



HONG KONG HOTELS ASSOCIATION

(Incorporated with Limited Liability)

Office of the
Executive Director

Reference : EXD008/COR/04/20

* All in 6 Pages *

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By Post &
Email consultation@compcomm.hk

Mr Jindrich Kloub
Executive Director (Operations)
Competition Commission
19/F, South Island Place
8 Wong Chuk Hang Road
Wong Chuk Hang, Hong Kong

Dear Sirs

Case EC/02NJ: Consultation under section 2 of Schedule 2 of the Competition Ordinance regarding the Commission's proposal to accept commitments from online travel agents

Thank you for your letter dated 31 March 2020 in relation to the above consultation.

We warmly welcome this opportunity to take part in the consultation. To our knowledge, this is the first time that the Commission has sought the input and views of hotels and accommodation providers in Hong Kong in this investigation. We are not aware of the evidence the Commission has used to reach its conclusions.

We have though carefully considered with our members the Proposed Commitments and request the Commission take into account the views expressed below. These reflect the concerns of our members of the impact of these commitments and the potential consequences on our sector, which in the past year has already faced unprecedented difficulties.

Unless otherwise indicated, we use the same terms as in the Commission's consultation notice.

... / 2



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1 The Hong Kong Hotels Association (“HKHA”)

- 1.1 The HKHA was established in 1961 to promote the interests of hoteliers in Hong Kong. As at April 2020, the HKHA has a total of 140 member hotels representing the majority of accommodation providers across the city. The HKHA is the official voice of the sector and includes the full range of accommodation providers, including international brands and regional/local hoteliers.
- 1.2 In providing these comments, we have consulted our members, and this reflects their collective views. Individual members may have given additional comments.

2 Proposed Commitments – the need for an admission of a contravention

- 2.1 We note that none of the Proposed Commitments contain an admission of a contravention of the First Conduct Rule. We consider that unfortunate omission to be a material concern to hotels and consumers in Hong Kong. Unlike other jurisdictions, the Commission’s role in accepting commitments and a gatekeeper to damages claims is incredibly significant. Without an admission of a contravention, victims of anti-competitive conduct are excluded from any recourse under s.110 CO.
- 2.2 If the Commission were to accept the Proposed Commitments as currently drafted, the Commission removes any ability of a hotel or a consumer to commence follow-on damages claims against the OTAs for their apparent illegal behaviour since full-implementation of the CO.
- 2.3 As a result of changes in consumer behaviour and spending habits which has led in the increasing usage of OTA platforms, it has become essential for hotels to build relationships with OTA platforms. As such online platforms are often more accessible to a wider end consumer base, this has translated into strong bargaining power of OTA platforms, leaving accommodation providers/hotels limited space for negotiation.
- 2.4 Given that competition agencies globally have for some time raised concerns with the conduct in question, and indeed legislation prohibits such conduct elsewhere, OTAs must have been fully aware of the risks of such clauses – and nonetheless chose to adopt such practices in Hong Kong. This appears to us to aggravate the seriousness of the contravention.

... / 3



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- 2.5 The HKHA therefore would strongly encourage the Commission reconsider this aspect. Failing to secure for victims an admission of a contravention, we would expect the Commission could at least ensure OTA's commit to an appropriate redress and compensation scheme for those persons impacted by the OTAs conduct.

3 Further investigation is needed into the Proposed Commitments to Narrow MFNs and hotels' online channels

- 3.1 We strongly support the Proposed Commitments in respect of Wide MFNs and welcome the Commission's decision to ban such clauses. However, we are concerned that Narrow MFNs are excluded and therefore restrictions could remain in place relating to hotels' own online sales channels. These are an important sales channel for our members and a crucial way to give consumers an introduction to the services being offered.
- 3.2 With a view of enhancing competition and ensuring consumer choice, we would have expected that the Commission conduct further investigation into Narrow MFNs. We believe the Commission should ensure that consumers can benefit from the lowest prices or most favourable terms across all channels, including hotels' own websites.
- 3.3 The Commission will be aware that different considerations may apply in the nature of competition between standalone/non-chain hotels and chain-hotels. Members therefore may take different views on the use of Narrow MFNs. Those positions need to be considered further by the Commission.
- 3.4 As the Commission may be aware, Narrow MFNs have raised significant concerns in Europe - for example, in France, Austria, Belgium and Italy. Indeed, their serious impact has resulted in legislation outlawing such clauses – both narrow and wide MFNs are expressly prohibited as a result of those legislations.
- 3.5 We note that in certain EU jurisdictions, it was argued that there may be economic efficiencies justifying Narrow MFNs. We would however urge the Commission to examine the anti-competitive effects of the Narrow MFNs by taking into account specifically the nature and market conditions of the hotel industry in Hong Kong, and the potential significant negative impact arising from such Narrow MFNs on Hong Kong hotels and consumers. Any efficiency arguments relating to Narrow MFNs need to be assessed carefully against the conditions set under Section 1 of Schedule 1 to the CO to the requisite legal standard set down by the Tribunal.

... / 4



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- 3.6 Due to the serious consequences of OTA's use of Narrow MFNs, we would strongly recommend the Commission reconsider this aspect. For example, the concern that OTAs may seek to use narrow MFNs to replicate the effects of the wide MFN and to impose restrictions on competition from direct channels.

4 Trip's commitments

- 4.1 We note that the scope of the commitments proposed by Trip are different from Booking and Expedia. In particular, Trip's commitments only attempt to address the "wide price parity" clauses and is silent on the "wide conditions parity" and "room availability parity" clauses.
- 4.2 We assume the Commission has undertaken a comprehensive review of all of Trip's contracts with hotels in Hong Kong, and concluded those clauses do not exist.
- 4.3 However, even if Trip does not currently have such clauses, the Proposed Commitments should be amended to ensure that they are properly aligned with Booking and Expedia to ensure there are no attempts to introduce such clauses in the future. Trip should not gain any competitive advantage because of the Proposed Commitments.

5 Retaliation and non-circumvention measures are essential to be included

- 5.1 We would strongly recommend stringent non-retaliation and non-circumvention measures are adopted in the commitments. Our members are deeply concerned that even after the Proposed Commitments enter into force, there is a real risk that the OTAs could easily find alternative means to achieve the same anti-competitive impact the Commission has identified. Hotels often face very little choice in terms and conditions imposed by OTAs. For example, denigrating hotel search results or altering algorithms in a way to demote hotels who do not comply with OTA's demands on pricing or other terms/conditions. Members are concerned that OTAs are able to secretly lower hotels' positions on their platforms, lessen their exposure to consumers then request additional discounts from the hotels and lure them to increase their positioning.
- 5.2 To ensure the Proposed Commitments do not become devoid of purpose, we would request a clause is included which prohibits the OTAs from engaging in any conduct that would directly or indirectly, by act or omission, lead to similar anti-competitive effects as those identified by the Commission.

... / 5



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- 5.3 Such clauses have been adopted overseas, including by Booking¹ and should therefore be insisted upon to avoid further harm to the sector and consumers by alternative means.

6 Enhanced Monitoring of the OTAs compliance with the Commitments Inconsistent monitoring mechanisms

- 6.1 We note that the scope and nature of the proposed self-reporting by the OTAs is inconsistent. The divergent drafting and differing reporting standards are likely to confuse our members, making it more difficult for the industry to “police” the OTAs and also the Commission to have a fair standard to properly assess compliance.

- 6.2 A mere confirmation of compliance is inappropriate. In our view, a standardised monitoring mechanism should be in place across all three OTAs. An initial and detailed compliance report should be submitted within 90 days of the commitments being accepted by the Commission. Subsequent bi-annual compliance statements should then be required (supported by statutory declarations by corporate officers of the companies involved). Such regular and formal assessments should have the effect of deterring possible non-compliance and ensures disciplined implementation of the commitments.

Self-monitoring by the OTAs is insufficient

- 6.3 The Commission appears to place faith in the OTAs to self-certify their compliance. This shifts a significant burden onto hotels and the Commission to be forensically and systematically assessing OTAs compliance in the next five years. This is obviously an unfair burden on our members.
- 6.4 We would strongly recommend OTAs are required to appoint independent third parties to monitor and certify compliance. Such an approach to monitoring of compliance with commitments is international best practice, including in commitments made by the OTAs overseas.

... / 6

¹ See, for example, Décision n° 15-D-06 du 21 avril 2015 sur les pratiques mises en oeuvre par les sociétés booking.com B.V., Booking.com France SAS et Booking.com Customer Service France SAS dans le secteur de la réservation hôtelière en ligne; Decision of the European Commission of 4 May 2017 in Case AT.40153 E-book MFNs and related matters (Amazon).



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7 Harmonisation of the Proposed Commitments

- 7.1 We note that there are definitions and drafting inconsistencies between the Proposed Commitments. For example, (i) the definition of “marketed online” is only available in the Proposed Commitment offered by Expedia and it cannot be found in the Proposed Commitments offered by Trip and Booking; (ii) Offline channel is described as “Offline Channel” in Proposed Commitment offered by Expedia, and “Offline Direct Sales Channel” in the Proposed Commitment offered by Trip – with slightly different meanings.
- 7.2 To avoid any drafting inconsistencies leading to subsequent differing assessment standards and confusions in monitoring by the sector and/or Commission, we would encourage much greater harmonisation of the text of the commitments.

8 Entities/platforms covered by the Proposed Commitments

- 8.1 The Proposed Commitments contain general language on the entities/platforms within scope – although the specific platforms are not specifically named. HKHA and its members should not be expected to assess the corporate control structures of the parties making the Commitments.
- 8.2 To ensure that HKHA members are clear as to the companies/platforms involved in the Proposed Commitments, we would encourage a complete list is provided in the text of the commitments (to be updated from time to time by the relevant party). This will ensure there is never any doubt on which OTA is permitted to have such clauses.

We confirm that this submission can be published on the Commission’s website.

Yours sincerely

Patrick KWOK
Executive Director
Hong Kong Hotels Association