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The Antitrust Assessment of Parity Clauses in Digital Markets

The Case of the Hotel Online Booking Sector

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INTRODUZIONE

L'economia e i mercati del terzo millennio sono indubbiamente caratterizzati da un pervasivo fenomeno di digitalizzazione. Questo processo è chiaramente rappresentato dall'affermazione di numerose piattaforme di e-commerce, che stanno gradualmente guadagnando quote di mercato a discapito delle forme più tradizionali di *retailing.* Le ragioni di questo successo sono molteplici e sicuramente comprendono una singolare abilità nel garantire a tutte le categorie di utilizzatori della piattaforma (ovvero: sia ai produttori che ai clienti finali) servizi di intermediazione più veloci e più efficaci, in grado di facilitare l'incontro tra domanda e offerta.

Questo elaborato si pone l'obiettivo di affrontare alcune delle principali tematiche rilevanti per il diritto della concorrenza caratterizzanti tali nuovi contesti, prendendo ad esempio il mercato delle prenotazioni alberghiere online. Infatti, alcune pratiche contrattuali poste in essere dalle principali agenzie di viaggio online (le *online travel agencies*, anche definite OTA), tra cui Booking.com e Expedia Inc., sono state recentemente fatte oggetto dell'attività investigativa di numerose autorità nazionali antitrust in Europa (e, limitatamente, negli Stati Uniti), a causa di una loro presunta anticoncorrenzialità.

Le OTA sono indubbiamente uno strumento commercialmente prezioso sia per gli operatori del settore turistico che per i consumatori, essendo in grado di fornire, ai primi, una visibilità internazionale altrimenti non raggiungibile con mezzi propri e, ai secondi, un'importante selezione di funzioni, tra cui la possibilità di cercare, confrontare e prenotare i servizi turistici prescelti con grande semplicità, andando ad abbattere i costi di ricerca e transazione che tradizionalmente ostacolano la finalizzazione delle prenotazioni. Questi elementi di forza hanno permesso alle OTA di conquistare delle preminenti quote di mercato nel settore dell'intermediazione turistica, andando ad erodere la supremazia degli intermediari più classici, quali le agenzie di viaggio e i tour operator. Per di più, l'ingente potere contrattuale così guadagnato ha permesso loro di imporre sugli operatori turistici costi considerevoli in termini di commissioni per prenotazioni finalizzate (in generale attestantesi tra il 15% e il 25% del prezzo per notte), fenomeno ancora più rilevante in mercati, quali molti di quelli europei, caratterizzati dalla prevalenza di strutture alberghiere di dimensioni medio-piccole.

Recentemente, l'attenzione di molte autorità antitrust si è concentrata sulle c.d. *parity clauses* previste dalle maggiori OTA nei contratti con i partner alberghieri: in virtù di queste clausole tra fornitore a monte e piattaforma di e-commerce, il primo si impegna a non vendere i propri beni e servizi a prezzi più bassi o a condizioni più vantaggiose (per i clienti finali) attraverso altri canali di vendita. Il particolare contenuto di queste previsioni contrattuali, assieme alla graduale adozione del modello dell'agency da parte delle maggiori OTA (in virtù del quale è il fornitore a monte a mantenere le decisioni sul prezzo finale), le rende difficilmente incasellabili entro le più tradizionali categorie teorizzate dal diritto e dall'economia antitrust.

Inoltre, il mercato della intermediazione dei servizi di viaggio online è un tipico esempio di mercato a due (o più) versanti, definizione che sottolinea la sussistenza di due o più gruppi omogenei di utilizzatori (nel caso di specie, albergatori e consumatori) ai quali simultaneamente si rivolge la stessa piattaforma (detta anche, piattaforma a due o più versanti). La presenza di due versanti sul mercato rilevante pone numerose sfide per l'intermediario: la ricerca della profittabilità dell'attività svolta deve necessariamente passare attraverso una consapevole valutazione di entrambi i gruppi di utilizzatori e delle profonde interdipendenze che li legano. In questo, il business model adottato dalle OTA perfettamente incamera le principali caratteristiche dei *two-sided markets*: da una parte vi è la non neutralità della struttura di prezzo adottata, che vede l'albergatore sopportare la totalità dei costi per la prenotazione, in termini di commissioni sul prezzo finale, mentre spesso il viaggiatore (formalmente) non corrisponde alcuna forma di remunerazione all'intermediario; dall'altra, l'evidente presenza di esternalità di rete indirette, per le quali il valore della piattaforma per ogni gruppo di utilizzatori aumenta con il numero e la varietà di utenti sull'altro versante. La considerazione delle caratteristiche principali dei mercati a due versanti non è esercizio meramente teorico, poiché da una piena consapevolezza di questi elementi può dipendere la qualità e la rilevanza della decisione adottata dall'autorità competente. Tuttavia, come anche le decisioni citate dimostrano, molte autorità antitrust sono finora troppo spesso rimaste vincolate ad una logica chiaramente mono-versante, con il rischio di non valutare correttamente le interrelazioni esistenti tra i gruppi di utilizzatori.

Per i motivi appena elencati, sebbene si ritenga generalmente che il commercio elettronico non dia luogo a nuove fattispecie intrinsecamente differenti da quelle già esaminate nei mercati tradizionali, è d'uopo considerare che, nei casi trattati, vi sia incertezza anche già in merito all'identificazione degli accordi come intese verticali o

orizzontali. Molteplici ne possono essere i motivi, ivi inclusi la particolare trasparenza dei mercati digitali (che acuisce gli effetti orizzontali di accordi eminentemente verticali) e la combinazione degli accordi in oggetto con il modello dell'*agency*, che, lasciando il potere di fissazione del prezzo nella disponibilità del fornitore a monte, per quanto condizionato dalla necessità di rispettare la *parity clause*, rende ardua la sussunzione di queste previsioni contrattuali entro altre più storicamente definite condotte anticoncorrenziali, come la *minimum resale price maintenance* e le *most favoured nation clauses.* Tuttavia, il ricorso alla letteratura già presente in merito alle due citate categorie di condotte potrebbe non essere privo di rilevanza: come condiviso sia dalla dottrina che dalla prassi decisionale, i principali effetti anticoncorrenziali delle *parity clauses* molto richiamano quanto viene generalmente ascritto alle precedenti fattispecie, come la riduzione della concorrenza *intrabrand*, la chiusura del mercato all'ingresso di nuovi intermediari e, da ultimo, data la maggiore uniformazione dei prezzi sul mercato, anche una ridotta concorrenza *interbrand* nel mercato a monte.

L'analisi delle condotte, tuttavia, è resa più complessa dalla necessità di tenere in considerazione le potenziali efficienze prodotte, principalmente in termini di riduzione dei costi di transazione, dagli intermediari, che sarebbero garantite dalla stessa esistenza delle *parity clauses*. Infatti, questi effetti positivi potrebbero essere fortemente ridimensionati da un rilevante fenomeno di *free-riding* che potrebbe mettere a rischio la profittabilità e la stessa sopravvivenza delle OTA: in particolare, prive della possibilità di garantire il migliore prezzo e le migliori condizioni possibili, le OTA verrebbero utilizzate dai consumatori solo per consultare le strutture disponibili in una determinata destinazione, salvo poi procedere alla prenotazione tramite altri canali, tra i quali i siti proprietari degli alberghi, privando così l'intermediario di qualsivoglia forma di remunerazione per i servizi sin lì forniti. Per quanto non esente da aspre critiche, questa posizione ha registrato il generale accordo di gran parte della dottrina e della maggior parte delle autorità antitrust europee nell'accettare gli impegni proposti da Booking.com proprio sulla scorta di una valutazione delle preminenti efficienze prodotte nel mercato rilevante. Impegni in virtù dei quali alla piattaforma viene concesso di mantenere in essere le proprie clausole di parità, sebbene in una versione ristretta, che lega prezzi e condizioni riservate all'intermediario esclusivamente ai canali di vendita online diretti dell'operatore turistico (quali, di fatto, i siti Internet delle strutture alberghiere). Si deve però registrare che i suddetti impegni non sono stati accettati da parte del tedesco *Bundeskartellamt,* unica autorità europea che, seguendo

la precedente decisione riguardante un'altra OTA, HRS, ha stabilito il divieto *tout-court* per Booking.com di prevedere *parity clauses* nei rapporti contrattuali con gli operatori turistici. Fulcro della decisione dell'autorità è esattamente il rigetto della determinante rilevanza delle efficienze prodotte dalle OTA per giungere all'esenzione per le clausole in oggetto, seppur in versione ristretta.

Le risultanze dei casi riguardanti il mercato delle prenotazioni alberghiere online sono ragguardevoli sotto molteplici aspetti. Innanzitutto per la discrepanza registratasi tra le decisioni delle principali autorità antitrust europee aventi ad oggetto la stessa condotta della stessa impresa, ovvero Booking.com, che opera in maniera del tutto uniforme in tutti i mercati nazionali degli stati membri. Questa difformità è significativa dell'attuale debolezza del meccanismo di coordinamento tra autorità antitrust europee, che, nei casi in cui manca l'intervento diretto della Commissione, dovrebbe avere nello *European Competition Network* un valido strumento per garantire una risposta unitaria a comuni tematiche concorrenziali. Inoltre, la perdurante mancanza di una condivisa e accreditata valutazione antitrust delle clausole di parità tariffaria si ritiene discenda anche dall'eccessivo ricorso della Commissione, e delle autorità nazionali, alla possibilità di chiudere anticipatamente i procedimenti mediante l'accettazione di impegni, pratica che porta con sé la conseguenza di non concludere l'analisi della fattispecie e quindi di limitare l'efficacia chiarificatrice dell'attività di *enforcement.*

Allo stesso modo, vi sono elementi più "sostanziali" dell'analisi delle *parity clauses* svolta nei casi citati che risultano controversi, anche causa delle numerose questioni rimaste prive di una chiara presa di posizione da parte delle autorità competenti.

In primis, vi è tutt'ora incertezza circa la corretta definizione delle OTA quali rivenditori indipendenti o *genuine agents* ai fini della valutazione antitrust, laddove solo il *Bundeskartellamt* ha espressamente escluso la possibilità di considerare le piattaforme dei puri agenti.

La seconda questione riguarda l'opportunità di classificare le condotte rilevanti quali restrizioni aventi oggetto o, piuttosto, effetto anticoncorrenziale: da questa valutazione potrebbe discendere l'applicabilità o meno alle fattispecie dell'esenzione per le restrizioni verticali prevista dal Regolamento 330/2010 e la stessa esperibilità dell'esenzione individuale ai sensi dell'articolo 101.3 del TFUE.

Da ultimo, nell'alveo di una più generale presa di coscienza dei limiti di un'applicazione del diritto della concorrenza ritenuta eccessivamente formalistica, si

deve registrare come parte della dottrina critichi la stessa scelta di fondo di esaminare le condotte citate in qualità di intese; al contrario sarebbe stato più corretto (ed efficace) incentrare i casi sull'eventuale sfruttamento abusivo della posizione dominante raggiunta dalle OTA, sebbene collettivamente, nei mercati di riferimento. Questa impostazione sarebbe di fatto opportuna per superare molti dei nodi problematici ai quali si è fatto riferimento, compresa, se non altro, l'evidente forzatura che si produce nell'applicare la disciplina delle intese a delle condotte sostanzialmente unilaterali o, quantomeno, nel fatto che la posizione di una delle due parti contraenti non sia stata sottoposta in concreto al vaglio delle autorità antitrust (quale è il caso degli operatori turistici che, anzi, sono stati tra i più attivi sostenitori dei procedimenti contro le OTA).

L'ultimo nodo ad essere dibattuto riguarda la stessa efficacia dei provvedimenti antitrust adottati: a distanza di qualche anno, vi sono numerosi studi empirici che dimostrano come né i prezzi finali siano di fatto diminuiti successivamente alla restrizione delle *parity clauses*, né vi sia stata un'effettiva differenziazione dei prezzi tra le maggiori piattaforme di prenotazione alberghiera, che doveva essere esattamente l'obiettivo dell'accettazione degli impegni proposti da Booking.com. A questo si deve poi aggiungere che, successivamente alle modifiche legislative che in alcuni paesi membri hanno vietato l'applicazione delle *parity clauses* da parte delle OTA, l'attenzione di numerosi commentatori si stia gradualmente concentrando su un nuovo aspetto, ovvero sulla sostanziale reintroduzione della parità tariffaria ad opera degli algoritmi che regolano il funzionamento delle stesse piattaforme online: in particolare, le OTA starebbero riducendo la visibilità sulle loro piattaforme delle strutture che non rispettano, in concreto, una tacita condizione di parità con altri canali di vendita online.

Prescindendo tuttavia dalle numerose posizioni esistenti in merito ai nodi problematici appena esposti, risulta chiaro come un effettivo contributo alla costruzione di una più condivisa e meno ambigua valutazione dell'anticoncorrenzialità delle condotte descritte non potrà prescindere da un futuro intervento chiarificatore della Commissione Europea.

INTRODUCTION

Modern economy and modern markets are characterised by an increasing resort to digitalisation: this phenomenon is clearly represented by the rise of many e-commerce marketplaces, which are step-by step replacing bricks-and-mortar retailers. The reasons of this success must be looked for in their unique ability to provide all the groups of users interacting on Internet platforms (i.e. suppliers and end-users) with more customised and faster intermediation services, which ease the connection between demand and supply.

Some of the antitrust issues arising in these contexts have been addressed in this dissertation by referring to the example of the hotel online booking sector, which has been repeatedly targeted by several European competition authorities for the purportedly anticompetitive behaviours entered into by some of the major Online Travel Agencies (OTAs), among which Booking.com and Expedia Inc.

OTAs are extremely valuable instruments, both for hoteliers and for consumers, providing the first with an enhanced worldwide visibility and the latter with a selection of services, like the search-compare-and-book function, which are deemed to reduce the search and transaction costs that traditionally prevent the finalisation of reservations. These key-features have allowed OTAs to gain a growing relevance to the detriment of other more traditional forms of travel intermediation and, thanks to their bargaining power, they can now impose on hotels considerable costs in terms of per-booking commission fees (the average commission is between 15% and 25%), in particular where the hospitality sector is still characterised by the majority presence of small and medium-sized independent properties, like in some European member states.

During the last years, the attention of many competition authorities has focused on the parity clauses required by the major OTAs in the contracts with their hotel partners: by these provisions, an e-commerce platform requires the partnering supplier (in this case the hotelier) to not sell its goods at a lower price or at more enticing conditions through another retailer. Because of their peculiar content and the context in which they have been implemented, parity clauses are agreements that can be classified with difficulty under any previous category theorised by competition law and economics.

One of the most peculiar aspects of these cases is that all the major OTAs have gradually adopted the agency business model, due to which it is the hotel, not the intermediary, to set the final room prices displayed on the intermediary's platform: at least, as long as the intermediary is endowed with prices, rooms' availability and booking conditions no worse than those granted through any other sales channel.

Moreover, the hotel online booking sector is a clear example of what is defined, by competition law and economics, as a two-sided (or multi-sided) market, by that highlighting the existence of more than one homogenous group of customers (hoteliers and end-users) who are targeted by the same intermediary (the two-sided platform). The two-sidedness of the relevant market poses several challenges: in order to make its own business profitable, the hotel booking platform cannot focus upon just one of these groups and, even more importantly, it needs to consider the deep interdependencies existing between them. OTAs' business model perfectly exemplifies the key-features of two-sided platforms: on the one hand, there is a peculiar, 'non-neutral', price structure, since consumers are not (directly) charged any price for the reservation, while all the cost is borne by hotels through the per-booking commission fee; on the other, OTAs mostly face indirect network externalities, since their attractiveness for each group of users plainly depends on the critical mass of properties and consumers generating value through the platform, which the intermediary seeks to internalise to remunerate its services. Reasoning on the key-features of two-sided markets is not a mere theoretical exercise, since the correct subsumption of these elements in antitrust enforcers' decisions may highly influence the final assessment of the relevant conducts; however, the investigations carried out in the hotel online booking sector demonstrate that antitrust enforcers still keep reasoning in a strict one-sided logic, even when aware of the main features of two-sided markets, with the risk of not correctly weighing the value of the interrelations between the different groups of users.

Moreover, despite it is believed that digital markets do not give rise to new anticompetitive conducts intrinsically different from what has been already examined in offline markets, it is noteworthy that scholars and enforcers disagree even on the classification of parity clauses as inherently vertical or (more substantially) horizontal agreements. This uncertainty should be consequential to the enhanced transparency of digital markets and to the combination of the clauses to the agency model, that, by formally keeping the pricing decisions at the supplier's level, although conditioned to the respect of parity, makes it difficult to equate parity clauses to more standard

conducts, such as the resale price maintenance or the most favoured nation clauses. Nonetheless, to recur to the antitrust theories and literature about these two 'typical' conducts could still be a remarkable instrument to develop the theories of harm for the debated cases. Hence, the main anticompetitive effects that have been attributed to parity clauses (at least in their 'wide' version, that requires parity towards any offline and online sales channel) resemble the traditional theories of harm related both to (minimum and fixed) RPM and MFN provisions: a) the introduction of parity clauses has been deemed to primarily reduce the competitive pressure on OTAs, with the negative effect of stifling competition on the commission's level and, ultimately, of raising retail prices; b) consequently, the spread of parity clauses leads to the foreclosure of the market for new entrants and for low cost competitors, since any way of gaining market shares by offering lower commission fees to the hoteliers, to be granted lower retail prices, is prevented by the same parity clauses; c) lastly, the implementation of parity clauses may increase the likelihood of price uniformity across the market, negatively affecting even interbrand competition and also possibly incentivising intermediaries to reduce investments in innovation and quality.

This setting is made more complex due to the necessity to sufficiently take into consideration the efficiencies benefitting consumers that derive from the OTAs' business model and that are somehow granted by the same implementation of parity clauses. Namely, it is undebated that Internet intermediaries, in general, and OTAs, in particular, are able to reduce transaction costs and eliminate the hold-up problem that, by refraining the finalisation of transactions, affect the consumer welfare. Nonetheless, these positive aspects must be weighed in light of the allegedly compelling free-riding concerns which may endanger the same viability and profitability of the OTAs' business model: namely, if OTAs are not endowed with the best price guarantee that stems from the implementation of parity clauses, their platforms may be seen just as showrooms, useful to obtain information about the properties in the desired destination, while customers will later book the hospitality services on another platform or, even more likely, on the hotel's proprietary website, probably at lower room prices or at better conditions. Even if persuasive and commonly agreed by some of the European authorities that took part to the investigations into the hotel online booking sector, the relevance of the free-riding defence in the case, as a way to partially exempt parity clauses by the enforcers' prohibition, is far from being undebated. Although the evaluation of the balance between pro- and anti-competitive consequences of the

conducts is strictly case-specific, some scholars disagree with the decisions issued by the French, Italian and Swedish Authorities in the *Booking* case, due to the acceptance of the amended commitments proposed by Booking.com mainly on the grounds that free-riding could jeopardise all the efficiencies produced by the defending platform. Thus, the Authorities has allowed the most powerful OTA in Europe (in terms of market share) to keep applying its parity clauses, although in a narrower version which requires the hotel partner to respect the rate parity just in relation to the hotel's own website, while permitting him to price differentiate between different OTAs. However, narrow parity clauses have not been remarkably accepted by the German *Bundeskartellamt*, which, following its previous decision regarding another OTA, HRS, alone decided to issue a prohibition decision against Booking.com. The OTA has been ordered to refrain from requiring hotel partners to respect any form of parity when setting prices, availability and booking conditions on the platform, with the Authority exactly disagreeing on the consistency of the free-riding concern for Booking.com and equating the scenario produced by narrow parity clauses to that of their wider version.

The results of the procedures targeting the hotel online booking sector is notable under several perspectives. Under a first point of view, the discrepancy between the decisions simultaneously rendered about Booking.com' reveals the weakness of the actual European competition enforcing system and the limitations of the European Competition Network, which was appointed exactly to coordinate the acting authorities to obtain a univocal European response to the problem. Moreover, the lack of a sound theory on the topic is also deemed to depend on the extreme resort to commitment decisions endorsed by European competition authorities: the truncation of the investigations, in order to obtain faster and more customised decisions, may have the important drawback that the analysis of the scenario will unavoidably remain at a more superficial layer, with negative implications for the legal certainty and without clarifying most of the controversial aspects. Furthermore, a weak response to the problem by competition authorities may lead to the exogenous intervention of national lawmakers, that may decide to defend interests different from those at the basis of the antitrust investigations, as somehow happened with the legal ban of OTAs' parity provisions in certain European national legislations.

Equally, there are many other 'substantial' controversial aspects arising from the decisions adopted until now: alongside a fragmented resort to the main theories on two-sided platforms to define the relevant product markets and to weigh the market

power of the defending firms, the Authorities have left many questions open as to the classification of the conducts under some more traditional antitrust categories. First, it is missing a general and clear evaluation of the nature of online travel agencies as agents or genuine resellers. Just the German *Bundeskartellamt* has openly defined OTAs as resellers, not believing the 'Genuine Agent test' to be fulfilled in the case, while other authorities have kept more undefined positions. Second, the enforcers still question whether these agreements should be considered anticompetitive conducts by effect or by object: from the correct classification of the behaviours may depend if they fall within the application of the Vertical Block Exemption Regulation (provided that all the other requirements are fulfilled) and even the same individual exemption under article 101.3 TFEU. Lastly, many scholars have challenged the same opportunity to settle the procedures on OTAs' parity clauses under art. 101 TFEU: except for the English Office of Fair Trading's investigation, all the other procedures have always been addressed just to OTAs, avoiding to take into consideration the position of the other party to the agreement, that is the hotel partner, risking to result in an anomaly application of Art. 101. To solve this problem, it should be more consistent with competition law principles to settle the relevant cases on parity clauses under Art. 102 TFEU and the provisions on the abuse of dominant position, even if collectively held by the major intermediaries.

The last point that has been debated deals with the effectiveness of the decisions taken in the hotel online booking sector, since, few years after the entrance into force of the commitments and the generalised switch from wide to narrow parity clauses, it is hard to say whether the decisions have restored an enhanced competitive pressure in the market. Some recent studies demonstrate that intrabrand competition between OTAs is still very weak in the European member states, whereas new threats for competition may derive from the algorithms that regulate the functioning of OTAs' platforms: if the hotel's ranking on the website somehow depends on a substantial respect of price parity with other online sales channels, OTAs could be reproducing, although in a more opaque way, the same anticompetitive scenario deriving from parity clauses. For these reasons, many competition law practitioners suggest the intervention of the European Commission to provide a univocal antitrust assessment of parity provisions in digital markets, also agreeing on the necessity of the switch towards a more effect-based and flexible approach when applying the standard antitrust procedures and categories to the new challenges arising in modern markets.

1

PARITY CLAUSES UNDER COMPETITION LAW

I. INTERNET INTERMEDIATION, E-COMMERCE AND OTAS

Digitalisation of the global economy is a clear phenomenon that during the last years reached some unpredictable peaks, regarding almost all the sectors of our daily-life.

A large part of this development has been carried out by digital intermediaries, or "cybermediaries",[1] such as Internet service providers, data processing providers, web-search engines, online payment solution providers, social networks and e-commerce companies.[2]

A 2010 OECD Report[3] identified at least seven key-services provided by Internet intermediaries. Among others: a) to provide infrastructure, b) to collect, organise and evaluate dispersed information, c) to facilitate social communication and information exchange, d) to aggregate supply and demand, e) to facilitate market process, f) to provide trust and g) to take into account the needs of buyers and sellers or of users and customers.

Today much more than in 2010, it is undebated that digital retail is step-by-step replacing its bricks-and-mortar counterpart, as the growth in revenue and market share of massive marketplaces, such as Amazon, demonstrates. However, this evolution is not a mere change in consumer's habits, only influencing where end-users buy goods and services, but this is an evolution capable of affecting the business model of many other economic actors, in particular within the same value-chain. Due to the fast-growth typical of online platforms, suppliers now must face more powerful intermediaries, capable of deepening steadier and (potentially) more durable economic ties with upstream companies.[4]

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[1] Sarkar, Butler, and Steinfield (1998), p. 215.
[2] Colangelo and Zeno-Zencovich (2015), p. 44.
[3] Perset (2010), p. 6.
[4] On the contrary, a different literature predicts that this "intermediation" will be progressively replaced by a "disintermediation" process, that, thanks to Internet transparency and reduced search costs, will directly connect users and producers (for instance, see Sarkar, Butler and Steinfield,

The e-commerce intermediaries' mission is to ease connections between demand and supply in order to foster the conclusion of transactions between buyers and sellers. This is ensured by providing a selection of connected services to all the different groups of users interacting with that intermediary.[5] Services like user-friendly interfaces, monitoring activities, customer-care and, maybe more importantly, a reliable brand that encourages users to close contracts with third-parties which would be otherwise unreachable.

A special attention is going to be paid to a particular category of e-commerce companies which, thanks to its fast-growing success among users, perfectly resembles how intermediaries are able to innovate business models to implement new demand-enhancing services. This is the category of the Online Travel Agencies (the so-called OTAs, or also hotel booking platforms): during the last decade, OTAs have radically transformed the way in which we plan our holidays or book a hotel for business, directly going to the core of the traveller's needs and eliminating any purported "filter" between the user and the individuation of his preferred hotel.

Year by year, OTAs are replacing physical agents thanks to some better opportunities offered by digitalisation and the spread of Internet, like a bigger transparency, the reliability of the customer reviews, 24/7 in language assistance and, in general, a more customer-oriented approach. This trend has been well highlighted by the US Bureau of Labor statistics, branch of the US Department of Labor, according to which in 2000 there were almost 124,000 travel agents in the U.S., a number that fell to 81,700 in 2014 and that is expected to decline 12% from 2016 to 2026.[6]

Just a few years ago, it was indeed usual to call our trusted travel agent to plan a trip. Through his services, we could buy flight tickets, rent cars or arrange transfers and many other services. Having received our enquiry, the travel agent would have used

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supra fn. 1). Without wanting to go more in depth into the analysis of Internet disintermediation, it will be seen below how this phenomenon and, namely, the competition between e-commerce platforms and suppliers' own websites can threaten huge online platforms, due to several free-riding concerns.

[5] A certain Scholarship defines e-commerce marketplaces as two or multi-sided platforms, in order to address the existence of two or more groups of users differently partnering with the same intermediary. A broader review of their principal attributes is provided after in chapter 1 and will form the connecting element throughout the different sections of this dissertation.

[6] Bureau of Labor Statistics, U.S. Department of Labor (2018), p. 5. According to the Bureau: "The ability of travellers to use the Internet to research vacations and book their own trips is expected to continue to suppress demand for travel agents. Job prospects should be best for travel agents who specialize in specific destinations or particular types of travellers".

one or more of the computerised CRSs (Customer Reservation Systems) to communicate with a bigger tour operator or directly with airlines and hotel partners in order to arrange the requested services. After that, its work would have been remunerated through a commission fee usually calculated on the net rates previously agreed with the partnering operators.

Nowadays, all these services can be easily arranged through one of the several existing hotel booking platforms. OTAs have high attractiveness to customers, due to their unique qualities: as any other e-commerce website, hotel booking platforms can be easily visited at any time, almost from any place, and give customers access to thousands of destinations all over the world. Thanks to the "search-and-compare" function, our preferred hotel can now be booked just through a few simple actions, relying on the platform's transparency and on several pledges, such as the best price guarantee and clear booking conditions that (should) prevent any hidden cost.

Nevertheless, the other side of the coin cannot be overlooked. In many cases, customers have lost direct contact with hotels and often the boundaries of the platform's (contractual and commercial) liability are not perfectly defined. Even the best price guarantee is controversial: a customer-friendly interface and many displayed reassurances could actually hide some commercial practices aimed at artificially raising room prices to the detriment of consumers.

The same factors have affected (and will continue to do so in the future) the business model that had been applied by hoteliers for many years. If just ten years ago small and medium-sized (independent) hotels (generally) generated just a minimum part of the whole revenue through travel agents, today, 'mediated' bookings (i.e. for which hotels have to pay a commission to an intermediary) almost represent 50% of all reservations.

Internet and OTAs are of course extremely valuable instruments for hoteliers, mostly for independent ones, who would not manage to bear the costs of singularly-owned sales channels capable of generating the same volume granted by OTAs. Thus, on the one hand, hotel platforms give hoteliers access to a world-wide growing tourist market, making customers aware of destinations and lodging solutions thousands of kilometres away; on the other, online travel agencies very often attract customers that otherwise would use direct (online and offline) hotels' sales channels. This involves a vivid increase of commission expense for hotels, that can be unlikely negotiated with the major intermediaries, usually endowed with a much stronger bargaining power.

However, the OTAs' business model is completed by another crucial element, which has put OTAs under the fierce attack of many hotel associations. Namely a contractual term, year by year implemented by almost all the hotel booking platforms in their contracts with hotel partners: the parity clauses.

Parity clauses are contractual agreements that can be classified with difficulty under any earlier provision, displaying a combination of characteristics that raised the attention of competition law and economic scholars, wanting to compare them with other standard devices in order to assess their potential anticompetitive nature and effects. Unfortunately, it still must be registered the lack of a consistent and established literature on this topic and this is likely the reason why different investigations into the same sector carried out by different European and US enforcers produced even completely opposite decisions as to the alleged hindrance to competition generated through these arrangements.

Dealing with the structure of this chapter, first OTAs and their particular business model are going to be described. Then a review of the main law and economic theories on Internet intermediaries and of e-commerce markets will be provided, highlighting the most concerning aspects of their contractual forms which in the last years triggered the investigations that are going to be examined in chapter 2.

Ultimately, chapter 3 sums up the main controversial aspects arising from literature and the competition law investigations, trying to display an updated and critical overview of all the elements that must be borne in mind when wanting to design an overall opinion about the real consistency of the competitive worries arising from the implementation of parity clauses in the hotel online booking sector.

II. Online Travel Agencies and the Hotel Booking Sector

The dominance of Internet has revolutionised tourism marketing and distribution. The public is now endowed with easier access to booking channels, undermining the business model of traditional travel agencies, at least for individual and leisure reservations.[7] The impact of online transactions in this sector has been

[7] Toh, Raven, and DeKay (201), p. 182.

higher than in others, also considering that already in 2005 tourism was the top US industry in terms of online transactions, with 48% of hotel reservations made through Internet in 2008 and 43% of them through OTAs in 2014.[8]

The growth in hotel online reservations is strictly related to the general industry growth, estimated to value USD 829.42 billion by 2017, forecasting a compound annual growth of 6,8% between 2017 and 2021, so that by 2021 the global hotels industry is expected to have an overall revenue of USD 1,077.6 billion.[9]

On the other hand, within online travel bookings, hotels contribute the highest share with 55% out of a total revenue amounting to USD 212.7 billion in 2017, estimating a compound annual growth rate of 8.8% until 2022.[10]

Hotel booking portals have played a fundamental role in this growth, but the cost for consumers and hotel operators has been significant and is expected to be even more in the future. The average commission fluctuates between 15% and 25% per booking,[11] with hoteliers forced to engage in these distribution channels to face the fierce competition in the market for accommodation, also due to the large room capacities to be filled. As it will be analysed during this dissertation, OTAs' market power (and fast-growth) made them the most important sales-channel for leisure and individually booked business travels, with a relevant drawback, that their business model is unavoidably eroding hoteliers' profits, with the ultimate effect to push hotels to raise their retail prices, negatively impacting on consumer welfare. And whereas a large hotel chain may quite easily absorb this cost, smaller firms risk to be squeezed out by this new context, with larger intermediaries incentivising an enhanced concentration in the accommodation industry, through mergers or the affiliation to larger hotel chains.[12]

The reasons for online travel agencies' success among users, in particular among younger generations, must be sought in both the general digitalisation of the economy and new enhanced opportunities that an online environment can provide and will keep to provide in the future, by the implementation of new technologies like virtual reality

[8] Oskam and Zandberg (2016), p. 268.
[9] MarketLine (2018b), p. 21.
[10] Statista (2018b), p. 4.
[11] MarketLine (2018a), p. 20.
[12] The recent Marriott-Starwood merger has created the larger hotel worldwide operator, by revenue and properties, counting more than 1 million rooms. MarketLine (2016), p. 6.

and integration with social networks.[13] Online Travel Agencies are perfect examples of firms that decided to be more consumer-focused rather than product-focused, to directly respond to the consumer demand.[14]

OTAs mainly provide three services to consumers: a) search facility, b) inter-brand[15] price comparison and c) product review (and not limited to hotel rooms or hospitality, but also covering some other services typically part of a tourist package).[16] On the other hand, OTAs offer hoteliers a range of services referring both to pre-booking (a priceless showcase for their properties, granted by a wide advertising activity, a wider group of users) and after-confirmation phases (credit card details, customer care, payment collection…). These services are free of charge as long as the booking is not finalised, and then are remunerated by hoteliers (and hoteliers only, since consumers are not directly charged for OTAs' intermediation).

Nonetheless, OTAs are just the last version of a longstanding tradition of Internet implementation in travel services. Online booking was first developed by airline companies, that since the '70s have been using their computerised reservation systems (CRSs) as an immediate interface between them and physical travel agencies. CRSs soon conquered a high market power over travel agents, because they usually registered on a single system per time, forcing airline companies to be listed on almost all the existing CRSs and leading to an artificial price uniformity. For this reason, CRSs have been soon subjected to stricter regulations, both in the EU and in the US, forcing airline companies to dismiss their participation in the reservation infrastructures in order to provide consumers with neutral information.

Commission fees and potential abusive conducts, like the ban from the platform, were considered of high concern by US and EU authorities. As will be seen below, these are almost the same theories of harm that moved some Competition Authorities to investigate the hotel online booking sector. Among the standard contractual practices implemented by CRSs and by their direct evolution, the GDSs (global distribution systems, that also operate in the hotel reservation sector), the 'full content agreements' are of primary importance: due to them, hotels and airline companies undertake to offer

[13] MarketLine (2018a), p. 32.
[14] Buccirossi (2013), p. 11.
[15] Intra-brand comparison is provided by metasearch engines, that are often controlled by the same OTAs (such as Kayak, subsidiary of Booking.com; or Trivago, controlled by Expedia).
[16] Toh, Raven, and DeKay (2011), p. 182.

to the GDS their full inventory of rates and conditions, just like OTAs require to the hotel partners by their parity clauses.

OTAs have gradually implemented an agency business model:[17] the intermediary connects hotels and customers, provides them with the service necessary to finalise the reservation and earns a commission out of each booking, usually just from the hotelier. Under this model, hotels, instead of the agents, set final prices. The opposite model is that of wholesale, where hotels set wholesale prices and the wholesalers (usually big tour operators for tourist groups) set final prices after applying their mark-up. On the contrary, another hybrid relationship that is standardly implemented is the one based on the merchant model, where hotels (as well as airline companies) agree with an intermediary to sell a certain amount of rooms at a pre-arranged price (usually below the rate commonly charged for direct reservations) through his distribution channel, whereas the agent applies its commission fee on the net rates. The main difference between the agent model and the two last scenarios is that, in most cases, the hotel is not even aware about the final (total) price paid by the customer to the intermediary, with potential harms to its brand reputation. The main benefit of the agency model for a hotelier lays on the enhanced transparency of the cost structure for each reservation.[18]

Reasoning on OTAs' critical success factors, the particularities of the economic environment in which they operate require them to face an extra-burden when establishing the business strategy to be followed. The two-sidedness of the relevant market,[19] based on the existence of two groups of customers differently approached by any OTA, poses several challenges: in order to make its own business profitable, the hotel booking platform cannot address just one of these groups and, even more importantly, needs to consider the deep interdependencies existing between them. Neither the buyer side of the market nor the seller one can be effectively targeted by the platform if the other side is not itself sufficiently large and attractive.[20]

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[17] Colangelo and Zeno-Zencovich (2015), p. 45.
[18] Toh, Raven, and DeKay (2011), p. 185. Among these main standard models, OTAs have also developed some sub-categories: for instance, the "distressed inventory" model, focusing on discounted rooms for bookings made more closely to the arrival date (last-minute reservations) or the comparison shopping, model adapted by meta-search engines like TripAdvisor and Kayak.com.
[19] See the following section.
[20] Caillaud and Jullien (2003), pp. 309–310.

III. ONLINE PLATFORMS AND ONLINE MARKETS: ONE INTERMEDIARY, MORE 'SIDES'

Shifting to the analysis about the effects on competition of online platforms (and OTAs), it is crucial to address the most important theories describing how these intermediaries operate and how they influence their relevant markets.

Firstly theorized by Jean Charles Rochet and Jean Tirole in the early 2000s,[21] the two-sided market (and, consequently, two-sided platform) theory perfectly describes the way in which many e-commerce intermediaries carry on their businesses.[22] Obviously, this theory can also be applied to some more "traditional" markets, such as media (with editors connecting audience and advertisers) and credit cards (where financial institutions issuing cards usually also provide the POS service), but it is clear that nowadays e-commerce platforms are capturing the attention of law and economic literature.

Even if during the last two decades many contributions have been made to the development of a general theory about 2SMs, an undebated and comprehensive definition is still missing, causing ambiguity and jeopardising a correct subsumption of these principles by practitioners. As for the existing literature on 2SMs, Auer and Petit[23] opine that most of the given definitions are limited and focus on only one of the related elements. Hence, if on the one hand Rochet and Tirole pay a particular attention to the price strategies, stating that "a market is two-sided if the platform can affect the volume of transactions by charging more one side of the market and reducing the price paid by the other side by an equal amount",[24] on the other, Marc Rysman[25] targets the consistent

[21] Rochet and Tirole (2003).
[22] Hereafter, two-sided markets will be referred to as 2SMs and to two-sided platforms as 2SPs. For the sake of completeness, it must be noted that other authors prefer the definition of "multi-sided" markets (and platforms), as, for instance, Evans and Schmalensee (2013, 7). The Authors show that sometimes even more than two groups of users actively interface with the same intermediary. However, it is possible to generally refer the analysis to two-sided markets and platforms, because it can be easily subsumed that multi-sided markets show the same issues, which are just amplified.
[23] Auer and Petit (2015), pp. 433–434.
[24] Rochet and Tirole (2006), pp. 664–665. However, Rochet and Tirole's studies are always deemed to be the most representative and complete works on this topic.
[25] Rysman (2009), p. 126.

presence of network externalities,[26] whilst Evans and Schmalensee[27] give more space to the primary role played by 2SPs in fostering value-enhancing interactions.

Nonetheless, although not being equally evaluated by the several authors that built the theory about 2SMs, these topics are exactly considered to be the milestones of this literature.

By reducing the transaction costs that usually hamper the successful closing of negotiations between sellers and customers A 2SP is an intermediary which eases the match between demand and supply. This is achieved by responding to the demand of different groups of customers with a different range of services, for which the platform must bear different costs. The starting point is how the standard economic metrics are influenced by the 2SM theory: the evaluation of the allocative efficiency (with the lowest possible prices in case of perfect competition) and of the opposite inefficiency (with artificially higher prices in case of monopoly), needs to be adapted to the particularities of a new market structure, in which there is a clear "chicken-and-egg problem".[28] A circular relationship between the different groups of customers, which Rochet and Tirole effectively represent through the example of gaming console manufacturers: nobody will buy a console if there are not compatible games, just as nobody will develop videogames for a console not used by gamers.[29] Firms operating in a single-sided market develop their own pricing strategies targeted at a single context, namely setting a price that is based on the characteristics of a single demand, belonging to a (more or less) defined group of customers. Conversely, two-sided platforms seek the profit maximization through a deep awareness of the heterogeneity and of the cross-connections between all the groups of customers.[30]

Nonetheless, this implies that different demands correspond to different groups of customers and that it would be impossible to bring together dissimilar demands by setting a single price level. Rochet and Tirole prove that this deadlock can be solved

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[26] "There is some kind of interdependence or externality between groups of agents that the intermediary serves". Ibid.
[27] Evans and Schmalensee (2013), p. 7. 2SPs are "economic catalysts", creating value by providing customers with a solution to their coordination and transaction cost problems.
[28] Caillaud and Jullien (2003), p. 309. The Authors maintain that from "informational intermediation" consumers have "larger expected gains, the larger the number of users on the other side of the market" (i.e. indirect network effects, see below for more details) and that to "attract buyers, an intermediary should have a large base of registered sellers, but these will be willing to register only if they expect many buyers to show up". Ibid., pp. 309–310.
[29] Rochet and Tirole (2003), p. 990.
[30] Caccinelli and Toledano (2018), p. 196.

choosing "a price structure, and not only a price level".[31] A '*divide et impera*'[32] approach which, as a consequence, is not without effect on the quantity of output.

One side, the so-called 'money-side', is chosen for bearing the cross-support of the other side, the 'subsidy-side', i.e. to recover the losses incurred by the platform to provide the subsidy-side with the services necessary to complete the transactions with the money-side customers. This means that the first group will usually pay a price well below the marginal cost borne by the company to assure the related service (or even a not positive price, like in "zero-price" markets),[33] while the other will be charged a price well over the corresponding marginal cost.[34] Going more in depth, Rochet and Tirole[35] also identify two subcategories of customers, that can affect pricing. Thus, there are "marquee buyers", valuable customers that represent an important target for both the platform and the other group, and the "captive buyers", that are somehow tied to the platform, for instance due to the existence of loyalty programmes or other connections such as long-term contracts and sunk costs. The rent-maximization strategy would suggest to further price-differentiate, charging the first group lower prices, with the related losses being covered by the higher prices captive buyers are charged.[36]

However, the non-neutrality of the price structure is not sufficient to make clear how 2SPs operate if the existence of network externalities is not taken into account. Since the group demands depend on each other, the value-enhancing interactions realised through the platform unavoidably produce network effects (or externalities),[37]

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[31] Rochet and Tirole (2003), p. 990. The price level can be approximately considered as the sum of the prices the different groups of customers are charged by the platform; the price structure is approximately their ratio.
[32] Or "divide-and-conquer" as in Jullien (2011), p. 187.
[33] Newman (2015), p. 151.
[34] Following an acknowledged literature, Caccinelli and Toledano maintain that "in digital markets, where the cost of serving one additional consumer is close to zero, checking prices upon marginal cost is often inappropriate" Nevertheless, the reference to this scale may still be valuable, since shows that "one side of the market is not charged/is 'overcharged' for the cost of the service is enjoying". Caccinelli and Toledano (2018), fn. 11.
[35] Rochet and Tirole (2003), p. 19–24.
[36] To exemplify, online travel agencies could decide to apply lower commission fees to the most successful and loyal partnering properties, that presumably generate a higher traffic on the platform and guarantee a better conversion ratio. Accordingly, they may decide to reserve higher commission fees to less famous and smaller properties.
[37] Of course, network externalities impact on the same price strategy, since the group that will produce the larger amount of positive externalities towards the other will be exactly the most fiercely targeted by the platform becoming the money-side group. Some scholars have also demonstrated that not all the externalities are beneficial to all the groups of customers, as there are cases in which one side's welfare drops due to the increase of other's excessive usage of the platform. For instance, see Filistrucchi et al., who show that in case of media markets, consumer

which the 2SP seeks to internalise in order to remunerate its services, made attractive by the prospect to reduce transaction costs. These effects are called 'externalities' because the two groups, namely the 'buyers' and the 'sellers', produce value by finalising their transactions through the platform (i.e. by 'using' the two different groups of services offered by the platform on the two sides) and, by that, generate network effects. However, the user groups that buy these services "do not internalise these effects, which are therefore called externalities".[38]

E-commerce intermediaries mostly face indirect network effects,[39] that are divided into two main categories: usage externalities and membership externalities.[40] There is a usage externality when the two user groups need to coordinate their actions using the platform to create value. Evans and Schmalensee cite the example of OpenTable, a US-based company providing fine dining reservation service: by enabling consumers to make reservations and restaurants to receive them, this platform may drastically reduce search and transaction costs,[41] but, of course, only if customers and restaurants are able to enter into contact. Any other aspect facilitating this outcome can increase the value of the externality, such as investments in the quality of the platform and in advertising. As seen above (fn. 37) there is also the possibility that usage externalities are positive for one user group but negative for the other: in this case, as long as the net value of these externalities is positive, the overall effect will benefit interactions and the platform will be in the position to try to internalise some of this value.

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welfare can decrease in case of a massive and uncontrolled advertising, as advertisers are "buying" consumer time. This may lead to the production of negative externalities, impacting on the other group. Filistrucchi et al. (2014), p. 297.

[38] Ibid.

[39] Indirect network effects are produced when the value of the 2SP for one group of users is directly correlated to the usage of the platform by the other group and to the number of its members; direct network effects when the value for one group increases the more users of that group choose that platform. The latter is the typical scenario of social networks, where the attractiveness of the platform for consumers depends exactly on the number of consumers overall using that platform. To be more detailed, also in the first situation users on one side of the market benefit from the increase in the number of users on their market side, but it happens just indirectly, since the network effect spreads through the other side. For more details, see Haucap and Stühmeier (2016), p. 4.

[40] Evans and Schmalensee (2013), p. 6; Rochet and Tirole (2006), pp. 646–647.

[41] The platform immediately shows the available restaurants for a certain date (together with extra information about the menu, the location and customers' review), by that allowing customers to save the time previously spent in calling several restaurants until they managed to find the right place at the right time. This may also benefit the restaurants, that used to dedicate a certain amount of resources to take phone calls and register reservations, tasks which are now automatically granted by the platform.

There is a membership externality when the value for one user group is related to the number of users acting on the other side.[42] Going back to the OpenTable scenario, the respective platform's value for customers and restaurants relies on their participation to the platform.

Given this brief analysis of the relevant aspects of two-sided markets, it seems clear why this category perfectly exemplifies the structure of Online Travel Agencies: OTAs aim at promoting transactions between two independent groups of users, which are hotels and travellers. There are usage externalities whenever a customer finalises a reservation through the platform; moreover, the attractiveness of the major OTAs, such as Booking.com and Expedia, plainly stands on the vast variety of partners they can rely on, suggesting the existence of relevant membership externalities.[43] As to the price structure, the amount required to hotel partners (both in terms of commission fees and of possible membership fees) almost outbalances what required to customers, that in the vast majority of the cases do not pay any direct fee to book a hotel room via the OTA.[44]

IV. Two-sided Markets and the Definition of the Relevant Market

Before going in depth with the analysis of the relevant conducts that pushed several EU and US authorities to investigate OTAs' conducts, a more general overview

[42] Evans and Schmalensee (2013), p. 6.
[43] Even the abovementioned consumer-oriented key features of OTAs, that boost the platform's quality, undoubtedly weigh on the value of the externalities.
[44] This analysis is also corroborated by the fact that Evans and Schmalensee choose to exemplify their theory citing the case of OpenTable, which also aims at facilitating reservations and operates in a sector similar to the OTAs' one. The Authors highlight that OpenTable started by providing table management software to restaurants (one-sided business). As soon as a critical mass of restaurant customers was reached in several US cities, it launched the web-based platform allowing customers to make reservations automatically integrated with the already released restaurant software. A service completely free of charge for customers, that are also incentivised to use it thanks to the guarantee of small rewards or discounts off the final bill. On the contrary, the restaurants both need to be licensed for using the software and to pay a commission fee for any patron they welcome who has made the reservation through OpenTable. Evans and Schmalensee (2013), p. 5. This business model brought OpenTable to enumerate more than 31 thousand restaurant partners in 2014, with a revenue of USD 174 million. In 2014 OpenTable has been acquired by Priceline Inc. for USD 2.6 billion. Booking Holdings Inc. (2014).

of the application of competition law provisions and principles to the world of e-commerce is required.

According to Colangelo and Zeno-Zencovich[45] there are two preliminary points to be discussed: the first one concerns whether e-commerce markets give rise to new types of anticompetitive conducts, requiring adapting classic antitrust principles or to develop new ones. The second, thoroughly linked to the first, questions whether two-sided markets need an equal form of adjustment of the same classic principles.

For what concerns the first question, a well-established literature explains that the anticompetitive conducts which are being registered in e-commerce settings unlikely result in new schemes intrinsically different from what has been already examined in offline markets.[46]

Nevertheless, more recent studies demonstrate that there are some recurring e-commerce peculiarities which may be relevant under an antitrust perspective, such as: a) the reduction of search-costs, dependant on the prompt and rich availability of information typical of Internet environments;[47] b) the alteration of the distribution costs, deriving from the overall impact of new relationships between consumers and producers, both in terms of disintermediation and of intermediation. In addition to that, there is also a boosted and more differentiated warehousing capacity for the retailer, thanks to faster communications and to the epochal shift from a focus on products to one on consumers' demand;[48] c) increased geographical dimension for transactions, since e-commerce is thought to potentially reach anyone all-over the world at any

[45] Colangelo and Zeno-Zencovich (2016), p. 76.

[46] Ibid. Nonetheless, as analysed in Chapter 3, some scholars disagree with this position, endorsing the necessity to look at the new challenges arising in digital markets with an enhanced flexibility, in order to avoid too formalistic approaches that could prevent antitrust practitioners from deeply understanding the newest implications of the conducts adopted by digital economic players, which could just apparently look similar to other more traditional contexts typical of offline markets.

[47] Buccirossi (2013), p. 11. The author also warns against a too simplistic assumption of this element, since also the usage of metasearch engines and 'shopbots' to access the whole set of offers does involve a 'non-trivial' amount of search costs. This is also amplified by a non-negligible quantity of price dispersion when comparing the offers of various retailers, which "lower search costs so that while search engines try to create a frictionless environment, retailers counteract by adopting price-obfuscation tactics."

[48] This allows online retailers to commercialise an enhanced variety of goods, including niche products that offline retailing has probably already eliminated. The same reasoning can be applied to the case of OTAs, where small and not well-known accommodation solutions (not only hotels, but also B&Bs and guest houses) are able to survive (and to expand) thanks to a new worldwide visibility of their services. A visibility that they are provided with even if they individually generate just low volumes of conversions. Besides these positive elements, there are also some disadvantages, like the increase in shipping costs, that in many e-commerce activities has become a predominant budget heading.

time;[49] d) new forms of information asymmetry, typical of online environments and absent in offline markets, like the impossibility to examine the chosen product before the purchase.

The nature of 2SPs may further increase these corrections to traditional theories.

First of all, dealing with the main principle and paramount mission of competition law, that is to protect and promote social (and consumer) welfare, it is possible to see that the first implication of the 2SP model is that all the interdependent groups of customers need to be adequately borne in mind when assessing the impact of the anticompetitive conducts adopted by platforms.[50] Due to the spread of externalities among all the groups of users, business decisions affecting one group's welfare will unavoidably have effects also on the other. Consequently, the choice of the profit-maximising price structure and the social welfare of the market will be necessarily connected. This produces two kinds of market failure.

First, 2SMs may be more concentrated than other industries.[51] Scale economies, high fixed costs (to develop the platform itself) and almost negligible marginal costs bring to a "winner-take-all" tendency that characterises all the digital markets. Thus, successful firms base their performances on reaching a critical mass of users to cover fixed costs and to recover sunk-costs investments and on the corresponding increase in their own market power.[52] Thus, it is much probable that the company, far from a perfect competition balance, will set prices somehow over what is socially-desirable. Although this deviation could be consistent, it could be not remarkable,[53] since any other single-sided firm deviating from the perfect competition would produce the same scenario. Moreover, when assessing the harmfulness of the 2SP's behaviours, it must be borne in mind that competition law's aim and competition law authorities' mission is not (or should not be) to just protect the multiplicity of economic actors operating on a given

[49] Even here, some corrections are required, since often big online retailers could lack the necessary know-how on specific products and on specific markets, representing a great limit that makes offline retailers still valuable in certain highly technical markets. Buccirossi (2013), p. 12.
[50] Evans (2003), p. 195.
[51] The achievement of a high market power may be amplified by the phenomenon of "tipping", due to which, quoting King, "a particular platform can become dominant in a two-sided market simply because all participants believe it will be dominant." If strong positive externalities are highly spread over new potential users, it is well possible that just one or a few platforms will successfully attract customers, with a self-reinforcing effect. King (2018), p. 112.
[52] Successful digital platforms tend to pursue fast-growing developments. To this it is often associated a general tendency towards a cyclical substitution of the market leader, due to the likewise evolution of technology and of business processes that he could not be able to keep up.
[53] Evans and Schmalensee (2013), p. 12.

market or to defend an eventual restricted category of competitors, but they should aim at maximizing welfare by safeguarding competition (and in a rather 'passive' way, i.e. not actively intervening to shape a certain market structure, task that should be left to the lawmaker).[54] Hence, it has been proved[55] that this oligopoly (or even monopoly) condition could be efficient, due to the maximization of indirect externalities, or at least more welfare enhancing than a less concentrated market structure. It is indeed demonstrated[56] that network externalities may be maximised when users are able to coordinate themselves on a single platform.

However, as in similar one-sided cases, this dominance may be immune to entry, since new platforms should "defeat" a behavioural barrier to entry: "they cannot successfully compete without gaining a substantial user base, but no user has an incentive to switch to the new platform as that platform does not have a substantial user base (having regard to both the sides of the market)".[57]

There are nonetheless equal and contrary forces that may offset the effects of concentration as to providing the platform with an effective market power. One of them is the multi-homing effect: there is multi-homing when a customer (also due to low switching costs) can contemporarily use more platforms in a certain sector, by that unavoidably amplifying the competitive pressure on the incumbent. Of course, it does not necessarily mean that any competitive concern may be eliminated through multi-homing. As detailed below dealing with OTAs' cases in chapter 2, there are some further factors that must be borne in mind when considering the overall degree of competition on two-sided online markets, either more correlated to the intrinsic nature of digital environments (like price transparency)[58] or dependant on particular devices

[54] Caccinelli and Toledano (2018), p. 199.
[55] Haucap and Stühmeier (2016), p. 5.
[56] Caillaud and Jullien (2003), p. 314.
[57] King (2018), p. 112.
[58] In its investigation into the alleged agreement between major UK hotel chains and main OTAs, the UK Office of Fair Trading (hereafter OFT) underlined the high degree of price transparency and the relatively low search costs for consumers that differentiate e-commerce, stating that "the Internet allows for a much swifter search and comparison across a wide variety of choice factors including price, dates, quality and location" and that "the Internet brought about price transparency across the market, enabling consumers to identify the best deal, i.e. the lowest price for any given hotel room, at a very low search cost". OFT's Statement of Objections – unpublished - as reported in *Skyscanner Ltd v CMA* (2014), para. 75. As will be seen below, exactly on the ground of the reduction in price transparency OFT decision has been quashed by the Competition Appeal Tribunal.

adopted by the incumbents, such as parity clauses.[59] Another countervailing force is the capacity constraint that even in digital markets can be envisaged, in particular as related to the narrowness of the advertising space and to the negative externalities that could arise from an increase in the heterogeneity of the platform's users, that could be addressed with difficulty by a single advertising strategy.

The second market failure may be generated from the business decision to prefer a price-structure that could not maximise the social welfare. However, Evans and Schmalensee underline that there is a real risk for Courts to hold some behaviours anticompetitive due to a just partial examination of the welfare implications, like when just a side of users is taken into consideration or when the negative effects of a considerable market concentration are not counterbalanced by the assessment of the benefit brought about by indirect network effects.[60] This may well be the case for price-cost margins, sometimes used by authorities as a measure of market power but that risk not having any sense if prices are disconnected from costs;[61] for the same reason, authorities could find 2SPs responsible for predatory pricing in respect to the "zero-price" customers.[62]

Another key preliminary process in the antitrust assessment of any purportedly anticompetitive conduct is the definition of the relevant product and geographical markets, i.e. to determine the framework within which antitrust enforcers have to determine not only the impact of the parties' relevant conducts, but also the likely consequences of the prohibitions and of the requirements that the authorities should impose on the investigated firms. A mistake could lead to adopt socially inefficient and welfare-detrimental decisions. As to the latter, as seen above, e-commerce may potentially have a global dimension. Nevertheless, the empirical analysis of the

[59] Multi-homing is a key-factor also in defining the price structure strategy. According to Armstrong, in many cases platforms may achieve a monopoly power exactly on providing access to a "multihoming sector" to its single-homing customers (namely, customers that have to choose one platform per time). This is the case of the meta-search websites. Thus, it could be profit-maximizing to charge multi-homing customers higher prices. Armstrong (2006), p. 669.
[60] Evans and Schmalensee (2013), p. 35. This scenario can be considered as crucial to evaluate the overall effects of OTAs' business models, where technological development, advertising and other value-enhancing measures must be balanced with the harms produced by the implementation of parity clauses.
[61] King (2018), p. 111.
[62] Caccinelli and Toledano (2018), p. 196.

decisions covering 2SMs shows that the geographical market, at least on the consumer-side of the platform, is often intended by authorities as limited to the national borders.[63]

Dealing with the product relevant market, one of the most concerning questions regards whether online markets need to be separated by their offline counterparts or they can still be considered as competing with them. The decision would depend on several factors, such as whether the quality of the products and the price are different between online and offline sales channels.[64] It is however clear that, given the high distinctive variety of online retailers and missing general and accurate criteria to evaluate the separation between online and offline product markets, a case-by-case approach seems to be the only advisable way of proceeding. This way is even more essential when dealing with 2SMs and online platforms, because to circumscribe the relevant product market it is necessary to address a preliminary issue, that is to argue whether one or two relevant markets need to be defined and whether the existence of another market side should influence each single market definition. This is not a redundant question, because if just one market is defined, a partnering firm will be on both the sides of the market, whereas if two markets are defined, then that firm will just operate on one of them. Recently, some authors have elaborated a new classification to try to give a more technical answer to this question, dividing 2SMs into two-sided transaction markets and two-sided non transaction markets.[65] Two-sided non-transaction markets (such as media markets) are characterised by the absence of "real" transactions between the two user groups operating on the platform, by that meaning that the platform could unlikely be able to charge a per-transaction fee or a two-part tariff (i.e. a tariff including both the price for the listing on the platform and for the single interaction).[66] Conversely, two-sided transaction markets (such as credit cards) imply the presence of observable transactions between the user groups, by that allowing the platform to charge the users both for joining and for using the platform, because

[63] For instance, the definition of the relevant (at least downwards) markets for hotel booking portals in investigations throughout Europe. This may also alter the demonstration that the examined conducts affect trade between Member States when applying TFEU Artt. 101 and 102.
[64] Colangelo and Zeno-Zencovich (2015), p. 53.
[65] Filistrucchi et al. (2010), pp. 296–300. The Authors specify that the market definition should always take into consideration both sides of the market, even if whether one or two markets are to be defined depends on the type of 2SM.
[66] However, it must be noted that, although just recently, the spread of online tracking technology has enabled platforms to charge advertisers a pay-for-click price for any finalised operation that originated from an advertisement. Still debated is whether the same finding can be extended to cases in which the transaction is not concluded, i.e. the buyer does not purchase the advertiser's product.

two-sided markets, by definition, show both usage and membership externalities. Turning to the implications of this theory, in two-sided non-transaction markets two interrelated markets must be identified, whereas finding only one in two-sided transaction markets. Since the hotel online booking sector is based on the finalisation of several transactions between customers and hotel partners, it is clearly a two-sided transaction market and, then, just one relevant product market should be defined.[67]

There are also some correctives to this theory that must be borne in mind. First, it is always necessary to take both the sides of the market under consideration, although the relevant conduct under scrutiny just refers to one side of it. Filistrucchi *et alii* argue that this derives from the fact that "how much competition the platform faces in getting customers on one side also depends on its competitive position on the other side, and *vice versa"*.[68] Second, it would be inaccurate to avoid considering one side of the platform when the relative customers do not pay any (monetary) price for the service they enjoy. It was indeed one of the first contributions of the two-sided theory to demonstrate that providing a service for free may still be a profit-maximising strategy, because this may boost the number of customers using the platform and then make the platform itself more attractive for the other group of users, that will counterbalance the losses on the first side. This may produce a higher amount of profit than what could be achieved by charging both sides a positive price.[69]

Shifting to the practical definition of the relevant product market, it is straightforward that also the usual economic tools implemented by authorities to define the relevant market require some adjustment . The existing literature has shown that

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[67] Namely, the market for the services necessary to finalise the relevant transaction between the supplier and the buyer. Filistrucchi et al. argue that this will make candidate substitute products both other competing platforms and even non-intermediated transactions. Filistrucchi et al. (2014), p. 303. This point has been implicitly addressed (and endorsed) by the US Supreme Court in *United States v. Grinnel Corp.* (1966), para. 2*,* talking about a "single basic service". As examined later in chapter 2, among the several European investigations into the hotel online booking sector, just the Italian decision includes also non-mediated bookings, made through hotels' own websites, in the relevant product market. Autorità Garante della Concorrenza e del Mercato (2015b), para. 9.

[68] Filistrucchi et al. (2014), p. 319.

[69] Even in case of a 'negative price'. For instance, this situation may recur in the hotel online booking sector, when the OTA unilaterally decide to show end-users a lower room rate than that is set on the platform by the hotel, with the intent to cover the difference by renouncing to part of the commission fee. For more details, see Fletcher (2007), p. 223. Not positive prices determine however some uncertainties in the application of the SSNIP test (see after in this section), since it is impossible to calculate a demand deviation if the first factor is zero. In any case, Haucap and Stühmeier highlight the overall silence of literature on this "highly practical problem". Haucap and Stühmeier (2016), p. 9.

the "Small but Significant Non-transitory Increase in Price" test (SSNIP test) cannot be applied plainly to 2SMs.[70] Given that the hypothetical monopolist in the two-sided market is facing two distinct user groups for which it is setting different prices, at the very beginning it must be chosen which price should be raised to apply the test. Then, there are several other 'natural' questions: "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 the 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?"[71] Among these several questions, the literature has tried at least to identify some fundamental points that should lead the authorities' application of the SSNIP test. First, any SSNIP test run on just a side of the market will certainly fail to catch the cross-effects of the constraints on prices deriving from the interdependent demands. For instance, singularly observed, a price increase on one side of the market could be seen as profitable, but almost certainly it will have consequences on the other side; alongside a misunderstanding of positive or negative "feedback effects"[72] in demand, the overall effect may be to underrate or overrate the width of the relevant market.[73] The same outcome would also occur if the antitrust practitioner forgets to consider that the monopolist might also modify the price structure to countervail the potential loss in profit deriving from the price increase.

At the end of this brief analysis, as mentioned previously, it lasts the lack of a univocal opinion as to the way in which these economic tools should adapt to 2SMs, given that both case law and scholars agree on the necessity to avoid a plain and mechanical application "of standard antitrust ideas where they do not belong."[74] The

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[70] This common test supposes that if a firm (the hypothetical monopolist) would be able to profitably raise its price for a stable period by 5% to 10% above the competitive price level, the firm is considered not to be effectively under the pressure of competitive forces. On the contrary, where the increase is unprofitable, since the consumer is pushed to switch to alternative products, the latter are believed to be good substitutes and therefore to belong to the same market of the target firm.

[71] Auer and Petit (2015), pp. 442–443.

[72] Caccinelli and Toledano (2018), p. 198.

[73] Interestingly, Evans and Noel point out that a market could have been defined too narrowly even if the immediate repercussions on that are positive. A price increase on one side would produce a reduction of customers on that side, and then, due to positive feedback effects, a consequent reduction in demand of customers of the other side. All in all, this would further reduce the demand on the first side. Evans and Noel (2008), pp. 669–670; pp. 674–675.

[74] Tirole (2014), p. 518. The Nobel laureate recalls the inconsistency of the EU Commission position on this topic, that first admits that the application (with modifications) of the SSNIP test to markets in which there are "inter-group" network effects is complicated but still "not insurmountable", but after does not provide any clarification of how this should happen.

2SM theory has led, in practice, to contrasting decisions in the short case law about online platforms thus far, as the relevant cases in media market (*Google/DoubleClick*)[75] and credit cards (*Mastercard*[76] and *Visa Europe*)[77] have demonstrated.

There is also another case that is seen as a landmark for investigations into both 2SMs and the travel industry, that is the Worldspan/Travelport merger.[78] This case gave a first overview of how the Commission considers the overall structure of the online travel services booking sector. This merger produced its main effects in the market of GDS operators, to which Galileo (owned by Travelport) and Worldspan (named after the controlling company) belong. In accepting the merger as compatible with the Common Market, the DG competition has expressly defined the market for online travel distribution services through GDS systems as a 2SM, based on the interactions between two different groups of customers: on the one hand, GDS operators allow upstream firms to distribute their services (hotel rooms, flight tickets, car rentals) to online and offline retailers, on the other travel agencies use the same platform to make reservations for their customers.[79] Following the principles of the two-sided transaction markets theory, the Commission had identified just one relevant product market, whose geographical borders are as wide as the European Economic Area for the upstream side (i.e. that of the travel services providers) and limited to the single national borders for the downstream relationships with the traditional retailing (where national GDS market shares may widely vary nation by nation).[80]

V. Online Platforms and Parity Clauses: Classification and Main Theories of Harm

Recent case law shows that parity clauses have been one of the most powerful instruments employed by digital two-sided (transaction) platforms to reach their business efficiency targets. By tying their activity with that of their producer-side users,

[75] European Commission (2008), paras. 57–73. The Commission has identified just one relevant market for intermediation services, even if the cited Authors refer to online advertising market as a two-sided non-transaction market.
[76] European Commission (2007c).
[77] European Commission (2010b).
[78] European Commission (2007a).
[79] Ibid., paras. 9–21.
[80] Ibid., paras. 60–71.

digital platforms have managed to obtain the best available conditions for their customer-side users, ensuring the sustainability and even the profitability of their business model.

As a matter of fact, parity clauses "aim to provide assurance to the downstream online platform[81] that it has received goods or services from the supplier, at terms that are at least as favourable as those offered to any other buyer", including new entrants.[82] Online travel agencies have extensively recurred to these agreements in the contract relationship with hotels, by that attracting new customers thanks to the advertised best price guarantee that exactly relies upon the existence of parity agreements with hoteliers.

Nevertheless, parity clauses, as other forms of vertical between firms operating at different levels in the supply chain, bring about several problematic issues capable of impacting on all the value chain, having the potential to affect competition and, ultimately, consumer welfare. Namely, large part of the "policy-oriented literature conjectures that these agreements can raise prices for consumers and profits for platforms and may limit entrants with low-end business models".[83] Interestingly, even if parity clauses are so much spread in digital marketplaces, the antitrust law and economics have not developed solid and agreed principles yet, making a general recognition of the competitive overall effects of these provisions still missing. Rather, literature and practitioners have revealed to pay much more attention to how adapt earlier standards and terminology to the more actual cases involving Internet intermediaries. Without any doubt this can be considered as the right way to primarily address both a new literature on this topic and the first relevant cases; however, it could still jeopardise an effective intervention of the antitrust authorities in the fast-growing and fast developing e-commerce world. This statement is not groundless. There are two first elements that alone may suggest how far the achievement of a rudimental shared basis in the analysis of parity provisions is.

First, there is not consensus over the same terminology to be adopted to refer to these clauses. They have been commonly considered as most-favoured-nation (MFN)

[81] Considering the platform as vertically interrelated with the Hotel services supplier. This 'vertical dimension' of the parity clauses will represent a fundamental issue for the competition law assessment of these provisions.
[82] Ezrachi (2015), p. 488.
[83] Boik and Corts (2016), p. 106.

clauses,[84] agreements typically included in long-standing B2B contracts under which a supplier undertakes with a retailer to constraint its own ability to discriminate in price between its different customers, i.e. to not reserve more enticing price conditions to customers other than the one he agreed with the MFN. Within this broad category, many scholars have sharpened their own terminology, such as Across-Platforms Parity Agreements (APPA),[85] Retail Price MFNs[86], platform MFN agreements[87], Most-Favored-Customer Clauses,[88] contracts that reference rivals.[89] If this might not be a problem for scholars, who almost agree on the definition of these clauses, the same cannot be said about authorities and law enforcers. Many European practitioners have been fiercely criticised by scholars for having misnamed the relevant conducts, to the extent that this could lead to the application of completely unwarranted theories with illogical conclusions.[90] Similarly, the fact that there has been almost no federal enforcement directly against parity clauses in the United States until now reinforces this uncertainty. To keep the analysis as clear as possible, and to bear in mind the existing contradictions in theory and practice, in this dissertation these vertical agreements will be referred to using the "neutral" expression "parity clauses".

The existing literature has identified at least three categories of parity clauses:[91] a) wide (or broad) parity clauses "matching prices of rival producers' product at retailers", that are agreements requiring consumer prices for the producer's product to be no higher than consumer prices for any competing product at the same retailer;[92] b) wide parity clauses "matching prices at rival retailers", that are agreements between producers and retail platforms that require the end-user price to be no higher than the price charged elsewhere (both on offline and online channels); c) narrow parity clauses, agreements between a "price setting" producer and a retail platform requiring the

[84] The origin of the term most-favoured nation must be found in international public law, namely in international trade agreements, where it referred (and still refers) to a clause granting one nation no worse trade conditions than those offered to the 'most-favoured-nation.' Vandenborre and Frese (2015), fn. 1.
[85] Jones and Sufrin (2017); LEAR (2012); Hviid (2015).
[86] Fletcher and Hviid (2016).
[87] Boik and Corts (2016); Baker and Scott Morton (2018).
[88] Akman (2016).
[89] Scott Morton (2013).
[90] For instance Fletcher and Hviid (2016), p. 16. The Authors criticise the classification of parity clauses as RPMs in the UK Office of Fair Trading investigation into the hotel online booking sector.
[91] Hviid (2015), para. 67.
[92] This provision, potentially applicable in offline markets, is not primarily relevant for this dissertation.

producer to match the prices set on the platform on its direct online sales channel, that is its own website.

1) The economic rationale

Leaving aside the terminology and the enforcement highlights, that will be more in detail addressed in chapter 2, it could be worth to start looking at the reasons of the success of parity clauses in Internet markets and among two-sided platforms.

According to Ezrachi,[93] the rationale of parity clauses must be sought in the relationship between firms that occupy different positions in the value chain. The typical environment is that of the two-sided transaction markets, in which, often applying an agency model, there is an upstream firm selling its products through a platform intermediary. As in the case of the hotel online booking sector, it is also probable that the upstream firm will be able to choose more than one sales channel to commercialise its products. Hence, for its part, the platform will invest in demand-enhancing features, such as advertising, marketing, customer care and guarantees, aiming at fostering the use of the platform through the promotion of the upstream product and brand.

As to the first reason why upstream supplier should accept to limit their pricing freedom, it is important to recall that most of online 2SPs reach much bigger dimensions than any supplier, ensuring a higher bargaining power. This is also reinforced by the customer retention through loyalty-enhancing strategies typical of online platforms. Moreover, in digital markets it is much easier to prevent forms of "cheating", due to the price transparency and to the use of appropriate technical devices to scan the web seeking for better conditions.

MFN provisions in general, and parity clauses in particular, are deemed to be the right weapon at intermediary's disposal to deal with the unavoidable free-riding concerns arising in the two-sided markets, that could prevent the intermediary from realising market-specific (or, even more probably, contract-specific) investments and from gaining an efficient business equilibrium, since he could be unable to recoup its investments.

[93] Ezrachi (2015), p. 488.

Regarding online sales, two are the main cases stemming out from this framework in which free-riding is possible:[94] a) when many platforms operate downstream (i.e. competing with other platforms on the buyer-side of the 2SM), the market structure may generate horizontal externalities**,** since platforms could exploit one another's investments in promotion and pre-sale services. This externality is much more probable if the downstream market is characterised by phenomena like multi-homing; b) when the supplier is able to undercut the platform's price or conditions for its products on its own website, consumers may well use the platform to search and compare different goods or services and then the supplier's proprietary website to purchase the product. Moreover, negative consequences of free-riding may be worsened when the very nature of the business model needs the platform to reach a critical mass of users to gain vital efficiencies, deriving from economies of scale, and the two opposite sides of users are linked by indirect (membership and usage) externalities.

Both these scenarios may be faced by the platform by agreeing with suppliers to be granted parity clauses, narrow to prevent freeriding against the same upstream supplier and wide against any other competitor in the downstream market.

This is quite straightforward. A parity clause solves the "hold-up problem". Without this safeguard, the platform may be used by customers to learn about the features of the product and its quality, quite an easy task thanks to the user-oriented environment provided by the platform. Immediately after, they could finalise the transaction on any other low-cost intermediary, in particular on the producer's own website.[95] Without these forms of protection, according to some authors, the intermediary could be unavoidably discouraged by hold-up problems that, stifling investments in the relevant market, could lead, on a long-term basis, to inefficiencies negatively impacting on the consumer's welfare.[96]

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[94] Ibid., pp. 490–491.

[95] The producer's website may be deemed to be a low-cost alternative to the intermediary's platform, since prices does not have to include the intermediary's mark-up and may be well below the ones set on the platform.

[96] Ezrachi (2015), p. 491. Other authors (surprisingly in the US, where generally there is a major favour towards MFN provisions) point out that this thesis could be rebutted by demonstrating (for instance) that "that the consumer transaction costs of freeriding are high, or that the dominant platform charges a fee sufficient to compensate it for the services it provides to freeriders." Baker and Scott Morton (2018), p. 2199. In a nutshell, so here as in most antitrust cases, it is always to be borne in mind that only from a correct market structure analysis, conducted on a case-by-case perspective, it can originate the right assessment of the parties' behaviours and their potential exemption from the application of competition law prohibitions.

Absent these clauses, any potential gain that the supplier could achieve in the short-run, being free to set on his website prices lower than those charged on the platform, might be cannibalised by the resulting long-run inefficiency.

Proceeding with the analysis of parity clauses, this dissertation will first try to build a comprehensive description of their key-features through a compare-and-contrast scheme, that is to proceed by highlighting the main differences and similarities between parity clauses in digital markets and other more traditional (and more broadly defined) vertical agreements, like the resale price maintenance and the 'classic' most-favoured nation clause. Then it shall skip to the assessment of the two main categories of parity clauses used by Internet intermediaries and retailers, i.e. wide and narrow parity clauses.

2) Parity clauses and classic agreements

It has been noted that, notwithstanding the judicial classification of the 2SPs as agents or retailers under a competition law perspective, the advent of parity clauses in Internet retailing has often been combined with a general move from a wholesale to an agency model. This had many consequences that must be borne in mind when considering the overall competitive impact of parity clauses in online 2SMs. When a firm, acting as an agent, implements parity clauses, commentators tend to individuate one vertical and one horizontal element of the agreement, or at least of the consequences of the agreement. The vertical element is often seen as an RPM, while the horizontal is a price-matching promise that is often labelled as an MFN.[97]

a) The vertical dimension of parity clauses: the resale price maintenance in online and offline markets

In the context of the online two-sided transaction platforms, it is quite straightforward that the platform operates as an intermediary: for instance, OTAs constitute the most relevant online sales channels for hoteliers to reach potential customers with their offers. By that, competition law scholars and practitioners have identified the producer as the upstream firm, whereas the retailer is the downstream firm, being the last link in the chain from the producer to the customer. In addition to

[97] Hviid (2015), p. 20.

that, in these contexts, it is the 'upstream' producer to set final prices, producing a practical framework similar to that of a resale price maintenance.

Under the EU Regulation 330/2010, the Vertical Block-Exemption Regulation (VBER),[98] a vertical restraint is defined as "an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".[99] The scrutiny regarding whether parity clauses can be considered as vertical restraints, and as a form of Resale Price Maintenance, can be resolutive in a competition law investigation.[100]

In the EU and the US alike, vertical agreements are generally seen with major favour than other agreements which are purportedly in restraint of competition. The reason must be found in the very nature of the firms parties to the agreement, that are usually not (actual or potential) competing firms and which do not raise the same concerns as horizontal agreements between competitors.[101] The same fact that vertical agreements primarily affect intra-brand competition (i.e. the competition between the products of the same producer among different sales channels), rather than inter-brand competition (that is the competition between different products), justifies this approach.[102]

Nevertheless, it is a matter of fact that the European approach towards vertical distribution agreements has been and still is generally tougher than the American one, in particular after *Leegin.*[103] For many years, the Commission linked its several concerns on vertical restraints to its policy-principles, namely to the overarching

[98] Commission Regulation (EU) No 330/2010 (VBER) (2010).
[99] Ibid., Preamble, § 3.
[100] As many cases about OTAs show, most of the European Authorities have implicitly endorsed this theory, since somehow considered the application of the VBER to the relevant cases.
[101] Jones and Sufrin (2017), p. 751. This is the main conclusion of the Chicago School, that in the '60s underlined the main positive potentialities of vertical agreements, which are capable of leading to increased sales and to the minimisation of distribution costs. They opine that the supplier will only impose such agreements on intra-brand competition when necessary to enhance sales and to have positive externalities on inter-brand competition.
[102] Ibid., p. 767.
[103] *Leegin Creative Leather Products, Inc. v PSKS, INC.* (2007, vol. 551). See, for example, para 6 of the Commission's Guidelines on Vertical Restraints, where the Commission recognizes the potential positive effects of vertical agreements. However, it also maintains that competition concerns may arise even for the most vertical restraints exempted by the VBER.

objective to eliminate barriers to trade among Member States,[104] seeking to reinforce and protect the creation of the Single Market.[105] This necessarily hinder a favourable approach towards distribution agreements, as long as that they can reduce the homogeneity of conditions in the Single Market. As examined below, this is affecting the European approach to the resale price maintenance and then may affect its approach to parity clauses in 2SMs.

Consequently, different levels of intervention must be distinguished. First of all, the vertical agreement must fall within the application of Article 101(1) TFEU and must appreciably affect the trade among Member States. If the answer is positive, instead of following the arduous procedure of individual exemption pursuant to Article 101(3), the parties may well decide to recur to the "safe harbour" offered by the block-exemption, if the 30% threshold is not exceeded and if the agreement does not fall within the categories excluded by the VBER.[106]

However, defining whether the agreement may be exempted pursuant to the VBER may not be an easy task. The appreciability of the restraint to competition is identified by two other provisions of the Regulation 330/2010, namely Articles 4 and 5. Leaving aside the content of Article 5, describing a group of contractual clauses that, when included in vertical agreements, are not covered by the exemption, letter a) of Article 4 (1) ("hardcore restrictions") is of much more interest. In this provision, the Commission has implicitly "blacklisted"[107] the agreements allowing the producer to impose fixed or minimum resale prices, excluding them from the protection of the exemption and leaving to firms wanting to avoid a formal prohibition just to seek for an individual exemption under Art. 101(3).[108] For fixed or minimum resale price

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[104] Steuer (2015), p. 2.

[105] Doing so, in the past, it has been accused to impose an "enormous, and arguably, unnecessary, burden on firms." Jones and Sufrin (2017), p. 752. It must be remembered that before the 'modernization' of antitrust law in 2003 and the new (larger) block exemption regulations after 1999, firms were often unnecessary forced to recur to the long and expensive procedure under Art. 101(3) TFEU, i.e. the individual exemption. *Treaty on the Functioning of the European Union (Consolidated Version)* (2007).

[106] It can be stated that in EU, block exemptions have the aim to apply Article 101(3) TFUE to agreements falling into the category that expressly satisfies all the criteria stated by the provision itself. Hence, the coverage of the alleged violations by a block exemption regulation allows the parties to avoid justifying the compatibility of their agreement with the case by case exemption provided by Art 101 (3) TFEU.

[107] Buttigieg (2015), p. 260.

[108] In contrast, agreements limiting the maximum price or recommended a resale price are commonly considered reasonable and lawful (even if with some exceptions) under both European and US competition Law.

maintenance any existence of efficiencies has been strongly denied, leading to the classification of the agreement as a restraint by object:[109] there is no ECJ's judgement or Commission's decision in which it has been assessed that a minimum or fixed RPM is objectively necessary to achieve a legitimate aim; rather, they have been considered to be a "disproportionate" mean to achieve any aim alleged by the parties.[110]

There are two main anti-competitive effects about resale price maintenance that have been identified by scholars:[111] (a) an RPM is deemed to reduce intra-brand competition, since the retailers will no longer be able to compete on price-basis for a certain product, leading to a potential situation in which intra-brand competition has been completely eliminated (when the RPM is overspread in the market). Price discrimination as well may be hindered, by that limiting retailer's capability to increase revenue and to recover fixed costs. In a nutshell, it may be strongly inefficient, ultimately preventing customers to benefit from lower prices; (b) the first point is also deemed to have indirect effects on inter-brand competition. The resulting increased price transparency might reduce oppositions to a "cartelisation" of the downstream retailing market, namely because it might be harder to divert from the common position when the implementation of price-fixing clauses by all the participants reduces the "monitoring" and "enforcement" costs for cartelists to prevent "cheating" phenomena. And this is not all, since the literature underlines also the ability of the RPM to favour tacit collusion and to reinforce the market foreclosure for discount stores. Almost the same scenario may be reproduced at the upstream level.

On the contrary, the (even if limited) positive consequence must be found in the enhanced possibility, for producers, to avoid retailers to reduce prices at the expense of the quality of pre and post-sale services, with a possible freeriding on full-price (and more quality-oriented) retailers. In case of luxury brands, this may also protect their value as perceived by customers.

Nonetheless, although European Authorities have not considered the above arguments decisively leading to a turning point in the standard evaluation of RPM as a restriction by object, the increasing attention paid to the mentioned positive

[109] Whish and Bailey (2015), p. 120. Whether the restraints are restrictive by object must be ascertained paying attention to the content of the provisions and to the sought objectives and the economic and legal context in which they operate. Hard-core restrictions are a group of restraints that are more likely to be found unlawful.
[110] Jones and Sufrin (2017), p. 771.
[111] Buttigieg (2015), p. 260.

consequences has been of revolutionary importance in the US.[112] In 1911, in *Dr Miles*,[113] the Supreme Court held that all forms of RPM "are injurious to the public interest and void", and then constitute a *per se* violation of the Sherman Act Sec. 1. After decades in which intermittently some trade laws have partially allowed RPMs (before having been all repealed), just in 2007, in *Leegin,*[114] the Supreme Court, by a narrow majority, completely overruled *Dr Miles,* holding that "all vertical price restraints are to be judged according to the rule of reason, because price agreements are not so clearly anti-competitive that they should be deemed *per se* illegal".[115] The Court opined that the justifications for the other vertical restraints are not so different from those carried by commentators about the resale price maintenance, so it would be illogical to apply two different measures to cases arguably similar.

Notwithstanding the evolution of the approach in the United States, in Europe such a modification about minimum and fixed RPM has not occurred yet. Theoretically speaking, it must be pointed out that the starting point in Europe is slightly different: albeit deemed to be hard-core restraints by object, minimum and fixed RPM are, in principle, still exemptible pursuant to Art 101(3) TFEU. However the Commission decisional practice demonstrates that there has not been cases in which it has found one of these agreements to satisfy the conditions laid down by the individual exemption.[116] Although in the renovated Guidelines on Vertical Restraints[117] the Commission has openly stated that it will adopt an analysis more attentive to the possible positive aspects arising from the agreement, no relevant decisions have been taken so far and, in fact, European national authorities have demonstrated to remain more loyal to the previous approach.[118]

Not much literature is available about the implications of RPMs in online markets. What must be borne in mind is that free-riding in online markets is much more concerning than in offline markets, due to the reinforced ease in finding information in

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[112] Ibid. p. 253.
[113] *Dr Miles Medical Co v John D Park & Sons Co* (1911, vol. 220), p. 374.
[114] *Leegin Creative Leather Products, Inc. v PSKS, INC.* (2007, vol. 551).
[115] Buttigieg (2015), p. 254.
[116] There have been indeed cases in which the Commission has validated price-fixing schemes, but just because it did not find the clause to appreciably restraint trade among Member States (for instance in the *Sammelrevers* case).
[117] European Commission (2010a), paras. 106–109.
[118] E.g. the 2013 German Bundeskartellamt *CIBA Vision Vertriebs GmbH, Großosthein* decision.

digital environments.[119] The same concern may also regard competition between online and offline retailers. This phenomenon has been defined "showrooming":[120] customers may exploit the pre-sale services of bricks-and-mortar retailers and then finalise the transaction on a web retailer at a lower price, made possible thanks to the lower service-cost that the platform, absent such services, do have to transfer on the final price.

As already said, in many cases antitrust practitioners have addressed parity clauses (e.g. in the UK OFT's Investigation into the hotel online booking sector)[121] by defining them as an RPM scheme adopted by the majority of the economic actors in the market. Nevertheless, many scholars have pointed out that this is the consequence of a too narrow point of view in analysing the relevant cases. Hviid and Fletcher have well explained that the structure of a 'Retail price MFN' (i.e. parity clauses) certainly shows an inherent vertical element, that is a form of RPM obliging the retailer to set the price decided by the producer, because producers need to control prices of any retailer to ensure that they are not going to be lower than the prices set on the retailer endowed with the parity clause. However, they also argue that even the most relevant literature and case law about pure RPMs is revealing to pay an increasing and primary attention to a more implicit horizontal implication of RPMs, especially in digital environments. Since the producer may choose to sell through more retailers, then it is most likely that prices will be set equally across retailers; this is substantially equivalent to the application of a parity clause. Hence, the Authors opine that, even if inherently different, parity clauses should not be treated "more leniently" than RPMs, if not more restrictively.[122] At least, it would allow to apply the wide literature and case law of RPMs as a basis for a new analysis. But the 'drawback' is that it will need to be integrated with a more appropriate scrutiny of the different economic context and of the impact of any proposed policy intervention.

[119] Akman and Sokol (2017), p. 137.
[120] Wu, Wang, and Zhu (2015), p. 2. For an opposite theory, see Kuksov and Liao (2018), p. 469.
[121] *Skyscanner Ltd v CMA* (2014), para. 123.
[122] Fletcher and Hviid (2016), p. 98. Online MFNs may be more harmful than RPMs since, with the platform influencing the online minimum price, they will be able to manipulate the final price by raising commissions.

b) The horizontal element: parity clauses as 'online MFNs'

Switching to the more inherently horizontal dimension, as stated above, parity clauses, or online (platform) MFNs, are not equal to classic MFNs, which have been deeply dealt with by case law and scholars.

Due to an MFN clause, a seller commits to one or more buyers to not sell its product to any other buyer at more enticing conditions. For a buyer, this may seem a way to be granted a price lower than the one charged to any other competing buyer, since he will be inserted among the seller's most favoured customers. This framework may hence give rise to compelling antitrust concerns, since there are both theoretical reasons and empirical evidence showing that MFNs may lead to an increase in equilibrium prices.[123]

Again, these elements, even if with some differences, resemble what was already described dealing with the implicit horizontal dimension of an RPM.

First, MFN provisions may rise prices by weakening (price) competition: the linking framework of MFNs prevent (or make much more expensive) any form of discounting that could be reserved to more price-sensitive retailers. It is indeed possible to demonstrate why MFN clauses may rise prices by a simple reasoning: potential discounts are made less attractive for a producer subject to an MFN agreement, because any price-reduction will undoubtedly have repercussions on his overall retailing strategy, since he would be forced to offer the same more favourable conditions to any retailer. On the contrary, the adoption of a traditional MFN may be well profitable for the producer, namely because, through price uniformity, it may soften competition and raise retail prices.[124] However, as for RPMs, it is possible to detect a price uniformity only in the case in which these agreements are spread over all the retailers towards the same producer across the whole market: this will "amount to a commitment to uniform pricing, that is a commitment to not price discriminate".[125]

Second, an MFN may facilitate coordination. This may be produced through both coordinated conducts and unilateral accommodating conducts that soften

[123] Baker and Scott Morton (2018), p. 2181.
[124] Boik and Corts (2016), p. 108.
[125] Ibid.

competition.[126] Coordination leads almost unavoidably to higher prices when firms manage to monitor and prevent any form of detour from the common scheme.

The third consequent element is of "exclusionary"[127] nature, since MFNs are capable of raising costs of rivals and new entrants that implement price-focused strategies. A new retailer could want to raise its market share by offering competing products at lower prices, thanks to better supply prices individually agreed with the producer. Nevertheless, this strategy could be hindered from the fact that the producer is already constrained by pre-existing MFNs, that require him to offer new entrants not more "favourable" conditions than those reserved to the incumbents. Since these 'conditions' may already be artificially over the market equilibrium and since the new entrant would not be able to individually negotiate with the producer more favourable terms, MFNs may represent burdensome obstacles to the implementation of a low-cost strategy.

Online MFNs, or parity clauses, differ from these agreements, at least from theoretical and conceptual points of view. Parity clauses have exactly the aim to ensure that prices are the same across all retailers. Nevertheless, these agreements between producers and retailers cover the final prices that the producers are going to offer to retailers' customers; consumers, although "benefitting" from the agreement, are not part to it. The online MFN is not about offering assurances to the customer, that is just a third-party, but to the platform itself, which will not be undercut by the producer through any other sales channel. According to Hviid and Fletcher,[128] the previous analysis may result in a strong argument to define these provisions as MFNs,[129] since the parity clause could be considered as a promise "by the producer directly to the consumer that no-one else buying the good at this moment in time will get a better price

[126] It must be remembered that both provisions under Article 101 TFEU and US case law pay much attention also to any form of collusion not relying on an explicit agreement between the parts. Nevertheless, parallel conducts alone are not sufficient to demonstrate an extant competition restraint, being necessary to demonstrate a conscious direct or indirect contact among the parties, as stated in *Chemical Industries* (EU) and *Twombly* (US).

[127] Baker and Scott Morton (2018), p. 2180. The authors maintain that to use the term "exclusion" is functional to include either forms of foreclosure of potential entrants or conducts aiming to disadvantage rivals without necessarily forcing them to exit the market. Exclusion is deemed to be not *per se* anticompetitive, to the extent that it does not allow the incumbent to artificially raise prices.

[128] Fletcher and Hviid (2016), p. 4.

[129] As done, for instance, both in many papers and in some Authorities Decisions. For instance, see the Italian AGCM investigation into the hotel online booking sector (Autorità Garante della Concorrenza e del Mercato (2015b).

no matter where they shop".[130] But it could be more conveniently interpreted as akin a price matching guarantee made by the retailer to the end-customer, that is not aware of the previous restraint requested by the retailer to the producer. Nonetheless, the negative impact of parity clauses is not considered to differ considerably from that of traditional MFNs.[131]

Compared to traditional MFNs, there is at least one element in online platforms that has been more strongly underlined, that is a wider tendency of parity clauses to extend their anti-competitive consequences in the upstream market, affecting not only intra-brand competition, but inter-brand as well. Since online platforms usually are just one of the sales channels through which upstream producers sell their goods, that will reasonably be offered at similar prices through all the "public"[132] channels, an enhanced price transparency will be able to affect inter-brand competition, creating the favourable conditions for a collusive coordination between the upstream companies.

In addition to that, in spite of the general classification of the online platform as the firms operating downstream of the producer, who sells its products through them, this conclusion may not be as straightforward as argued. Because of the implementation of an agency model, if the platform is seen as a mere intermediary, the supplier's setting of retail prices may be considered as an RPM (with the already pointed out doubts). On the contrary, if the platform is considered to provide, as a supplier, the producer with a service similar to any other input in its supply chain, then the pattern may be seen as the downstream firm (i.e. the producer) to (indirectly) set the price, definitely excluding the presence of an RPM.[133]

Summarizing, despite some persuasive and more radical positions, parity clauses do not seem to be, in their negative consequences, *per se* more impacting on competition than their classic counterparts. Nevertheless, although many similarities have been noted between RPMs, MFNs and parity clauses, there is still a strong argument that makes the latter, if not more concerning than the other agreements, at

[130] Hviid (2015), p. 70.
[131] Moreover, if the same set of suppliers deals with the same platforms in a given market, it has been argued that parity clauses may have the same effect of an RPM. At this point, it must be correctly borne in mind that parity clauses, such as price matching guarantees, do not target absolute price levels, but set price "relativities", in that differing from an RPM. LEAR (2012), p. 3.
[132] Meaning that it is not reserved to a "closed-group" member, i.e. a long term or special customer who is usually reserved better price conditions ("privately").
[133] Hviid (2015), p. 21.

least "different". RPMs are used to limit price competition in a market different than those of the producer subject to the clause, while parity clauses are capable of restricting competition in the same market in which the platform operates.[134]

This may be relevant in weighting the positive consequences of all these clauses and the relevance of the free-riding defence, at least in two ways: a) on the one hand, a producer imposing an RPM may still be affected by a price increase of its products, that he will need to counterbalance by larger investments in demand-enhancing services, while the platform benefits from the reduced price-competition that could prevent it exactly from investing in quality;[135] b) on the other, parity clauses will counterbalance the type of free-riding much more typical of 2SPs, which will exactly need to protect their investments in demand enhancing features.[136]

c) Parity clauses and the agency model: when horizontal and vertical elements collide

All the cases involving parity clauses have raised the question whether the platform imposing the restraint should be considered as an agent or a genuine reseller. This is not an odd aspect, since agent-principal relationships usually benefit from a more favourable approach by antitrust law.

In the United States, the price-fixing typical of agency contracts has been exempted from the antitrust assessment.[137] According to the ECJ and to the Guidelines on Vertical Restraints,[138] when the agent is closely interrelated with the principal, they are deemed to constitute an economic unity, with the agent operating as an "auxiliary" organ of the latter. Otherwise, the principal-agent relationship should be looked at as any other vertical agreement. Case law demonstrates that what is considered to be decisive when assessing whether the agent must be treated as an independent

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[134] Buccirossi (2013), para. 72. The author shows that this affects the balance between positive and negative consequences of the implemented agreement.
[135] Hviid (2015), p. 21.
[136] As seen in the previous sections and how it will be described with more details in chapter 2 and 3, there is not agreement among scholars as to the real extent of the free-riding defence for 2SPs, with the overall assessment fluctuating between who consider investments in quality exactly what should stimulate competition among platforms, so importantly to require to be appropriately defended through parity clauses, and who think that price competition should not be limited for any reason.
[137] Jones and Sufrin (2017), p. 756.
[138] European Commission (2010a), paras. 13–15.

undertaking is the economic reality, notwithstanding the parties' definition of the arrangement.[139] Namely, in two fundamental cases,[140] the ECJ has stated that the proof must be sought for in the clauses of the agreement ("implied or express") defining who is assuming the financial and commercial risk linked to the sale of goods to third parties. This evaluation will be made on a strict case-by-case basis. The ECJ qualifies the previous sentence by referring to a "negligible share" of risk, after which the agent must be considered as an independent reseller, a quality to be ascertained looking at the risk borne by the intermediary. A risk related to the contracts negotiated or concluded with third parties (e.g. considering whether the intermediary assumes distribution or transportation costs, maintains stocks at his own expense, assumes responsibility for any damage occurred to the goods) or related to market-specific investments directly realized by the agent. When this threshold is exceeded, the agent will be deemed to be an independent undertaking, exposing its conduct to the evaluation pursuant to Art. 101.[141]

As to this assessment, the classification as agent has been generally excluded for online platforms, showing that they bear significant market specific investments. Moreover, parity clauses are usually required by the platform, making it quite illogical to believe that an agent would be endowed with such a bargaining power to impose a price restriction to its principal.[142]

Leaving aside the Genuine Agent test, the revolution in e-commerce that has been brought by the advent of the agency model inevitably has repercussions on the functioning of 2SMs and on the potential anticompetitive effects stemming out from the adoption of parity clauses. Starting from *E-Books*[143] cases, a new strand of literature has focused on this aspect. Agency is so much likely to be implemented in online environments, because digitalisation removes many of the standard obstacles that would end with favouring the adoption of a wholesale model, like all those linked to the storage

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[139] Ibid., p. 13. In any case the burden of proof lays on the Commission or on the authority wanting to prove a violation of Art. 101 TFEU.
[140] *Case C-217/05, Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* (2006, I–12032). *Case C-279/06, CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* (2008).
[141] Quite interestingly for this dissertation, the ECJ has qualified as an independent undertaking a bricks-and-mortar travel agency, namely on the basis that the agent acted on the behalf of many tour operators, providing its services completely autonomously. *Case C-311/85, VZW Vereniging van Vlaamse Reisbureaus v VZW Sociale Dienst van de Plaatselijke Overheidsdiensten* (1987), p. 20.
[142] Bundeskartellamt (2013), para. 147.
[143] European Commission (2012); *United States v. Apple Inc.* (2013, vol. 12).

of the goods. Reasoning after *E-Books*, Hviid[144] questions whether any subsequent anticompetitive aspect of the case should be ascribed to the model's change (from wholesale to agency) or to the implementation of a parity clause and determines that it is not insignificant at what level pricing decisions are taken. The Author demonstrates that the introduction of the agency model leads unavoidably to higher prices, at least in the first period after the implementation, if compared to markets where there is a wholesale model at work, due to the consumer lock-in. Moreover, the agency model leads to higher prices if the competitive pressure is higher at the retail level than at the supplier, by that suggesting that consumer price setting should be delegated to the level at which competition is less fierce. Even if agency is not a prerequisite for parity clauses, it makes their adoption much simpler.

3) Potential positive effects and main theories of harm of parity clauses

Summarizing the main insights obtained until now and anticipating what it is going to be dealt with in the next sections, it is possible to regroup the main anticompetitive harms arising from parity clauses on two dimensions:[145] first the mechanism may be collusive or exclusionary; second, parity clauses may harm competition among platforms, but also among upstream producers.

Both in literature and case law parity clauses are deemed to have stronger anticompetitive effects the wider is their application and duration, including the potential penalties they can impose on producers.[146] The larger is the share of hotels that accept the parity clause imposed by OTAs, the narrower the way for smaller and new intermediaries to enter profitably the market by choosing a low-cost/low-price strategy.

However, before going more in depth with the main harms to competition, it is noteworthy to recall the most acknowledged potential efficiencies that may arise from these agreements.

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[144] Hviid (2015), para. 36.
[145] Baker and Scott Morton (2018), p. 2182.
[146] There is also the category of the so-called "MFN plus" provisions, which require the supplier to set on the beneficiary platform prices that are by a certain percentage lower than those other intermediaries are charged, exacerbating the exclusionary effect.

a) Parity clauses' potential efficiencies

It must be noted that scholars have always been attentive to the beneficial effects of parity clauses. Potential efficiencies that must be weighted by enforcers when determining the overall impact of the agreements. These efficiencies almost resemble what said about the economic rationale of parity clauses, so they will be just briefly recalled.

First, online two-sided platforms often have a beneficial effect in terms of reduction of search costs.[147] Online intermediaries improve information flows between sellers and producers, that are canalized and aggregated through the platform. This results in an enhanced user-experience, where prices, conditions and other details about the product are made easier to be understood (often in multiple languages). Since users have an enhanced possibility to compare offers and products, this is deemed to foster inter-brand competition, thanks to substantial allocation efficiencies. Moreover, having to deal with well-informed suppliers (thanks to the feedback on users guaranteed by the platform) and well-informed customers, the platform will be gradually incentivized to invest in quality and services, ameliorating the overall user experience. At the same time, better and easier to be found information, and increased switching costs (thanks to the compare function), reduce supplier's market power upon customers, exerting a downwards pressure on final prices. In addition to that, the customer may count on a more reliable and safer environment, which mitigates potential obstacles to the conclusion of the deal and his potential delay in finalising the transaction is reduced by the better price guarantee, which grants that no lower prices will be found in the future or via other sales channels. Even if, dealing with most of the 2SMs, often a high market concentration could be symptomatic of a low competition, still the positive consequences should not be excluded, since the welfare-enhancing consequences of (among others) economies of scale and of strong indirect network effects shall be taken correctly into account.[148]

As to the upstream suppliers, parity clauses may have positive implications even for them. As largely anticipated in the case of OTAs, online platforms may provide producers with enhanced large-scale advertising capacities, helping in the commercialization of their products, even on an international basis. Furthermore, online

[147] Ezrachi (2015), p. 492.
[148] Caccinelli and Toledano (2018), p. 199.

platforms may be a valuable instrument for new upstream producers' entry and expansion, enabling them to reach a wider population of potential customers, competing on more equal terms with bigger and more established incumbents.[149] The facilitation of entry, in turn, further enhances competitive pressure upstream.

All these potential benefits, either stemming from the same (profitable) existence of the platform or more intimately related to contractual relations between intermediaries and suppliers, could be jeopardised if the parity clauses should be removed. The protection from free-riding, which has been already deeply analysed, has been considered the main point in favour of a (even limited) maintenance of parity clauses in the investigated sectors. Scholars and enforcers (with the remarkable exception of the German Authorities) have paid much attention to the potential free-riding among platforms and between platforms and producers. Absent the parity clause, the producer may have good reasons to show low prices on its own website or to reward low-cost intermediaries with discounted prices.[150] In case a large amount of producers and customers should engage in such a practice, the intermediary may "foresee this problem, and may not invest"[151] in quality enhancing features. Consequently, it may lose customers and, ultimately, force full-service intermediary to exit the market. "Only no-frills discounter offering limited features"[152] would survive, letting consumer search and transaction costs to raise again.

Baker and Scott-Morton strongly disagree as to the conclusions of the main theories about free-riding. Citing the example of the hotel online booking sector, the Authors point out that there are several reasons questioning whether free-riding is so substantial for full-service intermediaries so far as to force their exit. The first reason is again about consumer transaction costs: not all the consumers may want to seek hotels on one site (the intermediary) and then to find and book it onto another site (a no-frills

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[149] This efficiency is well represented by the case of the Accommodation Sector, where, also thanks to the advent of OTAs, new small (and more occasional) businesses have gained an unexpected online exposure. That is the case of B&Bs, guest houses, and short-term leases.
[150] Baker and Scott Morton (2018), p. 2183. The authors link the possibility to show lower prices, except for loss-leader strategies in case of new entrants, to the fact that both producers and low-cost intermediaries may have reduced investments in quality, at least on the distribution channel. Hence, they may seek to address more price-sensitive customers, even if this could be an argument opposite to the free-ride defence: if the population of customers reached by the low-cost sales-channels alternative to the incumbent intermediary is different from the one targeted by the intermediary, then he should not worry about possible free-riding.
[151] Ibid., p. 2184.
[152] Ibid.

OTA or a hotel proprietary website). A frequent OTA user, less price-sensitive than others, may be more sensitive to the cost-savings (and time-savings) deriving from the "loyalty" towards a certain platform, where he could have its billing and credit card details already stored, or could more easily plan a trip requiring multiple services. Another reason may be "differentiation": some producers can decide to sell via a platform some products not available on their websites.

b) Parity clauses' main theories of harm

When dealing with the scarce case law about parity clauses, it is worth to remember that both EU and US Enforcers have widely demonstrated to avoid building a full and separate theory about parity clauses other than the more acknowledged strands about RPMs and MFNs, sometimes paying attention to the agency model as a complicating factor, but not as a source able to create a new legal category.

All the European cases involving parity clauses have been built on the basis of a purported violation of Article 101.1 TFEU or of equivalent national provisions. Some authors, among whom Akman,[153] have highlighted the inconsistency of this approach, suggesting that a classification of the conducts as abuses of dominant position would be more logical. For the time being, the first option shall be preferred, but this debate will be more in depth addressed in chapter 3.

On the other side of the Atlantic Ocean, it is likely that enforcers follow the classic framework adopted for MFN provisions when assessing parity clauses: US competition analysis of MFN clauses has been usually framed both as a "conspiracy […] in restraint of trade" pursuant to §1 of the Sherman Act[154] or, according to §2,[155] as the conduct of a person (or, more likely, of a firm) who "monopolize, or attempt to monopolize […] any part of the trade or commerce".[156] As the European Counterparts,

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[153] Akman (2016), p. 831.
[154] *Sherman Act, U.S.C.* (2012, vol. 15, § 1).
[155] Ibid. (vol. 15, § 2).
[156] Baker (1996), p. 530. The main difference between the two provisions is that, if under §1 the existence of an agreement (among rivals or among firms at different levels in the supply chain) is requested to fulfil the set of circumstances required by the law, under §2 it is mandatory to proof that the defending firm is endowed (and makes use) of a monopoly power or that there is the actual danger that it could achieve a monopoly power. Moreover, a case under §1 could be also brought under §2. Practically speaking, this implies that it is improbable that cases will be carried out under §2, except for the existence of a high market share, being the Courts generally reluctant to assess the existence of a monopoly with a market share below 70%. Going more in depth, as Baker demonstrates, US District Courts are agreeing on the application of a 'burden-shifting' approach

US Enforcers have mainly dealt with "MFN" provisions in offline sectors: the major US decisions have focused on whether implicitly infer an agreement about fixing prices when rivals adopt MFNs independently but in parallel, even if more recent cases have focused on the capability of preventing rival discounting and discouraging entry.[157]

Among the main classifications of parity clauses already discussed, both scholars and part of the case law (at least in the several EU proceedings against Booking.com) have paid an increasing attention to the difference between wide and parity clauses. Ezrachi[158] has put this dichotomy at the basis of its study about parity clauses, also dividing the examination of the main theories of harm into two sections. This scheme will be hereafter followed.

As already done in the previous sections, the market of the intermediation services will be referred to as the downstream market, while the market in which the producers sell their products (although through an intermediary) as the upstream market.

Wide parity clauses

It is crucial to distinguish between wide and narrow clauses to take under correct consideration the overall market equilibrium reached after the introduction of parity in the two different scenarios.

Though scholars and competition law enforcers agree upon the necessity to deal with complex cases as those regarding parity clauses on a case-by-case approach, it is still possible to give a general overview of the main collusive and exclusionary effects associated to wide and narrow parity clauses implemented by businesses adopting an agency model.

Excessive intermediation

The enhanced competition that may be granted by the advent of online 2SPs may not always have positive effects. The adoption of a wide parity clause may

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when analysing whether an agreement, and so an MFN, is "unreasonable" (§1) or "consequence of a predatory conduct" (§2). As a matter of fact, after a prima facie case is satisfactorily submitted by the plaintiff, the burden of production will be shifted to the defendant and only if he will succeed, the plaintiff will need to comply with a "burden of persuasion" explaining why the benefit to competition does not cover or mitigate negative consequences on competition.

[157] Baker and Scott Morton (2018), p. 2190.

[158] Ezrachi (2015), p. 506.

incentivise the intermediary that operates under an agency model to increase its fees or, at least, to refrain from reducing them. The reason must be found in the restricted pricing freedom of the producer, that will not be able to react to an increase of commission fees by an intermediary by raising retail prices just on that platform. This may lead to a reduced competition among intermediaries on the fees charged to the upstream firms and, as a consequence, to a general increase of retail prices.[159] This can be explained even in another way: due to the price coherence deriving from wide parity clauses, once an intermediary rises his fees, he will probably push the producer to increase prices on all the other platforms.[160] Consequently, the consumer will 'bear' these higher fees even if buying through platforms other than the one which first raised commission fees. Thus, even if raising commission fees, the intermediary will not face a reduction in demand: on the contrary, if he manages to invest the higher mark-up in the platform quality, he will attract consumers that, having to pay the same price across all the platforms, will prefer the intermediary with more user-friendly features to the one which, despite charging lower fees, will show the same higher price without providing the customer with other forms of benefits (such us loyalty programs, customer care and other pre- and post-sale services). The competition among intermediaries will indeed shift to grounds other than price, awarding the intermediary that first granted a better experience to the customer, thanks to the higher remuneration of its service.

Market foreclosure for low-cost platforms

A low-cost intermediary could find it quite difficult to enter a market where the incumbent firms, adopting an agency model, require parity. A reduction in commission fees will not benefit the new entrant, because the producer will need to offer any potential discounted price to the incumbent platforms, by that both contrasting the new entrant's strategy and potentially affecting the producer's cost structure. More probably, the producer will decide not to offer lower prices to the new entrants, deterring their possibility to compete in the market. This will ultimately reduce the competitive

[159] Edelman and Wright (2015), p. 1286.
[160] Probably, in a first moment, he will try to "resist" absorbing the higher fees, in order to keep a certain "parity" with its competitors. However, if the increase is too high, the producer will likely delist from the platform.

pressure on the incumbent intermediaries, stifling investments in quality and innovations and preventing an effective competition on commission fees.[161]

Price uniformity

Another effect of the implementation of wide parity clauses by the leading platforms operating in a 2SM is to increase the likelihood of price uniformity across the market.

The resulting situation depends indeed on several factors: number of platforms requiring parity, number of producers that are tied by these agreements, the respective bargaining power of producers and platforms, the effective compliance of producers[162] and the availability of Internet devices checking and comparing prices set by producers on their online sales channels. Ezrachi also supports that the negative effects of price uniformity on intra-brand competition are deemed to be less intensive when the level of inter-brand competition is higher. An effective inter-brand competition will push the producer to compete on prices with his rivals, by that keeping lower retail prices. A price level that, although uniform, is still competitive.[163]

Less investments and innovation

Even if parity clauses are deemed to favour innovation and investments in quality in the downstream market, wide parity clauses may theoretically have the opposite effect. According to this theory (that Ezrachi refers to as the "weakest" of the four) since investments will not have the effect to reduce commission fees, and hence to attract new upstream customers, they may be somehow disincentivised.[164] As seen by the CMA in the UK *Private Motor Insurance* case,[165] this theory of harm may apply only when the possible investment may benefit just the upstream producers, without

[161] However, Boik and Corts opine that when the new entrant has a business model resembling the incumbent intermediaries, parity clauses may encourage entry, as a critical success factor granting even to the new entrant to not be undercut or be subject to free-riding. Boik and Corts (2016), p. 1304. See above, fn. 50, on the phenomenon of 'tipping'.
[162] On this topic, the EU Commission Report on the Monitoring Exercise carried out in the Hotel Online Booking Sector, shows that more than the 20% of the hotel that responded to the survey admitted that they had undercut OTAs' prices on their websites even before that wide parity clauses were prohibited by the ECN Authorities. European Competition Network (2017b).
[163] Ezrachi (2015), p. 499.
[164] Ibid., p. 500.
[165] Competition and Markets Authority (2014), para. 8.39.

favouring the downstream customers. Without the wide parity clause, the producer may pass-on the consequential lower business costs to the consumer.

Narrow parity clauses

As mentioned previously, in contrast to wide parity clauses that generally limit the producer pricing flexibility both on online and offline sales channels, narrow parity requires the producer to not undercut the platform price *vis-à-vis* his direct online sales channels, i.e. mainly his own website. Hence, at least theoretically, narrow parity does cover just the relationship between the single producer and the single retailer, without formally addressing the price set on other rival platforms. This reduces the negative impact of many of the already seen harms.

First, the intermediary cannot be sure anymore that an increase in commission fees will not lead to an increase of retail prices on his platform. Since the supplier is now free to price differentiate between intermediaries, they should be incentivised to offer lower fees to be rewarded with lower prices and then resulting in attracting more customers. Subsequently, intermediaries are now incentivised to compete on demand-enhancing features, both targeting end-users and producers, fostering intra-brand and, to a certain extent, also inter-brand competition.[166] There is also an overall benefit for the producer, since, being allowed to price-differentiate between different sales channels, he would improve his revenue management.

The overall positive opinion about narrow parity clauses, that has also been endorsed by several European National Competition authorities,[167] needs to be counterbalanced by two theories of harms, which some scholars, including Ezrachi[168] consider "narrow in scope".

Competition on commission fees

The generally acknowledged improved efficiencies deriving from narrow parity clauses have been fiercely criticised by some scholars[169] and by the German *Bundeskartellamt* in the *Booking* decision.[170] The potential efficiencies arising from an

[166] Ezrachi (2015), p. 507.
[167] See the investigations into the Hotel Booking Sector and the UK Private Motor Insurance sector.
[168] Ezrachi (2015), p. 507.
[169] Hviid (2015), p. 15.
[170] Bundeskartellamt (2015b), pt. VI.

enhanced price-differentiation among different OTAs has been considered to be just theoretical and also empirically confuted. It must be remembered that, since all the major OTAs require a narrow parity, the hotel's proprietary website is virtually linked to all the existing OTAs which will need to have granted prices at least as favourable as those charged on the hotel's website. This means that, if the hotelier wants to set lower prices on a certain OTA, he will need to undercut his website's prices, that otherwise would be lower than the prices set on the other OTAs. Both the German NCA and the cited Authors opine that this would be improbable and counterintuitive, by that, as to the effects on price differentiation, equalising narrow to wide parity clauses. Consequently, narrow parity clauses will not foster price competition between OTAs and will also foreclose the market as under wide parity.

The main argument opposed to this reasoning is that to produce these effects, the proprietary website should be responsible of a high volume of transactions. Unfortunately, also considering the higher attractiveness of online platforms and their actual market shares, this scenario, unless for the biggest producers, is quite hard to recur. Thus, in the OTAs' market, the switch from wide to narrow parity has been deemed to be sufficiently resolutive of the inefficiencies, potentially leading to lower commission fees and consequential lower room rates. This outcome has been endorsed by highlighting that hotels' websites (the so-called booking engines) count for just a minor part of the online bookings, that OTAs provide cost-effective advertisement and that there are hotel loyalty programmes that are expressly not covered by narrow clauses. All these reasons should push hotels to price differentiate among OTAs, eliminating the risk of upwards pressure on commissions and of network effects, even if at the cost of undercutting their own website.

As will be seen below, in chapter 3, a recent European Competition Network's investigation launched in the hotel online booking sector[171] seemingly invalidate this scenario as forecasted by the National Competition Authorities in the *Booking* cases, since just a small share of European hoteliers began to price differentiate among different OTAs after the switch from wide to narrow parity.

[171] European Competition Network (2017b), para. 9.

Reduction in vertical competition

The second alleged negative effect regards a reduced vertical competition between the producer and the intermediary, because the necessity to not undercut the conditions set downstream may affect the producer's market power over the platform, resulting in higher prices. However, this theory has been both contested by the UK CMA in its Private Motor Insurance investigation[172] and by the Italian Authority in its investigation into the Hotel Booking Sector:[173] namely, the latter states that narrow parity, on the contrary, incentivises hotels to offer cheaper room rates through OTAs rather than on the booking engine.

[172] Competition and Markets Authority (2014), para. 8.56. The Authority points out that, for insurers, to attract customers through a "price comparison website" could be cheaper than a "direct customer acquisition. Moreover, the beneficial effects of the price aggregation completely overcome any potential stifling effect on competition, leading to lower retail prices.
[173] Autorità Garante della Concorrenza e del Mercato (2015b), para. 49.

2

PARITY CLAUSES AND E-COMMERCE: MAIN EU AND US CASES

This chapter deals with the main cases in EU and US competition law that focus on OTAs' frequent use of parity agreements. Before looking at the main topic in detail, also a brief review of the leading precedents is provided.

As mentioned previously, all of these disputes involve scenarios in which retailers say to the producers "you must not sell your goods at a lower price or at more enticing conditions through another retailer".[174] Moreover, the analysis is made more complex by other elements.

First, here it is going to deal with online two-sided platforms, the main characteristics of which must be fully borne in mind to understand the extent of the decisions and look critically at whether they can properly address the latest challenges arising from the digitalisation of the markets. Furthermore, the agency model is broadly spreading in these contexts, strongly influencing the market structure and, consequently, the antitrust assessment of the standard conducts.

Hence, one thing can be said with certainty from the outset: the impact of these agreements is, without any doubt, strictly case-specific, deeply dependant on elements such as the precise role in the vertical chain occupied by the firms involved, their own bargaining power and the degree of market concentration. This is the reason why the research for the purposes of a general assessment of this topic can be somewhat demanding. Furthermore, the relatively agreed theoretical assessment of parity agreements in literature has not always been followed by a homogenous assessment by competition law enforcers. Indeed, there are some cases in which, despite dealing with the same company operating in highly similar national markets, different competition authorities acting within the same legal pattern (European Treaties and Principles) have come to different conclusions, ending with legal certainty being undoubtedly undermined.

[174] Hviid (2015), para. 8.

I. E-BOOKS

1) Background

E-Books was one of the first cases in which European and US competition authorities assessed the alleged antitrust concerns raised by platform parity clauses, leading to a prohibition (US) or to the acceptance of commitments (in the EU and the US alike) that completely banned the application of such clauses in the relevant markets.

In 2007, following the launch of its *Kindle* e-book reader, Amazon adopted a broad discount policy for newly-released English-language best-sellers (USD 9.99, way below the e-book listed price and, usually, also below the e-book wholesale price as set by the publishers).[175] Thanks to this, Amazon soon reached 90% of market share. In 2008 onwards, at least five publishers[176] revealed concerns about the negative effects of Amazon's predatory prices (with one reason also being the extension of these conditions outside the US and, for example, to Europe) and sought a collective and global response in order to hinder (and neutralise) the rebates.

In the meantime, Apple was about to release its e-book platform and, despite the original idea of entering the market under a wholesale model, soon changed its decision and the Five Publishers received the opportunity to be granted an agency model. All the parties would have benefitted from this alternative agreement: namely, the Five Publishers would have been able to set the retail prices of e-books on Apple iBook Store, while Apple, thanks to the addition of a wide retail price MFN clause (in particular only on the newly released e-books), would have been granted the same sale conditions as displayed on any other e-book retailer and, in particular, on Amazon.[177] In the case of an e-book being shown on another platform at a lower retail price, the publisher would have been forced to lower the price on iBook Store to match the better conditions displayed elsewhere, probably resulting in a burdensome cost, as a consequence of Amazon's rebates policy.[178]

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[175] European Commission (2012), para. 22.
[176] Penguin, Hachette, Harper Collins, Holtzbrinck/Macmillan and Simon & Schuster, the so-called 'Five publishers'.
[177] The clause being in force even in relation to a retail platform operating under a wholesale agreement, as Amazon used to do.
[178] Paradoxically, as Baker and Scott Morton maintain, if Amazon had kept applying its rebates, the Publishers would have even earnt less per book from the iBook Store than from Amazon distribution

According to the European Commission,[179] the deal between Apple and the Five publishers had two immediate related outcomes: on the one hand, Apple could reach a critical mass[180] of suppliers at the launch of iBook Store; on the other, Apple induced the Publishers to enter into contact among themselves, disclosing strategical information about the negotiations and future actions in the relevant market.

The most important consequence of the Apple-Publishers deal was the high pressure exerted on Amazon that, threatened in addition with the loss of some of the most important e-book publishers' bestsellers, first in the US, then in the EU, was pushed to agree to switch to the agency model in the relationships with all the Five Publishers. Hence, due to the introduction of the MFN clause, the Publishers gained much more bargaining power in pricing decisions, being able to prevent price-cutting and, as the Authorities pointed out in their argumentation, also to raise e-book retail prices.[181] As will be seen in relation to the hospitality industry and OTAs' parity agreements, the advent of e-commerce has brought two main consequences: a) the traditional bargaining power balance between intermediary and supplier has been generally reversed, moving in support of the "agent"; b) technically, these agreements have the effect of "rewarding" both parties: the platform is now sure to avoid any possible undercut (except in the case of cheating), whereas the supplier gained the power to decide retail prices (although without the chance to properly discriminate between different sales channels).

a) Legal assessment

E-Books is regarded as a milestone among price-fixing decisions. Nonetheless, it also must be noted that the Authorities on both sides of the Atlantic raised more concern over Apple's efforts in trying to influence e-book prices, than about the

agreements, "because the publisher's compensation after Apple's commission would be less than the wholesale price paid by Amazon." Baker and Scott Morton (2018), p. 2191.

[179] European Commission (2012), paras. 33–34.

[180] Namely, having the same key terms both in US and EU, the agreements required a commission of 30% on the retail price to be paid to Apple, maximum retail prices grids and the mentioned retail price MFN.

[181] European Commission (2012), paras. 38–39. According to the US District Court for the Southern District of New York, the MFN provisions "not only protected Apple by guaranteeing it could match the lowest retail price listed on any competitor's e-book store, but also imposed a severe financial penalty upon the Publisher Defendants if they had not forced Amazon and other retailers similarly to change their business models and cede control over e-book pricing to the Publishers". *United States v. Apple Inc.* (2013, vol. 12, 02831).

competitive effects of the platform parity clauses.[182] The so-called "horizontal element" (i.e. the "horizontal" dimension regarding all the publishers competing at the same level in the value-chain) has been considered of overarching importance. It is seen as a "commitment device"[183] capable of forcing Amazon to change its main business model in the e-book market.

Except for the collusive conduct of the Publishers, there are two other main theories of harm (in a vertical perspective) generally envisaged in this case: one refers to the constraint imposed on pricing; the other to the decisive shift to the agency model.[184]

On the 16th of October 2012, the US Department of Justice, together with 33 States and Territories, sued Apple and the Five Publishers for conspiracy to fix prices through contractual agreements (before the US District Court for the Southern District of New York). The Five Publishers settled out of the Court and accepted the removal of any clause allowing them to restrict retailers' freedom of pricing for at least two years. Apple, by contrast, decided to carry on the litigation and, being found to have violated §1 of the Sherman Act,[185] was banned from agreeing with Publishers any clause preventing their ability to set, alter or reduce the price of e-books.[186] Later, the key findings of the District Court have been upheld by the US Court of Appeals for the Second Circuit and, lastly, the Supreme Court rejected Apple's request to review *E-Books* Second Circuit Decision.[187]

On the other side of the Atlantic, the European Commission also raised concerns about the business model used by Apple and, after opening an investigation in December 2011, accepted commitments submitted by Apple and the Five Publishers, including provisions that greatly resemble those ones agreed on in the US: Apple would have immediately ceased to apply the agency model in the e-book market[188] and The Five publishers would have been hampered from applying any price restriction on e-book Retailers.[189]

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[182] Ezrachi (2015), p. 502.
[183] European Commission (2012), para. 38.
[184] Hviid (2015), para. 39.
[185] *Sherman Act, U.S.C.* (2012), vol. 15, sec. 1.
[186] *United States v. Apple Inc.* (2013, vol. 12, 02853).
[187] United States Department of Justice (2016).
[188] European Commission (2012), para. 111.
[189] Ibid., para. 117.

The Second Circuit decision is extremely useful to better understand the rationale behind the settlement of the case, since it clearly stresses the rising contrast between Amazon and the Publishers: even if suppliers, when operating under a wholesale agreement, shouldn't usually worry about resale prices, because these do not directly affect their revenue (that is fixed and is based on the already agreed wholesale prices),[190] the Five Publishers' concerns focused on the probable exponential increase of Amazon's bargaining power. This could have led to a crucial shift of bargaining power in favour of the retailer, with a possible further decrease in e-book prices.[191]

Furthermore, this scenario could have been even worse for the Publishers considering that Amazon's strategy also envisaged the exploitation of another fundamental externality, that is the lock-in effect exerted on consumers by the introduction of the e-book reader Kindle. Thanks to the latter (and to favour Kindle sales), Amazon managed to implement a loss-leading strategy aimed at reducing e-book retail prices even below the wholesale cost.[192] However, it must be remembered that the same strategy was also mirrored by Apple, although with different outcomes. According to Benhamou: "The economic models of Amazon and Apple rely on the lock-in of users, in the framework of a proprietary format. For Amazon, books and e-books are a part of more general e-commerce activity. Initially, Amazon's Kindle files could be read on the Kindle only. For Apple, e-books are seen as an additional application within the general economic model of Apple. Apple has restricted its iBook files to the iPad (and iPhone). Even when it is possible to download a file on another device, users stay in the Amazon/Apple ecosystems of software and services".[193] The lock-in of users is deemed to be relatively hard for online retailers, that often have to face multi-homing and consequent free-riding from other competitors (the hotel online booking sector is exactly an example of this trend).

Last, but not least, this case also explains how the shift of such key decisions, like those on pricing in digital markets, from retailers to wholesalers can lead to completely different economic outcomes and, consequently, to opposite related antitrust assessment. Usually competition is deemed to be less intensive where there is a smaller

[190] Quite the opposite, the upstream firm usually would approve such a method, that, boosting sales at the retail level, will also increase wholesaler revenues, relying upon a per-unit wholesale price.
[191] Hviid (2015), para. 35.
[192] And this conduct also played a key role in preventing Amazon from any charge for monopsony behaviour. Akman and Sokol (2017), p. 141.
[193] Benhamou (2015), p. 126.

number of competitors. In the e-book sector, that should be the case for the downstream market, at the retail level, which, after the entrance of Apple, should be viewed as a near duopoly. Nevertheless, also due to the peculiar market characteristics, many contributors and the Authorities agreed upon a diametrically opposed view, i.e. underlining how behaviours at the Publishers' level could lead to much bigger competitive concerns. For instance, meetings traditionally held to discuss relations with agents and authors, started to be seen more suspiciously, because, due to the price decision retention, they could become instruments favouring a (not anymore just) theoretical tacit collusion among publishers.

Summarising, *E-Books* is everything but a standard antitrust case. On the one side, the hub-and-spoke conspiracy[194] has been practically orchestrated by an intermediary, Apple; on the other, this is one of the first cases in which a particular MFN clause has been implemented to achieve the results sought by the defending parties. Namely a "platform parity clause", about which the (formal) "beneficiary", the customer, is not even aware, but who gains from the higher transparency in online prices and from the reduction of the search costs. An agreement concluded between suppliers and agent-retailers who do not neither purchase the good that is directly sold to the end-users through the platform. However, even if both EU and US Authorities pointed out that the price parity agreement softened intra-brand competition at the retail level, there is not any reference to the main theories about MFNs (or platform MFNs, or parity agreements) in their holdings, mainly, as already stated, focusing on the price-fixing conspiracy.[195] Hence, "there is a stark difference between the horizontal theory of harm as pursued in (*E-Book*) and the theory of harm underlying the investigations of the European NCAs into (*parity clauses*)".[196] Even if in a scenario involving online 2SPs and their implementation of parity clauses, the Authorities, supported by the effective existence of collusionary conducts, preferred to build the case in a pure horizontal dimension, probably envisaging better chance of succeeding in the judicial review of the decisions. The main practical consequence is that, as seen above in chapter 1,

[194] Steuer (2015), p. 4.
[195] Weiner and Falls (2014), p. 71. The Authors also harshly criticise the reasoning of Judge Cote in S.D.N.Y.'s decision. According to the Authors, there is empirical evidence that, after switching to the agency model, most of the time, retail prices resembled previous wholesale prices, due to Apple's maximum prices grids. However, now the Five Publishers would have had to pay a 30% commission fee on that price. Hence, the authors ironically ask whether could be logically justified the sense of a price-fixing conspiracy having the effect of reducing publishers' net revenue.
[196] Akman (2016), p. 818.

excluding the classification of the relevant conducts as vertical agreements, neither the Authorities have adopted the more lenient approach that usually is reserved to vertical agreements nor, in the European investigation, any space has been given to the possible application to the case of the Vertical Block Exemption Regulation.[197]

II. UK MOTOR INSURANCE

It is also useful to consider another precedent, about UK Motor Insurance Industry.

In 2012, the (then) Competition Commission, (now Competition and Markets Authority, hereafter CMA) opened an investigation aimed at assessing elements of antitrust relevance in vertical agreements between private motor insurances (PMIs) and price comparison websites (PCWs).[198]

Due to an increasing relevance and popularity, at least the four main PCWs managed to agree with PMIs parity clauses imposing pricing restrictions. The final report by the CMA, identified two main types of parity clauses in the relationships between PMIs and PCWs, determining significantly different harms to competition:[199] a) "wide MFN clauses specify that the premium for a policy may not be lower on any other PCW, on the PMI provider's own website and, in some cases, on any sales channel at all"; b) narrow MFN clauses specify that the PMI provider's own website will not offer the policy at a lower premium than it is available on the PCW".

Hence, for the first time, there is an antitrust assessment clearly distinguishing between wide and narrow parity clauses and, even more remarkably, in a case whose ruling is based on the traditional theories of harm about platform parity clauses developed by scholars. The CMA stated that parity clauses unavoidably have the effect of hindering intra-brand competition, but it is just in case of wide parity clauses that the restriction is significant to justify a formal prohibition.[200] By softening price competition between PCWs, in terms of lower commission fees and, consequently, of potential lower retail prices, wide parity clauses also deter entry in the market by new PCWs, that could compete with incumbents by offering, at least at the beginning, more

[197] *Commission Regulation (EU) No 330/2010 (VBER)* (2010).
[198] Competition and Markets Authority (2014).
[199] Ibid., para. 57.
[200] Ibid., paras. 62–63.

advantageous conditions to PMIs. At the end, this could also lead to less inter-brand competition among PMIs, resulting in a net decrease of consumer welfare.

On the contrary, the CMA did not consider the potential anticompetitive harms produced by narrow parity agreements to be problematic enough to lead to a ban.[201] They indeed have the effect of stifling any competition among PMIs websites and PCWs in terms of pricing; nevertheless, alleged pro-competitive effects must be borne in mind. First, they still allow intra-brand competition among PCWs, since suppliers are free of showing different prices on different platforms, as a mean of remunerating intermediaries offering better conditions (e.g. lower commission fees). Free-riding would inevitably discourage contract-specific investments by the intermediary, ending up with neutralising all the positive outcomes otherwise produced in terms of consumer welfare.[202] That is the reason why narrow parity clauses could operate as a sort of proof of PCWs' "credibility": by ensuring that PMIs won't be able to offer better prices or conditions on their websites, the intermediaries will offer their customers the assurance of their "truthfulness with regard to the statement on price".[203]

However, this last statement has been criticized by some scholars (like Hviid):[204] since there is empirical evidence that in this sector, also because high risk of multi-homing, competition among PCWs is quite strong, the Author maintains that free-riding among platforms could be much more worrying than that with PMIs own websites.

III. THE INVESTIGATIONS INTO THE HOTEL ONLINE BOOKING SECTOR

The investigation activity carried out in the hotel booking sector has been one of the most complex dealing with platform parity clauses. The conduct of at least three major Online Travel Agencies (i.e. Booking.com, Expedia and HRS) has been targeted

[201] Ibid., para. 60.
[202] Ezrachi highlights that, according to this reasoning, parity clauses may even be necessary for the same survival of PCWs as a profitable business model, with all the benefits that will be further discussed in the next section. Ezrachi (2016), p. 542.
[203] Akman and Sokol (2017), p. 146.
[204] Hviid (2015), paras. 59–60.

by several European National Competition Authorities (hereafter NCAs) and by some private actions for damages in the US.

All of them sought to assert the anticompetitive extent of these clauses very common among e-commerce companies and tried to find a balance between the potential pro-competitive outcomes and the alleged harms produced into the hotel online booking sector.[205]

To do this, among many other aspects, the Authorities had to take into consideration the peculiar structure of the hotel and lodging market, characterized by a high number of small and medium-sized hotel firms, at least in the clear majority of the European Countries.

The doubleness of services provided by OTAs[206] is a clear mark of their nature as two-sided platforms, whose profitability stems from the aptitude in promoting transactions among the two groups of users, that without the intermediary would have been "costly (or impossible)".[207] Namely, the search and compare service is the main critical success factor in OTAs' business model, contributing to these platforms' popularity among consumers and also, to a certain extent, among hospitality companies, mostly the smallest ones, that are endowed with a larger worldwide visibility that otherwise could be afforded only by major hotel chains. Nevertheless, as seen above, these may result in OTAs' "Achilles' heel", due to free-riding threats: consumers are often an heterogenous class and the costs of switching from one platform to the other are quite low, favouring multi-homing.[208] Subsequently, consumers may be already 'rewarded' just by using the search facility, being then free to finalise the booking directly on the hotel's website or on other low-cost OTAs at a discounted price and depriving the former OTA of the remuneration for the services provided so far. The economic rationale of parity clauses (narrow and wide) makes them likely the best option for well-established OTAs to disarm this potential threat and assure the return

[205] Hereafter, in order to make the analysis simpler, the terms "hotel", "hotelier" and "hotel sector", when used, will generally exemplify the vast and heterogenous category that encloses the firms belonging to the hospitality industry (including B&Bs and other not strictly entrepreneurial activities). For the same reason, by OTAs it will be referred to the major OTAs that used to implement wide parity clauses in Europe and still implement in USA and in some other countries.
[206] See above in Chapter 1, second Section.
[207] Caccinelli and Toledano (2018), p. 203.
[208] Colangelo (2017), p. 12.

on their market-specific investments.[209] For this reason, by parity clauses, OTAs have made hotels to commit offering equal or better terms and conditions for rooms shown on their platforms. However, since these clauses are applied by almost all the main OTAs, hotels have been forced to agree to identical prices, availability and conditions throughout the main digital sales channels.

Since more than a dozen of European Authorities have taken part to the investigation into OTAs' parity clauses, this selection of cases is been the first 'test bench' for the European Competition Network. According to some scholars[210] it is unsurprising that this approach has not achieved the desired results, namely to obtain better and more harmonious decisions, given the proximity of the Authorities to the respective national markets. On the contrary, even if the Commission has appointed as forerunners Italian, German, Swedish and French NCAs to lead the case and, together with the DG competition, reach an agreed conclusion, the German *Bundeskartellamt* has been the only Authority that issued an infringement order, completely prohibiting Booking.com (and HRS) from applying parity clauses at all, while the other partner Authorities accepted Booking.com's commitments to amend parity clauses by narrowing their effects. Consequently, the major OTAs must respect conflicting interpretations of the same law within Europe, "which is arguably a single market with no materially different characteristics to justify the differing approaches!"[211]

This divergence could have been avoided if the Commission had not waived to first-hand investigate the case. This approach would have been more logical, since the dispute involves companies operating in almost all the European Union Member States, defining a scenario similar to *E-Books*, where, even if accepting commitments (and so avoiding to legally clarify its position about parity clauses), the Commission took control of the procedure.

[209] As Hviid points out, indeed the successful implementation of these clauses implies that the OTA retains sufficient bargaining power that allows it to impose such a "restriction". And that is the case, since for a hotel it could be essential to be listed on that platform and to achieve the benefits flowing from it. Hviid (2015), fn. 25.
[210] Among others, Akman and Sokol (2017), p. 144.
[211] Ibid.

1) UK investigation into the hotel online booking sector

In September 2010, following a complaint brought by a small online travel agent, Skoosh, the Office of Fair Trading (hereafter OFT)[212] launched an investigation into the hotel online booking sector for alleged breaches of Chapter I of the Competition Act and of Article 101 of the TFEU. This led to a Statement of Objections released on the 31st of July 2012,[213] alleging that some major OTAs infringed UK and EU competition law together with at least the biggest English (and worldwide, at that time) hotel chain, the Intercontinental Hotels Group plc (IHG).

Namely, the OFT found that Expedia Inc and Booking.com B.V.[214] autonomously agreed with IHG to restrict their own freedom to discount hotel room-only[215] prices to end-consumers, including the possibility to base the discount just on the reduction of the amount of commission fees required for the reservation from the hotelier.

In particular, due to these agreements, OTAs has undertaken to not offer accommodation at any property of the hotel chain at a lower rate than what decided on a day-to-day base by IHG; at the same time, the hotel chain has undertaken to provide any OTA with a booking rate that would have not been higher that the rate charged on any other online distributor, resulting that each OTA would have been endowed with a parity rate clause reassuring against the possibility to be undercut by any other competitor.

In January 2014, the OFT accepted the commitments proposed by the parties, conceding that:[216] a) OTAs would have benefitted from the possibility to offer discounts, regarding the involved Hotel Chain, but only to customers already belonging to a "closed group";[217] b) following the same principle, hotels would have been free to

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[212] OFT ceased its activity on the 1st of April 2014, replaced by the Competition and Markets Authority (CMA).
[213] Office of Fair Trading (2012).
[214] Booking.com, and its ultimate parent company, Priceline.com Inc (nowadays Booking Holdings Inc), and Expedia were deemed to be the two largest online travel agents operating in the UK, whose market generated a revenue of GBP 849million through hotel bookings in 2010 (and, not surprisingly, this value, worldwide, rose to USD 5.419billion in 2016). Statista (2018a), p. 9.
[215] By "room-only" the OFT referred to "stand alone bookings", i.e. reservations not involving other services such as flights or car hires.
[216] Office of Fair Trading (2014a), paras. 6.6-6.18.
[217] According to the commitments, it means to be partner of a group a) whose membership customers expressly agreed to, b) whose online interface is password-protected and c) for which members have completed a customer profile. Ibid., para. 6.14.

offer reductions off the room rates charged on OTAs, but just to their respective closed group members; c) OTAs would have been able to advertise their special offers without any restriction, but again just to the members of the closed group when referring to IHG properties and d) the hotels could not have put any restraint on OTAs' commissions or margin level cap that could result in a limit to their freedom to offer discounted rates.

The OFT stated that such a pattern had the object of preventing, restricting or distorting competition, in particular by hindering price competition between OTAs and by foreclosing the market to new or low-cost competitors, whose more profitable strategy could have been exactly to focus on discounted prices to attract consumers.[218] A form of resale price maintenance, having the effect of restricting discounts and reducing or eliminating competition in prices.[219]

During the procedure, the parties had the possibility to submit their respective views about the efficiencies of the system, helpful in order to find a balance between counteracting forces.[220] Discounted rates are of fundamental importance, since they can also have effects on other strictly non-pricing aspects, such as the brand reputation. An uncontrolled discount policy implemented by OTAs over headline rates could damage hotel reputation, since prices are an important indicator for customers. Moreover, remarkably discounted rate could jeopardize the yield management, whose effects are an important element of producer's welfare procurement for hotels.[221] Yield management, i.e. an effective price discrimination, according to the OFT[222] "involves sophisticated price modelling to enable providers to discriminate between different customer groups based on their willingness to pay" and "has also been adopted by the hotel industry as a means of maximising revenue". Making this impossible may be a potentially disruptive inefficiency in managing reservations, that could lead to a proportional decrease in consumers welfare (although, the same strategies, when associated to a dominant position, could have a completely antithetic outcome).[223]

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[218] That was exactly the approach used by Skoosh, that complained about the restrictions in offering discounted rooms on its website as a result of the application of rate parity clauses. According to Dorian Harris, CEO of Skoosh, this was a consequence of the pressure exerted on the OTA by Hotels wanting to respect parity; otherwise they threatened to cancel themselves from Skoosh.
[219] Office of Fair Trading (2012). Reported in *Skyscanner Ltd v CMA* (2014), para. 123.
[220] Varona and Canales (2015), p. 5.
[221] Ibid.
[222] Office of Fair Trading (2014b), fn. 797.
[223] Varona and Canales (2015), p. 5.

Very important for this dissertation is to underline that neither the OFT has specifically quashed the parity clauses agreed by the parties nor they have been addressed to in the commitments. However, these clauses may be otherwise covered to the extent that they could result in preventing either hotels or OTAs in exercising their freedom to offer discounts to their respective closed members, since the parties undertook to amend any provision leading to such effects.[224]

This limitation of the commitments' results has been harshly challenged by several economic actors (and Skoosh was again among them),[225] that basically anticipated the debate that would have arisen after other European NCAs started investigations into the hotel booking sector. Among them Skyscanner, a third-party metasearch engine, who challenged OFT's acceptance of commitments by arguing that the impact on metasearch engines had not been taken into adequate consideration. Skyscanner successfully appealed the Competition Appeal Tribunal,[226] whose holding directly addresses the limitations of the OFT during its investigation. Mainly, the CAT maintains that the OFT did not correctly evaluate the negative impact of the commitments on price transparency, unavoidably stemming from the creation of the user closed groups, notwithstanding the defence of this provision brought by the OTAs. As a matter of fact, the CAT highlighted that the restriction on disclosure of the special offers reserved to members of the closed groups derived from the very necessity to neutralise the "prevalence" of rate parity obligations, usually triggered by the display of public rates.[227]

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[224] According to Pinar Akman, this could occur "indirectly", for instance if a hotelier should be forced to offer an OTA "the same discounted booking rate as the Hotel or another OTA is offering to closed group customers". Akman (2016), p. 797.

[225] Skoosh's founder argued that the commitments accepted by the OFT would have gone in the wrong direction, boosting Booking.com and Expedia's (relative) dominance and so preventing the very same aim of the statement of objections, since would have equally prevented new OTAs from focusing on prices to obtain a competitive advantage.

[226] *Skyscanner Ltd v CMA* (2014). In summary, Skyscanner appealed on three grounds, complaining that: a) in taking its decision, the OFT "failed to take into account properly or at all the representations that Skyscanner made to it on the impact the Decision would have on the meta-search sector and/or on the inter-brand competition"; b) by accepting the commitments without considering the potential anticompetitive consequences that they may have, "the OFT acted contrary to the policy"; c) the Decision was *ultra vires*, since the Commitments basically required third-parties to cooperate for their implementation, even if neither those third parties offered commitments, nor the OFT accepted them. As examined later, ground a) and b) have been accepted by the CAT that, on the contrary, refused to recognise that the OFT acted *ultra vires.* Ibid., para. 6.

[227] *Skyscanner Ltd v CMA* (2014), para. 97.

Moreover, the CAT held that the OFT also failed to foster pro-competitive effects accepting commitments that, by reducing price transparency and limiting the offers' disclosure, both prevent metasearch engines (whose welfare-enhancing function through the reduction of search costs is acknowledged) from promoting lower prices and prohibit OTAs from adequately advertising their services to anybody but the closed group members. This indeed limits their achievement of a critical mass of users that is deemed to be vital to employ economies of scale and then, by making their business profitable, potentially benefit the consumer.[228]

Two more considerations are fundamental for this dissertation. First, according to CAT's findings, by concluding that the restriction was a competition restraint by object, the OFT did not adequately analyse the market: not having gone in depth with the assessment of the effects of the behaviours, the Authority was not in the position to completely understand the effects of the proposed commitments.[229] Moreover, as already stated, it refused to evaluate properly the impact of parity agreements in the Hotel Booking Sector, only considering their additional effects to the main agreement.

Second, the question whether Booking.com must be considered as a reseller or a genuine agent has not been answered, although it would affect the overall assessment of the related behaviours. However, according to Zeno-Zencovich and Colangelo,[230] even if Booking.com declares itself to be an agent, the very fact that the Authority started the investigation and found the conduct to be anticompetitive may symbolize an implied judgement of anti-competitiveness.

After the CAT's Judgement, again appointed of the *Booking, Expedia and IGH* case, the CMA has decided to close the investigation under administrative priority grounds,[231] undertaking to keep a "careful watch on how the market develops both in the UK and across Europe". It is probable that also Booking.com's announcement to amend its wide parity clauses throughout Europe,[232] in favour of narrower provisions, influenced this decision, since one of the main anticompetitive aspects under scrutiny ceased to exist.

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[228] Ibid., para. 93.
[229] González-Díaz and Bennett (2015), p. 30.
[230] Colangelo and Zeno-Zencovich (2016), p. 80.
[231] Competition and Markets Authority (2015).
[232] Booking.com (2015). Shortly after Booking.com, also Expedia announced that it would have abandoned its parity provisions in Europe. Expedia group (2015).

Lastly, in October 2017, the CMA has again launched an investigation into the hotel booking sector, that brought to an enforcement action on the 28th of June 2018.[233] Despite this procedure being formally opened on the ground of consumer-protection law enforcement, object of the Authority is the "clarity, accuracy and presentation of information on sites, which could mislead people and stop them finding the best deal".[234] This topic will be addressed more broadly in chapter 3, but it is already clear that, as the Authority highlights, the question whether the NCAs have successfully eradicated anticompetitive concerns in the hotel online booking sector is still open. Wide parity clauses are not operating anymore, at least in Europe, but new OTAs' behaviours could actually lead to the same outcomes: importantly for this dissertation, the Authority has decided to put under the microscope the algorithms influencing hotels' ranking on the search results page, wanting to ascertain "to what extent search results are influenced by factors that may not be relevant to the customer's requirements, such as the amount of commission a hotel pays to the site".[235] Parity rate may have been officially amended by OTAs, but practically speaking it could be still in-force, awarding hotels that respect a substantial parity with better positions in the search results.

Following this principle, on the 6th of February 2019 the CMA has (for the time being) accepted the commitments submitted by some hotel booking sites, among which Booking.com. Even if keeping a formal consumer protection law's perspective, it is notable that Booking.com has undertaken to clearly disclose to consumers if the commission fees paid by the hoteliers "may affect the ranking of the search results being displayed to the consumer",[236] properly labelling and differentiating the reserved slots.

2) HRS – Hotel Reservation Service v Bundeskartellamt: the first 'proper' assessment of wide parity clauses in the hotel online booking sector

Just a few years before that several European NCAs started scrutinizing OTAs' business models in *Booking* cases, in January 2010, due to the complaint of a hotel

[233] Competition and Markets Authority (2017).
[234] Ibid.
[235] Competition and Markets Authority (2018).
[236] Booking.com (2019), paras. 4-6.

partner (soon joined by other hotels and the German Hotel Association), the *Bundeskartellamt* started the first proceeding against a German OTA, HRS – Hotel Reservation Service Robert Ragge Gmbh, exactly focusing on the harmfulness of the parity clauses contained both in single contracts with hoteliers and in general terms and conditions. By these clauses, HRS requested hotel partners to charge the lowest room rates on its platform, together with the maximum room availability and more favourable booking and cancellation conditions than those offered elsewhere on the Internet (including hotel's own website). A wide parity clause, that has been brought to the attention of the Competition Authority when some hotel partners, after contesting rate parity, have been threatened to be excluded from the platform.

In the meantime, some associations applied to the Düsseldorf Court of Appeal to obtain an interim order to prevent HRS from enforcing its parity clause (defined as an MFN clause, by German courts and the Authority).[237] The interim order has been issued. Even if this proceeding is completely independent of the following investigation opened by the *Bundeskartellamt* (BKartA), it indeed represents a first important examination of parity clauses' consequences when used by OTAs. The Court held that parity clauses where in contrast with Section 1 of the German Act against Restraints on Competition (GWB),[238] as they restricted hotels' freedom in pricing, in a market in which price-driven competition is deemed to be crucial.[239] These argumentations can be found again in other reasonings of the German NCA.

The commitments proposed by HRS to the BKartA have not been considered to be resolutive, due to their limited range (just 5 years ban of wide parity clauses, unlikelihood of their implementation, exclusion of the hotels' own websites from the amendment)[240] and to the fact that the BKartA wanted to issue a proper prohibition order with the value of an important legal precedent.[241]

On the 20th of December 2013, the BKartA prohibited HRS from continuing to apply its parity clauses and ordered the OTA to remove the clause from any contract

[237] Oberlandesgericht Düsseldorf (2012).
[238] *GWB* (2013), § 1.
[239] González-Díaz and Bennett (2015), p. 30.
[240] Bundeskartellamt (2013), paras. 263–267.
[241] Ibid., para. 267. It is worth to bear in mind that, in contrast with any other Authority throughout Europe, the Bundeskartellamt was the only Authority to adopt an infringement decision against OTAs. However, this necessarily implies that those decisions are restricted to the parties recipients of the relevant orders.

and from general terms and conditions.[242] At the same time, as will be seen below, the NCA started its own proceeding against Booking.com, which was using similar clauses in its contracts.

In its reasoning, the Authority found HRS liable of violating Art 101 of the TFEU and section 1 of the GWB. As in other decisions, the relevant market has been limited to that of the "hotel portals",[243] intermediaries offering three kind of services: search, compare and book. The geographical extension has been circumscribed to the national territory.[244] Market shares retained by HRS has been calculated by the BKartA to exceed the 30% threshold imposed by the European Vertical Block Exemption Regulation,[245] by this officially considering parity clauses as vertical agreements between an upstream supplier (the Hotel) and a downstream retailer, the OTA. The agreements are nonetheless ineligible for an individual exemption under TFEU Article 101.3/ GWB Section 2 (1). Not all the conditions required by the individual exemption are deemed to be fulfilled: a) the likely increase in efficiency and competition is "at best limited",[246] since the Authority does not judge contrasting free-riding as to be decisive. Even if free-riding (in particular by other hotel portals) could hinder investments positively impacting on the quality of services (and then on consumer welfare), this is not deemed to be as decisive as requested by the exemption;[247] b) there are alternative business models that could be profitably adopted to achieve the same efficiency gains, such as service fees payable by customers, a fixed fee for hotel partners or, lastly, a pay-

[242] Ibid., para. 252. Quite importantly, both the BKartA and, later, the Düsseldorf Court of Appeal have not distinguished between wide and narrow parity clauses, at least to the extent that a narrow clause could be implemented in order to find a balance between anticompetitive harms and the OTA's free-riding defence. The same reasoning will be followed the BKartA in *Booking* cases, where a more detailed justification about the exclusion of narrow parity clauses is provided.
[243] Using a peculiar terminology, the BKartA has differentiated hotel portals from OTAs, excluding the latter from the relevant market, because "as a rule, do not have direct contractual ties with Hotels, and hence operate on another level of the distribution chain than hotel portals do". Ibid., para. 91. However, according to Caccinelli and Toledano it is quite difficult to imagine an OTA without the typical search, compare and book functions. Probably, the BKartA has just used a different terminology. Caccinelli and Toledano (2018), p. 210.
[244] Bundeskartellamt (2013), para. 108. Even if OTAs are firms operating worldwide, the relevant market neither is global nor European. According to the BKartA, this is also symbolized by the "special attention" that online platforms pay to the German hotel market, that is made evident by the higher commission revenue collected in Germany than in any other European Market and the larger number of bookings. Ibid., para. 86. Nevertheless, it must be borne in mind that any other NCA in Europe dealing with OTAs has reached the same conclusion.
[245] *Commission Regulation (EU) No 330/2010 (VBER)* (2010), § 3. Bundeskartellamt (2013), para. 68.
[246] Bundeskartellamt (2013), 199.
[247] Ibid., sec. 5.1.

per-click, as used by meta-search engines;[248] c) moreover there is not any appreciable evidence that customers will be granted a fair share of any efficiency gain, due to the awkward impediment to a selective price reduction and due to the fact that price transparency (the main defence provided by HRS) is innate in e-commerce (together with the presence of metasearch engines);[249] d) parity clauses eliminate actual and potential competition, by restricting price and quality competition between hotel portals and price competition among hotels.[250]

This may result in a leverage effect, with the outcome of boosting overall sales cost for hotels: definitely not beneficial to hotels and, consequently, to consumers. A price-fixing agreement cannot be defended on the basis that it fosters competition on non-pricing grounds, in particular on advertising. Moreover, according to a German stricter provision (section 20 (1) GWB),[251] by applying parity clauses HRS has unfairly hindered small and medium-sized hotels, which, due to their limitation of resources, can be deemed to be 'dependent' on the OTA.[252] This element brings the question (analysed in depth in chapter 3) whether the relationship between Art. 101 and Art. 102 TFEU should be taken more in consideration, or even, *de iure condita,* more strictly interpreted by the enforcers, to avoid a misleading application of the concept of 'cartel'.

BKartA's main theories of harm in *HRS* case are of central relevance, since many other European NCAs took inspiration from this way of reasoning.

BKartA found that parity clauses primarily restricted competition between hotel portals. They produce effects that resemble price fixing agreements between competing intermediaries (OTAS, in this case),[253] because of the elimination of any economic incentive to reserve lower commissions to hotels already listed on HRS, with the aim of being "granted" lower room rates or better conditions. It is indeed clear that, if the hotel, which is still keeping the freedom to set prices, at least considering online sales channels as a whole, is prohibited from price-differentiate between OTAs, it unlikely will accept to reduce all online room rates just to foster sales on a specific OTA.

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[248] Ibid., sec. 5.2.
[249] Ibid., sec. 5.3.
[250] Ibid., sec. 5.4.
[251] *GWB* (2013), § 20 (1). § 20(1) GWB is a stricter German, similar to abuse of dominant position, that bans undertakings with a relative market power with a dependence relationship with small and medium-sized undertakings, to abuse that relationship by unfair impediment or discrimination.
[252] Bundeskartellamt (2013), para. 244.
[253] Hossenfelder (2015), p. 84.

Subsequently, HRS will not fear to increase commission fees, since it will be relatively sure that hotel partners, in order to avoid a collective rise of online sales, won't be able to 'pass on' this increase to their customers booking via HRS. Hence, this lack of price-competition will disincentivize OTAs from competing on non-price grounds (user-friendly interface, pre-sale services, reliability) and finally will lead to an upward pressure regarding commissions.[254] Therefore, this will produce a market foreclosure for new entrants that, at least at the beginning, would likely implement a low-price strategy to gain market shares.

On the other hand, dealing with inter-brand competition, the Authority has also reflected on the possible consequences for the very hotel accommodation market. Hoteliers are not able neither to exploit lower commission charges by reducing final prices on given platforms nor to price differentiate as a way to counteract possible unforeseen events without destabilizing their overall strategy.[255]

Last, but not least, the harmfulness of HRS provisions is reinforced by the fact that both Booking.com and Expedia, HRS's main competitors, are implementing similar clauses in the relevant market, by that covering 90% of German hospitality industry with a strict lock-in for hotels.[256] If a market is highly covered by parity clauses, i.e. many retailers (till even the vast majority) require suppliers to agree upon these provisions, the latter will be practically forced to charge the same retail price on all the partner platforms. Hence, "wide platform MFNs with agency distribution will lead to the same outcome as resale price maintenance (RPM) with wholesale distribution: products are sold on all the platforms at an identical retail price, chosen by the vendor".[257]

However, "whether the MFN clauses are hardcore restrictions can remain open",[258] in the meaning of Art. 4, (a) of the VBER, according to which any agreement that directly or indirectly relates to fixed or minimum prices must be considered a hardcore restriction.[259]

Although parity clauses force hotel partners to match HRS's room rates elsewhere on online channels and not, formally, set a fixed price level, essentially it has

[254] Ibid.
[255] Bundeskartellamt (2013), p. 164.
[256] Ibid., p. 163.
[257] Baker and Scott Morton (2018), fn. 5.
[258] Bundeskartellamt (2013), paras. 181–187.
[259] See below, in chapter 3, for more details.

the effect of transforming HRS room rates into minimum prices, also supported by adjustment mechanisms that can be easily triggered in case of breaches of the agreement by hotel partners.

On the 20th of January 2014, HRS lodged an appeal against this decision, before the Düsseldorf Court of Appeal,[260] that fully upheld the *Bundeskartellamt* decision, but also provided some new indications which have been taken in high consideration during the following case about Booking.com.

Parity clauses constitute an appreciable restriction which does not meet the conditions for an individual exemption pursuant to Article 101 (3) TFEU. Mainly, the Court has rejected the free-riding argument, as linked to the potential positive consequences of wide parity clauses. Even though HRS tried to demonstrate this, referring to wide provisions as instruments capable of creating "crucial incentives for ongoing investment in the quality of the downstream platform",[261] the Court held that investing capability would not be necessarily undermined, even in case of a reduction of sales in the downstream market. In any case, it would be in the hotel portals' interest to invest in quality to gain broader market shares, also by exploiting direct and indirect network effects.

According to Ezrachi,[262] even if the Court's opinion about wide parity provisions can be shared, the following exclusion of free-riding is unavoidably "overreaching". In case of an indiscriminate freedom of undercutting OTAs' rates, this, alongside the maintenance of an agency model, could in the future undermine its profitability and, more probably, at least prevent its willingness and ability to invest in quality enhancing services.

Conversely, albeit the Court does not agree with BKartA's opinion about the possible classification of parity clauses as restrictions by object, it questions not only whether this provision falls within the application of the Vertical Block Exemption Regulation, but if these agreements can be considered as vertical agreements at all. The intermediation between hotels and OTAs does not directly regard any form of resale of any good or service, just imposing a restriction on hotels, which alone are selling hotel

[260] Oberlandesgericht Düsseldorf (2015).
[261] Ezrachi (2015), p. 504.
[262] Ezrachi (2016, p. 504.

rooms. In this framework, OTAs are not in a vertical relationship with the hoteliers.[263] However, whatever the "right" interpretation should be, the Court recognises that HRS exceeds the 30% threshold to enjoy the "safe harbour" settled by the VBER.

HRS decided not to appeal on points of law to the Supreme Federal Court.[264]

Of course, this decision has arisen even other critiques. For instance, Pinar Akman finds that "somewhat contradictorily, while the OFT found restrictions on the OTAs' discounting freedom imposed by the hotel partner to be anticompetitive in its investigation into the hotel online booking sector (implying that prices should be set freely by the OTAs), in *HRS* the Bundeskartellamt held that "price setting should be always decided by the hotels since they bear the sales risk."[265]

3) Booking.com's parity clauses under scrutiny of several European NCAs

In June 2014, before the end of *HRS,* several European Authorities,[266] also on the behalf of the European Commission, started investigating the parity clauses used by the main online travel agency (by market share and revenue)[267] operating in Europe, that is Booking.com B.V. (hereafter Booking), the Dutch subsidiary of the American holding The Priceline Group Inc. (from 2017 Booking Holdings Inc).[268]

Almost all the investigations have been carried out on the basis of several complaints raised by a vast group of stakeholders, such as hotel chains and associations, small OTAs and other businesses competing in the hotel booking sector (both online and offline), all highlighting how the platform's business model risked to jeopardize the

[263] Hossenfelder (2015), p. 85.
[264] After the Court's decision, Andreas Mündt, president of the *Bundeskartellamt*, stated that "Best price' clauses are only beneficial to the consumer at first glance because ultimately they restrict competition between the hotel booking platforms […] Consumers therefore benefit directly from the court's decision. Competition between the portals for lower hotel room prices or favourable cancellation conditions will increase. It will be easier for new hotel booking portals with innovative services to enter the market." Bundeskartellamt (2015a).
[265] Akman (2016), p. 800; Bundeskartellamt (2013), para. 167.
[266] Some European Countries other than the main four (France, Germany, Italy, Sweden) in which these clauses have been or are still being assessed are Austria, Switzerland, Ireland, Hungary, Poland, the Czech Republic, Denmark, Belgium and Greece.
[267] Booking.com is reported to be the largest OTA in Europe, reported to have more than 60% share in 2015. See, among others, PhocusWire (2015).
[268] MarketLine (2018b), p. 5.

hotel industry profitable survival.[269] Again, Booking's strategy was based on the use of a wide parity clause, committing all the hotel partners wanting to be listed on the platform to charge on it the same or better conditions than those on all the other direct and indirect sales and distribution channels, both online and offline. By "terms and conditions", as in other cases dealing with OTAs, Booking refers to a range of elements, such as room price (rate parity), availability (availability parity, that means that the amount of rooms available to be booked on Booking needs to be as wide as on any other platform) and booking conditions (implying that the best rates for the best amount of available rooms must be listed on Booking.com together with the best conditions as regard to cancellation policies, the inclusion of extra-services and any other component that could in any way impact on the value of the service purchased via Booking).

It is worth recalling that all these investigations and their respective conclusions have been adopted mainly focusing on the alleged infringement of ART. 101 TFEU, so that defining the conducts as vertical agreements, with also potential horizontal consequences. However, in some Countries the NCAs have tried to investigate whether these agreements could also infringe article 102 TFEU as well as their respective national stricter provisions (e.g. in Germany).

Due to the clear transnational dimension of hotel bookings finalised through Booking.com, and its clear impact on the Single Market as a whole, a form of reinforced collaboration between the acting Authorities has been necessary, within the framework of the European Competition Network, since the Commission has waived to took charge of the procedure

As a response to the statements of objections issued by the NCAs, in December 2014 Booking jointly proposed a first set of commitments to the Authorities, undertaking to narrow its parity provisions, almost on the basis of what already agreed on with the British OFT.[270] After the rejection of this proposal, believed to be not

[269] Even if investigations have been sometimes carried out against Expedia Inc (the second major OTA by market share in Europe), sometimes in conjunction with Booking.com (like in the Italian proceeding), their results always resemble what already said for Booking.com. That is the reason why this dissertation will not focus on them.

[270] See, for instance, the Autorità Garante della Concorrenza e del Mercato (2015b), para. 16. In its first proposal Booking.com offered to: a) narrow its parity clause by applying it just to hotel partners' direct sales channels, both online and offline, including meta-search engines, by that excepting competing OTAs and any other indirect sales channel (i.e. any channel in which the price is not "directly" decided by the hotel); b) allow hotel partners to publicise discounted rates to certain corporate customers or to users belonging to closed groups; c) keep displaying its "best price guarantee"; d) refrain from offering certain hotel partners lower commissions or other more enticing

sufficiently resolutive of the unlawfulness of the agreements, Booking submitted new commitments in April 2015 that have been definitely accepted. From these it results a new form of parity clause, a "narrow" provision that the NCAs (except for the BKartA) thought to be an effective instrument to find an equilibrium between free-riding concerns (i.e. the viability of Booking's business model) and the restriction on price competition. Due to narrow parity clauses, hotel partners in all European Countries but Germany would be free to offer lower prices or more enticing conditions via their offline sales channels and to price differentiate among different OTAs. In the meanwhile, they would still need to avoid undercutting Booking on their direct online sales channel, that is the hotel proprietary web site (the so-called booking engine).

These commitments entered into force on the 1st July 2015 for a period of five years. Moreover, in the same period, both Booking and Expedia announced that they would have voluntarily extended these amendments to all the bookings regarding hotel partners within the European Economic Area.[271]

In order to obtain an analysis of the four decisions regarding the same company that could be as useful and effective as possible, this dissertation will follow the pattern designed by Chiara Caccinelli and Joëlle Toledano in their broad work on the *Booking* cases.[272] This involves that, even if following a by-nation analysis of the case, three questions will be used in order to regroup the most relevant aspects dealt with in the decisions. According to the Authors, these three questions mirror the three main challenges that an Authority involved in this case should have contended with: a) has the enforcer sufficiently "integrated" two-sided markets' features in its analysis? b) in light of this key-features, how has he adjusted the relevant market definition to it? c) how has he evaluated pricing and non-pricing two-sided markets' conventional strategies to determine the anticompetitive effects of the "abusive" practices?

It is clear that all these three challenges stress the relevance of the very nature of a two-sided platform and of the relative two-sided market for a correct analysis of

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contractual conditions in relation to the fact that the hotel partner charges on Booking.com lower room rates or more favourable booking conditions. In other words, to refrain from applying incentives that could end up reproducing the same restraints in force under the former wide parity clause. Notably at point a), availability and conditions parity are not mentioned. The rejection of the commitments also relies on this point.

[271] Booking.com (2015); Expedia group (2015).

[272] Caccinelli and Toledano (2018), p. 197.

platform parity clauses. The main theories about two (or multi) sided markets are not going to be addressed here again, but how it can be inferred from the analysis of chapter 1 about 2SMs, these questions are functional to ascertain whether the competent Authorities took into consideration the necessary process of adaption that must target the application of traditional competition law techniques and principles to these contexts. However, it could be worth to at least recall one (already quoted) definition of two-sided markets given by Jean-Charles Rochet and Jean Tirole in one of their seminal works in the early 2000s: "a market is two-sided if the platform can affect the volume of transactions by charging one side more and reducing the price paid by the other by an equal amount".[273] Therefore, even if not so often openly stated by Competition Law Enforcers, it is important not to underestimate how the key-features of two-sided markets, as designed by scholars, impact on the functioning of all the other classic theories primarily designed to be applied to single sided markets by competition law literature and practitioners.

a) France

Following complaints raised by the French Hotel Association (UMIH) and the AccorHotels group, actually the first European hospitality company, the French *Autorité de la Concurrence* (hereafter, ADLC) opened a proceeding against Booking. The claimants accused Booking of violating several European and French provisions, through the implementation of many anticompetitive behaviours, such as vertical restrictions, tacit coordination with other OTAs and abuse of dominant position as well.

Is the market two-sided?

The ADLC is the only NCA expressly recognizing that Booking operates two-side, connecting hotel partners and end-users (i.e. its two groups of customers) for the sale of "overnight stays".[274]

How is the relevant market defined?

The ADLC distinguishes between upstream and downstream markets, properly linked by the two-sided platform. The upstream market is defined as "the market of the

[273] Rochet and Tirole (2003), p. 664.
[274] Autorité de la Concurrence (2015b), p. 25. *Unofficial Translation*.

supply of online travel agency reservation services for a simple overnight stay proposed by hotels based in France",[275] and involves Booking and its hotel partners, while the downstream market concerns the supply of pre- and post-sale services to end-users, including the well-known search, compare and book functions.

Just the upstream market is deemed to be relevant.[276] Interestingly, this definition excludes from its borders both hotels' own websites and metasearch engines.[277] The geographical market is thought to be national.

How has the Authority determined the market power, the abusive conducts and their effects on welfare?

The ADLC finds that the two main harms produced by parity clauses implemented by Booking are the reduction in competition between different OTAs and the market foreclosure for smaller and new OTAs.

First, according to some studies commissioned by the ADLC, it is stated that the OTA has over 30% of market share, "but it cannot be excluded that Booking.com is actually enjoying a dominant position".[278] Since it is perceived as vital for a hotel to be listed on this platform, the NCA maintains that the market share is not necessarily representative of its real bargaining power.

However, Booking's clauses cannot fall within the scope of the VBER, since whether it exceeds the 30% threshold or not, the market is covered by parallel agreements creating a cumulative effect.[279]

Second, alongside this 'practical' dominance, the ADLC underlines the high presence of entry barriers to the downstream market, whose existence depends on the strong indirect network effects operating in this business model. It is indeed fundamental to reach a certain critical mass of users to exploit the necessary economies

[275] Ibid., p. 26. *Unofficial Translation*.
[276] To define the borders of the relevant product market, the ADLC applied the SSNIP test, i.e. the test of the hypothetical monopolist, just to the upstream market, in particular by evaluating the effects of a significant, non-transitory 5-10% increase of the commission fee, implying that the demand on both the sides of the market will be directed to other substitute services. Curiously, in its previous decisions involving online sales (e.g. Decision n°14-D-18 of 28 November 2014, *Vente-privee.com*) the ADLC focused on the downstream market. See also Billard and Honoré (2015), p. 4.
[277] Caccinelli and Toledano (2018), p. 205.
[278] Autorité de la Concurrence (2015b), p. 30.
[279] Billard and Honoré (2015), p. 4.

of scales thanks to which the company can profitably invest in an adequate advertising[280].

Going more in depth, as in other decisions, the NCA states that Booking is capable of easily deploying its bargaining power to raise commission fees without the fear of being undercut by other platforms' more favourable conditions.[281] It is also considered likely that, in case of an increase in commission fees, the competing platforms (also due to price transparency) will emulate the market-leader.[282] A "dilution mechanism", whose uniform pricing will without a doubt soften competition among OTAs. Consequently, this reinforces the already existing entry barriers. Alternatively, new entrants and smaller OTAs may try to compete on non-price grounds, but, as said by many other competition law practitioners, this is not deemed to be relevant in case of the sterilization of pricing competition.[283]

By the acceptance of the commitments, the ADLC opines that competition between OTAs will be encouraged, making it likely for commissions, and consequently prices, to fall, benefitting both hotels and consumers. This is possible since, as Booking detached the link between its prices and the prices charged on other OTAs, it restored a more logical connection between the commission level and the volume in demand. Being able to price differentiate and to decide the room inventory charged on any platform, the hotel is able to reward "cheaper" OTAs by conceding lower rates and may manage to counterbalance any increase in Booking's commissions by both increasing prices shown on the latter and reducing room availability.

On the other hand, as acknowledged, to narrow parity provisions, without eliminating them, still constitutes a remarkable weapon to face free-riding. This itself guarantees the viability of the platform.[284] "A balanced solution is thus proposed, providing an impetus to competition in the market in order to bring down prices while preserving the existing efficiency gains".[285]

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[280] Autorité de la Concurrence (2015b), pp. 32–33. *Unofficial Translation.*
[281] See also, above, *HRS.*
[282] According to the ADLC, not surprisingly, this will also imply that small OTAs, emulating bigger competitors strategies, will seem to have as market power as the major OTAs. Caccinelli and Toledano (2018), p. 207; Autorité de la Concurrence (2015b), p. 33.
[283] Caccinelli and Toledano (2018), p. 206.
[284] González-Díaz and Bennett (2015), p. 32.
[285] "The Autorité de la concurrence, in coordination with the European Commission and the Italian and Swedish Authorities, has obtained particularly extensive commitments from Booking.com

b) Italy

The Italian *Autorità Garante della Concorrenza e del Mercato* (hereafter AGCM) as well opened an investigation into the "market of tourist service – hotel online bookings".[286] Even in this case, the main complaints have been carried by the national Hotel Association, *Federalberghi*, together with an official report submitted by the *Guardia di Finanza.*[287] Again, parity clauses, regarded as vertical agreements, are object of the proceeding within the scope of Article 101 TFEU and of Article 2 of the national provisions pursuant to Law 287/1990.[288]

Thanks to a significative market power, Booking (and Expedia) is believed to be able to require high commission fees from hotel partners (never under 15%).[289] In the meantime, it also prohibits hoteliers from rebating prices on any other offline or online sales channel and, consequently, prevent a fair price competition between OTAs and restrict market access for new OTAs. The statement of objections deeply resembles what already stated in other cases and individuates the existence of a wide parity provision mirroring the one present in general terms and conditions in all the other European markets.[290]

Revealing a certain attention for hotels reasons in this case, the AGCM also focused its investigation onto the "best price guarantee", that is granted by Booking to the consumers using its platform, due to which hotels are required to match prices charged on Booking through any other direct online or offline sales channel.[291] To its extent, this clause requires hotels that should be found "cheating" to refund the difference to the customer that, booking through the OTA, was forced to book at higher rate. The AGCM also explains how these clauses are enforced, that is namely by the implementation of metasearch engines, often owned by the very OTAs (for instance Trivago and Kayak, respectively owned by Expedia and Booking). Alongside the

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aiming to boost competition between online booking platforms and give hotels more freedom in commercial and pricing matters". Autorité de la Concurrence (2015a).

[286] Autorità Garante della Concorrenza e del Mercato (2015b).

[287] Namely the special division for the protection of markets and competition. The *Guardia di Finanza* is a law enforcement police with competence on financial crimes.

[288] *Loi 2015-990 Du 6 Août 2015 Pour La Croissance, l'activité et l'égalité Des Chances Économiques* (2015).

[289] Colangelo and Zeno-Zencovich (2016), p. 67.

[290] Autorità Garante della Concorrenza e del Mercato (2015b), para. 25.

[291] Ibid., para. 6.15.

refund, the enforcement is also granted through other several penalties, in terms of ranking, visibility and commission fees percentage.[292]

Is the market two-sided?

Even if the AGCM does not explicitly question whether Booking is operating two-side or not, it implicitly accepts the two-sidedness of the relevant market when recognises that Booking is offering services both to Hotels and consumers.[293]

How is the relevant market defined?

Any implicit reference to the two-sided nature of the platform disappears when the Authority borders the relevant product market. It is defined to be the market of hotel online booking services, clearly distinct from the traditional forms of tourist retailing, that are the bricks-and-mortar travel agencies.[294] The geographical market is "at least national"[295].

How has the Authority determined the market power, the abusive conducts and their effects on welfare?

If, on the one hand, the AGCM highlights that 70% of online bookings are made through OTAs (with doubts about the very nature of the other online sales channels covering the remaining 30%), on the other hand, it just states that Booking is the first operator in Italy (followed by Expedia) in a market that is highly concentrated, but says nothing about their respective precise market shares.[296]

Parity clauses are defined as vertical restrictions capable of significantly hamper competition on rates and on special offers in the market among OTAs and other online sales channels (those including also hotels' proprietary websites, a subsumption that constitutes an *unicum* among NCAs' decisions).[297]

The AGCM shares the opinion that parity clauses restrict competition and foreclose the market of hotel online bookings, by that also inferring that the room rate,

[292] Colangelo and Zeno-Zencovich (2015), fn. 2.
[293] Caccinelli and Toledano (2018), p. 207.
[294] Autorità Garante della Concorrenza e del Mercato (2015b), para. 9.
[295] Ibid., para. 12.
[296] Ibid., paras. 13–14.
[297] Ibid., para. 7.

with its respective conditions, showed on Booking or on Expedia, will automatically become the minimum price and the best condition for a certain room on a certain day.[298]

As in the French investigation, also the AGCM has positively considered the second commitments offered by Booking. In a press release, the NCA concluded that "the commitments offered by Booking.com strike the right balance for consumers in France, Italy and Sweden, restoring competition while at the same time preserving user-friendly free search and comparison services and encouraging the burgeoning digital economy".[299]

c) Sweden

Differently from AGCM and ADLC, the *Konkurrensverket* has started its investigation into the hotel online booking sector without having received any complaint by national associations or other OTAs. Parity clauses have been object of the proceeding for alleged violation of Art. 101 TFEU, due to their ability to affect trade among EU Member States.[300] Other difference is that the Swedish Authority decided to accept commitments together with a fine in total amounting to almost EUR 4 million.[301]

Is the market two-sided?

In defining the relevant market, the *Konkurrensverket* does not formally state whether Booking is operating in a two-sided market or not.[302] Nonetheless, it is also concluded that Booking' business is run under a platform business-model as an intermediary, serving two different types of customers: on the one hand, hotels use the online portal to reach customers on a far-reaching scale; on the other, OTAs provide customers with the search and compare function via an efficient and user-friendly platform.[303]

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[298] Ibid., para 23. This conclusion is also reinforced by the overspread application of these clauses by the main OTAs, with the overall effect of sterilizing any possible downward reduction of commission fees and, consequently, of retail prices.
[299] Autorità Garante della Concorrenza e del Mercato (2015a).
[300] Konkurrensverket (2015), para. 14.
[301] Ibid., para. 56.
[302] Caccinelli and Toledano (2018), p. 208.
[303] Konkurrensverket (2015), paras. 8–9.

How is the relevant market defined?

The *Konkurrensverket* recognises the relevant market in that of online travel agencies, defined as the Internet intermediaries allowing "direct" reservations. The geographical dimension is national.[304]

How has the Authority determined the market power, the abusive conducts and their effects on welfare?

The Swedish Authority believes that parity clauses fundamentally operate on a double dimension, allowing Booking to obtain equal or more enticing conditions than other intermediaries. First there is a horizontal dimension, since parity clauses influences competition between Booking and competing OTAs; then there is also a vertical dimension, as they impact on the relationship between Booking and its hotel partners. Just the horizontal perspective has the effect of significantly restrict competition as to be considered abusive, because its consequences hinder competition between competing undertakings (the OTAs) in the same relevant market.[305]

Contrarily, due to the lack of "direct" competition between hotels and Booking in the same relevant market, the fact that hotel partners cannot offer rooms at better conditions via their own websites does not harm competition between OTAs more than the impact of the horizontal agreement as stated above.[306]

Following the common line agreed with the fellow NCAs, also the *Konkurrensverket* accepted Booking's commitments, whose search and compare services can still be offered on the market to the benefit of the consumers.[307]

By the end, holding on the appeal presented by Booking after the fine imposed by the *Konkurrensverket,* the Swedish Patent and Market Court has issued its judgement prohibiting Booking from applying its clauses in contracts with hotels since October 2018. By this decision, also Sweden officially entered the group of Countries in which Booking's parity clauses have been completely banned.[308]

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[304] Ibid., para. 15.
[305] Ibid., paras. 24–26.
[306] Ibid., para. 28.
[307] "The results of the analyses carried out by the Competition Authority support the conclusion that hotels will have incentives to offer lower room prices in exchange for lower commission rates. An important motivation for the hotels in this context will be the competition between hotels for room bookings". Ibid., para. 46.
[308] Competition Policy International (2018).

d) Germany

Inconsistently with the approach adopted by the other NCAs, a few days before their acceptance of Booking's commitments, the German BKartA sent a statement of objections to Booking, stating that it would not have accepted the adjustment offered by the OTA to its wide parity clause, because the reduction in their scope was deemed to be insufficient to mitigate the anticompetitive repercussion on the online portals market.[309] Much of the purported key-findings used by the BKartA to build the *Booking* case, find their justification in *HRS* decision as upheld by the Düsseldorf Court of Appeal.[310]

Is the market two-sided?

The *Bundeskartellamt* does not state whether Booking is operating on two-sided basis, even if, as seen in all the cases but the French, the NCAs have always described its business model as entailing the existence of two interacting groups of customers.[311] However, the BKartA also pointed out some differences between these two sides: first it identifies the relationship between Booking and consumers as a "zero – price" non-monetary intermediary agreement, that has its origins in the moment in which the reservation is finalised; on the other side, there is a direct "monetary" agreement between booking and its hotel partners.[312]

How is the relevant market defined?

Following what already stated in *HRS* by the Düsseldorf Court of Appeal, the BKartA narrowly borders the relevant product market as to hotel portals[313] in Germany.[314] It does not include hotels' own websites and all the remaining online sales channels others than OTAs. The geographic market is limited to Germany.[315] As the

[309] Bundeskartellamt (2015b), para. 82.
[310] See above *HRS* case.
[311] Caccinelli and Toledano (2018), p. 210.
[312] Bundeskartellamt (2015b), para. 18.
[313] Offering the three classic services of "search, compare and book" which "are convenient for customers".
[314] Bundeskartellamt (2015b), para. 137.
[315] Ibid., para. 158. According to Andreas Mündt, president of the *Bundeskartellamt,* the strict reference to the German Market may be the very reason why the German Authority adopted a decision different from that of the fellow Authorities. Hotel portals necessarily "focus on Germany in terms of regional presence, content and advertising". Heinz (2016), p. 531. Moreover the BKartA rejected Booking.com's claim that its decision would have been inconsistent and "disproportionate"

Düsseldorf Court stated in the relevant precedent, the market for the hotel portal services, deemed to be "objectively offer-driven", sees the hotel portals "as suppliers" standing opposite the hotels "as consumers". [316]

How has the Authority determined the market power, the abusive conducts and their effects on welfare?

Booking retains 50-55% market share of the German relevant market, followed by HRS with 30-35% and Expedia with 10-15%. Moreover, in 2015, even if 70% of online reservations is made through OTAs, still offline sales seem to be the preferred booking channel, accounting for almost 70% of overall hotel bookings.[317]

As to the consequences of narrow parity clauses, the remaining constraint on hotels own online sales channel, i.e. their own website, is still believed to be abusive under Art. 20(1) GWB,[318] because Booking is unfairly impeding small and medium-sized hotel partners that are in a relation resembling the dependence on Booking.

Going more in depth, narrow provisions are thought to:[319] a) restrict hotels' free pricing and reduce their incentive to offer lower room rates; b) reduce incentives to offer hotels better terms and conditions and lastly c) reinforce entry barriers.

As to point a), the BKartA interestingly refuses the agreed theory according to which narrow parity clauses foster competition between OTAs. This is just theoretical,[320] since hotels will still be prohibited from offering better conditions on their websites, this meaning, conversely, that they will not be able to undercut OTAs. The BKartA does not believe that hotels will logically desire to price differentiate between OTAs, meaning that at least one of them (the one with better room rates), will unavoidably undercut their own websites (still forced to respect price parity with all the remaining OTAs which will be granted a higher price). This contravenes the same logic at the basis of any economic strategy, since hotels will always seek to maximize their profits by reducing commission fees cost.

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as to the positions adopted by the other Authorities, clarifying that it is not bound by their reasoning, since Art. 11 Regulation 1/2003 does not provide for any obligation. Bundeskartellamt (2015b), para. 328.

[316] Oberlandesgericht Düsseldorf (2015), para. 69.

[317] Bundeskartellamt (2015b), p. 46; p. 243.

[318] Ibid., para. 306.

[319] Heinz (2016), p. 531.

[320] Bundeskartellamt (2015b), para. 192 et seq.

As to letter b), subsequently to the general reasoning on wide parity clauses and to what is said about point a), since all major OTAs operating in Germany use parity clauses, it would be probable that the impossibility to practically offer better room rates will also negatively impact on competition among OTAs on commission fees level.[321] As to letter c), considerations already made for *HRS* are equally decisive.[322]

The Authority also goes further by addressing the potential impact of narrow parity clause on the hotel market, i.e. on inter-brand competition, that will unavoidably be hampered and sterilized by the same impossibility to price-differentiate *vis-à-vis* different OTAs.[323] At the end, restrictions are deemed to be appreciable, also due to the peculiar market concentration and the overspread presence of parity clauses on it. The BKartA concludes that is sufficient that just one of the major OTAs applies a narrow parity clause to produce almost the same effects, since hotels are usually listed on all of them.[324]

As to the impossibility to apply a block or individual exemption to this kind of agreements, the holding in *HRS* has been adapted to the slightly different scenario.[325] Hence, the BKartA judges that Booking has not been able to demonstrate the inextricability of narrow clauses from the potential efficiency gains arising from its business model.[326] Moreover, with a position that has been contested by some scholars, it also questions the very existence of a free-riding problem. According to the Authority, there would be a "real" free-riding problem just if the hotel partners could effectively "capture" customers thanks to their presence on the OTA and then benefit from their disintermediated booking on their booking engine. Nonetheless, if the proprietary booking engine cannot show better prices or conditions than those charged on the OTA, unlikely the customer will be convinced to leave the user-friendly and reliable

[321] Ibid., para. 213 et seq.
[322] Ibid., para. 220. Booking also submitted a study in which tried to demonstrate that price differentiation was still possible and probable, but the study has been rejected after the Authority considered it too much limited in terms of results and of the model used (just one hotel and one portal taken in isolation). It also submitted data from 4000 hotels that purportedly already took advantage of narrow parity clauses to price differentiate among OTAs, but again the statistic sample has been defined as "a too vague mix". Ibid., para. 207.
[323] Bundeskartellamt (2015b), para. 229 et seq.
[324] Ibid., para. 237.
[325] Ibid., para. 256 et seq.
[326] Such as "generating traffic, bundling demand, better utilization rate for hotels, improved access to foreign customers, reduction of search costs for end customers and transparent pricing". Heinz (2016), p. 533.

environment typical of the OTA to book directly on the hotel web-site.[327] By the end, as seen, the Authority also rejects that prohibiting narrow clauses would discourage market specific investments and investments in advertising (with a boomerang effect for small and medium-sized hoteliers). Just an effective competition on price grounds among OTAs, enabled by the ban of narrow parity clauses, will push OTAs to more effectively compete among themselves on price and non-price grounds. No fair share of efficiency gains for consumers (as demonstrated lower prices are almost utopic) and the individuation of possible alternative business models complete the demonstration of why these provisions cannot benefit from an individual exemption pursuant to Art. 101 (3) TFEU.

Last, but not least, as seen in *HRS*, the BKartA also questions whether Booking's conduct may be found illicit in terms of an abusive exploitation of its market power. Even if the NCA does not prove the effective presence of a dominancy, it finds Booking responsible of exerting abusively its bargaining power on "dependent" small and medium-sized hotels, pursuant to Sections 20(1),19(2) no.1 GWB. For this reason, narrow parity clauses have been found inconsistent with the recalled provisions of the GWB due to the lack of balancing interests in the relevant scenario. Hotels would have the interest to freely price their rooms, due to the retention of the economic risk, while Booking is found to have just the interest to "largely foreclose competition and secure its own booking volume, which cannot prevail".[328]

Some other aspects of this decision have been criticized by scholars. The BKartA opines that the Düsseldorf Court of Appeal held in *HRS* a complete ban of parity clauses, without any distinction between wide and narrow parity, hence justifying the reason why, differently from the other European NCAs, it had to reject Booking's proposal about narrowing its best price guarantee. However, although in *HRS* the Court without any doubt banned the implementation of parity clauses by HRS, it must be borne in mind that no evaluation has been carried out about potential effects of narrow parity clauses, that is otherwise provided by the BKartA in its *Booking* order.[329] For this reason, the BKartA's interpretation of the Court's decision is believed to be "overly

[327] Heinz underlines the partial illogicity of this reasoning by remembering that, according to Art. 101(3), efficiency gains should not necessarily derive from the alleged anticompetitive provision, but from the overall consequences of the agreement between the parties. Ibid., p. 535. See, after, chapter 3.
[328] Ibid., p. 534.
[329] Ezrachi (2015), p. 513.

wide". Its conclusions regarding narrow parity do not flow naturally from the Court's Judgement nor they do reflect a substantive analysis. In other words, "a ban on wide MFNs and a refusal to accept commitments which provide only temporary relief from wide MFN does not provide a firm analytical foundation upon which to base a ban on narrow MFNs".[330] The decision is also contested as it lacks to take into consideration the potential threats that more harshly stem from free-riding when also hotels' own websites are excluded from the parity rate obligation.

Trying to summarize the recurring theories of harm in NCAs' investigations, through a parity rate agreement a platform will be sure that no other competitors or competitive sales channels will display lower prices for the same room at the same conditions, and not thanks to a particular attention paid to keeping costs below or in line with competitors, but because it contracted for other OTAs prices to be no lower, including, in case of wide parity, hoteliers' own websites. Nonetheless, despite a unitary vision on these points, a fragmented analysis of free-riding defence produced the *unicum* of the German decision.

However, all the recent cases concerning OTAs in Europe "demonstrate a problematic approach in terms of the theory of harm and the legal provision used".[331]

The most concerning points arising from these decisions, involving the application of EU Competition Law principles, the consistency of the relevant market definitions and the assessment of the market power retained by Booking in all these cases will be addressed further in chapter 3. For the time being, it is worth to say that several contradictions characterize the decisions taken by the Authorities, even in their very own reasoning. For instance, first the Swedish Authority points out that the relevant behaviours belong to the category of the Vertical Agreements, then finds that is the horizontal parity (between prices offered by competing OTAs) rather than the vertical parity (between prices offered by a hotel and an OTA) that negatively affect competition.

The exact limitation of the results probably relies on the fact that none of the Authorities has addressed, in its investigation, all the major OTAs involved in the relevant market (except for the OFT and, probably), and again just a few of them

[330] Ibid., p. 514.
[331] Akman and Sokol (2017), p. 144.

addressed all the "parties" in the agreements (except for the OFT), risking creating an anomalous application of Article 101.[332]

4) *In re Online Travel Company*: an American Perspective on OTAs' Parity Agreements

US competition enforcers usually adopted a positive approach towards MFN clauses, sometimes even believed to have pro-competitive outcomes.[333] Parity clauses (deemed to fall within the category of MFN provisions)[334] are consequently seen under a more benevolent light.

In 2014, the District Court for the Texas Northern District decided the case *In re Online Travel Company (OTC) Hotel Booking Antitrust Litigation*,[335] a private case for alleged price fixing of hotel rooms rates by OTAs. The plaintiffs, a group of consumers, sued twelve major hotel chains, nine OTAs (among which Expedia, Travelocity, Priceline and Orbitz) and a travel industry news company, EyeforTravel, for a purported industry-wide conspiracy that, from 2003, had the aim of adopting RPM agreements (between hotels and OTAs), implying also further restrictions (defined as MFN provisions), in order to stifle price-competition among hotel booking portals.[336] It is worth noting that the alleged abusive conducts do not refer to the existence of a generalised adoption of an RPM,[337] but of a conspiracy to adopt it.

The Court dismissed the case on two bases.

First, on the ground that the plaintiffs have not managed to demonstrate that the defendant OTAs introduced their MFN provisions by agreement.[338] Parallel conducts

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[332] Se after, in chapter 3.
[333] For instance, *Blue Cross and Blue Shield United of Wisconsin and Compcare Health Services Insurance Corporation v. Marshfield Clinic, et Al.* (1998, vol. 152).
[334] And this, according to Hviid, is not only a "misnomer", but also an hint of how misleading some enforcers' interpretations of "across-platform parity agreements" (APPAs, i.e. parity clauses) may be. Hviid (2015), para. 48.
[335] *In Re Online Travel Company (OTC) Hotel Booking Antitrust Litigation* (2014).
[336] Ibid., pp. 2–6.
[337] And, again, Hviid states that this in is another inappropriate definition, since there would be an RPM if the hotel "said to the OTA «you must set this price and the price must be the same everywhere». But in this case the hotel is saying «this is the price and it is the same everywhere» and the OTA is not involved in setting the price. See also Hviid (2015), fn. 32.
[338] *In Re Online Travel Company (OTC) Hotel Booking Antitrust Litigation* (2014), p. 13. The Court opines that the conditions requested by US case law have not been satisfied. Furthermore it maintains that the high market concentration cannot ascertain the possibility for an alleged controlling group to impose this clause to the whole market.

are not sufficient to demonstrate the existence of a conspiracy, since they may be rationally explained on the basis that any defendant adopted the same vertical constraint to defend the profitability of its economic activity. Moreover, the general pattern adopted by the contracting parties is even rational. On the one hand, hotels retain their freedom to set final rates (even if losing the ability to price differentiate among intermediaries); on the other, each OTA is sure that any competitor will not be able to compete by the mean it has given up on, namely the possibility to discount hotel direct prices.[339] Also when, after the first rejection, the plaintiffs presented a Second Consolidated Amended Complaint in which abandoned the allegations about hotel chains, the Court reiterated its position.[340]

Second, the Court rejects the alleged mislead for consumers of the alleged deceptiveness of the "best price guarantee", by agreeing with the defendants that indeed the very application of MFNs make them intrinsically true.[341]

About the assessment of parity clauses, the holding provides several insights that must be borne in mind. According to the claimants, the defendants are believed to conspire in order to reduce intra-brand competition,[342] including hotel direct online sales channels. Both the plaintiffs and the Court agree that the two abovementioned agreements, i.e. the RPM and MFN, forms the two layers of an overall conduct, divided into a vertical (the RPM) and a horizontal element (the MFN). Consequence of this

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[339] Ibid., p. 14. Interestingly, the Court also dismiss that hotels would like to compete with OTAs through their own websites: "this conclusive assertion is undermined both by common economic experience and facts in the Complaint itself. First, the freerider theory of economics may explain why Hotel Defendants agree not to undercut OTAs on price. As applied to this case, the free-riding theory posits that the hotel will suffer a loss if the OTA fails to invest in "genuinely useful" services (e.g., a more powerful price-comparison search engine), because of the OTA's consumers will use the OTA's service to find a suitable hotel room, only to then go to another' website (i.e., the entity taking a free-ride off the OTA's services, such as the hotel) and purchase the room at a discounted value, cutting the OTA out of the deal. Second, the Complaint itself offers an alternative factor: each Hotel Defendant would prefer to compromise with each OTA Defendant and provide each OTA with the assurance of an MFN clause, rather than risk the competitive disadvantage of not reaching an agreement". Ibid., pp. 18–19.

[340] However, and this will be also important for the reasoning about the relationship between Art. 101 and 102 TFEU (see after in chapter 3), the Court theoretically agreed upon this decision, that at least "eliminates an inherent contradiction in the Complaint's theory – hotels are no longer simultaneously victims and willing participants in the scheme". See Colangelo and Zeno-Zencovich (2015), p. 71. The Authors quote the Court's Order denying *137 Motion to Amend/Correct,* 27 October 2014.

[341] *In Re Online Travel Company (OTC) Hotel Booking Antitrust Litigation* (2014), p. 30.

[342] Colangelo and Zeno-Zencovich (2015, n. 95). The Authors recall that the US Supreme Court (in *Leegin*) clarified that "the antitrust laws are designed primarily to protect inter-brand competition, from which lower prices can later result".

"RPM scheme" is the OTAs' best price guarantee, since they are quite sure than no lower prices will be displayed elsewhere.

Curiously, despite the relevant conducts being exactly the same as in the EU cases,[343] here a different vision is adopted, not without some contradictions. In its analysis, the Court shows that both the parties gained from this agreement, based on a rational scheme that any hotel-OTA couple would have implemented on an individual basis, automatically excluding the existence of a conspiracy. This could be, by the way, an odd reasoning: on the one hand, hotels want to retain their freedom to set prices, on the other, when they turn down the possibility to offer discounted rates on their websites, they end up ceding the very nature of price discrimination. "The argument offered for the hotel's part of the agreement is completely nullified by the OTA's part, so what is the *quid-pro-quo*? In addition, the OTA market is very concentrated in the US. In the light of that and the fact that the agreements created the perfect means for increasing prices, the decision to grant an early dismissal of the case may surprise some".[344]

[343] Hviid (2015), para. 50.
[344] Ibid.

3

CRITICAL ANALYSIS OF PARITY CLAUSES

The brief analysis just provided of case law on parity clauses demonstrates how far practitioners are from defining an unambiguous policy. Even if it has been repeatedly stated that investigations targeting platforms (especially in online environments) require authorities to adopt a case by case analysis of the relevant conducts, paying attention to the peculiar structure that characterises any two-sided market, it is indeed clear that at least an agreed method in approaching these cases should be provided. The several procedures dealing with Booking.com support this statement: although the European NCAs underpinned almost the same theories of harm, starting from the same premises, the same relevant conduct has sometimes led to diametrically opposed decisions.

Many scholars believe that such a complexity in "forging a European Competition Policy Response to Online Platforms"[345] can be attributed, among other factors, to the misunderstanding of the key-features of 2SMs.[346] Even if in many cases Authorities have at least demonstrated to take into consideration the main findings about the functioning of online platforms, such as the existence of several groups of users, with their respective demands, and of indirect network effects, their decisions have not been "anchored in a formal two-sided markets reasoning".[347]

In addition to that, some other contrasting forces must be faced in the path towards a more broad and unequivocal assessment of anticompetitive conducts in the more digitised and more global today's markets. Antitrust enforcement has widened its borders and its mission, diluting the main goals it was historically based on. The promotion of the market welfare, that has traditionally overlapped with the maximization of consumer welfare, has been essentially questioned by the same decisions. Moreover, this ambiguity is compounded by an increasing lack of legal certainty. Aiming to accelerate procedures and to obtain less distortive outcomes, EU Commission and EU NCAs have broadened their resort to commitments. A way to

[345] Alexiadis (2017), p. 3.
[346] Caccinelli and Toledano (2018), p. 223; Auer and Petit (2015), p. 456.
[347] Auer and Petit (2015), p. 452.

truncate investigations that, in the meantime, unavoidably limits the soundness of the decisions for future cases, since many of the more controversial issues may not be fully ascertained.

In this chapter, first the main controversial aspects arising from the cases regarding Booking.com will be dealt with, beginning from the most relevant differences among the European (and US) decisions. Then, this quite recent strand of case law will be considered not only to give an actual overview of the hotel booking sector, but also as an example to reflect on the present and the future of antitrust policy, namely addressing the challenges of an effective regulation of dematerialised markets.

I. CASES ON BOOKING.COM: A CRITICAL ANALYSIS

1) Main differences among the *Booking* cases

a) Two-sided markets' features

Following the three questions, adopted by Caccinelli and Toledano,[348] that has been used to lay down the assessment of the main European cases dealing with the Booking.com's parity clauses in chapter 2, the same scheme can now be implemented to point out the case-by-case differences that distinguish the European proceedings. As said, unsurprisingly, not only the relevant investigations have led to contrasting decisions, but even when some Authorities agreed on whether the related conducts should be defined as compatible with competition law principles or not, some inconsistencies must be noted, corroborating the previous statement that a unique approach and a unique policy, within the Single Market, is still lacking.

It has been highlighted, from the outset of this dissertation, that one of the starting points when scrutinising the anticompetitive reach of parity clauses is to adequately bear in mind the key-features of 2SMs. Among the European NCAs that targeted Booking.com between 2014 and 2015, the only one that explicitly refers to hotel online booking market as a 2SM is the French ADLC.[349] Curiously, also in the note submitted by Italy to the OECD Hearing on "Competition and cross-platform parity agreements" (that took place in October 2015, so just a few months after the

[348] Caccinelli and Toledano (2018), pp. 197–199.
[349] Autorité de la Concurrence (2015b), p. 25. *Unofficial Translation.*

decisions were adopted), OTAs are defined as firms that "typically operate in two-sided markets, coordinating the interdependent demands of two distinct groups of customers, who need to interact with each other".[350] Nevertheless, Italian, Swedish and French NCAs, notwithstanding a certain awareness of the presence of two interrelated sides linked by the intermediation service offered by Booking.com, still reveal a certain deference to a more standard one-sided logic when, ultimately, decide to focus on just one market, that is the upstream side regarding OTAs and hotel partners, refusing to give an adequate relevance to the cross-platform externalities.[351]

The same ambiguous logic can be found in the German decision, that follows the previous Düsseldorf Court of Appeal's holding in *HRS*. Albeit the BKartA recognises the presence of indirect network effects between the "unremunerated"[352] side (that is the end-users' side) and hotels, capable of influencing the volume of transactions finalised through the platform, still it defines just a single-sided market, formally leaving "this question open in the present case".[353] The intermediation service exerted by Booking.com is believed to remarkably rely upon the existence of network effects, but then they are completely absent in the evaluation of Booking.com's business model.[354] In addition to that, the cited Authors,[355] point out that the German Authority also betrays a clear uncertainty in defining who is the "real" group of customers targeted by Booking.com' business strategy. First, the NCA states that there are two groups of users interacting on the platform, then maintains that there is an intermediary relationship just between the platform and the end-users, while only a "simple" contract binds it to the hotel partners. This configuration is kept in the preliminary definition of the relevant market,[356] whereas, in the decision chapter dedicated to the relevant market definition,[357] a wider emphasis is given to the rather passive role played by the platform,

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[350] OECD Competition Committee (2015), para. 11.
[351] Caccinelli and Toledano (2018), p. 213.
[352] Bundeskartellamt (2015b), para. 142.
[353] Ibid., para. 141.
[354] Also, it must be noted that in another recent case about online platforms in the real estate sector (Merger B6-39/15, *Merger Approval of Online real estate Platforms)*, the BKartA broadly recognised the logic of a zero-price side in a business model based on the existence of different groups of users. Similarly the Italian AGCM in a case about broadcasting rights (*Provvedimento n. 24206, Procedure Selettive Lega Calcio 2010/11 e 2011/12*), where it was used the expression "*mercato a due versanti"*, i.e. the Italian translation for two-sided market.
[355] Caccinelli and Toledano (2018), p. 214.
[356] Bundeskartellamt (2015b), para. 137. The relevant product is described to be the "search, compare and book" function, clearly referring to the consumer side of the platform services.
[357] Ibid., chap. IV.

mainly focusing on the supply of intermediation services to its sole customers, who are now described to be the hotel partners. They are said to demand for search and compare services to make their rooms available online, aiming at maximising the number of end-users booking via the platform, whereas no attention has been paid to the overarching "Booking.com's aim to get both more hotels and more consumers".[358]

Another question remains open, since it is still missing an empirical demonstration of how the Authorities' conclusions could have differed if they had been more deferent to the main theories about two-sided markets. Even in cases at the beginning structured by the authorities to address 2SMs, like the European and American proceedings regarding Microsoft during the last decade, it has been noted that 2SM theory has often been used just to delineate the overall framework of the case, while the authorities' reasoning remained intrinsically one-sided.[359] Nevertheless, few details are given about how the decisions could have been practically different. In the relevant cases dealt with in this dissertation, it could be thought that the Authorities should have considered the usage externalities arising from the consumer-side of the market and their influence on the lock-in of hotel partners, as a reinforcing mean for the latter's market power. However, talking about the acceptance of the commitments, would it be decisive to refuse them and to consider this conduct overarching to the free-ride concern? If so, would it be sufficient the "simple" removal of parity clauses from contracts and terms and conditions to restore an effective price competition benefitting consumers and market welfare? These questions will be further discussed in this chapter, also in view of the most recent changes in OTAs' business models and of some papers considering the evolution of hotel prices after the relevant decisions entered into force. For the time being, it is sufficient to recall that, practically speaking, for authorities it should be not *per se* relevant if a market is two sided, but rather if it is relevant for the definition of the case. There are many cases in which the relevant conduct is already so well determined and so much resembles more standard (and offline) conducts that it could be trivial to spend time (and resources) in duplicating all the analysis to address the two-sidedness of the relevant market.[360]

[358] Caccinelli and Toledano (2018), p. 214.
[359] Auer and Petit (2015), p. 456.
[360] Ibid.

On the contrary, a better subsumption of 2SMs' key features may grant a better understanding of the beneficial consequences of parity clauses, as for the demonstration of the existence of efficiency gains deriving from the reduction of free-riding concerns pursuant to the first condition of Art. 101 (3). Recently the CJEU has made clear that, in case of 2SPs, to fulfil the first condition laid down in Art. 101 (3) it is necessary to take into account all the objective advantages flowing from the measure, including also the side of the market being not directly addressed by the relevant conduct. Nonetheless, the advantages on the "other side" will not suffice whether the benefits on the "first" side should not be appreciable.[361]

b) The definition of the relevant market

The concerns that have been expressed in literature about the effective subsumption of 2SM features find their principal source in the definition of the relevant product market. Between the four main Authorities investigating the case, just the ADLC distinguishes between an upstream and a downstream market, respectively defined as the "profit-making" and the "loss-leader" or "subsidized" segments, given the zero-price strategy adopted in the consumer-platform relation.[362] Nonetheless, it is quite clear that, after providing such a definition of the structure of the relevant market, the Authority again turned to a single-sided vision, when the upstream market is the only taken into consideration. For instance, the SSNIP test has been applied only to the upstream market. And the few points in the proceeding in which formally the downstream market is involved in the reasoning are deemed to be not relevant:[363] although the ADLC maintains that an hypothetical increase of 5-10 % in commission fees above the competitive level may cause the shift towards substitute products for both the groups of customers,[364] neither this finding is further followed in the other parts of the decisions, nor it is more in depth ascertained. The Authority does not pay any attention to the interdependence between the two groups of customers, that are thought

[361] *Case C-382/12 P, MasterCard and Others v Commission* (2014), paras. 228–231.
[362] Autorité de la Concurrence (2015b), p. 25. *Unofficial Translation.* The ADLC follows the categories lied down by Rochet and Tirole (2003), paras. 991–992.
[363] Caccinelli and Toledano (2018), p. 215.
[364] Autorité de la Concurrence (2015b), pp. 25–26. *Unofficial Translation*.

to be autonomously influenced by the raise of the commission fees.[365] Swedish and German approaches almost resemble the French one.

A different logic is followed by the Italian AGCM, that, instead of referring to the existence of two markets vertically related, defines a relevant market in which any form of online booking is deemed to be a potential substitute of OTAs' services. The reasoning is concentrated on the dichotomy online/offline reservations, with the important consequence of including hotels' own websites in the same relevant market. By this inclusion, the AGCM reveals to prefer a more horizontal dimension than the French counterpart, mainly focusing on the vertical relationship between OTAs and hotel partners.[366]

In any case, it must be noted that this interpretation of the relevant market could also undermine the consistency of the Authority's acceptance of Booking.com's narrow parity clauses. If hotels are expressly deemed to be not only "partners", but also competitors of OTAs, namely through their online websites, they should be included among the firms for which the relevant market (i.e. online reservation services) could be foreclosed by the exclusionary conduct of the incumbents. Moreover, direct online sales channels could offer the same rooms at lower prices, since there is not an intermediary to be remunerated for the finalisation of the booking, ultimately benefitting consumers. Nonetheless, the measures accepted by all the European Authorities but the German, including the AGCM, are only intended to foster competition among OTAs, expressly excluding hotels' websites from the possibility to price differentiate, due to compelling free-riding concerns. By that, it might be inferred that the Authorities made the policy choice to favour non-price welfare enhancing features (user-friendly interface, pre- and post-sale services) rather than a price competition (even though just potential) between OTAs and hotel partners.

In addition to that, offline sales channels are excluded from the relevant product market and from the application of narrow parity clauses. A study from Anderson,[367] even if dating back to 2009, showed that being listed on OTAs has the direct effect to boost even the volume of offline reservations (with a peak of 26% for US independent

[365] Equally, the Authority, after stating 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", does not provide any information on how these features should influence the adoption of the final decision. Ibid., p. 25.
[366] Caccinelli and Toledano (2018), p. 216.
[367] Anderson (2009), p. 8.

hotels), demonstrating that OTAs are often used for the search and compare function, while bookings are later made via offline hotels' sales channels (telephone, e-mail). This is another element that challenges the reach of the adopted decision: after the narrowing of the clauses, that excludes offline sales channels from the respect of parity, the OTAs are exposed to a free-riding concern seemingly more compelling that the one produced by hotels' websites.

It appears quite straightforward that the Italian Authority has decided to leave the question open. Otherwise it would have had to endorse one of the two visions. Namely, either to endorse the recognition of hotel websites as effective competitors, by that equating their situation to that of any smaller or newer OTA, that means the rejection of "narrow" parity clauses which hamper any form of price competition between OTAs and proprietary websites; or to deny (as in the US decision) that proprietary websites can effectively compete with OTAs, by that excluding them from the range of the substitute producers and then justifying the acceptance of narrow parity clauses.

Nevertheless, this reasoning is in general made more complex by the free-riding argument, since it is also questionable whether a non-effective competitor,[368] excluded from the relevant product market, could be seen as a remarkable source of free-riding concerns to the extent that, to protect the OTAs' business model, it is necessary to prohibit the undercut of their offers by hotel websites.[369]

Even if not agreeing with the German reasoning that has led to the rejection of Booking.com's commitments, this is a topic that cannot be underestimated when assessing the soundness of the decisions. The Italian AGCM has revealed an initial vision similar to the German one, but then has adopted the same position of the other Authorities. Probably, this outcome could be attributed to the willingness to adopt a

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[368] Autorità Garante della Concorrenza e del Mercato (2015b), p. 18. The AGCM opined that only a 5-15% of hotel bookings were made via hotel own websites, while still a 60-70% was finalised through offline sales channels.

[369] Akman emphasises one more possible inconsistency produced by the agreed scenario. Because of the suppression of the linkage between OTAs and offline sales channels, but not with hotel websites, consumers wanting to know if the hotel directly offers better prices will need to contact it individually by phone or e-mail. This not only increases search and transaction costs, "but also defies the convenience of having PCWs (OTAs) in the first place because the consumer would need to contact hotels separately to make use of their potentially better offline rates". This questions the very core of the free-riding defence, which relies on the efficiencies produced by OTAs and namely on the reduction of transaction costs, that, on the contrary, are substantially raised by the same decisions that have been intended to defend exactly these efficiencies produced by online platforms. Akman (2016), p. 802.

common position alongside the French and Swedish counterparts.[370] A compromise reached with the Swedish *Konkurrensverket,* that strongly endorsed the necessity to let Booking.com still apply its parity towards hotel websites.[371]

c) The anticompetitive conducts

Leaving aside for a while the problem of the potential subsumption of the cases under the different category of abuse of dominant position, though collective, for the time being the analysis must focus on the partially divergent approach followed by the Authorities, also in defining the theories of harm to be implemented in the *Booking* cases.

Following a certain strand in antitrust literature that underlines the multidimensional structure of platform parity clauses,[372] both the French and German Authorities believe that such clauses, alongside a more acknowledged horizontal impact, also produce anticompetitive effects relevant from a vertical point of view, that is, the relationship with the hotel partners. On the one hand, the ADLC opines that Booking.com is able to exert its market power by an increase in commission fees; on the other the BKartA also considers Booking.com liable of unfair impediment of small and medium-sized hotels which are "dependent on the platforms".[373] Some commentators[374] reason on the ambiguity stemming from the decision to address just part of the potentially involved firms in their investigations, that has been the common trend in all the European decisions on OTAs except for the English one.[375] It is indeed straightforward that, revealing to pay an increasing attention to the horizontal element of the clauses, it would have been more consistent with this logic to address all the alleged parties in this potentially collusionary scheme, i.e. all the competing OTAs retaining sufficient market power to harm competition in the relevant market.[376]

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[370] Caccinelli and Toledano (2018), p. 218. "The AGCM might have considered that the anticompetitive effect of this clauses would have been limited enough to be outbalanced by the benefits of providing a consistent, transnational response to the abusive behaviour under analysis".
[371] Ibid., p. 216.
[372] Hviid (2015); Fletcher and Hviid (2016).
[373] Bundeskartellamt (2015b), para. 244. See above in chapter 2.
[374] Akman and Sokol (2017), p. 148.
[375] Following its overall vertically approach to the case, the OFT investigated the "separate arrangements" that Booking.com and Expedia each entered into with IHG.
[376] In the wording of the BKartA in *HRS*, "the economic effect of the MFN clauses is similar to direct collusion between the hotel portals, namely concerted behaviour regarding the sale of a specific hotel room at a specific minimum price". Bundeskartellamt (2013), p. 157.

Nonetheless, the same Booking.com's market power is not straightforwardly defined. Many Authorities have declined to precisely define the market shares retained by the OTA, often just recurring to a non-precisely analysed overrun of the 30% threshold pursuant to the VBER. And this is not all: as seen in chapter 1, dealing with the main characteristics of two-sided platforms, in digitised markets there are also some other "forces" at stake, that can influence the overall market power as perceived by other firms, both horizontally and vertically related with the incumbent. For instance, an emulation process by smaller or newer competing OTAs makes the incumbent's business model to be considered as the most profitable in a relevant market in which customers are already "accustomed to it",[377] by that reinforcing Booking.com's position. Furthermore, this has been also useful to the ADLC's defence of the commitments, since the adoption of parity clauses may be seen by small platforms as a way to protect themselves from the threat of free-riding, that, given their necessarily limited market power, could be more conceivable.

However, some authors[378] also ascribe the reason of different evaluations, by different NCAs, to the presence of some country-specific features that should not be underestimated, albeit highlighting the potential harm to the protection and promotion of a single antitrust policy in an (allegedly) single market perspective.[379] Hence, a high tribute to the peculiar national hotel market can be found both in Italian and German decisions, where emphasis is given to the characteristic fragmentation of lodging market due to the large presence of independent small and medium-sized hotels, often owned by single firms and not linked, even just by contractual means, to bigger national or international hotel chains. This impact on their capability to implement direct online sale channels, because, just in the case of major hotel chains, proprietary websites have been demonstrated to be an effective competitor to OTAs.[380] Notwithstanding a similar market structure, with almost the same OTAs operating in the two markets, German and Italian Authorities adopted diametrically opposite decisions about narrow parity clauses.

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[377] Autorité de la Concurrence (2015b), p. 12.
[378] Caccinelli and Toledano (2018), p. 218; Heinz (2016), p. 535.
[379] Heinz (2016), p. 535.
[380] Toh, Raven, and DeKay (2011), p. 182. According to the AGCM, in Italy independent hotels represent the 85% of all hotels, usually offering a limited range of rooms. Similarly, the BKartA recalls that in Germany over 60% of "classical lodging businesses" offer less than 20 rooms. Autorità Garante della Concorrenza e del Mercato (2015b), para. 55; Bundeskartellamt (2015b), fn. 425.

Equally, even if all the four NCAs showed to pay attention (at least formally) to the existence of indirect network externalities (and all of them failed in demonstrating how these forces impact on the economic analysis of the conducts),[381] it is just the Swedish *Konkurrensverket* that based its reasoning (and its acceptance of free-riding justification) on a clear scrutiny of the positive effects of parity clauses on the market welfare. Namely, the Authority opines that vertical parity clauses preventing hotels from offering better conditions on their proprietary websites are a natural consequence of Booking.com's business model, due to the fact that "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 […]".[382] Moreover, without a proper subsidy of the end-users' side, Booking.com is believed to not be able to contribute to price transparency and to "an increased competition between hotels"[383] (exactly the opposite of the German decision!)[384] to the benefit of consumers.

As to the reasons of this different approach, which cannot be attributed only to country-specific features impacting on the assessment of the relevant market and of the OTA's market power, some authors questioned whether it could depend on a different approach to the individual exemption pursuant to Article 101 (3) TFEU. On the one hand Heinz[385] directs her attention onto the Authorities' evaluation of the efficiencies produced by the clauses, demonstrating that the BKartA has rejected the commitments on the basis that positive aspects stemming out from parity clauses were unavoidably

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[381] Caccinelli and Toledano (2018), p. 219.
[382] Konkurrensverket (2015), p. 7.
[383] Ibid.
[384] Where business models not based on the request of a commission fee just to the hotel partner have been deemed to be vital alternative to resolve both the free-riding concerns and the anticompetitive restraints. Bundeskartellamt (2015b), para. 290. Caccinelli and Toledano nonetheless note that the stricter approach taken by the German *Bundeskartellamt* follows a smoother previous vision adopted by the same Authority in a background paper on vertical restraints in the Internet economy published shortly after the conclusion of *HRS* (prepared for the 2013 meeting of the Working group on Competition Law). It must be remembered that in *HRS* just wide parity clauses were at scrutiny, while in *Booking* the decision mainly involves the acceptance of narrow parity. Hence, in the background paper The BKartA states that free-riding concern is particularly harsh for platforms being remunerated on a commission fee basis, while the platform would have all the interest to actively promote the sale of its supplier's products. Inconsistently with this vision, in *Booking* the BKartA rejects any stance for indispensability for narrow parity clauses, instead reiterating that the incentive to quality-driven investments would not be affected even in case of free-riding. Caccinelli and Toledano (2018), p. 220.
[385] Heinz (2016), p. 533.

outbalanced by the existence of negative externalities. Nonetheless, the Author fiercely contests this arrangement and the assumption that there are no relevant efficiencies to fulfil Art. 101 (3) requirements: namely she finds "doubtful" the BKartA's opinion to require the efficiencies to directly derive from the "narrow MFN", excluding the general platform efficiencies (that are somehow protected by narrow parity) from the balancing test. The Author points out, on the contrary, that Art. 101(3) requires the Authority to weigh the efficiencies arising from the overall "economic activity that form the object of the agreement",[386] i.e. from the complexity of the contractual agreement and not just by the clauses imposing narrow parity.[387]

On the other, Caccinelli and Toledano, disagreeing with Heinz's stance, believe that the German stricter approach is only due to a *per se* approach that the BKartA pursued in this investigation, in contrast with a "rule of reason" applied by the other three Authorities, that has been fiercely endorsed by the Swedish *Konkurrensverket*.[388] Namely, the BKartA's stricter logic would be "locked-in" in the *HRS's* decisions, as upheld by the Düsseldorf Court of Appeal, notwithstanding that wide, and not narrow, parity clauses were object of that investigation.

For the sake of completeness, it should be said that Heinz, although briefly, refers to the application of a *per se* prohibition logic to the BKartA's reasoning about the individual exemption. She also opines that this procedure could derive from the German law amended by the Regulation 1/2003, in which MFN clauses were deemed to be *per se* infringements of the prohibition to restrict any resale pricing, and then hard-core restrictions. Nonetheless, again, despite criticising such an approach that would be

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[386] As maintained in the 2004 Commission's Guidelines on the application of Article 81(3) of the Treaty. European Commission (2004b), para. 53.

[387] At most, the direct linkage between efficiencies and anticompetitive restraints should be relevant for the indispensability test also required by Art. 101 (3) TFEU. Moreover, Heinz also challenges the BKartA's requirement of Booking.com to demonstrate its necessity to exit the market in case of the narrow parity clauses having been quashed.

[388] Caccinelli and Toledano (2018), p. 221. Nonetheless, quite curiously the Authors dismiss the theory of a different interpretation of the individual exemption by citing the Authorities' rejection of the Vertical Block Exemption Regulation. The Regulation should be considered as a sort of practical actualization of the Commission's view on the only possible cases in which a vertical agreement producing efficiencies should be held procompetitive and, then, exempted. If the block exemption requirements are not met, even if just for the excess of the 30% threshold laid down in Art. 3, then also an individual exemption should be excluded. However, even if this statement could be empirically demonstrated, the provision in Art. 101(3) is considered to be exactly the last resort for firms seeking for an exemption when failing to fall within the dimensional requirements of the group exemption. If the individual procedure should be excluded when a group exemption regulation cannot be applied, the relevance of Art. 101 (3) could be strongly reduced.

linked to an abolished provision, the Author does not exclude, for this reason, the applicability of the individual exemption to the relevant case.

II. Controversial Issues Arising From the Antitrust Assessment of OTAs' Parity Clauses

Leaving aside the comparison between the *Booking* decisions, the next step some part of the relevant literature[389] moved to is to focus more on the impact of the endorsed positions in terms of evolution of antitrust law, rather than stressing the discrepancy between them. Hence, there are some ambiguous points in Authorities' explanations of the rationale behind their decisions, that leave some questions open, such as whether an online travel agent should be considered a reseller or a genuine agent; whether the relevant conducts should have been more correctly deemed to be an abuse of dominant position instead of an agreement falling within the provisions on cartels and vertical agreements; whether, given the subsumption under the category of the vertical restraints, the restriction should be considered an infringement by object or by effect.[390] Moreover, it is indeed clear for scholars that all the questions just raised find large part of their justification in the still too fragmented European approach to some antitrust issues, due to a sometimes excessively ambiguous application of the principle of subsidiarity in leaving the national NCAs at the head of important investigations which, having a clear impact throughout the single market, should encourage the Commission to take over these cases.

Reasoning on the approach followed by the European NCAs, Akman points out that, inconsistently with the previous European case law involving price parity clauses, the national Authorities have endorsed a theory of harm more based on collusion rather than foreclosure as the most concerning consequence of the relevant conducts. Thus, this is deemed to be the reason why the most rational approach was to assess the OTAs' behaviours under Art. 101 TFEU. An "unfortunate" choice, since from a normative perspective, it could have been more appropriate to scrutinise parity clauses under Art.

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[389] Akman (2016), p. 803; Colangelo (2017), p. 10; Colangelo and Zeno-Zencovich (2016), p. 81.
[390] This analysis, except for some necessary references to the US antitrust law and enforcement, should be as valid for the European context as for the US one, given that both the competition legislations provide similar provisions, "namely a rule prohibiting anticompetitive agreements and a separate rule prohibiting anticompetitive unilateral conduct". Akman (2016), p. 803.

102 and its national equivalents.[391] All the controversial issues which are going to be analysed are believed to derive from this choice.

a) Online travel agencies: genuine agents or resellers?

"The first and potentially formidable hurdle"[392] that must be faced when reasoning on the appropriateness of the assessment of parity clauses under Art. 101 is to correctly assume the "true" nature of the platform at stake, that is to decide whether it must be considered as a genuine agent[393] or a reseller. This is not a superfluous question, since from the answer may depend the classification of the firm as an independent undertaking and the same applicability of Art. 101 to the relevant conducts, that is excluded for the agreements regarding two or more legal persons that form "a single economic entity".[394] The decisive element is the "unity of the conduct" of the two firms on the market, not whether they are formally separated or not.[395] Moreover, it has already been stated that the allocation of the commercial and financial risks between the principal and the intermediary is the relevant element identified by the CJEU[396] and by the Guidelines on Vertical Restraints[397] to lead the reasoning over this topic.

As seen in chapter 2, some of the Decisions dealing with parity clauses in the hotel online booking sector, have taken into consideration this issue: for instance, the OFT decision, where scholars usually think that the Authority implies that they must be

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[391] Ibid., p. 804.
[392] Ibid., p. 805.
[393] As seen above, in chapter 1, according to Section 13 of the Commission's Guidelines on Vertical Restraints, it is an agent a "legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person, either in the agent's own name or in the name of the principal", entitled with the power to purchase or sell goods and services for the principal. It is not relevant how the intermediary-supplier relationship is formally defined by the parties (Guidelines Section 3). It shall be taken into account that, under Regulation 1/2003, national antitrust provisions or authorities cannot prohibit agent-principal agreements, exempted from the Application of Art. 101, when they produce an effect on trade between Member States, that has been considered to be the case in OTAs' investigations (for instance in the Swedish decision and in *HRS*). This means that, if these cases had been found to be an agent-principal setting with effect on trade between Member States, NCAs would have been prevented from declaring them as anticompetitive even under domestic competition law provisions. *Council Regulation (EU) No 1/2003* (2002), § 3 (2).
[394] As in *Case 15/74 Centrafarm BV v. Sterling Drug, Inc* (2006), para. 41.
[395] As reiterated *Case C-279/06, CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* (2008), para. 41.
[396] Ibid., paras. 44–46. The Court also considers not applicable Art. 101 when the intermediary is only bearing a "negligible share of risks".
[397] European Commission (2010a), para. 15.

seen as agents of the hotel-partner.[398] Different has been the position adopted by the BKartA in the strand of decisions that began with *HRS*, where OTAs' classification as agents has been clearly rejected.[399] Several are the reasons adduced by the Authority to these conclusions, all of them being somewhat related to the introduction of parity clauses. First, the Authority maintains that the restraint has not been introduced by a principal (in this case hotel partners) on the alleged agent, but rather the opposite.[400] Second, HRS is deemed to bear its own financial and commercial risks, as demonstrated by the high volume of market-specific investments carried out by the platform.[401] Last, but not least, the Authority also applies the aforementioned principle expressed by the European Court in *VVR.*[402] Despite dealing with a bricks-and-mortar Travel Agent, in *VVR* the Court rejects to recognise the existence of genuine agent relationship when the intermediary is linked to (and commercializes the services of) more than one upstream firm (in the case tour operators). The Court opines that in such a context it is hard to observe the required single unity of the economical conducts of the firms and the lack of dependency from the intermediary, who is able to adopt independent selling strategies that could lead to favour one supplier rather than another when promoting the services to the end-users.

All these three reasonings are refuted point by point by scholars. First, it is found to be not *per se* relevant, as to the agent-reseller issue, if the intermediary was endowed of sufficient bargaining power to obtain the acceptance of its proposed terms before the principal-agent relationship entered into force.[403] The intermediary may well be in a stronger position than the principal before entering in the agreement and the principal

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[398] Colangelo and Zeno-Zencovich (2016), p. 79. However, as seen above in chapter 2, the same Authors infer from the fact that the OFT investigated the infringements that the authority went for a non-agent classification of the OTAs or, at least, excluded that the genuine-agent nature could be an obstacle for the antitrust assessment of the conducts. Whatever should be the case, adopting a vision more consistent with the aims of antitrust law, it is in fact not possible to exclude any anticompetitive concern even when a principal-agent relationship is envisaged. It is indeed clear, and it has been, even if in a fragmented way, endorsed by enforcers, that there are cases in which this relationship may produce effects outside the principal-agent relationship, impacting on a more horizontal dimension. Bennett (2013), pp. 5–6.

[399] Bundeskartellamt (2013), para. 145.

[400] Bringing about the doubts of some authors (including Akman), who reflect on the unilateral amendment of contractual provisions by HRS as found by the BKartA. If this scenario were confirmed, this would support for a materially different approach to the case, more consistently related to the abuse of dominant position.

[401] Consistently with this opinion, see Buccirossi (2013), para. 102.

[402] *Case C-311/85, VZW Vereniging van Vlaamse Reisbureaus v VZW Sociale Dienst van de Plaatselijke Overheidsdiensten* (1987), para. 20.

[403] Bennett (2013), p. 8.

may be "forced" to grant larger concessions to obtain a new agent; nonetheless, once the conditions should have been accepted, the "agent may well act as a single economic unit with the principal and hence constitute a genuine agent".[404] Any previous bargaining power should not be considered resolutive enough to demonstrate the following ability of the agent to act independently.

As to the second point advanced by the BKartA, the statement about the investments is believed to confuse the risks and costs that any business, including that one of agents, must bear with the assumption of any relevant risk arising from the principal's activity.[405] Moreover, OTAs are deemed not to bear any risk associated with the transaction, such as the risk for the sale not being finalised (even in terms of cancellation penalties).[406] Most important, they do not set prices. Other authors, nonetheless, promoting a more general effect-based antitrust policy and paying much more attention to economic evaluations, suggest that a different perspective should be adopted both by authorities and scholars: the single economic unit should be tested by questioning whether, as to the contested behaviours, the alleged agent has taken the same potential decision of the principal or not, that is to say, in more "economic terms", whether the decision will find agent and principal interests "aligned".[407]

As to the third point, though scholars agree on a stricter application of the Court's reasoning in *VVR* in relation to the hotel online booking sector, there is not uniformity as both the rationale of this different approach and the consequences it would produce in the relevant cases. Also in light of the explicit provision in the Guidelines pursuant to which "it is not material for the assessment whether the agent acts for one

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[404] Ibid.

[405] Akman (2016), p. 808. It is also expressly stated in Section 15 of the Guidelines on Vertical Restraints that the risks related to the activity of providing agency services in general, including "general investments in personnel, premises" and so on, are not material to the assessment of whether the intermediary bears risks of the type that would render the agency exception inapplicable.

[406] However, it must be noted that, in this case, even if not bearing the 'cost' of an unsold (or not granted) room for a certain date, the OTA will equally lose the commission fee, since usually Terms and Conditions applied by OTAs link the payment of the commission to the successful collection of the payment by the Hotel.

[407] Bennett (2013), p. 6. The Author believes that this criterion would allow to better distinguish between the "real" agency agreements from the "sham" agency models usually designed just to bypass RPM provisions. RPMs, according to Bennett, produce a settlement that splits producer and reseller's interests, as demonstrated by the fact that the reseller has the ownership of the good, while the price is set by the producer. In genuine agency models both ownership and pricing strategies remain at the principal.

or several principals",[408] the apparent contrast that the Court's ruling might have with the Guidelines could be solved by reflecting on the logic behind the decision, that, into practice, deeply resembles what already stated about the single unity conduct. The ruling may be correct "from an initial economic viewpoint", since, when acting as an agent to multiple competing principals, it will be difficult to satisfy all their wishes simultaneously. The concerns that could arise from their contrasting interests could require the agent to take a side in the possible dispute, independently deciding which principal's instruction to prioritise over the others, jeopardising, as a result, the classification as genuine agent.[409]

At this point, two, not necessarily contrasting, solutions are given in literature. On the one side, Bennett,[410] changing the perspective, maintains that digital platforms should be seen as a sort of third category, other than the traditional figures of agent or reseller. The business model implemented by OTAs and many other digital platforms may not be considered neither that of traditional retailers nor that of genuine agents. Investing a large amount of resources in advertising, both of certain destinations and of certain properties, that is bearing high market-specific costs, OTAs are deemed to fail a narrow agency test; on the contrary, it is well known that OTAs neither take ownership of the hotel rooms, nor directly set prices for the rooms displaced on their platforms. But if not an agent, and if not, according to Bennet,[411] strictly violating the RPM provisions,[412] a too narrow, and too strict, test may produce distortive enforcement decisions. Hence, unsurprisingly, the solution suggested by the Author would be to narrow not the criteria applied to the Agency test, but, when reasoning with digital platforms, rather the same relevance of the Genuine Agency test. A 'Platform Exception' should replace the more traditional 'Genuine Agency Exception', without forgetting that, when reasoning within digital contexts, the mere fact that the firms are vertically related in a principal – agent relationship does not, *per se*, exclude that this structure will harm competition.

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[408] European Commission (2010a), sec. 13.
[409] Bennett (2013), p. 7.
[410] Ibid., p. 9.
[411] Ibid., p. 10.
[412] As to the possibility to equate parity clauses to RPM, see above in chapter 1 and the next section of this chapter.

On the other, adopting a more traditional approach towards the Genuine Agency test, Akman[413] reflects on the relevant differences between the *VVR* scenario and the OTAs' investigations. Namely, the author rejects the possibility that OTAs may have, alongside the necessary means, even just the interest to influence the transactions finalised on their platforms, preferring some properties to the detriment of others. Since "the full list" of hotels is provided and the platforms does not directly intervene in the consumer's choice, it can be considered as a genuine agent.[414] Nonetheless, as the English case demonstrates, this does not necessary entail that the relevant conducts should be completely exempted from an antitrust scrutiny. In particular it must be remembered that the agent-principal relationship could facilitate collusion or exclusionary conducts, by that infringing Art. 101, if to the vertical relationship were added some other elements (like parity clauses) capable of impacting on a horizontal dimension.

This brief analysis demonstrates how far is a common approach to the implementation of the agent-reseller test to the cases involving platforms in digital markets. Moreover, as for many other not "trivial" issues, in the relevant decisions a few arguments are often provided about the enforcer's view on this topic. Nor, at the moment, may be resolutive the words of the former DG Competition Deputy Director General Italianer, who, formally defined OTAs as resellers, due to the significant investments made in advertising, software and customer support.[415]

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[413] Akman (2016), p. 809.

[414] In case a "full list" of the hotels should not be displayed, according to Akman, this would first go for a potential breach of the contract between the platform and the hotel, then it could also undermine the same overall strategy of the platform which, by promoting one hotel just on grounds such as the higher commission fee granted, could meet the consumers' dissatisfaction. Even if persuasive, this statement, could clash with the most recent strategies expressly adopted by OTAs, that, as in the English case (see above in chapter 2) are rising concerns within the enforcement Authorities. Namely, any possible manipulation of the hotels' ranking (i.e. the order in which they are displayed on the platform once the consumer's query is launched) may result for exactly that "independent" choice made by the OTA that, by discriminating between hotel partners on the ground of the commission fee percentage and other contractual concessions, may promote hotels not in a purely "efficient" perspective.

[415] Italianer (2014), p. 10. According to Italianer, two are the most relevant characteristics of the OTAs' business model that should influence the antitrust assessment, namely the shifting of bargaining power towards the intermediary and "the combined use of resale price maintenance and the price parity clause", capable of eliminate intra-brand competition, reduce intermediaries competition on commission fees and the market foreclosure for new entrants.

b) Restrictions by object or by effect?

The second fundamental question raised by scholars is whether the relevant conducts should be considered an infringement of competition law by object or by effect. This is not a purely theoretical issue, since from the position endorsed by the enforcers depends the treatment, that, in concrete, the behaviours may receive in the proceeding, with more burdensome proofs to be provided by the defendant in case the conduct should be shown to have a *per se* anticompetitive nature.

Nonetheless, there are two preliminary issues to be addressed before going more in depth with the relevant topic of this paragraph. First, as largely said in in this dissertation, parity clauses produce a certain fluctuation in literature and among practitioners on their correct ascertainment under the categories of vertical or of horizontal restrictions, with diriment consequences not only in terms of a more lenient approach in general (both in the US and the EU legal systems), but in particular for the applicability of the vertical exemption regulation. It is believed to be a key-feature of two-sided markets the unavoidable linkage between the two dimensions,[416] given that, even if the platform is inextricably part of a vertical relationship with other firms operating at different layers of the value chain, it also competes with other platforms, in a more standard horizontal perspective.[417] Without reiterating what already stated in the previous sections, it may be useful to recall that the problem has not been firstly raised by OTA cases. Already the proceedings that took place in the US about the *E-Books* case demonstrate that there is a certain "disjoint between the theory of harm and the legal tool used".[418] The lack of defined positions is also underlined by Fletcher and Hviid, whose study, comparing 'broad retail price MFNs' (that are wide parity clauses) with RPMs, is based on the existence of a high similarity between the (implicit) horizontal element of RPMs and that one of parity clauses. This would allow antitrust

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[416] Fletcher and Hviid (2016), p. 68.

[417] However, it must also be remembered that concerns about intra-brand competition are usually seen by enforcers as a less harmful issue, in particular where inter-brand competition is strong, both at the intermediary and at the supplier layer, implying that firms are endowed with a lower market power.

[418] Akman (2016), p. 819. Namely, though in the District Court reasoning it appears that the main concern should have been the inter-brand competition between producers (and, then, between titles), the case was formally set as a form of inter-brand competition. According to the Court, since any best-seller has just one publisher per time, they cannot be considered substitutable products. Hence, the relevant conducts cannot harm inter-brand competition. Conversely, the author maintains that even if publishers cannot, strictly speaking, compete on price-grounds, they may (and the effectively do) compete on authors and agents.

practitioners to infer the competitive implications of parity clauses by adapting the relevant and well-established theory developed for minimum RPM.[419]

Thus, given that almost all the relevant cases somehow gave more importance to the well-known vertical element, this should logically go for an assessment of parity clauses under the relevant provisions dealing with vertical conducts and, consequently, with the European VBER. Notwithstanding that the 30% threshold should have been exceeded, the BKartA in *HRS* opined that, on a technical reading, the conditions laid down in Art. 4 (a) of the Regulation should be considered as not fulfilled, meaning that parity clauses should be theoretically "not non-exemptible".[420] According to the Authority, and to Akman, two are the possible scenarios in which the provision could be applied and in both the cases the relevant conducts are not deemed to fall within the reach of Art. 4 (a).[421] Namely, if hotels are deemed to be "suppliers" and the platforms are "buyers", then it is not the buyer's pricing freedom to be restrained, but the supplier's. On the contrary, if the hotel portal is deemed to be the supplier of intermediation services to the hotel partner, it is hard to consider the hotel as a proper buyer within the scope of Art. 4 (a), since it does not resell the product "bought" by the OTA.[422]

Given that parity clauses should be mainly considered as vertical restraints that are nonetheless not strictly covered by the VBER's provisions, the question immediately after arising is whether the conducts should be considered as restraints by object or by effect, or, applying terms more spread under US competition law, as *per se* infringements or not. In the US case against Apple, the Department of Justice considered the relevant conduct at stake to be a horizontal price-fixing conspiracy

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[419] Fletcher and Hviid (2016), p. 68.
[420] Akman (2016), p. 821.
[421] Moreover, pursuant to Art. 1 (H) of the same regulation, even the firm that sells or buys on the behalf on somebody else is deemed to be a 'buyer'.
[422] Bundeskartellamt (2013), para. 183. However, according to the Commission's Guidelines of Vertical Restraints, the application of Art. 4 is not restricted to end-price setting, also covering the setting of price components that can indirectly influence end-prices. Hence, the same NCA finds that, theoretically, the competitive effect of (wide) parity clauses is the same of hard-core restrictions under Article 4(a) VBER, since the aim of that provisions is to defend the pricing freedom of the buyer. It is also noteworthy that the Guidelines on Vertical Restraints, at section 48, believe minimum RPMs to be prohibited even when achieved through indirect means (among which, the case in which the retail price of a product is linked to the retail price offered by competitors). Scenarios that could even be more harmful when the direct or indirect RPM should be made more effective thanks to adoption of some "ancillary restraints", such as an MFN provision, reducing the buyer's incentives to lower resale prices. But the outcome is the same as above, since the platform does not buy nor resell "anything", and so does the supplier.

subject to a *per se* prohibition, and, in its preliminary findings that lead to the acceptance of commitments, also the Commission shared the opinion to set the case as an anticompetitive concerted practice by object. Similarly, the OFT in its investigation into the hotel online booking sector.

In contrast, other Authorities have treated parity clauses as restrictions by effect (as the same CMA in *Private Motor Insurances*)[423] or, ultimately, left the question open, as the BKartA in *HRS*[424] and in the following cases about OTAs, where, for the time being, they are deemed to be at least "significant restraints of competition by effect". According to Freese and Vandenborre,[425] due to the existence of several positive effects produced by parity clauses (in particular when is adopted in digital contexts) and to the lack of an acknowledged experience on this topic, it "is impossible to reach the conclusion that platform MFC clauses should be deemed restrictions of competition by object". The same position is seemingly endorsed by the French, Italian and Swedish Authorities that, when accepting Booking.com's commitments and the narrowing of parity clauses, recognise the necessity of these clauses to grant the viability of OTAs' business models. Moreover, according to Akman, given the strict case-by-case approach that characterizes any analysis of the possible effects stemming from platform parity clauses, it would be impossible to state that these clauses should be treated as restrictions by object because of their natural harmfulness to competition. Therefore, platform MFC clauses require an effect-based analysis under Article 101.[426]

The same position is endorsed by Buccirossi[427] and by Iacobucci and Winter,[428] who suggest that a presumption of legality should operate when referring to these (vertical) agreements, that could be rejected on the base of the available evidence, namely the explanation of the economic rationale of the clauses. According to the Authors, the only theory of harm applicable in these cases is collusion at the retailer level. Then it may be possible to weigh the positive and negative effects arising from the agreement even if formally impacting on competition on different ways, given that, for instance, a restriction of price-competition (impacting on final price) could be

[423] Competition and Markets Authority (2014), paras. 9.65-9.67.
[424] Bundeskartellamt (2013), para. 137.
[425] Vandenborre and Frese (2015), p. 337.
[426] Akman (2016), p. 823.
[427] Buccirossi (2016), p. 103.
[428] Iacobucci and Winter (2016), p. 48.

compensated by non-pricing benefits, such as the previously mentioned reductions in transaction costs.

Different, as arguable, is the position endorsed by Hviid and Fletcher, according to whose analysis "a consistent legal approach would not treat Broad Retail Price MFNs any more leniently than RPM. In Europe, this means that Broad Retail Price MFNs should constitute hardcore restrictions of competition by object".[429] Obviously the reach of this provision would be even more important reflecting in a comparative perspective, since, as seen in chapter 1, after *Leegin* US antitrust enforcers have subjected also RPMs to a rule of reason analysis, that, consistently with the wide parity clauses and minimum price RPMs equalization, would be extended to these agreements.

c) Article 101 or 102?

Another aspect that has been scrutinized by the literature strand on parity clauses is even more radical in its reach. Namely, many authors have questioned the same opportunity to settle the relevant cases under the provisions on agreements, when maybe a more consistent approach would have been to assess their compatibility with competition law under the provisions on abusive dominance, once demonstrated a (singular or collective) dominant position. Hence, two are the main aspects: from one point of view, it is technically criticised the assessment of the relevant conducts under, in Europe, art. 101 TFEU; then, reasoning on the applicability of Art. 102, a different theory of harm is provided by some scholars.

The first point is raised in literature notwithstanding whether the restriction should be deemed to be a vertical or horizontal agreement, since the problematic issue relies on the same concept of agreement. "One would expect to the decision to be addressed to at least two parties to an agreement if the anticompetitive practice in question were an "agreement or concerted practice" falling under Article 101 or its

[429] Fletcher and Hviid (2016), p. 98. This conclusion is also reached by reasoning on what triggered the OFT investigation into the hotel booking sector, namely the compliant brought by the small OTA Skoosh, which "was primarily concerned about the horizontal Broad Retail Price MFN clauses, not the vertical "RPM". Consistently, asking why the OFT settled the case under an RPM scheme instead of going after the "MFN" clause directly, the Authors state that the Authority, after agreeing that the case has an "economic merit", usually adopts a format that is most likely to succeed, also reasoning in terms of which is the quickest way to reach a consistent decision. Since RPM is, and MFN are not, deemed to be a hardcore restriction, the OFT could have forecasted a quicker and more successful definition, even if at cost of distorting the enforcement approach.

national equivalents".[430] The risk is that of creating an anomaly in the application of the provisions on agreements and as seen, except for the English investigation, all the other European decisions involving the hotel online booking sector have never referred to hotel partners as being active parties to the conducts at stake.

Nonetheless, this is quite an old problem,[431] since it is well established that an agreement implies a "concurrence of will between the parties to conduct themselves on the market in a particular way".[432] Moreover, those who participate in the agreement are believed to not being able to claim for damages, except for a restrictive application of the *Courage's* principle.[433] As a consequence, in these cases hotels should not be perceived as victims, but as willing participants; otherwise, a more correct approach would be to consider just the unilateral conduct of the OTAs, with the caveat that this would result in an anticompetitive judgement just in case the OTA retains (or share) a dominant position in the market.[434] The risk is that of a distortive interpretation of Article 101, which has often been subject to a broader interpretation, due to which it has been applied to unilateral behaviours, albeit lacking the evaluation of a clear dominant position.

Despite these technical remarks, there are other reasons that come out on the side of an assessment under Art. 102. Among others, the same genuine agent – reseller argument, since the CJEU has explicitly stated that a single economic entity may still be challenged for an abuse of dominant position.[435] This different approach shifts the preliminary focus of the Authorities from the recognition of the relationship in force between the parties to the evaluation of the market power retained by the relevant firms.[436] The cases dealt with in chapter 2 indeed all shows the presence of a certain

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[430] Akman (2016,) p. 815.
[431] Colangelo (2017, p. 12.
[432] *Case C-74/04 P Commission v Volkswagen AG* (2006), para. 60. This concretely includes the participation or at least the acquiescence of the other party, with this logic to be applied in the same manner in digital settings.
[433] *Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* (2001). Namely, in these cases, it is well established that, although in most of the legal systems of the Member States it is commonly recognized that a litigant should not profit from his unlawful conduct, where a party to an anticompetitive contract is deemed to have accepted the agreement due to its weaker market position, this should not *per se* prevent him from claiming damages from the other contractual party.
[434] Colangelo (2017), p. 12. Curiously, this ambiguity has been pointed out by the US investigation into OTAs, that, accordingly, led the plaintiffs to present a second amended complaint focusing just on the OTAs' position.
[435] Jones and Sufrin (2017), pp. 136–137.
[436] Akman (2016), p. 824.

market power at least on one side of the market.[437] Moreover, for example in *HRS,* the BKartA has itself argued that hotels "cheating" on parity clauses have been threatened to be expelled by the platform (or, in very few cases, even been effectively expelled) and this raises Akman's question on whether Hotels would want to stay on HRS unless the platform was perceived as a "must have" or a dominant player, a "critical gateway" for hotels to reach their customers.[438]

Nonetheless, given the previously mentioned hurdles in defining firm's market power when operating on a two-sided market, other Authors[439] underline that this evaluation could result in an activity far from being easy for authorities. Namely, it must be recalled what has been said about the dominance that some successful platforms may achieve in digitised markets, as a consequence of the sought for a critical mass of users as requested by the high volume of market-specific investments necessary to grant the viability of their business model. At the same time, alongside all the potential efficiencies that even just one super-dominant platform may produce, the tendency towards a "winner-take-all" is counterbalanced by the innate transitory character of dominance in online settings, where sudden changes in the market leadership often follow the fast development of new technologies by competing platforms.[440]

However, the necessity to accept the presence of a dominant position may be bypassed by recurring to the principles on collective dominance.[441] The dominant position may be shared either in a horizontal way, namely by the platforms competing in the market, or in a vertical one, since it could be retained by firms linked by a vertical relationship.[442] What is required for the recognition of a collective dominance is the adoption by two or more legally independent firms of a common policy on the market

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[437] For instance, in *HRS,* it is stated that Booking.com, Expedia and HRS roughly reach a market share of 90% and that the consequences of the HRS' parity clauses are even exacerbated by the application of parity clauses by other OTAs. Bundeskartellamt (2013), para. 163.
[438] Akman (2016), p. 825.
[439] Colangelo and Zeno-Zencovich (2015), p. 55; Colangelo (2017), p. 12.
[440] Ibid. According to this non-negligible difficulty in determining when a firm in digital markets should be considered as enjoying a dominant position, the Authors suggest that an alternative approach could be to address anti-competitive behaviours of non-dominant firms under provisions on unfair trading practices, as also endorsed by the 2012 OECD hearings on *The digital Economy.* In any case, Colangelo somehow agrees with the potential analysis of parity clauses under Art. 102 when admits that the platform's significant market power "appears to be the only explanation for a supplier to be induced to accept these clauses".
[441] Akman (2016), p. 826.
[442] Like in the English case on OTAs, where the hotel "defendant" in the procedure was the IHG group, at that time, the largest hotel chain in the World.

and their power to act, to a considerable extent, independently of their competitors, customers and consumers.[443] Consequently, the oligopolistic nature of the market may lead competing firms to implement parallel behaviours, by that appearing to the market as a collective entity. For the major OTAs mentioned in this dissertation, it is at least possible to confirm the presence of the characteristics of a collective dominance, as demonstrated by the common adoption of similar parity clauses in the contracts binding hotel partners and the implementation of best price guarantees towards consumers.

Once ascertained the collective dominance, something different is to demonstrate whether the relevant conducts should constitute a collective abuse of the collective market power. Parallel behaviour alone is not abusive.[444] Under EU competition law, the abuse of dominant position generally may involve two types of conducts, namely exploitative conducts and exclusionary conducts. As to parity clauses, potentially both of the categories may be envisaged. From the one hand, parity clauses seem to be imposed on hotel partners by OTAs "against their will",[445] threatening them with possible repercussions in case of failure to respect the contractual provisions. This scenario could resemble an imposition of "unfair trading conditions" pursuant to Article 102 (a), acting alongside the "unfair pricing" (also prohibited by art. 102 (a)) that could stem from artificially higher product prices originated by OTAs' conducts and the market foreclosure consisting in making it harder for new and low-cost OTAs to gain market shares by rebating incumbents' prices. The last scenario might also be reproduced at the hotels' level, since the failure to respect parity clauses and the consequential exclusion could force the weakest hospitality firms to exit the market. Exclusionary conducts, both at OTAs' and at hotels' levels may be covered under Art. 102 (b), which prohibits the limitation of production, markets or technical development to the prejudice of consumers. Lastly, the same discrimination mentioned above about the potential exclusion of the hotel partners that have not respected the parity imposed by OTAs may also fall within the application of Art. 102 (c), given that the excluded hotels may be considered as victims of a competitive disadvantage, in particular if prevented from accessing their customers through what is considered to be the most competitive online sales channel.

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[443] *Case T-228/98, Irish Sugar PLC v EC Commission* (1999), para. 46.
[444] Whish and Bailey (2015), p. 616.
[445] Akman (2016), p. 828.

Nonetheless, as seen about the test under Art. 101, also the presence of a possible objective justification of the relevant conducts should not be underestimated when operating within the reach of Art. 102. This justification of the abusive conduct may be brought under two grounds, namely if parity clauses should be deemed to be "objectively necessary" or if the efficiencies produced should outweigh the competitive harms.[446] As to the ways in which the exemption could be achieved by the defending firm, Akman[447] opines that almost the same defences adopted when dealing with the exemption in the Art. 101 perspective could be successfully implemented in this case: namely, the risk of free-riding (mostly when narrow parity clauses are at stake), the offer of higher-quality services to consumers and all the other efficiencies mentioned in chapter 1 may be resolutive even under an Art. 102. Provided that the defending party succeeds in proving that the conduct is indispensable to the realization of the efficiencies and that does not eliminate effective competition.

On the other side of the Atlantic, also Baker and Scott Morton provide a sound theory about the possibility to settle the relevant cases under Sherman Act §2 and, then, under the provisions prohibiting monopolization. Nonetheless, even if the reasoning on the evaluation of the market power retained by the major incumbents deeply resembles what has been said on the European side, seemingly the US legal system does not provide legal coverage to collective dominance, by that narrowing the scope of these provisions for the relevant cases.[448]

Nonetheless, although the abuse of a collective dominance in the oligopolistic hotel online booking sector could represent a "potentially viable and appropriate legal basis for the competition law assessment of platform MFC clauses […] this avenue has oddly not been explored by any of the competition authorities".[449]

d) The fragmented European approach to parity clauses and the increasing resort to commitments

In several sections of this dissertation it has been pointed out that a large part of the uncertainty actually regarding the antitrust assessment of parity clauses must be attributed to the lack of a general and sound case law on this topic. The investigations

[446] Ibid., p. 829.
[447] Ibid., p. 830.
[448] Baker and Scott Morton (2018), p. 2190.
[449] Akman (2016), p. 831.

that all over Europe targeted Booking.com are an effective landmark of this legal uncertainty, that should be considered even more worrying if compared with the Single Market mission that should be achieved not only by the European Commission, but even by each NCA when enforcing European competition law principles.

Reasoning in a broader perspective, many scholars share the belief that antitrust enforcers are demonstrating a certain degree of unfitness in approaching the most remarkable challenges arising in the digitalisation of the global economy and, namely, in its "platformisation".[450]

This statement can be made more evident by dealing with three concerning issues: a) the increasing resort to commitments to conclude proceedings in digital markets; b) an ambiguous European tendency towards a sort of "federalisation" of antitrust enforcement, within the structure of the European Competition Network and c) the lack of general consensus on the necessity of a more effect-based approach of competition law enforcement, that, even if in principle shared by both practitioners and scholars, has not found a concrete expression yet.

As to the first point, the recent investigations confirm the European tendency to deal with cases raising pressing competition concerns by way of commitment decisions, pursuant to Art. 9 Regulation 1/2003. This procedure is preferred in order to obtain a prompt intervention and more customised decisions, given that it is the defending party, being more familiar with the market's key-features and with the dynamics of competition, which submits the proposed remedies to the enforcer, who, avoiding a full-scale investigation, has already identified the most concerning competition issues.[451] Hence, as to the relevant cases in this dissertation, commitment decisions may have been intended as an effective instrument to escape the hurdles an authority must face when balancing the efficiencies and the anticompetitive effects of 2SPs' practices, since less data are collected by the enforcer than he should have done in a prohibition procedure and because an infringement decision would require more sound basis.[452]

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[450] Lasserre (2016), p. 429.

[451] However, it must be noted that even the same idea that commitments make antitrust procedures faster has been challenged by some scholars, who showed that commitment procedures (in particular regarding abuse of dominant position) at the Eu level actually lasted 15% longer than prohibition procedures (with the remarkable example of the investigation into Google Search that, opened in November 2010, was closed in June 2017). For more details, Mariniello (2014), p. 5.

[452] In the wording of the former European Commissioner for Competition, Joaquin Almunia, about the decision in *E-Books*, "The alternative would probably have been to impose fines at the end of a long procedure. However, this was not the best solution in the case of a nascent and very fast-

In a quite optimistic evaluation of commitment decisions in the modern markets, Bellis[453] identifies at least three main concrete reasons that may make commitments so popular among companies, namely that, thanks to Art. 9, firms may conclude the case without the imposition of a proper fine[454] and, most importantly, that commitment procedures close without formally identifying a breach of competition law provisions. Commitment decisions limit themselves to finding that there are no longer grounds for action by the Authority (with arguably positive, even if not automatic, benefits in terms of defence from civil actions for damages).

Alongside these two immediately technical issues, Bellis also points out the relevance of commitments in allowing antitrust enforcers to develop remedies that go beyond those that could be imposed in an infringement decision, with the chosen remedies that may find both the companies and the Authority's concerns better addressed. For instance, about the aforementioned Swedish decision about Booking.com, the *Konkurrensverket* expressly highlights the key-role played by commitments in "cases concerning complex markets and cases where the conduct consists of complex contractual activities" and in which "complex market definitions are involved", allowing the authority to close the case "without having finally assessed the relevant market".[455]

Nonetheless, this rationale has been fiercely contested by other scholars, on multiple grounds. On the one hand, "this pragmatism comes at a cost":[456] the absence of in-depth analysis and the scarce presence of judicial review of the topics covered by commitment decisions may further preclude the development of a consistent theory about two-sided platforms, whose legal principles at the moment need to be found in a "non-authoritative guidance".[457] On the other, the same possibility to adopt more flexible and potentially overreaching decisions, in the name of their effectiveness, has been sometimes criticised as the result of an "unduly restriction of the ability of

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moving market. Accepting these commitments means removing immediately the results of the collusion and restoring normal competitive conditions. This route is the quickest way to bring competition back to this market, to the benefit of all consumers who buy e-books in Europe". Almunia (2012), p. 3.

[453] Bellis (2016), p. 4.

[454] Although this principle, expressed by Recital 13 of the Regulation 1/2003, has been sometimes disregarded by National Authorities, as the Swedish proceeding against Booking.com demonstrates, since it was closed with the imposition of an overall fine of about EUR 3.5 million.

[455] OECD Competition Committee (2016), para. 32.

[456] Caccinelli and Toledano (2018), p. 228.

[457] Jenny (2015), p. 733.

undertakings to compete on the market".[458] Furthermore, the rationale behind commitment decisions has been contested also under another perspective, since it could seemingly support a shift of competition law enforcement in 2SMs towards an *ex ante* intervention.[459] Commitment decisions may operate as an *ex ante* intervention, since the enforcer impacts on the firm's future behaviours by mean of the application of the commitments, in most of the cases without a complete awareness of the probable evolution of the market equilibrium as influenced by the decision.[460] Moreover, some other interests at stake in the relevant market may not be properly addressed, exposing the decision to the challenge by other stakeholders that perceive it as unsatisfactory. This was exactly the case for the Skyscanner's appeal against the OFT's acceptance of the commitments proposed by Booking.com, Expedia and IHG.

A further risk, as examined later in this chapter, may ultimately be that of an exogenous intervention by the lawmaker, that, aiming at adequately defending interests other of that covered by the intervention of antitrust authorities risks to further exacerbate the lack of a sounding general theory.

Alongside the legal uncertainty that derives from an allegedly too large resort to commitment decisions, in the European legal system there is also another remarkable concern that threatens to undermine the antitrust response to the new concerns arising in the fast-evolving digital markets. Namely the decentralised application of European competition law due to the principle of subsidiarity. The lack of a direct Commission's intervention in the investigations into the hotel online booking sector has been considered "a terrible mistake" and "the inconsistency among State Members is borderline inexcusable".[461] Namely, the Commission has avoided to directly take on the cases on OTAs' parity clauses as possible pursuant to Article 11(6) of the Regulation 1/2003, leaving it to the National Competition Authorities to forge a coherent European Approach to the issue, with scarce success. The Commission may have argued that these cases could have been the correct 'touchstone' for the European Competition Network, that, fostering coordination between National Competition Authorities, has the potential to allow more agreed decisions even when the Commission refuses to primarily lead

[458] Ibid., p. 755.
[459] Caccinelli and Toledano (2018), p. 228.
[460] Jenny (2015), p. 702. The Author supports its theory also by arguing that an intervention *a priori* should imply some proper remedies to guarantee the effectiveness of the decision and avoid unforeseen consequences, such as an automatic review mechanism.
[461] Akman and Sokol (2017), p. 148.

the case. On the contrary, having left cases with such a major economic significance to the NCAs might have been a "suboptimal use of the decentralized enforcement mechanism".[462] Such a "federalisation" of antitrust enforcement may not always be the best option, since "it takes only one jurisdiction to take a wrong decision to negatively affect the entire global chain of decision-making".[463]

Moreover, the fragmentary approach of European enforcers to problems covering not only European, but also global markets, may lead to a more worrying global divergence on the competition policy's treatment of such clauses. Even more so that taking into account the current situation of antitrust enforcement of parity clauses in the US, that is even less defined, since just private actions for damages have been (unsuccessfully) brought to the attention of Courts, with the Department of Justice that has still not taken a position on this matter.

Nonetheless, although a purportedly overall positive evaluation of the performances of the ECN thus far, it is noteworthy that the Commissioner Vestager has stated that NCAs will refrain from individually opening new cases in the hotel online booking sector, until the European Commission gains a better understanding of the remedies, by that announcing the forthcoming launch of an investigation into this sector to better understand the effects of the measures adopted (see next section of this chapter).[464]

Both the two remarks that has been just described must be further debated on a broader perspective, that embraces the discussion on how competition law should adopt a more effect-based policy, that, involving a less formalistic approach in the assessment of the new contexts typical of digital markets, could lead to more far-reaching and more consistent decisions. Mostly in clearly oligopolistic online markets, where the potential overlap of provisions on abuse of dominant position and anticompetitive agreements may divert the enforcer from its main goal, that should be the case to focus on the

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[462] Akman (2016), p. 832. The Commission should relieve the already acting authority only after consulting it. Furthermore, according to the Commission Notice on Cooperation Within the Network of Competition Authorities, the Commission is particularly "well placed if one or several agreements or practices, including network of similar agreements or practices, have effects on competition in more than three Member States" and it "is particularly well placed to deal with a case if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises, or to ensure effective enforcement". European Commission (2004a), para. 7. Both the conditions are seemingly well fulfilled in the OTAs' cases.

[463] Akman and Sokol (2017), p. 149.

[464] Vestager (2015).

anticompetitive consequences rather than on their formal classification. Furthermore, this could also imply that competition authorities should extend their awareness of the more recent theories developed by competition economists: this topic has already been faced when reasoning on the possible subsumption of parity clauses' enforcement under the provisions on abuse of dominant position rather than under those on agreements and the same may be said, for instance, about the high indifference shown by NCAs in addressing the best price guarantees offered by OTAs. Although the Authorities mostly failed to take into consideration the anticompetitive reach of these quite spread promises made by online platforms to their consumers, it has been demonstrated that the combination of even narrow price parity clauses and best price guarantees may favour the incumbent monopolisation of the relevant market. Namely, in some studies by Wang and Wright[465] and by Wals and Schinkel,[466] it has been pointed out that, in markets in which there is a higher-quality incumbent platform, the best price guarantee may foreclose entrance by a rival less efficient platform, while the narrow price parity clause eliminates competition from the direct sales channels. Thus, applying this theory to the OTAs' market, the combination of these legal devices may be a mean to monopolise booking platforms, as demonstrated by the fact that, even after the commitment decisions, commission fees did not significantly decrease. Although narrow parity should be deemed to be less harmful when considered in isolation, it could be said that, after removing the obligation for hotel partners to offer the best price on Booking.com *vis-à-vis* other competing OTAs, it will be the consumers now that, being targeted by the best price guarantee, will facilitate any collusive or exclusionary conduct implemented by OTAs. Thanks to this unilateral promise, missing any agreement with any other party, platforms could now exploit consumers to eliminate price discrimination.[467]

Ultimately, the same concerns that can be found in the missed evaluation of best price guarantees, may, under the same logic, also cover the too formalistic approach often adopted towards the positive effects produced by parity clauses, both concerning their consequences in terms of efficiencies and their nature of ancillary restraint to grant the viability of the OTAs' business model.[468] It is straightforward than any evaluation

[465] Wang and Wright (2016).
[466] Wals and Schinkel (2018).
[467] Akman (2015).
[468] Ezrachi (2015).

of the overall competitive effects of parity clauses depends on how the free-riding defence is weighed by the enforcer, and all the doubts exactly about this process has been already raised in the section 1 (b) of this chapter. Nonetheless, to reason on a more economic basis and on the interests that lead firms' decisions when evaluating investments could make it easier to better understand the logic at the basis of the free-riding concern for digital companies. A concern that, remarkably, has not persuaded the BKartA so as some European lawmakers when introducing a general ban of parity clauses in their legal systems. Considering the incentives at the basis of the market-specific investments largely borne by OTAs, it might be easy to demonstrate that they favour also the hotel partner, since the improvement of hotel reservations will benefit both the economic actors. And, since the platform will only take into consideration its own benefits when choosing the level of the service efforts provided, the level is likely to be suboptimal if the platform is certain that large part of its investments will not be remunerated.[469] However, exactly by assessing all the case-specific key-features and both the pro-competitive and anti-competitive consequences of parity clauses in the hotel online booking sector, Vezzoso managed to demonstrate that, at least for these cases, what at a first glance could be clear, so far as to be agreed on by the acting enforcers, could result in a quite weak defence and could not, as recognised by the BKartA, correctly fulfil the conditions laid down by article 101(3).[470]

III. STATE INTERVENTION IN THE ANTITRUST ISSUES

Alongside the intervention of the NCAs, recently in four European Countries (Austria, France, Italy and Belgium) Legislators went further, stating the full prohibition of parity clauses in the tourist accommodation sector. This produced, as to the effects, almost the same outcome reached for Booking.com and HRS in Germany and (recently) for Booking.com in Sweden, where the ban has been respectively issued by a *Bundeskartellamt*'s decision and a judgement of the Swedish Patent and Market Court.[471]

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[469] Vezzoso (2016), p. 25.
[470] Ibid., p. 38. In the wording of the Author, "if not a swan song for the free-riding defence, the hotel online booking saga makes once more clear that efficiency allegations of this type need to be carefully and thoroughly assessed, especially in digital markets".
[471] Competition Policy International (2018).

For instance, Art. 166 of the Annual Italian Competition Law (2017), states that "any agreement by which the hotel is obliged not to offer to the final clients, by any means or any instruments, prices, terms and any other condition better than those offered by the same hotel through intermediaries, independently from the law applicable to the contract, is void".[472]

National Lawmakers approved their bills ideally countervailing the positions endorsed by their respective NCAs that, both in France and in Italy, accepted commitments by Booking.com that undertook to remove wide parity agreements from its contracts with hoteliers, switching to a narrower restriction that only prevent the hotelier from charging more favourable conditions on its own website. It is noteworthy that, in both cases, a high pressure has been exerted on legislators by main national and European hospitality associations.

Roland Heguy, president of HOTREC's[473] French member UMIH, welcomed the French reform saying that "it is a real revolution that is underway for the French hotel industry and for our customers. After the decision of the Competition Authority, this vote will contribute to the establishment of a renovated contractual framework to restore conditions of a commercial relationship based on trust between hotels and booking sites in the interest of consumer."[474]

Nonetheless, some scholars have explained that these Lawmakers' intervention in a matter of competition law policy has probably been overreaching. Dealing with "the adequate scope of intervention" not only of NCAs, but more generally of competition law, maybe this has not been the most balanced regulatory choice. According to Ezrachi,[475] state intervention through legislation or regulation should not be confused with competition law analysis, that is reserved to competition enforcers. This type of exogenous intervention usually occurs in cases already positively judged

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[472] Unofficial translation. "*È nullo ogni patto con il quale l'impresa turistico-ricettiva si obbliga a non praticare alla clientela finale, con qualsiasi modalità e qualsiasi strumento, prezzi, termini e ogni altra condizione che siano migliorativi rispetto a quelli praticati dalla stessa impresa per il tramite di soggetti terzi, indipendentemente dalla legge regolatrice del contratto*". *Legge 4 Agosto 2017, n. 124, Legge Annuale per Il Mercato e La Concorrenza* (2017). There is just one main difference among Italian and French provisions, namely that since Italian text embraces all the elements of original parity clauses (i.e. both rooms' prices and availability), its reach is broader than that of art. 133 of the *Loi Macron,* that seemingly does not cover rooms' availability. *Loi 2015-990 Du 6 Août 2015 Pour La Croissance, l'activité et l'égalité Des Chances Économiques* (2015).
[473] HOTREC – "Hotels, Restaurants & Cafes in Europa", is a Pan-European trade Association of Hotels and Ho.Re.Ca. companies.
[474] HOTREC - Hospitality Europe (2016).
[475] Ezrachi (2015), p. 517.

by the competent authorities, for instance because the Government wants to modify the existing welfare allocation, that could have been found generally positive for consumers, seeking to achieve other social goals or resolve an imbalance of bargaining power in a given sector.[476] That being said, the Author disapproves the position taken by the Lawmakers, since they "seemed to engage with the aim of remedying competition on the market and favouring (their) own balancing point over that endorsed by the competition agency".[477] He also judges disruptive that the ban has been applied just to the hotel sector and not to other industries, implying a "limited competition rationale and the promotion of narrow interests, by selected stakeholders".[478] Analysing the consequences of the strict prohibition, Ezrachi recalls the study already applied to the *Bundeskartellamt'*s prohibition of narrow parity clauses: if, one the one hand, this could provide hotels with a broader freedom in pricing, on the other the Author reiterates its position on the negative consequences of free-riding. But with one difference: in this scenario, not only the probable consequent decrease in market-specific investments will directly affect consumer welfare (due to the raise of search and transaction costs), but it could constitute an entry barrier for small and medium-sized hotel activities, that cannot rely on OTAs' visibility procurement anymore. In the long run, this could lead to a competition reduction in the upstream hospitality market, with an even worse welfare reduction. In addition to that, state interventions have accentuated the already fragmented enforcement situation about parity clauses all over Europe.

All in all, just the analysis of these measures during the next years will help us to judge the effects of the state intervention in the hotel online booking sector.

It could be anyway helpful to recall what already happened in the market for the Computerised Reservation Systems, where, both in the EU and the US, lawmakers have developed regulations to restore a higher degree of competition between the several distribution channels (formerly controlled by some of the major airline companies) and to ensure that more neutral information were given to consumers. Namely, Lawmakers were worried by the increase in commission fees and by the abusive conducts to the

[476] And Ezrachi is probably referring exactly to the OTA case. It is renowned that many NCAs' investigations and also legislative interventions have been vehemently requested by hotel associations aiming at solving the purported asymmetry in bargaining power between hotels and intermediaries.
[477] Ezrachi (2015), p. 518.
[478] Ibid.

detriment of bricks-and-mortar travel agents and, ultimately, of consumers. Although the main goal of the regulation, the imposition of measures to ensure non-discrimination and the mandatory participation for airlines have failed to reach the purported efficiency targets,[479] since the same Commission had to admit that the measures negatively impacted on prices without decreasing the average commission fees requested by the systems, pushing airline companies to prefer other distribution channels (such as their own website) rather than partnering with travel agencies.[480] Even if in a different sector, this case should be wisely borne in mind by Lawmakers wanting to shape a competition policy other than that endorsed by antitrust enforcers, despite remarkable concerns.

Moreover, it is remarkable that recently the European Commission has announced to open an investigation into airline tickets distribution services, focusing on the restraints that the full content agreements with two of the most important GDSs, Amadeus and Sabre, allegedly imposed on travel agents and airlines companies. Namely, the latter's freedom to choose alternative suppliers for ticket distribution services may be deeply hindered by the conducts of the GDS operators, by that threatening to "create barriers to innovation and raise ticket distribution costs, ultimately raising ticket prices for travellers".[481]

IV. The Current Status of the Hotel Online Booking Sector: Has Something Really Changed During the Last Three Years?

The obvious question arising after the analysis of the decisions adopted in the hotel online booking sector and after the legislative prohibitions in some States is whether, in the last three years, something has really changed. Namely, it should be already possible to make a first evaluation of the dynamics of room prices and of commission fees, as some of the indicators of the overall effect of the partial or complete ban of parity clauses.

[479] Colangelo and Zeno-Zencovich (2015), pp. 63–64.
[480] European Commission (2007b), para. 6.
[481] European Commission (2018).

In April 2017, the DG Competition, alongside the Authorities of 10 Member States[482] that somehow addressed parity clauses in the hotel online booking sector, published the results of the monitoring exercise carried out in the sector covering the period from January 2013 to June 2016 (namely a period including both the situation before the cases on parity clauses and the evolved scenario immediately after the entrance into force of commitments and of the first prohibitions).[483] The heads of the ECN, including the Commissioner Vestager, welcomed the report as a demonstration that "both types of measures which are based on a converging theory of harm (*i.e. both the narrowing and the complete ban of parity clauses*) go in the right direction".[484] Despite the quite triumphalist statements, from the reading of the report it appears quite straightforward that neither it can be considered decisive to give a correct insight of the effects nor the same scarcely useful insights have been correctly interpreted by the ECN.[485]

As a matter of fact, as to the first point, the report is based on a survey submitted to 16000 hotels in the ten participating States, with a response rate of just 12%; moreover, of the 20 OTAs, 19 major hotel chains and 11 metasearch websites consulted, just 5 OTAs, 13 hotel chains and 7 metasearch websites replied to the questionnaire.[486] Hence, not only the report is built on a very limited statistic sample, but, more

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[482] Belgium, Czech Republic, France, Germany, Hungary, Ireland, Italy, Netherlands, Sweden, United Kingdom.
[483] European Competition Network (2017b), para. 5.
[484] European Competition Network (2017a).
[485] For the sake of completeness, it is noteworthy that the ECN expressly recalled the limitation of the results of its study, namely the overrepresentation of hotels belonging to major chains, the possibility that some hoteliers did not correctly understand the questions (!), the fact that some of the hotels, or at least their associations, took part to the proceedings against OTAs, the persisting different treatment of some OTAs around Europe (like HRS, whose clauses are prohibited just in Germany, while in other EU Countries it is still able to apply wide parity clauses) and the limited time at disposal for the decisions to start spreading their effects on the market, since the survey was submitted just 6 moths after the latest prohibition decision in Germany against Booking.com and 12 months after the narrowing of Booking.com and Expedia's parity clauses in the other Member States. European Competition Network (2017b), para. 15. Furthermore, in the difference-in-differences analysis conducted on the basis of the data submitted by OTAs and metasearch engines, the ECN, although maintaining that there was an equal evidence of certain price discrimination, points out that the data collected by metasearch websites should be treated with caution, since they could not be able to properly distinguish between a proper price differentiation and price differentiation as caused by a product differentiation. The reason is that sometimes the web prices aggregator may fail to properly compare the same product or, more likely, to adequately intend some extra-services differentiation, like between a price "including breakfast" and a "room-only" rate. Ibid., para 27. Nevertheless, it is remarkably that, though these limitations, the ECN apparently did not give evidence of paying sufficient attention to them.
[486] European Competition Network (2017b), para. 5.

importantly, large part of the replies came from hotels somehow members of hotel chains that, although still being a minority of the European properties, are overrepresented in the report.

To demonstrate the second statement, a brief analysis of the report is required. In light of the main theories of harm endorsed by the Authorities in the relevant case law, the ECN monitoring exercise focused on three main aspects: a) room price differentiation by hotels between sales channels; b) room availability differentiation by hotels between sales channels and c) OTA commission rates. Given the issues, the first remarkable result of the monitoring exercise is that 47% of hotel respondents stated that they were not even aware of the recent change in parity clauses that involved both Booking.com and Expedia.[487] However, even more importantly, in 79% of the cases it has been responded that the hotel did not price differentiated between OTAs in the period after the change in OTAs' policies, with the main reason being (53% of the cases) that the hotel did not see any evident reason to treat different OTAs in different ways.[488] This is quite a persuasive element, given the high expectations placed by the Authorities on narrow parity clauses to foster price discrimination between OTAs. In 33% of the cases, price differentiation has not been implemented due to the fear of possible repercussions in terms of ranking by OTAs and, equally remarkable even if residual, is that in 20% of the cases (where allowed) hotel partners did not price differentiated to avoid their website to be undercut by the less expensive OTA.[489] Despite being seemingly underestimated by the ECN, the threat of penalization in terms of ranking by the undercut OTA, particularly if one of the major, is not far from being real, representing probably one of the most concerning actual aspects in the hotel online booking sector. Not less importantly, 90% of the hotels said that there has been no change in commission rates, or in the remuneration strategy implemented by OTAs (never requiring, except for the admission to premium programmes, the payment of a fixed listing fee) in the period between July 2015 and June 2016.[490]

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[487] Ibid., para. 8. This percentage is slightly lower (30% of the respondents) in France and Germany.
[488] Ibid., para. 9.
[489] Ibid., para. 19. Quite curiously, 40% of the hotels responded that after the switch of Booking.com and Expedia to narrow parity clauses they have systematically undercut their partner OTAs by offering lower room prices on their own websites, even if this is not allowed under narrow parity provisions. Ibid., para. 24.
[490] European Competition Network (2017b), para. 32. Interestingly the empirical evidence demonstrates that just in Italy, in which, at the time of the survey, narrow parity clauses were still

Hence, it is straightforward that the report, even if effectively addressing the right issues at stake in the relevant cases, leaves many questions open and is far from representing a clear source of information about the effectiveness of the decisions, as the presentation of clearer evidence could have demonstrated.

At the same time of the ECN's monitoring exercise being carried out, a growing number of theoretical and empirical papers have tried to evaluate the economic effects of parity clauses, although even in the same studies it has been pointed out how difficult it could be to obtain reliable data.[491] Curiously, it is recurring in these studies that the Authors alternatively focused on just some of the State Members' geographical market and this is the reason why, at the moment, it is still missing a study covering the Single Market as a whole.

Three are three main studies whose findings may be noteworthy for this dissertation.

In their investigation based on data covering the tourist dynamics of the Mediterranean region (France, Italy and Spain) in the period 2014 - 2015, Mantovani, Piga and Reggiani compared both the shift from wide to narrow parity and (in France) the one from narrow to prohibition.[492] The results of their studies reveal a significant price drop between 2014 and 2015, which the Authors mainly attribute to pressures exerted on Booking.com from the antitrust investigations that ended up with the OTA "voluntarily" amending its parity clauses all over Europe.[493] The following bounce of prices that characterizes 2016 should not be considered as a lack of effectiveness of the enforcement actions, since tourist demand in the relevant Countries registered a boom in 2016[494] that, according to the Authors, could have raised prices even at a bigger ratio with wide parity clauses being still in force.[495]

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in force, a significant statistical increase in price discrimination took place: such an increase did not occur in the rather similar German market, supporting the defence of narrow parity clauses.

[491] Mantovani, Piga, and Reggiani (2018),p. 2.

[492] Mantovani, Piga, and Reggiani (2017).

[493] Ibid., p. 12. Country differences are also in line with the enforcement differences, since the reduction is much more consistent in Italy and France rather than in Spain, where the antitrust law Authority adopted a "wait and see" strategy towards the investigations being carried out in other EU Countries.

[494] Mainly due to the North-Africa "turmoil" that reached its peak between 2015 and 2016. Again, reflecting the enforcement situation, in more proactive Countries, like Italy and France, price increases were more limited than in Spain. Nonetheless, it should also not underestimate the impact of the terroristic attacks that occurred in France exactly in that period.

[495] Mantovani, Piga, and Reggiani (2017), p. 21.

A similar study has been carried out by Hunold, Kesler, Laitenberger and Schlütter, who gathered data about 30000 hotels from Kayak.com from January 2016 to January 2017 and, focusing on Germany and France (where the similar ban of at least Booking.com's parity clauses is in force), demonstrated that the prohibition of the clauses not only induced hotels to show lower prices on their direct online sales channels, but, most importantly, incentivised hotels to increase their use of Booking.com.[496]

Nevertheless, although the results of the studies about the dynamic of hotel prices could be debatable (as whether depending on the effects of the antitrust enforcement or not), it is noteworthy that a more recent paper[497] by the same Authors has shifted the focus to the impact on the hotel industry of the newest strategies adopted by OTAs, and namely the effect of the OTAs' manipulation of the hotel ranking on the basis of the prices displayed on the platform. That of the hotel's ranking reduction is a threat that has been always highlighted both by Authorities and by scholars.[498] It is important to recall that in the commitment decisions adopted by French, Italian, and Swedish Authorities, Booking.com committed to not apply certain measures likely to produce effects equivalent to wide parity clauses, among which directly linking display ranking and commission rates to the observance of wide parity.[499] OTAs' ranking algorithms may shape the market dynamics in place of parity clauses, taking advantage of the hoteliers' interest in remaining at the top of the search page.[500] Namely, the

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[496] Hunold et al. (2018b), p. 564.

[497] Hunold et al. (2018a). The research study is based on hotel prices and search results for 250 main tourist destinations in 13 different Countries.

[498] For instance, the *HRS Bundeskartellamt*'s decision, where the Authority includes the ranking issue among the threats that mostly worry hoteliers, by that reinforcing *HRS* bargaining power. The same issue is at the basis of the most recent CMA's investigation into alleged consumer protection law infringements in the OTA market. See above in chapter 2.

[499] For instance, see the Booking.com's amended commitments in the Italian AGCM's procedure, Annex to the final decision, Prot. 0028074, para 4.

[500] Iacovides and Jeanrond (2017), p. 12. Quite interestingly, in 2018 Booking.com has announced to its hotel partners (without an evident press release) that, in the section devoted to the "price performance Dashboard" of the Booking.com's extranet (the platform in which hotel partners may manage their page on Booking.com) it has started to be shown a new "price Quality Score", that compares the prices set on booking and eventual lower prices found elsewhere on the Internet. According to the message shown on the extranet, this new score "is a reflection of (*the room price*) on Booking.com compared with the lowest prices on other channels. If (*the hotel has*) a higher score (*the hotel has*) a higher conversion rate. This is important for good visibility on our site". That is to say, if your prices are lower on Booking.com, you will be more attractive for our customers and then, being your conversion ratio higher than that of other hotels, your hotel will be shown in a higher position in the search page. In the wording of Booking.com: "This means (*the hotel* gets) more visibility on our site. We can also spend more to market (*the property*)". Booking.com (2018).

Authors, managed to demonstrate that hotel ranking on OTAs is generally higher when the same rooms are offered at higher prices on competing online sales channels. Due to this strategy, OTAs may maximize their profit, but at the expense of a reduction in search quality for consumers.[501] This issue may seriously challenge the efficiency claims that, thus far, have partially kept safe parity clauses and OTAs' behaviours from a fiercer evaluation of the Antitrust Enforcers.

OTAs' algorithms, alongside preferred programmes, are the most recent concerns for scholars and it is not unlikely that the further investigations preannounced also by the ECN will focus on them. Equally, concerns may be raised about "pressure strategies", such as the connection between the ranking and the percentage of commission fee paid per booking. The result is that competition in the OTA sector "may be stifled even in absence of price parity clauses".[502] Dominant OTAs may force hotels to pay higher fees (with potential influence on final prices) to achieve an enhanced visibility, despite other factors being more efficient for the consumers' hotel choice. Several aspects that, from a competition law policy perspective, may reinforce the theories opining that an evaluation of OTAs' conducts under provisions on abusive dominance would be more consistent with the current state of the affairs.

It could be argued that a contribution to a clearer assessment of the antitrust relevance of these conducts may indeed arrive from forms of private enforcement in light of the abovementioned legal bans of parity clauses that occurred in some European legislations. For instance, in the Italian case, it may be questioned whether the ban introduced by the Art. 133 of the 2017 Competition and Market Law could be an effective instrument in private actions for damages: namely, OTAs' manipulation of the hotel ranking dependent on the substantial hotel's respect of wide parity could result in an implicit violation of the legal prohibition of parity clauses. Nevertheless, even if theoretically possible, also in light of the recent Italian transposition of the EU Directive

[501] Hunold et al. (2018a), p. 42. The Authors give an economic justification to this practice, being intended as a profit-maximization strategy for OTAs. If the vast majority of reservations finalised is made for the most "reliable" hotels, the OTA will more efficiently focus its advertising investments on that particular property, be sure of a higher conversion ratio. Moreover, if also combined with the hotel's admittance to "preferred programmes", usually requiring higher commission fees, it is clear that the more visible the most remunerative hotel (in terms of commissions), the higher is the OTA's income.
[502] Mantovani, Piga, and Reggiani (2018), p. 5.

on Private Enforcement,[503] the difficulties in succeeding in stand-alone private claims for damages in antitrust cases, alongside the inherently difficulty in extending the interpretation of the legal provision to cover this new scenario, could undermine the effectiveness of private enforcement.[504] At least, until a public enforcement procedure should take on the case.

As to the effective degree of competition in the hotel online booking sector, recently some commentators have raised another issue: all the existing literature on this topic, has almost always avoided to extend the perspective to other potential entrants in the market that could somehow challenge the OTAs dominance. Interestingly, Caccinelli and Toledano[505] suggests that a sound policy in assessing the borders of digital relevant markets should also take into consideration that supply-side substitution might be much more relevant in online settings that elsewhere. Traditionally, both EU and US competition enforcers have emphasized the primary role played by demand-side substitution in the product market definition, given that it is commonly believed that suppliers may find quite hard to switch production to other relevant products and market them in the short term without incurring in significant additional costs. Nevertheless, it is exactly the fast-growing and fast-developing nature of digital markets that could allow some tech-giants to adapt swiftly to other remunerative markets. That may be the case for the hotel online booking sector, where companies such as TripAdvisor or Google are now directly contracting with hotels to offer their services as metasearch engines.

This implies that there is an increasing presence of the hotels' proprietary websites on the metasearch engines, with their offers being displayed among those of the OTAs. Thus, the Authors opine that the opening of the market that follows the narrowing of parity clauses may result in a valuable comparative advantage for companies already operating in a connected market that could quite easily develop a booking facility and compete with OTAs.

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[503] *Directive 2014/104/EU* (2014)., as transposed in Italy by the *Decreto Legislativo 19 Gennaio 2017, n. 3* (2017).
[504] Lopopolo (2017), p. 27.
[505] Caccinelli and Toledano (2018), p. 226.

V. FINAL REMARKS

At the end of this dissertation, it is straightforward that a univocal antitrust assessment of parity clauses in digital markets is still far to come. Although many investigations have targeted these clauses, in particular in the hotel online booking sector, nowadays it is still difficult to say whether their implementation by major online intermediaries should be considered compatible with competition law principles and, in Europe, with the development of a Single Market.

This statement involves two different aspects that must be taken separate when reasoning on this fragmented scenario. On the one hand, there are the technical enforcement problems that affect the European response to parity clauses, given by the decentralised approach that has been adopted in the relevant cases and the excessive resort to commitment procedures. On the other, there are the intrinsic findings of the decisions which, with the remarkable exception of the *Bundeskartellamt*'s order, involve the compatibility of parity clauses with competition law principles, though in a version narrower than the original provisions.

If the first point is almost unanimously condemned in literature, the outcomes of the relevant cases targeting OTAs have been differently criticised. The majority of scholars seemingly endorses the more lenient judgement of parity clauses stemming out form the Authorities' acceptance of Booking.com's commitments, sharing the enforcers' evaluation of the efficiencies deriving from the development of online platforms. Hence, even the well acknowledged competitive restraints produced by parity clauses are outweighed by the benefits produced in terms of consumer welfare and the free riding defence is deemed to be the resolutive argument in the acceptance of narrow parity clauses. Conversely, some more critical authors disagree with this analysis, differently focusing on some inconsistencies that would arise from the investigations: the same free-riding argument has been demonstrated to be quite an ambiguous concept, whose concrete graduation is revealed to depend on the general policy adopted by the practitioner, as well as on a strict case-specific assessment.

What can be stated is that any attempt to generalise the key-findings stemming from the recent investigations in the e-commerce sector may be void. Modern digital markets are constantly in evolution and online economic actors develop new business strategies on a daily basis. The awareness of the difficulty for competition law and practitioners to keep pace with innovation pushes some authors to stand for a broader

policy change. It does not mean that classic categories, as developed insofar, should be completely repealed to address the most recent cases. It means that enforcers should abandon a sometimes too formalistic way of reasoning in favour of a more effect-based evaluation of the behaviours and of the forces at stake in the concrete cases, in particular in the case of two-sided markets. Such a reasoning would allow, for instance, to begin considering the provisions on restraints and abuse of dominant position as more complementary, to set more flexible borders between vertical and horizontal restraints and to more broadly ascertain in each case the competitive effects produced even by conducts that traditionally are included among the restraints by object.

Nevertheless, it is also undebatable that most antitrust categories and procedures have been developed with the aim of ensuring less invasive and faster proceedings and that a sound antitrust policy should also defend the legal certainty, indispensable to allow the correct functioning of the Single Market and to attract investments. Thus, even an overreaching change in antitrust policy could produce unexpected outcomes, as encouraged by some scholars.

Alongside these worries, it is noteworthy to point out the general dilution of the antitrust policies in most of the European Legal Systems: the jurisdiction of many European competition authorities now embraces new sectors, such as the consumer protection law, which are not intrinsically linked to the defence of competition. It can be argued that the enlargement of the 'weapons' at disposal of the antitrust enforcers would ensure to more effectively combat those behaviours which, affecting consumers, ultimately would have negative repercussions on all the functioning of the market. Nevertheless, even the over-intervention of antitrust authorities may produce the same distortive consequences that the modernisation of antitrust policies would like to avoid.

However, it is likely that, at least for the hotel online booking sector, the next battle will be fought on a different ground, namely on that of platforms' algorithms that link the prices set on the platforms to the hotel's ranking and, hence, to the hotel's online performance. The European Commission's Report on the e-commerce sector inquiry carried out between 2016 and 2017 reveals that the majority of online platforms makes extensive use of algorithms to track competitors' prices, including those on the direct online sales channels of their suppliers;[506] algorithms may further increase price transparency on online markets and then reinforce other pre-existing anticompetitive

[506] European Commission (2017), para. 13.

conducts. This scenario could reinforce the debated theories on the alternative subsumption of the cases under the provisions on the abuse of dominant position, given that the agreements between hoteliers and OTAs will not be primarily at stake anymore.

Accordingly, to face these new cases, authorities will need new instruments and this seems to be the idea of the German Government: in a recent report submitted to the Federal Ministry of the Economic Affairs and Energy, the independent think tank DICE recommends the federal legislature to reform German competition law with a view to regulate companies' behaviours before they become dominant market players. The way designed to achieve this goal should be the tightening of the provisions on the abuse of relative market power.[507]

It is not clear who will lead the next strand of investigations that will again address the practices dealt with in this dissertation. However it is unequivocal that the intervention of the European Commission could be unavoidable to give an effective and univocal European response to the many questions mentioned in this dissertation.

[507] Haucap and Heike (2018), para. 5.

BIBLIOGRAPHY

- Akman, P. (2015, July 8). Are the European Competition Authorities making a less anticompetitive market more anticompetitive? The Booking.com saga. Retrieved 22 May 2018, from https://competitionpolicy.wordpress.com/2015/07/08/are-the-european-competition-authorities-making-a-less-anticompetitive-market-more-anticompetitive-the-booking-com-saga/
- Akman, P. (2016). A competition law assessment of platform most-favored-customer clauses. *Journal of Competition Law and Economics*, *12*(4), 781–833. https://doi.org/10.1093/joclec/nhw021
- Akman, P., & Sokol, D. D. (2017). Online RPM and MFN Under Antitrust Law and Economics. *Review of Industrial Organization*, *50*(2), 133–151. https://doi.org/10.1007/s11151-016-9560-x
- Alexiadis, P. (2017). Forging a European Competition Policy Response to Online Platforms. *Business Law International*, *18*(2), 91–154.
- Almunia, J. (2012, December 13). Statement on commitments from Apple and four publishing groups for sale of e-books of Joaquin Almunia, Vice President of the European Commission responsible for Competition Policy [Press Release]. Retrieved 5 June 2018, from http://europa.eu/rapid/press-release_SPEECH-12-955_en.htm
- Anderson, C. (2009). The Billboard Effect: Online Travel Agent Impact on Non-OTA Reservation Volume. *Cornell Hospitality Report*, *9*(16), 6–9.
- Armstrong, M. (2006). Competition in Two-Sided Markets. *The RAND Journal of Economics*, *37*(3), 668–691.
- Auer, D., & Petit, N. (2015). Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy. *The Antitrust Bulletin*, *60*(4), 426–461. https://doi.org/10.1177/0003603X15607155
- Autorità Garante della Concorrenza e del Mercato, Provvedimento n 25422, I779 - Mercato dei servizi turistici-prenotazioni alberghiere online - Bollettino anno XXV

n. 14, pp. 5-22 (2015). Retrieved from http://www.agcm.it/dotcmsDOC/bollettini/14-15.pdf

- Autorità Garante della Concorrenza e del Mercato. (2015b, April 21). I779 - Commitments offered by Booking.com: closed the investigation in Italy, France and Sweden [Press Release]. Retrieved 10 November 2018, from http://en.agcm.it/en/media/press-releases/2015/4/alias-2207
- Autorité de la Concurrence, Décision n. 15-D-06 (2015). Retrieved from http://www.autoritedelaconcurrence.fr/pdf/avis/15d06.pdf
- Autorité de la Concurrence. (2015b, April 21). Online hotel booking sector [Press Release]. Retrieved 10 November 2018, from http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2535
- Baker, J. B. (1996). Vertical restraints with horizontal consequences: Competitive effects of '"most-favored-customer"' clauses. *ANTITRUST LAW JOURNAL*, *64*(3), 517–534.
- Baker, J. B., & Scott Morton, F. M. (2018). Antitrust Enforcement Against Platform MFNs. *Yale Law Journal*, *127*(7), 2176–2202.
- Bellis, J.-F. (2016). Background Note on EU Commitment Decisions: What Makes Them So Attractive? In *125th meeting of OECD Competition Committee - Commitment Decisions in Antitrust cases*. Retrieved from https://one.oecd.org/document/DAF/COMP/WD(2016)53/en/pdf
- Benhamou, F. (2015). Fair use and fair competition for digitized cultural goods: the case of eBooks. *Journal of Cultural Economics*, *39*(2), 123–131. https://doi.org/10.1007/s10824-015-9241-x
- Bennett, M. (2013, June 20). Online Platforms: Retailers, Genuine Agents or None of the Above? Retrieved 20 April 2018, from https://www.competitionpolicyinternational.com/online-platforms-retailers-genuine-agents-or-none-of-the-above/
- Billard, O., & Honoré, P. (2015). Most Favored Nation Clauses: A French Perspective on the Booking.com Case. In *CPI Antitrust Chronicle - RPM and MFN*

Clauses in a Brave New World (Vol. 5 (1)). Retrieved from https://www.competitionpolicyinternational.com/assets/Uploads/BillardHonoreMay-151.pdf

- Blue Cross and Blue Shield United of Wisconsin and Compcare Health Services Insurance Corporation v. Marshfield Clinic, et al., 152 F.3d 588 (7th Cir. 1998). Retrieved from https://law.justia.com/cases/federal/appellate-courts/F3/152/588/543820/
- Boik, A., & Corts, K. S. (2016). The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry. *The Journal of Law and Economics*, *59*(1), 105–134. https://doi.org/10.1086/686971
- Booking Holdings Inc. (2014, June 13). The Priceline Group Agrees to Acquire OpenTable, Inc. [Investor Relation]. Retrieved 20 November 2018, from http://ir.bookingholdings.com/news-releases/news-release-details/priceline-group-agrees-acquire-opentable-inc
- Booking.com. (2015, June 25). Booking.com to Amend Parity Provisions Throughout Europe [Press Release]. Retrieved 14 November 2018, from https://news.booking.com/bookingcom-to-amend-parity-provisions-throughout-europeesp/
- Booking.com. (2018, March 29). How Dynamic Ranking uses data to match guests with your property. Retrieved 18 December 2018, from https://checkin.booking.com/en-gb/local-insights/2018/03/29/how-dynamic-ranking-uses-data-to-match-guests-with-your-property/
- Booking.com. (2019, February 6). Undertaking to the Competition and Markets Authority (CMA) Under Section 219 of the EA02 Relating to the Consumer Protection from Unfair Trading Regulations 2008. Retrieved 6 February 2019, from https://assets.publishing.service.gov.uk/media/5c5ab0e140f0b676b3222ab9/Booking.com_B_V_undertakings.pdf
- Buccirossi, P. (2013). Background Note. In *OECD Competition Committee Policy Roundtables - Roundtable on vertical Restraints for on-line Sales*. OECD. Retrieved from

http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2013)1&docLanguage=En

- Buccirossi, P. (2016). Vertical Restraints: a comment on Iacobucci-Winter and Fletcher-Hviid. *Antitrust Law Journal*, *81*(1), 99–109.
- Bundeskartellamt, B 9-66/10 (2013). Retrieved from https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.html
- Bundeskartellamt, B9-121/13 (2015). Retrieved from https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.html
- Bundeskartellamt. (2015b, January 9). HRS's 'best price' clauses violate German and European competition law - Düsseldorf Higher Regional Court confirms Bundeskartellamt's prohibition decision [Press Release]. Retrieved 6 June 2018, from https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html
- Bureau of Labor Statistics, U.S. Department of Labor. (2018). *Occupational Outlook Handbook. Travel Agents.* Retrieved from https://www.bls.gov/ooh/sales/travel-agents.htm
- Buttigieg, E. (2015). Vertical Conduct: Resale Price Maintenance. In Duns, John, Duke, Arlen, Sweeney, Brendan J, & Duns, John Charles, *Comparative competition Law* (Vols 1–Book, Section). Cheltenham, UK; Northampton, MA: Edward Elgar.
- Caccinelli, C., & Toledano, J. (2018). Assessing anticompetitive practices in two-sided markets: The Booking.com cases. *Journal of Competition Law & Economics*, *14*(2), 193–234. https://doi.org/10.1093/joclec/nhy005
- Caillaud, B., & Jullien, B. (2003). Chicken & Egg: Competition among Intermediation Service Providers. *The RAND Journal of Economics*, *34*(2), 309–328. https://doi.org/10.2307/1593720

- Case 15/74 Centrafarm BV v. Sterling Drug, Inc (14 December 2006). Retrieved from https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:61974CJ0015
- Case C-74/04 P Commission v Volkswagen AG (13 July 2006). Retrieved from http://curia.europa.eu/juris/liste.jsf?language=en&num=C-74/04
- Case C-217/05, Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA (14 December 2006). Retrieved from http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d5ef6c435ac4f64ace8da2d8eeaedb86ff.e34KaxiLc3eQc40LaxqMbN4Oa3uOe0?text=&docid=62635&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=573784
- Case C-279/06, CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL (11 September 2008). Retrieved from http://curia.europa.eu/juris/liste.jsf?language=en&num=C-279/06
- Case C-311/85, VZW Vereniging van Vlaamse Reisbureaus v VZW Sociale Dienst van de Plaatselijke Overheidsdiensten (1 October 1987). Retrieved from http://curia.europa.eu/juris/liste.jsf?language=en&num=C-311/85
- Case C-382/12 P, MasterCard and Others v Commission (11 September 2014). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0382
- Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others (20 September 2001). Retrieved from https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61999CJ0453
- Case T-228/98, Irish Sugar PLC v EC Commission, 1999 E.C.R. II-2969 (1999). Retrieved from http://curia.europa.eu/juris/liste.jsf?language=en&num=T-228/97
- Colangelo, M. (2017). Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking. *Journal of European Competition Law & Practice*, *8*(1), 3–14. https://doi.org/10.1093/jeclap/lpw046
- Colangelo, M., & Zeno-Zencovich, V. (2015). La intermediazione on-line e la disciplina della concorrenza: i servizi di viaggio, soggiorno e svago. *Il Diritto Dell'Informazione e Dell'Informatica*, *31*(1), 43–88.

- Colangelo, M., & Zeno-Zencovich, V. (2016). Online platforms, competition rules and consumer protection in travel industry. *Journal of European Consumer and Market Law*, *5*(2), 75–86.
- Commission Regulation (EU) No 330/2010 (VBER), Commission Regulation 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. OJ L 102, 23.4.2010, p. 1–7 § (2010). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0330
- Competition and Markets Authority. (2014). *Private Motor Insurance Market Investigation - Final Report* (8.42). Retrieved from https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf
- Competition and Markets Authority. (2015, September 16). CMA closes hotel online booking investigation [Press Release]. Retrieved 14 November 2018, from https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.
- Competition and Markets Authority. (2017, October 27). Online hotel booking - CMA launches consumer law investigation into hotel booking sites. [Press Release]. Retrieved 14 November 2018, from https://www.gov.uk/cma-cases/online-hotel-booking#history
- Competition and Markets Authority. (2018, June 28). CMA launches enforcement action against hotel booking sites [Press Release]. Retrieved 14 November 2018, from https://www.gov.uk/government/news/cma-launches-enforcement-action-against-hotel-booking-sites
- Competition Policy International. (2018, August 1). Sweden: Booking.com ordered to amend price parity clauses [Press Release]. Retrieved 13 November 2018, from https://www.competitionpolicyinternational.com/sweden-booking-com-ordered-to-amend-price-parity-clauses/
- Council Regulation (EU) No 1/2003, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in

Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25 § (2002). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001

- Decreto Legislativo 19 Gennaio 2017, n. 3, Attuazione della direttiva 2014/104/UE del Parlamento europeo e del Consiglio, del 26 novembre 2014, relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell'Unione europea. 17G00010, GU Serie Generale n.15 del 19-01-2017 § (2017). Retrieved from http://www.gazzettaufficiale.it/eli/id/2017/01/19/17G00010/sg
- Directive 2014/104/EU, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19 § (2014). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0104
- Dr Miles Medical Co v John D Park & Sons Co, 220 U.S. 373 (S. Ct. 1911). Retrieved from https://supreme.justia.com/cases/federal/us/220/373/
- Edelman, B., & Wright, J. (2015). Price coherence and excessive intermediation. *Quarterly Journal of Economics*, *130*(3), 1283–1328. https://doi.org/10.1093/qje/qjv018
- European Commission. Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43–53 § (2004). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52004XC0427%2802%29
- European Commission. Guidelines on the application of Article 81(3) of the Treaty, 2004/C 101/08, OJ C 101, 27.4.2004, p. 97–118 § (2004). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0427(07)
- European Commission. Commission staff working document - Proposal for a Regulation of the European Parliament and of the Council on a code of conduct for computerised reservation systems - Impact Assessment, COM(2007) 709 final

SEC(2007) 1497} § (2007). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52004XC0427%2802%29

- European Commission. (2007b). *Mastercard - Summary of Commission Decision of 19 December 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement* (COMP/34.579 - 2009/C 264/04 - OJ C 264, 6.11.2009, p. 8–11). Retrieved from https://publications.europa.eu/en/publication-detail/-/publication/2e128710-1431-429c-8e8f-f867fdb41c31/language-en

- European Commission. (2007c). *Travelport/Worldspan - Regulation (EC) No 139/2004 Merger Procedure* (COMP/M. 4523 - C(2007)3938 - OJ L 314, 1.12.2007, p. 21–28). Retrieved from http://ec.europa.eu/competition/mergers/cases/decisions/m4523_20070821_20682_en.pdf

- European Commission. (2008). *Google/ DoubleClick - Regulation (EC) No 139/2004 Merger Procedure* (COMP/M.4731 - C(2008) 927 (final) - O.J. C 184, 22.7.2008, p. 10-12). Retrieved from http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

- European Commission. Guidelines on Vertical Restraints, C 130/1, OJ C 130, 19.5.2010, p. 1–46 § (2010). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010XC0519%2804%29#document1

- European Commission. (2010b). *Visa MIF - Commission Decision relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement* (COMP/39.39 - C(2010) 8760 final - OJ C 79, 12.3.2011, p. 8–9). Retrieved from http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_6930_6.pdf

- European Commission. (2012). *E-Books - Commission Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement* (COMP/AT-39.847 - C(2012) 9288 (consolidated version) - OJ C 73, 13.3.2013, p. 17–20). Retrieved from http://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_26804_4.pdf

- European Commission. (2017). *Final report on the E-commerce Sector Inquiry* (Report of the Commission to the Council and the European Parliament, COM(2017) 229 final, SWD(2017) 154 final). Retrieved from http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf
- European Commission. (2018). *Antitrust: Commission opens investigation into airline ticket distribution services* (Press release IP/18/6538). Retrieved from file:///Users/filippomastrofini/Downloads/IP-18-6538_EN.pdf
- European Competition Network. (2017a). *Report on the Monitoring Exercise Carried out in the Hotel Online Booking Sector by EU Competition Authorities in 2016*. Retrieved from http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf
- European Competition Network. (2017b, February 17). Outcome of the Meeting of ECN DGs on 17-02-2017. Retrieved 16 December 2018, from http://ec.europa.eu/competition/antitrust/ECN_meeting_outcome_17022017.pdf
- Evans, D. S. (2003a). Some Empirical Aspects of Multi-sided Platform Industries. *Review of Network Economics*, *2*(3). https://doi.org/10.2202/1446-9022.1026
- Evans, D. S. (2003b). The antitrust economics of multi-sided platform markets. *Yale Journal on Regulation*, *20*(2), 325–382.
- Evans, D. S., & Noel, M. D. (2008). The Analysis of Mergers that Involve Multisided Platform Businesses. *Journal of Competition Law and Economics*, *4*(3), 663–695.
- Evans, D. S., & Schmalensee, R. (2013). The Antitrust Analysis of Multi-Sided Platform Businesses. *National Bureau of Economic Research Working Paper Series*, *No. 18783*, 1–72. https://doi.org/10.3386/w18783
- Expedia group. (2015, July 1). Expedia Amends Rate, Conditions and Availability Parity Clauses [Press Release]. Retrieved 14 November 2018, from https://media.expediagroup.com/2015-07-01-expedia-amends-rate-conditions-and-availability-parity-clauses

- Ezrachi, A. (2015). The competitive effects of parity clauses on online commerce. *European Competition Journal*, *11*(2–3), 488–519. https://doi.org/10.1080/17441056.2016.1148870
- Ezrachi, A. (2016). *EU competition law: an analytical guide to the leading cases* (Fifth). Portland (Or.); Oxford; Bloomsbury Publishing.
- Filistrucchi, L., Geradin, D., Damme, E. van, & Affeldt, P. (2014). Market definition in two-sided markets: Theory and practice. *Journal of Competition Law and Economics*, *10*(2), 293–339. https://doi.org/10.1093/joclec/nhu007
- Filistrucchi, L., Geradin, D., van Damme, E., Keunen, S., Wileur, J., Klein, T. J., & Michielsen, T. O. (2010). *Mergers in two-sided markets - A report to the NMa* (Report n. madoc:46226). Tilburg. Retrieved from http://ub-madoc.bib.uni-mannheim.de/46226/
- Fletcher, A. (2007, April 19). Predatory pricing in two-sided markets: A Brief Comment. Retrieved 25 November 2018, from https://www.competitionpolicyinternational.com/predatory-pricing-in-two-sided-markets-a-brief-comment/
- Fletcher, A., & Hviid, M. (2016). Broad Retail Price MFN Clauses: are they RPM 'at its worst'? *Antitrust Law Journal*, *81*(1), 65–98.
- González-Díaz, F. E., & Bennett, M. (2015). The law and economics of most-favoured nation clauses. *Competition Law & Policy Debate*, *1*(3), 26–42.
- GWB, Gesetz gegen Wettbewerbsbeschränkungen, Bundesgesetzblatt I, 2013 p. 1750 - 3245 § (2013). Retrieved from http://www.gesetze-im-internet.de/gwb/index.html
- Haucap, J., & Heike, S. (2018). *Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy* (pp. 1–11). Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742
- Haucap, J., & Stühmeier, T. (2016). *Competition and antitrust in internet markets* (pp. 183–210). Retrieved from http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/199_Haucap_Stuehmeier.pdf

- Heinz, S. (2016). Online Booking Platforms and EU Competition Law in the Wake of the German Bundeskartellamt's Booking.com Infringement Decision. *Journal of European Competition Law & Practice*, *7*(8), 530–536. https://doi.org/10.1093/jeclap/lpw049
- Hossenfelder, S. (2015). Horizontal Effects of Parity Clauses Implemented by Online Travel Agents in Contracts with Hotel Partners - The German HRS - Decision Confirmed by the Higher Regional Court Symposium: Parity Clauses. *Competition Law & Policy Debate*, *1*(3), 83–86.
- HOTREC - Hospitality Europe. (2016, July 9). France Forbids Parity Rate Clauses by Law [Press Release]. Retrieved 6 June 2018, from https://www.hotrec.eu/france-forbids-rate-parity-clauses-by-law/
- Hunold, M., Kesler, R., Laitenberger, U., & Schlütter, F. (2018a). Evaluation of best price clauses in online hotel bookings. *International Journal of Industrial Organization*, *61*, 542–571. https://doi.org/10.1016/j.ijindorg.2018.03.008
- Hunold, M., Kesler, R., Laitenberger, U., & Schlütter, F. (2018b). *Hotel rankings of online travel agents, channel pricing and consumer protection*. Düsseldorf Institute for Competition Economics: DICE Discussion Paper n3863042999. Retrieved from http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/300_Hunold_Kesler_Laitenberger.pdf
- Hviid, M. (2015). Vertical Agreements Between Suppliers and Retailers That Specify a Relative Price Relationship Between Competing Products or Competing Retailers. In *124th OECD Competition Committee - Competition and Cross Platform Parity Agreements - Hearing on Across Platform Price Parity Agreements*. Paris. Retrieved from http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)6&doclanguage=en
- Iacobucci, E., & Winter, R. A. (2016). European Law on Selective distribution and Internet Sales: an Economic Perspective. *Antitrust Law Journal*, *81*(1), 47–64.
- Iacovides, M., & Jeanrond, J. (2017). *Keep Calm and Carry on Applying the Existing Rules–EU Competition Law and the Digital Economy* (Research Paper n.

36). Faculty of Law, Stockholm University. Retrieved from SSRN: https://ssrn.com/abstract=3073006

- In re Online Travel Company (OTC) Hotel Booking Antitrust Litigation, 3:12-cv-3515-B (N.D. Tex. 2014). Retrieved from https://cases.justia.com/federal/district-courts/texas/txndce/3:2012cv03515/222550/136/0.pdf?ts=1392827654
- Italianer, A. (2014). Competition Policy in the Digital Age. In *Presentation at the 47th Innsbruck Symposium "Real Sector Economy and the Internet-Digital Interconnection as an Issue for Competition Policy", Innsbruck*. Innsbruck: European Commission. Retrieved from http://ec.europa.eu/competition/speeches/text/sp2014_01_en.pdf
- Jenny, F. (2015). Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions. *Fordham International Law Journal*, *38*(3), 701–770.
- Jones, A., & Sufrin, B. (2017). *EU competition law: text, cases, and materials* (Sixth). Oxford, UK: Oxford University press.
- Jullien, B. (2011). Competition in multi-sided markets: Divide and conquer. *American Economic Journal: Microeconomics*, *3*(4), 186–219.
- King, S. P. (2018). Technology and Competition Economics. *International Journal of the Economics of Business*, *25*(1), 109–118. https://doi.org/10.1080/13571516.2017.1397879
- Konkurrensverket, Ref 596/2013 (2015). Retrieved from http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf
- Kuksov, D., & Liao, C. (2018). When Showrooming Increases Retailer Profit. *Journal of Marketing Research*, *55*(4), 459–473.
- Lasserre, B. (2016). Competition Authorities and Digital Markets: The Need for an All-Around Resolute Action. *Journal of European Competition Law & Practice*, *7*(7), 429–430. https://doi.org/10.1093/jeclap/lpw060
- LEAR. (2012). *Can 'Fair' Prices Be Unfair? A review of Price Relationship Agreements. A report prepared for the Office of Fair Trading.* (No. OFT1438).

London: Office of Fair Trading. Retrieved from http://www.learlab.com/publication/1145/

- Leegin Creative Leather Products, Inc. v PSKS, INC., 551 U.S. 877 (S. Ct. 2007). Retrieved from https://supreme.justia.com/cases/federal/us/551/877/
- Legge 4 agosto 2017, n. 124, Legge annuale per il mercato e la concorrenza, 17G00140, GU S. Gen. 189, 14-08-2017 § (2017). Retrieved from http://www.gazzettaufficiale.it/eli/id/2017/08/14/17G00140/sg
- Loi 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques, JORF n°0181, 7 Aug. 2015, p. 13537 § (2015). Retrieved from https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=93055690D9B7D9085AB5D66566349411.tplgfr25s_2?cidTexte=JORFTEXT000030978561&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000030978558
- Lopopolo, S. (2017). Il recepimento italiano della Direttiva 2014/104/UE sul private enforcement antitrust. *Federalismi.It*, (23/2017), 1–27.
- Mantovani, A., Piga, C. A., & Reggiani, C. (2017). *The Dynamics of Online Hotel Prices and the EU Booking.Com Case* (NET Institute Working Paper n. 17-04). Retrieved from SSRN: https://ssrn.com/abstract=3049339
- Mantovani, A., Piga, C., & Reggiani, C. (2018). On the Economic Effects of Price Parity Clauses - What Do We Know Three Years Later? *Journal of European Competition Law & Practice*, (Journal Article), lpy028 1-5. https://doi.org/10.1093/jeclap/lpy028
- Mariniello, M. (2014). *Commitments or Prohibition? The EU Antitrust Dilemma* (Bruegel Policy Brief n. 1 (2014)) (pp. 1–8). Retrieved from http://bruegel.org/2014/01/commitments-or-prohibition-the-eu-antitrust-dilemma/
- MarketLine. (2016). *Marriott & Starwood Creating the world's largest hotel chain* (MarketLine Case Study n. ML00022-035). Retrieved from https://advantage.marketline.com/Product?ptype=Case+Studies&pid=ML00022-035
- MarketLine. (2018a). *Booking Holdings Inc.* (Company Profile No. C97B38CE-6BDE-4C01-8B8D-B03365AABFB9). Retrieved from

https://advantage.marketline.com/Product?ptype=Companies&pid=C97B38CE-6BDE-4C01-8B8D-B03365AABFB9

- MarketLine. (2018b). *The Future of Travel and Tourism: Technology is driving significant change and growth is on the horizon.* (Theme Report n. ML00026-015). Retrieved from https://advantage.marketline.com/Product?ptype=Theme+Reports&pid=ML00026-015

- Newman, J. M. (2015). Antitrust in zero-price markets: Foundations. *University of Pennsylvania Law Review*, *164*(1), 149–206.

- Oberlandesgericht Düsseldorf. German Hotel Association/HRS, VI Kart 4/12 (W) 2935 (2012). Retrieved from https://openjur.de/u/676361.html

- Oberlandesgericht Düsseldorf, VI - Kart 1/14 (V) (2015). Retrieved from http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2015/VI_Kart_1_14_V_Beschluss_20150109.html

- OECD Competition Committee. (2015). Note by Italy. In *124th OECD Competition Committee - Competition and Cross Platform Parity Agreements - Hearing on Across Platform Price Parity Agreements*. Retrieved from http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)58&doclanguage=en

- OECD Competition Committee. (2016). Note by Sweden. In *125th meeting of OECD Competition Committee - Commitment Decisions in Antitrust cases*. Retrieved from http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2016)39&doclanguage=en

- Office of Fair Trading. (2012, July 31). OFT issues Statement of Objections against Booking.com, Expedia and Intercontinental Hotels Group [Press Release]. Retrieved 14 November 2018, from http://webarchive.nationalarchives.gov.uk/20140402182533/http://www.oft.gov.uk/news-and-updates/press/2012/65-12

- Office of Fair Trading. (2014a). *Hotel online booking: Decision to accept commitments to remove certain discounting restrictions for Online Travel Agents*

(OFT 1514dec). Retrieved from https://webarchive.nationalarchives.gov.uk/20140402182536/http://www.oft.gov.uk/shared_oft/ca-and-cartels/oft1514dec.pdf

- Office of Fair Trading. (2014b). *Hotel online booking: Decision to accept commitments to remove certain discounting restrictions for Online Travel Agents - Annexe 2* (OFT 1514dec). Retrieved from https://webarchive.nationalarchives.gov.uk/20140402182536/http://www.oft.gov.uk/shared_oft/ca-and-cartels/oft1514dec.pdf
- Oskam, J., & Zandberg, T. (2016). Who will sell your rooms? Hotel distribution scenarios. *Journal of Vacation Marketing*, *22*(3), 265–278. https://doi.org/10.1177/1356766715626965
- Perset, K. (2010). *The Economic and Social Role of Internet Intermediaries* (OECD Digital Economy Papers No. 171). Paris: OECD Publishing. Retrieved from https://doi.org/10.1787/5kmh79zzs8vb-en.
- PhocusWire. (2015, June 19). French parliament kills rate parity, and Booking predicts hotel price war [Press Release]. Retrieved 6 June 2018, from https://www.phocuswire.com/French-parliament-kills-rate-parity-and-Booking-predicts-hotel-price-war
- Rochet, J.-C., & Tirole, J. (2003). Platform Competition in Two-sided Markets. *Journal of the European Economic Association*, *1*(4), 990–1029.
- Rochet, J.-C., & Tirole, J. (2006). Two-Sided Markets: A Progress Report. *The RAND Journal of Economics*, *37*(3), 645–667.
- Rysman, M. (2009). The Economics of Two-Sided Markets. *The Journal of Economic Perspectives*, *23*(3), 125–143.
- Sarkar, M., Butler, B., & Steinfield, C. (1998). Cybermediaries in Electronic Marketspace: Toward Theory Building. *Journal of Business Research*, *41*(3), 215–221. https://doi.org/10.1016/S0148-2963(97)00064-7
- Scott Morton, F. M. (2013). Contracts That Reference Rivals. *Antitrust*, *27*(3), 72–79.

- Sherman Act, U.S.C., 15 § (2012). Retrieved from http://uscode.house.gov/browse/prelim@title15/chapter1&edition=prelim
- Skyscanner Ltd v CMA, 1226/2/12/14 (CAT 2014). Retrieved from https://www.catribunal.org.uk/sites/default/files/1226_Skyscanner_Judgment_CAT_16_260914.pdf
- Statista. (2018a). *Digital travel planning in the United Kingdom (UK)* (No. did-31650-1). Retrieved from https://www.statista.com/study/31650/mobile-and-digital-holiday-travel-in-the-united-kingdom-uk-statista-dossier/
- Statista. (2018b). *eTravel Report 2018 - Online Travel Booking* (Statista Digital Market Outlook – Segment Report No. 40460). Retrieved from https://www.statista.com/study/40460/online-travel-booking/
- Steuer, R. (2015). Online Price Restraints Under US Antitrust Law. In *CPI Antitrust Chronicle - RPM and MFN Clauses in a Brave New World* (Vol. 5 (1)). Retrieved from https://www.competitionpolicyinternational.com/online-hotel-booking/
- Tirole, J. (2014). Market Failures and Public Policy. In *Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel*. Retrieved from https://www.nobelprize.org/prizes/economic-sciences/2014/tirole/lecture/
- Toh, R. S., Raven, P., & DeKay, F. (2011). Selling Rooms: Hotels vs. Third-Party Websites. *Cornell Hospitality Quarterly*, *52*(2), 181–189. https://doi.org/10.1177/1938965511400409
- Treaty on the Functioning of the European Union (Consolidated Version), OJ C 326, 26.10.2012, p. 47–390 § (2007). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1546864173565&uri=CELEX:12012E/TXT
- United States Department of Justice. (2016, March 7). Supreme Court Rejects Apple's Request to Review E-Books Antitrust Conspiracy Findings [Press Release]. Retrieved 4 June 2018, from https://www.justice.gov/opa/pr/supreme-court-rejects-apples-request-review-e-books-antitrust-conspiracy-findings
- United States v. Apple Inc., 12 CV 02826 (S.D.N.Y. 2013). Retrieved from http://www.nysd.uscourts.gov/cases/show.php?db=special&id=306

- Vandenborre, I., & Frese, M. J. (2015). The role of market transparency in assessing MFN clauses. *World Competition*, *38*(3), 333–348.
- Varona, E. N., & Canales, A. H. (2015). Online Hotel Booking. In *CPI Antitrust Chronicle - RPM and MFN Clauses in a Brave New World* (Vol. 5 (1)). Retrieved from https://EconPapers.repec.org/RePEc:cpi:atchrn:5.1.2015:i=18244
- Vestager, M. (2015). The vision of a digital Europe: challenges and opportunities. Conference on The Digital Single Market – What's in it for us? In *European Commission Press Release Database*. Copenhagen. Retrieved from https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/vision-digital-europe-challenges-and-opportunities_en
- Vezzoso, S. (2016). Online Platforms, Rate Parity and the Free Riding Defence, Prepared for presentation at 11th ASCOLA Conference. Leiden Law School. http://dx.doi.org/10.2139/ssrn.2802151
- Wals, F., & Schinkel, M. P. (2018). Platform monopolization by narrow-PPC-BPG combination: Booking et al. *International Journal of Industrial Organization*, *61*, 572–589. https://doi.org/10.1016/j.ijindorg.2018.03.006
- Wang, C., & Wright, J. (2016). *Search platforms: Showrooming and price parity clauses* (Working Paper). Retrieved from http://www.cirje.e.u-tokyo.ac.jp/research/workshops/micro/micropaper16/micro0110.pdf
- Weiner, M. L., & Falls, C. G. (2014). Counseling on MFNs After e-books. *Antitrust*, *28*(3), 68–74.
- Whish, R., Whish, R. P., & Bailey, D. J. (2015). *Competition law* (Eighth). Oxford: Oxford University press.
- Wu, C., Wang, K., & Zhu, T. (2015). *Can price matching defeat showrooming?* (University of California, Haas School of Business,). Berkeley. Retrieved from https://pdfs.semanticscholar.org/7f9e/993e8d1266ed60591df0e3cf78aa7a350294.pdf