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### Online Hotel Booking

Edurne Navarro Varona &  
Aarón Hernández Canales

Uría Menéndez

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### I. INTRODUCTION

Online retail has radically changed consumer behavior in recent years. The booking of hotel rooms has been particularly affected by this new trend. Many travellers currently make hotel reservations directly online, and not through travel agents as they used to. A number of specialized platforms have appeared to help identify the different hotel offers available. The way in which these operate, and the conditions that they apply, have led to several investigations from competition authorities in various European countries. This article will analyze the issues in these matters and the various on-going procedures.

### II. MOST FAVORED NATION CLAUSES

At stake are the “Most Favored Nation” or “MFN” clauses that the Online Travel Agents (“OTAs”) apply, whereby the Agents should benefit from conditions at least as favorable as those offered on the market (both by hotels and other OTAs).<sup>2</sup>

From a competition law perspective, MFNs can be regarded as positive, since they are likely to lead to lower prices and better conditions for customers. Some efficiency advantages have been pointed out in relation with MFNs: (i) they contribute to eliminating opportunism, making it more difficult for free riders to unfairly exploit the investments done by other players; (ii) they reduce transaction costs between the contracting parties; and (iii) they reduce uncertainty about price fluctuations.

But MFNs can also be deemed to harm competition, as they tend to indirectly create equal terms for all operators, thereby ultimately reducing the ability to make competitive offers. In recent years, their common use in certain economic sectors has raised some concerns of competition authorities around the world. Nevertheless, MFNs must not be considered as intrinsically bad for competition. In fact, no competition authority or court has so far found them *per se* illegal.

The characteristics of the market where these clauses are applied, and the contractual forms under which they are established, must be taken into account in order to assess their legality from a competition law perspective. Most concerns regarding MFNs have been related to online retail services. Such has been the case for eBooks<sup>3</sup> or online car insurance distribution,<sup>4</sup> as well as hotel bookings.

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<sup>1</sup> Edurne Navarro Varona is the partner in charge of the Brussels office of Uría Menéndez; Aarón Hernández Canales is an associate in the same office.

<sup>2</sup> The MFN concept originated in international trade, where they dictated that commercial agreements between States should apply tariffs not less favourable than those granted to other States.

<sup>3</sup> The U.S. judgement, *United States of America v. Apple Inc., et al.*, 12 Civ. 2862 (DLC), stated that contracts between Apple and five book publishers containing MFNs with maximum retail price grids and a 30 percent

### III. ONLINE HOTEL BOOKING

Currently, hotels can sell their services through several channels: physically, at the hotel's desk or through traditional travel agencies; and online, through the hotel's own web page or through OTAs. It has been estimated that in Europe, during 2015, 34 percent of hotels' turnover will be made through online reservations. OTAs represent 70 percent of these online hotel reservations, the remaining 30 percent being done through hotel websites. Thus, the OTAs channels represent around 24 percent turnover of the hotels. The commissions paid by the hotels to the OTAs amount to almost 5 percent of the formers' turnover.<sup>5</sup>

OTAs are very important for the functioning of the hotel sector. Furthermore, they are essential for independent hotels, as OTAs allow these smaller hotels to compete on equal terms with larger hotel chains, given that their services are shown, rated, and traded in the same conditions as for the chains.

From an economic point of view, most OTAs are mere intermediaries between hotels and customers. They neither buy nor resell services; therefore, they must be considered as hotels' agents. The hotels themselves hold the responsibility of setting the price and selling conditions for their services and assume the business risks. OTAs are remunerated through the payment of a commission by the hotel. This commission is proportional to the price of the reservation and normally ranges between 10 and 30 percent of the final price paid by costumers.

Sometimes, clients pay for the services directly to the hotel; which then pay the commission to the OTA once the client has made use of the service (the "commission-based model"). In other cases, the clients pay the price directly to the OTA when the booking is made and the latter pays it to the hotel, having deducted its commission (the "merchant model").

Meta-search engines also play an important role in the online booking process. They do not allow hotel reservations, but carry out a comparison of the price of the services offered by OTAs and by hotels in their own websites. Meta-search engines are normally remunerated by click: When a surfer is redirected to an OTA or a hotel website by a meta-search engine, the engine receives a fixed amount.

One of the main characteristics of the online hotel reservation sector is its high concentration, with a few OTAs holding substantial shares of the market. As above-said, under the agency model, the principal (hotel) fixes the resale price of its services and the commission to be paid to the agent (the OTA). OTAs having major market shares enjoy higher bargaining power, given that hotel owners will be interested in operating with them. This could lead to a

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commission for Apple were in breach of competition law. Publishers settled the case offering commitments, but Apple refused to do so, went to trial, and was found guilty of conspiracy to restrain trade under Section 1 of the Sherman Act. Before the European Commission, Apple and eBook retailers offered commitments in case COMP/C-2/39.847. As a result, agency agreements between Apple and retailers were terminated and a 5-year ban on MFNs was imposed. Furthermore, retailers would be free to set retail prices during two years (EC Commitments Decision of 25 July 2013).

<sup>4</sup> The UK's Competition and Markets Authority, in its Order of 18 March 2015, banned MFNs between price comparison websites and car insurers.

<sup>5</sup> *European Online Travel View*, Phocuswright (December 2013). This report, among others, was used by the French Competition Authority in its Decision n° 15-D-06 of 21 April 2015.

price being fixed by the OTA that, by virtue of an MFN, would be extended to the rest of the market players. These smaller market players would be prevented by the contracts signed with hotels from introducing lower prices, even with a charge to their commission.

Moreover, MFNs are often combined with other clauses ensuring enforcement. Some of them allow the OTA to suspend or revoke the contract in case of lack of compliance by the hotel. Another common sanction used by OTAs is the degradation of the position occupied by the infringing hotel within the result pages of the online platform.

#### IV. CASES IN THE EUROPEAN UNION

Since 2010, competition authorities from ten Member States<sup>6</sup> have launched inquiries regarding MFNs in the online booking sector. In view of the transnational scope of the issue, the European Commission (“EC”) has intervened; but, given the differences between national markets and divergences regarding the “theory of harm” in each jurisdiction, the cases have been ultimately dealt with at the national levels to date.

However, several meetings have been held within the framework of the European Competition Network (“ECN”) between national officers and the EC, where the latter has ensured coordination in order to achieve consistency among national decisions.

Competition authorities from France, Italy, and Sweden started investigations regarding MFNs in the online booking sector between November 2012 and May 2014. These MFNs covered room availability and reservations made at hotels’ desks. On account of these similarities, the authorities were appointed by the ECN to jointly lead the European national procedures regarding MFNs.

An OTA presented a first set of commitments simultaneously to these three national competition authorities in December 2014. The commitments excluded MFNs regarding other OTAs, but allowed MFNs in respect to hotels’ own sales channels, only excepting loyalty programs and prices negotiated bilaterally with clients and not published. Room availability clauses also remained in force. A market investigation was launched in December 2014. The commitments were discussed within the ECN.

Finally, the authorities involved jointly rejected the offered commitments and the OTA presented new ones in April 2015. Through them, the OTA has engaged not to continue to apply MFNs, except for rooms sold through hotels’ direct online channels or sold at hotels’ desks but published online. Availability clauses are also excluded. These amended commitments were accepted by the French, Italian, and Swedish authorities through their respective decisions issued on April 21, 2015.

The British national authority has also dealt with MFNs in the hotel booking sector. It was one of the first European competition authorities to launch a formal investigation on the functioning of the hotel-booking sector, doing so in September 2010. Nevertheless, the former Office for Fair Trading (“OFT”) inquiry did not intend to assess the lawfulness of MFN. It was mainly focused on the use, in contracts between two important OTAs and a hotel chain, of resale

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<sup>6</sup> Austria, Denmark, France, Germany, Hungary, Ireland, Italy, Sweden, Switzerland, and the United Kingdom.

price maintenance restricting discounts and consequently reducing or eliminating competition in prices.

Furthermore, the authority was concerned about the risk that restrictions on discounting could lead to the creation of important barriers to entry in the online hotel booking market. These barriers would result from new entrants being unable to offer lower prices in order to win market share. Additionally, the OFT was concerned about the possibility of generalization of the controversial clauses in the affected market, which would result in major restrictions or even a total prevention of competition therein.

The companies involved offered commitments to the OFT, which were first rejected and subsequently amended. Through the final commitments, hotels would be allowed to set headline room rates. On the other hand, OTAs would be free to offer discounts over headline room rates fixed by the hotels on the basis of their commission revenue, but only to “closed customers.” These are costumers already registered in the OTA system, having made a previous booking through it.

Additionally, OTAs would be able to publicize information regarding discounts without any restriction, except for information related to the hotel chain involved in the case. This information should be available only for “closed costumers.” Hotels would also be allowed to offer unlimited discounts to their own “closed costumers” and publicize information regarding discounts over a specific hotel room to them. The scope of application of the final commitments would include hotel bookings made by all EU residents concerning hotels located within the EEA.

During the investigation, concerned parties submitted their views about the efficiencies of the system. Unlimited discounts by OTAs over headline rates could damage hotels’ reputations; price being an important reputational indicator for clients. Additionally, free discounts offered by OTAs could lead to harmful effects, such as the reduction of hotels’ incentives to distribute their services through OTAs. This would harm inter-brand competition in the market and discourage business innovation.

Furthermore, a greater degree of freedom to offer discounts might jeopardize the benefits for hotels, and consequently for costumers, of yield management. Yield management, as explained by the OFT, “involves sophisticated price modelling to enable providers to discriminate between different customer groups based on their willingness to pay” and “has also been adopted by the hotel industry as a means of maximising revenue.”<sup>7</sup> An unlimited capacity by OTAs to offer unlimited rebates would distort price models set by hotels, preventing them from an efficient management of reservations.

Finally, the concerned parties claimed that price freedom could result in the cannibalization of direct sales made by hotels and the raising of their distribution costs. It could also undermine OTAs’ incentives to invest in their own platforms; taking into account the possibility for hotels or other OTAs to undercut the former’s prices by setting lower ones, given

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<sup>7</sup> OFT’s Notice of intention to accept binding commitments to remove certain discount restrictions for Online Travel Agents and Invitation to comment, of 9 August 2013, p. 31.

the low search costs for customers in the market. The OFT considered that “some of the arguments put forward for the existence of efficiencies [were] likely to have some merit in this sector.”<sup>8</sup>

Final commitments were accepted by the OFT on January 31, 2014, putting an end to the investigation. An appeal was filed by a meta-search engine and the Competition Appeal Tribunal annulled the OFT decision on September 26, 2014 on procedural grounds.

In January, 2010, the German Bundeskartellamt also launched an investigation regarding MFNs applied since 2006 by one of the main OTAs operating in Germany. In this case, the MFNs also covered room availability and were extended to reservations made at hotel desks. On December 20, 2013 a decision declared that these MFNs constituted agreements between companies that prevented or restricted competition.

The Bundeskartellamt concluded that no efficiency gains arose from the application of MFNs, thus they could not benefit costumers. The authority also pointed out some alternative business models that could be more suitable for this case, including the introduction of a service fee payable per customer, a cost-per-click payment, a listing fee, or a fixed monthly fee payable by hotels.

An OTA offered commitments during the investigation, but they were not considered suitable to bring the competition infringement to an end. The inquiry was extended to other OTAs. The decision was appealed before the Higher Regional Court of Düsseldorf, which upheld it on January 9, 2015.

## V. CONCLUSION

The outcome of ongoing national procedures concerning online hotel booking will be extremely important for the development of a European common digital market. Accordingly, a consistent approach among national jurisdictions will be required. In the light of the procedures mentioned in this article, close coordination between national authorities might be considered as a suitable way towards consistency.

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<sup>8</sup> *Id.* at 40.