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

20 December 2013

OFT1514
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1 EXECUTIVE SUMMARY

1.1. Following the launch of a formal investigation in September 2010, on 31 July 2012, the Office of Fair Trading ('OFT') issued a Statement of Objections alleging that Booking.com 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 Competition Act 1998 (the ‘Act’) and Article 101 of the Treaty on the Functioning of the European Union (‘TFEU’) in relation to the online offering of ‘Room-Only’1 hotel accommodation bookings by online travel agents (‘OTAs’).

1.2. 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.

1.3. 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, 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 (that is, intra-brand competition).

- **Current restrictions on discounting may increase barriers to entry:** the current restrictions on discounting may create barriers to entry to the extent that they prevent new OTAs from entering the market, and/or achieving sufficient scale (with discounted rates for Room-Only hotel accommodation).

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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 2.9 in Annexe 2). ‘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 2.13 in Annexe 2).
• To the extent that similar discounting restrictions are replicated currently in the market, then any prevention, restriction or distortion of competition is further exacerbated: although the OFT has not investigated the extent to which similar discounting restrictions are replicated in the market, the OFT understands that the alleged practices are potentially widespread in vertical distribution arrangements in the industry. In principle, a market in which discounting restrictions are prevalent is likely to be characterised by significant limits to price competition and barriers to entry.

1.4. In order to address the competition concerns of the OFT and assist with bringing the investigation to a close, the Parties offered commitments (the ‘Commitments’) to the OFT that they would modify their behaviour in accordance with the following key Principles:

• Hotel room discounts offered by OTAs: 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 members of a ‘closed group’, for instance in the context of membership or loyalty schemes.\(^3\) 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.

• Hotel room discounts offered by hotels: Hotels would also be free to offer reductions off their own headline rates to closed group members on the same basis as OTAs.

\(^2\) Under the Commitments, ‘headline room rate’ means the room-only headline hotel room rates set by the relevant hotel partner for its rooms. It refers to the published retail rate for a room at a hotel on a particular night at a given point in time.

\(^3\) 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 would not be disincentivised from joining several groups due to onerous joining mechanisms. Depending on the OTA offering the scheme, no purchase may be required to join the closed group itself (as opposed to being eligible for discounts).
• **Advertising of hotel room discounts**: 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 or extent of discounts for any IHG hotel room or any other information which would allow a discounted retail rate to be calculated (including, for the avoidance of doubt, the discounted rate itself) to non-members. Similarly, other (non-IHG) hotels may prevent OTAs from publicising such information for their hotel rooms to non-members.

1.5. Other restrictions, such as retail rate most-favoured nation provisions (‘MFN provisions’), have not been considered by the OFT and are not the subject of the Commitments, save to the extent that such restrictions could prevent either hotels or OTAs from offering such discounts as are allowed for by the Commitments. This is to ensure the efficacy of the Commitments and avoid the potential for any distortive effects. Thus, under the Commitments the OTA Parties may not prevent hotels from operating on the basis of arrangements which are consistent with the Principles, that is, from offering discounts in an equivalent manner to OTAs.

Under such MFN provisions, a hotel agrees to provide an OTA with a hotel reservation for that OTA to offer to end-users at a booking rate which is no less favourable than the lowest booking rate displayed by other online distribution outlets. This is also known as ‘Rate Parity’. This guarantees the OTA the lowest booking rate at least in relation to its distribution channel (that is, it cannot be undercut).

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

The adjustment of MFN or equivalent provisions required by the Revised Commitments is a minimum standard only. The Revised Commitments would not affect any existing contractual arrangements under which a hotel can offer discounts, or allow its other OTA partners to do so. For the avoidance of doubt, this would mean, amongst other things, that if discounting by that hotel or discounting by other OTAs of that hotel’s accommodation is currently outside the scope of any MFN provisions, this would be unaffected by the Revised Commitments. The Revised Commitments also do not affect the ability of hotels and OTAs to agree additional discounting rights and adjustment of MFN or equivalent provisions that go beyond the Principles set out in the Revised Commitments.
1.6. The Parties proposed that the Commitments would apply to bookings made by UK residents for rooms in hotels located in the EU, and would remain in force for a period of three years.

1.7. The OFT, pursuant to section 31A of the Act, conducted a consultation exercise (the ‘Consultation’) to seek views on the Commitments offered by the Parties. This took the form of publication of a Notice to accept binding Commitments issued on 9 August 2013 (OFT1500).8

1.8. In the light of the representations submitted to the OFT pursuant to the Consultation and further developments (including the OFT’s further consideration of the sector), the OFT requested from the Parties, and has received, amendments to the Commitments (the ‘Amendments’ and, combined with the Commitments, the ‘Revised Commitments’).9 Specifically, the Parties have offered the following Amendments:

- **Hotel closed group discounting**: Amendments have been made to clarify that the Commitments envisage hotels being able to offer discounts in an equivalent manner to OTAs.10 These Amendments have been offered because 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.

- **Geographic scope**: An amendment to the geographic scope of the Commitments has been made to the effect that they would apply

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7 Under the Commitments, ‘UK resident’ meant 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.

8 [www.of.t.gov.uk/shared_of.t/ca-and-cartels/of.t1500.pdf](http://www.of.t.gov.uk/shared_of.t/ca-and-cartels/of.t1500.pdf)

9 The Parties have offered the Revised Commitments in the understanding that the OFT will close its investigation in this case without any finding of infringement and the offering of the Revised Commitments by the Parties does not constitute an admission of wrongdoing by the Parties.

10 However, unlike OTAs, hotels would not fund such discounts using commission revenue or equivalent margin. For further details, see paragraph 3.17.
to bookings made by European Economic Area (‘EEA’) residents\textsuperscript{11} for rooms in hotels located in the UK, rather than to bookings made by UK residents for rooms in hotels located in the EU.

- **Duration:** An amendment has been made to specify that the Revised Commitments would remain in force for a period of two years, rather than three years.

1.9. The draft text of the Revised Commitments is set out at Annexe 1 to this document. The OFT is currently of the view that the Revised Commitments address the OFT’s competition concerns in this case.

1.10. The OFT invites representations from interested third parties as to the Revised Commitments, by 17 January 2014.

1.11. A decision by the OFT to accept the Revised Commitments would not amount to or imply any finding as to the legality or otherwise of the conduct by the Parties either prior to acceptance of the Revised Commitments or once the Revised Commitments are in place.

\textsuperscript{11} Under the Revised Commitments, EEA residents means a consumer who has an EEA address, an EEA telephone number or an EEA registered credit card. For the avoidance of doubt, the nationality or legal residency or tax status of the individual is irrelevant.
2 INTRODUCTION

2.1. Section 31A of the Act provides that, for the purposes of addressing the competition concerns it has identified, the OFT may accept, from such person or persons concerned as it considers appropriate, commitments to take such action (or refrain from such action) as it considers appropriate.

2.2. Having considered the Parties’ proposed Revised Commitments \(\text{(Annexe 1)}\), the OFT is currently of the view that the Revised Commitments address its competition concerns, for the reasons set out in this notice (‘Consultation Notice on the Revised Commitments’). On this basis, the OFT is currently of the view that it is appropriate for it to exercise its discretion to close its investigation by way of a formal decision accepting the Revised Commitments.

2.3. Therefore, the OFT hereby gives notice to interested third parties pursuant to paragraph 3 of Schedule 6A of the Act that it proposes to accept the Revised Commitments offered by the Parties in case CE/9320/10 in accordance with section 31A(2) of the Act. The OFT invites representations from interested third parties on this proposed course of action.

2.4. Formal acceptance of the Revised Commitments by the OFT would result in the termination of its investigation, with no decision made on whether or not the Act or Article 101 TFEU has been infringed by any of the Parties. For the avoidance of doubt, a decision by the OFT accepting binding commitments would not include any statement as to the legality or otherwise of the conduct by the Parties under investigation either prior to acceptance of the Revised Commitments or once the Revised Commitments are in place.

2.5. As far as general deterrence is concerned, the OFT provisionally considers that its proposed decision to accept the Revised Commitments would promote competition law compliance in vertical distribution arrangements in the hotel online booking sector. To the extent that this is not the case, the OFT could decide to take further enforcement action in relation to other vertical distribution arrangements and/or related markets which raise competition concerns.
2.6. **Annexes 2 and 3** to this document contain relevant extracts from *OFT1500*\(^{12}\) and are provided for ease of reference. **Annexe 2** describes the OFT’s investigation; the market context in which the investigation has been carried out; and which parties are involved. **Annexe 3** sets out the OFT’s competition concerns and summarises the Commitments as set out in the Consultation.

2.7. **Annexe 4** to this document includes an overview of the responses made to the Consultation and a description of how the OFT has taken them into account.

2.8. The remainder of this document sets out a brief summary of the OFT’s competition concerns, the Commitments and responses to the Consultation. It then sets out the Amendments to the Commitments and why the OFT is currently minded to accept the Revised Commitments.

2.9. The OFT invites interested third parties to make representations, which it will take into account before making its final decision on whether to accept the Revised Commitments. Details of how to respond to this consultation are provided at the end of this document. The closing date for comment is 17 January 2014.

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\(^{12}\) OFT’s Notice of intention to accept binding commitments to remove certain discounting restrictions for Online Travel Agents and Invitation to comment, issued on 9 August 2013.
3 THE COMMITMENTS AND REVISED COMMITMENTS

OFT’s competition concerns

3.1. 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.

3.2. 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, 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 (that is, intra-brand competition).

- **Current restrictions on discounting may increase barriers to entry:** the current restrictions on discounting may create barriers to entry to the extent that they prevent new OTAs from entering the market, and/or achieving sufficient scale (with discounted rates for Room-Only hotel accommodation).

- **To the extent that similar discounting restrictions are replicated currently in the market, then any prevention, restriction or distortion of competition is further exacerbated:** although the OFT has not investigated the extent to which similar discounting restrictions are replicated in the market, the OFT understands that the alleged practices are potentially widespread in vertical distribution arrangements in the industry. In principle, a market in which discounting restrictions are prevalent is likely to be characterised by significant limits to price competition and barriers to entry.

Commitments

3.3. In order to address the competition concerns of the OFT and assist with bringing the investigation to a close, the Parties offered Commitments to the OFT that they would modify their behaviour in accordance with the following key Principles:
- **Hotel room discounts offered by OTAs:** OTAs would be free to offer reductions off headline room rates,\(^\text{13}\) for example by way of discounts, vouchers, rewards and/or cash back, funded by their commission revenue or margin to members of a ‘closed group’, for instance in the context of membership or loyalty schemes.\(^\text{14}\) 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.

- **Hotel room discounts offered by hotels:** Hotels would also be free to offer reductions off their own headline rates to closed group members on the same basis as OTAs.

- **Advertising of hotel room discounts:** 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 or extent of discounts for any IHG hotel room or any other information which would allow a discounted retail rate to be calculated (including, for the avoidance of doubt, the discounted rate itself) to non-members. Similarly, other (non-IHG) hotels may prevent OTAs from publicising such information for their hotel rooms to non-members.

3.4. Other restrictions, such as MFN provisions, have not been considered by the OFT and are not the subject of the Commitments, save to the extent

\(^{13}\) Under the Commitments, ‘headline room rate’ means the room-only headline hotel room rates set by the relevant hotel partner for its rooms. It refers to the published retail rate for a room at a hotel on a particular night at a given point in time.

\(^{14}\) 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 would not be disincentivised from joining several groups due to onerous joining mechanisms. Depending on the OTA offering the scheme, no purchase may be required to join the closed group itself (as opposed to being eligible for discounts).
that such restrictions could prevent\textsuperscript{15} either hotels or OTAs from offering such discounts as are allowed for by the Commitments.\textsuperscript{16} This is to ensure the efficacy of the Commitments and avoid the potential for any distortive effects. Thus, under the Commitments the OTA Parties may not prevent hotels from operating on the basis of arrangements which are consistent with the Principles, that is, from offering discounts in an equivalent manner to OTAs.

3.5. The OFT remains of the view, following the Consultation, that the Principles and related provisions as set out above are appropriate to address its competition concerns.

Responses to the Consultation

3.6. The OFT conducted the Consultation pursuant to section 31A of the Act to seek views on the Commitments offered by the Parties. This took the form of publication of a Notice to accept binding commitments and invitation to comment issued on 9 August 2013 (\textit{OFT1500}).

3.7. The Consultation ran for five weeks and closed on 13 September 2013. The OFT received over thirty-five responses from a range of respondents including independent hotels, hotel chains, OTAs, industry associations and other interested third parties.

3.8. The OFT contacted a wide range of participants in the hotel online booking sector to seek their views. Such potential respondents included hotel chains, OTAs, and industry associations. The OFT also contacted organisations in other markets with experience in areas relevant to the

\textsuperscript{15} This could be indirect, for example if a hotel is required to offer an OTA the same discounted booking rate as the hotel or another OTA is offering to closed group customers.

\textsuperscript{16} The adjustment of MFN or equivalent provisions required by the Revised Commitments is a minimum standard only. The Revised Commitments would not affect any existing contractual arrangements under which a hotel can offer discounts, or allow its other OTA partners to do so. For the avoidance of doubt, this would mean, amongst other things, that if discounting by that hotel or discounting by other OTAs of that hotel’s accommodation is currently outside the scope of any MFN provisions, this would be unaffected by the Revised Commitments. The Revised Commitments also do not affect the ability of hotels and OTAs to agree additional discounting rights and adjustment of MFN or equivalent provisions that go beyond the Principles set out in the Revised Commitments.
Commitments, such as the use of yield management techniques. The OFT held follow-up calls and meetings with a number of respondents.

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

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

- **Rate parity/MFN provisions:** The Commitments do not address rate parity and other types of MFN provisions directly. Some respondents urged the OFT to investigate the effect of such provisions. In addition, the OFT received a number of queries with regard to the extent to which the Commitments have an impact on the ability of hotels to offer discounts to closed groups, if there are provisions such as MFNs which may make it difficult for hotels to do so.\(^{17}\)

- **Potential adverse impact on market structure:** Some respondents submitted that the Commitments may have an adverse impact on the structure of the market by strengthening OTAs’ market position vis-à-vis hotels, strengthening Booking.com and Expedia’s market positions, and/or impacting on consumers’ ability to shop around.

- **Efficiency arguments:** Some respondents supported the efficiency arguments put forward by the Parties\(^ {18}\) while others challenged the strength of the efficiency arguments. The OFT did not receive evidence that either strongly confirmed or refuted the efficiency arguments.

3.11. **Annexe 4** sets out under these headings the key issues raised in the responses received to the Consultation, alongside limited submissions.

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\(^{17}\) Indirectly, by requiring the hotel to offer an OTA that benefits from an MFN provision the same lower booking rate as the hotel is offering to its customers.

\(^{18}\) The efficiency arguments put forward by the Parties are set out in section 4 of Annexe 3, which replicates paragraphs 5.23-5.24 of OFT1500 (the Notice to accept binding commitments and invitation to comment issued on 9 August 2003).
made in respect of the geographic scope and duration of the Commitments, together with the OFT’s response.

3.12. In summary, the OFT notes that the submissions it received during the Consultation provided contradictory views on a variety of issues, and that little evidence was provided in support of the submissions. The feedback from the Consultation suggested that the Revised 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 Revised Commitments do not need to allow OTAs to engage in full, unrestricted discounting. 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 3.31ff below.

The Revised Commitments

3.13. In the light of representations submitted to the OFT pursuant to the Consultation and further developments (including the OFT’s further consideration of the sector), the OFT requested from the Parties, and has received, the Revised Commitments.¹⁹ Specifically, the Amendments are as follows:

• **Hotel closed group discounting**: Amendments to clarify that the Commitments envisage hotels being able to offer discounts in an equivalent manner to OTAs.²⁰ These Amendments have been offered because 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.

• **Geographic scope**: An amendment to the geographic scope of the Commitments to the effect that they would apply to bookings

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¹⁹ The Parties have offered the Revised Commitments in the understanding that the OFT will close its investigation in this case without any finding of infringement and the offering of the Revised Commitments by the Parties does not constitute an admission of wrongdoing by the Parties.

²⁰ However, unlike OTAs, hotels would not fund such discounts using commission revenue or equivalent margin. For further details, see paragraph 3.17.
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.

- **Duration:** An amendment to specify that the Revised Commitments would remain in force for a period of two years, rather than three years.

### Hotel closed group discounting

3.14. Under the Commitments (and the Revised Commitments) the Parties may not prevent hotels from operating on the basis of arrangements which are consistent with the Principles, that is, from offering discounts in an equivalent manner to OTAs.

3.15. However, the Commitments did not specify what type of hotel discounting would be consistent with the Principles. The OFT received a number of queries about the extent to which the Commitments have an impact on hotels’ ability to offer discounts. In light of the comments received in the Consultation, the Parties have offered drafting amendments to the Commitments to clarify the position.

3.16. Specifically, the Parties have offered drafting amendments to clarify 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. For example, the hotel would not be able to publish to such consumers the amount/percentage discount offered which would allow a discounted rate to be calculated. This mirrors the restrictions on OTAs’ advertising of hotel room discounts set out in the Commitments.

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

3.18. The provision above relates only to the adjustment of MFN or equivalent provisions to the extent necessary, setting out a minimum standard
required of the OTA parties. In particular, it would be without prejudice to the existing ability of any particular hotel to discount its hotel rooms without triggering the enforcement of an MFN or equivalent provisions by an OTA.\textsuperscript{21}

**Geographic scope**

3.19. The OFT is aware of a significant amount of enforcement activity by other national competition authorities (‘NCAs’) across the European Competition Network (‘ECN’) and by competition authorities of the European Free Trade Association (‘EFTA’) Member States in the hotel online booking sector. It is important that the enforcement efforts of these competition authorities are coordinated where appropriate.

3.20. In the light of the evolving enforcement activities in several countries in the EEA in which the Revised Commitments would operate, the Parties have offered amendments to the geographic scope of the Commitments so that:

a) **all EEA residents\textsuperscript{22}** could benefit from the new discounting opportunities provided for by the Revised Commitments, rather than UK residents only. This change is intended to ensure that OTAs and UK hotels enjoy the benefits of the internal market by having the ability to offer discounts both in the UK and elsewhere within the EEA, and

b) the Revised Commitments would apply to bookings made in respect of **hotels located in the UK**, rather than hotels located in the EU. As the Parties have offered to extend the benefits of the Commitments to all EEA residents (rather than UK residents only), the OFT provisionally considers that it is appropriate to limit the geographic scope of the hotels to which the Revised Commitments would apply. The OFT currently considers that other NCAs and competition

\textsuperscript{21} The Revised Commitments also do not affect the ability of hotels and OTAs to agree additional discounting rights and adjustment of MFN or equivalent provisions that go beyond the Principles set out in the Revised Commitments.

\textsuperscript{22} That is, a consumer who has an EEA address, an EEA telephone number or an EEA registered credit or debit card; for the avoidance of doubt, the nationality or legal residency or tax status of the individual is irrelevant.
authorities of the EFTA Member States may be best-placed to secure benefits for UK residents booking hotels in their respective jurisdictions, when investigating the contracts between those hotels and OTAs.

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

Duration

3.22. The OFT is aware that online travel agency services, including hotel online booking, is a growing sector and is characterised by frequent introduction of new technology or platforms, such as apps (for example, specifically offering discounted accommodation for last-minute bookings),

23 new business models such as the consumer-to-consumer website AirBnB.com,

24 developments such as TripAdvisor offering independent hotels and B&Bs the ability to participate in hotel price comparison on its website,

25 and the expansion of search websites into the travel sector (such as Google and Microsoft entering the meta-search site space).

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3.23. Some respondents to the Consultation urged the OFT to consider the risk that the Commitments could cause distortions. For example, some respondents highlighted a risk that the Commitments could shift consumer purchasing behaviour away from hotels’ own booking websites to OTAs, raising hotels’ distribution costs.

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3.24. In light of these considerations, the Parties have offered to reduce the duration of the Commitments from three years to two years. The OFT


25 www.tripadvisor.co.uk/PressCenter-i6401-c1-Press_Releases.html.

26 Priceline/Kayak, OFT decision dated 9 May 2013.

27 For further detail on the responses to the Consultation, see Annexe 4.
has provisionally concluded that a period of two years is appropriate because:

- Although the OFT expects to see invigorated rate competition shortly after the effective date of the Revised Commitments, the OFT considers that a duration of less than two years would not address the OFT’s current competition concerns because there would be insufficient time for the full benefits of increased retail rate competition to be realised. On the other hand, the OFT currently considers that a period of longer than two years risks excessive regulatory intervention in a dynamic, innovative sector, and would not allow the OFT to react as quickly to any changes.

- After two years, the Competition and Markets Authority (‘CMA’) would be able to reassess the position using information provided by the Parties in annual reports following the adoption of the Revised Commitments, to decide if further action in this sector is appropriate.28

- If necessary, during the course of the two-year period, under section 31B(4) of the Act, the OFT (or in due course, the CMA) could, where it had reasonable grounds for believing that there has been a material change of circumstances since the Revised Commitments were accepted, continue the investigation, make a decision or give a direction.

**Other, minor changes**

3.25. In addition to the substantive changes described above (including consequential amendments to the text of the Commitments), a number of minor clarificatory/drafting amendments have been made to the Commitments which were the subject of the Consultation. These do not affect the substance of the Principles set out in the Commitments.

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28 See paragraph 3.47 with regard to reporting requirements.
Rate parity/retail rate MFN provisions

3.26. 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.

3.27. However, to ensure that the Revised 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 Revised 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.29

3.28. As explained in paragraph 3.16 above, in the Revised Commitments the Parties have also clarified that OTAs shall not enter into or enforce any MFN or equivalent provisions in respect of reductions off headline room rates offered by hotels to their closed group members. This is subject to the condition that the hotel does not publicise information regarding the specific level of discounts for a particular hotel room to consumers who are not members of that closed group.

3.29. Having regard to the present specific legal and economic context, for the duration of the Revised Commitments (if they are ultimately accepted), as regards the Parties to this investigation, the OFT would be unlikely to investigate under Chapter I of the Act or Article 101 TFEU

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29 However, the Revised 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.
any MFN provisions that comply with the Principles. The same would likely apply to similar MFN provisions, that is, provisions that comply with the Principles, in the Parties’ arrangements with other OTAs and hotels, as well as in arrangements between third party hotels and OTAs.

3.30. However, if the Revised Commitments were ultimately accepted and the OFT became aware that provisions, such as MFN provisions, appeared in practice to undermine the Principles, it would be open to the OFT to consider taking further action. In particular, the OFT would consider its options carefully if it became aware that MFN provisions were being enforced against hotels in a way that would make it practically impossible or very difficult for hotels to allow their OTA partners to offer closed group discounts or to offer discounts themselves to their own closed groups. It would also be open to the OFT/CMA to investigate MFN provisions in other sectors should the OFT/CMA have reasonable grounds for suspecting that such clauses, in their specific context, infringe UK or EU competition law.

The OFT’s provisional assessment of the Revised Commitments

3.31. As explained in paragraph 3.2 above, the OFT’s competition concerns set out in the Statement of Objections relate to current restrictions on OTA discounting which limit competition on room rates and may increase barriers to entry.

3.32. In terms of the impact on intra-brand competition, the Revised Commitments offered by the Parties allow for greater discounting freedom, albeit with some residual restrictions. Therefore, the Revised Commitments allow greater price competition, between (i) OTAs and hotels’ direct online booking channels; and (ii) OTAs, where, in the OFT’s provisional view, it is currently likely to be significantly restricted.

3.33. Consumers would have the option of joining numerous closed groups without needing to make a purchase first (as the prior booking requirement relates to eligibility for discounts, not the ability to join a

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

31 See paragraph 3.2, first bullet, above.
closed group). As set out in paragraph 33 of Annexe 4, the OFT currently expects that, once OTAs obtain the discounting freedom envisaged by the Revised Commitments, they would need to offer competitive discounts to 'multi-homing'\textsuperscript{32} customers to discourage them from purchasing through a rival OTA whose closed group the customer has already joined. All closed group members would benefit from this price competition, whether or not they have joined a rival OTA’s closed group. The OFT therefore currently expects that under the Revised Commitments consumers would gain significant benefits from the ability of OTAs to offer discounts to closed group members, and the Revised Commitments therefore address its competition concern in relation to intra-brand competition.

3.34. In relation to the impact on barriers to entry,\textsuperscript{33} under the Revised Commitments, OTAs would be able to offer discounts to end-users who have joined a closed group and made a single booking, where they are currently prevented from doing so. As set out in paragraphs 27-37 of Annexe 4, the OFT therefore provisionally considers that the Revised Commitments would increase incentives for new entry and lower barriers to entry created by the current restrictions on discounting.

3.35. The OFT’s concern is that, currently, a new entrant may not be able to offer discounts to attract customers away from incumbents. In particular, a more efficient new entrant may not be able to use its lower costs to offer larger discounts in order to attract customers away from incumbents.

3.36. Under the Revised Commitments, new entrants would still be prevented from offering a discount on an initial purchase. However, they would be able to compete by offering discounts on future purchases. This may substantially reduce barriers to entry relative to the current market conditions as it would provide entrants with additional scope to compete. Such competition could take place through the ability to offer discounting schemes and to advertise the existence of these schemes to non-members. This should provide consumers with a valuable incentive to search across OTAs for the best available deals and to become

\textsuperscript{32} That is, customers who join more than one closed group.

\textsuperscript{33} See paragraph 3.2, second bullet, above.
members of more than one closed group to find out details of specific discounts on offer to eligible members.\textsuperscript{34}

3.37. The OFT has received submissions, as set out in paragraphs 16-17 of Annexe 4, suggesting that closed group discounting and/or the prior booking requirement might result in a switching cost for customers or raise barriers to entry. However, the OFT’s view is that the switching cost arising from the closed group and prior booking requirements would not undermine the ability for greater price competition to emerge in this market, for the reasons set out in paragraph 32 of Annexe 4.

3.38. In addition, the Revised Commitments envisage a cap on OTA discounting up to the level of the OTA’s commission revenue or margins. The OFT currently considers that such a cap might serve to protect new entrant OTAs from an aggressive response (for example, retaliatory deep-discounting) by incumbent OTAs that might otherwise deter entry.

3.39. The OFT provisionally considers that the Revised Commitments should allow, and set appropriate incentives for, greater price competition between OTAs and between OTAs and hotels. The OFT would expect to see OTAs and hotels compete to attract customers through the attractiveness of their closed group offering, and that consumers will ultimately benefit from such competition, alongside competition on price, quality, range and service and other factors.

3.40. Therefore, while the Revised Commitments would not allow for unrestricted discounting, the OFT would expect them to result in greater price competition, where there may currently be none or it may be significantly restricted, as well as lowering barriers to entry by allowing OTAs to offer certain discounts to attract customers. The OFT therefore expects the Revised Commitments to introduce further competition between OTAs, and between OTAs and hotels’ direct online sales channels, while also encouraging new entry of OTAs.

3.41. The OFT has considered the issue of how much discounting freedom would be appropriate in the context of the dynamic nature of the market in the UK. As described in paragraph 3.22 above, the OFT is aware that

\textsuperscript{34} As noted above, consumers would have the option of joining numerous closed groups without needing to make a purchase first.
online travel agency services, including hotel online booking, is a growing sector and is characterised by frequent introduction of new technology or platforms and development of new business models. The OFT recognises that there is a complex interaction between various players and distribution channels. In this context, freedom by OTAs to discount hotel accommodation without any restrictions may potentially have harmful effects by reducing the incentives of hotels to deal with OTAs (or to limit the number of OTAs that they deal with), thereby potentially damaging inter-brand competition, and by chilling innovation in the development of new business models.

3.42. Risks could also be created by requiring a greater degree of price freedom than provided for by the Revised Commitments because such freedom might jeopardise the possible realisation of efficiencies put forward by the Parties. These are that (1) the benefits to a hotel flowing from yield management (and consequent consumer benefits) might be made significantly more difficult or impossible to achieve were all restrictions on discounting to be removed; and/or that (2) a greater degree of pricing freedom could also result in a shift in the balance of power between hotels and their OTA partners, leading to the cannibalisation of their direct sales channel and potentially raising their distribution costs. The OFT also notes the submissions by the OTA parties that requiring a greater degree of pricing freedom may mean that OTAs’ incentives to invest, for example in pre-sales services and other promotional activities (including the functionality of their websites, range of travel offers, customer support, or content quality), may be undermined if other OTAs (or hotels) are able to undercut their prices by publishing a lower headline rate, given low search costs of customers for hotel online booking services.\footnote{It is not necessary for the OFT when exercising its discretion under section 31A (2) of the Act to carry out an assessment under Article 101(3)/section 9 of the Act to establish whether the residual restrictions remaining under the Revised Commitments meet all of the relevant criteria under that Article and section. The OFT’s acceptance of the Revised Commitments should not be seen as amounting to or implying any finding as to the legality or otherwise of the conduct of the Parties either prior to acceptance of the Revised Commitments or once the Revised Commitments are in place.}

3.43. As set out above and in paragraph 44 of Annexe 4, 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 Revised Commitments. However, the responses to the Consultation and further representations from the Parties suggest that, in the specific factual context, the arguments put forward for the existence of efficiencies are likely to have some merit in this sector.

3.44. The OFT has also considered the potential risk of harmful effects in the light of the scope of its investigation, which was limited to two large online travel agents and one large hotel chain, whereas the Revised Commitments are intended to introduce further competition between parties in the wider market. In particular, the OFT has not been able to consider in detail the ways in which the relationships of small hotel groups and independent hotels with OTAs may differ from those of large hotel chains, or for whom the potential efficiencies from having control of the headline rate may be more important. This may mean that the potential impact on hotel incentives to use different distribution channels, and the possible resulting impact on inter-brand competition, may vary.

3.45. The OFT recognises that the exact consequences of the introduction of limited price competition through the Revised Commitments if they are accepted cannot be anticipated with complete certainty. For example, as referred to above and set out in paragraphs 10-18 of Annexe 4, the OFT has received submissions suggesting that the Commitments might increase switching costs, resulting in an incumbency advantage and that, if they result in a cannibalisation of the direct channel, this may raise hotels’ distribution costs. However, for the reasons set out in paragraphs 27-37 of Annexe 4, on balance, the OFT’s current assessment is that the benefits to competition from allowing closed group discounting under the Revised Commitments would be likely to outweigh the potential risk from increasing any switching costs, relative to the current market position. Indeed, while it might be easy for consumers to switch between OTAs currently, there are limited benefits from doing so in respect of Room-Only hotel accommodation due to the current restrictions on discounting. By contrast, the OFT currently considers that the switching cost under the Revised Commitments would be small in comparison with future benefits (that is, long-term eligibility for discounts).

3.46. Further, the OFT currently considers that the clarifications to the Commitments following the Consultation, and the residual restrictions
on OTA discounting which would remain under the Revised Commitments, would mitigate the risk of such unintended consequences. In particular, the reduction of the duration of the Commitments from three to two years means that the OFT/CMA would be able to consider the impact of the Revised Commitments in this evolving sector, and any unintended consequences, within a shorter time horizon.

3.47. In addition, to monitor the effectiveness of the Revised Commitments, the Parties would be required to report to the OFT/CMA each year on the implementation of the Revised Commitments. The Revised Commitments also contain provisions relating to compliance, according to which the Parties and other hotels and OTAs could write to the OFT/CMA regarding alleged non-compliance by Expedia, Booking.com and/or IHG with the Revised Commitments. The Parties could also write to the OFT/CMA regarding contractual arrangements of other hotels and/or OTAs which may be incompatible with the Principles.

3.48. As noted above, under section 31B(4) of the Act, the OFT (or in due course, the CMA) could continue the investigation, make a decision or give a direction where it had reasonable grounds for believing that there has been a material change of circumstances since the Revised Commitments were accepted.36

Conclusion

3.49. Accordingly, in light of the considerations set out above, based on an assessment of the evidence available to it, the OFT currently considers that the Revised Commitments address its competition concerns by allowing for a greater degree of price competition than currently exists, and by lowering barriers to entry by enabling new entrants to compete to attract customers to join their closed groups through the ability to offer discounts. The OFT is provisionally satisfied that the Principles are sufficient and appropriate to address its competition concerns in the context of the affected markets.

36 The OFT/CMA could also take such action where it had reasonable grounds for suspecting that a person has failed to adhere to one or more of the terms of the Revised Commitments; or it had reasonable grounds for suspecting that information which led it to accept the Revised Commitments was incomplete, false or misleading in a material particular.
3.50. For the avoidance of doubt, the Revised Commitments would not in any way restrict OTAs’ ability to agree with IHG and/or any other hotel any other discounting rights over and above the right to offer Reductions within the meaning of the Revised Commitments, subject to existing contractual restrictions. Similarly, the adjustment of MFN or equivalent provisions required by the Revised Commitments is a minimum standard only. The Revised Commitments would not affect any existing contractual arrangements under which a hotel can offer discounts, or allow its other OTA partners to do so. 37

3.51. The Revised Commitments would also not in any way restrict the ability of hotels to set the headline room rates for their respective hotel rooms, or benefits available to members of OTAs’ and hotels’ existing loyalty schemes prior to the Revised Commitments being accepted by the OFT (should the OFT ultimately proceed to accept them).

3.52. In addition, the Revised 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.

37 For the avoidance of doubt, this would mean, amongst other things, that if discounting by that hotel or discounting by other OTAs of that hotel’s accommodation is currently outside the scope of any MFN provisions, this would be unaffected by the Revised Commitments. The Revised Commitments also do not affect the ability of hotels and OTAs to agree more extensive adjustment of MFN provisions than is required by the Revised Commitments.
4 THE OFT’S PROPOSED NEXT STEPS

4.1. In light of the above, the OFT provisionally considers that the Revised Commitments as set out in Annexe 1 of this document address its competition concerns in this case. Therefore, the OFT intends to accept the Revised Commitments by means of a formal commitments decision.

Invitation to comment

4.2. As required by paragraph 3 of Schedule 6A of the Act, the OFT now invites interested third parties to make representations on the Revised Commitments. The OFT will take such representations into account before making its final decision whether to accept the Revised Commitments.

4.3. The OFT will also inform the European Commission, no later than 30 days before the adoption of a decision accepting commitments.38

4.4. Any person wishing to comment on the Revised Commitments should submit written representations to the OFT at the address given below, by 17 January 2014. 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.

Hotel Online Booking Team (SIP)
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Email: hotelonlinebooking@oft.gsi.gov.uk

38 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.