

Representation by the Association of Independent Tour Operators on the CMA's market study 'Online platforms and digital advertising'

1. Introduction

This representation concerns the **cross-border digital advertising of holidays to UK consumers using Google PPC**. Its key elements can be readily extended to other suppliers of cross-border digital advertising of holidays.

Cross-border advertising of holidays opens many possibilities for mis-selling, under-provision, exposure to physical risk and financial loss, and outright fraud. Such advertising is therefore subject to a significant set of protections that the consumer should be able to rely on. These protections are in place in the UK and across the EU but do not exist outside it.

The difficulty that a consumer faces in pursuing claims across international borders, especially beyond the EU, should trigger an acute sense of care among intermediaries who open up and profit from this trade.

The major supplier of digital advertising to this market is Google, predominantly by PPC advertising alongside organic search results.

Geographical targeting is an essential element of all Google PPC advertising, Google's business model encourages and facilitates cross-border advertising, and Google is well-placed to inform and control this activity. However, Google makes no effort to educate, warn or restrict its cross-border travel sector advertisers from outside the EU or to exercise care towards the UK consumers those advertisers target.

As a result, the PPC ads that Google shows in response to travel searches related to destinations outside the UK/EU include a significant proportion that are placed by local advertisers who do not comply with UK/EU regulations.

In consequence:

- the UK regulatory regime for consumer protection is undermined
- UK consumers suffer detriment

- the cost of advertising is inflated by additional (and illegal) competition so that legitimate advertisers pay more than they should, with those inflated costs being passed to consumers in higher prices
- Google's non-UK/EU advertisers are exposed to commercial risks that they are unlikely to understand
- UK regulators are burdened with enforcement against Google, but Google's extraordinary resources place it beyond their ability or willingness to act
- Google's resources place it beyond the ability of individual customers or even their insurers to pursue Google under its liabilities as an intermediary

2. Basis

2.1 Background

The regulations that apply to holiday packages¹ are triggered when the package is sold or offered for sale in the UK.

It is evident in the regulations themselves (and underlined in guidance issued by BEIS in July 2018) that the trader's place of establishment is not relevant. It is clear beyond doubt that any trader that advertises packages to UK consumers must meet the obligations contained in the regulations, no matter where the advertiser trades and accepts bookings².

A holiday booking contract between a UK consumer and a trader based outside the UK is a cross-border consumer contract and is governed by Article 6 of Rome 1, which imposes the protections of the consumer's home nation if the trader 'by any means' directs its activities to that country. This widens the list of regulations applicable to such traders to include, for example, unfair trading, as well as the package travel regulations. Unfair trading regulations³ prohibit practices that contravene professional diligence and materially distort consumers' economic behaviour, as Google PPC certainly does.

In addition, most booking contracts in this sector are preceded by and often formed through an email exchange as would itself likely trigger the application of UK consumer law directly.

¹ Package Travel and Linked Travel Arrangements Regulations 2018 (PTALTAR 2018)

² See the regulations' explanatory note and BEIS guidance to the regulations. It should be carefully noted that PTALTAR 2018 19(4) addresses a particular practical issue. It requires that traders not established in the UK or EU must nonetheless provide 'effective' security to cover the costs of refunds and repatriation (eg funds accessible to UK courts). This is in addition to all the other requirements of those regulations that apply to all traders no matter where they are established.

³ Consumer Protection from Unfair Trading Regulations 2008 (CPUTR 2008)

Advertisers whose PPC ads are displayed by Google PPC on browsers in the UK have made a deliberate choice, selecting the UK from the range of countries that Google offers them for each of that advertiser's PPC campaigns. There can be no doubt that an advertiser who ticks the 'UK' box for its PPC campaigns must comply with the full range of UK consumer protections and that UK consumers ought rightly to expect those advertisers to do so.

2.2 Detriment to consumers

Holidays are a major element of household expenditure. They are the largest expenditure on intangibles that households incur.

Household expenditure on package holidays abroad is 33% more than households spend on insurance of all kinds (the next largest intangible).

AITO has provided travel industry regulators with examples of direct detriment to individual consumers and general or indirect detriment across the sector, including that intermediated by Google PPC. Examples of detriment to individuals include financial loss from trader insolvency, personal injury attributable to negligence, unfair cancellation terms, and more.

The over-riding concern is that consumers should be able to trust that products and services advertised to them in the UK are compliant. Consumers must have confidence that they will at least receive the protections to which they are entitled by law.

Travel offerings that are compliant with UK consumer law are very different from those that are not. However it is in practice very hard for most consumers to understand even the key differences affecting their financial protection, their personal safety, their right to cancel, their right to accurate information, the provider's responsibilities when things go wrong, their right to redress in UK courts at UK levels of compensation, etc.

Very importantly, it is impossible for consumers to know which products are compliant and which are not when the two are promoted alongside each other in PPC ads. A judgement is only possible after clicking on the ad and investigating the product with an expert eye – by which time Google has taken its fee for the ad.

Insofar as the regulation of package travel has its complexities it is up to every business involved, including Google, to see that those complexities are understood and dealt with before the consumer is presented with opportunities to investigate the product and make a purchase decision.

2.3 Commercial impact on UK firms

Google PPC plays a very significant role in facilitating illegal competition to UK firms in the travel sector.

Travel firms, including tour operators and travel agents, conduct their business in a heavily regulated and very competitive environment. Compliance with UK regulations places large financial and administrative burdens on them. Administrative costs are high, margins are thin. There is no scope to absorb increases in costs - any increase must be passed on to consumers.

Illegal competition is a severe and growing problem for this sector. It undermines a large number of enterprises, restricts opportunities for new businesses, weakens employment, reduces tax revenues, and pushes up the prices that travel firms must charge.

2.4 Commercial risk to Google advertisers

Traders who breach the package travel regulations are subject to several commercial risks:

- **enforcement risk** Non-compliant traders may be prosecuted.
- **unforeseen liabilities** For example, the regulations make the organiser liable for injury caused not only by the organiser itself but also its subcontractors. Waivers are set aside. Damages are to be pursued in the UK courts (no matter what jurisdiction is selected in the booking contract) whose awards are at UK levels. Few organisers outside the UK understand the extent of such liabilities and the critical need for insurance to cover them. Such insurance is not available for organisers in many of the destinations from which Google accepts ads.
- **nullity of booking contracts** UK consumer law inserts several key provisions in booking contracts for package travel, including provisions that can be regarded as fundamental to the contract. Non-compliant traders are exposed to the risk that the consumer can at any time declare its booking void and be refunded in full eg by their credit card provider.
- **infection** The regulations do not require a connection between a booking and a particular ad, for example, for that booking to be regulated by UK laws. Instead the regulations are constructed so that the whole of a trader's UK business becomes subject to UK regulation if the trader takes even limited steps to target UK consumers. A single PPC ad targeted at the UK could be enough to apply UK regulations to all that trader's bookings from the UK, no matter what marketing activity, if any, produced each individual booking.

Google makes no effort to communicate these issues to its advertisers.

2.5 Enforcement

BEIS is responsible for the enforcement of package travel regulations. It apportions its responsibility to Trading Standards unless the package includes any element of air travel in which case the CAA is responsible.

Enforcement gaps arise because Trading Standards is devolved to local councils, whose budgets may not allow the pursuit of rogue traders across international borders. Their budgets are better spent on providing local amenities, schools and social care.

The CAA is centrally organised and funded. While it could pursue traders across borders, it is keen to identify approaches that offer the best cost-effectiveness.

Practically all non-compliant purchases are made in response to activities conducted by intermediaries⁴ including PPC advertising conducted by Google. Most such intermediaries are well-placed to grasp the legal implications of the services they provide to the unwitting traders who use them and these intermediaries are readily subject to enforcement in the UK. It is therefore increasingly accepted that enforcement against intermediaries is the most cost-effective approach and Google can expect to be included in this.

2.6 Google's stance

Google's moral and reputational liability is clear:

- UK regulation of the package travel sector parallels the regulation of sectors such as financial services and healthcare. Google has demonstrated its ability to act by the steps it takes to educate, warn and restrict its advertisers in those sectors.
- Google makes no effort to seek, or even permit, feedback from consumers, trade bodies, or enforcement authorities that might facilitate proper control of this sector.
- In effect, and seemingly by intent, Google is gaming the enforcement gaps in this sector, betting that the demands on local authorities for local amenities and social services will outweigh their responsibility to enforce consumer protection against Google's extreme power, its access to financial and other resources, and the strategy of opacity, non-engagement and delay that it has so far adopted to this issue.

⁴ the term 'intermediary' is used to denote any businesses engaged by the trader to target consumers.

Google's legal liability is also clear⁵:

- Google's advertisers commit primary offences when they place ads geographically targeted at UK consumers where the service they provide does not meet UK regulations.
- Google has knowledge that such offences are likely where the advertiser's account is outside the UK/EU and their campaigns target the UK. In addition it could easily require each such advertiser to confirm the country where it accepts bookings.
- Google's contract with its advertisers gives Google the power to act.
- Google has been placed on specific notice of its role in the commission of these offences.
- Google has been recklessly inactive: it has taken no steps to mitigate the illegality carried out through its services, or to check compliance⁶.
- Google's practice towards this sector contravenes the requirements of professional diligence and distorts consumer behaviour.

Together these variously create for Google secondary and causal liabilities, and liabilities as principal under the CPUTR.

These liabilities are exacerbated to the extent that Google sits on its hands so that its revenues are not impacted.

⁵ The liability of intermediaries in this sector to enforcement has been confirmed under three heads:

- secondary ('accessory') liability, in criminal law
- causal ('bypass') liability, provided in PTALTAR 33 and CPUTR 16
- liability as principal, under the CPUTR

There is no difference in the liability of online and offline intermediaries.

Liability is clarified where the intermediary plays an active or knowing role, as to which evidence that the intermediary has been put on notice is a compelling factor.

In addition to enforcement, intermediaries are liable to individual consumers. Those who knowingly promote harmful services can expect to compensate those who suffer harm.

⁶ In this sector intermediaries can easily identify non-compliant traders. The online ATOL register lists traders licensed to offer air packages in the UK. Compliance with the PTALTAR is practically impossible without the involvement of an entity based in the UK as organiser or retailer.

Advertisers based in the UK or EU can be assumed to be compliant because the enforcement regime bears on them in an effective way. Those advertisers whose Google accounts originate elsewhere should be assumed to be non-compliant: it is very hard for them to comply, most do not comply, and the enforcement regime is largely ineffective against them. To accept without due diligence package travel advertising from an account outside the UK/EU is therefore reckless and triggers secondary liability in the same way that explicit knowledge would trigger that liability.

AITO has approached Google to raise its concerns. Google's response has been to divert and obstruct. AITO first approached Google in the UK, expecting its concerns to be passed to an appropriate department. The response it received was a simple denial that Google UK was in any way responsible. AITO accordingly approached Google Ireland, which runs PPC from UK advertisers. The response it received to that approach was dismissive:

"Google does not monitor the registrations of companies and cannot take on the position of policing this."

This dialogue is not the first that Google has tried to bring to an early close without taking action.

3. Steps for Google to take

The steps that Google should take are easily within its capability:

- 1) include package travel in its policy list of restricted content, eg on <https://support.google.com/adspolicy/answer/6008942>
- 2) provide a policy outline for package travel, eg within 'Advertising policies' on the above page, in the same way that 'financial services' and 'healthcare and medicines' are covered.
- 3) train its Google Experts to advise advertisers whose accounts originate outside the UK/EU and/or whose bookings are made outside the UK/EU of their likely non-compliance and its repercussions when advertisers 'Request a Review'
- 4) establish and train a team to carry out reasonable internal compliance checks ⁷
- 5) train its staff reviewing advertising editorial to flag cross-border package travel ads for internal compliance checks.

establish a reporting facility so that others outside Google are easily able to draw Google's attention to advertisers that appear likely to be non-compliant.

4. Steps for the CMA to take

This market is not working well.

The CMA should initiate as soon as practicable enforcement action against Google for its disregard of consumer protection in the travel sector. Given the responses to AITO from

⁷ Compliance checks could instead be carried out by Trading Standards for an appropriate fee, as is done for others.

Google UK and Google Ireland one suspects that this must be directly to Google Inc, which controls Google's PPC activity globally.

There is an undeniable overarching need for the CMA to urgently place its supervision of online platforms on a proper footing, centralised and covering the whole of the UK. The issues are beyond the scope of Trading Standards (which is localised) or the CAA (whose focus is on air travel) to address.

The CMA may wish to establish a working group that is focussed on the travel sector and invite dialogue with practitioners in this sector. AITO would be pleased to engage with any such effort, alongside the work it does with BEIS, Trading Standards, and the CAA.

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