

Anticipated acquisition by Priceline.Com Incorporated of Kayak Software Corporation

ME/5882-12

The OFT's decision on reference under section 33(1) given on 9 May 2013. Full text of decision published 14 May 2013.

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**Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.**

## **PARTIES**

1. **Priceline.com Incorporated** (Priceline) is a public company headquartered in Norwalk, Connecticut, United States of America (U.S.A.). Priceline is the ultimate holding company of Priceline Group. The companies belonging to the Priceline Group are online travel agencies (OTAs) that search and book travel services from travel service providers (TSPs) such as hotels, airlines and car rental companies on behalf of customers. The Priceline Group operates under four main brands; Booking.com, priceline.com, Agoda.com and Rentalcars.com. These websites intermediate between customers and TSPs. Booking.com is the main brand operating in the UK.
2. **Kayak Software Corporation** (Kayak) is a public company headquartered in Norwalk, Connecticut, U.S.A. Kayak's primary business is the provision of a meta-search site (MSS), more commonly known as a price comparison site, allowing customers to search and compare prices for hotel rooms, airline tickets, package holidays and rental cars. Kayak's UK turnover in 2012 was approximately £ [ ].

## TRANSACTION

3. Priceline intends to acquire 100 per cent of the shares in Kayak through a newly formed company, a wholly owned subsidiary of Priceline for a consideration of \$1.8 billion<sup>1</sup> payable in cash and shares.
4. The parties formally notified the proposed acquisition to the Office of Fair Trading (OFT) on 14 March 2013. The OFT's administrative deadline expires on 9 May 2013.

## JURISDICTION

5. As a result of the transaction the OFT considers that Priceline and Kayak (the parties) will cease to be distinct. The turnover test under section 23(1)(b) of the Enterprise Act 2002 (the Act) is not met since Kayak's UK turnover is less than £70 million.
6. For the purposes of the share of supply test under section 23(3) of the Act, the OFT considered, on a cautious basis, the narrowest reasonable description of services provided by the parties to be the supply of online travel search services to UK based customers<sup>2</sup> and the supply of online advertising services to UK based hotels. The OFT considered that the share of supply test is met given that on a UK revenue basis, the parties' combined share of supply in the provision of online travel search services to UK based consumers – in which the OFT considers the parties to overlap – is [25-35] per cent.
7. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation pursuant to section 23 of the Act.

<sup>1</sup> Equivalent to £1.16 billion at an exchange rate of \$1:£0.6432 as at 8 May 2013

<sup>2</sup> This includes overseas consumers searching for UK-based services.

## MARKET DEFINITION

### Background: The online travel services sector

8. The online travel services sector is characterised by TSPs, OTAs, MSSs and 'horizontal search engines' such as Google, Bing and Yahoo. TSPs provide hotel accommodation, flights, car hire, package holidays and cruises. They range in size from large multi-national hotel groups, airlines and car hire firms to family run businesses.
9. Customers can make direct online bookings with some but not all TSPs.<sup>3</sup> Customers also have the option of using OTAs, these websites provide online search and booking services, effectively intermediating between TSPs (some of which may not have booking functionality) and the customer. The customer also has the option of using other websites (MSSs or search engines) which provide the customer with search and/or price comparison services for various travel services and typically link the customer to the appropriate OTA or direct to the TSP where appropriate. Such services provided by OTAs, MSSs and search engines are free of charge to customers.
10. OTAs therefore serve as distribution channels for TSPs allowing customers to search and make bookings with TSPs. Priceline (Booking.com), Expedia and Lastminute.com are examples of OTAs. Some OTAs focus on a particular travel service such as hotel bookings while others distribute multiple types of travel services such as hotel room bookings, car hire and airline tickets.
11. MSSs are search engines that aggregate and simultaneously display the offerings of multiple OTA and TSP sites. Kayak, Trivago, Skyscanner and Travelsupermarket are a few examples of travel MSSs active in the UK. MSSs can be paid by a rate per click by OTAs or by receiving a percentage commission of the booking fee if a consumer who searches on an MSS subsequently goes to a TSP which results in the TSP making a booking. Essentially MSSs refer internet traffic either to OTAs or to TSPs direct.

<sup>3</sup> Some TSP websites do not have a booking functionality and therefore the customer will typically book through an OTA.

12. Horizontal search engines provide internet traffic for OTAs, MSSs and TSPs through their main search results and through paid advertising links alongside their search results. Unlike MSSs, search engines are not dedicated to travel and provide less detailed search options and results. However, the OFT understands that the search engine Google has launched its own dedicated hotel and flight MSSs.
13. The online travel services sector is also characterised by the supply by OTAs and MSSs of certain back-end technology to various affiliates that provide travel related services.

### **Product scope**

14. The parties' submitted that they operate in a two-sided market where one side of the platform comprises customers who are searching for hotel bookings and other travel services and the other side, TSPs looking to advertise their services and attract bookings from such customers.
15. The OFT did not need to conclude on the precise market definition for the purpose of analysing this merger given that any alternative formulation does not give rise to competition concerns. The OFT has therefore considered, without needing to conclude, the plausible impact of the merger on the supply of online travel search services to UK consumers and the supply of online advertising services<sup>4</sup> to TSPs.
16. In addition the OFT considers the parties overlap in the supply of back-end technology for online travel services by OTAs and MSSs.
17. The OFT's starting point in identifying the appropriate frame of reference is generally to consider first if the narrow candidate markets in which the parties overlap can be widened through demand-side substitution.

### **Distinction between online travel services provision and traditional 'bricks and mortar' travel agents**

18. The parties submitted that the OFT should consider traditional bricks and mortar travel agents within the relevant product frame of reference given

<sup>4</sup> The OFT considers 'online advertising services' in this case to include the online channelling of customers to UK-based TSPs and not just merely advertising their services/offers.

that services provided by them are not significantly different to those provided by online OTAs.

19. In its past decisional practice the European Commission (EC) has left open whether bricks and mortar travel agencies and online distribution were distinct markets or part of the same market. The EC has, however, noted that the distribution of travel services through online channels might constitute a separate market.<sup>5</sup>
20. The Competition Commission (CC) in its merger inquiry report of *Thomas Cook/Co-operative Group/Midlands Co-Operative*<sup>6</sup> indicated that there is a degree of differentiation between online and high street travel service offerings. The CC said: '[h]igh street agents have traditionally offered an element of service and advice as a feature that distinguishes the channel from other forms of distribution'.
21. Although this question was not specifically put to third parties, none of the third parties contacted by the OFT raised the point that bricks and mortar channels should be considered in the same market as online travel services. As such the OFT has adopted a cautious and narrow approach and assessed this transaction on the basis of online travel services.

### **Distinction between OTAs and MSS**

22. The OFT has considered the distinction between OTAs and MSSs. The parties submitted that online travel booking services are distinct from online travel search services because:
  - i. travel search services and booking services are not always supplied together
  - ii. Kayak and all other MSSs do not have a booking functionality
  - iii. there is intense competition in the supply of these services between OTAs and TSPs.

<sup>5</sup> COMP/M.6163 – Axa/Permira/Opodo/GoVoyages/eDreams

<sup>6</sup> Paragraph 7.6

23. In support of their contention that OTAs and MSSs do not form part of the same product market, the parties note that, in practice, Kayak only contracts directly with large hotel chains that have their own booking functionality whereas Priceline contracts with a much broader range of hotels including both large and small and with and without its own booking functionality because they can book through Priceline.
24. Set against this, third party responses indicated that OTAs both compete and have a vertical relationship with MSSs and TSPs. Specifically, the parties compete insofar as they both seek to obtain traffic by providing online travel search services to consumers and providing online advertising services to TSPs. However, third parties also noted that the key difference between an MSS and OTA was the fact that the former lacks ability for a customer to book a travel service and merely provides a gateway for a customer to link directly to a TSPs site.
25. To make direct use of an MSS, a TSP needs to have its own booking functionality. This is particularly relevant for hotels as they do not all have booking functionality on their own websites. A hotel dealing with Booking.com need only upload prices onto Booking.com's extranet. Booking.com will organise the bookings and to the extent that booking functionality is costly or difficult to set-up, this distinction limits the range of hotels that can use MSSs directly for the purposes of advertising services.
26. The OFT notes that through its 'Book Kayak' functionality, a customer can proceed to book and pay for some services instead of proceeding to an OTA or TSP website to complete their booking. However, when customers use 'Book Kayak', they make a booking through an affiliate service provided by an OTA (for example, Priceline, Expedia, Travelocity or getaroom). The booking is actually completed by the OTA booking system. Payment is also made through the OTA and the OTA handles customer service. These features are clearly signposted on the Kayak website. Kayak shares the commission the OTA receives from the TSP, much as they would if they channelled the customer to an OTA website. The OFT also notes that [ ] number of bookings were made by 'Book Kayak', amounting to [ ] revenue of approximately £[ ] in 2012 in the UK.
27. The OFT notes that Booking.com has [ ] customer care employees, [ ] of which are in the UK. By comparison, Kayak has [ ] to deal with individual

bookings in the UK and [ ] customer care employees in the USA, all of whom focus on issues relating to the website.<sup>7</sup> This is a consequence of Kayak operating a different business model to an OTA as regards the ability to book travel services online, such as, Booking.com. Kayak [ ] operate a booking system that is [ ] technology on which it is reliant and with which [ ] booking commission.

28. Based on the evidence available to it, the OFT considered that the parties do not overlap in booking services and so does not consider this overlap further. Nevertheless, the OFT has assessed whether any non-horizontal effects arise as a result of the merger.

### **Distinction between different travel service segments**

29. The parties submitted that it would not be appropriate to distinguish markets separately by the type of TSP, for example flights, hotels, car rental, tours and packages. The parties submitted that most OTAs and TSPs that are active in the UK provide most, if not all, types of travel service and that this is an indication there is considerable supply side substitutability between the various types of travel service.
30. The EC could not exclude that within the possible market for the online distribution of leisure travel services, a possible sub-market for the online distribution of leisure flights might exist.<sup>8</sup> As mentioned above, in identifying the relevant product market particular regard will be had to demand-side substitution factors<sup>9</sup> and different segments of travel services such as flights, hotel rooms and car hire are clearly not interchangeable from a consumers' perspective.
31. The OFT notes that there may be demand side complementarities which may incentivise firms to provide these services together. For example, consumers may prefer 'one-stop' shopping. There may also be some economies of scope in terms of the design and management of websites and databases in providing the different segments of travel services together. However, the OFT also notes that Priceline's business in the UK receives [ ] per cent of its UK revenue from hotel bookings and car rental.

<sup>7</sup> Parties submission

<sup>8</sup> COMP/M.6163 – Axa/Permira/Opodo/GoVoyages/eDreams

<sup>9</sup> Merger Assessment Guidelines, paragraph 5.2.6

Kayak receives [ ] per cent of its revenue from flights and about [ ] per cent of its revenue from hotel bookings. This indicates the parties each focus on particular types of travel services in the UK.

32. For these reasons, the OFT considers it may not be appropriate to aggregate different types of travel services into a single frame of reference. On a cautious basis and for the purposes of this analysis, the OFT considered different types of travel service separately. Therefore the OFT focused its analysis on hotels and car rental.

### **Online advertising by OTAs and MSSs to certain TSPs**

33. The parties submitted there is a relevant market for the supply of online advertising/distribution services to TSPs.<sup>10</sup> The parties also submitted there is a relevant market in the supply of advertising to OTAs by MSSs.
34. A TSP looking to attract bookings or customer traffic can market itself through horizontal search engines, MSSs and OTAs. Consumers may go directly to an OTA which may provide a booking function to the TSP or they may use the online advertising services of an MSS or horizontal search engine. Similarly, consumers may go directly to an MSS or to a horizontal search engine which may redirect them to the TSP.
35. The parties submitted that MSSs (vertical search), and horizontal search engines are largely active upstream of OTAs and do not overlap in the supply of online advertising services to TSPs. This vertical relationship could be described as being the supply of advertising services to OTAs by MSSs. However, MSSs channel a portion of consumers to OTAs and a portion to TSPs. In the case of Kayak, [ ] per cent of 2012 revenue relating to UK-based hotels came from OTAs and [ ] per cent came from TSPs. In 2011, [ ] per cent came from OTAs and [ ] per cent came from TSPs. In relation to UK based car hire firms, [ ] per cent of Kayak's 2012 revenue came from OTAs and [ ] per cent came from TSPs. In 2011, [ ] per cent came from OTAs and [ ] per cent came from TSPs.

<sup>10</sup> The OFT uses the term online 'advertising services' by OTAs and MSSs to certain TSPs' throughout rather than distribution to avoid confusion. This excludes booking services.



36. A number of responses to third party questionnaires have confirmed that OTAs both compete and have a vertical relationship with MSSs. The parties compete insofar as they both seek to obtain traffic.
37. The parties also submitted that Kayak contracts directly with large hotel chains. This would indicate that the parties do overlap in advertising services to TSPs, notwithstanding that Booking.com serves a wider range of TSPs in the hotel sector. The car hire sector is more concentrated and the parties appear to work with a similar set of TSPs.
38. Horizontal search engines provide internet traffic for OTAs, MSSs and TSPs through their main search results and through paid advertising links alongside their search results. The EC has previously distinguished between vertical and horizontal internet searches in the past. In a merger review between *Microsoft-Yahoo! Search Business* the EC said: 'General internet search must be distinguished from vertical internet search, which focuses on specific segments of online content such as for example legal, medical, or travel search engines. Contrary to general internet search engines, which index large portions of the internet through a web crawler, vertical search engines typically use a focused crawler that indexes only web pages that are relevant to a pre-defined topic or set of topics'.<sup>11</sup>
39. However, the OFT also notes that two major suppliers of horizontal search engines, Google and Microsoft, have entered the MSS space with Google Flights, Google Hotel Finder and Bing Travel. Such entry could be taken as an indication that the ability of horizontal search engines to compete with OTAs and MSSs is limited and would not be a strong competitive constraint on OTAs and MSSs.
40. In assessing the effect of the merger, the OFT will primarily be concerned with the parties' overlap in the provision of online advertising services to large hotel chains and car hire firms. On a cautious basis, the OFT will exclude horizontal search services from the frame of reference.

### **Online travel search services by OTAs and MSSs to consumers**

41. Consumers can search for travel services on horizontal search engines, OTAs or MSSs. All of these provide search services to consumers for free.

<sup>11</sup> COMP/M.5727 – Microsoft/Yahoo! Search business

As with online advertising services to TSPs, the parties submitted that OTAs and MSSs compete with horizontal search engines. The OFT considered that distinctions mentioned between OTAs, MSSs and horizontal search engines in relation to online advertising services to TSPs are also relevant to online search services to consumers. This suggests that horizontal search engines would not be a strong competitive constraint with regard to consumers.

42. The parties further submitted there are fundamental differences between the search functionality of OTAs and MSSs. The parties argued that MSSs aggregate and simultaneously display the offerings of multiple OTAs and TSPs whereas OTAs show competing offers from different TSPs for a specific travel service - for example, a hotel room reservation in a specific city. However, the parties have not provided any substantive evidence on the importance customers place on the distinction between the search functionality offered by OTAs and MSSs.
43. OTAs and MSSs both obtain revenue from attracting consumers to their websites. OTAs earn commission from TSPs if consumers make a booking on their website. MSS are paid either per-click or per booking made from traffic they forward to TSPs or OTAs. Therefore OTAs and MSSs have an incentive to compete to provide travel search services to consumers. This includes competition for traffic which may eventually flow through an MSS to an OTA, that is where the parties have a vertical relationship, or through an MSS direct to certain TSP (those with booking functionality), that is where there is a horizontal relationship.
44. OTAs would prefer consumers to come directly to them rather than through an MSS, as they will have to share a proportion of revenue with the MSS, either per unit of traffic, or a portion of any eventual booking commission. This implies OTAs and MSSs are likely to compete in online travel search services to consumers.
45. The OFT considers the competitor set of OTAs and MSSs to be very similar to online advertising services as discussed above. On a cautious basis, therefore, the OFT will focus on competition between OTAs and MSSs. The relevant overlapping travel search services in this case are those relating to car hire and hotels.

## **Supply of back-end technology for online travel search services by OTAs and MSSs**

46. Priceline provides back-end technology for online travel search and booking services to third party website operators through its 'affiliates programme'. This technology enables third party users to market under their own brands, for example airline companies, the travel services available on the websites operated by the Priceline Group.
47. The parties submitted that generally this technology can be supplied using two basic models. Third party website operators can contract to use so-called 'white label' website from the OTA, which is branded to reflect the third party's brand. Alternatively, the third party website operator can connect its own website to the OTA's booking engine which will provide a data feed to the third party website.
48. Kayak also has an 'affiliate programme' through which it enables third party websites, for example lonelyplanet.com and about.com, to offer Kayak's MSS functionality on their own websites. The parties' offerings are differentiated in that Kayak does not offer booking functionality.
49. The parties submitted that Kayak is, to a certain extent, a user of such back-end technology for its 'Book Kayak' functionality as Kayak has contracted with the 'affiliate' or 'white label' programmes of Expedia, Travelocity and getaroom and therefore the parties do not overlap.
50. Whilst Kayak does not have a booking functionality, there is nevertheless an overlap in travel search services between the parties' respective 'affiliate' programmes. However, based on the evidence available to it, the OFT considered that the parties do not overlap to a material degree in the supply of back-end travel search technology and so will not consider this overlap further in its competitive assessment.

## **Geographic scope**

51. The parties submitted that because services are internet based they can be provided globally and are not constrained by national or regional boundaries.

52. However, the parties noted that the EC has previously defined the markets for the online distribution of travel services as national in scope, and has cited language barriers as the primary reason for this<sup>12</sup> The parties also noted that for similar reasons, the OFT has in the past assessed the markets for online advertising of consumer finance products and online search services on a national basis<sup>13</sup> but recognised that the OFT can leave the geographic scope open. The OFT agrees that the geographic scope can be left open but on a cautious basis will adopt the UK as its frame of reference.

### **Conclusions on relevant frame of reference**

53. In summary and without concluding on the precise relevant market definition for this case, the OFT has taken a cautious approach and has assessed the effect of this transaction against the following frames of reference:

- i. Online advertising services to UK-based hotels and car hire firms by OTAs and MSSs in the UK.
- ii. Online travel search services for UK-based consumers relating to hotels and car hire by OTAs and MSSs in the UK.
- iii. Back-end travel search services technology to UK-based firms by OTAs and MSSs in the UK.

### **COMPETITIVE ASSESSMENT**

54. The OFT considered its competitive assessment in relation to online travel sector. The OFT assessed the following theories of harm:

- i. horizontal unilateral effects in the supply of online advertising services of hotel and car hire by OTAs and MSSs to TSPs, and travel search services relating to hotel and car hire to consumers in the UK

<sup>12</sup> EU Commission decision dated 30 May 2011, COMP/M.6163 – Axa/Permira/Opodo/Go Voyages/eDreams, paragraph 29.

<sup>13</sup> Google/BeatThatQuote, OFT decision dated 1 July 2011, paragraphs 26-28 and 34-36.

- ii. coordinated effects in the hotel and car hire sectors through the automation of detection and enforcement of rate parity deviations
- iii. foreclosure of rival OTAs and
- iv. conglomerate effects of Priceline bundling or tying its' other portfolio brands.

## **HORIZONTAL ISSUES**

### **Unilateral effects in the online hotel sector**

#### **Shares of supply**

55. The parties submitted share of supply data based on internet traffic. Internet traffic was calculated based on the number of unique visits to websites within comScore's 'travel' category.<sup>14</sup> The parties provided the data on a number of segments. The data showed that Priceline had approximately [ ] times the number of 'hits' than Kayak across all relevant segments with the maximum combined share of supply being [10-20] per cent in the OTA category (which included Kayak's hit data).<sup>15</sup>
56. The OFT had significant reservations about the appropriateness of using an approach based on internet traffic to measure share of supply. The data was likely to exclude overseas consumers searching for UK-based TSPs and counts traffic related to non-overlapping travel searches such as flights. As a result the OFT considers that the internet traffic metric is likely to understate the parties' combined share of supply in the relevant goods and services.
57. The OFT considered net revenue, volume and gross booking value (GBV) for the supply of online travel search services to UK consumers and the supply of online advertising services to TSPs as a more appropriate metric of the parties' share of supply. On the basis of information provided by the parties the OFT's estimate of shares of supply is outlined in Table 1 below:

<sup>14</sup>comScore is a firm which monitors internet traffic data (that is, 'hits'). The period covered by the data is 1 November 2011 to 31 October 2012

<sup>15</sup> The parties included the Kayak hits data in the OTA data with the caveat that their position is that there is no horizontal overlap between the parties.

**Table 1: Estimate of share of supply for online travel search services to consumers and online advertising services to hotels based on Revenue, Volume and GBV<sup>16,17</sup>**

Metric	Customer	Priceline (%)	Kayak (%)	Combined (%)
Revenue	Consumer	[25-35]	< 1	[25-35]
Revenue	Hotel	[35-45]	< 1	[35-45]
Volume	Consumer	[25-35]	< 2	[25-35]
Volume	Hotel	[35-45]	Not supplied	[35-45]
GBV	Consumer	[25-35]	Not supplied	[25-35]
GBV	Hotel	[35-45]	Not supplied	[35-45]

### Online advertising services of hotels by OTAs and MSSs

58. The OFT noted that the increment to Priceline's share of supply based on revenue is very small at [ $< 1$ ] per cent. The OFT received no third party concerns relating to unilateral effects. In terms of whether the parties are close competitors, OTAs and MSSs are distinguished by booking functionality. OTAs have a booking functionality when advertising hotel services whereas MSSs tend to merely channel the consumer wishing to book a hotel room either to an OTA or direct to a hotel.
59. Third parties were asked whether they thought OTAs and MSSs compete and are close competitors. Third parties representations were somewhat mixed, but a significant proportion indicated that OTAs and MSSs do compete and are to some extent interchangeable. However, third parties generally identified other OTAs, such as Expedia and Travelocity, as close competitors to Priceline and similarly other MSSs, such as Trivago and TravelSupermarket, as close competitor to Kayak. Furthermore, third parties indicated that there will remain a number of alternative OTAs and MSSs following the transaction.

<sup>16</sup> The parties were unable to provide an accurate, reliable estimate of the total market size and therefore the OFT estimated the market size based on data from market reports and information from the merging and third parties.

<sup>17</sup> 'Consumer' relates to the supply of online travel services to UK consumers (relates to domestic and overseas hotel use) and 'hotel' relates to the supply of online advertising services to UK-based hotels (domestic or overseas consumers).

60. That said, the OFT notes that Priceline's 2012 Annual Report lists a variety of current and potential competitors that include MSSs. Furthermore, Kayak's IPO prospectus also mentions competition from general search engines that could reduce their traffic.
61. One third party, active in the general search sector said that competition in search, including travel search, is vibrant and characterised by the presence of a large number of successful travel search services and therefore did not have any concerns in relation to the proposed merger. Also, one Kayak internal document indicated that Kayak considered itself [ ] in the UK [ ] of strong local competition.
62. Priceline is substantially larger than Kayak and so the increment is very small. A number of third parties have also indicated they do not consider the parties to be particularly close competitors and there are a number of other more significant competitors to both parties in the supply of online advertising services. Based on this evidence, the OFT does not consider this transaction creates a realistic prospect of a significant lessening of competition (SLC) on the basis of unilateral effects through price increases or a general degradation of quality of service in the supply of online advertising services by OTAs and MSSs to certain hotels.

### **Supply of online travel search services by OTAs and MSSs to consumers**

63. In terms of online travel search services, the parties' offerings are somewhat differentiated. MSSs allow customers to search across multiple OTAs and MSSs at once whereas with an OTA a consumer can only search on that OTA. It is not clear to what extent consumers find this distinction important.
64. An important characteristic of this market is that consumers are not charged for search services but in theory consumers could be affected by a general degradation in quality of service, for example, through the quality of functionality on websites. However, as with the OFT's consideration of the supply of online advertising services by OTAs and MSSs to certain TSPs, the increment in the supply of online travel search services by OTAs and MSSs to consumers is minimal. Table 1 above shows that on a revenue basis the combined share of supply is [25-35] per cent with an increment of less than one per cent [ ].

65. In addition, online travel search services to consumers are also characterised by a large number of other significant competitors and the parties are not in fact close competitors.
66. On this basis, the OFT considers this merger does not create a realistic prospect of an SLC with regard to the supply of online travel search services by OTAs and MSSs to consumers through either price increases (consumers are not currently charged for this service) or a general degradation of quality of service.

## **Unilateral effects in the online car hire sector**

### **Share of supply**

67. As with hotels, the OFT encountered substantial difficulty in measuring the size of the relevant hypothetical markets. Unlike the hotels sector, the parties were unable to supply the OFT with share of supply figures on either revenue or volume metrics, but did supply internet traffic data which as explained above, the OFT had significant reservations. The 2012 PhoCusWright UK Online Travel Overview estimates that the gross bookings in the UK car rental sector were £1.38bn in 2011 and forecast them to be £1.43bn in 2012, with approximately £0.3bn booked through supplier websites in each year. These figures refer to use of cars hired from UK-based TSPs. Equivalent data for UK-based consumers was unavailable. The OFT was therefore unable to estimate shares of supply.

### **Online advertising services to UK-based car hire firms by OTAs and MSSs**

68. Priceline had about £[ ] of revenue attributable to UK-based TSPs in 2012, mostly through their rentalcars.com brand. Kayak had just £[ ] of similar revenue<sup>18</sup>. Kayak, therefore, had [ ] per cent of the revenue that Priceline had in this segment. The OFT considers that such a small increment makes it unlikely that significant unilateral effects would arise as a result of the merger.
69. Furthermore, the OFT contacted a number of the parties' customers (car hire firms) none of whom raised any concerns about the merger. The OFT

<sup>18</sup> These figures were provided to the OFT by the parties.



considers that the absence of concerns is consistent with the parties' limited position in this market segment.

70. Given the available evidence, the OFT considers this merger does not create a realistic prospect of an SLC with regard to the supply of online advertising services to UK-based TSPs by OTAs and MSSs through either price increases or a general degradation of quality of service.

### **Online travel search services by OTAs and MSSs to consumers in the UK**

71. Priceline earned approximately £[ ] of revenue associated with UK-based consumers in 2012, mostly through their rentalcars.com brand. Kayak had just £[ ] of similar revenue.<sup>19</sup> Kayak therefore earned [ ] per cent of the revenue of Priceline through this service. The OFT considers that such a small increment makes it unlikely that significant unilateral effects would arise as a result of the merger.
72. Given that consumers are not charged for search services and the parties limited position in the market and the absence of any concerns, the OFT considered that there is no realistic prospect of an SLC on the basis of unilateral effects in travel search services for UK-based consumers relating to car hire by OTAs and MSSs.

### **Barriers to entry and expansion**

73. The parties submitted that the costs of entry are low, and that there have been several instances of entry in recent years. As noted above, the OFT understands that the search engine Google has recently launched its own dedicated hotel and flight MSSs. The OFT does not need to conclude on barriers to entry and expansion in this case.

### **Buyer power**

74. The OFT also assessed the extent to which any existing buyer power may be relied upon to protect customers and the effect the merger may have on any existing buyer power. The OFT also notes that an individual's negotiating power will be stronger if it can easily switch its demand away

<sup>19</sup> These figures were provided to the OFT by the parties.

from the supplier.<sup>20</sup> The OFT further notes that a number of alternative OTAs such as Expedia, Travelocity and others will remain in the market post the transaction. A number of alternative MSSs will also remain such as Skyscanner and Travelsupermarket. TSPs therefore have a number of alternatives to the parties

75. A number of the parties' customers (hotels), but not all, indicated that they consider that they have bargaining power with the parties and that such bargaining power is unlikely to be affected by the merger.
76. However, the OFT has not found it necessary to conclude on countervailing buyer power in this case.

### **Coordinated effects in the online hotel sector**

77. As discussed above, Priceline and Kayak both have a horizontal and non-horizontal relationship. Coordinated effects may arise when firms operating in the same market recognise that they are mutually interdependent and that they can reach a more profitable outcome if they coordinate to limit their rivalry that could, in turn, lead to an SLC.<sup>21</sup>
78. Coordination can take different forms including, but not limited to, agreeing to keep prices higher than would otherwise be possible in a competitive market, or dividing up the market, for example, by each party agreeing not to transact with hotels currently transacting with the other or along geographic lines. Coordination can also be explicit or implicit.<sup>22</sup>
79. In assessing coordinated effects the OFT will analyse certain characteristics of the market that could be conducive to coordination. One relevant factor in this case is whether there is evidence of whether firms in the market were coordinating pre-merger.
80. If in the view of OFT the pre-merger market showed (tacitly or explicitly) coordinated outcomes, the relevant question for the OFT's merger

<sup>20</sup> Merger Assessment Guidelines paragraph 5.9.2

<sup>21</sup> Mergers Assessment Guidelines, paragraph 5.5.1

<sup>22</sup> Mergers Assessment Guidelines, paragraph 5.5.3

assessment is whether the conditions for coordination are strengthened or weakened as a result of the transaction.<sup>23</sup>

### **The merger will help automate Priceline's detection and enforcement of rate parity deviations**

81. The OFT's inquiries with third parties resulted in a complaint focussing on a complaint that the merger will help Priceline automate detection and enforcement of rate parity deviations.
82. The OFT received concerns from Skoosh<sup>24</sup> that Priceline could use Kayak to automate the detection of deviations from rate parity<sup>25</sup> making enforcement easier. Skoosh indicated that, at present, these activities are labour intensive and with Kayak's technology, Priceline could increase its ability to check other travel websites in real time and find discrepancies in rate parity.
83. The parties submitted they do not agree that price parity agreements and the ability to monitor compliance facilitate coordination. In any event, the parties claim that Priceline already has a robust automated system for parity checks which will not be enhanced by the merger. Priceline has access to this information via other technology, namely datascrapers, such as [ ] which gather real time pricing information displayed on OTA websites.
84. The parties further submitted that even if Priceline wanted to use Kayak for this purpose, Kayak does not provide a comprehensive and reliable source of pricing information for parity checks. Kayak does not store its OTA and counterparty (TSPs) pricing data on its own systems. Instead when a consumer enters a search into Kayak, Kayak takes the criteria and runs the same search on various OTA and TSP price databases which it has access via a direct feed. The pricing data is provided in real time and consequently Kayak never has a full set of an OTA or TSP's prices.

<sup>23</sup> Merger Assessment Guidelines, paragraph 5.5.8

<sup>24</sup> Skoosh (a competitor of Priceline) publically announced its concerns to the OFT, regarding the merger, through publication in Mlex on 20 March 2013.

<sup>25</sup> Rate parity agreements may prevent hotels from offering hotel rooms at lower prices to other websites.

85. The OFT considers that if Priceline were to use Kayak in this way to detect price parity deviations, it is clear that Priceline would be limited to the searches carried out by Kayak's customers which may not be an effective detection mechanism. In any event, it would appear that more effective mechanisms are already open to use by Priceline in the form of various datascraping technology. On this basis the OFT does not consider this theory of harm to be credible.

## **Conclusion**

86. On the evidence available, the OFT does not consider that the merger strengthens any coordination that may already exist in this market. The OFT therefore finds no realistic prospect of the merger leading to an SLC as a result of coordination.

## **NON HORIZONTAL ISSUES**

87. As mentioned above, the merger has both horizontal and non-horizontal aspects. The OFT assessed whether the merger will provide Priceline with the opportunity to foreclose rivals from both online travel search services to consumers and online advertising services to TSPs by using Kayak to reduce internet traffic flowing to rivals and increase the cost to rivals. In addition, the OFT assessed whether conglomerate effects could arise through Priceline adopting bundling or cross selling strategies in order to gain increased fees from TSPs.
88. In line with its Merger Assessment Guidelines, the OFT frames its foreclosure and conglomerate analysis by reference to the following three questions:
- **Ability:** would the merged entity have the ability to weaken the competitive offering of rival services, for example through raising prices or refusal to supply them?
  - **Incentive:** would the merged entity find it profitable to do so?

- **Effect:** would the effect of any action by the merged entity be sufficient to reduce competition in the affected market to the extent that it gives rise to an SLC.<sup>26</sup>

### **Foreclosure of rival OTAs from online travel search services and online advertising services in the hotel and car hire sector**

89. A number of hotels and competitors complained to the OFT that the merger could represent a foreclosure opportunity for Priceline by using the following foreclosure strategies:
- i. using Kayak's website to bias search results in favour of Priceline's offerings, and
  - ii. raising rivals costs through more aggressive bidding for advertising space on Google and increasing the costs to other OTAs and TSPs.

### **Foreclosure through bias search results**

90. The first question to consider is Priceline's ability to engage in such a foreclosure strategy. It may be the case that with ownership of Kayak, Priceline may have the ability to manipulate search results on the Kayak site so as to favour Priceline's offerings. However against this, the OFT considered a number of factors submitted to it by the parties and third parties during the course of its investigation.
91. First, the OFT notes that the PhoCusWright 2012 European Consumer Travel Report<sup>27</sup> said that around 64 per cent of UK customers booking travel services visit at least three websites when comparing and choosing travel products. Second, consumers would quickly notice if Kayak is not providing an unbiased picture of the offerings it compares and its usage by consumers would decline as they could switch to using other alternative websites. Third, Priceline has informed the OFT that it will continue to develop the business of Kayak and will allow Kayak to operate independently.

<sup>26</sup> Merger Assessment Guidelines paragraph 5.6.6

<sup>27</sup> See 3<sup>rd</sup> Edition September 2012, figure 33

92. The second question to consider is Priceline's incentive to engage in such foreclosure strategy, and the OFT has assessed potential gains and losses to Priceline of manipulating Kayak's search service in favour of its own offerings. Priceline could potentially earn more revenue from biasing the results but this could be damaging to Kayak's business as other OTAs could stop using Kayak's website. The OFT considers that the losses would outweigh any gains to Priceline of this strategy, particularly given Kayak's limited size in this market. Furthermore, one competitor confirmed that it would be unrealistic for Kayak to either exclude other OTAs or prioritise Priceline's offers on its website.
93. The third question to consider is whether the effect on competition of Priceline undertaking such a foreclosure strategy would be sufficient to reduce competition to the extent that it would give rise to an SLC. The OFT considers that in order for there to be a sufficient effect on competition to lead to an SLC, Kayak would need to be a 'must have' website for other OTAs to generate traffic to their websites. The OFT did not receive any evidence to suggest that Kayak is a 'must have' MSS for OTAs and TSPs. On the contrary, the OFT notes that Kayak is one of several MSSs available to UK customers and MSSs are one of several means by which OTAs and TSPs generate traffic to their websites.
94. Consequently, considering the evidence in the round, including the minimal size of Kayak's share of supply, the OFT considers that even if Priceline were to attempt to engage in such foreclosure activity, the merger does not raise the realistic prospect of an SLC on the basis of biased search results.

#### **Foreclosure through raising rivals' costs**

95. One competitor of Priceline raised concerns that Priceline and Kayak would bid more aggressively for advertising space on Google following the merger. The competitor indicated this would harm competition by raising the costs of acquiring traffic through Google for competitors and therefore putting them in a weaker competitive position.
96. The competitor was unable to identify why the parties would change their behaviour in this way as a result of the merger. The OFT considered that as advertising is a route by which OTAs and MSSs attract customers, it is not implausible that more intense advertising by the parties may even enhance

competition. The OFT does not consider this to be a credible theory of harm.

97. The same competitor also raised concerns that, through Kayak, Priceline could increase advertising fees/price per click it charges to OTAs following the merger. The OFT considers that given Kayak's small share of supply, it does not represent a major source of traffic for OTAs and as noted above, MSSs are not the only source for OTAs to attract traffic to their websites. The OFT does not consider this to be a credible theory of harm.
98. Consequently, the OFT considers that the merger will not create a realistic prospect of an SLC on the basis of the parties increasing rivals' costs.

### **Conglomerate effects**

99. One customer raised concern that given the parties increased share of hotel search results and advertising, Priceline could use Kayak to leverage its other brands through bundling or tying to force other counterparties to sign up to one or more other Priceline brands. The third party customer submitted that this would be to the detriment of other rivals in the market.
100. In terms of Priceline's ability to engage in bundling or tying, the parties submitted that given Kayak's very small size in the UK, particularly the hotel sector, it did not present the Priceline Group with any significant incremental leverage with TSPs as a result of the merger. In any event, the vast majority of Kayak's customers are OTAs with whom there is no opportunity for bundling or tying.
101. More fundamentally, the parties submitted that Priceline would not have the incentive to engage in bundling or tying its other brands to TSPs. It would not financially benefit the Priceline Group to grow Kayak's direct relationships with TSPs at the expense of Booking.com or other brands. It also noted that it does not engage in such practices at present.
102. Furthermore, the online travel services sector is characterised by TSPs signing up to multiple OTAs and MSSs in any event. They do this so that they can increase exposure to traffic as much as possible and ultimately to increase bookings. It is not, therefore, clear what further incentive the merger would present Priceline to engage in bundling or tying given that TSPs are already signing up to multiple sites.

103. The OFT, therefore considers that the effect on competition is unlikely to be sufficient to give rise to an SLC, given the features of the market and Kayak's small size. Consequently, the OFT considers there is no realistic prospect of an SLC on the basis of conglomerate effects.

### **THIRD PARTY VIEWS**

104. The OFT has received several complaints about the merger from both customer and competitor third parties. Third party comments have been considered where appropriate above.

105. The majority of concerns focussed on theories of harm relating to foreclosure activities and conglomerate effects. However, the vast majority of respondents did not raise any concerns regarding the merger.

### **ASSESSMENT**

106. The parties are both active in the supply of online travel search services to consumers and online advertising services to TSPs. Priceline is an OTA and Kayak is an MSS and although there are horizontal aspects to the merger, the OFT also considered non-horizontal aspects as well.

107. Without concluding on the precise relevant market definition for this case, the OFT considers the relevant frames of reference for its analysis to be online advertising services to both UK-based hotels and car hire firms by OTAs and MSSs, online travel search services to UK consumers by OTAs and MSSs both in the hotel and car hire sectors and the supply of back-end travel search technology to UK based firms by OTAs and MSSs.<sup>28</sup>

108. The OFT considered a number of theories of harm in its competitive assessment in each of the relevant frames of reference, including horizontal unilateral and coordinated effects as well as non-horizontal foreclosure of rivals through various strategies involving biased results on the Kayak website favouring Priceline's offerings and raising rivals costs. In addition the OFT considered certain conglomerate effects concerning the parties' ability to bundle or tie their brand portfolio.

<sup>28</sup> The OFT considered that the parties' overlap in the supply of back-end travel search technology was limited and did not assess the competitive effects further.



109. Whilst the OFT considered that the parties compete in each relevant frames of reference, the minimal increment to the share of supply did not raise any unilateral concerns that the merger would give rise to a realistic prospect of an SLC. The OFT considered that each party had other close and more significant competitors left in the market.
110. Whilst some third parties raised various concerns, the OFT considered that on the basis of available evidence such concerns were unlikely to give rise to a realistic prospect of an SLC. The concerns regarding horizontal coordinated effects focussed on the merger enabling Priceline to use Kayak's technology to automate in detecting and enforcing rate parity. The evidence considered showed that more effective technology than Kayak's technology already exists in the market that could enable coordination such as datascrapers.
111. Concerns were also raised in relation to the parties engaging in various foreclosure activities and conglomerate bundling or tying. On the available evidence, it was not clear to the OFT that the parties would have the ability or the incentive, as a result of the merger, to engage in such activities.
112. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

113. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.