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Hotel Online Booking: The OFT announces its intention to accept binding commitments

Peter Malone (Clifford Chance) · Monday, September 30th, 2013

On 9 August 2013, the OFT issued draft commitments in the *Hotel Online Booking* investigation. The OFT has investigated the relevant markets for over 2 years and has provisionally found that certain hotels were restricting the ability of their distributors to offer consumers discounts on standard rates for hotel rooms. The case raises interesting questions on agency and the perceived harm caused by resale price maintenance.

In April 2010, the OFT received a complaint from the travel booking company, Skoosh, that certain hotels and online travel agents (OTAs) had entered into agreements whereby the OTAs would not offer discounts on the rooms that they distributed on behalf of the hotels. The OFT opened the investigation on 10 September 2010 and issued a Statement of Objections on 31 July 2012. Whilst the OFT asserted that the practices in question were widespread throughout the industry, its investigation focused on the InterContinental group of hotels (IHG), Expedia, and Booking.com. The Parties did not respond to the Statement of Objections, but have instead offered commitments which the OFT intends to accept and render legally binding.

During its investigation, the OFT found that IHG entered into separate agreements with Expedia and Booking.com whereby the OTAs agreed not to offer discounts on their sales of rooms supplied by IHG. In effect, the OFT alleged that the agreements imposed a form of resale price maintenance whereby the OTA's would offer the standard room rate quoted by hotels, and would not offer any further discount. The agreements thus limited the ability of OTAs to sacrifice some of their margin in the hope of driving traffic on their websites and attracting more consumers. The OFT found that the agreements restricted intra-brand competition and limited the ability of new entrants to gain market share by under-cutting their rival OTAs and the prices offered on the hotels' own websites.

Whilst the OFT's theory of harm is clear, the case is unusual in a number of respects.

First, the OFT did not consider the question of whether the OTAs were acting as independent third party distributors or as agents. The OFT explained that OTAs tend to adopt one of two business models. Expedia uses a "merchant model" whereby the consumer pays the full amount on the Expedia website, the majority of which Expedia passes on to the hotel while retaining a certain margin as payment for its service. Booking.com uses a "commission-based model" whereby the customer reserves a room on the booking.com website and then later pays the bill at the hotel. The hotel subsequently pays a commission to Booking.com as payment for its services.

The OFT did not clarify whether the OTAs were acting in each instance as an agent or third party distributor. The OTAs do not assume any commercial ownership of the rooms and do not appear to assume any commercial risk in the distribution of the hotel rooms. This would appear to imply that they act as agents of IHG. On the other hand, the OTAs are client-facing and present themselves as being independent from IHG in their marketing and client relations. For the purpose of its analysis, the OFT appeared to assume that the OTAs were independent third party distributors and proceeded straight to its examination of the potential competition harm of the conduct.

Second, having implicitly found that a) the OTAs acted as third party distributors, and b) the Parties adopted a form of resale price maintenance, the OFT is proposing to accept relatively short-term and somewhat lenient commitments. Under the terms of the Commitments, the Parties have agreed to terminate their agreements and allow the OTAs to offer discounts to a “closed group” of customers (*i.e.*, customers who have already made one purchase on the OTA’s website and who have opted into the closed group). This still means that the OTAs are prohibited from offering discounts to first-time customers. The Commitments are binding for 3 years. The relative leniency of the commitments and the absence of any punitive measures may imply that the OFT is moving away from the European Commission’s almost *per se* prohibition of resale price maintenance. Indeed, the OFT’s willingness to engage with the efficiency arguments advanced by the Parties may imply that it is moving towards a more U.S.-style rule of reason approach. This, indeed, would be a welcome development and would surely allow for a more sophisticated analysis of discounting practices.

Third, the original complainant, Skoosh, maintains that the proposed commitments actually further restrict competition in the sector. Skoosh has stated publicly that closed groups were already in existence before the complaint and that members of the closed groups could avail of discounts. According to Skoosh, customers were not obliged to make a purchase to qualify for membership of a closed group. They simply had to submit a membership application. Skoosh has alleged that the OFT’s commitments actually add an additional obligation, in that customers must now first make a purchase before being eligible to join a closed group and subsequently avail of discounts. If correct, such a modification to the existing system by the OFT would appear perverse as it would create an additional obstacle for consumers eager to shop around for discounts.

Whilst the underlying agreements between IHG and the OTAs gave grounds for concern, the case contains some unusual anomalies. Ultimately, it is unclear whether the OFT’s more flexible approach is a sign of a new attitude to resale price maintenance or whether its approach in this case was particular to the specific facts of the case and the definitional challenges that it presented.

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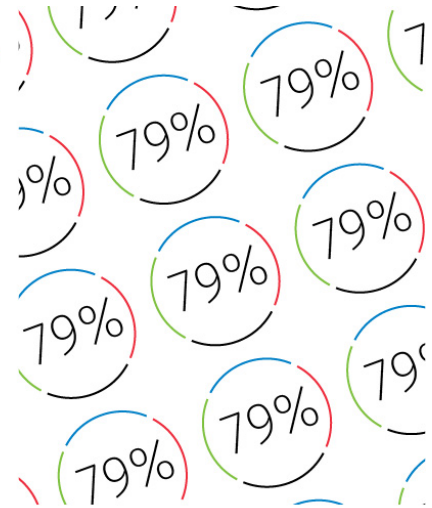
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