

## Insights

# HONG KONG COMPETITION COMMISSION ACCEPTS COMMITMENTS BY OTAS ON REMOVAL OF PRICE PARITY CLAUSES

Jul 29, 2020

## SUMMARY

On 13 May 2020, the Competition Commission of Hong Kong (the **Commission**) accepted commitments from three hotel booking platforms (known as online travel agents or OTAs) to remove parity clauses relating to room prices, conditions and availability from their contracts with accommodation providers, and not to enforce such obligations directly or indirectly. This is the first time the Competition Commission accepted voluntary commitments under the procedure set out in section 60 of the Competition Ordinance (Cap. 619) (the **Ordinance**).

The commitments were offered by US-based Expedia group, Amsterdam-based Booking.com and Shanghai-based Trip.com (formerly Ctrip.com) in exchange for the Commission discontinuing its investigations and not commencing proceedings in the Competition Tribunal. The commitments will be in force for five years. Under the commitments, no admissions were made.

## Background

The use of hotel booking platforms that allow hotels to advertise their rooms and consumers to browse and book the rooms is increasingly important for the hospitality industry. OTAs that operate these platforms enter into contracts with hotels in respect of the room listings and charge a commission for each booking made on their platforms.

The contracts between such OTAs and hotels often contain parity clauses that require hotels to provide rooms to the OTAs on the same or more favourable terms as those offered on all other online and offline distribution channels. Common parity clauses in the hotel booking industry include:

- a. wide price parity clauses, which require hotels to provide rooms at same or better prices as those offered on all other distribution channels;

- b. wide conditions parity clauses, which require hotels to provide rooms at same or better conditions to OTA's consumers as those offered on all other distribution channels;
- c. room availability parity clauses, which require hotels to provide the same or greater number of rooms as those offered on other online hotel booking platforms; and
- d. narrow price/conditions parity clauses, which, in contrast, only require hotels to provide rooms at the same or better price/conditions as those offered on the hotels' own websites.

## **Competition Commission's investigation**

In an investigation into three major OTA groups operating in Hong Kong, namely Booking.com, Expedia and Trip.com, the Commission found that their respective contracts with accommodation providers contained one or more types of the parity clauses discussed above.

The Commission was of the view that wide price parity, wide conditions parity and room availability parity clauses could have the following anti-competitive effects:

- a. removing incentive for OTAs to compete on commission rate in exchange for accommodation providers to provide rooms at better prices or conditions, or better room availability;
- b. preventing accommodation providers from using room rates, conditions and availability as bargaining tools with OTAs; and
- c. preventing accommodation providers from adjusting room prices to reflect commission rates charged by different OTAs, which in itself creates competitive pressure between OTAs.

The Commission was concerned that these three types of parity clauses may (a) soften competition between different OTA groups, and (b) hinder entry and expansion of new or smaller OTAs, in contravention of the First Conduct Rule. The First Conduct Rule prohibits businesses from making or giving effect to an agreement, or engaging in a concerted practice, if the object or effect is to prevent, restrict or distort competition in Hong Kong.

In contrast, narrow parity clauses might prevent accommodation providers from free-riding on OTAs' advertising and undercutting the OTAs. The Commission noted such potential pro-competitive efficiency and decided not to pursue narrow parity clauses in its recent investigation.

## **Voluntary Commitments**

Each of the three OTA groups offered voluntary commitments not to enforce or enter into wide price parity, wide conditions parity and room availability parity clauses in existing or new contracts with accommodation providers. The commitments do not apply to managed bookings, opaque bookings and packaged bookings where customers cannot compare prices in a meaningful way. The OTA

groups did not make any admission of competition law contraventions as a part of their commitments.

After a consultation which took place from 31 March to 23 April 2020, the Commission was satisfied that the commitments effectively address its competition concerns. On 13 May 2020, the Commission accepted the OTA groups' respective commitments.

Booking.com, Expedia, Trip.com and their affiliates, such as Hotels.com and Ctrip.com, had 90 days from the date of the Commission's acceptance to remove parity clauses (except narrow parity clauses) from their contracts with accommodation providers in Hong Kong. The commitments will be in force for five years. To monitor compliance, the Commission will rely on the OTAs self-reporting by way of an implementation report (120 days after acceptance) and annual compliance statements.

## **Key Takeaways**

This is the first time the Commission has accepted an offer of voluntary commitment. Section 60 of the Ordinance empowers the Commission to accept a voluntary commitment offered by any person to address the Commission's concerns about a possible contravention of a competition rule in exchange for the Commission terminating its investigation and not bringing any proceedings in the Competition Tribunal. Voluntary commitments can be made at any stage of an investigation and can be a quick and effective tool for businesses to achieve an amicable resolution with the Commission.

Secondly, because no admissions were made in these voluntary commitments, no compensation claims can be made against the OTAs for damage suffered as a result of the parity clauses. Under section 110 of the Ordinance, parties may bring proceedings in the Competition Tribunal in respect of damage suffered as a result of a contravention of competition rule only if a declaration, finding or admission of the contravention has been made. This is known as a "follow-on" action.

Next, the Commission's findings reveal that it is likely to consider wide parity clauses to be anti-competitive. This is a reminder to businesses in Hong Kong to review their contracts, remove any wide parity clauses and ensure full compliance with competition law.

Finally, while wide parity clauses are prohibited in most European countries, the European courts are divided over the legality of narrow parity clauses. By the Commission refraining from making a determination on the legality of narrow parity clauses at this stage, businesses in Hong Kong will follow with interest developments in Europe to see if a more unified approach emerges. This highlights that, while Hong Kong's competition law remains in its infancy, it is instructive to look internationally for guidance.

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## MEET THE TEAM



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