TRIVAGO SHOWS YOU ALL THE DIFFERENT PRICES…OR DOES IT?

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By: Ayman Guirguis

Trivago Misled Consumers on Hotel Room Rates: Australian Federal Court Looks Into an Algorithmic Black Box

IN BRIEF

The Federal Court has found accommodation comparison website Trivago contravened the Australian Consumer Law (ACL) by misleading consumers about the prices and ranking of accommodation offers.

The Australian Competition and Consumer Commission (ACCC) alleged that Trivago made representations to consumers, through television and website advertising, that it could "find your ideal hotel for the best price" by comparing offers from accommodation and online booking sites. However, the offers were based on algorithms which favoured online booking sites that paid Trivago higher fees in addition to price and room characteristics.

The Court found the conduct to be misleading. It also found that Trivago misled consumers by:

- comparing a high "strikethrough" price with a lower offer price that did not relate to the same or comparable rooms
- ranking some offers at the top of search results, when those offers were not the cheapest offer for the hotel, or did not have characteristics that made the rooms more attractive than lower-ranked offers for the identified hotel.

The findings serve as a timely reminder that:

- the ACCC is closely monitoring comparison websites and other online sites
- both the ACCC and the Courts are likely to seek access to the algorithms and data used by comparison sites
- representations made to consumers about price comparisons must not represent to consumers that they are receiving a "genuine" comparison of all other available prices on competitor websites when that is not the approach taken by the algorithm of the comparator site.

BACKGROUND

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The ACL prohibits conduct that is misleading or deceptive and specifically prohibits false or misleading representations about price.

Trivago operates a website that compares travel and accommodation offers from online travel agents, such as booking.com and from accommodation providers themselves. Trivago offers the comparison service to consumers at no cost and earns revenue from the travel agents and accommodation providers through fees when consumers click on an offer (the "cost per click" or CPC).

In August 2018, the ACCC instituted proceedings alleging that from at least December 2013, Trivago had misled consumers by representations about its ability to find the lowest offer price for accommodation, as set out in the judgment:

that the Trivago website would quickly and easily identify the cheapest rates available for a hotel room responding to a consumer's search (the Cheapest Price Representation)

that the Top Position Offers were the cheapest available offers for an identified hotel, or had some other characteristic which made them more attractive than any other offer for that hotel (the Top Position Representation)

that the Strike-Through Price was a comparison between prices offered for the same room category in the same hotel (the Strike-Through Representation)

that the Red Price was a comparison between prices offered for the same room category in the same hotel (the Red Price Representation).

WHAT THE COURT DETERMINED

Cheapest Price Representation

The "Cheapest Price Representation" was misleading or deceptive (or likely to mislead or deceive) because the website did not identify the cheapest rates available for a hotel room responding to a consumers search.

Rather, Trivago displayed hotel room offers of booking websites that had paid Trivago a CPC above a threshold amount for each consumer that "clicked" on the relevant booking website.

This resulted in Trivago misleading the public as to the "nature, characteristics and suitability for purpose of the accommodation search service provided by the Trivago website".

Top Position Representation and Red Price Representation

By positioning certain hotels at the top of search results, Trivago engaged in conduct that was misleading or deceptive as the top position offer was not always the cheapest available offer for the relevant hotel.

Similarly, the price was presented in red (Red Price Representation) which suggested it was the best offer on the room shown, when the comparison was not always to a room in the same category.

The prices displayed in the Top Position and Red Price Representations were accompanied with "hover-over" text

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that indicated the prices may not relate to the same rooms. However, they were insufficient to dispel the misleading impression created as the statements were not clear. Further, the Court found that some consumers may not place their mouse cursor over a hover-over feature on a website.

Strike-Through Pricing Representation

By presenting some price comparisons using strike-through pricing, Trivago made representations that were misleading or deceptive, as the strike-through pricing did not always relate to the same room category.

NEXT STEPS FOR THE ACCC AND COMPARISON WEBSITES AND OTHER ONLINE SITES – OPENING THE BLACK BOX

The ACCC has said that it will now look at taking action against comparison websites in other industries and will be closely monitoring such websites. The ACCC is also proceeding against comparison site iSelect in regard to energy offers on similar claims.

Expert Evidence From Computer Scientists

The judgment is significant in the type of evidence relied upon. Computer scientists were engaged by both parties and provided expert opinion evidence analysing the data and algorithms Trivago used to rank search results. The detail was confidential, but it is clear the expert reports and the Court's findings were based on close analysis of the data used and the algorithms used to arrive at the recommendations.

There was substantial disagreement between the experts on the contribution that different data inputs had on the ranking of results, and the judgment includes (plain English) descriptions of different means of assessing those factors within machine learning algorithms.

Behavioural Economics

Another new development, was the use of behavioural economic expert evidence to assess how consumers interpret the information provided by Trivago. The parties led expert opinion evidence, particularly on the issues of whether consumers act as economically rational decision-makers, how they weigh price and non-price factors and interpret marketing messages.

Although economic expert evidence is often central in competition matters, it is less common for judges to rely on experts to inform them of how representations would be perceived by consumers and therefore whether the conduct was misleading. Judges have traditionally relied on their own views of how consumers perceive information.

WE AWAIT THE JUDGMENT ON PENALTY

It will be interesting to view the approach taken by the Court on the size of the penalty in the context of a fully contested hearing, and data information on customer usage (although not necessarily damage).

WHAT SHOULD COMPARISON WEBSITES AND OTHER ONLINE SITES DO?

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- Comparison websites and other online sites should review all current representations made about pricing and search results to consumers ensuring that any ambiguous language that may lead to alternative assumptions be removed.
- When making representations such as "cheapest price" statements, strike-through pricing or top position offers, businesses must ensure that such representations are accurate and are made on the basis of clear and honest facts.
- If disclaimers are used, they need to be positioned clearly on websites, without the user having to hover or click to reveal the truth. The language used must be absent of any ambiguity.
- Online businesses and others that rely on algorithms to generate information to consumers must now presume that the inner workings will be at least considered, and may be analysed by the ACCC and the Courts. That is likely to raise a number of novel issues relating to a business' own understanding of the workings of those mechanisms, particularly where machine learning is involved.

The traditional model of a consumer making rational decisions (and therefore not susceptible to some marketing techniques) may be less accepted. Behavioural economics has become increasingly important in regulation and marketing strategy and, now, in the law. Accordingly, it is important that businesses consider the likely impact of advertising techniques.

Although the developments will have direct relevance to consumer protection cases, the ACCC has flagged that similar analyses will be relevant to its future work in regard to digital platforms and the case shows that the ACCC is clearly developing the capacity to assess the workings and effect of algorithms.

KEY CONTACTS



AYMAN GUIRGUIS
PARTNER

SYDNEY
+61.2.9513.2308
AYMAN.GUIRGUIS@KLGATES.COM

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