



Expedia and Booking.com: Agent or Distributor?

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Introduction by Europe Column editor Anna Tzanaki

In our first 2013 edition of the CPI Europe Column, Ioannis Kokkoris (University of Reading) makes some interesting remarks on the OFT's antitrust investigation against Expedia, Booking.com and InterContinental Hotels in the UK. Following the complaint of a small online travel agent in 2010, the OFT alleged in its statement of objections that the three companies has conspired to fix the prices in the online hotel bookings industry. In fact, their conduct was deemed to limit price competition and increase barriers to entry or expansion by restricting online travel agents' ability to discount prices for hotel rooms only. In addition, the OFT considered that the MFN clauses leading to these competition restrictive practices are per se anti-competitive. Most importantly, what lies at the heart of this case is whether the agreements between Expedia or Booking.com and InterContinental Hotels are of a genuine agency nature - where in general the principal alone bears any commercial and financial risk - and thus may be exempted from the application of Article 101(1) TFEU. In this regard, the outcome of the case will depend on the treatment of Expedia and Booking.com either as an agent or as a distributor. While Expedia has already applied for leniency merely hoping for a fine reduction, the author predicts that Booking.com is also likely to lose its battle before the OFT...

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An agreement between a principal and an agent/distributor has received different treatment in competition law. The EU Guidelines on Vertical Restraints¹ state that the agent is a separate undertaking from the principal and exclusive agency provisions will in general not lead to anti-competitive effects. This is markedly different from distribution agreements, which have received intense antitrust scrutiny.

Vertical restraints are no longer regarded as *per se* suspicious or *per se* pro-competitive. Rather, they rely more on the analysis of the facts of a case in question. What is essential in analyzing the anticompetitive impact of a vertical restraint is the market structure. Anti-competitive effects are only likely where

¹ Commission Notice on Guidelines on Vertical Restraints (hereinafter Vertical Restraints Guidelines) [2000] OJ C 291/1.

inter-brand competition is weak and there are barriers to entry at either producer or distributor level.

The facts of the case

In July 2012, the UK's Office of Fair Trading (OFT) issued a formal complaint against companies active in the online travel booking industry.² The OFT alleged that InterContinental Hotels, Expedia and Booking.com (a subsidiary of Priceline) had conspired to fix the price of hotel bookings across their websites. The OFT's press release states that the investigation is likely to have wider implications as the alleged practices are potentially widespread in the industry.³

The OFT's press release states that:

The OFT considers that the alleged infringements are, by their nature, anti-competitive in that they could limit price competition between online travel agents and increase barriers to entry and expansion for online travel agents that may seek to gain market share by offering discounts to consumers.

The formal investigation was initiated in September 2010 as a result of a complaint of the founder of Skoosh, a travel agency website that sells hotel accommodation online.⁴ Skoosh has argued that it was pushed to either raise the prices it charged tourists for staying at their hotels or to remove them from its website. Expedia, Travelocity and Booking.com are all major online travel agencies, helping millions of customers to book flights, hotels and rental cars every year. Skoosh has alleged that these larger rival travel agencies pressured hotels into refusing to deal with Skoosh and other agencies that offered lower prices, in order to keep hotel prices among online travel sites identical.

The OFT examined contracts between InterContinental and Expedia effective between 2007 and 2010, and agreements signed between InterContinental and Booking.com in 2007 that are still in place. According to the OFT, Booking.com and Expedia each had separately agreed with InterContinental to impose a limit on discounts offered by online travel agents for accommodation. These best price

² In 2010, the turnover of online hotel booking of UK customers was estimated at £849 million. Over the same year, the UK's online travel agency turnover, which is also derived from other tourist services, was £5.3 billion.

³ OFT press release 65/12 of 31 July 2012, available at: <http://www.offt.gov.uk/news-and-updates/press/2012/65-12>.

⁴ It is noted that Expedia has applied for leniency and can receive some reduction in the fine but not full immunity.

guarantees that resulted from “most-favored nation” contractual clauses are considered by the OFT per se anti-competitive.⁵

Thus, these agreements reduced price competition, and increased barriers to entry by inhibiting travel agents seeking to increase their market share by means of offering larger discounts.

Agent or Distributor?

Commercial agency agreements cover the situation in which a legal or physical person (the agent) is vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent’s own name, or in the name of the principal for the purchase of goods or services by the principal or the sale of goods or services supplied by the principal.⁶

Article 101(1) TFEU prohibits agreements between independent undertakings; however, a genuine agent is considered as if it were part of the same undertaking as its principal.⁷ As a result, Article 101(1) TFEU does not apply to some restrictions of competition included in commercial agency agreements.⁸ The existence of a genuine agency agreement does not grant immunity to all types of contractual obligations imposed on the agent. Genuine agency agreements benefit from inapplicability of 101(1) TFEU but non-genuine agency agreements are within the scope of article 101(1) if there is a restriction of competition, in which case Article 101(3) TFEU may apply. As Lianos argues, the justification for the immunity of commercial agency agreements from the application of Article 101(1) has been a contentious and complex issue.⁹

The determining factor in defining an agency agreement for the application of Article 101(1) is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal. Thus, in a genuine agency agreement, an agent must bear insignificant risk in its business

⁵ Such clauses guarantee a company’s competitors will not benefit from a better deal.

⁶ Commission Notice on Guidelines on Vertical Restraints [2000] OJ C 291/1, paragraph 12.

⁷ C-40 to 48, 50, 54 to 56, 111, 113 and 114-73 Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities, paragraphs 480 and 539, T-325/01 DaimlerChrysler v Commission [2005] paragraph 86 and C-217/05 CEEES/CEPSA paragraph 43.

⁸ See, *inter alia*, C-266/93 Bundeskartellamt v. Volkswagen AG and VAG Leasing GmBH [1995], T-325/01, Daimler-Chrysler AG/Commission [2005].

⁹ See further: Lianos I., *Commercial agency agreements, vertical restraints and the limits of article 81(1) EC: Between hierarchies and networks*.

operations, whereas the principal bears the commercial and financial risks associated with buying and selling the contract goods or services.

Generally, an agreement will be considered an agency agreement where property in the contract goods bought or sold does not vest in the agent, or the agent does not himself supply the contract services and where the agent does not contribute to the costs relating to the supply/purchase of the contract goods or services; the agent does not maintain at its own cost or risk stocks of the contract goods; the agent does not undertake responsibility towards third parties for damage caused by the product sold; the agent does not take responsibility for customers' non-performance of the contract; the agent is not obliged to invest in sales promotion, such as contributions to the advertising budgets of the principal; the agent does not make market-specific investments in equipment, premises or training of personnel; and finally, the agent does not undertake other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal. In *DaimlerChrysler*¹⁰ the General Court concluded that there was an agency agreement even though the agents partly assumed certain risks.

In this respect, Booking.com has argued that it runs an agency model hotel reservation platform. Hotels have complete discretion and control over setting their prices; Booking.com does not set or control prices, nor does it resell hotel rooms.¹¹ We should note that even in the case of genuine agents, Article 101(1) TFEU may apply to any restrictions concerning the relationship between the agent and the principal.¹²

Concluding Remarks

In addition to the OFT, the Swiss and German antitrust authorities are also investigating Booking.com. The German authority is investigating Booking.com, Expedia and HRS (the largest hotel booking website in the country) for allegedly requiring best-price guarantees from hotels featured on their websites. In February 2012, the Bundeskartellamt issued a statement of objections addressed to HRS. The Swiss authority is also investigating the same conduct and the same

¹⁰ T-325/01 *DaimlerChrysler v Commission* [2005].

¹¹ The Guidelines continue with stating that an agency agreement may also fall within the scope of Article 101(1), even if the principal bears all the relevant financial and commercial risks, where it facilitates collusion (paragraph 20).

¹² C-217/05 *CEES/CEPSA* paragraph 62.

undertakings as the German authority. In fact, the Swiss Competition Commission followed the German authority's approach and brought its case only against the reservation websites. The Swiss authority has argued that Booking.com, Expedia and HRS may be abusing their dominant position because they introduced these clauses "at the expense of the hotels."

The outcome of this case will depend on the treatment of Expedia and Booking.com as an agent or a distributor. Expedia has lost this battle - or never engaged in this battle - but having applied for leniency is likely to receive a favorable treatment in the fine calculation. Booking.com, on the other hand, has to forcefully argue that it is an agent rather than a distributor. In the author's opinion, Booking.com is likely to lose this battle at least before the OFT, as the OFT's Statement of Objections will be detailed and well argued in relation to this claim.

It will be very interesting to see how the Swiss and German authorities will proceed with their investigations and whether there will be any additional investigations in other jurisdictions, taking into account that the allegedly anti-competitive behavior of Expedia, Booking.com and InterContinental Hotels is widespread in this particular industry across many jurisdictions. It is noteworthy that the business model and profitability of a number of the undertakings involved is heavily depending on the allegedly anti-competitive clauses.¹³

¹³ Priceline, the parent company of Booking.com, argues that 81% of its worldwide bookings (c. US\$21.7 billion in 2011) are generated through an "agency" model.