Hotel online booking: Notice of intention to accept binding commitments to remove certain discounting restrictions for Online Travel Agents

and

Invitation to comment

9 August 2013

OFT1500
1 INTRODUCTION

1.1. The Office of Fair Trading (the ‘OFT’) hereby gives notice that it proposes to accept the commitments offered by the companies under investigation in case CE/9320/10 and invites representations from interested third parties on this proposed course of action. Formal acceptance of the commitments by the OFT would result in the termination of our investigation, with no decision made on whether or not the Competition Act 1998 (the 'Act') or Article 101 of the Treaty on the Functioning of the European Union (‘TFEU’) has been infringed by any of the companies under investigation. The draft text of the commitments offered is set out at Annexe 1 to this document.

1.2. 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 concludes by summarising the commitments offered by the parties and why the OFT considers that these address its competition concerns.

1.3. The OFT invites interested third parties to make representations on the proposed commitments, which it will take into account before making its final decision whether to accept the commitments. By articulating its competition concerns, the OFT hopes to assist those who respond to this consultation to understand both those concerns and why the OFT considers that the commitments offered are capable of being appropriate to address them. Details of how to comment are provided at the end of this document. The closing date for comment is 13 September 2013.
EXECUTIVE SUMMARY

1.4. Following the launch of a formal investigation in September 2010, on 31 July 2012, the OFT issued a Statement of Objections alleging that 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 then owner of the Intercontinental London-Park Lane hotel (‘ILPL’)) (the ‘Parties’ and each a ‘Party’) have infringed Chapter I of the Act and Article 101 of the TFEU in relation to the online offering of ‘Room-Only’ ¹ hotel accommodation bookings by online travel agents (‘OTAs’).

1.5. 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.

1.6. The OFT’s competition concerns 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, the degree of competition on the offer of room rates between OTAs and between OTAs and the hotel’s direct online sales channel for those hotel accommodation bookings (that is, intra-brand competition) may be non-existent.

- **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,

¹ ‘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 3.11 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 3.13 below).
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 potentially barriers to entry.

1.7. In order to address fully the OFT’s competition concerns and assist with bringing the investigation to a close, the Parties have offered formal commitments to modify their behaviour in accordance with the following key principles:

- OTAs would be free to offer reductions off headline room rates,\(^2\) 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 would be 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 commitments of any hotel room with that OTA.

- OTAs would 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

\(^2\) Under the commitments, ‘headline room rate’ means the room-only headline hotel room rates set by the relevant hotel partner for its rooms.
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.

1.8. The Parties have proposed that the commitments would apply to bookings made by UK residents\(^3\) for rooms in hotels located in the EU, and would remain in force for a period of three years.

1.9. The OFT provisionally considers that the proposed commitments are capable of introducing a degree of price competition where, in the OFT’s provisional view, none may exist, and may substantially reduce barriers to entry relative to the current market conditions. However, the OFT notes that the proposed commitments would not remove completely the current restrictions on OTAs discounting that currently exist in IHG’s agreements with Booking.com and Expedia. The Parties have argued that the residual restrictions are necessary in order to realise certain efficiencies. More particularly, the Parties made submissions that the current restrictions were necessary in order to realise certain efficiencies, although these submissions are also applicable to the residual restrictions, as discussed here and elsewhere in this notice. Accordingly, the Parties have argued that, despite the residual restrictions being in place, the competition concerns identified in the Statement of Objections would be fully addressed through the relaxation of the restrictions on discounting by the introduction of the greater freedom for OTAs to discount.

1.10. The OFT notes the efficiency arguments advanced by the Parties and recognises that there may be certain benefits for consumers from hotels having the ability to independently set and control the headline rate for their hotel rooms (and therefore restrict OTAs’ ability to freely discount off headline rates). As a result, the OFT provisionally considers that the benefits remaining after the implementation of the proposed commitments outweigh the residual restrictions on discounting. The OFT

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\(^3\) Under the commitments, ‘UK resident’ means a consumer who has a UK address, a UK telephone number or a UK registered credit card. For the avoidance of doubt, the nationality or legal residency or tax status of the individual is irrelevant.
has not, however, tested the Parties’ efficiency arguments fully. The Parties and interested third parties now have an opportunity to make appropriate submissions, as explained in paragraph 1.11 below.

1.11. In conclusion, therefore, the OFT provisionally considers that the commitments offered by the Parties are sufficient to address fully its competition concerns in this case. The OFT intends to accept the commitments by means of a formal commitments decision. Prior to this, the OFT invites interested third parties to make representations on the proposed commitments, which it will take into account before making its final decision whether to accept the commitments. The OFT is particularly interested to hear from other OTAs, hotels and consumers, and will be seeking information about the efficiency arguments put forward by the Parties, including yield management in this and other industries.

1.12. Specifically, the OFT would welcome:

- observations and evidence relating to the efficiency arguments put forward by the Parties, as noted above
- views on the efficacy of the commitments, for example, are consumers likely to become members of multiple OTA discounting schemes?
- views on whether the commitments fully address the competition concerns identified by the OFT, and
- views on the type of information which should be submitted in order to assess the effectiveness of the commitments, if formal commitments were to be adopted.
2 THE OFT’S INVESTIGATION

2.1. 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.

2.2. 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.

2.3. On 31 July 2012, the OFT issued a Statement of Objections in accordance with Rule 4 of the OFT Rules⁴ 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.

2.4. 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

2.5. 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.

2.6. 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.

2.7. In addition, the OFT met in person and conducted teleconferences with various parties and their representatives to gather further substantive evidence.

2.8. 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.

2.9. 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.

2.10. 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.

2.11. 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.

2.12. In this case, no infringement decision has been made. The current status of the investigation is that the Parties have not formally responded to the Statement of Objections (but the period for formal responses to the
Statement of Objections has not yet elapsed). However, the Parties did make some submissions: (i) prior to the publication of the Statement of Objections on the OFT’s preliminary legal assessment;\(^5\) 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 the efficiencies associated with the proposed relaxation of the current restrictions on discounting that were the subject of the OFT’s Statement of Objections. 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.

2.13. Without prejudice to the Parties’ position as regards the OFT’s preliminary legal assessment in this investigation, the Parties offered formal commitments in final form 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.

2.14. Having considered the Parties’ proposed commitments, the OFT is currently of the view that the binding commitments offered are capable of addressing its competition concerns, for the reasons set out in this notice and that, as a result, it is appropriate for the OFT to exercise its discretion to close its investigation by way of a formal decision accepting the commitments. Formal acceptance of commitments would result in the OFT terminating its investigation, and not proceeding to a decision on whether or not Chapter I of the Act and Article 101 of the TFEU have been infringed by any of the companies under investigation.

2.15. Therefore, the OFT hereby gives notice to interested parties pursuant to paragraph 2 of Schedule 6A of the Act that it proposes to accept the commitments in case CE/9320/10 in accordance with section 31A(2) of the Act and invites representations from interested third parties on this proposed course of action.

\(^5\) For example, in relation to how these arrangements should be characterised for the purposes of UK and EU competition law.
The Parties

IHG and ILPL

2.16. 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. 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.

2.17. 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

2.18. 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 and the hotels.com UK site. Expedia acquired a 61.6 per 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

2.19. 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

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6 As at 31 December 2012.
including activehotels.com, which redirect to the Booking.com website (although web traffic from those other websites is negligible).

2.20. 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 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 of companies 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.
3 INDUSTRY BACKGROUND

Industry background and the Parties’ activities

Supply of hotel accommodation

3.1. 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

3.2. 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

3.3. 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 OTA Parties’ activities in this notice, 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.

3.4. 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.

3.5. 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.
3.6. 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.

3.7. 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

3.8. 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

3.9. 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.\(^7\)

3.10. As set out in more detail below, the OFT’s competition concerns relate to the current restrictions on Booking.com and Expedia offering discounts on Room-Only hotel accommodation bookings at ILPL, for instance by restricting OTAs from sharing their commission or margin with the customer.

Packages

3.11. 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.

3.12. 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

3.13. Hotel accommodation bookings are also offered on an opaque basis, meaning that the identity of the hotel remains undisclosed to the end-

\(^7\) 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).
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.

3.14. 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.

3.15. 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 notice, references to hotel accommodation are therefore references to Room-Only hotel accommodation unless specifically stated otherwise.8

Rate Parity

3.16. Under rate parity obligations (also referred to as ‘room rate most favoured nation clauses’ or ‘MFN clauses’) a hotel agrees to provide an OTA with hotel accommodation for offer by that OTA to end-users at a booking rate which is no less favourable than the lowest booking rate displayed by other online distribution outlets (‘Rate Parity’). This guarantees the OTA the lowest booking rate at least in relation to its distribution channel (that is, it cannot be undercut). Vertical agreements which include restrictions on the OTA offering discounts to end-users on

8 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.
its bookings for Room-Only hotel accommodation may also include such a Rate Parity obligation. Whilst the OFT investigated restrictions on discounting, the OFT did not, however, assess Rate Parity obligations as part of its investigation.

**Expedia and Booking.com’s business models**

3.17. 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**

3.18. 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 3.20 below. Under the merchant model, the OTA offers hotel 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.

3.19. 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.
**Merchant Model**

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<tr>
<th>HOTEL</th>
<th>OTA</th>
<th>CUSTOMER</th>
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<tbody>
<tr>
<td>Net rate</td>
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<tr>
<td>Booking rate</td>
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**Booking.com**

3.20. 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.
3.21. 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 the payment for hotel accommodation is to be made (under the merchant model upon making the booking; under the commission-based model following the stay at the hotel). 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.

IHG’s hotel operation models

3.22. 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.

3.23. 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,

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9 The Parties have made submissions about additional differences between the merchant model and the commission-based model.

10 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.
at a minimum, a General Manager and will assume operational responsibility over the hotel. In addition to receiving a proportion of 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.

3.24. 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.

3.25. 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.

3.26. Hotels under all three operation models are covered 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.

11 Provided that they have not opted out of the arrangements.
4 THE OFT’S COMPETITION CONCERNS

4.1. 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’).

4.2. 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’).

4.3. 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.

4.4. 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

4.5. 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.

4.6. 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.

4.7. 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.\(^{12}\) 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).\(^{13}\) 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.

4.8. When OTAs face the current restrictions on discounting a hotel’s Room-Only accommodation, the degree of competition for the offer of room rates between OTAs and between OTAs and the hotel’s direct online sales channel for those hotel accommodation bookings may be non-existent.

\(^{12}\) 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.

\(^{13}\) The package and opaque distribution of hotel accommodation is described in more detail at paragraphs 3.11 to 3.15 above.
Current restrictions on discounting may increase barriers to entry

4.9. 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

4.10. 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.

4.11. 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 restrictions on discounting are prevalent is likely to be characterised by significant limits to price competition and potentially barriers to entry.

4.12. The OFT notes that it does not consider the Principles in Annexe 1 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.

4.13. 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.
5 THE COMMITMENTS

5.1. In order to fully address\textsuperscript{14} the OFT’s competition concerns (as described in paragraphs 4.1 to 4.11 above), the Parties have offered commitments to the OFT (in the form set out in Annexe 1 and summarised below) which would relax the current restrictions on discounting by allowing OTAs greater freedom to offer discounts on Room-Only bookings to end-users. The commitments offered are analysed in detail below.

5.2. Following consultation with the Parties, the OFT has reached the provisional view that its competition concerns may be capable of being addressed by those formal commitments. Formal acceptance of commitments would result in the OFT terminating its investigation, and not proceeding to a decision on whether or not the Act has been infringed by any of the companies under investigation.

5.3. Accordingly, for the avoidance of doubt, a decision by the OFT accepting binding commitments will not include any statement as to the legality or otherwise of the conduct by the Parties under investigation either prior to acceptance of the commitments or once the commitments are in place.

Appropriate case for commitments

The OFT Guidance

5.4. The OFT Guidance (OFT 407 (\textit{Enforcement})) and the Procedural Guidance (OFT1263rev (\textit{A guide to the OFT’s investigation procedures in competition cases})), states 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.\textsuperscript{15}

\textsuperscript{14} In accordance with the OFT’s published guidance: see further paragraph 5.4 below.

\textsuperscript{15} Paragraph 4.3 of the OFT Guidance and paragraph 10.16 of the Procedural Guidance.
5.5. 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.\(^{16}\)

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

5.6. 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 4.1 to 4.11 above.

- **The OFT has reached the preliminary conclusion that the commitments offered by the Parties are capable of addressing fully the OFT’s competition concerns**: the commitments enable OTAs to offer certain discounts to end-users using ‘closed group’ schemes. An explanation of why these commitments are capable of addressing the OFT’s concerns by increasing price competition and potentially lowering barriers to entry, whilst at the same time preserving the efficiencies resulting from the restrictions, is set out in paragraphs 5.25 - 5.33 below. As noted in paragraph 5.33 below, the OFT invites interested parties to submit observations and evidence relevant to the efficiency arguments put forward by the Parties in order to assist the OFT in its final assessment of the proposed commitments.

- **The commitments offered 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

\(^{16}\) Paragraph 4.5 of the OFT Guidance.
with the Principles,\textsuperscript{17} 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.

5.7. Finally, the OFT does not consider that accepting commitments in this case would undermine deterrence: in fact, it considers that the proposed 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.

5.8. In light of the above, therefore, the OFT’s preliminary conclusion is that this is an appropriate case for it to accept binding commitments from the Parties.

**The proposed commitments**

5.9. The paragraphs below summarise the commitments proposed by the Parties and the efficiency arguments they have advanced.

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

5.10. IHG and Booking.com propose to commit to amend their existing commercial arrangements between them to ensure that these arrangements comply with the Principles, and to ensure that for the duration of the commitments, any new commercial arrangements between them 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 commitments. Such a commitment is an anti-avoidance measure to ensure that the discounting ability envisaged by the commitments is not undermined.

\textsuperscript{17} For an explanation of capitalised terms used in this section, see Annexe I Definitions.
Joint commitments from IHG and Expedia

5.11. IHG and Expedia propose to commit to amend their existing commercial arrangements between them to ensure that these arrangements comply with the Principles, and to ensure that for the duration of the commitments, any new commercial arrangements between them 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 commitments. Such a commitment is an anti-avoidance measure to ensure that the discounting ability envisaged by the commitments is not undermined.

Commitments from IHG

5.12. To facilitate industry-wide roll-out, IHG has also proposed to commit to ensure that its existing and future arrangements with other OTA partners 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 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 proposed to use reasonable endeavours to procure such consent.

Commitments from Booking.com

5.13. To facilitate industry-wide roll-out, Booking.com has proposed to commit to ensure that its existing and future arrangements with other hotel partners 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 hotel partners, from taking advantage of the discounting opportunities provided for by the 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 proposed to use reasonable endeavours to procure such consent.
Commitments from Expedia

5.14. To facilitate industry-wide roll-out, Expedia has proposed to commit to ensure that its existing and future arrangements with other hotel partners 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 hotel partners, from taking advantage of the discounting opportunities provided for by the 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 proposed to use reasonable endeavours to procure such consent.

The Hotel Online Booking Principles

5.15. The Parties have offered to modify their behaviour to comply with the following key Principles:

- OTAs would 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 would be 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 commitments of any hotel room with that OTA.

- OTAs would 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 partner agree or have agreed to a contractual right for IHG or any other hotel partner to match a Reduction displayed to
consumers who are non-members, the commitments shall not restrict the enforceability of that right.

5.16. The Parties have proposed that the commitments would apply to bookings made by UK residents\(^{18}\) for rooms in hotels located in the EU, and would remain in force for a period of three years.

5.17. For the purposes of the 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 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.

5.18. The commitments also provide that hotel partners 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 commitments.

5.19. To monitor the effectiveness of the commitments, the Parties will be required to report to the OFT each year on the implementation of the commitments.

5.20. The 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

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\(^{18}\) Under the commitments, ‘UK resident’ means a consumer who has a UK address, a UK telephone number or a UK registered credit card. For the avoidance of doubt, the nationality or legal residency or tax status of the individual is irrelevant.
and/or IHG with the commitments. The Parties may also write to the
OFT regarding contractual arrangements of other hotel partners and/or
OTAs which may be incompatible with the Principles.

5.21. For the avoidance of doubt, the commitments do not in any way restrict
OTAs’ ability to agree with IHG and/or any other hotel partner any other
discounting rights over and above the right to offer ‘Reductions’ within
the meaning of the commitments, subject to existing contractual
restrictions.

5.22. In addition, the 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.

Potential efficiencies relating to the relaxation of the current
restrictions on discounting

5.23. The Parties have not formally responded to the Statement of Objections.
However, the Parties have submitted initial observations on potential
efficiency arguments in support of the need for some residual
restrictions on the ability of OTAs to discount the price of Room-Only
hotel accommodation to end-users. These potential efficiency arguments
relate primarily to the benefits that arise from a hotel having the ability
to independently set and control the headline rate for its hotel rooms
(and therefore restrict OTAs’ ability to freely discount off headline
rates).

5.24. The potential efficiency arguments on which the Parties have submitted
initial observations can be summarised as follows:

• Firstly, IHG submitted that the headline rate for the hotel room acts
  as an important indicator of quality for consumers. Unrestricted
discounting by OTAs may undermine this and damage the hotel’s
brand or reputation. As a result, hotels may be reluctant to use
OTAs which in turn is likely to result in lower availability of rooms to
consumers, lower inter-brand competition and higher prices and
search costs.
Secondly, the Parties submitted that in a market which is characterised by intense inter-brand competition, hotels have to balance an uncertain and variable demand against a fixed and perishable inventory of rooms. Because of this, yield (revenue) management pricing\(^{19}\) has become an essential tool within the industry. This enables hotels to adjust room rates frequently in the window between the time at which a room becomes available to book and the occupancy date, responding to updated information about the level of demand for their rooms. Yield management may include price discrimination between early bookers who may be more price-sensitive and late bookers who are less price-sensitive, typically as they have less flexibility around the date (for example, business travellers). This form of dynamic price discrimination can deliver significant benefits to consumers both by allowing more rooms to be sold and by ensuring that these rooms are allocated efficiently to those who value them the most and therefore are prepared to pay the most for them. Any form of discounting by OTAs has the potential to undermine the benefits of yield management to some extent, if it is difficult for hotels to predict and take into account when setting headline rates over time. Since OTAs do not take any of the inventory risk of unsold rooms, unrestricted discounting would further result in the hotels’ inability to ensure that the costs they incur for the provision of hotel rooms are properly taken into account by an OTA pricing decision. This could lead to a distortion in hotel room pricing and available inventory, ultimately resulting in the possibility that hotels would rely on selective distribution systems or even cease using OTAs as a distribution channel altogether.

Thirdly, IHG considers that unrestricted discounting by OTAs would cannibalise sales in the hotels’ direct online sales channels. IHG argues that hotels’ direct online sales channels are currently very significant, particularly for large hotel chains. As hotels do not pay

\(^{19}\) Yield management usually involves sophisticated price modelling to enable providers to discriminate between different customer groups based on their willingness to pay. It is now widely used in transport sectors such as airlines and has also been adopted by the hotel industry as a means of maximising revenue.
commission in their direct channel, unrestricted discounting by OTAs would have a significant impact on their profitability and may create a risk that certain hotels refuse to deal with OTAs, deal with fewer OTAs, or offer less inventory to the OTAs they use. This may significantly undermine the OTA model and erode the benefits that the model brings to consumers: consumers would be left with fewer hotels on OTAs, potentially increasing consumer search costs, reducing inter-brand competition between hotels and requiring hotels to engage in more of their own advertising/online customer acquisition, potentially resulting in duplication of cost. The Parties submit that all of this is likely to increase price and cost to consumers.

Fourthly, Expedia and Booking.com submitted that by enabling OTAs to engage in unrestricted discounting, there is a risk that no-frills websites could free-ride on the investment made by other OTAs, for example in the functionality of its website, range of travel offers, customer support, enhanced content quality or in advertising. This may undermine the incentive for OTAs to invest in valuable services for consumers. The retention by hotels of control over headline rates may therefore have the potential to result in enhanced competition between OTAs on the quality of their platforms, which in turn improves consumer choice, and hence enhance inter-brand competition between hotels on any one platform.

The OFT’s assessment of the commitments against the background of the efficiency arguments

5.25. The OFT has carefully considered the Parties' proposals for commitments set out in Annexe 1 and the Parties' arguments, including the efficiency arguments, as to why these commitments fully address the OFT’s competition concerns.

5.26. The OFT provisionally considers that the proposed commitments are capable of introducing a degree of price competition where, in the OFT’s provisional view, none may exist. Under the proposed commitments, OTAs would be able to offer discounts to end-users who had joined a
closed group and made a single booking, where they are currently prevented from doing so.

5.27. Further, the OFT considers that the commitments may substantially reduce barriers to entry relative to the current market conditions. The commitments would provide entrants with additional scope to compete by allowing them to offer discounting schemes and to advertise the existence of these schemes to non-members. This could provide consumers with a valuable incentive to search across OTAs for the best available deals.

5.28. However, the OFT notes that the proposed commitments would not remove completely the current restrictions on OTAs discounting that currently exist in the Relevant Price Agreements. The Parties have argued that the residual restrictions are necessary in order to realise the efficiencies referred to in paragraph 5.24 above and, accordingly, despite the residual restrictions being in place, the competition concerns identified in the Statement of Objections would be fully addressed through the relaxation of the restrictions on discounting by introduction of the greater freedom for OTAs to discount.

5.29. The OFT notes the efficiency arguments advanced by the Parties and recognises that there may be certain benefits for consumers from hotels having the ability to independently set and control the headline rate for their hotel rooms (and therefore restrict OTAs’ ability to freely discount off headline rates). In particular, the OFT recognises that, in the context of strong inter-brand competition and a fixed and perishable stock of hotel rooms, hotels may have a stronger incentive than OTAs to adjust the headline room rates to reflect changes in demand and ensure maximum occupancy levels. Unrestricted discounting by OTAs could potentially undermine the benefits of yield management, since it makes it difficult for hotels to predict OTA discounting and therefore take it into account when setting headline prices. It is possible that hotels would cease using OTAs as a distribution channel altogether if OTA discounting prevented hotels from yield managing effectively or they would ration the number of rooms distributed in this way. Overall the OFT believes that realising these efficiencies while at the same time introducing the new freedom to discount under the commitments is capable of producing real and tangible benefits for consumers.
5.30. The OFT also notes the other efficiency arguments put forward by the Parties (summarised at paragraph 5.24 above). The OFT recognises that collectively these arguments may provide additional justification for hotels needing the ability to independently set and control the headline rate for their hotel rooms (and therefore restrict OTAs’ ability to freely discount off headline rates).

5.31. The OFT’s preliminary view on the residual restrictions on OTA discounting envisaged by the commitments is set out below:

- **Discounts limited to OTAs’ commission or margin levels**: By limiting the extent of possible discounting to the level of commission or margin received by the OTA, the effects on hotels’ ability to engage in yield management will be limited.

- **Discounts available to closed groups only, for instance in the context of membership or loyalty schemes**: If membership of OTA discounting schemes is not limited in any way, there is a risk that the efficiencies discussed in paragraph 5.24 above are not realised. In particular, limiting the availability of discounting schemes is important to preserve the hotels’ ability to effectively apply yield management.

- **Eligibility for discounts dependent on having made a previous booking with that OTA**: If there are no meaningful criteria governing eligibility for discounts within closed groups, the efficiencies discussed above are unlikely to be achieved. The OFT has considered with the Parties what the least restrictive eligibility criteria should be in order to deliver the efficiencies discussed in paragraph 5.24 above (and be implementable in practice) and agrees that a limitation of discounts to members of a ‘closed group’ who have made one previous booking would appear to be justified.

- **Advertising of discounts**: The commitments offered propose that specific details of the level of discounts (that is, amount/percentage discount offered) could be displayed to end-users on OTAs’ websites when logged in as a member of a closed group. Members will therefore be able to see the range of discounts available without having had to make a purchase. In addition, information regarding the availability of discounts could be displayed on price comparison
sites for each hotel/date (that is, to members and non-members) so that consumers can see where deals would be available if they were to sign up and make a single purchase. However, in respect of IHG hotel rooms, OTAs cannot publicise specific details of the level of discounts to non-members, including to price comparison websites; and other (non-IHG) hotels may prevent OTAs publicising such details in respect of their hotel rooms. The Parties argue that, in order to ensure that headline rate integrity is sustainable, it is necessary to ensure that discounted rates are not displayed in a way which would easily undermine that integrity.

5.32. As a result, the OFT provisionally considers that:

- the proposed commitments address fully its competition concerns
- the commitments strike an appropriate balance between allowing for enhanced price competition, which may significantly lower barriers to entry, whilst preserving efficiency benefits to a reasonable degree, and
- the benefits remaining after the implementation of the proposed commitments outweigh the residual restrictions on discounting.

5.33. While the efficiency arguments advanced by the Parties appear credible, the OFT has not tested these arguments fully. The OFT therefore invites interested parties to submit observations and evidence relevant to commitments in general and the efficiency arguments put forward by the Parties in particular in order to assist the OFT in its final assessment of the commitments advanced by the Parties.

Rate parity/MFN clauses

5.34. As explained at paragraph 3.16 above, under rate parity obligations (also referred to as ‘room rate most favoured nation clauses’ or ‘MFN clauses’) a hotel agrees to provide an OTA with hotel accommodation for offer by that OTA to end-users at a booking rate which is no less favourable than the lowest booking rate displayed by other online distribution outlets. This guarantees the OTA the lowest booking rate at least in relation to its distribution channel (that is, it cannot be undercut).
5.35. 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 Article 101 TFEU. Rather, the focus of the OFT’s investigation has been the current restrictions on OTAs discounting off the Room-Only Rate set by the hotel.

5.36. However, to ensure that the 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 commitments. This could include amending any MFNs, 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.

5.37. Having regard to the present specific legal and economic context, for the duration of the commitments, as regards the Parties to this investigation, the OFT is unlikely to investigate any agreements, including MFN obligations, that comply with the Principles.20 The same would likely apply to similar MFN clauses, that is, clauses 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.

5.38. However, if the OFT becomes aware that provisions, such as MFN clauses, appear in practice to undermine the Principles, it would be open to the OFT to consider taking further action. It would also be open to the OFT to investigate MFN clauses in other industries should the OFT have reasonable grounds for suspecting that such clauses, in their specific industry context, infringe UK or EU competition law.

20 The OFT notes that as of 1 April 2014 the OFT will cease to exist and the Competition and Markets Authority (‘CMA’) will then assume the OFT’s current competition enforcement powers. The OFT cannot, of course, bind the CMA in how it chooses to exercise its enforcement powers from 1 April 2014.
6 THE OFT’S INTENTIONS AND INVITATION TO COMMENT

6.1 In light of the above, the OFT provisionally considers that the commitments offered by the Parties as set out in Annexe 1 of this document are sufficient to address fully its competition concerns in this case. Therefore, the OFT intends to accept the commitments by means of a formal commitments decision.

6.2 As required by paragraph 2(2)(d) of Schedule 6A of the Act, the OFT now invites interested third parties to make representations on the proposed commitments and will take such representations into account before making its final decision whether to accept the commitments.

6.3 The OFT is particularly interested to hear from other OTAs, hotels and consumers. As noted above, the OFT has not reached a final view on the Parties’ efficiency arguments and invites interested parties to submit observations and evidence relevant to the efficiency arguments put forward by the Parties (including yield management in this and other industries) in order to assist the OFT in its final assessment of the commitments advanced by the Parties.

6.4 Specifically, the OFT would welcome:

- observations and evidence relating to the efficiency arguments put forward by the Parties, as noted above
- views on the efficacy of the commitments, for example, are consumers likely to become members of multiple OTA discounting schemes?
- views on whether the commitments fully address the competition concerns identified by the OFT, and
- views on the type of information which should be submitted in order to monitor the effectiveness of the commitments, if formal commitments were to be adopted.
6.5 The OFT will also inform the European Commission, once it has considered representations from third parties, and no later than 30 days before the adoption of a decision accepting commitments.\textsuperscript{21}

**Invitation to comment**

6.6 Any person wishing to comment on the commitments should submit written representations to the OFT at the address given below, by 13 September 2013. We would be grateful if responses can be supplied in both hard copy and in electronic form. Please quote the case reference CE/9320/10 in all correspondence related to this matter.

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Fleetbank House  
2-6 Salisbury Square  
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Email: hotelonlinebooking@oft.gsi.gov.uk

\textsuperscript{21} In accordance with the requirement under Article 11(4) of Regulation 1/2003 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p1) to inform the European Commission no later than 30 days before the adoption of a decision accepting commitments in all cases which affect trade between Member States, to enable it to submit any comments.