

Parity with international regulators? Hong Kong Competition Commission proposes to accept MFN commitments

15 April 2020

On 31 March 2020 the Hong Kong Competition Commission (HKCC) commenced a public consultation on the commitments offered by three online travel agents (OTAs) to remove certain parity clauses in their existing and future contracts with accommodation providers in Hong Kong. The consultation period was extended yesterday to 23 April 2020. Significantly, this is the first time that the HKCC has published a [notice](#) proposing to accept commitments offered under section 60 of the Competition Ordinance (ordinance).

The investigation

The HKCC's investigation concerned certain parity clauses in the respective contracts of Booking.com, Expedia.com, and Trip.com with accommodation providers in Hong Kong. Three types of parity clauses – often called most favored nation (MFN) clauses – were examined:

- **Wide price parity.** Accommodation providers were to always give the OTA the same or better price as the prices they offer in all other sales channels (excluding for the purposes of the investigation the accommodation provider's own online sales channels).
- **Wide conditions parity.** Accommodation providers were to always give the OTA the same or better room conditions as those they offer in all other sales channels (excluding for the purposes of the investigation the accommodation provider's own online sales channels).
- **Room availability parity.** Accommodation providers were to always give the OTA room availability that is at least as favorable as those given to any of its competitors.

HKCC's concerns

The HKCC considered that the three OTAs made up a large part of OTA accommodation bookings in Hong Kong, and that the contracts between the OTAs and accommodation providers were vertical agreements (that is, the agreements were not between competitors).

The HKCC went on to assess whether the parity clauses could have the potential effect of harming competition (as opposed to the object/purpose of harming competition) in Hong Kong. The HKCC concluded that these clauses may have the potential effect of softening competition among OTAs, and of hindering entry and expansion by new or smaller OTAs who may not be able to

compete effectively with the incumbents. The HKCC was therefore concerned that the parity clauses could potentially harm competition in breach of the First Conduct Rule of the ordinance (which prohibits anti-competitive agreements).

Proposed commitments

To address the HKCC's concerns, the OTAs offered certain commitments aimed at ensuring that they will not enforce or enter into agreements with accommodation providers that contain wide price parity, wide conditions parity, and room availability parity terms. The HKCC was satisfied that the proposed commitments were appropriate to address its concerns about a possible infringement of the First Conduct Rule and therefore proposed to accept them. Notably, the OTAs did not have to admit an infringement of a competition rule as part of the proposed commitments in this case.

The HKCC's public consultation was extended to 23 April 2020. If the proposed commitments in this case are ultimately accepted, the HKCC will end its investigation and will not bring court proceedings against the OTAs on this matter. The commitments will then remain in force for five years from the implementation date. The OTAs will also need to report to the HKCC on their compliance with their respective proposed commitments.

Takeaways

Previously, there was no indication that parity or MFN clauses were an enforcement focus in Hong Kong. The HKCC's guidelines, despite being quite lengthy, make no mention of parity or MFN clauses, although these have been subject to scrutiny by antitrust authorities elsewhere and have even been banned in some jurisdictions in Europe. Now that parity clauses have caught the attention of the local antitrust authority, businesses should review their contracts to identify any parity clauses which may pose competition concern in Hong Kong.

Given the numerous MFN cases brought by antitrust authorities in Europe and the widely held perception that these cases represent "cutting-edge" antitrust enforcement, this proposed settlement may be interpreted to indicate the HKCC's willingness to align itself with international antitrust enforcement trends and priorities. All public cases by the HKCC so far were almost entirely local affairs, so this new case may be viewed as a "diversification" of enforcement priorities.

The proposed settlement notice seems to imply that only "wide parity" clauses are off-limits, while "narrow parity" should be allowed, even though the HKCC did not comment on narrow parity clauses specifically. Narrow parity clauses force the accommodation provider not to offer cheaper rooms itself (for example, on a hotel's own website) than those provided to the OTA. In Europe, most MFN decisions by antitrust authorities have followed the same approach of prohibiting wide parity clauses, while allowing narrow parity clauses (though some antitrust authorities also view narrow parity clauses negatively). In that sense, the HKCC's approach is aligned with the majority of antitrust developments in Europe.

From a procedural perspective, this case is significant because it indicates that the HKCC is prepared to settle cases in appropriate circumstances instead of bringing enforcement proceedings in the Competition Tribunal by using the full spectrum of tools in its enforcement arsenal. Section 60 commitments are a simple and cost-effective approach to settlement. In theory, section 60 commitments may be offered by any party under investigation at any stage. However, whether or not the commitments are appropriate to address the HKCC's concerns appears to be a matter of the HKCC's discretion. In this case, the HKCC considered that commitments were suitable because they appropriately addressed the HKCC's concerns, would

ensure a speedy resolution to those concerns and were considered to be a proportionate response in the circumstances.

The previous instance of settlement in Hong Kong saw the HKCC issuing an infringement notice under section 67 of the ordinance in January 2020 against an information technology software supplier for its alleged involvement in information exchange which allegedly amounted to price-fixing. Pursuant to the infringement notice, the HKCC offered not to bring proceedings against the supplier on condition that it made a commitment to comply with the requirements of the notice (which included the implementation of a competition compliance program). The difference, however, was that the supplier had to admit to an infringement of a competition rule as part of its commitment. This is a key distinction between the section 60 commitments route and the possibility to agree to the HKCC's proposal of commitments after it issues an infringement notice. This settlement with the OTAs highlights the relatively broad toolbox the HKCC has available to resolve cases in a speedy fashion.

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