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**INTERNET PLATFORMS :
TO REGULATE OR NOT TO REGULATE ?**

The (French) Booking.com case

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All views and opinions are my own

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Origin of the case

- In 2013 and 2015, the five main French **Hotel Unions** and the **Accor Group** initiated a contentious procedure before the French Competition Authority (FCA)
- They denounced practices implemented by the three main « Online Travel Agencies » (OTA), **Booking.com included**,
 - Subjecting hotels to compliance with so-called « **parity clauses** » (regarding prices, number of overnights stays, booking conditions, breakfast included or not...)
 - Imposing hotels **prohibitive commission rates**
 - Imposing hotels **other contractual clauses** such as using hotels' name on internet for their own purpose or forbidding hotels to get directly in touch with consumers gained through the platform.
- According to the plaintiffs, those practices were liable to constitute abuses of dominance (Art. 102 TFUE) and/or anticompetitive agreements or concerted practices (Art. 101 TFUE)

European context

- **Similar procedures were initiated in several Member States**
 - **Same practices, same operators**
 - EC and Member States decided (within the European Competition Network) to deal with the case in a **decentralized way**, at a national level
- But, with **coordination from the European Commission**, the concerned NCA have cooperated in order to deal with such practices **in an harmonized way**.
- **France, Sweden and Italy have simultaneously settled the case in April 2015, obtaining common commitments from Booking.com**
 - Germany issued formal objections involving Booking.com (rival operator HRS was sanctioned in 2013)
 - Belgium, Austria and Hungary are still investigating the case.

Industry background

- **A dynamic sector** : 17 000 hotels in France, for a global turnover of € 16 billions, approx. 150 000 jobs, 45% of consumers are foreigners.
- **Overnight stays can be sold** :
 - stand-alone, in travel packages (with transports and guided tours) or in business packages
 - by hotels : offline or online
 - **by internet-platforms** : OTAs (more or less specialized).
- **Online booking : a very high-growth channel of distribution**
 - 93% of the hotels' guests use Internet to find a hotel
 - Booking on line represents a growing part of the hotels' turnover (26% in 2011, 34% in 2014)
 - 70% of rooms booked via Internet are made through OTAs
 - OTAs in France : turnover > € several hundreds of millions in 2013, excluding business sales.

Industry background

- **OTAs are essential both for hotels and for consumers**
 - **Allow consumers** to search, compare and book hotels on the same website
 - **Give hotels exposure** and booking opportunities, in particular when they are too small to be referenced on Internet on their own
 - **Allow hotels to access consumers** in a context where consumers mainly turn to OTAs to book a hotel
 - **Most of the hotels are present on at least two OTAs** (to limit dependence and reach different type of demands)
- **OTAs' business model**
 - **Heavily invest** to ensure exposure to the hotels (Booking.com is one of the major Google's customer)
 - **Are paid at the time of the booking**
 - Hotels fix their retail prices (listed on the OTAs' website) but also rooms availabilities
 - OTAs get a **proportional commission (10 to 30%)** on every booking realized on their website

Parties and practices

- According to the plaintiffs, the **three main OTAs are concerned in the case** : Booking.com, Expedia and HRS.
- **The main denounced practices are the « PARITY CLAUSES » :**
 - **Price parity** : prices listed on the OTA's website should **be equal to or more attractive** than prices proposed in the other distribution channels (other OTAs, other online access, offline access) for the same room,
 - **“Conditions of the offer” parity** : the services associated to the overnight stay (dates, type of rooms and beds, number of consumers, breakfast inclusion, booking and cancellation fees...) should also be the same,
 - **Availability parity** : the number of rooms proposed should at least be equal to the number of rooms proposed in the other distribution channels.
- **All the OTAs are applying the same parity clauses (as Booking.com)**
 - Each of them has incentives to adopt parity clauses to avoid less attractive prices and conditions of sale on their platforms

Effects on competition

- Hotels are constrained to propose the **same commercial conditions** to every OTA
 - **Consequences on the market** : Uniformity of prices, of availabilities and of conditions of the offers
- Hotels **do not benefit from competition between OTAs**
 - Whatever the commission rates OTAs apply, hotels are not able to allocate more attractive commercial conditions to the OTA applying the lowest commission rate
- Commission rates **stay prohibitive** and **are passed on retail prices** by hotels
- Small or new **OTAs cannot challenge the market** and attract consumers with lower prices and/or more advantageous conditions of offer, and therefore **cannot develop**.

Commitment procedure

- **Council Regulation 1/2003** relating to implementation of articles 81 [101] and 82 [102] and **French Law** give the *Autorité de la concurrence* the power **to accept commitments** proposed by undertakings to put an end to anticompetitive practices.
- **Purpose of a « commitment decision » :**
 - Ensure that market operate in a competitive environment
 - Get concerned undertakings, **of their own accord**, to terminate or change for the future their conduct identified as raising « competition concerns »
 - **Commitments are legally binding**
 - **Differ from an « Infringement decision »** which draw conclusions on the anticompetitive nature of conducts, which order the termination of the infringement and which, if necessary, fine the concerned undertakings

Commitment procedure

- **Scope of a « commitment decision » :**
 - **Do not apply** to serious forms of collusion or abuse of dominant position having already caused significant harm to the economy
 - Apply to situations raising **ongoing competition concerns**, which could be ended quickly
 - To this date, concerned practices are basically unilateral and vertical practices restricting market access (French law and legal practice)
- **Procedure :**
 - Commitments should be given pursuant to a « **preliminary competition assessment** » which occurs **PRIOR** to any statement of objections
 - which is not the case before the EC.
 - which differs from the « Settlement procedure » which can be undertaken **AFTER** the statement of objections
 - **This assessment does not constitute a formal charge :**
 - Its purpose **is not to** demonstrate the reality of the infringement or ascribe it to undertakings or even lead to the imposition of a fine (French Supreme Court – 2008)
 - **Consequences** : Markets are identified but relevant markets are not strictly defined, Dominance is likely to be but not characterized, Practices are identified but not characterized as infringements
 - **Launch of a market test, Concerned parties access to the case file, Commitments' negotiations before the FCA**
 - **Issue of a decision making commitments binding**, follow-up by the *Autorité's* Services.

Preliminary competitive assessment

- **A two-sided market :**
 - OTAs are **intermediaries** between hotels and consumers
 - **On the one side (upstream market):**
 - Hotels provide OTAs with information, prices, availabilities,... ;
 - OTAs translate and webcast this information, providing different kind of advertising to the hotels, guaranteeing exposure ; OTAs are paid with commission rates proportional to booking prices.
 - **On the other side (downstream market) :**
 - OTAs provide search, comparison and booking services to the **consumers**, for free.
- Parity clauses concern the transactions between OTAs and hotels : the **relevant market** could be considered on the upstream side
 - **Hypothetical Monopoly SNIPP test :**
 - How profitable would be a hypothetical monopolistic OTA if increasing commission rates from 5 to 10% above the competitive level given that demand can be transferred to substitutes both from the hotels side and consumers side ?
 - Parity clauses taken into account
 - Relevant market **could be** the market of “**supply of booking of overnight stays in French hotels through OTAs**”
 - excluding direct booking on the hotels’ websites, on metasearch and search engines’ results.

Preliminary competitive assessment

- **Booking.com may be dominant on this market**
 - **First OTA in the world** : turnover of 6.8€B in 2013, 750 000 overnight stays booked every day, 500 000 hotels referenced in 200 countries, website available in more than 40 languages...
 - Around **30% of market shares** at the European level in turnover (Source Phocuswright, but on a larger market)
 - **¾ of the French hotels** referenced
 - Several surveys conclude that Booking.com is far from its competitors in terms of **search and use by Internet users and awareness**
 - **Estimated market share on the relevant market : 65%**
- **Barriers to entry**
 - **Large indirect network effects** : the more hotels are referenced, the more attractive the platform is for consumers, the more hotels look for reference...
 - **Large platforms become larger (snowball or spiral effect)**, the size of the operators impacting directly their growth.
 - **Important economies of scale** : investments for exposure in search and metasearch engines.
 - **Not being referenced on a platform is costly** for an hotel, consumers being captured by referenced hotels.

Preliminary competitive assessment

- **Parity clauses may be constitutive of**
 - **Prohibited competition restrictions (101-1 TFUE) : vertical restraints and cumulative effects**
 - **Hotels are not able to determine pricing and conditions of sale on other platforms and in other distribution channels**
 - **Booking.com monitors effectiveness** of the parity clauses application through comparative systems of prices and availabilities of rooms (commercial teams, crawling and data scraping techniques....)
 - ex. of punishment : de-ranking, contract termination...
 - **Hotels are forced to adopt an identical price** in every distribution channel
 - **Competition is softened between OTAs** : commission rates and demand are uncorrelated
 - **Effects reinforced as all the OTAs implement similar parity clauses**
 - **Exploitative abuse of dominance (102 TFUE)**
 - Booking.com may be abusing its dominant position, imposing discriminatory parity clauses that foreclose the market.

Booking.com's Commitments

- **Commitments proposed and negotiated with the FCA aim at :**
 - **Allow hotels to recover pricing and commercial freedom but also countervailing power**
 - **Promote competition between OTAs** to bring down commission rates
 - **Preserve efficiency gains** related to OTAs activity (research and comparison services to consumers) **and avoid parasitism** (protect OTAs against free-riding)
- **Commitments adopted in April 2015 should be extended to the main OTAs (HRS and Expedia) and throughout the European Economic Area**
- **From the 1st of July, 2015 and for 5 years**

Booking.com's Commitments

- **Removal of any price parity obligation** with regard to other OTAs
 - Hotel may offer lower prices on other OTAs and adapt them with lower QoS or lower commission rates
 - Other OTAs may display these lower prices on their websites, comparison sites and search engines
- **Removal of price parity clause in relation to offline channels and loyalty programs**
 - Hotels may propose lower prices via their own direct offline channels, but not publish or market them online
 - Such lower prices have to be proposed to the client in a “private way” (loyalty program, direct email or SMS)
- **Removal of the availability parity**
 - Hotels will be free to manage their rooms capacity and availabilities
- **Removal of the obligations regarding parity of conditions**
- **Possibility to contact prior consumers**
- **Prohibition of bypassing commitments** through delisting hotels from the website, increasing commission rates, de-ranking hotels in the search results

Commitments

WHAT HOTELS CAN DO

Offer lower prices via other OTAs

BEFORE

AFTER

NO

YES

Offer consumers lower prices via their offline channels : telephone, hotel reception desks, text messages, instant messaging (WhatsApp, Messenger, etc.), emailing marketing campaign...

NO

YES

Offer lower prices to consumers provided that these room rates are not available to the public on the internet

NO

YES

Offer lower prices under their loyalty programs

SOMETIMES

YES

Communicate publicly the fact that they are offering “attractive” prices directly and via their loyalty programs

NO

YES

Grant more attractive commercial conditions to other OTAs

NO

YES

Grant other OTAs a greater number of available rooms and/or reserve the sale thereof to their own channels for certain periods

NO

YES

Contact prior customers of the hotel and the chain or community of hotels to which the hotel belongs

NO

YES

To go further

- **In May 2015**, the Paris Commercial Court concluded that :
 - **Parity clauses were null and void**, representing **significant unbalanced obligations** between co-contractors and therefore being illegal.
 - Indeed, the automatic alignment of prices on the best tariff **is not a compensation for a risk or a minimum purchase commitment justifying such a benefit.**
 - Decision made on the contracts between **Expedia** and French hotels between 2006 and 2011, no fine imposed
 - Case initiated by the Ministry of the Economy and independent hotels' organizations, having concerns about the “automatic alignment on the best price” clauses.
- **In early July 2015**, a new law (for the economic growth, economic activity and economic equal-opportunity) has been adopted :
 - **Removal of any rate parity clauses from contracts between hotels and OTAs**
 - **Modification of the nature of these contacts** (contract of mandate)

Concluding remarks

Thank you
for your attention!