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French Perspective on the
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Olivier Billard & Pierre Honoré
Bredin Prat

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I. INTRODUCTION

As e-commerce is soaring, competition authorities across Europe are paying increased attention to the commercial practices of companies regarding their online sales. This trend in enforcement priorities is evidenced in particular by the adoption of the European Commission's 2010 revised Guidelines on Vertical Restraints, the European Court of Justice's 2011 ruling in the *Pierre Fabre* case, the European Commission's 2013 *E-books* commitments decision, and the recent announcement of a sector investigation into e-commerce by Competition Commissioner Margrethe Vestager.

Within this context, the practice that has attracted most attention in recent years is undoubtedly the use of Most Favored Nation clauses ("MFN clauses"), also called "parity clauses," in agreements between online booking platforms and hotels. Pursuant to such clauses, hotels are obliged to offer to their online platform partner at least as favorable terms (price, room capacity, booking conditions, and services offered) as those offered to competing platforms and through other distribution channels, both on- and off-line, irrespective of the level of commission charged by the partner platform. Such clauses are widely used in identical terms by all three major online booking platforms in Europe (Booking, Expedia, and HRS).

In recent years, several national competition authorities have launched investigations into these practices. In 2013, the German Federal Cartel Office ("FCO") issued a decision finding that the MFN clauses contained in agreements concluded between HRS and hotels in Germany infringed article 101 TFEU and the corresponding German provisions. The FCO ordered HRS to cease using such clauses in its contracts, but no fine was imposed.²

More recently, the French, Swedish, and Italian competition authorities addressed the issue in parallel procedures that led to the adoption of very similar commitment decisions.³ No infringement of EU or national competition provisions was found, but Booking.com had to offer significant commitments to appease the national competition authorities' competition concerns. The present article will focus on the decision recently adopted by the French competition authority, the *Autorité de la Concurrence* ("ADLC").

¹ Respectively, Partner and Senior associate at Bredin Prat.

² Bundeskartellamt, 20 December 2013, dec. B9-66/10 – HRS.

³ French Competition Authority decision, n° 15-D-06, 21 April 2015; Swedish Competition Authority decision, 15 April 2015, n° 596/2013; Italian Competition Authority decision, 21 April 2015; respective press releases of 21 April 2015.

II. THE COMPETITION CONCERNS RAISED BY MFN CLAUSES IN THE ONLINE HOTEL RESERVATION SECTOR

A. *The Effects of MFN Clauses on Competition*

From a competition law standpoint, the assessment of MFN clauses is very fact-specific and depends on the exact terms of the clauses, the market positions of the companies, and the actual functioning of the market. In practice, such clauses may have both pro-competitive and anticompetitive effects.

1. Efficiency Gains

According to economic literature, MFN clauses may produce mainly two types of efficiencies.⁴ First, they tend to reduce “search costs” for consumers: once customers have found the product they were looking for online, they do not need to visit alternative platforms in search of a better price.

Second, MFN clauses may also help prevent “free riding” problems: online distributors have an incentive to invest in their platform (for example, by improving the use of the interface, providing additional information, etc.) if they have the guarantee that customers will not use their platform to gather information and then purchase the product from another platform offering lower prices.

By ensuring price uniformity, MFN clauses thus arguably tend to benefit consumers in the forms of improved service and reduced search costs.

2. Potential Anticompetitive Effects

However, MFN clauses may also have various types of anticompetitive effects. In its decision, the ADLC first found that the use of parity clauses may restrict competition between Booking.com and competing platforms insofar as that use suppresses the natural link that normally exists between the price charged by an economic operator (i.e. the commission rate charged by Booking.com to hotels) and the amount of demand that accrues to it (i.e. the number of reservations made on Booking.com’s platform).

Indeed, given that hotels are obliged to grant Booking.com terms as favorable as those granted to competing platforms (in terms of price and room capacity), Booking.com may charge higher commission rates without losing demand. Conversely, absent the parity clause, a competing platform could gain market share by lowering its commission rates applied to hotels; the latter would then be able to offer lower prices per room on this competing platform, thus attracting additional consumers and, in turn, additional hotels to the platform.

The ADLC also found that parity clauses may have foreclosure effects on competing platforms, especially on potential new entrants. Indeed, such clauses prevent competing platforms from lowering their commission rates charged to hotels, which could enable them to offer lower prices to online consumers in order to try to reach the critical mass where a sufficient number of consumers attract additional hotels to the platform. Given that they cannot compete on price, they have to compete on notoriety for which Booking.com has a historical competitive

⁴ F. Rosati, *MFN for online platforms: Some key economic issues*, n° 1 CONCURRENCES (2015).

advantage, due to significant network effects as well as its size and ability to get referenced by search engines.

Finally, the ADLC found that the use of such clauses by all online booking platforms entailed a cumulative effect on the market, thus reinforcing the anticompetitive effects described above. According to the ADLC, such clauses could normally be imposed only by platforms with significant market power. However, due to (i) the fragmented nature of the hotel sector, (ii) the fact that online platforms act as “gateways” for hotels to reach consumers on a large scale, and (iii) the need for hotels to distribute through various channels in order to fill their capacity, such clauses are applied by almost all online platforms in France. In this respect, it should be noted that the initial complaint lodged by hotel associations alleged that Booking.com, Expedia, and HRS were abusing a collective dominant position.

B. Legal Assessment of MFN Clauses

Whereas the FCO found that such clauses are contrary to article 101 TFEU only,⁵ the ADLC addressed the issue under both articles 101 and 102 TFEU,⁶ which required the ADLC first to define the relevant market and then to estimate Booking.com’s market share.

1. Market Definition

The ADLC considers that online booking platforms, as intermediaries between hotels and consumers, operate on a two-sided market. Upstream, they offer online booking services to hotels in exchange for a commission; downstream, they offer online search and comparison services to consumers for free.

In previous decisions regarding online sales, the ADLC focused on the downstream side of the market, assessing whether online sales were substitutable with other distribution channels from the consumers’ point of view.⁷ On the contrary, in the present case, given that the practices relate to the contractual arrangements between hotels and online booking platforms, the ADLC decided to focus on the upstream side of the market, and considered that there was a distinct national market for online booking of hotel stays, which excludes the hotels’ direct distribution channels (both on- and off-line).

Based on this market definition, the ADLC found that Booking.com is the market leader with a market share of at least 30 percent, and noted the existence of barriers to entry due to significant network effects. As is generally the case in commitment decisions, the ADLC did not reach a final conclusion as to the existence of a dominant position. As explained below, a market share in excess of 30 percent was sufficient for the ADLC to conduct its assessment under both articles 101 and 102 TFEU.

2. Assessment Under Article 101 TFEU

As explained above, parity clauses restrict hotels’ freedom to determine their own commercial policy and reduce competition between online platforms. The ADLC thus considers

⁵ And the corresponding German law provisions.

⁶ And the corresponding French law provisions (articles L. 420-1 and L. 420-2 of the French Commercial Code).

⁷ See, for example, decision n° 14-D-18 of 28 November 2014.

that they have a potential or actual anticompetitive effect on competition within the meaning of article 101.1 TFEU.

Given that, under Regulation (EC) n° 330/2010, block exemptions are only available where each of the parties to the agreement has a market share of below 30 percent, parity clauses cannot benefit from such block exemptions on account of Booking.com's relatively high market share (in excess of 30 percent). In addition, the existence of parallel restrictions due to the use of such clauses by competing online platforms entails a cumulative effect on the market, which excludes the possibility of a block exemption.

3. Assessment Under Article 102 TFEU

Under article 102 TFEU, the ADLC's analysis is extremely brief. It merely refers to the EU and French provisions prohibiting the abuse of a dominant position and concludes that, in the present case, it cannot be excluded that the use of parity clauses may constitute an abuse of an individual or collective dominant position.

III. THE COMMITMENTS OFFERED BY BOOKING.COM

In order to address the above-described competition concerns, Booking.com offered a series of commitments concerning its parity clauses, *vis-à-vis* both other online booking platforms and hotels' direct channels of distribution.

A. Commitments with Regard to Other Online Booking Platforms

Initially, Booking.com essentially offered to remove the price parity clauses with regard to the other online booking platforms, so that hotels could adapt their offer in order to be in line with online booking platforms' services and commission rates.

However, during the market test, third parties explained that such a commitment would be incomplete, and therefore ineffective, if it did not extend to conditions (breakfast, gym, cancellation policy) and room availability. Booking.com therefore offered an improved commitment package whereby it agreed to remove all price, conditions, and availability parity clauses with regard to other online booking platforms.

As a consequence, hotels should now be entirely free to offer lower prices, more rooms, and better conditions on competing platforms, depending on the quality of service and commission rate applied by each platform. In the ADLC's view, such commitments will thus restore the hotels' commercial freedom and the natural link between the commission rates applied by online booking platforms and their commercial results, thus removing an obstacle to unrestricted competition between them.

B. Commitments Regarding Hotels' Direct Channels

As a result of the commitments offered by Booking.com, hotels will now be free to propose prices lower than those available on Booking.com via their own direct offline channel (telephone, hotel reception, bilateral emails, travel agencies, etc.). These prices offered offline must not be published or marketed online to the public in general, i.e. on the internet (hotel website, comparison sites, etc.) or through mobile phone applications. However, on their website, hotels remain free to display qualitative information concerning the lower prices offered on their

offline channel (“good prices,” etc.). They may also offer lower prices to customers belonging to loyalty schemes.

Booking.com also committed not to prohibit hotels from making contact with prior customers, namely customers who have already stayed at the accommodation at least once, whatever the means of booking used for the previous stay, including via Booking.com. The concept of prior customer is defined in the broadest sense since customers who have stayed at one property that is part of a hotel chain or of a community of hotels that have pooled their reservation services are deemed to be prior customers of all the accommodation premises in this chain of hotels or community of hotels.

These commitments are all made for a period of five years. In the ADLC’s view, they are sufficient to address the competition concerns identified above and strike the right balance between the preservation of the online platforms’ economic model, which provides consumers with a powerful search tool, and the enhancement of hotels’ bargaining power, all the while stimulating competition between platforms.

IV. CONCLUSION

The Booking.com decision is highly representative of commitment decisions adopted either by the European Commission or by the ADLC. Indeed, in rapidly evolving markets, especially technology and online markets, competition authorities are keen to address specific competition problems through the settlement route rather than through a more traditional prohibition decision. While this procedure enables the ADLC to swiftly tackle competition problems and to find custom-made solutions thereto, using the settlement route can come at the expense of a detailed and sound reasoning of the decisions.

In the present case, while the competition concerns are explained in detail, many questions spring to mind that are not precisely addressed by the decision: Shouldn’t the market definition focus on the downstream side of the market, where Booking.com may be competing not only with other online platforms to attract consumers, but also with other on- and off-line channels of distribution? Does Booking.com really hold an individual dominant position with a market share that is mainly described as in excess of 30 percent or is there instead a collective dominant position, as initially alleged by the plaintiffs? What exactly is the nature of the abuse that may fall within the scope of article 102 TFEU? Irrespective of the final response to these questions, the reasoning of the decision could be improved by addressing them in further detail.

The Booking.com decision is also representative of the challenges faced by competition authorities in Europe in order to ensure consistency, and uniformity in the application of competition law throughout the common market. In this case, while the German competition authority issued a prohibition decision (regarding HRS’ practices), the French, Swedish, and Italian competition authorities preferred the commitment route (regarding Booking.com’s practices), in an unprecedented case of close cooperation under the supervision of the European Commission.

It should also be noted that the German competition authority, who is currently conducting a parallel investigation into Booking.com’s parity clauses, has recently announced that it intends to reject Booking.com’s commitments, even if these have been accepted by three other national competition authorities, thus reinforcing the risk of divergent application of EU

competition law. Against this background, it remains to be seen whether the Commission will use its—exceptional—powers under article 11.6 of (EC) Regulation 1/2003 to take jurisdiction away from the German competition authority, in an effort to ensure a uniform application of competition law to this specific issue.

In our view, collaboration between competition authorities should be welcomed because diverging decisions in different Member States would tend to prevent online platforms from adopting European-wide commercial policies, which runs contrary to the objective of a common digital market. In addition, a unified legal framework would provide internet companies more legal certainty and would thus improve the investment conditions throughout Europe for e-commerce.

Finally, it should be noted that the risk of legal uncertainty does not only relate to diverging opinions between national competition authorities, but may also arise from the application of different sets of provisions within the same Member State. Indeed, a few days after the adoption of the ADLC's decision, the Paris Commercial Court issued a decision declaring Expedia's price parity clauses null and void on the basis of article L. 442-6, I, 2° of the French commercial code, which prohibits clauses that create a significant imbalance in the contractual relationships between two parties.

This decision contrasts with the ADLC's in two respects: first, it sets a general prohibition of price parity clauses, while the ADLC made a distinction between price parity clauses that apply with respect to other online platforms (which are prohibited) and price parity clauses that apply with respect to hotels (which may still offer lower prices off-line); second, it considers that availability parity clauses are valid, while the ADLC specifically objected to these clauses as a result of the market test.

While this decision is based on legal grounds other than competition provisions, the adoption of diverging legal decisions may have significant practical consequences for on-line operators, which adds to the risks identified above in terms of legal certainty and investment conditions.