

## Article Information

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## Trivago to pay \$44.7 million in penalties for misleading consumers over hotel room rates

***A Federal Court penalty handed down to Trivago on 22 April 2022 sends a strong message to comparison websites that they must not mislead consumers when making recommendations.***

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Trivago is an online search and price comparison platform for hotel accommodation. Part of the Expedia group, Trivago aggregates deals offered by online booking sites for available rooms at a hotel and highlights one offer out of all offers. When a customer clicks on an offer, they are directed to the online booking site and each time a consumer clicks on an offer for accommodation, the relevant hotel or travel agent whose site it is pays a fee to Trivago (**Cost Per Click**).

In August 2018, the ACCC commenced proceedings against Trivago and in January 2020 the Federal Court found Trivago had breached *Australian Consumer Law* when it made misleading representations about hotel room rates on its website and television advertising. An appeal by Trivago was dismissed by the Full Federal Court in November 2020 and the recent penalty was handed down on 22 April 2022.

The case relates to the period between 1 December 2016 to 13 September 2019 (**Relevant Period**). During the Relevant Period:

- The best hotel deal for the relevant hotel was displayed on the Trivago website in the far right column, in green text, in a relatively large font and with space around it (**Top Offer**).
- Above the Top Offer was another offer displayed with a red 'strike through price'. Later, this offer was displayed in red text without a strike through.
- Three more offers were displayed in a column. These were displayed in a smaller font compared with the Top Offer.
- A "More Deals" button was displayed in bolded text. Once clicked, other offers from online booking sites for the selected hotel were displayed.
- Where a consumer clicked on an online booking site's offer on the Trivago website, the consumer was taken to the online booking site's website and could complete the booking by using the online booking site's website's booking service.
- Trivago advertised on television that it made it easy "to find the ideal hotel for the best price". The statement was repeated on its website.

### What were the ACCC's concerns?

The ACCC was concerned that the price that was presented as the Top Offer was in many cases *not* the cheapest offer for the particular hotel room and that Trivago had manipulated the information in the following ways:

- It only displayed offers made by online booking sites that agreed to pay a Cost Per Click amount to Trivago.
- Unless the Cost Per Click offered to be paid by the online booking site exceeded a minimum threshold set by Trivago, the offer did not appear on the Trivago website.
- Trivago used an algorithm to select the offer to appear as the Top Offer. A significant factor in determining the Top Offer was the amount of the Cost Per Click paid to Trivago.

The experts at trial on liability agreed that higher offers were selected as the Top Offer over alternative lower priced offers

in 66.8% of listings.

### **Breach of Consumer Law and reasons for penalties**

The Court agreed with the ACCC's concerns and ordered Trivago to pay pecuniary penalties totalling \$44.7 million, taking into consideration the representations and conduct of Trivago during the Relevant Period.

The Court also made a restraining order that for five years, Trivago not display as "Top Offer" a price offer that was not the cheapest available or which has some other characteristic that makes it more attractive than any other available offer for the hotel.

The Court found that Trivago had contravened the following provisions of the *Australian Consumer Law*:

- a) Section 18: misleading and deceptive conduct.
- b) Section 29(1)(i): false or misleading representations about the price of goods and services.
- c) Section 34: misleading conduct as to the nature of services.

In respect of the above, the Court gave the following reasons:

1. Trivago's representation that the Top Offer was the cheapest available for an identified hotel, or had some other characteristic which made them more attractive than any other offer for that hotel was 'highly misleading'.
2. Trivago's contraventions of sections 29(1)(i) and 34 were 'extremely serious'. The television advertising conducted by Trivago during the Relevant Period was 'highly misleading'. The advertising conveyed that the Trivago website would quickly and easily identify the cheapest rates available, which was not the case.
3. The false and misleading nature of the representations made in Trivago's advertising and on its website was obscured by the business model and algorithm that lay behind it – and this was hidden from consumers.
4. The contravening conduct extended over a lengthy period of time – nearly three years.
5. A large number of consumers were affected by the conduct. During the Relevant Period, there were approximately 111 million click-outs on the Trivago website. Of these, 93% were in respect of the Top Offer and approximately 57 million click-outs on a Top Offer were for an identified hotel where the Top Offer was not the cheapest offer.
6. Trivago derived substantial revenue from its contravening conduct of \$178 million during the Relevant Period. Trivago's submission was that the fine should be closer to \$15 million based on net income from its Australian operations of \$6.72 million over the 2017, 2018 and 2019 calendar years. The Court's view was that revenue, not profits from the Australian operation was relevant to assessing benefits to Trivago from the contraventions.

### **Key Takeaways**

It remains a key ACCC priority to hold online businesses accountable for their representations to consumers and to ensure consumers are fully aware of the way these services actually work and know what influences the determination of what prices are displayed.

Consumers must not be misled when online websites are making recommendations.