

## Determination

### **Expedia, Inc and Wotif.com Holdings Limited [2014] NZCC 30**

- The Commission:** Dr Mark Berry  
Anna Rawlings  
Dr Jill Walker
- Summary of application:** An application from Expedia, Inc. seeking clearance to acquire up to 100% of the issued shares of Wotif.com Holdings Limited.
- Determination:** Under s 66(3)(a) of the Commerce Act 1986 the Commerce Commission determines to give clearance to the proposed acquisition.
- Date of determination:** 4 November 2014

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

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## The proposed acquisition

1. On 18 July 2014, Expedia, Inc. (Expedia) applied for clearance to acquire up to 100% of the issued shares of Australian Securities Exchange-listed Wotif.com Holdings Limited (Wotif).
2. The proposed acquisition is to be implemented by way of a scheme of arrangement, and is subject to Expedia receiving clearances from the Commission as well as the Australian Competition and Consumer Commission (ACCC) and the Australian Foreign Investment Review Board.
3. The acquisition would result in the aggregation of Expedia's and Wotif's online travel agency businesses.

## The decision – clearance granted

4. The Commission gives clearance to the proposed acquisition. The Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

## Our framework

5. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>1</sup>

## The substantial lessening of competition test

6. As required by the Commerce Act 1986, we assess acquisitions using the substantial lessening of competition (SLC) test.
7. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).<sup>2</sup>
8. We make a pragmatic and commercial assessment of what is likely to occur in the future with and without the acquisition based on the information we obtain through our investigation and taking into account factors including market growth and technological changes.
9. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),<sup>3</sup> or reduce non-price factors such as quality or service below competitive levels.

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<sup>1</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

<sup>2</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>3</sup> Or below competitive levels in a merger between buyers.

10. Determining the scope of the relevant market or markets can be an important tool in determining whether an SLC is likely.
11. We define markets in the way that we consider best isolates the key competition issues that arise from the acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.<sup>4</sup>

#### **When a lessening of competition is substantial**

12. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.<sup>5</sup> Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.<sup>6</sup> An SLC in a significant section of a market, may, according to circumstances, be an SLC in a market.<sup>7</sup>
13. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

#### **When an SLC is likely**

14. An SLC is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur. This requires that an SLC is more than a possibility, but does not mean that it needs to be more likely than not to occur.<sup>8</sup>

#### **The clearance test**

15. We must clear an acquisition if we are satisfied that the acquisition would not be likely to substantially lessen competition in any market.<sup>9</sup> If we are not satisfied – including if we are left in doubt – we must decline to clear the acquisition.<sup>10</sup>

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<sup>4</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>5</sup> *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

<sup>6</sup> *Ibid* at [129].

<sup>7</sup> As the Federal Court of Australia noted in *Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd* (1982) 64 FLR 238, 260; 44 ALR 173, 192; ATPR 40-315, 43,888, cited with approval by McGechan J in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 at 435: “Although the words “substantially lessened in a market” refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening of competition in a market”.

<sup>8</sup> *Ibid* at [111].

<sup>9</sup> Commerce Act 1986, s 66(1) of the Commerce Act 1986.

<sup>10</sup> In *Commerce Commission v Woolworths Limited* (CA), above n 2 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”. However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

## Key parties

### Expedia

16. Expedia is a global online travel agency (OTA) listed on the NASDAQ in the US. Expedia provides booking services for accommodation, flights, vacation packages, rental cars and other retail travel products through its websites, which include Expedia.co.nz and Hotels.com. Expedia also owns a majority share in the metasearch site, Trivago.com.<sup>11</sup>

### Wotif

17. Wotif is an Australian-based OTA listed on the Australian Securities Exchange in Australia. Wotif provides booking services for accommodation predominately, but also for flights, travel packages and other travel products through its websites, including Wotif.com and Lastminute.com.au.

### Other industry participants

18. A number of other international and domestic OTAs operate in New Zealand. The largest of these is the global OTA, Priceline Group (Priceline). Priceline provides booking services for accommodation, flights, vacation packages, rental cars and other retail travel products through its websites, including Booking.com and Agoda.com. Priceline also owns the metasearch site, Kayak.com.

## How the acquisition could lessen competition

19. OTAs are one of a number of online and offline platforms through which travel service providers distribute their inventory to consumers. The primary platforms are:
- 19.1 **Direct bookings** – Consumers may book directly with a travel service provider by phone, email, or in person. In addition, all airlines and many accommodation providers use internet booking engine software to allow consumers to book directly on travel service providers' own websites. Many accommodation providers obtain access to such software through channel managers that they employ to manage their inventory across their own websites, OTAs and metasearch sites in real time (thus reducing the risk of double-booking by ensuring that availability is up to date).
- 19.2 **OTAs** – OTAs provide online booking services for accommodation, flights, travel packages and other travel products supplied by different travel service providers. OTAs enable an accommodation provider to list their property (including room availability and pricing) alongside other properties in their geographic area. OTAs are essentially marketing and booking platforms that take bookings on behalf of travel service providers. OTAs charge travel service providers a commission for each booking made. Some OTAs also charge consumers a booking fee.

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<sup>11</sup> We discuss metasearch sites in more detail below.

- 19.3 **Metasearch sites** – sites such as TripAdvisor<sup>12</sup> and Google Hotel Finder<sup>13</sup> allow consumers to compare prices for travel products across different OTAs (eg, compare, across OTAs, prices for a specific accommodation provider on a particular date) and accommodation providers.<sup>14</sup> On metasearch sites, consumers search for travel products based on characteristics such as geography and price and then ‘click-through’ to an OTA (or, in some cases, the travel service provider itself) to complete the booking.<sup>15</sup> Metasearch sites typically charge on a ‘cost per click’ basis to appear in search results, meaning that OTAs and travel service providers pay for every click a consumer makes on their offering, regardless of whether a booking is made.
- 19.4 **Bricks and mortar travel agencies** – Traditional travel agencies have a physical presence where consumers meet directly with travel agents. While most bricks and mortar agencies have developed an online presence (eg, House of Travel, Flight Centre), physical stores cater to consumers who prefer personal advice and assistance. Travel agencies charge travel service providers a commission based on the value of the booking.

### With and without scenarios

20. We compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.<sup>16</sup>

### With the acquisition

21. Expedia would acquire up to 100% of the shares of Wotif. Expedia has publicly stated that the proposed acquisition is an opportunity for it to:<sup>17</sup>
- 21.1 add to its portfolio of travel’s most trusted brands;
  - 21.2 share best practices and technology with Wotif to improve conversion on Wotif sites;
  - 21.3 grow Wotif’s international accommodation business by enabling it to access Expedia’s global supply network; and
  - 21.4 grow Expedia’s accommodation business by enabling it to access Wotif’s Australian and New Zealand supply network.

<sup>12</sup> Although TripAdvisor now has a metasearch function, it started as a travel review website. TripAdvisor lists over [ ] accommodation properties in New Zealand, ranging from hotels to youth hostels. E-mail from [ ].

<sup>13</sup> The main other metasearch sites – Kayak and Trivago – are owned or are partly owned by Priceline and Expedia, respectively.

<sup>14</sup> For example, an accommodation property’s listing on a metasearch site will show prices and booking buttons for a number of OTAs and may also list prices from an accommodation provider’s own site.

<sup>15</sup> Metasearch websites do not have their own booking functionality and instead consumers must either use a travel service provider’s website (eg, an accommodation provider’s website) or an OTA to complete the booking.

<sup>16</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, above n1 at [2.33].

<sup>17</sup> Wotif Group, *Scheme Booklet* (5 September 2014) at 28.

22. [ ]<sup>18 19</sup>

### **Without the acquisition**

23. Without the acquisition we have considered:

23.1 whether Wotif is likely to be sold to another party; and

23.2 what is likely to happen to Wotif's product offerings, including the commission rates it charges to accommodation providers and booking fees charged to consumers.

24. For the purposes of this determination, we have adopted a without the acquisition scenario where Wotif would continue to compete as a stand-alone entity.

25. We have compared the acquisition against this scenario on the basis that it is the most conservative. Doing so means our analysis is based on a worst case scenario, in the sense that it is the scenario that would give rise to the greatest competition concerns. If the proposed acquisition is unlikely to substantially lessen competition compared to this worst case scenario, then it is unlikely to substantially lessen competition when compared to any other likely scenario.

### *Sale to another party*

26. We considered whether Wotif would be sold to another party without the acquisition. Wotif submitted that without the acquisition [ ],<sup>20</sup> although Wotif stated that [ ].<sup>21</sup>

27. We consider that there is a real chance that Wotif would be sold to another party without the acquisition.

### *Commission rates and booking fees*

28. In the without the acquisition scenario, we consider that Wotif (whether independent or owned by another entity) would seek to remove booking fees to consumers [ ].

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<sup>18</sup> [ ], attached to an e-mail from Chapman Tripp (on behalf of Expedia) to the Commerce Commission (15 August 2014).

<sup>19</sup>

[

] Ibid.

<sup>20</sup> Submission from Clayton Utz (on behalf of Wotif) to the Commerce Commission (1 August 2014).

<sup>21</sup> Commerce Commission meeting with Wotif (28 October 2014).



29. Wotif submitted that  
[  
].<sup>22</sup> Wotif stated that,  
[  
].<sup>23 24</sup>
30. [ (see competition analysis for further detail).<sup>25</sup>

### *Conclusion on without the acquisition*

31. We consider that, without the acquisition, Wotif would continue to compete as a stand-alone entity (either under its existing ownership or owned by another party). Regardless of ownership, Wotif would seek to remove booking fees to consumers [ ].

## **Market definition**

### **Our approach to market definition**

32. Market definition is a tool that provides a framework to help identify and assess the close competitive constraints the merged firm would likely face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
33. To help us establish whether customers would switch sufficient purchases to alternative products, we use the hypothetical monopolist test as a conceptual tool. This test asks whether a hypothetical sole supplier of a set of products would profitably increase prices for at least one of the merging firms' products by at least a small, but significant, amount.<sup>26</sup> This is often referred to as a SSNIP – a small, but significant, non-transitory increase in price.
34. In general, the smallest set of products in which the SSNIP can be profitably sustained is defined as the relevant product market.

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<sup>22</sup> [ ].

<sup>23</sup> Commerce Commission meeting with Wotif (28 October 2014).

<sup>24</sup>

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<sup>25</sup> Indeed,

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<sup>26</sup> The test assumes that all other prices are held at current levels.

### The applicant's view of the relevant markets

35. Expedia submitted that the relevant market is a market for the distribution, booking and retail supply of travel products in New Zealand. It submitted that this market includes:<sup>27</sup>
- 35.1 supply of all travel products (accommodation, flights, travel packages and other travel products); and
  - 35.2 "consumer-facing supply" from traditional bricks and mortar travel agents, OTAs and directly from travel service providers.

### Our view of the relevant markets

36. We consider that the relevant markets for the purposes of this application are:
- 36.1 the provision of online leisure accommodation booking services to New Zealand consumers;
  - 36.2 the provision of online leisure accommodation booking services to New Zealand accommodation providers;
  - 36.3 the provision of online leisure flight booking services to New Zealand consumers; and
  - 36.4 the provision of online leisure flight booking services to New Zealand airlines.
37. These markets draw a distinction between:
- 37.1 **The two sides of the market.** Expedia and Wotif are essentially marketing platforms that allow for consumer bookings on behalf of travel service providers. The relevant markets reflect competition both for consumers' bookings and for providing booking services to accommodation providers.
  - 37.2 **Different travel products.** From the perspective of consumers, individual travel products are not substitutable for one another (eg, flights are not substitutable for accommodation). Unless a travel service provider provides a bundle of travel products (eg, both flights and accommodation), it does not care whether an OTA provides booking services for multiple travel products.<sup>28 29</sup>
  - 37.3 **Corporate and leisure travellers.** Expedia and Wotif focus on leisure travellers. Corporate travellers typically use travel specialists to provide travel

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<sup>27</sup> Clearance application from Expedia, Inc. (18 July 2014) at [26].

<sup>28</sup> Expedia itself acknowledges that individual travel products are not substitutable from a demand perspective. Expedia application above n27 at [34].

<sup>29</sup> Overseas decisions have also considered different travel products separately. In AXA/Permira/Opodo/GO Voyages/EDreams, the European Commission defined a market for the online distribution of flights, rather than a wider online travel services market. In Priceline/Kayak, the Office of Fair Trading considered separately the effects of the proposed acquisition on hotels and rental car firms.

booking services that meet the business’s travel budget and plans. The merging parties do very little corporate business and so our assessment is focused on the leisure market.

**37.4 Online and bricks-and-mortar travel agents.** Travel bookings made in-store through physical bricks and mortar travel agencies are outside of the markets defined, but the online booking services offered by some bricks and mortar travel agents are included within the market. That said, we note that, to date, the online booking presence of bricks and mortar travel agencies is more focused on online flight bookings than on accommodation bookings.<sup>30 31 32</sup> Where bricks and mortar travel agents offer online accommodation booking services, the content they offer is often a “white label” version of an OTA’s content,<sup>33</sup> such that they compete only for a share of consumer bookings and do not compete with other OTAs to provide services directly to accommodation providers.

38. We considered whether a distinction could be drawn between larger and smaller accommodation providers due to the presence of price discrimination.<sup>34</sup> Specifically, we considered whether the difference in effective competitive alternatives for these sets of customers indicates that they comprise separate markets because they face differing competitive alternatives.

38.1 Market enquiries indicated that direct bookings appear to be a stronger alternative for larger accommodation providers (such as hotel chains) than smaller ones (like bed and breakfasts). Larger accommodation providers tend to have strong brands and are more able to invest in online marketing by, for

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<sup>30</sup> Bricks and mortar travel agents tend to only sell accommodation to leisure travellers as part of a wider travel booking or package deal and the ones that we spoke with did not see OTAs as a serious threat to their business. One accommodation provider also told us that it would take a traditional bricks and mortar agent six months to generate as many bookings as that which an OTA like Expedia generates in two days. Commerce Commission interview with [ ] .

<sup>31</sup> [ ] Commerce Commission interview with [ ] .

<sup>32</sup> [ ] Commerce Commission interview with [ ] . [ ] Commerce Commission interview with [ ] .

<sup>33</sup> They are referred to as “white label” websites because they take content from another site and rebrand it on their own website to make it look as though it is their own (similar to mass-produced generic goods). OTAs typically share a portion of the commission they receive from accommodation providers with the operator of a white label website.

<sup>34</sup> [ ]

example, purchasing Google AdWords in order to help drive direct bookings.<sup>35</sup>

- 38.2 A number of smaller accommodation providers told us that they do not have the resources to invest in direct marketing to the same extent as larger accommodation providers. Online marketing is key to attracting travellers and OTAs spend large amounts of money in this area.
39. For ease of analysis, however, we do not define the market by consumer groups but rather consider the differences across these accommodation providers – and in particular their ability to drive direct bookings – as part of our competition assessment where relevant.
40. The relevant markets are national as booking services are offered to New Zealand consumers and New Zealand accommodation providers and all face the same competitive alternatives.

### **Competition analysis – online leisure accommodation booking services to consumers**

41. The proposed acquisition will consolidate the OTA businesses of Expedia and Wotif. More specifically, given Wotif's focus on accommodation, the acquisition would result, primarily, in overlap between online leisure accommodation booking services.
42. Expedia submitted that the proposed acquisition would not raise any competition concerns in the supply of accommodation booking services to consumers because consumers would continue to be able to choose from services offered by a large number of existing competitors. These competitors include other OTAs and direct bookings with accommodation providers.<sup>36</sup>
43. As discussed below, we view other OTAs, and particularly the three large OTAs, as providing the primary competitive constraint on each other. Taking this view of the market, data from Expedia, Wotif and Priceline, along with data from one of the smaller OTAs<sup>37</sup> gives an indication of relative market shares. These indicative market shares are set out in Table 1.<sup>38</sup>

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<sup>35</sup> Google AdWords is Google's advertising system in which parties bid on certain keywords in order for their clickable ads to appear in Google's search results.

<sup>36</sup> Executive summary to Expedia application above n27 at [9].

<sup>37</sup> TradeMe which launched its OTA, TravelBug, in 2007.

<sup>38</sup> The market shares are only indicative because the data collated excludes the value of bookings handled by other small OTAs (other than TradeMe) and also direct bookings handled by accommodation providers (assuming they are in the same market). As such, the market shares of individual OTAs are overestimated.

**Table 1: Indicative value of bookings made by New Zealanders through OTAs and corresponding OTA market shares<sup>39</sup>**

	Booking value	%
<b>Expedia</b>	[ ]	[ ]%
<b>Wotif</b>	[ ]	[ ]%
<b>Merged entity</b>	[ ]	[ ]%
<b>Priceline</b>	[ ]	[ ]%
<b>TradeMe</b>	[ ]	[ ]%
<b>Total</b>	[ ]	<b>100%</b>

Source: industry participants

44. Table 1 shows that the merged entity would handle, on a gross booking value basis, up to [ ]% of the accommodation bookings made through OTAs by New Zealand consumers.<sup>40</sup> Priceline is the largest OTA and would handle more accommodation bookings than the merged entity.
45. We consider it is unlikely that, post-merger, Expedia would raise the booking fees Wotif charges to New Zealand consumers or introduce such fees to its own consumers. This is because the OTA industry has moved away from charging consumers booking fees. Of the three largest OTAs, Wotif is the only one to charge booking fees<sup>41</sup> and, indeed, Wotif's consumer booking fee was cited as a reason for its competitive decline.<sup>42</sup> No booking fees are seen as a way of increasing the number of consumers using a platform, and so increasing the platform's attractiveness to accommodation providers.
46. We therefore do not consider that the proposed acquisition will, or will be likely to, substantially lessen competition in this market. We note that (as discussed further later) Wotif has been lagging behind its competitors in terms of technology and, post-acquisition, Wotif consumers may benefit from the advanced technology and features offered by Expedia.

<sup>39</sup> The indicative market share figures in Table 1 are based on the gross values of accommodation booked through OTAs by New Zealand consumers. The market shares do not sum to 100% due to rounding.

<sup>40</sup>

[  
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<sup>41</sup> Some other smaller OTAs (eg, TravelBug) also charge booking fees.

<sup>42</sup>

[

], attached to an e-mail from Chapman Tripp (on behalf of Expedia) to the Commerce Commission (21 August 2014).

## Competition analysis – online accommodation booking services to accommodation providers

47. Expedia submitted that the proposed acquisition would not raise any competition concerns in the supply of accommodation booking services to accommodation providers because:<sup>43</sup>
- 47.1 accommodation providers would continue to be able to choose from services offered by a large number of existing competitors as well as attracting bookings directly from consumers;
  - 47.2 there are low barriers to entry and expansion; and
  - 47.3 competition is facilitated by the dynamic nature of the market, in particular, the growth of metasearch websites.
48. Our investigation has revealed that OTAs have become an increasingly important channel to market for accommodation providers.
49. Although accommodation providers list their inventory on their own websites and with bricks and mortar travel agents, for many accommodation providers, OTAs drive a significant and growing percentage of bookings (see Figure 1 below). Market enquiries also revealed that other channels do not impose as strong a constraint as large OTAs such as Priceline.
50. Given this, we were concerned that the loss of Wotif, as one of the three large OTAs in New Zealand, would allow the remaining OTAs to increase the commission rates they charge to accommodation providers.
51. In terms of OTAs, our investigation found that Priceline has grown significantly in recent years (growing both the number of New Zealand and Australian accommodation properties it lists and its share of bookings). Meanwhile, Wotif's competitive position in the market has been declining in recent years.
52. Moreover, for the reasons set out below, we consider that there are important developments occurring in the industry that may allow accommodation providers to resist (or mitigate) a price increase. Importantly, the largest travel site, TripAdvisor, has recently launched Instant Booking, a tool that may result in it directly competing with Expedia and Priceline for online accommodation booking services in New Zealand and give accommodation providers the ability to bypass those OTAs. Instant Booking is currently only available to accommodation providers and consumers in the US, but is to be rolled out in other countries.<sup>44</sup>

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<sup>43</sup> Executive summary to Expedia application above n27 at [9].

<sup>44</sup> In announcing the launch of Instant Booking in June 2014, TripAdvisor stated an intention to gradually roll out Instant Booking to additional markets later in 2014. [http://www.tripadvisor.com/PressCenter-i6805-c1-Press\\_Releases.html](http://www.tripadvisor.com/PressCenter-i6805-c1-Press_Releases.html).

[ ] Commerce  
Commission interview with [ ].

## Existing competition between OTAs

53. In this section we discuss the competition that currently takes place among the three largest OTAs operating in New Zealand: Expedia, Priceline and Wotif.
54. Data from Expedia, Wotif and Priceline, along with data from one of the smaller OTAs gives an indication of relative market shares. These indicative market shares are set out in Table 2.<sup>45</sup>

**Table 2: Indicative accommodation provider market shares for booking services to New Zealand accommodation providers<sup>46</sup>**

	Booking value		Commission revenue		Number of accommodation properties listed
	\$	%	\$	%	
Expedia	[ ]	[ ]%	[ ]	[ ]%	[ ]
Wotif	[ ]	[ ]%	[ ]	[ ]%	[ ]
Merged entity	[ ]	[ ]%	[ ]	[ ]%	[ ]
Priceline	[ ]	[ ]%	[ ]	[ ]%	[ ]
TradeMe	[ ]	[ ]%	[ ]	[ ]%	[ ]
<b>Total</b>	[ ]	<b>100%</b>	[ ]	<b>100%</b>	

Source: industry participants

55. Even though the data collated in Table 2 is incomplete, it nonetheless tells us that the merged entity would have, on a commission revenue basis, up to [ ]% market share. The data in Table 2 also shows that Priceline is the largest OTA and would handle more accommodation bookings than the merged entity. Other OTAs operating in New Zealand are currently considerably smaller. Network effects and sunk costs may make it difficult for smaller OTAs (or new entrant OTAs) to achieve sufficient scale to compete effectively with the merged entity.<sup>47</sup>
56. [ ] provided data (depicted in Figure 1) on the trend in the share of bookings made through each of Expedia, Wotif, Priceline, other OTAs and on accommodation provider websites.<sup>48</sup> Figure 1 shows that in the last five years,

<sup>45</sup> As noted above in terms of Table 1, the market shares are only indicative because the data collated excludes the value of bookings handled by other small OTAs (other than TradeMe) and also direct bookings handled by accommodation providers (assuming they are in the same market). As such, the market shares of individual OTAs are overestimated.

<sup>46</sup> The indicative market share figures for accommodation providers in Table 2 are based on gross values of bookings handled by OTAs for New Zealand accommodation providers and the commissions earned by OTAs on those bookings. Displayed in Table 2 alongside these figures is the total number of New Zealand accommodation properties listed by each OTA as at October 2013. Figures do not add to 100% due to rounding.

<sup>47</sup> Platforms, such as OTAs, typically benefit from network effects. Consumers value having access to a range of accommodation providers through one website and so as the platform grows their base of accommodation providers, for example, the greater value a consumer is likely to derive from the platform. Conversely, the greater the OTA's base of consumers (in terms of web traffic, hits or bookings) the more value an accommodation provider is likely to place on listing on that platform.

<sup>48</sup>

[ ]

Priceline significantly increased its share of bookings (from [ ]% to [ ]%), while direct bookings declined (from [ ]% to [ ]%).<sup>49</sup>

**Figure 1: Trend in share of bookings**

[ ]

Source: Commerce Commission based on data from [ ]

*Constraint provided by Wotif*

57. Wotif was the first OTA to provide online accommodation booking services to New Zealand accommodation providers<sup>50</sup> and, until recently, it was the acknowledged market leader in New Zealand.
58. Of concern is whether the loss of Wotif would remove an important constraint on commission rates. For example, Priceline entered [ ]<sup>51</sup>
59. In the last three years, the number of New Zealand accommodation providers listed on Wotif has increased from [ ] to [ ] (an increase of [ ]%), despite increasing its commission rates to accommodation providers from 10% to 12% in the last two years. However, Wotif has been losing market share for the past three years (see Figure 1). We consider this is likely due, in part, to Wotif charging a \$5 booking fee to consumers and Wotif lagging behind its competitors in terms of technology.<sup>52</sup>
60. We examined whether Wotif would continue to provide an effective constraint on Expedia's and Priceline's behaviour without the acquisition. [ ]<sup>53</sup>
- Ultimately, based on this evidence, the Commission has real questions about the

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<sup>49</sup> E-mail from [ ]

[ ] E-mail from [ ]

<sup>50</sup> At the time that Wotif entered, Expedia and Priceline were providing online accommodation booking services to accommodation providers overseas, but not in New Zealand.

<sup>51</sup> Commerce Commission interview with [ ]

<sup>52</sup> For example, historically, Wotif accommodation search results were returned according to alphabetical order. Only recently has Wotif had flexibility to allow accommodation providers to pay to display their inventory more prominently in consumer searches.

<sup>53</sup> Wotif submitted that, [ ]

[ ]. Submission from Simpson Grierson and Clayton Utz (on behalf of Wotif) to the Commerce Commission (27 October 2014) at [28] and [50]. Wotif advised that [ ]

[ ]. Commerce Commission meeting with Wotif (28 October 2014).



present and ongoing constraint provided by Wotif; although, due to the existence of other constraints (discussed later), we did not need to reach a definitive view on this.

*Constraint provided by Priceline*

61. Expedia submitted that the Priceline Group (and specifically Booking.com) had exerted significant pressure on it globally “through their low commissions and more extensive Hotel Count”.<sup>54</sup> It also submitted that Booking.com has significantly expanded its presence in New Zealand and Australia in the last two to three years.<sup>55</sup>
62. Industry participants identified Priceline as the major competitor to Expedia and Wotif. Like Expedia and Wotif, Priceline supplies accommodation providers in New Zealand with room bookings by New Zealand and international consumers.
63. Priceline has grown significantly in New Zealand and Australia in recent years (growing both the number of New Zealand and Australian accommodation properties it lists and its share of bookings). Priceline is now the largest OTA and would have greater market share of accommodation bookings than the merged entity. It is likely to provide a significant competitive constraint on the merged entity.<sup>56</sup>

*Potential for smaller OTAs to expand*

64. As noted above, other OTAs operating in New Zealand (other than Expedia, Wotif and Priceline) are currently considerably smaller. Network effects and sunk costs may make it difficult for smaller OTAs (or new entrant OTAs) to achieve sufficient scale to compete effectively with the merged entity.<sup>57 58</sup>

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<sup>54</sup> [ ]

<sup>55</sup> Letter from Expedia above n42 at 5.

<sup>56</sup>

[ ] E-mail from [ ]

[ ]<sup>56</sup> E-mail from [ ]

<sup>57</sup>

[ ]  
[ ] Commerce Commission interview with [ ]

<sup>58</sup>

[ ]  
[ ] Commerce Commission interview with [ ]

### Constraint from direct online bookings

65. Expedia submitted that it would continue to be constrained by the direct booking functionality offered by accommodation providers.<sup>59</sup> It submitted that “almost every hotel property listed on Wotif has its own direct bookings website”.<sup>60</sup> In terms of the cost of direct supply, Expedia submitted that:<sup>61</sup>

...large-scale investment is not required for smaller accommodation chain owners and independent accommodation owners to have an effective direct online supply capability...

66. Industry participants provided evidence that accommodation providers prefer consumers to book directly with them. This is largely because it means bypassing the payment of a commission to an intermediary such as an OTA. However, direct bookings are not without cost as accommodation providers need to spend money on a direct booking platform and also make consumers aware of the direct booking option through marketing and other tools.<sup>62</sup>

67. Figure 1 above shows a decline in direct bookings in the last five years (from [ ]% to [ ]%). We have considered whether, in response to the merged entity increasing commission rates, accommodation providers could reverse this trend and increase their direct bookings (recognising that this could only be done by indirect means and would carry a risk of failure).

68. Factors that potentially limit the ability of an accommodation provider to promote and grow its direct bookings (eg, through price promotions) are:

68.1 the sunk cost of promoting and advertising the direct booking option;<sup>63</sup>

68.2 price parity clauses [ ]. Price parity clauses require accommodation providers to make rooms available on the OTA’s at a price that is at least as low as it is elsewhere (including the accommodation provider’s own website); and

68.3 [

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69. However, contracts with OTAs do not generally prevent accommodation providers from attracting people to book directly by offering loyalty schemes, value-added items when people book direct (eg, free breakfast or wireless internet), and special

<sup>59</sup> Executive summary to Expedia application above n27 at [6.2].

<sup>60</sup> Expedia application above n27 at [30].

<sup>61</sup> Expedia application above n27 at [59].

<sup>62</sup> For example, Google AdWords advertising, promotional discounts or deals available when booking direct.

<sup>63</sup> Google AdWords operates on an auction basis and smaller accommodation providers may not be able to justify the investment in purchasing Google AdWords with no certainty that it will generate bookings (compared to paying OTAs a percentage commission for each booking generated).

packages when people book directly (eg, for two night weekend stay).<sup>64</sup> Having said that, we received mixed evidence on the effectiveness of these strategies, and a number of accommodation providers advised that they are constrained by parity clauses.

- 70. Overall, the evidence indicates that an accommodation providers’ ability to drive bookings directly at the expense of bookings through OTAs is heavily influenced by its size. Large hotel chains tend to be more sophisticated and have more resources to spend on direct sales and marketing.<sup>65</sup> By contrast, smaller independent accommodation providers tend to rely more heavily on third party marketing and sales such as those via OTAs.<sup>66</sup> Given the above, we consider that (without a substantial change in circumstances) an insufficient proportion of accommodation providers would be able to effectively drive more bookings through their own websites in response to an increase in OTA commission rates.

**Constraint from metasearch sites**

- 71. Expedia submitted that:<sup>67</sup>

the growth of metasearch sites such as TripAdvisor, HotelsCombined, Kayak and trivago, which, similar to OTAs, increase price transparency and lower searching costs for consumers by giving them the ability to browse many providers at once, while simultaneously allowing accommodation owners, including via their own booking sites, to reach large numbers of consumers...

*The role of metasearch to date*

- 72. Metasearch websites have traditionally been data aggregators (in that they aggregate and display comparative data from a number of travel websites). To date, metasearch sites have increased competition between the OTAs (and between OTAs and accommodation providers where these are listed on metasearch sites) rather than competing against them.
- 73. TripAdvisor, which originated as a traveller review website, has in the past few years expanded its offering into metasearch by allowing OTAs and accommodation providers to display booking links on accommodation listings. It currently offers New Zealand accommodation providers with two options to promote their inventory.

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[ ] Commerce Commission

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interview with [ ].  
For example,  
[

] Commerce Commission interview with [ ].

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Executive summary to Expedia application above n27 at [9.2(b)].

- 73.1 **Business listings.** Accommodation providers that sign up for a TripAdvisor business listing can display contact details on its TripAdvisor listing (including a link to their own website) and can also display ‘specials’ to attract consumers to book directly. Accommodation providers pay an annual subscription for a business listing.<sup>68</sup>
- 73.2 **TripConnect.** A TripConnect listing allows accommodation providers to display room prices and booking buttons linking to their own websites alongside OTA booking buttons. Like other metasearch sites, these booking links are priced on a cost per click basis.<sup>69</sup>
74. While some accommodation providers display prices and booking buttons on metasearch sites, and therefore benefit directly from the effects of increased competition, market enquiries revealed that using metasearch sites (including using TripConnect) was currently not viable for many accommodation providers. In particular, smaller accommodation providers told us that it was too expensive to display prices and booking buttons on metasearch sites because doing so requires them to bid in auctions against OTAs for ranking on these sites. Market enquiries revealed concerns from accommodation providers that the cost per click model (used by TripConnect and metasearch sites) is relatively expensive and does not allow them to viably promote their inventory.

#### *Expansion by TripAdvisor*

75. TripAdvisor is the largest travel website in the world.<sup>70</sup> TripAdvisor’s recent product developments [ ] may result in TripAdvisor directly competing with Expedia and Priceline (and other OTAs) in the future.
76. As noted earlier, TripAdvisor has recently launched the Instant Booking feature to US customers. Unlike TripConnect, Instant Booking allows consumers to complete accommodation bookings without leaving the TripAdvisor website. Although consumers never leave TripAdvisor’s website, bookings are powered by either the accommodation provider’s, or an OTA’s, internet booking engine.<sup>71</sup>
77. Unlike other metasearch models, Instant Booking is priced on a commission, rather than a cost per click, basis, which is likely to be more attractive to (and economic for)

<sup>68</sup> Approximately [ ] New Zealand accommodation providers currently have a business listing. The cost of a business listing varies according to an accommodation provider’s size. While business listings have been around for a while, the extent to which they drive direct bookings is unclear.

<sup>69</sup> TripConnect was launched in New Zealand at the start of 2014. Approximately [ ] New Zealand accommodation providers currently use TripConnect.

<sup>70</sup> TripAdvisor is the largest travel website in the world by number of unique visits – according to TripAdvisor and Expedia 2013 Annual Reports, it had 2 billion unique visitors to its website in 2013, compared to Expedia’s 60 million unique visitors.

<sup>71</sup>

[ ] Commerce Commission interview with [ ].

accommodation providers.<sup>72</sup> The fact that Instant Booking is based on a more traditional commission structure means that, in effect, it operates in a similar way to OTAs (and may compete directly with them). A commission structure does not carry the risk of paying to display a listing with potentially no return (like an auction-based cost per click model does), and this puts accommodation providers on equal footing with OTAs (allowing them to effectively promote direct bookings).

78. Instant Booking is in its infancy and is currently only available to accommodation providers and consumers in the US.<sup>73</sup> However, as noted earlier, it is to be rolled out in other countries shortly. Both TripAdvisor (and market analysts<sup>74</sup>) are confident that Instant Booking will be successful. In a presentation to potential partners on Instant Booking, TripAdvisor estimates that around 40% of TripAdvisor traffic will shift to Instant Booking.<sup>75</sup>

[  
] <sup>76</sup>  
[  
77 ]

**Conclusion**

79. A number of accommodation providers expressed concern that Expedia may increase commission rates for bookings made through Wotif websites post-acquisition. This appears to be because, while Expedia’s commission rates have reduced over time, its commission rates are higher than those of other OTAs and it charges higher commission rates overseas (where Wotif is not present) than it does in New Zealand and Australia.

80. However, on balance, we do not believe the proposed acquisition is likely to substantially lessen competition in this market.

81. Priceline has grown significantly in recent years (growing both the number of New Zealand and Australian accommodation properties it lists and its share of bookings) and is likely to impose a significant competitive constraint on the merged entity. Conversely, Wotif’s competitive position in the market has been declining in recent years. In addition, as noted earlier,

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<sup>72</sup> [ ] Commerce Commission interview with [ ]. To partake in Instant Booking, TripAdvisor requires the accommodation provider to pay TripAdvisor an annual subscription for a business listing.

<sup>73</sup> Instant Booking was launched in the US in June 2014.

<sup>74</sup> See for example comment from Deutsche Bank available at <http://www.benzinga.com/analyst-ratings/analyst-color/14/10/4900528/deutsche-bank-believes-tripadvisors-instant-book-footpri>.

<sup>75</sup> TripAdvisor presentation, *TripAdvisor Instant Booking Partner Guide*.

<sup>76</sup>

[ ] Commerce Commission interview with [ ].

<sup>77</sup> [ ]

]

82. In addition, TripAdvisor appears actively to be moving to compete with OTAs as well as offer accommodation providers opportunities to drive direct bookings. Although TripConnect has had limited success since it launched in New Zealand at the start of 2014, Instant Booking appears to draw on more traditional agency tools and so may have greater traction with accommodation providers (and smaller OTAs). TripAdvisor is the largest travel website in the world  
[ ]

83. The combination of Priceline’s growing strength, Wotif’s continued decline in competitiveness and TripAdvisor’s intention to expand its operations means that the merger is unlikely to substantially lessen competition.

### Competition analysis – online leisure flight booking markets

84. Expedia estimates that New Zealand leisure consumers annually book online retail flights to the value of approximately [ ].<sup>78</sup> In 2013, New Zealand consumers booked flights to the value of \$[ ] through Expedia<sup>79</sup>, but only flights to the value of \$[ ] through Wotif. On this basis, the proposed transaction represents a negligible gain in Expedia’s market share; less than [ ]% of online flight bookings.

85. In addition, efforts by airlines to “cut out the middleman” and deal directly with consumers is increasingly driving direct bookings through airlines’ own websites. Bookings through bricks and mortar travel agent websites such as Flight Centre, also appear to impose a more significant constraint on OTAs for the sale of flights to consumers than for accommodation bookings.

86. For these reasons, we are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant flight bookings markets even on the most conservative plausible definition of these markets (online flight bookings for leisure travellers).

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<sup>78</sup> [ ], attached to an e-mail from Chapman Tripp (on behalf of Expedia) to the Commerce Commission (1 August 2014) at 7.

<sup>79</sup> In addition, [ ]. Expedia only offers domestic flight booking services for Air New Zealand and Jetstar.

### **Determination on notice of clearance**

88. The Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
89. Under s 66(3)(a) of the Commerce Act 1986, the Commission gives clearance to Expedia, Inc. to acquire up to 100% of the issued shares to acquire up to 100% of the issued shares of the Australian Securities Exchange-listed Wotif.com Holdings Limited.

Dated this 4th day of November 2014

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Dr Mark Berry  
Chairman