CASE CE 9320/10 - HOTEL ONLINE BOOKING

DECISION TO ACCEPT COMMITMENTS TO REMOVE CERTAIN DISCOUNTING RESTRICTIONS FOR ONLINE TRAVEL AGENTS

ANNEXE 3

Summary of responses to the public consultations

This Annexe summarises the key issues raised in the responses received to the public consultations, together with the OFT’s response.

FIRST CONSULTATION

The First Consultation\(^1\) 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.

The main points fell under five key headings and have been grouped accordingly for the purposes of this overview:

1. Commitments do not address rate parity and other MFN provisions directly
2. Impact on the structure of the market
3. Third party views on efficiency arguments put forward by the Parties
4. Geographic scope of the Commitments
5. Duration of the Commitments

**Issue 1: Commitments do not address rate parity and other MFN provisions directly**

1. The majority of respondents raised concerns with rate parity and/or other MFN provisions, which were not the focus of the OFT’s investigation and which, therefore, the Commitments (and Final Commitments) do not address directly.

2. Hotels in particular submitted that rate parity provisions prevent them reflecting the different costs, service standards or business models of various distribution channels in different rates between channels. In

\(^1\) Defined terms used herein have the same meaning as those used in the Decision.
addition to rate parity provisions, concerns were also raised about other (non-price) MFN/parity provisions, such as provisions requiring hotels to offer OTAs last room availability and their most favourable booking and cancellation conditions.

3. Some respondents urged the OFT to investigate issues associated with rate parity and/or other MFN provisions in close cooperation with other NCAs in the EEA and/or the European Commission in order to ensure the consistent application of European competition law in the hotel online booking sector.

4. Several respondents raised concerns about the application of rate parity provisions to hotels’ own booking websites and offline channels. The respondents thought that this in turn could prevent hotels from offering equivalent discounts to those that the Commitments would enable OTAs to offer to members of their closed groups (indirectly, by requiring the hotel to offer OTAs the same (discounted) rate made available via its own booking website). These respondents were therefore concerned that the Commitments could give OTAs an unfair competitive advantage in the online offering of hotel accommodation bookings to end-users.

5. Only one respondent submitted that rate parity is important for consumers to know that no matter where they book they will not get a cheaper rate for the same room.

OFT response

6. 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.2,3

7. However, to ensure that the Commitments and 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

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2 Therefore, the Parties have not had the opportunity to respond formally to comments raised by respondents on these issues.

3 See paragraphs 6.39-6.42 of the Decision for further detail of the OFT’s position on rate parity/retail rate MFN provisions in this case.
the Commitments and 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 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.4

8. In addition, the OFT received a number of queries about the extent to which the Commitments have an impact on the ability of hotels to offer discounts to closed groups. To address these queries, the Parties offered drafting amendments to the Commitments to clarify the ability of hotels to offer discounts to closed groups.5 In particular, in the Final Commitments the Parties 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. This mirrors the restrictions on OTAs’ advertising of hotel room discounts set out in the Commitments and Final Commitments.

**Issue 2: Impact on the structure of the market**

9. Many respondents indicated that the Commitments could have an adverse impact on the structure of the market by strengthening OTAs’ market positions vis-à-vis hotels; strengthening Booking.com and Expedia’s market positions; and/or impacting on consumers’ ability to shop around.

**Commitments may strengthen OTAs’ market positions vis-à-vis hotels**

10. Some respondents highlighted a risk that the Commitments could lead to a shift of consumer purchasing behaviour away from hotels’ own

4 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.

5 See paragraphs 6.30-6.33 of the Decision for further detail.
booking websites to OTAs. It was submitted that this could raise hotels’
distribution costs and hotels might therefore limit their dealings with
OTAs that engage in discounting or offer less inventory to those OTAs.
On the other hand, the OFT was also told that OTAs are already able to
offer certain discounts to consumers via closed group discounting
schemes and it was submitted that the proposed Commitments would
not change the current position.

11. Some concern was also raised by respondents about the wider
applicability of the Commitments beyond the Parties. In particular, the
OFT was told that independent hotels may not be in the same bargaining
position with OTAs as international hotel chains such as IHG. The OFT
was told that many hotels (particularly independent hotels) feel that they
have to work with OTAs in order to reach a wider customer base.
Therefore, the OFT was told, OTAs (particularly the larger OTAs such as
Booking.com and Expedia) are in a strong bargaining position vis-à-vis
those hotels.

12. There was also a concern that the prior booking requirement might
favour OTAs above hotels’ own booking websites because consumers
are less likely to make as many bookings on a hotel’s own website as on
an OTA which offers a selection of different hotels in different locations.

13. Some respondents suggested that the Commitments should ensure that
OTAs would not be permitted to retaliate against hotels, for example by
demoting them in OTA listings, if hotels engaged in discounting
consistent with the Principles or permitted other OTAs to discount.

14. The OFT was also told that it might be difficult for hotels to monitor OTA
compliance with the Principles under the commission-based model (as
opposed to the merchant model), and that the Commitments should
incorporate a right for hotels to regularly request information to monitor
OTA compliance.

15. In addition to questions around how the Commitments would affect
hotels’ relationships with OTAs, the OFT was asked whether the

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6 As explained in paragraphs 4.18-4.19 of the Decision, under the merchant model, the OTA
charges the customer a retail price and remits a rate net of its agreed margin to the hotel.
Under the commission-based model, the hotel charges the customer and then pays the OTA a
commission (see paragraph 4.20 of the Decision).
Commitments would apply to the wholesale channel, where hotels do not have direct contractual relationships with OTAs.

Commitments may strengthen Booking.com and Expedia’s market positions

16. Several respondents queried whether the design of the Commitments, for example, the requirements for consumers to have joined a closed group and made a prior booking before becoming eligible for a discount, would risk entrenching the existing market positions of Booking.com and Expedia. For example, consumers might remain loyal to specific OTAs rather than join multiple OTA or hotel closed groups to compare prices, and the prior booking requirement might dissuade consumers from using other OTAs or the hotel’s own website to make subsequent purchases once they had made their first booking with one OTA.

17. Respondents also suggested that OTAs such as Booking.com and Expedia could have a competitive advantage over new entrant OTAs under the Commitments because they already have access to an extensive customer base and may have pre-existing membership schemes. Likewise, the OFT was told that smaller OTAs and independent hotels might be less able than larger OTAs and hotels to invest in the relevant technology to operate closed groups that would monitor prior bookings.

18. In addition, the OFT was told that the larger OTAs have a greater ability than smaller OTAs and hotels to advertise, for example by being ranked higher in search engine results. It was submitted that smaller OTAs typically negotiate lower commission rates from hotels than the larger OTAs. Therefore, the OFT was told that, because the Commitments envisage OTAs being able to discount only up to the level of their commission for the relevant hotel property, smaller OTAs would have less commission with which to offer discounts. This factor, combined with smaller OTAs’ lesser market presence, may suggest that the Commitments would not lower barriers to entry. One respondent recommended that the OFT consider imposing the same commission levels for all hotels and OTAs as part of the Commitments, to ensure an equal basis for offering discounts.
Commitments may impact on consumers’ ability to shop around

19. Some respondents considered that the definition of closed group is too narrow, for example, the definition excludes consumers who have signed up to a newsletter/mailing list. However, the OFT was also told that the closed group criteria are easily satisfied and that discounts would therefore be so widely available that it would become impossible for hotels to maintain the integrity of their headline room rates.

20. Some respondents raised concerns about consumer confusion regarding the availability and level of discounts. For example, it was submitted that because price differences would only be visible to closed group members, rather than publicly, it would not be easy for consumers to compare the effective prices being offered by OTAs and hotels via their closed groups. It was also queried whether consumers would be able to figure out which website will offer the best long-term deal.

21. It was raised that the marketing message around closed group discounting could be confusing for consumers. There was also some concern about the need to provide personal data when joining a closed group, potentially to multiple booking sites.

OFT response

Competition between OTAs and hotels’ direct online booking channels

22. The Commitments did not specify what type of hotel discounting would be consistent with the Principles. As mentioned at paragraph 8 above, the OFT received a number of queries about the extent to which the Commitments would have an impact on hotels’ ability to offer discounts. To address these queries, the Parties offered drafting amendments to the Commitments to clarify the ability of hotels to offer discounts to closed groups.7

23. The Final Commitments provide hotels with a greater ability to offer discounts than OTAs because 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. Therefore, the

7 See paragraphs 6.30-6.33 of the Decision for further detail.
OFT does not consider that the prior booking requirement and OTAs’ ability to offer a wider selection of hotel accommodation than hotels unduly affect hotels’ ability to compete with OTAs’ closed group discounting schemes.

24. As regards retaliatory action by OTAs, the OFT notes that it would be inconsistent with the spirit of the Commitments and Final Commitments for OTAs to take such action against hotels that offered discounts in accordance with the Principles, or permitted other OTAs to do so. The Commitments and Final Commitments provide that third parties may write to the OFT/CMA regarding alleged non-compliance by Expedia and Booking.com with the Final Commitments.

25. As regards hotels’ ability to monitor OTA compliance with the Principles, it is not clear to the OFT why it would be more difficult for hotels to monitor OTA compliance with the Principles under the commission-based model than under the merchant model. It is not the OFT’s intention to favour any particular business model. The OFT notes that the Commitments and Final Commitments provide that hotels contracting with OTAs will be entitled to require such information as may reasonably be required to enable them to assess and verify compliance with the core Principles, such as the commission cap. However, hotels cannot impose any method of accounting on any OTA which may restrict, limit or impede OTAs from operating on the basis of arrangements which are consistent with the Principles.

26. On the question of whether the Commitments and Final Commitments apply to the wholesale channel, 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 made no assessment of whether similar restrictions may exist in the wholesale channel.

**Competition between OTAs**

27. As explained in paragraph 5.9 of the Decision, one of the OFT’s competition concerns is that 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). As a result, a more efficient new entrant may be unable to use its lower costs to offer larger
discounts in order to attract customers away from incumbent OTAs. Currently, potential entrants may therefore need to create strong non-price related incentives for consumers to search for their sites and switch away from the established OTAs. The current restrictions on offering discounts to consumers may also mean that, even if small-scale entry does occur, it creates little incentive or ability for the incumbent OTAs to lower their commissions or reduce effective prices.

28. Therefore, the OFT considered carefully the concerns raised by a number of respondents regarding whether the Commitments (and, by implication, the Final Commitments), contrary to what they are designed to achieve, may make market entry for OTAs more difficult and may inadvertently cement the market positions of the large, incumbent OTAs.

29. In particular, the OFT considered the possibility that by restricting the eligibility of discounts to those customers that have made a prior booking with a specific OTA, the Commitments and Final Commitments might have the effect of raising switching costs (as customers would have to forgo the discount that might be available from his/her current OTA, in order to become eligible for discounts for all future purchases under a rival OTA’s membership scheme) and as a result, might impact on competition between OTAs.

30. The OFT recognises that this might present an obstacle to switching to the extent that consumers do not place sufficient weight on uncertain future benefits (that is, future discounts at the rival OTA), as hotel room purchases may be relatively infrequent and the level of potential discounts uncertain. This could render competition between rival OTAs’ membership schemes less effective than in other sectors where competing, non-exclusive loyalty schemes and ‘multi-homing’ are commonplace (for example, supermarket club cards, coffee shop loyalty cards).

31. The OFT recognises that, as there is currently likely to be limited, if any, intra-brand competition between OTAs on Room-Only Rates, there is little direct evidence on the likely proportion of customers that would search for discounts and switch between OTAs to take advantage of

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8 It should be noted, however, that this ‘cost’ of forgoing a discount at the OTA at which the consumer is already a member would only arise if that OTA actually offered a discount at the particular hotel on the particular date the consumer wished to book.

such discounts. However, the OFT notes that the majority of consumers surveyed in the consumer focus groups were open to joining multiple closed groups. Moreover, although they might try to remain loyal to one group initially, they did not want to find themselves tied to one OTA and wanted to be able to continue to shop around to take advantage of the best offers.

32. The OFT’s view is that the switching cost arising from the prior booking requirement would not undermine the ability for greater price competition to emerge in this market, for the following reasons:

- Most consumers surveyed in the consumer focus groups were not overly concerned with the idea of having to make one full price booking in order to receive discounts. They felt that if they had found a good enough deal on a hotel room, then it would not be an issue to pay full price for it – and that getting a discount at a later date would be an additional bonus.

- 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, if customers expect to make a number of future purchases, the switching cost under the Commitments and Final Commitments will be small in comparison with future benefits (that is, long-term eligibility for discounts).

- The switching cost would not necessarily result in an exclusivity effect as consumers can 'multi-home'. They can make an initial purchase with multiple OTAs in order to be eligible for immediate discounts with all of them (and they will not incur any switching cost at all if the OTA they are already a member of does not offer a discount at the hotel/night). As explained above, the majority of consumers surveyed in the consumer focus groups were open to joining multiple closed groups.

- The threat of switching by marginal customers who are price-sensitive and search for lower prices will provide incentives for

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9 However, one of the Parties provided evidence indicating that a significant proportion of consumers are price sensitive and that price is the most important criterion that consumers use when sorting search results for hotel rooms.
incumbent OTAs to continue to offer attractive loyalty schemes, even to those customers that do not want to switch or 'multi-home' between OTAs.

- Any loyalty effect might strengthen the incentives for Booking.com and Expedia to offer substantial discounts in competition with one another as well as in response to the threat of entry.

- Some switching costs might make the threat of entry a greater constraint on the incumbent OTAs (as it would be more difficult for the incumbent OTAs to win back customers from a new entrant’s closed group).

33. Therefore, the OFT expects that, once OTAs obtain the discounting freedom envisaged under the Commitments and Final Commitments, they will need to offer competitive discounts to 'multi-homing' customers to discourage them from purchasing through a rival OTA whose closed group the customer had already joined. All closed group members will benefit from this price competition, whether or not they have joined a rival OTA’s closed group.

34. The OFT considers that the fact that the Commitments and Final Commitments will provide new entrant OTAs with additional scope to compete for customers by allowing them to offer discounting schemes (and the potential to offer generous discounts on future purchases) should in itself provide consumers with an even greater 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, thereby increasing the competitive constraint on the incumbent OTAs.10

35. In addition, the Commitments and Final Commitments set out a cap on OTA discounting up to the level of the OTA’s commission revenue or margins. The OFT considers that this cap might serve to protect new

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10 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 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).
entrant OTAs from an aggressive response (for example, retaliatory deep-discounting) by incumbent OTAs that might otherwise deter entry.

36. The OFT recognises that the incumbent OTAs might benefit from economies of scale as they will have access to an extensive, existing customer base and might have pre-existing membership schemes. However, the Commitments and Final Commitments are intended to provide a level playing field between large, incumbent OTAs; smaller OTAs wishing to expand; and potential entrants, as follows:

- The prior booking requirement will be satisfied only through purchases made after entry into force of the Final Commitments. Therefore, previous purchases at OTAs (including the incumbent OTAs) will not be relevant in assessing whether a customer is eligible for discounts. In addition, new entrant OTAs will not be prevented from incentivising consumers to make the first purchase (making them eligible for future discounts) in innovative ways.

- OTAs will be able to fund discounts up to the aggregate commission earned for a hotel property for up to one year. This will allow OTAs with lower commission levels to have greater flexibility in the discounts they offer, for example by saving up their commission to enable them to engage in deeper discounting.

37. In light of the above, the OFT considers that the Commitments and Final Commitments will increase incentives for new entry and lower barriers to entry created by the current restrictions on discounting. The OFT also considers that, on balance, the benefits to competition from allowing closed group discounting under the Commitments and Final Commitments will be likely to outweigh the potential risk from creating any switching costs, relative to the current market position.

38. Although the OFT was told that smaller OTAs and independent hotels may be less able than larger OTAs and hotels to invest in the technology to allow them to operate closed group schemes, the OFT did not receive evidence demonstrating that the costs of doing so would be prohibitive, that is, that smaller OTAs and hotels would be unable to offer such discounting schemes or membership programmes.

39. In respect of consumer and data protection legislation concerns, the Commitments and Final Commitments operate without prejudice to
applicable consumer and data protection legislation and the OFT expects organisations to comply with their legal obligations at all times.

**Issue 3: Third party views on efficiency arguments put forward by the Parties**

40. Overall, the feedback from the First Consultation suggested that the Commitments (and, by implication, the Final Commitments) are sufficient to address the issue of restrictions on OTAs’ ability to offer discounts, which was the focus of the OFT’s investigation, that is, that the Commitments and Final Commitments would not need to allow OTAs to engage in full, unrestricted discounting. Several respondents supported the efficiency arguments put forward by the Parties to justify the retention of some restrictions on OTA discounting. In particular, the OFT was told that:

- From a hotel’s perspective, headline room rates can act as an **important indicator of quality** for consumers. If such rates are routinely undermined by OTAs offering significant discounts off the headline rate then this may damage the value of a hotel’s brand in the eyes of consumers and its position relative to competitors and may adversely impact inter-brand competition.\(^{12}\)

- All hotel respondents who made comments on the efficiency arguments put forward by the Parties highlighted the importance of **yield (revenue) management strategies** to the efficient operation of their businesses. This can involve the regular adjustment of room rates to respond to observed changes in consumer demand. This allows hotels to manage their inventory more efficiently and avoid being left with unoccupied rooms. By contrast, the OFT was told that because OTAs do not take on any inventory risk, they may not have the same incentives as the hotel to adjust prices to maximise occupancy levels.

- A number of hotels also supported the Parties’ contention that fully unrestricted discounting by OTAs would lead to a **cannibalisation** of

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\(^{11}\) The efficiency arguments put forward by the Parties are set out in **Annexe 2** to the Decision.

\(^{12}\) The OFT understands, for example, that whilst hotels themselves may engage in deep-discounting of rates from time to time in order to sell unoccupied rooms, this is normally done through an opaque channel operated by an OTA whereby the name of the hotel is only revealed once the consumer has made a booking.
hotels’ direct online sales channels and would therefore have the effect of raising hotels’ distribution costs and dissuade them from dealing with OTAs (or as many OTAs as they currently do).

41. During the First Consultation, the OFT also received additional representations and argument from the Parties on the need for hotels to independently set and control headline room rates, in particular to facilitate the efficient operation of yield management techniques and also to avoid free-riding. However, in the absence of an appropriate counter-factual, the OFT did not receive any evidence to substantiate the Parties’ contention that the specific shape of the residual restrictions proposed in the Commitments (and, by implication, the Final Commitments), for example, the closed group and prior booking requirements, are essential to deliver the efficiencies claimed by the Parties. For example, the OFT did not receive any evidence from hotels to substantiate the claim that yield management would be wholly unworkable without some form of discounting restrictions such as the specific restrictions set out in the Commitments and Final Commitments.

42. Moreover, a number of respondents challenged the strength of the efficiency arguments. For example, in relation to the free-riding argument, it was questioned whether, in practice, the remaining discounting restrictions are necessary to ensure that OTAs continue to invest in website functionality and customer services.

**OFT response**

43. 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.

44. However, 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 Commitments (and, by implication, the Final Commitments). Therefore, the OFT has insufficient evidence on which to make a definitive assessment of these efficiency arguments. In particular, the OFT has insufficient evidence on which to make a definitive assessment of whether removing all restrictions on
OTA discounting would have all of the potentially negative consequences claimed by the Parties.

45. Based on its assessment of the evidence available, the OFT has sought to strike the right balance in terms of the extent of the intervention needed in this sector to address its competition concerns, as set out in paragraphs 6.43ff of the Decision.

**Issue 4: Geographic scope of the Commitments**

46. Some respondents questioned why the Commitments applied only in respect of UK residents and identified a possible discrimination issue with such an approach. Another respondent questioned why the Commitments applied only to EU hotels, rather than hotels worldwide.

**OFT response**

47. The OFT notes these submissions. For the reasons set out at paragraph 6.34 of the Decision, the Final Commitments amend the geographic scope of the Commitments so that they would apply to bookings made by EEA residents for rooms in hotels located in the UK, rather than to bookings made by UK residents for rooms in hotels located in the EU.

**Issue 5: Duration of the Commitments**

48. It was raised by some respondents that the three-year term of the Commitments originally proposed might be insufficient because it would not generate sufficient legal certainty and the Parties would not be obliged to comply thereafter.

**OFT response**

49. The OFT notes these submissions. However, the OFT is aware that online travel agency services, including hotel online booking, is a growing, dynamic sector and some respondents to the First Consultation urged the OFT to consider the risk that the Commitments could cause distortions. Therefore, the OFT now considers that the three-year period originally proposed risks excessive regulatory intervention in a dynamic, innovative sector, and would not allow the OFT to react as quickly to any changes. In light of these considerations and for the reasons set out at paragraph 6.38 of the Decision, the Final Commitments amend the
duration to specify that the Final Commitments shall remain in force for a period of two years, rather than three years.

SECOND CONSULTATION

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.

The main points fell under five key headings and have been grouped accordingly for the purposes of this overview:

1. Final Commitments do not address rate parity and other MFN provisions directly
2. Impact on the structure of the market
3. Practical implementation issues
4. Geographic scope of the Final Commitments
5. Duration of the Final Commitments

Issue 1: Final Commitments do not address rate parity and other MFN provisions directly

50. One respondent expressed concern that the Final Commitments do not address MFN provisions directly. Similar to the First Consultation, one respondent urged the OFT to work with other NCAs and the European Commission in respect of rate parity/MFN provisions.

51. One respondent queried whether the Final Commitments would allow hotels to offer lower rates to customers that book with the hotel directly than the rates that are offered via OTAs. It was suggested by another respondent that most hotels would like to be able to do this, but they are prevented from doing so by rate parity/MFN provisions.

52. One respondent welcomed the clarification introduced in the Final Commitments in respect of hotel closed group discounting.

OFT response

53. As explained in paragraph 6 above, 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. The OFT remains of the view that the Final Commitments address its competition concerns.

**Issue 2: Impact on the structure of the market**

54. A number of parties raised concern, similar to concerns raised in the First Consultation, that the Final Commitments could have an adverse impact on the structure of the market by (i) strengthening OTAs’ market positions vis-a-vis hotels; and (ii) strengthening larger OTAs’ market positions vis-à-vis smaller OTAs and tour operators.

55. A concern was also raised that the Final Commitments do not adequately take the meta-search business model into account, nor recognise the importance of meta-search sites in stimulating competition within the travel sector.

**Final Commitments may strengthen OTAs’ market positions vis-à-vis hotels**

56. Some respondents considered that the fact that OTAs will be able to offer discounts that under-cut rates offered by hotels will increase sales generated via OTAs, thus increasing hotels’ dependence on OTAs and driving hotel revenues down.

57. It was suggested that the Final Commitments may result in OTAs seeking larger commissions from hotels than they currently receive, in order to under-cut hotels and other OTAs by offering attractive discounts up to their commission levels. Therefore, hotels would need to take into account OTAs’ higher commission levels when setting headline rates (as hotels – particularly independent hotels – are not in a position to refuse to deal with OTAs).

58. It was also mentioned that there has been a proliferation of deal sites in recent years, which demand low prices and high commissions. It was submitted that an over-reliance on such sites by hotels could lead to insolvency.
59. One respondent said that price parity between hotels and OTAs enables hotels to better manage their availability and selling price in relation to commission paid. The OFT was told that OTAs on high commissions have less availability, so customers get a better deal.

60. Two respondents suggested that the closed group and prior booking requirements might favour OTAs above hotels’ own booking websites. For example, it was submitted that OTAs are likely to have more members of closed groups than hotels, and customers would be more likely to book through OTAs several times. It was also submitted that smaller hotels may not be able to absorb the costs of running closed group schemes, whereas large chains of hotels might be able to do so.

61. Another respondent suggested that hotels are not currently prevented from selling discounted rates to closed groups for first time bookings, so the prior booking requirement under the Final Commitments limits discounting opportunities that already exist.

62. One respondent mentioned that the Final Commitments could dissuade hoteliers from using OTAs that operate under the merchant model (as opposed to the commission-based model).

63. One respondent urged the OFT to consider issuing guidelines on the commissions that OTAs can charge. Another respondent recommended that the Final Commitments prevent OTAs from bidding on a hotel’s name via pay-per-click.

Final Commitments may strengthen Booking.com and Expedia’s market positions

64. Two respondents argued that the hotel sector is highly fragmented. Therefore, it was submitted that standardised pricing of a particular hotel should not be problematic because there are many others from which to choose. It was suggested that ‘minimum mark-up’ policies help smaller players to compete. By giving the larger OTAs freedom to offer certain discounts, the Final Commitments might permit them to grow market share and squeeze the margins of smaller OTAs and tour operators, which risks putting such smaller players out of business.

65. The OFT was told by one respondent that the number of hotel room bookings made by the average consumer in any given year is not high.
Therefore, the respondent did not believe that consumers will ‘multi-home’ between closed groups. In turn, this would make the hotel online booking sector less attractive to new entrants, due to the delay that would result to their business growth.

**Impact on meta-search sites**

66. A meta-search site respondent submitted that the closed group and advertising restrictions envisaged by the Final Commitments would result in a lack of clarity for consumers with regard to price, and inaccurate search results for members of closed groups. It noted its belief that consumers are frequently driven by price, particularly in the case of making a hotel booking. Therefore, it considered that the Final Commitments have the potential to undermine the value of meta-search sites and search engines to consumers.

67. Furthermore, a meta-search site respondent requested that the Final Commitments be extended to relate to meta-search sites as well as OTAs and hotels, in those cases where a transactional booking does not take place on the meta-search website. It also requested that the Final Commitments allow discounts to be available after a prior purchase of any product offering, not only where there has been a previous hotel room booking.

**OFT response**

**Competition between OTAs and hotels’ direct online booking channels**

68. The OFT remains of the view that the Final Commitments address its competition concerns. In particular, whilst the OFT notes that the Final Commitments give OTAs certain freedom to discount that they may not previously have had, the Final Commitments also enable hotels to offer discounts to members of their own closed groups.

69. In addition, the Final Commitments provide hotels with a greater ability to offer discounts than OTAs because 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.
The prior booking requirement does not add an extra condition to closed group discounting. Rather, the Final Commitments set out a minimum standard such that, if MFN provisions currently do not permit such discounting by hotels, they must be adjusted to allow for it. If there are no MFN provisions, or MFN provisions that do not apply to closed group discounting, such clauses are 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.

As regards the suggestion that the Final Commitments could dissuade hoteliers from using OTAs that operate under the merchant model, it is not clear to the OFT why this would be the case. It is not the OFT’s intention to favour any particular business model.

The OFT considers that the Final Commitments are appropriate (and sufficient) to address its competition concerns and does not consider that the regulation of OTA commission levels or pay-per-click activity is necessary in this case.

**Competition between OTAs**

The OFT recognises that, on one view, restrictions on discounting and ‘minimum mark-up’ policies might help smaller players in the travel sector to compete (on parameters other than price), in the sense that it prevents them being under-cut by larger OTAs. However, one of the OFT’s competition concerns is that, 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 between OTAs (and between OTAs and the hotel’s direct online sales channel) for those hotel accommodation bookings. The OFT remains of the view that the Final Commitments address this competition concern.

**Impact on meta-search sites**

The Final Commitments allow hotels to prevent OTAs from publicising information regarding the specific level of discounts for a particular room to consumers who have not joined their closed groups, for example on price comparison websites and meta-search sites. There are similar
restrictions on hotels publicising such information about the specific level of discounts from the headline rate they offer for a particular room without MFN provisions being enforced. However, OTAs and hotels are free to publicise information on the general 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). The OFT remains of the view that the Final Commitments, including the provisions relating to advertising, are sufficient to address its competition concerns, which relate to intra-brand competition and barriers to entry for OTAs.

75. The focus of the OFT’s investigation has been restrictions on OTAs’ discounting off the Room-Only Rate set by a hotel. The OFT has not investigated meta-search sites in this case and has made no assessment of whether similar restrictions may exist in this area. The OFT therefore does not consider it appropriate to extend the Final Commitments to meta-search sites, but also notes that transactional bookings, in relation to which discounts could be offered, do not take place on meta-search sites.

**Issue 3: Practical implementation issues**

76. A number of queries were raised about the practical implementation of the Final Commitments, for example, which party would be responsible for monitoring the fulfilment of the prior booking requirement.

77. It was suggested by one respondent that it would be helpful to amend the definition of closed group, to make it clear that closed groups may include all members who are registered with an OTA, regardless of the reason for the member’s first registration with that OTA.

78. Some queries were raised as to the rates affected by the Final Commitments. For example, one respondent suggested that the discounts envisaged by the Final Commitments would undermine discounted headline rates that are already offered to OTAs by hotels, for example, Advance Purchase Rates. One respondent queried how the Final Commitments would apply to wholesale rates.
OFT response

79. The practical implementation of the discounting schemes envisaged by the Final Commitments is a matter for OTAs and hotels, in accordance with the Principles. Hotels contracting with OTAs will be entitled to require such information as may reasonably be required to enable them to assess and verify compliance with the core Principles, such as the commission cap and prior booking requirement. However, hotels cannot impose any method of accounting on any OTA which may restrict, limit or impede OTAs from operating on the basis of arrangements which are consistent with the Principles.

80. As regards the definition of closed group, the OFT notes that joining a closed group is intended to be a relatively low threshold, which may require only the entry of certain personal details online. An OTA or hotel would be free unilaterally to set criteria for membership of its own closed group going beyond the criteria set out in the Final Commitments. However, a hotel may not impose such requirements on an OTA in order to permit discounting in accordance with the Principles. Similarly, OTAs may not impose stricter criteria than set out in the Principles for hotels to benefit from the non-enforcement of MFNs. Therefore, unless the OTA or hotel offering the 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). In addition, under the criteria set out in the Principles, the reason for joining the closed group is irrelevant.

81. As regards the rates affected by the Final Commitments, the OFT notes that the Final Commitments relate to any rates which are published retail rates for a room at a hotel as determined by the hotel. Corporate travel programmes, opaque hotel room bookings and package offers (for example, rates that combine accommodation with travel) are excluded.

82. Moreover, 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 made no assessment of whether similar restrictions may exist in the wholesale channel.
Issue 4: Geographic scope of the Final Commitments

83. One respondent queried why the geographic scope of the Final Commitments had been amended to relate only to UK hotels, rather than EU hotels.

84. One respondent queried why all EEA residents will be able to benefit from the new discounting arrangements provided for by the Final Commitments because this will increase the impact of the Final Commitments.

OFT response

85. The OFT remains of the view that, in the light of the evolving enforcement activities in several countries in the EEA in which the Final Commitments will operate, and for the reasons set out at paragraph 6.34 of the Decision, the geographic scope of the Final Commitments is appropriate. That is, the OFT considers that it is appropriate for the Final Commitments to relate to bookings made by EEA residents for rooms in hotels located in the UK.

Issue 5: Duration of the Final Commitments

86. One respondent suggested that the two-year duration of the Final Commitments is insufficient and would not provide legal certainty. In its view, no business would be likely to invest in the closed group discounting opportunities provided for by the Final Commitments within this timescale. Conversely, another respondent said that it thought the OFT’s reasons for the two-year duration were sound.

OFT response

87. For the reasons set out at paragraph 6.38 of the Decision, the OFT remains of the view that the duration of the Final Commitments is appropriate. That is, the OFT considers that it is appropriate for the Final Commitments to remain in force for a period of two years.