

16 October 2015

**Submission to EU Internal Market Sub-Committee, House of Lords  
Inquiry: Online platforms and the EU Digital Single Market inquiry  
British Hospitality Association — Written evidence**

1. This response is submitted on behalf of the British Hospitality Association (“BHA”) which is a representative body for the UK hospitality and tourism industry, speaking on behalf of 40,000 hospitality and tourism establishments, including hotels, restaurants, catering and facilities management companies, attractions and apart-hotels in the UK.
2. The BHA has conducted two surveys with its members relevant to this call for evidence, the first asking them to respond to questions 3, 4 and 5 of the call (“Survey”). The second survey mainly concerned the National Living Wage but also sought information regarding OTA commissions in the UK hospitality industry, which is included in the answer to question 4b.

**Summary**

3. In summary the answers provided to the Inquiry’s questions set out below indicate that the BHA and its members agree that:

- online platforms in their industry have provided a wider market place with global reach, resulting in exposure to more customers and increased business but this has come at a price. The growing power of online platforms has created a market which is not competitive and in which businesses and customers alike have less choice;
- that it is no longer feasible for the majority of hospitality and tourism venues to operate without online sales, as most searches for hotel, restaurant and other bookings are made online. Venues must therefore make agreements with online platforms and are obliged to choose the largest platforms, since these are the ones visited by customers. They are visible on the first pages of a customer’s search, venues own websites appearing several pages on;
- as a result, venues, in particular SMEs have little bargaining power and agreement terms are controlled by the online platforms, resulting in contracts which include “parity clauses” and “most favoured nations” clauses;
- a myriad of other concerns arise as a result of this platform/industry/customer imbalance. These include excessive commissions and lack of transparency on the part of online platforms, whose websites are often confusing and misleading for the customer, for example, in not providing the customer with key information about pricing, how ratings are awarded to venues, terms of booking and so on;
- the need for answers to these problems is pressing as the most powerful online platforms have grown in strength very rapidly, in control of the market and in wealth, giving them enormous resources to consolidate their position. This Inquiry is welcomed by the BHA as a key step in considering how to regulate online commerce and how to implement regulation in the short term, particularly since reliance on existing legislation is not seen as an effective tool for addressing the issues raised, rapidly and cost effectively.

**4. In response to Q.1 Do you agree with the Commission's definition of online platforms? What are the key common features of online platforms and how they operate? What are the main types of online platform? Are there significant differences between them?**

Yes, the definition is accurate.

The main types of online platform used in the hospitality and tourism industry are online marketplace platforms such as Booking.com, Expedia, Laterooms.com, Lastminute.com, Opentable and Bookatable and search engines such as TripAdvisor and, of course, Google as initial search engine of its customers.

Online marketplaces deal with the booking of hotel rooms, restaurant tables and so on, whilst search engines provide information about available venues in particular areas and with particular characteristics and provide comparative pricing. There are links on search engines directing customers to Online Travel Agents ("OTAs") and other hospitality and travel marketplaces. The large online platforms now often own both the search engine and online marketplace platforms, including OTAs, blurring the distinctions between different platforms, as does, for example, searching Google Maps for the location of a restaurant and being able to click on Open table within the Google app to book.

**5. In response to Q.2 How and to what extent do online platforms shape and control the online environment and the experience of those using them?**

See our answers to questions 3 to 5.

**6. In response to Q.3 What benefits have online platforms brought consumers and businesses that rely on platforms to sell their goods and services, as well as the wider economy?**

Following the answers received in the Survey the BHA can say, in summary, that there is consensus that on-line platforms, including on-line travel agents (OTAs) and search engines, have been instrumental in enabling the industry to reach customers globally, resulting in an increase in business and exposure to a wider audience in Europe and the rest of the world.

*"Increase in business, and exposure to a wider audience.*

*More exposure to potential guests, therefore increased sales"*

Marketing and the expertise of online companies has enabled large businesses to extend global brands and revenue streams, whilst SMEs have been able to use OTA's marketing resources to reach many more customers.

*"The OTAs helped smaller businesses, who couldn't afford the expertise on their own, have access to the www as it replaced the various guide books travellers had used.*

*Global brand coverage. Huge increase in global revenue streams. Efficiency savings in coordinating pricing, supply and booking delivery/creation."*

OTAs and search engines such as Tripadvisor are seen as useful for consumers since they provide "one-stop shops" for travellers.

*"The ability for a service provider to reach a wider International audience without extra work or language translation issues.*

*Online Travel Agents (OTAs) create a 'one-stop-shop' for travellers. They allow a guest to search in an area and instantly find all of the hotels in the area. Guests browsing the web no longer have to trawl through lots of different websites. They have very much replaced the old-fashioned guide book in this sense."*

**7. In response to Q.4 What problems, if any, do online platforms cause for you or others, and how can these be addressed? If you wish to describe a particular experience, please do so here.**

Following the Survey the BHA can say, in summary, that the key issues raised are:

- a) The so-called parity clauses included by OTAs in their agreements with hotels and serviced apartments. These “most favoured nations” clauses are very restrictive: prices, commercial conditions (type of room, etc.) and number of rooms offered listed on the OTA’s website must be equal to or more attractive than prices offered by the hotels themselves, all other OTAs and off-line booking channels.

Recently, following various complaints resulting in “settlements” throughout Europe, Booking.com and Expedia have agreed to introduce “narrow parity” whereby a hotel can offer other OTAs lower prices, more rooms and better commercial terms but must not itself offer better terms on its own website than the OTA with which it is contracting. In practice, however, the combination of this “narrow rate parity” and the hotel’s “Best Price Guarantee” means that hotels cannot discount prices through rival OTAs. The result is that the customer is left without a choice, as prices are the same across the market place.

*“Restrictive pricing. They all say that we cannot charge less than they do, but that we can offer different pricing to other OTAs. However as they all have the clause “not less than us” clause, they effectively fix a single price and remove competition.*

*It is tantamount to price fixing when the platform contracts the operator to giving best prices and best price guarantee to them. Businesses should be free to choose which prices strategy they want and decide which price to give to who: direct booking or via OTA's.”*

- b) Another key concern is the amount of commission taken by the OTAs, felt to be unrealistically high, ranging between 15%-25% and, on occasion, between 10%-35%.

The survey conducted by the BHA on the National Living Wage is relevant to this issue. It provided 99 responses from hotels answering questions about OTAs.

The total turnover of the 99 was £1.03 billion or about 4% of the total hotel and similar turnover of £24 billion (source Oxford Economics). 96 of the 99 obtained business via OTAs, 3 did not.

The question “What percentage of your sales are via OTAs?” provided the answer that, of the total £1.03 billion turnover, £489.5 million (47.4%) came via OTAs.

The question “What is the average rate of commission you pay to Online Travel Agents on these sales?” gave the answer that total commission paid to OTAs on the £489.5 billion was £77.26 million, which is an average 15.8% commission on those sales and equal to 7.5% of all sales.

It is worth noting that the total turnover of hotels and similar turnover is £24 billion, if the 7.5% is applied across the whole sector, that would be £8 billion in commissions to OTAs.

Members comments in response to the Survey were focussed on the high level of commission, the effect on room prices to customers and the lack of clarity in booking methods such as “pay per click”:

*“OTAs charge commission of between 15-25%, as the share of business which OTAs bring to a hotel increases, so does the hotel tariff. Thankfully, we have a relatively small percentage of our business coming through OTAs, but our prices have increased across the board by around 5% to cover these commission charges. I know of some hotels who claim that their general tariff has increased by 10% to cover OTA commission. By comparison, a conventional travel agent charges 8% commission, and their involvement is normally much more labour intensive.*

*VERY expensive commission charges, 20% commission is too high.*

*Increase in costs to both the business and the end consumer. Commission levels are not proportionate to the effort expended.*

*Booking.com and others compete against us as a vendor causing an unfair market place (Competition and Markets Authority ref is CE/9320-10) whereby we have to Pay per click to compete against a partner who will also charge us a commission for a booking."*

Of particular concern is the lack of transparency for the consumer, who is often unaware that a commission is being charged by the OTA or that this inevitably increases the cost of the room. Even when a breakdown of the room charge is given on the platform, the commission is usually not identifiable but simply included in "costs and taxes".

- c) The power of OTAs and search engines is felt by all hotels but especially by SMEs. OTAs and search engines have huge budgets for advertising and are able to pay to position themselves at the top of or high up on the Google page, often leaving the hotel's own website, particularly if it is a SME, to be found several pages on.

*"Their huge size and marketing muscle effectively bullies us into submission. We use Booking.com, which then means that any online search for our hotel name or related search, has a Booking.com banner advert at the top of the first page. We cannot compete with that, and it drives our customers through to the OTA because they click the first link they see that relates to us."*

Customers who search by the name of the hotel are often drawn to an OTA or search engine which is confusingly similar to the hotel website, leading some customers to believe that they are booking on the hotel website. Many other features of OTA websites are misleading and not transparent - such as how the platform awards rating stars.

*"Our particularly bad experience was with Expedia or Venere who had set up a website, which appeared to be our official website on their Irish system and UK, using our photos (they had asked our permission for use of photos to help promote us to their clients) and which took quite a few bookings from people, who thought they were booking with us direct, on which they were charging us 23% commission.*

*Their IT departments have set up algorithms on all search engines preventing the general public from having a choice and finding exactly what they are looking for. Many internet search engine pages are now only full of sponsored ads by Booking.com, Trivago, Lastminute.com, etc. so when anyone tries to find a specific page it cannot be found. We have had previous guests who cannot find our contact details as even a search for our own website still leads them to Booking.com etc where they finally make their reservation as they give up trying to find us."*

There is a general consensus that OTAs and search engines in working together dominate the marketplace and create an anti-competitive marketplace for the hospitality venues and consumers. An additional concern is that the large online platforms are coalescing –Expedia and Trivago, Priceline/ Booking.com/Open Table/Kayak giving them a dominant position.

Other concerns include customer reviews on websites, such as TripAdvisor, which are felt to be unfair since they frequently give no right of reply to the establishment reviewed. The way in which ratings are given to venues is not disclosed to the customer and, contrary to the belief of consumers, it is not simply based on the quality of the venue or its match to the customer's search requirements but includes factors such as the commercial value of the venue to the online platform.

It is also felt that OTAs fail to take responsibility in general for booking practices. Whilst their insistence on retaining customer contact details and not giving them to the venues lacks

transparency. From a purely practical point of view, it makes difficult for the hotel to manage the customer's stay, affecting the quality of service enjoyed by the customer.

**8. In response to Q.5 In addition to concerns for consumers and businesses, do online platforms raise wider social and political concerns?**

Following the Survey of BHA's members, the BHA can say, in summary, that online platforms are thought to raise serious social and political concerns:

a) Online platforms are seen as dominant in the marketplace and monopolistic. They are able to dictate prices, insist on restrictive agreements and do not appear in the eyes of the hospitality industry to have any effective independent regulation, unlike other industries. In particular, SMEs are seen as disadvantaged since they have little bargaining power and customers as online platform websites are not transparent.

b) There is a clear indication that the industry would like online commerce to be more closely regulated to produce a fairer and more competitive market in which consumers and businesses can operate on an equal footing.

*"They are becoming monopolistic and don't appear to have independent regulation of their claims. Size and online presence appears to raise them above being questioned.*

*All those platforms are part of companies which operates globally, with little respect for the local economies.*

*Many online platform businesses are buying up other online platform businesses. Expedia Inc has so many businesses it has acquired, for example, more recently Wotif and now Orbitz, that there is reducing competition and the benefits that this brings the consumer. Although the current rate parity issues prevent competition on price. The 'power' certainly lies with the online platform, and less competitors in the marketplace reinforces this.*

*Yes, as they are dictating to everyone what prices to charge.*

*SMEs are disadvantaged within the online booking industry as ranking is often dependant on availability and larger hotels invariably have more."*

**9. In response to Q.6 Is the European Commission right to be concerned about online platforms? Will other initiatives in the Digital Single Market Strategy have a positive or negative impact on online platforms?**

The BHA and its Members recognise the advantages brought by the Digital Single Market and the benefits it is capable of bringing to their industry and to their customers across the EU and beyond. The BHA welcomes the attention which on-line platforms are now receiving and the assessment being made of the *"nature of the problems that may arise from their pivotal role in the digital economy and whether existing regulatory tools are sufficient to tackle them, or whether new tools need to be developed"*.

The BHA suggests that until such an assessment has been definitively concluded and until the problems are addressed – either by existing, or new means – it is difficult to answer the second part of this question other than to express the hope that the various problems identified at answer 4 above can be adequately resolved to the satisfaction of the BHA Members and their customers.

**10. In response to Q.7 Is there evidence that some online platforms have excessive market power? Do they abuse this power? If so, how does this happen and how does it affect you or others?**

The general consensus amongst the BHA members is that online platforms have enormous power which is steadily growing. A large share of the market is held by a very few companies, which often own other online platforms performing related functions in the same industry, for example search engines and online booking websites.

The largest OTAs are able to insist on onerous contract terms as hospitality venues have no realistic alternatives. Put simply these venues need online bookings to conduct their business but, except perhaps for the very largest hotel chains, they do not have the resources to pay for their websites to appear on page one, or even two or three, of a Google search. Their difficulties are further exacerbated by a lack of transparency on the websites making bookings for them.

The result is that hospitality venues are bound by agreements and practices which distort the market, are anti-competitive and do not provide choice for the customer, hospitality venues and smaller and start up OTAs.

The two principal problems which affect BHA Members and its customers are those which are already widely-recognised, namely, *High commissions/non transparent pricing* ("Excessive Charging") as well as *Restrictions on pricing*. These problems occurred repeatedly in answers to question 4 above and are well-documented across the EU as a whole where, so far, they have been addressed with varying degrees of forcefulness and effectiveness in an ad hoc manner within different Members of the EU with Germany taking the lead (so far as price parity clauses are concerned) in cases such as: *Munich District Court, file no. 37 O 7636/10, 3 May 2010* and in *HRS- Hotel Reservation Service v Hotelverband Deutschland (IHA)* where the Düsseldorf Regional Court ordered that:

*"8. The MFN agreements between HRS and its hotel partners are likely to affect trade between Member States within the European Union. The agreements are within the scope of both the German and of the European bans on anti-competitive agreements. This is neither contradicted by the status of HRS, which HRS considers to be that of a 'genuine agent', nor are the MFN clauses mere ancillary agreements implementing contracts which are neutral in terms of competition law. The MFN clauses bring about a restraint of competition, in particular they are a competitive restraint between the hotel portals and between the hotels; it can be left open whether competition is restrained by object, as well.*

*9. There are significant restraints of competition by effect. The MFN clauses remove the economic incentives for the hotel portals to offer lower commissions to the hotels or to face up to competition by adopting new sales strategies. Market entries by new competitors are made more difficult and opportunities open to hotels are considerably restricted. Hotels cannot use different hotel portals and other sales channels in order to make offers at different prices and conditions. Moreover, the MFN clauses of the two other major hotel portals operating in Germany, namely Booking and Expedia, strengthen the restraints of competition which are brought about by the MFN clauses of HRS".*

**11. In response to Q.8 Online platforms often provide free services to consumers, operate in two- or multisided markets, and can operate in many different markets and across geographic borders. Is European competition law able adequately to address abuse by online platforms? What changes, if any, are required?**

The BHA recognises that the problems of Excessive Charging and MFN clauses can be addressed in three ways: regulatory action; negotiation between platform operators and hotel operators; or, as has occurred already in Germany and some other parts of the EU, by litigation. None of these routes necessarily require a substantive change in European Competition law: rather, they are dependent upon the adequate enforcement of the current legal regime and compliance with that regime by the relevant participants.

The HRS case arguably did not do anything other than identify a practice on the part of the on-line platform operators which was, as the Court declared, a significant restraint on competition *by effect*, if not also *by object*. Private litigation, however, is the most expensive and commercially dangerous means by which these abuses can be addressed as it is ruinously costly, slow and uncertain.

**12. In response to Q.9 What role do data play in the business model of online platforms? How are data gathered, stored and used by online platforms and what control and access do consumers have to data concerning them?**

The BHA does not propose to answer this question.

**13. In response to Q.10 Is consumer and government understanding and oversight of the collection and use of data by online platforms sufficient? If not, why not? Will the proposed General Data Protection Regulation adequately address these concerns? Are further changes required and what should they be?**

The BHA does not propose to answer this question.

**14. In response to Q.11 Should online platforms have to explain the inferences of their data-driven algorithms, and should they be made accountable for them? If so, how?**

The BHA considers that the potential for effects harmful to consumers arising from online platforms' access to huge quantities of customer data – and ability to manipulate this data – represents a major future challenge to competition and other regulatory authorities. A better understanding of the algorithms applied by online platforms is essential to identifying and combatting these effects in the online environment. Therefore, the BHA does indeed consider that the inferences applied by online platforms' data-driven algorithms should increase in transparency, to enable regulators to assess whether they have at their disposal adequate tools to address the potentially harmful effects of these practices and, if not, consider regulatory reform.

**15. In response to Q.12 Can you describe the challenges that the collaborative economy brings? What possible solutions, regulatory or otherwise, do you propose?**

The BHA is concerned at the unregulated nature of some of the collaborative or sharing economy platforms. Websites such as Airbnb invite bookings for overnight stays in accommodation which is not regulated and for which no safety standards are in place. As a regulated industry the hospitality sector believes this is both unsafe for customers and unfair to hospitality venues, many of which are SMEs which are required to be rigorous in their application of safety requirements.

In addition, the lack of regulation allows the sharing economy to undercut the hospitality and tourism industry by charging lower rates since they are not paying taxes or complying with industry standards.

**16. In response to Q.13 How are online platforms regulated at present? What are the main barriers to their growth in the UK and EU, compared to other countries?**

Online platforms are regulated through the application of the existing general competition, consumer protection and data protection rules, at EU level and in the individual countries where they operate. To the BHA's knowledge, they are not subject to any industry-specific or business model-specific regulation.

**17. In response to Q.14 Should online platforms be more transparent about how they work? If so, how?**

OTAs need to be more transparent in the areas mentioned in question 4 which include pricing, hotel rates, the terms on which the customer is booking, how the customer is able to raise queries and, especially important, the inclusion of details of commission included in the room rate. OTAs should be transparent in how they manage their platforms, order hotel and venue listings, award ratings and should supply all venues with the customers' contact details.

As part of a regulatory solution to these problems, complete transparency is a necessary ingredient.

**18. In response to Q.15 What regulatory changes, if any, do you suggest in relation to online platforms? Why are they required and how would they work in practice? What would be the risks and benefits of these changes? Would the changes apply equally to all online platforms, regardless of type or size?**

The need for some form of additional regulation is apparent from the present position in the market place. However, at this stage it is difficult to speculate as to what form those regulations will take.

As a minimum, the BHA recommends that online platforms should – in the interests of customers – be subject to enhanced consumer protection rules requiring them to provide more comprehensive information to customers (particularly regarding the commission rates charged by platforms) and to provide customers' contact details to hotels at which bookings are made via their platform (similar to the undertakings recently made binding on Airbnb and eDreams by the Australian Competition and Consumer Commission).

With regard to price and similar parity obligations, the BHA suggests that the dampening effects of the widespread use of parity obligations on price and other parameters of competition justifies withdrawal of the European Commission's Vertical Restraints Block Exemption, which the Commission is currently empowered to do by Article 29 of Regulation (EC) No 1/2003.

**19. In response to Q.16 are these issues best dealt with at EU or member state level?**

In theory, for a cross border industry such as hospitality and tourism these issues might be best dealt with at the EU level but from a practical perspective this would be a lengthy process. Further, absent an individual competition enforcement action for suspected breach of Article 101 or 102 of the Treaty on the Functioning of the European Union, even if a decision were reached, the effectiveness of any sector inquiry at EU level would be limited by the European Commission's inability to impose binding remedies (unlike, for example, the UK Competition and Markets Authority). So the BHA welcomes the intervention of the Internal Market Sub-Committee, which carries with it the prospect of Member State-level intervention and the power to follow up with direct action in the UK, if appropriate.

The BHA would welcome the opportunity to develop the answers set out above at the proposed public hearings before the Internal Market Sub-Committee and to assist it in the resolution of the problems which have been identified by Members of the BHA and others across the EU.

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