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Briefing note September 2016

ACCCs agreement with Expedia and Booking.com - an expedient solution

On 2 September 2016 the Australian Competition and Consumer Commission (ACCC) announced that it had reached agreement with the two main online travel agents (OTAs) in Australia to amend price and availability parity clauses in their contracts with Australian hotels. However, the agreements do not prevent online travel agents from continuing to prohibit their hotel suppliers from offering lower prices to consumers on the hotels' own websites.

Although the ACCC agreement brings the Australian position in line with many other jurisdictions, its actual effect on price competition between OTAs remains to be seen. Additionally, it is unlikely to completely appease the hotels who were the main drivers of the ACCC investigation in the first place. Finally, it poses questions regarding the compatibility of the ACCC's position here and the one it's taken in the ongoing Flight Centre litigation, which arguably involves similar facts.

Key issues

- The ACCC agreement with Booking.com and Expedia to remove certain parity clauses from contracts with hotels goes only some of the way to addressing the hoteliers' concerns.
- However, it is a pragmatic compromise appearing to recognise the pro-competitive benefits provided by OTAs to consumers while at the same time returning to the hoteliers' a degree of much-needed bargaining power.
- The agreement is in line with the approach taken in most European jurisdictions to date.
- It is unclear whether there will be an incentive on hotels to make use of the removal of the 'wide' price parity clause where they are still constrained by 'narrow' price parity clauses.
- The approach taken by the ACCC here may lead to some confusion when compared with its approach taken in respect of the Flight Centre proceedings.

Introduction

On 2 September 2016, the ACCC announced that, following its investigation into the online accommodation booking sector, Expedia and Booking.com have each reached agreement to amend price and availability parity clauses in their contracts with Australian hotels and accommodation providers.

While the agreement removes some of the constraints on hoteliers, and thereby in turn returns to them some degree of bargaining power, it is unlikely to satisfy all their concerns as they continue to be prevented from reducing their own online prices.

Additionally, the effect of the agreement on the level of price competition between the OTAs may be questioned, as well as the compatibility of the ACCC's approach here with that taken in relation to its proceedings against Flight Centre.

Background

ACCC inquiry into the online accommodation booking sector

The ACCC commenced its inquiry into the sector by way of a consultation with industry participants and stakeholders, which ran from 8 September 2015 to 27 September 2015. The inquiry followed Expedia's acquisition of competitor Wotif.com in 2014 during which hoteliers raised concerns that the merger would lead to OTAs increasing their commission rates resulting in increased prices for consumers, and the lack of constraints on the OTAs doing so due to widespread parity clauses imposed on the hotels.

What are 'price parity' clauses?

Price parity clauses, also known as most favoured nation (MFN) clauses, require a supplier to offer its customer the best (or equal) price it offers to any other customer. In the context of OTAs, they are clauses requiring the hotel to provide it with the best price for its inventory that it provides to any other OTAs, or to consumers itself through its direct sales channels.

OTAs also use MFNs to require hotels to provide them with their best, or equal, treatment in relation to other terms and conditions such as room availability (i.e. availability parity clauses).

The European approach to price parity

The competitive impacts of MFNs have been widely debated around the world. Many competition authorities have investigated their impact, also in the online hotel room booking sector specifically, and the ACCC would have likely looked to the outcomes of these investigations as a form of guidance during their own inquiry.

The general position taken in Europe has been to allow 'narrow' MFN clauses, while prohibiting 'wide' MFN clauses. Narrow MFN clauses generally only prohibit the hotel from undercutting the OTA on the hotel's own website, while allowing the hotel to provide some OTAs with better prices than other OTAs.

The idea is that this is a compromise that allows a level of 'intra-brand' competition that would otherwise not exist (i.e. by allowing hotels to give different OTAs different prices for the same hotel room which theoretically will create price competition amongst OTAs), while preserving the consumer benefits (such as increased convenience and information from the comparison and user review functions) and increased ‘inter-brand’ competition created by OTAs by preventing the hotels from free-riding on the OTA platform investments and thereby undermining the OTA model.

However, the outcomes in Germany and France differ in that both wide *and* narrow MFNs have been prohibited. The view of the German authority and courts appear to be that narrow MFN clauses impose a price floor and create barriers to entry, and that the free-riding concern is overstated. The French prohibition was a result of the 'Macron loi', a set of economic liberalisation reforms, and overrode the French competition authority's prior acceptance of narrow MFNs.

The Agreement

Terms of the agreement

The agreement reached by the ACCC with Booking.com and Expedia is that they will each remove from their contracts with hotels those clauses which require the hotels to:

- offer room rates that are equal to or lower than those offered on any other OTA;
- offer room rates that are equal to or lower than those offered on an accommodation provider's offline channels;
- make all remaining room inventory available;
- offer the same number and same type of rooms offered to any other online travel agent.

The ACCC agreement is not underpinned by court-enforceable undertakings and it is not clear for how long the agreement is to last.

Effectively, the agreement allows hotels to now offer cheaper rates to some OTAs over others, as it sees fit, and to offer discounted rates to its own direct customers through its *offline* channels such as via telephone bookings or 'walk ins'. Hotels can continue to be prevented, however, from offering cheaper prices through their *online* channels, i.e. their own websites, than the prices which they offer to their OTAs. This is effectively prohibiting the use of wide MFNs while allowing the use of narrow MFNs.

Implications of the agreement

While this aligns with the position adopted in most of the European jurisdictions, it may not be the solution hoped for by hoteliers, nor may it be the "reinvigoration of competition" between OTAs that the ACCC expects.

It is the wiping of the 'wide MFN' that the ACCC considers will lead to more price competition between OTAs as hotels can now provide discounted rates to certain OTAs, e.g. those that compete on their commission levels or provide better services, and theoretically the OTA would then be

able to pass on these lower prices to the consumer. However, in the circumstances where the hotel is under an obligation not to undercut any of its OTAs, there may be little incentive for it to offer price discounts to any OTA as it would be unable to match the discounted price on its own website. This would have the effect of further 'cannibalising' its own direct, cheaper, sales channel.

The agreement is also unlikely to completely appease all hoteliers as, while they continue to use OTAs (which most do to maximise their reach), they will be constrained in reducing their own online prices (which is the primary method used by consumers for hotel bookings) and therefore their online prices will continue to be inflated by an amount equal to the commission that is paid to OTAs, usually around 15%.

However, the removal of the availability parity clause will enable hotels to choose to withhold inventory from OTAs when it suits, for example, during peak times when the additional reach and marketing provided by the OTA is not required. The threat of withholding inventory may also be enough to constrain OTAs in increasing their commission rates beyond competitive rates.

A comparison with the Flight Centre case

Lastly, it is interesting to compare the position agreed to by the ACCC here with its approach in the Flight Centre proceedings.[1] In those proceedings, the ACCC is alleging that Flight Centre is a competitor of its supplier airlines (in relation to either the supply of air travel or, alternatively, the supply of booking and distribution services) and therefore its attempt to enter into agreements with the airlines, to the effect that the airlines would not undercut Flight Centre in their direct sales to customers, was alleged cartel conduct. It is interesting that agreements between the OTAs and hotels, to the effect that the hotels will not undercut the OTAs in the hotels' direct sales with customers via their own online sites, is not being similarly frowned upon by the ACCC.

Conclusion

The pragmatic nature of the agreement reached here, as well as the possible inconsistency with the Flight Centre proceedings, demonstrates the need for a consistent, clear and sensible approach to pricing arrangements between suppliers and distributors in dual distribution models. Care especially needs to be exercised in the regulation of two-sided platforms such as OTAs.

Distributors and two-sided platforms provide services additional to the product itself and these value-adds arguably should not be undermined by unreasonable interference in the pricing arrangements between a supplier and distributor. Other than where protection is needed due to unequal bargaining power, e.g. where one party holds a dominant market position, the incentives of each party to continue with the relationship should be protected. The risk, otherwise, is that certain distributor type intermediaries and innovative technology platforms may find it no longer profitable to operate or innovate, and consumers will be left worse off by these players (and their consumer benefits) ultimately leaving the market.

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[1] *ACCC v Flight Centre Travel Group Limited* [2016] HCATrans167 (27 July 2016)

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