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ASSESSING ANTICOMPETITIVE PRACTICES IN TWO-SIDED MARKETS: THE BOOKING.COM CASES

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ABSTRACT

This paper aims to shed light on the economic tools, as well as the legal-economic reasoning, which are used by different European antitrust authorities to assess the allegedly anticompetitive practices of a platform operating in a two-sided market (2SM). First of all, we show that despite the flourishing literature on 2SM economics, antitrust authorities are still facing major challenges when taking decisions concerning two-sided platforms (2SPs). Secondly, we perform a cross-country, comparative study of recent competition proceedings towards the 2SP Booking.com and highlight conceptual and practical divergences among antitrust authorities which are bound by and applying a common European legislation. By concretely and thoroughly showing where the differences lie, our study contributes to identifying the issues to tackle to ensure a better harmonized implementation of measures towards 2SPs at the EU level. Finally, building on the results of our work, we propose some alternative approaches which could benefit future antitrust analyses in 2SMs.

JEL: L42; K21; L50; L81

I. INTRODUCTION

The digitalization of the economy has dramatically transformed viable and profitable business models, and nowadays an increasing amount of companies are two-sided platforms (2SPs), working as intermediaries between different types of consumers, and often winning all the market. Despite the flourishing literature on the economics of two-sided markets (2SMs), antitrust authorities are still facing major challenges when it comes to identifying and punishing anticompetitive conducts of firms operating in these markets. This is due to several reasons.

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First of all, some practices which would normally be deemed abusive in single-sided markets (that is excessive or predatory pricing) may, in some cases, be only "*seemingly* anomalous",[1] as they would be undertaken by both small and incumbent two-sided platforms, and in both monopolistic and competitive two-sided markets. The same holds for nonpricing strategies (that is restrictive agreements, exclusionary dealing, and tying) which might have both pro- and anticompetitive aims, as well as effects.

Secondly, scholars have argued that the tools of analysis "traditionally" used by competition authorities to determine anticompetitive behaviours should be adequately revised before being applied in cases concerning 2SPs. Nevertheless, there is still no consensus as to the practicalities of possible alternatives.

Thirdly, the question of the timing is predominant. On the one hand, even in the event of an agreement over the appropriate economic and legal instruments to use in 2SMs, adapting the rules, the reasoning and the general analytical framework would obviously take time. On the other hand, any "traditional" procedure currently available to competition authorities cannot keep pace with the swiftness of the strategies adopted by two-sided platforms. Finally, competition authorities are (and will be) more and more frequently taking decisions concerning two-sided platforms.

In the light of these difficulties, some antitrust authorities have been progressively resorting to more agile competition procedures, such as *interim* measures or commitment decisions. Such procedures, which were hardly used in the first decade of the 2000s, have been explicitly endorsed by the European Competition Network (ECN) in two recent recommendations as key powers that "authorities in the Network should have in their competition toolbox".[2]

These alternatives to full-scale investigations are praised for allowing for a quicker reestablishment of effective competition, and thus for responding to the timing concern. However, the current surge in their adoption may also be indicative of the general difficulty by antitrust authorities in apprehending the implications and effects of anticompetitive practices in 2SMs. The recent hearing organized by the OECD on the key competition concerns related to the Across Platforms Parity Agreements (APPAs) imposed by Online Travel Agents (OTAs),[3] has further highlighted the complexity of competition analysis and enforcement in cases where a sound economic theory on the effects is still missing.

[1] Geoffrey Parker & Marshall W. Van Alstyne, *Two-Sided Network Effects: A Theory of Information Product Design*, 51 MANAGEMENT SCIENCE 1494 (2005).

[2] *See* http://ec.europa.eu/competition/ecn/documents.html.

[3] OECD Competition Committee, *Hearing on Across-Platforms Parity Agreements*, DAF/COMP/M(2015)2, (2015).

The OTA *par excellence*, Booking.com, is a case in point of such difficulties. The recent competition proceedings against this 2SP in France, Germany, Italy, and Sweden allow us to concretely address some major questions concerning competition law enforcement in 2SMs: in the lack of a precise analytical framework, which tools are competition authorities currently using to identify anticompetitive practices in two-sided markets? What is the reasoning they follow to appraise the legacy of these practices? How do they assess the effects on welfare? What kind of measures and procedures are they choosing?

Some scholars[4] have recently analysed the competition decisions against Booking.com in different European countries, and sometimes carried out a comparative evaluation. However, to our knowledge, our study is the first to offer a law-and-economics, thorough a review of the four proceedings,[5] with an eye to specific difficulties raised by 2SM economics (that is relevant market definition, assessment of the effects of allegedly abusive behaviour, and so forth), and with a special focus on the economic tools and legal-economic reasoning used by antitrust authorities to support their decisions.

Our study is organized as follows. In Section II, a presentation of the key features of two-sided markets economics allows us to identify three key challenges that competition authorities are facing when taking decisions on platforms operating in this kind of markets: (1) integrating two-sided markets' features in the analysis, (2) defining the relevant market, and (3) assessing the anticompetitive effects of the allegedly abusive practices. In Section III, we perform a cross-country, comparative analysis of four competition proceedings against Booking.com's rate parity clauses as led by the French, German, Italian, and Swedish antitrust agencies and show that the lack of a precise legal-economic framework for the analysis of 2SPs' behaviour may result in contradictory decisions towards the very same platform. Section IV quickly reviews the effects of the decisions in the four countries under analysis, two years after their entry into effect. Building on the results of our study, in Section V we propose some alternative approaches which could benefit future antitrust analyses in 2SMs. Section VI concludes.

[4] Pınar Akman, *A Competition Law Assessment of Platform Most-Favored-Customer Clauses*, 12 J. COMPETITION L. & ECON., 781 (2016); Margherita Colangelo & Vincenzo Zeno-Zencovich, *Online Platforms, Competition Rules and Consumer Protection in Travel Industry*, 5 JOURNAL OF EUROPEAN CONSUMER AND MARKET LAW 75 (2016); Silke Heinz, *Online Booking Platforms and EU Competition Law in the Wake of the German Bundeskartellamt's Booking.com Infringement Decision*, 7 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 530 (2016); Simonetta Vezzoso, *Online Platforms, Rate Parity, and the Free Riding Defence*, in THE ROLE(S) OF INNOVATION IN COMPETITION ANALYSIS (Paul Nihoul & Pieter Van Cleynenbruegel, eds. Edward Elgar 2017).

[5] Due to lack of availability in English of the decisions by the Italian and French authorities, the Swedish decision has been used by some authors as representative of all three commitment decisions, see for instance Akman, *supra* note 4.

II. COMPETITION LAW AND POLICY IN TWO-SIDED MARKETS

A. The Economics of Two-sided Markets

First theorized by Jean-Charles Rochet and Jean Tirole in the early 2000s,[6] two-sided markets[7] present some peculiar traits which distinguish them from more "traditional" markets. First of all, firms operating in these markets simultaneously serve more than one group of consumers and offer them the opportunity, as well as an interface, for fruitful exchanges. These value-enhancing interactions generate important direct and indirect network externalities among the groups, which 2SPs would typically aim to internalize. Unlike single-sided markets – where a firm would normally set a price *level* which takes account of the demand elasticity of the consumers it is serving – the profit-maximizing process in 2SMs relies on the more sophisticated price *structure* which is modelled on the heterogeneity, as well as on the cross-group network effects, of *all* the different types of consumers (they have different needs, different price-elasticities of demand, different willingness-to-pay, different utilities…). Since it would be impossible to bring together dissimilar demands by setting a single price level,[8] 2SPs' strategies present a "divide-and-conquer" nature, where one side is being subsidized ("divide"), whereas the loss is recovered by "conquering" the other side.[9] Thus, if a member of one group exerts a large positive externality on members of the other group, then the first group will be targeted aggressively by the platform; this will be used to subsidized the second group and possibly generate the platform's revenues.[10] By reflecting the way prices are distributed between consumers on the two sides of the market, it is the price structure which determines the overall volume of transactions in 2SMs. This balancing exercise between interlinked, heterogenous demands entails a price structure which is non-neutral and typically very skewed. Users on one side of the market may pay a price (considerably) below marginal cost[11] (or

[6] Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 JOURNAL OF THE EUROPEAN ECONOMIC ASSOCIATION 990 (2003); Jean-Charles Rochet & Jean Tirole, *Two Sided Markets: A Progress Report*, 37 RAND JOURNAL OF ECONOMICS 645 (2006); *And also* Bernard Caillaud & Bruno Jullien, *Chicken & Egg: Competition among Intermediation Service Providers*, 34 THE RAND JOURNAL OF ECONOMICS 309 (2003) and Mark Armstrong, *Competition in Two-Sided Markets*, 37 THE RAND JOURNAL OF ECONOMICS 668 (2006).

[7] For the sake of simplicity, we follow Caillaud & Jullien (*supra* note 6) and refer to these markets and platforms as "*two*-sided", even for cases where more than two groups of consumers are involved. We consider that *multi*-sided platforms present the same (amplified) characteristics as in two-sided markets.

[8] Rochet & Tirole 2003, *supra* note 6.

[9] Caillaud & Jullien, *supra* note 6.

[10] Armstrong, *supra* note 6.

[11] In digital markets, where the cost of serving one additional consumer is close to zero, checking prices upon marginal cost is often inappropriate. In this case, we use the reference to the marginal cost to show that one side of the market is not charged/is "overcharged" for the cost of the service it is enjoying.

even negative), whereas users on the other side will be charged a price which is (considerably) higher than the marginal cost the 2SP incurs in to serve them.

1. *Three challenges for competition authorities in 2SMs*

The features of two-sided markets raise important implications for antitrust authorities

a. *Integrating two-sided markets' features in the analysis*

First of all, although almost fifteen years have passed since their first formalization, an unambiguous definition of two-sided markets is still missing. Auer and Petit[12] show how some definitions are relatively narrow and mostly focusing on the pricing strategies – that is Rochet and Tirole's statement that "a market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount"[13] – whereas others focus either on the existence/magnitude of network externalities – that is Rysman's observation that there needs to be "some kind of interdependence or externality between groups of agents that the intermediary serves"[14] – or on the key role played by the 2SP in enabling or creating value-enhancing interactions.[15]

Even though scholars and practitioners seem to agree about the fundamental aspects which characterize 2SMs and several antitrust authorities have published reports addressing these new challenges, the lack of a universally accepted definition may lead competition authorities to leave key features of a 2SP's business model out of the antitrust analysis.

b. *Defining the relevant market*

Secondly, the interdependence between the two sides of the market makes the correct definition of the relevant product market a particularly complicated task.

In competition law, the relevant market definition is of crucial importance, since anticompetitive practices can only be determined and assessed within the borders of this relevant market, and authorities who fail to correctly define the relevant market in which an incumbent firm is operating may

[12] Dirk Auer & Nicolas Petit, *Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy*, 60 THE ANTITRUST BULLETIN 426 (2015).

[13] Rochet & Tirole 2006, *supra* note 6, p. 665.

[14] Marc Rysman, *The Economics of Two-Sided Markets What Defines a Two-Sided Market?*, 23 JOURNAL OF ECONOMIC PERSPECTIVES 125 (2009), p. 126.

[15] *See* David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, in OXFORD HANDBOOK ON INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol eds., Oxford University Press 2013).

decide to impose a set of requirements which can be socially inefficient and welfare-detrimental.[16]

In two-sided markets, however, the mechanical application of the economic tools which are used in single-sided markets to define the relevant market has proved to lead to significant errors. For instance, the literature on 2SMs has extensively shown that the "Small but Significant Non-Transitory Increase in Price" (SSNIP) test cannot be applied in its traditional form to competition cases concerning 2SPs.[17] Any SSNIP test based on one side of the platform alone would fail to capture the effects of the constraints on a price increase when demand interdependencies among the multiple platform sides are at play. For instance, considering that a price increase is profitable on one side and that nothing would change on the other side is a quite strong assumption in 2SMs and the failure to take account of positive feedback effects in demand may result in significantly overstating or understating the breadth of the market.[18] Moreover, since price level does *not* matter,[19] when running the test, the hypothetical monopolist should also be allowed to adjust the price structure to avoid overestimating the loss in profits due to an increase in price.[20] In its note to the OECD Competition Committee, the delegation of the European Union optimistically recognizes that "It is *somewhat* more complicated" to define a relevant market by means of the SSNIP test when the link depends on inter-group network effects, "*however*, these problems are not insurmountable and […] the SSNIP test can still be applied *with modifications*".[21] For the details about these "modifications" they refer to a previous contribution of the European Commission to the OECD

[16] Lapo Filistrucchi, Damien Geradin, Eric van Damme & Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON., 293 (2014).

[17] *See* Rysman, *supra* note 14; Evans & Schmalensee, *supra* note 15; Filistrucchi, Geradin, van Damme & Affeldt, *supra* note 16; Auer & Petit, *supra* note 12. The reasons are intuitive: since a "hypothetical monopolist" in a two-sided market is facing two distinct groups of users for which he is setting different prices, the very first question would be *which price* he should be raising. In fact, a number of questions naturally arise, and the answer given by authority may lead to significantly different decisions. For instance, as highlighted by Auer & Petit, *supra* note 12: (a) should a single SSNIP test be applied to both sides of the market, or should a separate test be applied to each side? (b) how to allocate the 10% price increase among different groups of users? (c) how to capture the fact that SSNIP increases can affect demand on both sides of a platform? and (d) upon which baseline should it be calculated?

[18] David S. Evans & Michael D. Noel, *Defining Antitrust Markets when Firms Operate Two-Sided Platforms*, 2005 COLUMBIA BUSINESS LAW REVIEW 667 (2005). They claim that a price increase on one side would rather result in a reduction of demand by customers on that side *and*, because of positive feedback effects, in a reduction in the demand on the other side. As a consequence, the decline in demand on the other side would further reduce the demand on the first side. So all in all, a price increase would actually be *un*profitable, and the market has probably been defined too narrowly.

[19] Rochet & Tirole 2003, *supra* note 6.

[20] Filistrucchi, Geradin, van Damme & Affeldt, *supra* note 16.

[21] OECD Competition Committee, *Roundtable on market definition – Note by the Delegation of the European Union*, DAF/COMP/WD(2012)28, (2012), p. 7 [*italics added*].

Competition Committee, where, however, the very same wording is used and no further clarifications are provided.[22] While both scholars and practitioners agree that the economic tools traditionally used to define the relevant market should be adapted,[23] there is no consensus as to the practicalities of possible alternatives.

c. Determining abusive practices and assessing their anticompetitive effects

Finally, determining whether 2SPs' pricing and nonpricing strategies are truly abusive and assessing their anticompetitive effect appears to be a particularly complex task.

First of all, because of strong network externalities and economies of scale, 2SMs may appear quite concentrated. When the countervailing force represented by horizontal and vertical product differentiation among platforms is strong enough, we do not encounter (semi-)monopolistic positions,[24] but it is still very common for two-sided platforms to face (very) few competitors.[25] Generally speaking, competition policy does not aim at maximizing the number of firms on a market, or at defending competitors, but at safeguarding competition to increase welfare. However, in 2SMs, market concentration may on the one hand increase market power, but at the same time also be more efficient as it would enhance indirect network effects.

Secondly, as far as pricing strategies are concerned, the highly-skewed price structure that we typically encounter in 2SMs may indeed raise the question of whether the 2SPs' profit-maximizing process is socially efficient. When analysing the two sides of the market as separate, competition authorities are likely to find what would look like "predatory pricing" on the one side and "excessive pricing" on the other side. It can be noted how the two main elements of a predatory strategy – a revenue loss and the possibility to cover such loss by raising prices – are strongly intertwined in 2SMs, as platforms not only set "too low" and "too high" prices simultaneously but one practice explains and justifies the other.

However, the underlying idea is *not* that excessive, or predatory pricing do not occur in 2SMs, but examining 2SPs' strategies with an eye to both sides

[22] OECD Competition Committee, *Roundtable on two-sided markets*, DAF/COMP(2009)20, (2009): "Both the SSNIP test and CLA can still be applied with modifications", p. 168.

[23] *See* Jean Tirole's lecture *Market Failures and Public Policy*, upon reception of the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel, p. 518: "Regulators should refrain from mechanically applying standard antitrust ideas where they do not belong".

[24] David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 CPI JOURNAL, COMPETITION POLICY INTERNATIONAL (2007).

[25] Caillaud & Jullien, *supra* note 6; David S. Evans, *Economics of Vertical Restraints for Multi-Sided Platforms*, 9 CPI JOURNAL, COMPETITION POLICY INTERNATIONAL (2013); Bertin Martens, *An Economic Policy Perspective on Online Platforms*, 5 JRC TEHNICAL REPORTS (2016).

of the market is essential to determine the anticompetitive nature of such practices.

The same holds for nonpricing strategies, such as exclusive dealing, tying, and vertical restraints for which the literature has identified both pro- or anticompetitive effects. Exclusive deals and vertical restraints may encourage sunk-cost investments, increase the certainty of demand by preventing the risk of free-riding and facilitate entry,[26] but also decrease social welfare.[27] Similarly, tying seems to be welfare-enhancing when multihoming[28] is allowed,[29] but the impact on consumer surplus may be ambiguous.[30]

B. The Increasing Resort to Commitment Decisions

There is a rich literature on the implications of 2SM economics for competition policy,[31] however there remain serious conceptual divergences amongst its proponents. As a result, while the literature has entered both US and European law cases,[32] this has occurred in the absence of a structured, precise framework. A lack which reflects the diversity and divergences which animate the patchwork of two-sided markets theory and, *in fine*, provides competition authorities with little analytical support to take decisions against 2SPs.

In the last ten years, we have observed how most countries worldwide have been progressively resorting to more agile competition procedures, such

[26] Caillaud & Jullien, *supra* note 6; Robin S. Lee, *Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, 103 THE AMERICAN ECONOMIC REVIEW 2960 (2013); Evans 2013, *supra* note 25.

[27] Toker Doganoglu & Julian Wright, *Exclusive Dealing with Network Effects*, 28 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 145 (2010); Lee, *supra* note 26.

[28] Multihoming occurs when consumers can connect/subscribe to multiple platforms.

[29] Jay P. Choi, *Tying in Two-Sided Markets with Multi-Homing*, 58 JOURNAL OF INDUSTRIAL ECONOMICS 607 (2010); Jean-Charles Rochet & Jean Tirole, *Tying in Two-Sided Markets and the Honor All Cards Rule*, 26 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 1333 (2008); Evans & Schmalensee 2015, *supra* note 15.

[30] Andrea Amelio & Bruno Jullien, *Tying and Freebies in Two-Sided Markets*, 30 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION, 436 (2012).

[31] *See for instance* David S. Evans, *The Antitrust Economics of Two-Sided Markets*, 20 YALE JOURNAL ON REGULATION 325 (2003); Julian Wright, *One-Sided Logic in Two-Sided Markets*, 3 REVIEW OF NETWORK ECONOMICS 44 (2004); Marc Rysman, *The Empirics of Antitrust in Two-Sided Markets*, 3 COMPETITION POLICY INTERNATIONAL (2007); Doganoglu and Wright, *supra* note 27; Evans 2013, *supra* note 25; Evans & Schmalensee 2013, *supra* note 15; Filistrucchi, Geradin, van Damme & Affeldt, *supra* note 16; Auer & Petit, *supra* note 12; Gonenc Gurkaynak, Oznur Inanılır, Sinan Diniz, Ayse Gizem Yasar, *Multisided Markets and the Challenge of Incorporating Multisided Considerations into Competition Law Analysis*, 5 JOURNAL OF ANTITRUST ENFORCEMENT 100 (2017); Joëlle Toledano, *Réguler le 'numérique'*, 3 DIGITAL NEW DEAL FOUNDATION (2017); *and others*.

[32] *See* Auer & Petit, *supra* note 12 for a review of law cases concerning 2SPs.

as commitment decisions.[33] Under commitment procedures, antitrust authorities identify competition concerns and address them to the undertaking which, in turn, can propose some remedies. If the agency, typically after a market test, finds that the remedies offer a satisfactory response to its concerns, these commitments become legally binding for the concerned company and no infringement case is opened against it. With the sole exception of the United States, where the first negotiated remedies[34] were proposed in 1906, most countries have only recently adopted these competition tools.[35] In the European Union, their introduction was formalized in 2004 following the adoption of the Regulation 1/2003.[36] Between 2004 and 2016, out of 57 European antitrust decisions (excluding cartels), 35 decisions concerned commitment decisions.[37] Although there does not seem to be a clear correlation between the use of commitment decisions and a specific sector,[38] the European Commission recognizes having made "extensive use of this power in the IT and digital economy sectors".[39] Some recent cases include Microsoft,[40] IBM,[41] E-books,[42] Samsung[43] and Online Hotels Booking

[33] *See* OECD Competition Committee, *Commitment Decisions in Antitrust Cases*, DAF/COMP (2016)7, (2016). In the United State, since 1995 the FTC has closed 93% of its competition cases by consent orders. Within the EU, there were over 150 commitment decisions between May 2004 and December 2013, accounting for 23% of all decisions by NCAs, with France resolving more than half of abuse of dominance cases with commitments after 2010, Italy nearly half of the cases from 2009 to 2014, and similar patterns can be found in Germany, Greece, Poland, Spain, and Croatia.

[34] In the United States, such remedies are referred to as "consent decrees or consent orders" and correspond, in broad terms, to European "commitment decisions". For more details about the differences between consent decrees/orders and commitments, *see* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, 13 GEORGE MASON LAW & ECONOMICS RESEARCH PAPER (2013).

[35] OECD Competition Committee, *Commitment decisions in antitrust cases – Background paper by the Secretariat*, DAF/COMP(2016)7, (2016), p. 6.

[36] *See* European Council, *Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, Published on 16 December 2002. Article 9 provides for the acceptance by the European Commission of commitments from the companies in cases of alleged abuse of dominant position and vertical anticompetitive agreements, with the exception of cartels.

[37] OECD Competition Committee, *Commitment decisions in antitrust cases – Note by the European Union*, DAF/COMP/WD(2016)22, (2016).

[38] OECD Competition Committee, *supra* note 35, p. 10.

[39] European Commission, *To commit or not to commit? Deciding between prohibition and Commitments*, 3 COMPETITION POLICY BRIEF, March 2014, p. 4.

[40] European Commission, Commitment decision, Case COMP/C-3/39.530 – Microsoft (tying), Published on 16 December 2009.

[41] European Commission, Commitment decision, Case COMP/39.692 – IBM Maintenance Services, Published on 13 December 201113 December 2011.

[42] European Commission, Commitment decision, Case COMP/39.847 – E-BOOKS, Published on 25 July 2013.

[43] European Commission, Commitment decision, Case COMP/C-3/39.939 – Samsung Electronics, Published on 29 April 2014.

cases.[44] Moreover, although the adoption of commitment procedures dates to 2004, it is only in 2013 that they were explicitly endorsed by the European Competition Network (ECN) as key powers that "authorities in the Network should have in their competition toolbox".[45] A more recent proposal of the European Commission to empower NCAs "to be more efficient competition enforcers" further confirms this direction.[46]

In two-sided markets, the increasing resort to commitment decisions may be due to several reasons. In novel and fast-evolving markets, long-lasting competition procedures could not realistically keep pace with the swiftness of the companies' strategies and practices. The market conditions which call for an antitrust intervention today are likely to have changed by the time an infringement decision comes into effect, and the current business models raising competition concerns be replaced by potentially very different ones. Nevertheless, although the main reasons invoked to justify the use of commitment decisions are procedural efficiencies, quick market impact, swift resolution of concerns, the involvement of fewer resources, and so forth,[47] our study suggests that along with the timing concern commitment decisions can offer competition authorities "a way out" from the difficulties they face in assessing practices in 2SMs. We will treat this point more in details in Section V.C.

III. A COMPARATIVE ANALYSIS OF FOUR COMPETITION PROCEEDINGS AGAINST BOOKING.COM

In this section, we analyse four competition proceedings against Booking.com. To structure our study, we follow the three challenges identified in Section II. We will thus examine (1) whether competition authorities integrated key two-sided markets's features in their analysis, (2) how they defined the relevant market, and (3) how they assessed the anticompetitive nature of a 2SP's practices.

A. Background

Booking.com is a two-sided Online Travel Agent (OTA) offering a platform for consumers to search for, compare and book hotel rooms free of charge, and for hotels to have their offers promoted to consumers in two-hundred different countries and translated in more than forty languages. Booking.com is a typical two-sided platform which (1) brings together distinct groups of

[44] *See* Section III.

[45] European Competition Network, *See* http://ec.europa.eu/competition/ecn/documents.html.

[46] European Commission, *Proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*, COM(2017) 142 final, Published on 22 March 2017.

[47] OECD Competition Committee, *supra* note 35 p. 17.

consumers, who (2) benefit for an interaction which (3) would have been considerably more costly (or impossible) without the intermediary. Moreover, (4) an increase in the number of consumers on one side also increases the value of the service for the other side.

The service provided by Booking.com is free of charge *until* a reservation is made *on the platform*. In that case, the hotel pays a commission (going from 10% to 30% of the room price) to the platform, whereas consumers are not (directly) charged any price. Since Booking.com does not get remunerated in case the room booking takes place elsewhere (hotels' website, on the phone, through e-mail, and so forth), the platform is only viable once the risk of free-riding (that is finding the hotel on the platform and then booking through other channels) can be appropriately integrated in its business model. To this end, rate parity clauses (also known as "best price clauses" or "across platform parity agreement")[48,49] commit the hotels present on Booking.com to offer the same or a better terms and conditions[50] on this platform than on all the hotels' other direct and indirect sales and distribution channels, be it online or offline.

Following several complaints raised by other online travel agents, main hotel chains and associations, many European authorities launched investigations to determine whether such rate parity clauses agreements infringed the prohibition of restrictive agreements as defined under Article 101 of the Treaty on the functioning of the European Union (TFEU), and, in some countries, whether they also accounted for an abuse of dominance under Article 102 of the TFEU, as well as under their respective national legislations. Given the predominantly transnational character of online booking in the hospitality sector, a special cooperation procedure among three national competition authorities (NCAs) – namely, the French *Autorité de la concurrence*, the Italian *Autorità Garante della Concorrenza e del Mercato* and the Swedish *Konkurrensverket* – and the European Union was initiated in June 2014 within the European Competition Network (ECN).[51]

[48] Despite the term "across platforms", these agreements usually concern retailers and suppliers. For further details, see http://www.oecd.org/daf/competition/competition-cross-platform-parity.htm.

[49] Although rate parity clauses are often referred to as "Most-favoured-nation (MFN) clauses" or "Most-favoured-customer (MFC) clauses", they do not correspond to the same thing. Unlike Most Favoured Nation (MFN) clauses, in parity clauses costumers are often not aware of their existence and they rather result from an agreement between the supplier (i.e. the hotels) and a third-party platform (i.e. Booking.com). As Akman showed, *supra* note 4, "Normal MFCs" link prices between different costumers of the same seller, whereas "Platform MFCs" link prices for the same customer buying from different outlets.

[50] Such terms and condition would include: Price parity – that is that the prices listed on Booking.com should be the same as or lower than on other distribution channels; Parity on the conditions of the offer; Availability parity – that is the number of rooms promoted on Booking.com should be equal to or larger than what is promoted on other channels.

[51] *See* the European Competition Network website https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-bookingcom.

As a response to the competition concerns, Booking.com proposed a set of commitments narrowing the scope of application of its parity clauses. In particular, it accepted to move from *wide* to *narrow* parity clauses. Under *wide* clauses hotels had to refrain from offering better terms and condition on any other distribution channel – competing OTAs, hotels' offline channels, hotels' websites, and so forth, – than on Booking.com, whereas under *narrow* parity clauses hotels can offer lower room prices and better room availability on other OTAs, as well as on offline sales channels, while they should still refrain from publishing lower room prices or better conditions on their own website. These narrow clauses were accepted by the three NCAs and became effective on July 1, 2015, for a period of five years. As a result, the legal proceedings against the platform were officially closed in France, Italy, and Sweden. In June 2015, Booking.com announced that the narrow parity clauses would be implemented throughout the European Union, and the second biggest OTA Expedia also voluntarily committed to move from wide to narrow parity clauses.

In spite of these harmonization efforts at the EU level, the German antitrust authority found that these commitments were insufficient to solve the related competition concerns and opened an individual, isolated investigation resulting in a complete ban of both wide and narrow clauses. Furthermore, in other countries, such as France and Italy, the outcome of the NCAs' decisions was eventually altered by an *ex post* intervention by the legislator, also translating in a complete ban. Still, while Germany's decision is indeed falling within the scope of our analysis, we will not focus on the position of the French and Italian legislators and will only analyse the NCAs' reasoning and decision. We consider that the French and Italian competition landscapes concerning this 2SP were impacted by an exogenous overlapping event (the legislator's intervention) which is perfectly independent of the authorities' analyses.

B. France

The French antitrust authority (*Autorité de la concurrence*, Adlc) opened an investigation on Booking.com following the complaints raised by the main unions of French hospitality sector,[52] as well as the AccorHotels group. The seizing parties accused Booking.com of having undertaken anticompetitive practices such as vertical restrictions, tacit coordination and abuse of dominant position and thus of having violated the articles L. 420-1 and L. 420-2 of the French *Code de commerce*, as well as articles 101 and 102 of the TFEU.

[52] Union des Métiers et des Industries de l'Hôtellerie (UMIH), Groupement National des Chaînes Hôtelières (GNC), Confédération des Professionnels Indépendants de l'Hôtellerie (CPIH), Syndicat National des Hôteliers, Restaurateurs, Cafetiers et Traiteurs (SYNHORCAT), Fédération Autonome Générale de l'Industrie Hôtelière Touristique (FAGIHT).

1. Three issues in 2SMs

a. Is the market two-sided?

The Adlc explicitly recognizes that Booking.com is operating in a two-sided market: "OTAs serve as intermediaries in a market that has two sides, linking two distinct categories of customers: hotels and consumers of overnight stays".[53]

b. The relevant market definition

The Adlc makes a distinction between the upstream and downstream markets:

- The upstream market concerns the relation between Booking.com and the hotels present on its platform, whereas
- The downstream market consists of the service that Booking.com is providing to the consumers, including search, comparison and hotel reservation.[54]

The Adlc then states that the allegedly abusive practices only concern the relation between the OTA and the hotels. Consequently, *only* the *upstream* market is considered as relevant in the competition analysis. To define its borders, the Adlc applies the test of the hypothetical monopolist (that is SSNIP test). They thus consider whether a significant, nontransitory 5–10% increase of the commission fee above the *competitive* level would be profitable, knowing that the demand of *both* sides of the market could be directed towards other services perceived as substitutes.[55] The relevant market is thus finally defined as "the market of the supply of online travel agency reservation services for a simple[56] overnight stay proposed by hotels based in France".[57] The direct distribution channels such as the website of the hotel, as well as metasearch engines and search engines are therefore not part of the same relevant market as Booking.com. The geographical relevant market is defined as national.

[53] Autorité de la concurrence, *Décision n° 15-D-06*, 21 Apr 2015, p. 25: "Les OTA servent d'intermédiaire sur un marché qui comprend deux faces, en mettant en relation deux catégories de clients distinctes: les hôteliers et les consommateurs de nuitées".

[54] Idem, p. 25.

[55] Idem, pp. 25–26: "Sachant que des reports de demande sont possibles vers d'autres substituts, à la fois du côté des hôtels et du côté des clients d'hôtels".

[56] Not part of a broader offer.

[57] Autorité de la concurrence, supra note 53 p. 26: "Le marché pertinent pourrait être, dans ces conditions, le marché de l'offre de services de réservation de nuitées seules d'hôtels français sur des OTA".

c. Determining market power, abusive conducts and their effects on welfare

Based on the relevant market as defined here above, Booking.com is said to have over 30% market share,[58] but it cannot be excluded that Booking.com is actually enjoying a dominant position.[59] The Adlc also adds that since it is of crucial importance ("*indispendable*") for hotels to be present on OTAs, the market share is not necessarily representative of the actual market power they can exert on hotels.[60]

Together with a significant market share, the Adlc considers the presence of barriers to entry in the relevant market previously identified. These barriers would be due to important indirect network effects, where the size of a company is an essential parameter of its growth (the so-called "snowball effect"), and the economies of scale linked to the volume of investments undertaken by the OTA, on Google and metasearch engine to ensure the platform visibility. As a consequence, the parity clauses imposed by Booking.com would result in two main types of anticompetitive effects, (1) a reduction in competition between different OTAs, and (2) the foreclosure of smaller platforms or new entrants.

More in details, the Adlc concludes that Booking.com could easily exert its market power by increasing its commission fees since other platforms would be unable to challenge the incumbent by offering more competitive prices. Furthermore, an increase in Booking.com commission rate would likely be emulated by potential competitors. This "dilution mechanism" would create a homogeneous pricing strategy which would significantly soften competition among OTAs.[61] As a result, these parity clauses represent a strong deterrent for smaller companies, or barriers to entry for new ones, as these platforms could not differentiate by offering lower prices. The only way for them to increase their market share would be to enjoy a better visibility or offer a better-quality service than Booking.com, which the Adlc does not consider to be likely given Booking.com's significant advantage.[62]

The Adlc also states that, although in theory it would be impossible, even small platforms (that is nondominant) in this relevant market can exert market power by imposing their own parity clauses. This practice is said to more

[58] The share had been computed on the basis of different studies by Coach Omnium, Harris Interactive, JDN/Kantar Media Compete France Phocuswright. The online overnight reservations made on the websites of the group Odigeo have been included under Booking.com market share since they are all redirecting to this OTA.

[59] Idem, p. 30: "Il n'est pas exclu que Booking.com puisse détenir une position dominante sur le marché pertinent de l'offre de services de réservation de nuitées seules d'hôtels français sur des OTA. En tout état de cause, la part de marché de Booking.com est supérieure à 30%".

[60] Idem, p. 13.

[61] Idem, p. 31.

[62] Idem, p. 32–33.

easily accepted by the hotels because a big platform like Booking.com is doing the same.[63]

C. Italy

In May 2014, the Italian competition authority (*Autorità Garante della Concorrenza e del Mercato*, AGCM) also opened a proceeding against both Booking.com and Expedia[64] following the complaints by the Italian Hotels Association (Federalberghi) and the Financial Guard, with the aim of inquiring possible restrictions on competition related to the use of parity clauses. Price parity clauses, considered as vertical restraints, were investigated within the scope of Article 101 of the TFEU and of Article 2 of Law 287/90 of the Italian Competition Law.

1. Three issues in 2SMs

a. Is the market two-sided?

The AGCM does not explicitly state that Booking.com is operating in a two-sided market. However, it recognizes that platforms like Booking.com are simultaneously serving hotels, as well as end-consumers.

b. The relevant market definition

The AGCM defines the relevant market as the market for *online* hotel booking services, which is therefore distinct from the market for offline "traditional" booking services.[65] The relevance of this distinction is justified by the fact that (1) online booking will exponentially grow *in the future*, (2) there are different types of commissions applied in online vs. offline channels, (3) hotels have the possibility to reach an *infinitely* higher number of consumers thanks to OTAs, (4) the use of the internet to search for and book hotel rooms has significantly increased.[66] The geographical relevant market is considered to be national, since Booking.com is differentiating their commission fees based on the national borders.

[63] Idem, p. 33: "(…) L'ensemble des OTA, même petites, semblent disposer d'un pouvoir de marché suffisant pour imposer leurs clauses de parité aux hôtels partenaires. Les faire accepter des hôteliers est d'autant plus aisé que les gros acteurs tels que Booking.com appliquent ces mêmes clauses".

[64] Since the decision is concerning two OTAs, the scope of the AGCM's analysis is going beyond the only activity of Booking.com.

[65] Autorità Garante della Concorrenza e del Mercato, *Provvedimento n. 25422, I779 - Mercato dei servizi turistici-prenotazioni alberghiere online*, Bollettino n. 14, 27 Apr 2015, p. 7: "Si è considerato il mercato rilevante (…) il mercato dei servizi di prenotazione alberghiera online, distinto da quello della distribuzione tramite punti vendita fisici tradizionali".

[66] Idem, p. 2 *[italics added]*.

c. Determining market power, abusive conducts and their effects on welfare

The AGCM writes that in 2013, 70% of all *online* reservations were done through OTAs. However, exact data on Booking.com's market share are not provided. The AGCM only says that both Booking.com and Expedia are the biggest operators *worldwide* and that in Italy the online booking market appears to be highly concentrated, with Booking being the first operator, followed by Expedia.[67]

The AGCM's competition concerns focus on the fact that the rate parity clauses are said to be vertical restrictions which would significantly reduce the incentive for both OTAs *and other* booking channels (hotels' websites, travel agencies and so on) to compete on prices and other conditions. Moreover, these clauses could be strategically used by the OTAs with the aim of deterring new entrants.[68]

D. Sweden

Unlike the French and Italian cases, the Swedish competition authority (*Konkurrenverket*) launched investigations on Booking.com without having been seized by third parties. Price parity clauses between Booking.com and Swedish hotels are said to affect trade among EU Member States and thus fall within the scope of Article 101 of TFEU. Again, unlike Adlc and AGCM, the commitments taken by Booking.com were associated with a fine of approximately 530,000€ (5,000,000 SEK) for Booking.com Sverige AB, and a fine of approximately 3,145,000€ (30,000,000 SEK) for Booking.com B.V.[69]

1. Three issues in 2SMs

a. Is the market two-sided?

The Konkurrenverket does not explicitly state that Booking.com is operating in a two-sided market, but recognizes that the platform's business model as an intermediary is to bring together and serve two different types of users.[70]

b. The relevant market definition

The relevant market is defined as the market for the provision of online travel agency services. The Konkurrenverket further specifies that only online travel

[67] Idem, p. 3.
[68] Idem, p. 7.
[69] Konkurrensverket, *Decision 15/04/2015*, Ref. no. 596/2013, p. 1.
[70] Idem, p. 5: "Hotels enlist on online travel agencies with the aim of reaching consumers which the hotels themselves have difficulty reaching. Online travel agencies thus make hotel rooms available to consumers on behalf of hotels, which in turn provide online travel agencies with the rooms consumers are able to book. In addition, online travel agencies offer consumers a search and comparison function that individual hotels are unable to offer".

agency services that enable *booking* directly on the platform should be considered. The geographical relevant market is national.

c. Determining market power, abusive conducts and their effects on welfare

Since wide rate parity clauses aim to guarantee that Booking.com obtains the same or a better price than all other distribution channels, the Swedish competition authority states that these clauses have a double character:

- A *horizontal* dimension, as they have an impact on the relationship between Booking.com and its competitors, and
- A *vertical* dimension, as they may also influence the relationship between Booking.com and the hotels.

The authority then says that *only* the *horizontal* competitive dimension of the parity clauses – that is the fact that the same room cannot be offered at better conditions on other OTAs – may be considered as abusive as it affects "the competition between companies in the *same* relevant market".[71] Conversely, the Konkurrenverket says that the fact that hotels cannot offer better room prices on their own channels does not have an impact on the competition between Booking.com and other OTAs beyond the impact of the horizontal agreement presented here above. Since "Booking.com and the hotels (…) are not active in the same relevant market (…) the vertical price parity does not restrict any competition between Booking.com and the hotels".[72]

E. Germany

Contrary to the approach taken by the French, Italian, and Swedish competition authorities and to the clauses which were applied in all EU countries, the German antitrust authority (*Bundeskartellamt*, BKartA) took a harsher line, by declining the commitments proposed by Booking.com and opening an individual proceeding. This case is thus different from the others here above as it concerns the analysis of the anticompetitive nature of the *narrow* parity clauses negotiated by the other three authorities.

Another important difference is that in Germany another OTA (HRS) had already been the subject of a competition proceeding ending with a complete ban on wide parity clauses.[73] In fact, in December 2013, the BKartA prohibited HRS from continuing to apply its best price clause and also initiated proceedings against the OTAs Booking and Expedia for applying similar clauses in their contracts with their hotel partners. HRS's appeal against the BKartA's decision was rejected by the Düsseldorf Higher Regional Court in January 2015 and all parity clauses by this OTA were cancelled. In March 2015, the

[71] Idem, p. 5.
[72] Idem, p. 6.
[73] Bundeskartellamt, *Beschluss B 9-66/10* – Gem. § 32 ABS. 1 GWB, December 2013.

BKartA informed Booking.com that reducing the scope of its clauses (that is, the *narrow* parity clauses) was insufficient to allay competition concerns, and the OTA was ordered to remove all price clauses (both narrow and wide) from its General Terms and Conditions and from the individual agreements by January 31, 2016, for hotels and other accommodations located in Germany.

1. Three issues in 2SMs

a. Is the market two-sided?

The German Bundeskartellamt does not clearly state that Booking.com is operating in a two-sided market. However, the description of the platform's business model suggests that there are two different market sides at play. The relationships between the two sides and the platform are defined as "agreements", and they seem to be of a different nature:

- The relation between Booking.com and the consumers is described as an intermediary nonmonetary agreement,[74] whereas
- There is a direct monetary agreement between Booking.com and the hotels.[75]

b. The relevant market definition

Following the HRS case, the German authority says that the relevant market will be defined as the market for *intermediary* services of hotel portals offering three kinds of different services, that is "search, compare and book", which are "convenient for hotel customers".[76] The relevant market is therefore neither including the hotels' own websites nor "online travel agencies",[77] or online specialized platforms which are not offering the bundle of these three services (like tour operator portals or metasearch engines). More in details, the BKartA takes the position also supported by the Düsseldorf Higher Regional Court in the HRS law case and states that the market for the hotel portals intermediary services is "objectively"[78] offer-driven. In this "offer-

[74] Bundeskartellamt, *Beschluss B 9-121/13* – Gem. § 32 ABS. 1 GWB, December 2015, p. 4: "By booking a hotel room via the hotel portal, an *intermediary* agreement is formed between the hotel customer and Booking. No costs are charged to the hotel customer for the intermediary service of Booking; he pays solely the room price to the booked hotel".

[75] Idem, p. 4: "There is an agreement between Booking and the hotel companies on the inclusion of the related hotels in the Booking reservation system. The agreements provide that the hotel must pay a standard commission of 10–15% on the overnight price to Booking for each realized individual booking".

[76] Idem, p. 5.

[77] The Bundeskartellamt seems to make a distinction between "hotel portals" and "online travel agencies" ("online-Reisebüros"), the latter being excluded from the market. It is quite difficult to understand what kind of online travel agency would not satisfy the criteria for "search, compare and book". Nevertheless, on the basis of the description in the Bundeskartellamt's decision we can positively assume that "hotel portals" and "OTAs" are synonyms.

[78] Bundeskartellamt, *supra* note 74, p. 39.

driven market for the hotel portals' intermediary services (hotel portal market), the *hotel portals as suppliers* stand opposite the *hotels as consumers*".[79] In geographic terms, the market is also defined as national.

c. Determining market power, abusive conducts and their effects on welfare

The hotel portals' market share in 2013 is said to be distributed as follows: (a) Booking 50–55%; (b) HRS 30–35%; (c) Expedia 10–15%; (d) others.[80] As for online booking, 70% of reservations are made on hotel portals, and 30% on the hotels' own websites. However, online platforms do not appear to be the preferred channel for hotel booking. End-customers are in fact said to book only one-third of their hotel room accommodations online, whereas the big majority of bookings (two-thirds) is made through offline channels.[81]

The *narrow* price parity clauses accepted by France, Italy and Sweden are said to represent restrictive agreements between companies and can therefore be pursued under the Article 101 of the TFEU, as they restrict competition on both the hotel portal market (the relevant market here) *and* the wider market for hotel rooms. If, following the other NCAs' decisions, hotels are now allowed to offer more favourable conditions on other OTAs as well as through offline channels, the remaining narrow clauses are said to restrict competition on hotels' own websites. Booking.com is thus accused of "unfair impediment[82] of the small and medium-sized hotel partners *depending* on Booking"[83] since their competitive freedom of action over other "online distribution channels"[84] is still significantly reduced.

As for the abuse of dominance, the German authority states they it "will leave unresolved the question of whether Booking.com, given its high market share, also additionally satisfies the special elements constituting abuse under Article 102 (2) (a) TFEU".[85] However, no particular reason is given for this omission.

F. Analysis

In Table 1, we present the four decisions according to the three challenges as identified in Section II.[86]

[79] Idem, pp. 39-40 [*italics added*].
[80] Idem, p. 74.
[81] Idem, p. 8.
[82] *See* Heinz, *supra* note 4: "Unfair impediment requires (i) a direct or indirect significant negative impact on the competitive freedom of another undertaking and (ii) a balancing of the interests of all parties concerned, taking into account that the purpose of the ARC is free competition".
[83] Bundeskartellamt, *supra* note 74, p. 92 [*italics added*].
[84] Idem, p. 94.
[85] Idem, p. 94.
[86] *See* Appendix for a more detailed table.

Table 1. Overview of the four decisions according to three main challenges

Three challenges			France (Adlc)	Italy (AGCM)	Sweden (Konkurrenverket)	Germany (BKartA)
1 **Recognizing two-sided markets**	Use of specific terminology		**Yes**	**Not explicitly *but*** recognizes the features	**Not explicitly *but*** recognizes the features	**No**
	Market sides under analysis		**One**	**One**	**One**	**One**
2 **Defining the relevant market**	Definition		The market of the supply of online travel agency reservation services for a simple overnight stay	The market for online hotel booking services, which is therefore distinct from the market for offline 'traditional' booking services	The market for the provision of online travel agency services where booking is possible on the platform itself	The market for intermediary services of hotel portals offering three kind of different services: search, compare and book
	Tool used		SSNIP test on one side only	Not specified	Not specified	Not specified
	The relevant market	includes	Other OTAs	Other OTAs; hotels' own websites; travel agencies' websites	Other OTAs	Other OTAs
		does NOT include	Hotels' own websites; metasearch engines and search engines	Metasearch engines and search engines	Hotels' own websites; metasearch engines and search engines	Hotels' own websites; tour operator portals; metasearch engines and search engines
3 **Assessing the anticompetitive effects of the allegedly abusive practices**	Market share		Over 30%	Data not provided	Data not provided	50–55%
	Anticompetitive practices	Vertical dimension	**Yes**	**Yes**	**No**	**Yes** (*NB: referring to narrow parity clauses*)
		Horizontal dimension	**Yes**	**Yes**	**Yes**	**Yes**
	Overall effects on welfare of *WIDE* parity clauses		**Negative**	**Negative**	**Negative & Positive** *(Positive effects outweighted by negative ones)*	**Negative**
	Overall effects on welfare of *NARROW* parity clauses		**Positive**	**Positive & Negative** (*Negative effects outweighted by positive ones)*	**Positive**	**Negative**

1. *Challenge 1: Recognizing two-sided markets and integrating their features in the analysis*

The French Adlc is the only competition authority, among the four under analysis, which is explicitly referring to the online hotel booking market as two-sided. The Italian AGCM and the Swedish Konkurrenverket do not explicitly state that Booking.com is operating in a 2SM, despite the fact that in Italy the terminology "*mercato a due versanti*" had already been used in 2013 in a case concerning collective sale of broadcasting rights,[87] and that in the note submitted by Italy in preparation of the OECD Competition Committee (held on October 27–28, 2015, so only few months after the decision on Booking.com and Expedia), OTAs are explicitly referred to as online platforms which "typically operate in two-sided markets, coordinating the interdependent demands of two distinct groups of customers, who need to interact with each other".[88] In spite of the lack of precise terminology, both the Italian and the Swedish authorities recognize the key features supporting the two-sidedness of the platform (that is an intermediary service provided to both hotels and consumers with distinct pricing strategies).

A due consideration of the economic specificities of two-sided markets is however still limited. The French, Italian and Swedish authorities recognize the presence of two sides in the OTAs' market but only focus on one of them, and thus fail to coherently integrate into their analysis the consequences and the magnitude of the corresponding externalities. As already noted by Auer and Petit[89] in other competition cases, 2SM theory is only used to set the scenes of the case, but the authorities' reasoning remains essentially one-sided.

In this sense, the German Bundeskartellamt's position is particularly interesting. At the beginning of the decision, the BKartA recognizes that Booking.com is in a relation with two distinct types of users, but then fails to acknowledge that *both* of them are enjoying the intermediary service provided by the platform. Furthermore, the nature, *as well as the beneficiaries*, of this intermediary service change in the course of the analysis, ending up in ambiguous definitions. The Bundeskartellamt initially defines the relation between Booking.com and the consumers as an *intermediary* agreement ("*Vermittlungs*vertrag"), whereas there is a simple, more standard "contract" ("Vertrag") binding Booking.com and the hotels.[90] This intermediary nature of the platform-consumers' relation is kept in the final definition of the relevant market, where a special emphasis is given to the value for the consumers of the services

[87] Autorità Garante della Concorrenza e del Mercato, *Provvedimento n. 24206, Procedure selettive lega calcio 2010/11 e 2011/12*, Bollettino n. 7, (2013), p. 7.

[88] OECD Competition Committee, *Hearing on across platform parity agreements - Note by Italy*, DAF/COMP/WD(2015)58, (2005), p. 3.

[89] Auer & Petit, *supra* note 12.

[90] Bundeskartellamt, *supra* note 74, p. 4 [*italics added*].

provided.[91] Nevertheless, in the decision's chapter dedicated to the relevant market definition,[92] the platform seems to play a rather passive role and is defined as a *supplier* satisfying the *demand* and needs of *its sole customers*: the *hotels*. Hotels thus *ask* the supplier-Booking.com *for* the intermediary service of making rooms searchable and comparable online.[93] To satisfy this demand, Booking.com offers *hotel customers* the search, compare and book functions in a user-friendly service package. Thus, Booking.com's services are said to allow hotels to get more customers, while the BKartA does not consider that there is an *overarching* goal to the hotels' aim to reach more consumers, and that is Booking.com's aim to get *both* more hotels *and* more consumers.

In this "one-sided logic in two-sided markets"[94] the four NCAs do not take into account the relevance of indirect network effects in the competition analysis. This is more explicit in the German decision, where the BKartA draws a one-dimensional market even though it does recognize, just like the Düsseldorf Higher Regional Court did in its decision against HRS's appeal, that indirect network effects between the hotels and the hotel's consumers may be at stake,[95] and that the "unremunerated side"[96] (the end-consumers) may actually "influence market activity at least for the corresponding services and products performed for remuneration".[97] Despite this claim, the Bundeskartellamt decides to "explicitly leave this question open in the present case"[98] and to consider the sole relation linking the hotels to Booking.com. Although the German authority sees that "the relevant intermediary service, which is the primary service, is significantly influenced by network effects",[99] these network externalities, which would account for the existence of an additional side of the market, completely disappear in the competitive analysis of Booking.com's business model. Furthermore, the Bundeskartellamt even states that "in more recent cases,[100] the Bundeskartellamt referred to similar platforms for intermediary services in the real estate sector as transaction platforms, and *viewed the non-remuneration of one market side as a differentiating pricing strategy of the platforms that resulted in the internalization of indirect network effects*, high discounts down to a price of zero for

[91] "The relevant market is the market for *intermediary* services of the hotel portals which includes the service bundle of 'search, compare and book' *that is convenient for hotel customer*", Idem, p. 5.
[92] Idem, Chapter IV, pp. 39–48.
[93] Idem, p. 41.
[94] Wright, *supra* note 31.
[95] Bundeskartellamt, *supra* note 74, p. 43.
[96] Idem, p. 43.
[97] Idem, p. 43.
[98] Idem, p. 43.
[99] Idem, p. 41.
[100] The Bundeskartellamt case report B6-39/15 *Merger Approval of Online Real Estate Platforms*, (2015).

one of the user groups"[101] – thus suggesting that the Bundeskartellamt is well aware of the specificities of pricing and nonpricing strategies in two-sided markets.

2. *Challenge 2: The relevant market definition*

The authorities' one-sided approach is confirmed in the definition of the relevant market.

The French Adlc recognizes that two different kinds of markets are at play and makes a distinction between upstream and downstream market. In Rochet and Tirole's terminology, the downstream market is representing the "loss leader" or "subsidized" segment, whereas the upstream market hosts the "profit-making" segment.[102] Although the dynamics of the two markets are clearly intertwined, only the upstream market is said to be relevant. Secondly, to define the relevant market, the Adlc applies the SSNIP test in its most traditional form, and only on one side of the market (the upstream market). Still, to show that the 2SM theory is somehow taken into account, the Adlc assumes that the effects of this hypothetical 5–10% increase of commission fee above the competitive level[103] *may* result in the redirection on *both* sides towards other services perceived as substitutes.[104] However, this acknowledgment remains a simple statement and does not serve as a support in the authority's further analysis. The Adlc keeps considering the two sides as distinct, where the respective demands could be *independently* redirected towards other substitute products. Moreover, the Adlc states that "when dealing with a two-sided market, one must also take account of this second side and of its possible indirect effects on the relevant market",[105] but provides no clear reference to how these new dynamics could be apprehended.

Unlike the Adlc's distinction between the upstream (Booking.com-hotels) and the downstream (Booking.com-consumers) markets, the Italian AGCM only focuses on the differences in the *type* of service offered (online vs. offline), and its associated features (that is different type of commissions in online and offline channels). This seems to suggest that any company offering online booking facilities is in the same relevant market as Booking.com

[101] Idem, p. 43 [*italics added*].

[102] Rochet & Tirole 2003, *supra* note 6, pp. 991–992.

[103] The profitability of an 5–10% increase in the commission fee is tested upon their *competitive* level. Wright, *supra* note 31, had highlighted that the question of whether a SSNIP test should be performed upon the marginal cost or the competitive price level was not a trivial one. Indeed, because of large economies of scales, the marginal cost would not have been a valuable reference point.

[104] Autorité de la concurrence, *supra* note 53, pp. 25–26: "sachant que des reports de demande sont possibles vers d'autres substituts, à la fois du côté des hôtels et du côté des clients d'hôtels".

[105] Idem, p. 25: "Dans la mesure où il s'agit d'un marché biface, il convient de tenir compte de la seconde face du marché et de ses effets indirects éventuels sur le marché en cause".

(hotels' own websites, "traditional" travel agencies' website, and so on). This also suggests that, according to the AGCM's market definition, consumers would perceive hotels' websites as substitutes of a two-sided platform like Booking.com. Thus, a reservation on the hotel website (= online) would fall within the same relevant market as the one Booking.com is operating in. Furthermore, by including both OTAs and hotels' websites in the same relevant market, the AGCM adds a new dimension to the competition analysis. If the French Adlc had mainly focused on the vertical character of the parity clauses (considered as agreements imposed by Booking.com on partner hotels), the AGCM seems to enlarge the field of the analysis to include a more horizontal dimension, where hotels and travel agencies could be direct competitors in the same relevant market (that is their online channels).

The relevant market definitions provided by the Swedish and German NCAs are essentially similar to the French Adlc.

3. *Challenge 3: The assessment of the anticompetitive effects of the allegedly abusive practices*

Even though the relevant market definitions are similar, the practices considered as abusive within its boundaries, as well as their effects, significantly differ in the four proceedings. Here below we analyse the theories of harm, as well as the assessment of the allegedly abusive behaviour when both country and noncountry-specific features are at play.

a. The theories of harm

We find that, despite some claims,[106] the four competition authorities, even when coordinated under the ECN, do *not* all retain the same theory of harm.

According to the French Adlc and the German BKartA such practices have both a vertical and horizontal dimension, since they are exerted both on Booking.com's competitors and on the hotels themselves. More in details, the French Adlc states that Booking.com could exert its market power by raising the level of commission fees, and the Bundeskartellamt even accuses Booking.com of unfair impediment of small and medium-sized hotels which are *dependent* on the platform. This vertical nature of the abusive conduct is not considered in the Swedish decision, where the authority only acknowledges the horizontal dimension of the practices and focuses on the reduction in competition among firms operating in the same relevant market.

It is also interesting to note that only the Adlc and the BKartA consider that Booking.com's practices may also be judged as an abuse of dominant position under the Article 102 of the TFEU and not only as restrictive

[106] OECD Competition Committee, *Hearing on Across-Platforms Parity Agreements*, DAF/COMP/M(2015)2, (2015).

vertical agreements (Article 101 TFEU). Despite this statement, neither the French nor the German authorities effectively try to prove the abuse of dominance, and explicitly leave the question open,[107] without providing any particular reason for this omission.

The determination of market power appears to be a particularly complicated task in 2SMs. The Adlc states that even (very) small OTAs seem to have enough market power to impose *their own* parity clauses.[108] This can be the consequence of two different situations. On the one hand, we showed that even small platforms operating in two-sided platforms undertake *seemingly* anticompetitive behaviours and that this conduct is actually the result of "normal" business model in 2SMs. This may reinforce Booking.com's position according to which price parity clauses are the only viable way to avoid the risk of free-riding. The Adlc itself cites different studies showing that customers' price elasticity of demand in this market is particularly high.[109] Moreover, online channels appear to be used by a huge majority (93%)[110] of consumers for *searching* for an accommodation, whereas the booking itself is still largely done offline.[111] Thus, Booking.com, which *only* gets remunerated *if* the booking is done on its platform, obviously has a huge incentive to make sure that both consumers and hotels find the transaction more "profitable" online. Because of cross-network externalities, platforms have indeed an incentive to perform well on *both* sides.[112] On the other hand, however, it cannot be excluded that small platforms' imposition of parity clauses may be the result of a form of business emulation, in which small platforms engage in an anticompetitive behaviour in a market environment in which consumers are "accustomed" to it.

As for the Italian AGCM, its relevant market definition triggers interesting considerations on the appropriateness of the accepted commitments.

First of all, the relevant market as defined by AGCM suggests that, in case Booking.com's market power is confirmed, this is considered to be exerted on all the players present in this market, that is the hotels subject to parity clauses, *as well as* the other hotels offering online booking services. We find this to be a quite strong assumption. Secondly, the commitments imposed on Booking.com provide for the possibility for hotels to propose better conditions than those displayed on Booking.com on their *offline* channels, but *not* on their own *websites*. If the relevant market under analysis includes the hotels' own websites, this seems to suggest that Booking.com could actually

[107] Bundeskartellamt, *supra* note 74, p. 94 and Autorité de la concurrence, *supra* note 53, p. 30.
[108] Autorité de la concurrence, *supra* note 53, p. 33: "L'ensemble des OTA, même petites, semblent disposer d'un pouvoir de marché suffisant pour imposer leurs clauses de parité aux hôtels partenaires".
[109] Idem, p. 33.
[110] Idem, p. 12.
[111] Idem, p. 12.
[112] *See* Armstrong, *supra* note 6.

continue to exert the same degree of market power even after the adoption of the commitments, and that the competitive concerns raised by the AGCM would still be in place.

Consequently, the position of the German competition authority which opted for a complete ban of both wide and narrow parity clauses would have been more consistent with the relevant market definition proposed by the AGCM. These conclusions may be partly nuanced by fact that the Italian authority says that only 5–15% of total reservations are made through the hotels' online websites[113] and that the big majority of their sales (60–70%) is still happening through offline channels,[114] where the narrow price parity clauses are indeed no longer applying. Alternatively, this potential contradiction may also be due to a "compromise" resulting from the coordination effort among the three authorities. In fact, the Swedish competition authority took a strong position to defend Booking.com's right to impose price parity clauses on the hotels' website.[115] The AGCM might have considered that the anticompetitive effect of this clause would have been limited enough to be outbalanced by the benefits of providing a consistent, transnational response to the abusive behaviour under analysis.

b. Country- and noncountry-specific features

Secondly, along with the intricacies presented here above, we find that the four decisions highlight interesting conceptual divergences as regards the assessment of the aims and effects of the allegedly abusive behaviour. Generally speaking, it can be reasonably argued that reaching different conclusions in different countries is not necessarily a sign of regulatory failure, provided that these conclusions are supported by an accurate market analysis highlighting characteristics which are specifically national.[116] To take account of such potential specificities, we assess the divergences of the NCAs' decisions according to both country- and noncountry-specific features.

As for country-specific characteristics, both the Italian and German NCAs claim that their national hotel markets are highly fragmented. In Italy, independent hotels represent 85% of all hotels, are generally small-sized and often do not have the means to operate and maintain online booking facilities.[117] In Germany, over 60% of all classical lodging businesses and over 45% of all hotels and bed-and-breakfasts offer less than 20 rooms.[118] Nevertheless, the commitments provided by Booking.com were considered satisfactory in Italy and inacceptable in Germany, although these different

[113] Autorità Garante della Concorrenza e del Mercato, *supra* note 65, p. 8.
[114] Idem, p. 16.
[115] *See* following paragraph "Country- and noncountry-specific features".
[116] OECD Competition Committee, *supra* note 106.
[117] Autorità Garante della Concorrenza e del Mercato, *supra* note 65, p. 16.
[118] Bundeskartellamt, *supra* note 74, p. 92.

approaches do not seem to be explained by the market structure at the national level.

We then consider that in the context of two-sided, fast-evolving markets, there are features, such as indirect network effects, free-riding concerns, as well as a rule of reason approach, which would account for noncountry-specific characteristics. Since these characteristics are not specific to the country in which the abusive behaviour is allegedly taking place, we should observe a convergence in the reasoning followed by the four European authorities. Our study shows that on the one hand, all four authorities mention the presence of indirect network effects, and all fail to effectively integrate them into the economic analysis. On the other hand, the German and Swedish NCAs draw antithetical conclusions as regards free-riding concerns and the choice of the legal-economic approach (rule of reasons vs. *per se*), whereas the Italian and French authorities take a more intermediate approach.

We showed that the BKartA turns the relevant market into a one-dimensional product market in which the supplier-Booking.com is offering its clients-hotels a service for which it gets remunerated through commission fees. On the contrary, by making a clear-cut distinction between the horizontal and vertical nature of the agreements, and adding that only the former had no anticompetitive effect in the defined relevant market, the Swedish Konkurrenverket accuses Booking.com of abusive behaviour towards its competitors operating in the *same market*, but somehow justifies its *vertical* restrictive clauses. Although all four NCAs recognize the general interest of the services provided by Booking.com, the Konkurrenverket is the only one to explicitly internalize in its analysis the positive effects that these OTAs create on total welfare and efficiency. After acknowledging the 2SP's value for both hotels and end-consumers, it states that vertical parity clauses prohibiting hotels to offer a better price on their own channels is a natural consequence of Booking.com's business model, since otherwise "hotels (would) have an incentive to persuade consumers who have found the hotel on Booking.com to book in the hotel's own channel instead",[119] since "if the hotel was completely free to control the relationship between prices on the hotel's own channels and prices on Booking.com, the hotel would have the possibility to free-ride on Booking.com's investments. Booking.com would therefore face significant risk of not being compensated for the services it provides".[120] These clauses, instead, are aimed at supporting the loss leader segment of the market, "so that the services can continue to be offered on the market *to the benefit of consumers*".[121] Moreover, "the competition authority's investigation further supports the conclusion that the online travel

[119] Konkurrensverket, *supra* note 69, p. 7.
[120] Idem, p. 7.
[121] Idem, p. 7 [*italics added*].

agent's services *contribute to price transparency* on the market and to *increased competition between hotels*, which is also *to the benefit of consumers*".[122] By contrast, the BKartA takes a more radical stance despite the relatively open position it had taken shortly before the ruling against HRS. In 2013, the Bundeskartellamt published a background paper on vertical restraints in the internet economy where it explains how parity clauses "could prevent the risk of free-riding and thus improve the distribution of goods"[123] and how "vertical restraints in this area and in particular the indirect network effects between the two connected market sides require a careful review of general assessments when applied to these markets".[124] It had also recognized that the risk of free-riding is particularly relevant in business models whose financing is assured via commission fees (like Booking.com's) and that this model "allows for more efficient risk allocation if a supplier only has to pay for the use of the platform if he effects a sale through the platform. This could be particularly important for less diversified suppliers. In addition, if a platform works with commissions, it has a strong incentive to promote the sales of the suppliers active on it".[125] Still, while the Swedish authority recognizes that imposing restrictive clauses may indeed be the only viable business model for the platform to avoid the risk of free-riding, the BKartA concludes that "the use of narrow best price clauses is lacking indispensability, because alternative business models appear to be practicable".[126] Moreover, even in the event of free-riding, the BKartA states that Booking.com's would still have an incentive to make quality-driven investments.[127]

Heinz[128] suggests that the different NCAs' positions may be the result of the application of the exemption pursuant to Article 101(3) TFUE by the three competition authorities who accepted Booking.com's commitments. The Commission Regulation on the application of Article 101 (3)[129] indeed provides for block exemption concerning vertical agreements in case such restraints serve efficiency purposes and can therefore be deemed procompetitive. However, our analysis of the decisions of the French, Italian and Swedish authorities invalidates this hypothesis. In particular, the Swedish

[122] Idem, p. 7 [*italics added*].

[123] Bundeskartellamt, *Vertical Restraints in the Internet Economy*, MEETING OF THE WORKING GROUP ON COMPETITION LAW, 10 Oct 2013, p. 25.

[124] Idem, p. 26.

[125] Idem.

[126] Bundeskartellamt, *supra* note 74, p. 6. For instance "the direct payment for the use of the platform in the form of a service fee", as mentioned in Bundeskartellamt, *supra* note 123, p. 26.

[127] Idem, p. 42.

[128] Heinz, *supra* note 4.

[129] European Commission, *Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, also known as the Vertical Restraints Block Exemption Regulation* (VRBER).

Konkurrenverket, which has shown to be particularly attentive to the free-riding concerns raised by Booking.com, clearly states that the hotel market structure (with Booking.com enjoying a market share higher than 30%), makes this exemption inapplicable.[130] We therefore suggest that the failure by the German BKartA to consider the efficiency claims of vertical restraints to address free riding directly stems from the *per se* approach that the authority pursued, and not from a dissimilar application of EU law in this specific case. Indeed, while the French, Italian and Swedish NCAs use a *rule of reason* approach, the BKartA's *per se* prohibition results from a reasoning which is locked-in in the HRS's 2013 decision, where the German NCA was actually evaluating the effects of *wide* parity clauses. Despite the different nature of the restrictions under analysis (wide vs. narrow parity clauses), the BKartA explicitly refuses, in the current case, to accept that a balancing analysis of pro- and anticompetitive analysis be performed for narrow clauses as compared with the wide clauses which were prohibited in 2013,[131] since "such facts known to the authorities need not be ascertained anew in a parallel or subsequent antitrust administrative proceeding".[132]

IV. THE EFFECTS AND EFFECTIVENESS OF BOOKING.COM'S COMMITMENTS

Following a mandate from the ECN, a working group composed of ten national competition authorities[133] and the DG Competition carried out a monitoring exercise to assess the effects of the antitrust enforcement measures in the online hotel booking sector[134] and published a report in April 2017. Although the heads of the ECN welcomed the results as showing that both types of measures – the narrow parity clauses and their total prohibition – "go in the right direction",[135] an analysis of the effects two years after the acceptance of the commitments does not seem to support clear conclusions.

First of all, almost half of the respondents (47%) stated that they were not aware of the recent changes in the parity clauses linking them to Booking.

[130] Konkurrensverket, *supra* note 69, p. 5.
[131] Bundeskartellamt, *supra* note 74, p. 54.
[132] Idem, p. 55.
[133] Belgium, Czech Republic, France, Germany, Hungary, Ireland, Italy, Netherlands, Sweden, United Kingdom.
[134] The monitoring consisted of a uniform questionnaire, covering the period from January 2013 to June 2016, which was addressed to a sample of 16,000 hotels in the ten participating Member States, as well as to 20 online travel agents, 11 metasearch websites and 19 large hotel chains.
[135] *See* European Competition Network, *Outcome of the meeting of ECN DGs* on 17/02/2017, available at http://ec.europa.eu/competition/antitrust/ECN_meeting_outcome_17022017.pdf.

com,[136] and 79% of the respondents said that they did *not* price differentiate between OTAs, mostly because they "saw no reason to treat its OTA partners differently" (53%).[137] Secondly, as for the price differentiation among sales channels, the monitoring working group carried out a difference-in-differences analysis of room price data obtained from one or major metasearch websites,[138] and observed a positive effect on room price differentiation between OTAs. However, such results, statistically significant as they may be, should still be treated with caution. In fact, metasearch data do not allow to make a distinction between a *proper* price differentiation (that is, a differentiation among the prices of the very same service), and the price differentiation resulting from a product differentiation (that is refundable/non-refundable booking, breakfast included/not included and so on).[139] It is interesting to note that the two hospitality markets with the highest rate of small, independent hotels were applying different remedies – that is, Italy under narrow parity clauses and Germany where the two biggest OTAs[140] are not allowed to impose any clause – and that only in Italy an increase in price differentiation appeared to be statistically significant.[141] Nevertheless, the limitations concerning the data as reported here above do not allow us to draw unambiguous conclusions. Thirdly, concerning the effectiveness of narrow parity clauses, the report highlights that over one-third of the respondents admitted that they regularly undercut their OTA partners by publishing lower prices on their hotel website, even though the narrow parity clauses does not allow for this.[142] Moreover, it is interesting to note that, even when narrow clauses are respected, 71%[143] of the respondents do not wish to price differentiate among OTAs since this would imply that the hotel is offering a room price on its own website which is higher than the price it

[136] *See* European Competition Network, *Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016*, Published on 6 April 2017, p. 6. With the exception of France and Germany where the media coverage received by the cases seems to have contributed to a higher awareness (70% of the respondents).

[137] Idem, p. 11.

[138] European Competition Network, *supra* note 136: "The metasearch websites provided pricing data derived from searches by consumers on their website in periods before and after Booking.com and Expedia switched to narrow parity clauses. The data related to consumer searches in respect of a sub-set of hotels from the main hotel sample in each of the ten participating Member States. The methodology of the analysis is set out in Appendix 1 of this report". For further details on the methodology, see European Competition Network, *supra* note 136, Annex 1, p. 27.

[139] The ECN recognized these limitations, *See* European Competition Network, *supra* note 136, p. 13.

[140] Booking.com and HRS. Expedia is still applying narrow parity clauses, but its market share only amounts to 10–15% (*See* Section III, E, 1-c).

[141] European Competition Network, *supra* note 136, p. 12.

[142] Idem, p. 14.

[143] Idem, p. 15.

offers on at least one of the OTAs it uses.[144] This result seems to support the German BKartA's position according to which narrow parity clauses still hinder hotels' freedom to effectively price differentiate (namely on their website), since in a market where all OTAs are imposing narrow parity clauses, such agreements may de facto have the same anticompetitive effect as wide parity clauses.

A number of empirical studies are currently being carried out to measure the effects of the competition decisions on price levels, price differentiation and competition on different distribution channels, but results are yet not available at the time of writing.[145]

V. LESSONS FOR FUTURE ANTITRUST ANALYSES IN 2SMS

Our study highlighted how the lack of a sound economic theory on the effects of 2SPs' allegedly abusive practices may result in dissimilar antitrust analyses, in spite of the coordination efforts. We saw that competition authorities in Europe have increasingly adopted commitment procedures with the aim of quickly addressing their competition concerns. Still, our analysis shows that the understanding of 2SPs' strategies and the assessment of their effects on welfare are both limited and heterogenous among European jurisdictions. Indeed, despite the fact that the cases concern the same transnational company, and that the four NCAs are bound by, and applying the same European jurisprudence, we do not find a consistent approach towards Booking.com, even though the proceedings were coordinated under the European Competition Network and some national market characteristics appeared to be similar.

Such divergences are all the more consequential given the challenges that the European Union is facing in the completion of the internal market in the digital economy. In a recent Communication on Online Platforms,[146] the European Commission reiterates the importance of providing a "*right*" and "*balanced*"[147] regulatory framework for the digital economy, so as to foster

[144] Under narrow parity clauses, hotels can price differentiate among OTAs but cannot offer a lower price for the same product/service on their own website. This implies that, for instance, they could offer a room at 50€ on Booking.com and at 40€ on Expedia, but the allowed price on their hotel website would still need to be higher or equal to 50€.

[145] *See for instance* Arthur Cazaubiel, Morgane Cure, Bjørn Olav Johansen & Thibaud Vergé, *Substitution between Online Distribution Channels: An Empirical Evaluation on the Scandinavian Hotel Industry* (work in progress); Matthias Hunold, Reinhold Kesler, Ulrich Laitenberger & Frank Schlütter, *Evaluation of Best Price Clauses in Hotel Booking*, 16-066 ZEW RESEARCH DISCUSSION PAPER (2016); Andrea Mantovani, Claudio Piga & Carlo Reggiani, *The Dynamics of Online Hotel Prices and the EU Booking.com Case*, 17-04 NET INSTITUTE WORKING PAPER (2017).

[146] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe*, COM(2016) 288, Published on 25 May 2016.

[147] Idem, p. 4 [*italics added*].

sustainable development and scaling-up of the platform business model in Europe. To do so, the Commission wishes to avoid "differing national or even local rules for online platforms" which "create uncertainty for economic operators, limit the availability of digital services, and generate confusion for users and businesses".[148] Although EU Commissioner Vestager stated that this coordination among competition authorities in the online hotel booking market "has helped",[149] she added that NCAs would refrain from individually opening new cases in the sector, until the European Commission gains a better understanding of the effects of the remedies.[150]

By concretely and thoroughly showing where lie the divergences among the four competition authorities, our study contributes to identifying the issues to tackle in order to ensure a better harmonized implementation of measures towards 2SPs at the EU level. Building on the results of our work, we present here below some main alternative approaches that could benefit future antitrust analyses in 2SMs.

A. Key Features of 2SMs and 2SPs' Business Models Should not be Overlooked in the Antitrust Analysis

Our analysis shows that some key features of the Booking.com's business model have been overlooked or misinterpreted, translating in inconsistencies in the adopted decisions.

First of all, by identifying the 2SP as a mere service-supplier for hotels, the German Bundeskartelamt turned the relevant market into a one-dimensional product market in which the supplier-Booking.com is offering its clients-hotels a service for which it gets remunerated through commission fees. By neglecting the fact that Booking.com simultaneously provides end-consumers with a service for which it does not get remunerated, it is somehow more straightforward to consider vertical agreements with the hotels as abusive.

Yet, in this bilateral relation, the very notion of agreement can be questioned. As Colangelo and Zeno-Zencovich[151] suggest, the concept of agreement has often been subject to a broad view by competition authorities (firstly, the Commission) allowing Article 101 TFEU to be applied to unilateral behaviours in the absence of evidence of dominant position.[152] Despite

[148] Idem, p. 4.

[149] Speech of Competition Commissioner Margrethe Vestager, *The vision of a digital Europe: challenges and opportunities*, Copenhagen 8 December 2015, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/vision-digital-europe-challenges-and-opportunities_en.

[150] Idem.

[151] Colangelo & Zeno-Zencovich, *supra* note 4.

[152] Akman, *supra* note 4, also extensively explains why Article 101 would actually be inapplicable in the case of parity clauses. After showing that platforms should be considered as "agents" for the purpose of competition law, she points out that parity clauses do not fall within the scope of Article 101, which does not apply to agreements between principals and genuine agents, but only to agreement *between* separate undertakings.

the procedure chosen (prohibition), the German authority does not prove the abuse of dominance and claims to have deliberately left this question open,[153] while still accusing the 2SP to impose clauses which constitute an unfair impediment of small- and medium-sized hotels – which in principle should not be possible without enjoying (and exerting) market power.

A second example of the misinterpretation of the 2SP's key features is given by the Italian AGCM's definition of the relevant market. We saw that the Italian NCA defines the antitrust market as the market for hotel booking services which are generally provided online. The two-sidedness of the platform thus seems to lose its relevance in the AGCM's analysis, since all the functions associated to the service that Booking.com is providing (searching, comparing, and booking), and which would justify its business model (attracting consumers by means of a free service whose costs are born by the hotels), are now being reduced to simple online accommodation booking services. It is interesting to note that the OTAs' business model has been clearly identified by the Italian competition authority which dedicates several paragraphs to its analysis.[154] Even though the AGCM recognizes that *additional* services are provided by OTAs which represent a particularly important marketing channel for hotels, the authority still fails to apprehend the crucial difference between the intermediation service provided by Booking.com and the direct sale feature of any other traditional online booking facility. As previously discussed in Section III.F.3 this raises some questions as to the anticompetitive nature of the 2SP's behaviour in such a broad market.

B. Along with Network Effects, the Relevant Market Definition and Assessment Should Also Take Account of Supply-side Substitution

Many scholars have already highlighted the importance of accounting for feedback loops, and more generally network effects, when defining the relevant market in which 2SPs are operating.[155] We suggest that in 2SMs supply-side substitution should be awarded a more important role in the antitrust analysis.

The economic forces of supply substitution can enter the antitrust analysis at different stages, also depending on the nature of the case (merger control or competition law). Historically, U.S. courts have emphasized that markets should be defined with respect to sole demand substitution and that supply-side considerations should be only taken into account further in the antitrust analysis, namely during the identification of market players within the

[153] Bundeskartellamt, *supra* note 74, p. 94 and Autorité de la concurrence, *supra* note 53, p. 30.
[154] Autorità Garante della Concorrenza e del Mercato, *supra* note 65, pp. 7–8.
[155] *See* Section II.

defined relevant market and the assessment of entry.[156] The European Union took a similar stance and stated that for the relevant market definition, demand substitution constitutes the most immediate and effective disciplinary force on the firm, unless "suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks".[157]

In capital-intensive or highly technical industries, supply-side substitution is certainly less effective in constraining the firm's ability to exert market power, since the need for acquiring tangible and intangible assets, making additional investments and taking strategic decisions would either make the undertaking unprofitable, or entail considerable time delays. However, in fast-evolving markets, where strategies can change and adapt swiftly, and sunk costs may be limited, supply-side substitution may indeed be quick, effective and profitable. This is all the truer when the competitors already own (some of) the necessary assets, are already well-established platforms and when network effects may not be a barrier to entry because the 2SP can already rely on a solid customer base to which a new, *complementary* service can be provided.

Thus, some respondents to the ECN monitoring survey[158] mentioned the entry of "various new players" and "the introduction of new strategies and technologies by existing players",[159] and namely the fact that metasearch engines are now offering on their platform the possibility of direct booking, that several software tools are now proposed to hotels to enhance their own direct online booking facilities, and that one-third of the hotels are directly contracting with metasearch engines.[160] The biggest among them, like Google or TripAdvisor,[161] may indeed be the first beneficiaries of the competition enhancement in the online hotel booking market. The advantage that Booking.com was said to be enjoying compared with new entrants or smaller platforms, has been used by all authorities to support the theory of harm according to which wide parity clauses would result in market foreclosure. It is however likely that the opening of the market following the switch from wide to narrow parity clauses – or to no clauses at all – will give a comparative advantage to other already-installed nonregulated 2SPs. This is all the more likely since such platforms are already offering search-and-compare

[156] Jonathan B. Baker, *Market Definition: An Analytical Overview*, ANTITRUST LAW JOURNAL, Vol. 74, No. 1 (2007), pp. 129–173.

[157] European Commission, *Commission Notice on the definition of the relevant market for the purposes of Community competition law*, Official Journal, C 372, (1997), par. 20.

[158] *See* Section IV.

[159] European Competition Network, *supra* note 136, p. 21.

[160] Idem, p. 22.

[161] Other prominent metasearch engines include Kayak (which belongs to Priceline, like Booking.com) and Trivago (currently owned at 60% by the group Expedia).

services, and would only need to develop online booking facilities to act as a direct competitor of Booking.com.

None of the four competition authorities considered metasearch engines as part of the same relevant market as Booking.com, and still it is not excluded that the OTA will now face a significant competitive pressure from this side of the market. This would support Julian Wright's[162] insight that regulating prices (or clauses, in this case) set by a platform in 2SMs is never neutral, and is likely to provide unregulated 2SPs with significant competitive advantage.

C. A Systematic Resort to Commitment Procedures Hinders the Development of a Sound Analytical Framework to Assess Anticompetitive Practices in 2SMs

In two-sided markets the increasing resort to commitment decisions is often justified by the need for a prompt intervention to address (allegedly) pressing competition concerns. However, the EU case against Google raises some questions as to the actual time gain of such procedures in complex 2SMs,[163] and some scholars even showed that commitment procedures in cases concerning abuse of dominance at the EU level actually lasted 15% longer than prohibition procedures.[164]

Along with the timing concern, we suggest that commitment decisions offer competition authorities "a way out" from the difficulties they face in balancing of pro- and anticompetitive effects of 2SPs' practices. These procedures are indeed a much lighter alternative to full-scale investigations. On the one hand, authorities need to compile significantly less burdensome data and evidence than for an alleged infringement of the competition law. On the other hand, an infringement procedure also requires a fine and sound *understanding* of the nature and the effects of the practices under analysis. Commitment decisions, in which it is up to the 2SP to find a satisfactory solution to the competition concerns thus represent an important opportunity for the authorities to reduce the significant information asymmetry they face in 2SMs.

The Swedish representation to the OECD Competition Committee has explicitly stated that commitment decisions are "well-suited for cases concerning complex markets and cases where the conduct consists of complex

[162] Wright, *supra* note 31.

[163] On 30 November 2011, the European Commission opened an antitrust investigation into allegations that Google had abused a dominant position in online search. Google proposed several commitments which the DG Competition did not consider as satisfactory and finally decided to purse under a full investigation. After over six years no final decision has been reached. For further details, see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740.

[164] Mario Mariniello, *Commitments or Prohibition? The EU Antitrust Dilemma*, 01 BRUEGEL POLICY BRIEF (2014).

contractual activities and exhibits both positive and negative elements",[165] like the Booking.com case. They also praised such procedures in cases "involving complex market definitions" where the authorities can close the case "without having finally assessed the relevant market".[166]

This pragmatism comes at a cost. Joshua D. Wright and Douglas H. Ginsburg[167] provide a "useful historical lesson" by recalling that it is litigation (and not consent) which allowed for a shift in doctrine from rules of *per se* illegality towards a rule of reason approach, when it comes to vertical restraints. This shift has significantly improved the quality of the substantive legal rules, and they warn against an extensive use of commitment decisions which could interfere in, and distort, the development of antitrust law, especially in sectors where jurisprudence is still uncertain. The absence of appeals before the Court, which are by nature very rare in commitment procedures, is yet another missed opportunity for the judges to clarify the law, as well as to encourage more exhaustively reasoned and detailed decisions.

In 2SMs, where neither the law, nor its economic analysis, are well-established, the reduced level of qualitative and quantitative investigation and evidence required by commitment decisions may further hinder the development of a sound antitrust analytical framework.

D. The *ex ante* Role of Competition Law Enforcement in 2SMs: Shortcomings and Way Ahead

The increasing resort to commitment decisions raises interesting questions in the debate concerning the appropriate type of intervention towards 2SPs, that is *ex ante* vs. *ex post*.

On the one hand, a set of commentators argue against *ex post* antitrust enforcement in digital industries *tout court*, based on the claim that in novel markets – where the market dynamics and the effects of some practices on social welfare are not well-understood – the economic and social costs of overenforcement errors would exceed those of underenforcement. This error-cost analysis embraces the Schumpeterian idea that firms compete for the whole market through innovation rather than for a share of the market thought pricing[168] and that the dominant position, which naturally results from this exercise, is only transitory in any point in time. An antitrust intervention would then only be justified when the costs of underenforcement are

[165] OECD Competition Committee, *Commitment decisions in antitrust cases – Note by Sweden*, DAF/COMP/WD(2016)39, (2016), p. 7.

[166] Idem, p. 7.

[167] Joshua D. Wright & Douglas H. Ginsburg, *The Costs and Benefits of Antitrust Consents*, GEORGE MASON LAW & ECONOMICS RESEARCH PAPER (2016).

[168] *See* for instance Howard A. Shelanski, *Information, innovation, and competition policy for the Internet*, 161 U. PA. L. REV. 1663 (2013) and Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010).

"substantial, [when] there is a *longstanding* precedent indicating that the given practice is anticompetitive, and [when] *theory and evidence* suggest a *strong* likelihood that the practice is anticompetitive".[169]

A milder position is held by a group of scholars who tend to be reluctant towards a regulatory approach towards 2SPs and advocate an *ex post* intervention. They argue that in digital industries the lack of a capital-intensive infrastructure and significant sunk costs, which would normally constitute barriers to entry, as well as the lack of formerly State-owned monopolies and natural monopoly features do not justify an *ex ante* intervention. Some of them refer to the "three-criteria test" set up by the European Commission to further support their position. According to the three-criteria test, markets are susceptible to *ex ante* regulation if three cumulative criteria are met: (1) there are high and nontransitory barriers to entry, (2) markets will not tend towards effective competition within a relevant time horizon, and (3) competition law alone would not adequately address market failures.[170] These scholars all conclude that if criteria (1) and (2) can be debated, the last criterion does not hold in 2SMs, where competition law has already proved to effectively address market concerns.

Still, the results of our study seem to question this latter point. Moreover, in the tension between *ex post* and *ex ante* intervention, we find that the role that competition law enforcement is playing in 2SMs merits being further explored.

Indeed, the increasing frequency of commitment decisions seems to have translated in a shift from an *ex post* assessment of past conduct – which should be the primary role of competition law enforcement – to a broader *ex ante* regulatory approach and intervention, and this in the absence of an accurately designed framework and tools to fulfil the task.

Frédéric Jenny has highlighted how, via commitment decisions, the European Commission de facto affects firms' behaviour *ex ante*, and sometimes even restructure the competitive situation of a market.[171] He goes further and claims that this type of procedures are chosen either when the theory of harm is not very robust or, more frequently, when the Commission wants to impose conditions which it could not impose using prohibition decisions, or when it wants to regulate industries.[172]

[169] Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google*, 34 HARV. JL & PUB. POL'Y 171 (2011), p. 10 [*Italics added*].

[170] European Commission, *Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*, C(2007) 5406.

[171] *See* Frédéric Jenny, *Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions*, 38 FORDHAM INT'L L.J. 701 (2015) for an illuminating analysis of the *ex ante* role played by the European Commission in the last decade.

[172] Jenny, *supra* note 171.

This *ex ante* role of competition law enforcement in 2SMs is undesirable for several reasons.

Firstly, NCAs lack, by nature, an appropriate framework for a regulatory intervention *a priori* which should normally include a review mechanism to test the effects of the decisions and readjust the intervention accordingly.

Secondly, in the lack of an accurate understanding of firms' strategies, market dynamics and, more importantly, the effects of both on social welfare, the remedies chosen may not necessarily be minimum, properly justifiable and proportionate, as *ex ante* regulation would require. Consequently, since antitrust intervention in this case is not based on a past conduct but on present (and future) concerns, this may create a climate of uncertainty which may eventually refrain innovation.

Thirdly, if NCAs intervene *ex ante* but without the proper framework and tools to do so, the outcomes may be more easily challenged by market players and interest groups who perceive them as unsatisfactory. The risk in the short- and mid-term is that this may finally lead to an exogenous intervention by the legislator, at the expense of a more comprehensive competition rationale.

Booking.com is again a case in point of these shortcomings. Short after the adoption of the commitments, the *Macron Law* in France provided that hotels retained the right to grant to end-customers any discounts or tariff advantages of any nature whatsoever,[173] and thus eliminated narrow rate parity agreements. In Italy, the Competition and Market Law adopted in August 2017, also outlawed the narrow parity clauses which had been previously accepted by the Italian competition authority.[174] The same happened in Austria, and Belgium and Switzerland are likely to follow suit. As it has been noted,[175] the aim of the legislator's intervention does not respond to the promotion of a larger public policy, but essentially overlaps with that of the NCA. Furthermore, the legislator's ban selectively applies to the hospitality sector, whereas parity clauses are maintained in other industries.

As previously discussed, the time of law can hardly keep pace with the economic reality of 2SPs' strategies and an adaptation of current regulatory and antitrust tools is certainly needed. Accurately integrating key 2SM features in the antitrust analysis and accounting for supply-side substitution could represent a first cornerstone for meticulous and thoroughly-motivated decisions in the field. Moreover, if an intervention by competition authorities is

[173] Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques, article L. 311-5-1 du code de tourisme.

[174] Legge annuale per il mercato e la concorrenza. (17G00140), Legge 4 agosto 2017, n. 124, "Any agreement by which the hotel is obliged, by any means or any instrument, not to offer to the end-consumers better prices, terms and any other conditions than those offered by the same hotel through intermediaries is considered void." [*Translation by the authors*].

[175] Ariel Ezrachi, *The Competitive Effects of Parity Clauses on Online Commerce*, 55 OXFORD LEGAL STUDIES RESEARCH PAPER 2 (2015).

deemed necessary *ex ante* – as it is the case when commitment procedures are chosen – we propose that appropriate review clauses be integrated in the antitrust decisions. The timing of the evaluation *and review* of the commitment decisions should be consistent with the type of allegedly anticompetitive practices, as well as the specific market characteristics. The duration of the commitments of Booking.com, which was set to five years, appears to be a long term for a firm operating in a digital market. If we consider the opening to competition of capital-intensive, monopolistic sectors like electronic communications, we see that regulatory authorities are to submit a review of the regulated markets every three years. We do not see any apparent reason to expect that regulatory interventions in fast-evolving sectors like the one under analysis should be in place for a longer period without an appropriate assessment of their effects on the market. Moreover, establishing a framework for the assessment and review of antitrust *ex ante* decisions could not only represent an opportunity for the NCA to tailor the chosen measures to the evolution of the market, but could also reduce the potential for a corrective intervention by the legislator, especially in cases in which its scope and aim essentially overlap with those of the authority.

VI. CONCLUSIONS

In spite of the flourishing literature on 2SMs, we showed that a sound economic theory on the effects of 2SPs' potentially abusive practices is still missing. We suggested that the lack of a robust analytical framework may result in inconsistent choices on the economic approach of the analysis (*per se* vs. rule of reason), as well as on which 2SM features to retain, or to ignore (that is interdependency between the two sides of the market, magnitude of the indirect network effects, common non-neutral pricing structure, and so forth).

To test our assumptions, we carried out a comparative analysis of the competition proceedings against Booking.com's rate parity clauses in France, Germany, Italy and Sweden. Such cases are particularly interesting: given the transnational nature of the platform, these authorities decided to coordinate their investigations with the aim of finding a common response to the same competition concern. Despite these coordination efforts, our study highlights practical and conceptual divergences concerning both country- and noncountry-specific features, even though we did not find in the decisions any clear justifications supporting such heterogenous approaches. Such divergences are all the more consequential when we consider that this was a first, praised attempt to coordinate commitment decisions at the EU level, and that we stand on the threshold of the completion of the EU internal digital market.

By concretely and thoroughly showing where the divergences lie among the four competition authorities, our study contributes to identifying the

issues to tackle in order to ensure a better harmonized implementation of (common) measures towards 2SPs at the EU level. Building on the results of our work, we proposed some alternative approaches which could benefit future antitrust analyses in 2SMs.

First of all, when coordinated at the EU level, NCAs should agree on a set of key features which are used in support of the antitrust analysis, such as for instance the 2SP's business model or the competition dynamics of the market under investigation.

Second, we warn against a systematic resort to commitment decisions in digital markets. We argue that NCAs may prefer such lighter *ex ante* procedures when robust theory to support effect-based analysis is missing. Yet, the reduced level of qualitative and quantitative analysis, as well as evidence required by commitment decisions is likely to further hinder the development of antitrust law in sectors where the jurisprudence is still uncertain, as it is the case in 2SMs. Moreover, the absence of appeals before the Court, which are by nature very rare in commitment procedures, is yet another missed opportunity for the judges to clarify the law, as well as to encourage more exhaustively reasoned and detailed decisions.

Finally, if competition law enforcement is to play an increasing *ex ante* regulatory role in 2SMs, we propose that an appropriate framework be implemented to assess, *and review* – if need be – the effects of the commitment decisions. The terms of such review should be set according to the characteristics of the alleged abusive practices, as well as of the market itself. Establishing a sound analytical framework and enhancing effective coordination at the transnational level is key in digital markets. Otherwise, investigation outcomes perceived as unsatisfactory may lead to an increasing intervention by the legislators, which happens at the cost of a more comprehensive competition rationale.

Appendix

Table A.1 Detailed presentation of the four decisions according to three main challenges identified in Section II

Three challenges			France (Adlc)	Italy (AGCM)	Sweden (Konkurrenverket)	Germany (BKartA)
1 **Recognizing two-sided markets**	Use of specific terminology		**Yes.** Explicitly calls it a "two-sided market"	**Not explicitly *but*** recognizes two-sided market's business model	**Not explicitly *but*** recognizes two-sided market's business model	**No**
	Market sides under analysis		**One**	**One**	**One**	**One**
2 **Defining the relevant market**	Definition		The market of the supply of online travel agency reservation services for a simple overnight stay	The market for online hotel booking services, which is therefore distinct from the market for offline 'traditional' booking services	The market for the provision of online travel agency services where booking is possible on the platform itself	The market for intermediary services of hotel portals offering three kind of different services: search, compare and book
	Tool used		SSNIP test on one side only	Not specified	Not specified	Not specified
	The relevant market	includes	Other OTAs	Other OTAs; hotels' own websites; travel agencies' websites	Other OTAs	Other OTAs
		does NOT include	Hotels' own websites; metasearch engines and search engines	Metasearch engines and search engines	Hotels' own websites; metasearch engines and search engines	Hotels' own websites; tour operator portals; metasearch engines and search engines
3 **Assessing the anticompetitive effects of the allegedly abusive practices**	Market share		Over 30%	Data not provided. Booking.com said to be the biggest OTA; followed by Expedia	Data not provided	50–55%
	Anticompetitive practices	Vertical dimension	**Yes:** Exerts market power by increasing the level of commission fees	**Yes**	**No**	**Yes**: Imposing unjustified restrictive clauses on hotels; Competition restriction among hotels; Unfair impediment of small and medium-sized hotels dependent on Booking.com (*NB: referring to narrow parity clauses*)

Continued

Table A.1 *Continued*

Three challenges		France (Adlc)	Italy (AGCM)	Sweden (Konkurrenverket)	Germany (BKartA)
	Horizontal dimension	**Yes**	**Yes**	**Yes**	**Yes:** Anticompetitive agreements between companies (*NB: referring to narrow parity clauses*)
	Overall effects on welfare of *WIDE* parity clauses	**Negative:** Reduce competition among OTAs; Forecloses smaller companies and new entrants; Higher prices for consumers in the long run	**Negative:** Reduce competition among OTAs; Reduce competition among other firms providing online booking services (hotels; online travel agencies…); Foreclose new entrants; Higher prices for consumers in the long run	**Negative:** Reduce competition among OTAs; Foreclose new entrants **Positive:** Eliminate the risk of free-riding; Enable the platform to be remunerated for the free services offered to consumers; Only viable way for the platform to keep offering free services for end-consumers; Such platforms contribute to price transparency and increase competition among hotels *(Positive effects outweighted by negative ones)*	**Negative** *(NB: not part of the analysis)*
	Overall effects on welfare of *NARROW* parity clauses	**Positive:** Restore competition among OTAs; Consumers can still benefit from the platform's service	**Positive:** Restore competition among OTAs; Potentially lower prices for consumers booking offline **Negative:** Do not directly restore competition among other firms providing online booking services via their websites (*Negative effects outweighted by positive ones)*	**Positive:** Restore competition among OTAs; Keep the positive effects of wide parity clauses	**Negative:** Reduce competition among OTAs; Reduce competition among hotels' own websites; Reduce competition in the whole hotel market; Unfair impediment of small and medium-sized hotels which are dependent on Booking.com