there are provisions such as MFNs which may make it difficult for hotels to do so.<sup>35</sup>
- **Potential adverse impact on market structure:** Some respondents submitted that the Commitments may have an adverse impact on the structure of the market by strengthening OTAs' market position vis-à-vis hotels, strengthening Booking.com and Expedia's market positions, and/or impacting on consumers' ability to shop around.
- **Efficiency arguments:** Some respondents supported the efficiency arguments put forward by the Parties while others challenged the strength of the efficiency arguments. The OFT did not receive evidence that either strongly confirmed or refuted the efficiency arguments.

<sup>34</sup> The efficiency arguments put forward by the Parties are set out in **Annexe 2**.

<sup>35</sup> Indirectly, by requiring the hotel to offer an OTA that benefits from an MFN provision the same lower booking rate as the hotel is offering to its customers.



6.24. **Annexe 3** sets out under these headings the key issues raised in the responses received to the First Consultation, alongside limited submissions made in respect of the geographic scope and duration of the Commitments, together with the OFT's response.

### **Second Consultation**

6.25. The Parties offered the Final Commitments (that is, the Commitments combined with the Amendments) to the OFT on 27 November 2013. On 20 December 2013, the OFT launched the Second Consultation to seek views on its intention to accept the Final Commitments offered by the Parties. This took the form of publication of a Notice of intention to accept revised commitments (OFT1514).

6.26. The Second Consultation ran for four weeks and closed on 17 January 2014. The OFT received nine responses from respondents in the following categories: independent hotels, OTAs, industry associations, other interested third parties.

6.27. The respondents to the Second Consultation made submissions mainly relating to the following:

- **Rate parity/MFN provisions:** It was noted that the Final Commitments do not address rate parity and other types of MFN provisions directly. One respondent welcomed the clarification introduced in the Final Commitments in respect of hotel closed group discounting.
- **Potential adverse impact on market structure:** Some respondents submitted that the Final Commitments could have an adverse impact on the structure of the market by (i) strengthening OTAs' market positions vis-à-vis hotels; and (ii) strengthening larger OTAs' positions vis-à-vis smaller OTAs and tour operators. A concern was also raised that the Final Commitments do not adequately take the meta-search business into account.
- **Practical implementation issues:** A number of queries were raised about the practical implementation of the Final Commitments, such as the operation and monitoring of closed groups.

6.28. **Annexe 3** sets out under these headings the key issues raised in the responses received to the Second Consultation, together with the OFT's response. **Annexe 3** also summarises the limited submissions made in respect of the Amendments relating to geographic scope and duration, together with the OFT's response.

## **Amendments**

6.29. In the light of representations submitted to the OFT pursuant to the First Consultation and further developments (including the OFT's further consideration of the sector), the OFT requested from the Parties, and received, the Amendments. The Amendments combined with the Commitments constitute the Final Commitments.<sup>36</sup> The Amendments related to (i) hotel discounting; (ii) geographic scope; and (iii) duration.

### **Hotel closed group discounting**

6.30. During the First Consultation, the OFT received a number of queries about the extent to which the Commitments have an impact on hotels' ability to offer discounts. In light of those queries and comments, the Parties offered drafting amendments to clarify that hotels must be able to offer discounts in an equivalent manner to OTAs.

6.31. Specifically, OTAs shall not enter into or enforce any MFN or equivalent provisions in respect of reductions off headline room rates offered by hotels to their closed group members. This is subject to the condition that the hotel does not publicise information regarding the specific level of discounts for a particular hotel room to consumers who are not members of that closed group. For example, the hotel would not be able to publish to such consumers the amount/percentage discount offered which would allow a discounted rate to be calculated. This mirrors the restrictions on OTAs' advertising of hotel room discounts set out in the Commitments and the Final Commitments.

6.32. The Final Commitments do not envisage any form of financial 'cap' or limitation on the extent of the discounts that hotels can offer to members of their own closed groups without MFN or equivalent provisions being enforced against them. This is the only difference between OTA closed group discounting and hotel closed group discounting set out in the Final Commitments (in particular, the same geographic scope and prior booking requirement apply).

<sup>36</sup> The Parties offered the Final Commitments in the understanding that the OFT would close its investigation in this case without any finding of infringement and the offering of the Final Commitments by the Parties does not constitute an admission of wrongdoing by the Parties.

6.33. The provision above relates only to the adjustment of MFN or equivalent provisions to the extent necessary, setting out a minimum standard required of Expedia and Booking.com. In particular, it would be without prejudice to the existing ability of any particular hotel to discount its hotel rooms without triggering the enforcement of an MFN or equivalent provisions by an OTA.<sup>37</sup>

### **Geographic scope**

6.34. In the light of the evolving enforcement activities in several countries in the EEA in which the Final Commitments will operate,<sup>38</sup> the Parties offered amendments to the geographic scope of the Commitments so that:

- a) **all EEA residents**<sup>39</sup> can benefit from the new discounting opportunities provided for by the Final Commitments, rather than UK residents only. This change was intended to ensure that OTAs and UK hotels enjoy the benefits of the internal market by having the ability to offer discounts both in the UK and elsewhere within the EEA, and
- b) the Final Commitments apply to bookings made in respect of **hotels located in the UK**, rather than hotels located in the EU. The OFT considers that other NCAs and competition authorities of the EFTA Member States may be best-placed to secure benefits for UK residents booking hotels in their respective jurisdictions, when investigating the contracts between those hotels and OTAs.

<sup>37</sup> The Final Commitments also do not affect the ability of hotels and OTAs to agree additional discounting rights (or additional rights for the OTA to advertise its specific discounts) and adjustment of MFN or equivalent provisions that go beyond the Principles set out in the Final Commitments.

<sup>38</sup> The OFT is aware of a significant amount of enforcement activity by other national competition authorities ('NCAs') across the European Competition Network ('ECN') and by competition authorities of the European Free Trade Association ('EFTA') Member States in the hotel online booking sector.

<sup>39</sup> That is, a consumer who has an EEA address, an EEA telephone number or an EEA registered credit or debit card; for the avoidance of doubt, the nationality or legal residency or tax status of the individual is irrelevant.

6.35. The OFT intends to continue to cooperate with its counterparts within the ECN and the competition authorities of the EFTA Member States to help secure benefits for UK consumers where restrictions of competition in this sector in other jurisdictions have an impact on them.

### **Duration**

- 6.36. The OFT is aware that online travel agency services, including hotel online booking, is a growing sector and is characterised by frequent introduction of new technology or platforms, such as apps (for example, specifically offering discounted accommodation for last-minute bookings),<sup>40</sup> new business models such as the consumer-to-consumer website AirBnB.com,<sup>41</sup> developments such as TripAdvisor offering independent hotels and B&Bs the ability to participate in hotel price comparison on its website,<sup>42</sup> and the expansion of search websites into the travel sector (such as Google and Microsoft entering the meta-search site space).<sup>43</sup>
- 6.37. Some respondents to the First Consultation urged the OFT to consider the risk that the Commitments could cause distortions. For example, some respondents highlighted a risk that the Commitments could shift consumer purchasing behaviour away from hotels' own booking websites to OTAs, raising hotels' distribution costs.<sup>44</sup>
- 6.38. In light of these considerations, the Parties offered to reduce the duration of the Commitments from three years to two years. The OFT has concluded that a period of two years is appropriate because:
- Although the OFT expects to see invigorated rate competition shortly after the date of this decision, the OFT considers that a duration of less than two years would not address the OFT's current competition

<sup>40</sup> See for example <http://techcrunch.com/2012/11/07/hotel-tonight-faces-an-attack-of-the-last-minute-hotel-app-clones-in-europe/> and <http://blinkbooking.com/en/main/faq>.

<sup>41</sup> Web Reservations International/Hostelbookers.com, OFT decision dated 2 August 2013.

<sup>42</sup> [www.tripadvisor.co.uk/PressCenter-i6401-c1-Press\\_Releases.html](http://www.tripadvisor.co.uk/PressCenter-i6401-c1-Press_Releases.html).

<sup>43</sup> Priceline/Kayak, OFT decision dated 9 May 2013.

<sup>44</sup> For further detail on the responses to the First Consultation, see Annexe 3.

concerns because there would be insufficient time for the full benefits of increased retail rate competition to be realised. On the other hand, the OFT considers that a period of longer than two years risks excessive regulatory intervention in a dynamic, innovative sector, and would not allow the OFT to react as quickly to any changes.

- After two years, the Competition and Markets Authority ('CMA') will be able to reassess the position using information provided by the Parties in annual reports following the adoption of the Final Commitments, to decide if further action in this sector is appropriate.<sup>45</sup>
- If necessary, during the course of the two-year period, under section 31B(4) of the Act, the OFT (or in due course, the CMA) can, where it has reasonable grounds for believing that there has been a material change of circumstances since accepting the Final Commitments, continue the investigation, make a decision or give a direction.

### **Rate parity/retail rate MFN provisions**

- 6.39. The focus of the OFT's investigation has been the current restrictions on OTAs' discounting off the Room-Only Rate set by a hotel. The OFT has not investigated MFN provisions in this case and has made no assessment of whether MFN provisions may give rise to a breach of the Chapter I prohibition and/or Article 101 TFEU.
- 6.40. However, to ensure that the Final Commitments are effective, the Parties have committed to amend, remove or not include any provisions in current and future commercial arrangements between them that could undermine the new discounting freedoms provided for by the Final Commitments. This could include amending any MFN provisions, if necessary. The Parties must also use reasonable endeavours to ensure that there are no provisions in their current agreements with other OTAs and hotels which would undermine the new discounting freedoms, and must not include such provisions in any new arrangements. Again, this could include amending any MFN provisions, if necessary. In particular, MFN provisions must not be enforced in respect of either (i) the offering

<sup>45</sup> See paragraph 6.59 with regard to reporting requirements.

of discounts complying with the Principles to closed group members who have made a prior booking, or (ii) the publication of details of such discounts to members of the closed group.<sup>46</sup>

- 6.41. As explained in paragraph 6.31 above, in the Final Commitments the Parties also clarified that OTAs shall not enter into or enforce any MFN or equivalent provisions in respect of reductions off headline room rates offered by hotels to their closed group members. This is subject to the condition that the hotel does not publicise information regarding the specific level of discounts for a particular hotel room to consumers who are not members of that closed group.
- 6.42. Having regard to the present specific legal and economic context, for the duration of the Final Commitments, as regards the Parties to this investigation, the OFT would be unlikely to investigate under Chapter I of the Act and/or Article 101 TFEU any MFN provisions that comply with the Principles.<sup>47</sup> The same would likely apply to similar MFN provisions, that is, provisions that comply with the Principles, in the Parties' arrangements with other OTAs and hotels, as well as in arrangements between third party hotels and OTAs. However, if the OFT became aware that provisions, such as MFN provisions, appeared in practice to undermine the Principles, it would be open to the OFT to consider taking further action. In particular, the OFT would consider its options carefully if it became aware that MFN provisions were being enforced against hotels in a way that would make it practically impossible or very difficult for hotels to allow their OTA partners to offer closed group discounts or to offer discounts themselves to their own closed groups. It would also be open to the OFT/CMA to investigate MFN provisions in other sectors should the OFT/CMA have reasonable grounds for suspecting that such clauses, in their specific context, infringe UK or EU competition law.

<sup>46</sup> However, the Final Commitments do not affect the application of MFN provisions against discounts which are published outside of the closed group to which the discount has been offered.

<sup>47</sup> The OFT notes that as of 1 April 2014 the OFT will cease to exist and the CMA will then assume the OFT's current competition enforcement powers. The OFT cannot bind the CMA in how it chooses to exercise its enforcement powers from 1 April 2014.

## The OFT's assessment of the Final Commitments

- 6.43. As explained in section 5 above, the OFT's competition concerns as set out in the Statement of Objections relate to current restrictions on OTA discounting which limit competition on room rates and may increase barriers to entry.
- 6.44. In terms of the impact on intra-brand competition,<sup>48</sup> the Final Commitments offered by the Parties allow for greater discounting freedom, albeit with some residual restrictions. Therefore, the Final Commitments allow for greater price competition, between (i) OTAs and hotels' direct online booking channels; and (ii) OTAs, where, in the OFT's provisional view, it is currently likely to be significantly restricted.
- 6.45. Consumers will have the option of joining numerous closed groups without needing to make a purchase first (as the prior booking requirement relates to eligibility for discounts, not the ability to join a closed group). As set out in paragraph 33 of Annexe 3, the OFT expects that, once OTAs obtain the discounting freedom envisaged by the Final Commitments, they will need to offer competitive discounts to 'multi-homing'<sup>49</sup> customers to discourage them from purchasing through a rival OTA whose closed group the customer has already joined. All closed group members will benefit from this price competition, whether or not they have joined a rival OTA's closed group. The OFT therefore expects that under the Final Commitments consumers will gain significant benefits from the ability of OTAs to offer discounts to closed group members, and the Final Commitments therefore address its competition concern in relation to intra-brand competition.
- 6.46. In relation to the impact on barriers to entry,<sup>50</sup> under the Final Commitments, OTAs will be able to offer discounts to end-users who have joined a closed group and made a single booking, where they are currently prevented from doing so. As set out in paragraphs 27-37 of Annexe 3, the OFT therefore considers that the Final Commitments will

<sup>48</sup> See paragraphs 5.5 to 5.8 above.

<sup>49</sup> That is, customers who join more than one closed group.

<sup>50</sup> See paragraph 5.9 above.

increase incentives for new entry and lower barriers to entry created by the current restrictions on discounting.

- 6.47. The OFT's concern is that, currently, a new entrant may not be able to offer discounts to attract customers away from incumbents. In particular, a more efficient new entrant may not be able to use its lower costs to offer larger discounts in order to attract customers away from incumbents.
- 6.48. Under the Final Commitments, new entrants will still be prevented from offering a discount on an initial purchase. However, they will be able to compete by offering discounts on future purchases. This may substantially reduce barriers to entry relative to the current market conditions as it will provide entrants with additional scope to compete. Such competition could take place through the ability to offer discounting schemes and to advertise the existence of these schemes to non-members. This should provide consumers with a valuable incentive to search across OTAs for the best available deals and to become members of more than one closed group to find out details of specific discounts on offer to eligible members.<sup>51</sup>
- 6.49. The OFT received submissions, as set out in paragraphs 16–18 and 64–65 of Annexe 3, suggesting that closed group discounting and/or the prior booking requirement might result in a switching cost for customers or raise barriers to entry. However, the OFT's view is that the switching cost arising from the closed group and prior booking requirements will not undermine the ability for greater price competition to emerge in this market, for the reasons set out in paragraph 32 of Annexe 3.
- 6.50. In addition, the Final Commitments envisage a cap on OTA discounting up to the level of the OTA's commission revenue or margins. The OFT considers that such a cap might serve to protect new entrant OTAs from an aggressive response (for example, retaliatory deep-discounting) by incumbent OTAs that might otherwise deter entry.
- 6.51. The OFT considers that the Final Commitments will allow, and set appropriate incentives for, greater price competition between OTAs and between OTAs and hotels. The OFT would expect to see OTAs and

<sup>51</sup> As noted above, consumers should have the option of joining numerous closed groups without needing to make a purchase first.



hotels compete to attract customers through the attractiveness of their closed group offering, and that consumers will ultimately benefit from such competition, alongside competition on price, quality, range and service and other factors.

- 6.52. Therefore, while the Final Commitments do not allow for unrestricted discounting, the OFT expects them to result in greater price competition, where there may currently be none or it may be significantly restricted, as well as lowering barriers to entry by allowing OTAs to offer certain discounts to attract customers. The OFT therefore expects the Final Commitments to introduce further competition between OTAs, and between OTAs and hotels' direct online sales channels, while also encouraging new entry of OTAs.
- 6.53. The OFT has considered the issue of how much discounting freedom would be appropriate in the context of the dynamic nature of the market in the UK. As described in paragraph 6.36 above, the OFT is aware that online travel agency services, including hotel online booking, is a growing sector and is characterised by frequent introduction of new technology or platforms and development of new business models. The OFT recognises that there is a complex interaction between various players and distribution channels. In this context, freedom by OTAs to discount hotel accommodation without any restrictions may potentially have harmful effects by reducing the incentives of hotels to deal with OTAs (or to limit the number of OTAs that they deal with), thereby potentially damaging inter-brand competition, and chilling innovation in the development of new business models.
- 6.54. Risks could also be created by requiring a greater degree of price freedom than provided for by the Final Commitments because such freedom might jeopardise the possible realisation of efficiencies put forward by the Parties.<sup>52</sup> These are that (1) the benefits to a hotel flowing from yield management (and consequent consumer benefits) might be made significantly more difficult or impossible to achieve were all restrictions on discounting to be removed; and/or that (2) a greater degree of pricing freedom could also result in a shift in the balance of power between hotels and their OTA partners, leading to the

<sup>52</sup> The efficiency arguments put forward by the Parties are set out in Annexe 2.

cannibalisation of their direct sales channel and potentially raising their distribution costs. The OFT also notes the submissions by Expedia and Booking.com that requiring a greater degree of pricing freedom may mean that OTAs' incentives to invest, for example in pre-sales services and other promotional activities (including the functionality of their websites, range of travel offers, customer support, or content quality), may be undermined if other OTAs (or hotels) are able to undercut their prices by publishing a lower headline rate, given low search costs of customers for hotel online booking services.<sup>53</sup>

- 6.55. As set out above and in paragraph 44 of Annexe 3, the OFT did not receive evidence that either strongly confirmed or refuted the efficiency arguments put forward by the Parties to justify the residual restrictions remaining under the Final Commitments. However, the responses to the First Consultation and further representations from the Parties suggest that, in the specific factual context, some of the arguments put forward for the existence of efficiencies are likely to have some merit in this sector.
- 6.56. The OFT has also considered the potential risk of harmful effects in the light of the scope of its investigation, which was limited to two large OTAs and one large hotel chain, whereas the Final Commitments are intended to introduce further competition between parties in the wider market. In particular, the OFT has not been able to consider in detail the ways in which the relationships of small hotel groups and independent hotels with OTAs may differ from those of large hotel chains, or for whom the potential efficiencies from having control of the headline rate may be more important. This may mean that the potential impact on hotel incentives to use different distribution channels, and the possible resulting impact on inter-brand competition, may vary.
- 6.57. The OFT recognises that the exact consequences of the introduction of limited price competition through the Final Commitments cannot be anticipated with complete certainty. For example, as referred to above and set out in paragraphs 10-18 and 56-65 of Annexe 3, the OFT

<sup>53</sup> It is not necessary for the OFT when exercising its discretion under section 31A (2) of the Act to carry out an assessment under Article 101(3) TFEU/section 9 of the Act to establish whether the residual restrictions remaining under the Final Commitments meet all of the relevant criteria under that Article and section.

received submissions suggesting that the Commitments and Final Commitments might increase switching costs, resulting in an incumbency advantage and that, if they result in a cannibalisation of the direct channel, this may raise hotels' distribution costs. However, for the reasons set out in paragraphs 27-37 of Annexe 3, on balance, the OFT's assessment is that the benefits to competition from allowing closed group discounting under the Final Commitments are likely to outweigh the potential risk from increasing any switching costs, relative to the current market position. Indeed, while it might be easy for consumers to switch between OTAs currently, there are limited benefits from doing so in respect of Room-Only hotel accommodation due to the current restrictions on discounting. By contrast, the OFT considers that the switching cost under the Final Commitments will be small in comparison with future benefits (that is, long-term eligibility for discounts).

- 6.58. Further, the OFT considers that the clarifications to the Commitments following the First Consultation, and the residual restrictions on OTA discounting which will remain under the Final Commitments, should mitigate the risk of such unintended consequences. In particular, the reduction of the duration of the Commitments from three to two years means that the OFT/CMA will be able to consider the impact of the Final Commitments in this evolving sector, and any unintended consequences, within a shorter time horizon.
- 6.59. In addition, to monitor the effectiveness of the Final Commitments, the Parties are required to report to the OFT/CMA each year on the implementation of the Final Commitments. The Final Commitments also contain provisions relating to compliance, according to which the Parties and other hotels and OTAs can write to the OFT/CMA regarding alleged non-compliance by Expedia, Booking.com and/or IHG with the Final Commitments. The Parties can also write to the OFT/CMA regarding contractual arrangements of other hotels and/or OTAs which may be incompatible with the Principles.
- 6.60. As noted above, under section 31B(4) of the Act, the OFT (or in due course, the CMA) can continue the investigation, make a decision or give a direction where it has reasonable grounds for believing that there

has been a material change of circumstances since accepting the Final Commitments.<sup>54</sup>

## Conclusion

- 6.61. Accordingly, in light of the considerations set out above, based on an assessment of the evidence available to it, the OFT considers that the Final Commitments address its competition concerns by allowing for a greater degree of price competition than currently exists, and by lowering barriers to entry by enabling new entrants to compete to attract customers to join their closed groups through the ability to offer discounts. The OFT is satisfied that the Principles are sufficient and appropriate to address its competition concerns in the context of the affected markets.
- 6.62. For the avoidance of doubt, the Final Commitments do not in any way restrict OTAs' ability to agree with IHG and/or any other hotel any other discounting rights over and above the right to offer Reductions within the meaning of the Final Commitments, subject to existing contractual restrictions. Similarly, the adjustment of MFN or equivalent provisions required by the Revised Commitments is a minimum standard only. The Final Commitments do not affect any existing contractual arrangements under which a hotel can offer discounts, or allow its other OTA partners to do so.<sup>55</sup>
- 6.63. In addition, the Final Commitments only relate to discounts from the headline room rate and do not relate to or affect an OTA's ability to offer additional services or goods alongside hotel accommodation bookings, subject to existing contractual restrictions.

<sup>54</sup> The OFT/CMA can also take such action where it has reasonable grounds for suspecting that a person has failed to adhere to one or more of the terms of the Final Commitments; or it has reasonable grounds for suspecting that information which led it to accept the Final Commitments was incomplete, false or misleading in a material particular.

<sup>55</sup> For the avoidance of doubt, this means, amongst other things, that if discounting by that hotel or discounting by other OTAs of that hotel's accommodation is currently outside the scope of any MFN provisions, this is unaffected by the Final Commitments. The Final Commitments also do not affect the ability of hotels and OTAs to agree more extensive adjustment of MFN provisions than is required by the Final Commitments.

- 6.64. The OFT notes that it does not consider the Principles set out in the Final Commitments to be the only possible solution to the competition concerns it has identified. However, the OFT expects organisations in the hotel online booking sector with similar vertical distribution arrangements to give careful consideration to similar arrangements and to ensure they comply with UK and EU competition law.
- 6.65. As far as general deterrence is concerned, the OFT expects that this decision to accept the Final Commitments will promote competition law compliance in vertical distribution arrangements in the hotel online booking sector, and potentially beyond. To the extent that this is not the case, the OFT could decide to take further enforcement action in relation to other vertical distribution arrangements and/or related markets which raise competition concerns.

## 7 THE DECISION

- 7.1. In light of the above, the OFT considers that the Final Commitments as set out in Annexe 1 of this document address its competition concerns in this case and it has therefore decided to accept the Final Commitments. Accordingly, the OFT has closed its file in respect of this investigation.

A handwritten signature in black ink that reads "Ann Pope". The signature is written in a cursive style with a large initial 'A' and 'P'.

**Ann Pope on behalf of the Office of Fair Trading  
Senior Director - Services, Infrastructure and Public Markets**