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# **Travel markets and competition law**

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## Travel markets and competition law

### Introduction<sup>12</sup>

“Assessing the nature of competition in a given industry is rarely a straightforward task”<sup>3</sup>. Recently there has been increased focus in competition law on the travel sector. One of the key questions in this area is, how to structure the distribution chain and who is competing with whom. Since the European Commission is basically silent and does not intervene, national competition authorities all over Europe have initiated investigations. The earliest non-merger procedures were initiated around 2010 and since then the landscape has started to change a lot.

### Overview of (non-)interventions

One of the authorities who started to raise concerns was the Competition and Markets Authority<sup>4</sup>. The authority issued a statement of objections in 2012, but later closed the case on the grounds of administrative priorities.

In 2013 the Bundeskartellamt, the German competition authority prohibited HRS from continuing to apply its 'best price' clause (most favoured nation clause) and ordered the company to delete it from its contracts and general terms and conditions by 1 March 2014 as far as the clause affects hotels in Germany. In 2015 the authority prohibited Booking (Booking.com Deutschland GmbH, Berlin, and Booking.com B.V., Amsterdam) from continuing to apply its 'best price' clauses and ordered the hotel booking portal to completely delete the clauses from its contracts and general terms and conditions by 31 January 2016 as far as they affect hotels in Germany.

In Sweden, France and Italy the authorities were induced to accept commitment decisions in 2014<sup>5</sup>.

On 6 April 2017, a European Competition Network Working Group consisting of the European Commission and 10 national competition authorities published a report monitoring competition within the online hotel booking sector in light of earlier investigations.<sup>6</sup> The key result of the report is that there is large inconsistency in practice.

### Market definition

The definition of a relevant market “*in effect allows attention to be focused on the “important” or “primary” competitive constraints which exists between products*”<sup>7</sup>.

The textbook procedure of market definition is that it is necessary to define the demand and supply side substitution. There are several ways to define relevant markets and some ways are more

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<sup>1</sup> "The present paper is published under the aegis of the Hungarian Ministry of Justice, within the framework of the program entitled 'The Elevation of the Standards of Legal Education'"

<sup>2</sup> The author has investments in the hotel and travel industry.

<sup>3</sup> BISHOP, Simon and WALKER, Mike: *The Economics of EC Competition Law: Concepts, Application and Measurement*. London, Sweet & Maxwell, 2010. p 107.

<sup>4</sup> CE/9320-10.

<sup>5</sup> See further: IP/14/2661 - Commission announces the launch of market tests in investigations in the online hotel booking sector by the French, Swedish and Italian competition authorities.

<sup>6</sup> Available here: [http://ec.europa.eu/competition/ecn/hotel\\_monitoring\\_report\\_en.pdf](http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf).

<sup>7</sup> BISHOP, Simon and WALKER, Mike: *The Economics of EC Competition Law: Concepts, Application and Measurement*. London, Sweet & Maxwell, 2010. p. 108.

theoretical than others. One of the sources which can be defined as a starting point is the notice of the European Commission on market definition.<sup>8</sup> The notice goes like this:

*“A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. [...] The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. [...] Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.”*

A key issue in market definition is demand side substitution: *“the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer.”*<sup>9</sup>

Therefore, it is crucial to see what consumers think are interchangeable products or services.

### **Market definition in NCA decisions**

#### *HRS decision - Bundeskartellamt*

In the HRS decision of the Bundeskartellamt<sup>10</sup> the authority carried out an extensive evaluation of the relevant markets. The authority, evaluated the relevant product market in lengthy paragraphs. HRS argued that the product market shall be defined broadly, including both providers of the typical bundle of services of a hotel portal (search, comparison and booking (and all providers of a single service. The authority highlighted that the case concerns the sale of hotel rooms via hotel portals: “there is a need to distinguish between the various sales channels and the sales-relevant services specified by HRS. Relevant points are, in particular, whether services are offered as a bundle or individually and whether the service is offered at the same level of the distribution chain.” Furthermore, the orientation and the range of services offered by the channels need to be considered. [...] The meaning and purpose of the market definition under competition law is to include competition relationship between market players whose relationships are the focus of the investigation in a specific case.”<sup>11</sup> As the authority describes, it “has also investigated the perspective of the hotel customer in the market definition”<sup>12</sup>. The authority argues that hotels' own websites and specialized portals do not offer the same comprehensive bundle and therefore are excluded from the hotel portal market. OTAs and tour operators are on an another level of the distribution chain than hotel portals. Due to the different attributes and possibilities and the limitations of offline sales, there is a distinction between offline and online sales. One of the main arguments of the authority regarding excluding hotel websites from

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<sup>8</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law. OJ C 372, 9.12.1997, p. 5–13.

<sup>9</sup> Im. para 15.

<sup>10</sup> BKartA, 20. Dezember 2013, B9-66/10 - HRS. Some of the statements of the authority are sensitive to passing of time, therefore this article only relies on the arguments that are still a lot relevant today.

<sup>11</sup> Im. para 71.

<sup>12</sup> Im. para 72.

the market definition is as follows: “A further distinction should be made within online sales. In terms of their services and prices, hotel portals are in a close competition relationship in the view of the hotels, whilst other online sales channels do not constitute adequate substitutes, but tend more to complement online sales. Where online providers only connect other upstream and downstream sides of the market, they operate on a different level of the distribution chain. This leads to differing contractual obligations and means of payment between these online providers and their customers. The services of online providers which are on another level of the distribution chain are hence not a substitute for hotel portals, in particular in the view of the hotels which have to pay.”<sup>13</sup>

According to the argument put forward, hotel portals are two-sided markets with network effects, customers on the one side, and hotels on the other.

#### *Booking.com decision – Bundeskartellamt*

A few years later the Bundeskartellamt also condemned the narrow best price clauses of Booking.com.<sup>14</sup> The authority confirmed the previous approach and decided there is no unified market for bookings. The relevant market is the bundle of search, compare and book (hotel portals). The authority relied mainly on the confirmation of its previous decision in the HRS case, by OLG Düsseldorf<sup>15</sup>. The main demand of hotels is the service of the OTAs to send bookings to the hotel. The appearance and the comparability are only a secondary service to the main service. This bundle is comfortable to the hotels. The interchangeability of the services for consumers is influenced by indirect network effects. The authority expressly excluded all other distribution channels from the relevant product market. Hotel websites, meta search engines, specialized portals, online travel service providers, etc. are not in the relevant market. The Bundeskartellamt also excluded the relevance of supply side substitution.

#### *Swiss decision on Booking.com at al*

At the end of 2015, the Swiss authority Competition Commission COMCO also adopted a decision.<sup>16</sup> The authority took the position of the hotels as a starting point to analyse the market.<sup>17</sup> As the authority points out: “The point of view of customers is indirectly taken into account as hotels need to consider the demand by customers in their choice of distribution channels.”<sup>18</sup>

As the authority goes on, there are several distribution channels, the two main being: direct and indirect distribution.<sup>19</sup> Due to its relevance, we will cite the authority in length:

“242. As follows from the previous considerations, rating portals, meta-search engines and internet-search engines act as advertisers with especially online-booking platforms as their (paying) clients. Hotels themselves do not receive any bookings in a direct manner from these advertisers. While customers can use the services provided by these advertisers to search for hotels and to gather (various degrees of) information concerning these hotels, they are still compelled to use a hotel’s existing distribution channels to book a stay.

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<sup>13</sup> Im. para 80. A similar argument goes for tour operators.

<sup>14</sup> B9-121/13 Booking.com B.V., Booking.com (Deutschland) GmbH, HRS-Hotel Reservation Service Robert Ragge GmbH, Expedia Inc., Hotelverband Deutschland (IHA) e.V.

<sup>15</sup> OLG Düsseldorf, 9. Januar 2015, VI-Kart 1/14 (V) – HRS

<sup>16</sup> See Competition Commission COMCO - 32/2011/00260/COO.2101.111.4.128303 of 19 October 2015.

<sup>17</sup> See im. para 178 – 179.

<sup>18</sup> Im. para 179.

<sup>19</sup> See further im. para 203 - 241.

243. A possible substitution of online-booking platforms through advertisers is already ruled out by the simple fact that advertisers themselves lack any own booking facilities. The services provided by advertisers have to be seen as inputs to the service provided by online-booking platforms: The advertising services are bought by online-booking platforms as a marketing tool for their own services. Attributing internet-search engines to the same product market as online-booking platform would lead to the contradictory conclusion that advertising expenditures by online-booking platforms themselves would also have to be counted as turnover of 'competing' advertisers. This would make even less sense in the case of meta-search engines belonging to the same group as an online-booking platform.

244. The view that meta-search engines cannot be included in the relevant product market is also expressed by the Bundeskartellamt. As a reason for this conclusion, it is stated that from the point of view of hotels meta-search engines cannot be regarded as substitutes because they, unlike online-booking platforms, do not offer all aspects of distribution. Rather the Bundeskartellamt, based on experiences from merger procedures and on statements by online-booking platform, comes to the conclusion that meta-search engines operate on a different level of the market compared to online-booking platforms. [...]

247. In summary, rating portals, meta-search engines and internet-search engines cannot be regarded as substitutes to online-booking platforms. Advertisers rather offer possibilities to influence the choice by users between different distribution channels. [...]

253. As follows from the previous consideration, a hotel cannot substitute the distribution through online-booking platforms by using other distribution channels. It was also shown that advertisers cannot act as substitutes to online-distribution channels. The relevant product market is therefore the intermediation of bookings by online-booking platforms between hotels and customers.

254. The definition of the product market is ultimately the same as the one by the Bundeskartellamt, despite the fact that it came to this conclusion using a different approach: In a first step, the Bundeskartellamt made a distinction between the distribution of hotels through the internet (especially online-booking platforms, real-time bookings a hotel-homepages, GDS) and offline distribution channel (especially direct booking by telephone, fax, e-mail and reservation forms on hotel-homepages and bookings through travel agencies / tour operators). In a second step the Bundeskartellamt considered whether there are any substitutes for online-booking platforms within internet distribution channels, which was ultimately denied."<sup>20</sup>

#### *Market investigation of the Hungarian competition authority*

The Hungarian Competition Authority (further on: GVH) carried out a market investigation.<sup>21</sup> The final report was issued in 2016. The authority did not reach any conclusion on a possible relevant market, but delivered some insights. The report discussed the relevance of two-sided markets on this market. The GVH stated that externalities are a very important factor in this market and such markets are usually characterized by large market concentration.<sup>22</sup>

#### **What went wrong with market definitions?**

Competition authorities usually investigate past conduct – excluding of course the case of merger control – and these investigations also tend to last long. The CMA investigation took 5 years to result

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<sup>20</sup> Im.

<sup>21</sup> GVH: Final report on the sectoral inquiry on the online booking market. May 2016

<sup>22</sup> For a detailed introduction to the report of the GVH, see: SZILÁGYI, Pál: The evaluation of the Hungarian sector inquiry in the online travel market. PLWP 2017/16. Link: [http://www.plwp.eu/files/2017-16\\_Szilagy\\_i](http://www.plwp.eu/files/2017-16_Szilagy_i).

in a decision to close the case on the grounds of administrative priorities. The HRS case took almost three years, the Booking.com case similarly. Of course, competition authorities must carry out ex-post investigations in these cases, but market trends – in the cases – seem to be undervalued. While in 2010 the booking behaviour of consumers might be defined by offline and online channels, etc., even at the time of the adoption of the cases discussed previously, one could have easily seen how the markets have evolved. Consumer behaviour is shifting rapidly and this also has major implications on the relevant markets.

Demand side substitution is key to defining the relevant market. Platforms, like OTAs, are typically characterized by two sides (two-sided markets), and two distinct groups of consumers are using the same service and only one is paying for it (typically). In the case of OTAs, both the travellers and the hotels use the same service and the hotels pay the costs of this service in the form of commissions.

#### *Demand side substitution - consumers*

Starting with the hypothetical form of market definition, what would happen in the case of a small but significant non-transitory increase in price (SSNIP test), is very difficult to say.

The SSNIP test, or Hypothetical Monopolist Test<sup>23</sup> as is also called is a theoretical approach: *“The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (“hypothetical monopolist”) likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market [...] The SSNIP is intended to represent a “small but significant” increase in the prices charged by firms in the candidate market for the value they contribute to the products or services used by customers. This properly directs attention to the effects of price changes commensurate with those that might result from a significant lessening of competition caused by the merger. This methodology is used because normally it is possible to quantify “small but significant” adverse price effects on customers and analyze their likely reactions, not because price effects are more important than non-price effects.”*<sup>24</sup>

The direct price<sup>25</sup> for travelling consumers is zero, and therefore that cannot be increased by 10 percent. The fact is that basically no OTA service is established which charges directly to consumers for the bundle of search, compare and book. Even though it is a hypothetical argument – like the hypothetical monopolist test itself – one could argue, that an introduction of even a small fee would basically drive away consumers to other channels, where they can search freely at zero cost for accommodation. The main characteristic of the service that is the most relevant to consumers is that they can search on specialized portals for accommodation. Comparison and the possibility of easy booking is a secondary and valuable service to that. But in our hypothesis, if an OTA would charge for any of these services, the consumers would switch to other distribution channels, like metasearch engines or search engines and hotel websites. Even with the existence of specialized OTAs, consumers still spend plenty of time researching hotels, prices and other terms and conditions, before they book.

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<sup>23</sup> The original formulation in government document can be found in the 1982 Horizontal Merger Guidelines. See also: Horizontal Merger Guidelines. U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION: 1992, revised 1997.

<sup>24</sup> Horizontal Merger Guidelines. U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION: 2010. 4.1.1 and 4.1.2.

<sup>25</sup> We exclude the fact that travel habits and personal data is also valuable for OTAs and could have a monetary value and therefore treated as a form of payments.

### *Demand side substitution – hotels*

Hotels are looking for ways to connect with consumers and they aim to convince consumers to book at the hotel. Hotels have several ways to reach consumers: most of the hotels have their own website; they can advertise on search engines; list themselves on metasearch engines and rating sites; use the service of OTAs, etc. The main aim of the hotel is to reach more and more consumers and convince them to book.

Most hotels use a “marketing mix”, like advertising on Facebook, Google, etc. and also use recommendation services, rating sites and OTAs. Each of these channels has different costs, which can be mainly distilled to acquisition costs. How much money is spent on all of these services (payments, commissions, etc.) to acquire a booking guest?

For the commissions applied by the OTAs, using the classical approach to market definition, a SSNIP could lead to different outcomes. One possible argument would be that hotels would not use any alternative channel more extensively, if they think that those other channels are less efficient on a cost per acquisition basis. The other argument would be that hotels would try to use other channels and try to lower the number of acquisition of guests via OTAs. In order to choose this possibility, the cost per acquisition shall be lower than the commission they have to pay to OTAs.<sup>26</sup> It is however really difficult to measure the effectiveness of any of the channels. It may be that a future hotel guest only checks an OTA website or app and books a hotel based on that, but it is also possible that the same guest was targeted with a Facebook ad, checked the rating on TripAdvisor and Google and finally used the booking.com app to book the hotel due to the convenience factor that the OTA app gives the consumer.

Basically, the main service providers, are competing for the same thing: booking of the consumer via their platform or site.<sup>27</sup> If any of the service providers increase their price, hotels are trying to calculate whether they shall rebalance their ‘marketing mix’ and spend more money on alternative channels. For example, if an OTA increases the minimum level of commission, the hotel might reallocate fund to Facebook advertisements or to give extra savings to loyalty programme members to make direct bookings more favourable.

One of the most interesting issues regarding competition for the consumers’ bookings is the fact that the OTAs are among the largest buyers of ads at search engines. The largest OTAs are among the top5 ad buyers of search engines. In 2013, Priceline was the second largest advertiser, Expedia the fourth in the US<sup>28</sup>. The same was true for 2014.<sup>29</sup> And the trend is probably similar also in the years since 2014.<sup>30</sup>

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<sup>26</sup> OTAs have not changed their effective commission rate recently. See further EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016) p. 8.

<sup>27</sup> Some service providers have not yet introduced direct booking possibilities (like search engines), but Google and Facebook are both experimenting with this possible feature.

<sup>28</sup> See PETERSON, Tim: Amazon Tops List of Google's 25 Biggest Search Advertisers. Link: <http://adage.com/article/digital/amazon-tops-list-google-s-25-biggest-search-advertisers/294922/>.

<sup>29</sup> Who Are Adwords Biggest Ads Spenders? Link: <https://www.sekkeistudio.com/blog/2015/08/who-are-adwords-biggest-ads-spenders/>; See also OTAs Lead Top Travel Advertisers in Paid Search. Link: <https://www.adgooroo.com/resources/blog/otas-lead-top-travel-advertisers-in-paid-search/>.

<sup>30</sup> See e.g. EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016) p. 22: There has been a marked increase in OTA payments to metasearch websites and to Google in the period mentioned.

If consumer searches for a place and accommodation, chances are quite high that the ads on the first page of a search engine are all advertisements of OTAs. Hotel and hotel chains are basically out advertised using the commissions they have paid to the OTAs, by the OTAs. The fact that hotels and OTAs are competing for the same places is an important indicator that they all compete for the attention of the consumer to make a booking using their service (website, portal, app, etc.).

The aim of market definition is to define a theoretical and practical framework to analyse competitive effects regarding certain practices. So, in order to have a meaningful market definition, one needs to have a certain conduct in mind. This is the reason, why market definitions might differ in ex-post cases compared to merger cases for example. It is therefore difficult to give a market definition *in abstracto*.

One of the main issues in this market is the clause applied by OTAs in which they require price parity and similar availability. Therefore, we will consider this as a hypothetical and practical starting point.

MFN clauses like the ones applied by OTAs are supposedly to have several positive effects. MFN clauses usually stipulate that a hotel offers its rooms to an OTA on terms regarding price and availability that are at least as good as the best terms available publicly anywhere, including the websites of the hotels.

Competition authorities and the industry label MFN parity clauses as wide or narrow. Wide price parity clauses stipulate, that the OTA must receive the best possible terms. Narrow price parity clauses mean the hotels must offer at least as good terms and prices to the OTA as can be found on their own website, so these are relative to the prices and availability on the websites of the hotels.

The general aim of competition is to protect, even to increase consumer welfare. If both hotels and travellers are consumers on this two-sided markets<sup>31</sup>, increase of welfare on any of the sides of the market is pro-competitive, if the gains outweigh the loss on the other side.

Hotels are free to set their prices – with the limitations in the MFN clauses – on the OTA portals, therefore if they increase the prices, that has an effect directly on the travellers. However, one can argue, that on most geographical markets hotels operate on a very competitive landscape. They face intensive competition from other hotels. This increased competition is a natural consequence of the fact that average fixed costs (ATC) are high compared to average variable costs (AVC) and hotels will use all opportunities to fill their rooms if they think that this has beneficial effects on their bottom line: the most expensive room is the unsold room. If demand from travellers decreases, hotels will drop their prices, if demand increases hotels can charge extremely high prices compared to time periods with the low demand. This is the result of seasonality which can be observed almost anywhere. OTAs and price comparison sites (Trivago, TripAdvisor, recently Google, Bing, etc.) ensure transparency which will ensure hotels must act quickly to reduce (or increase) prices to keep profitability increasing. The norm in the industry has become basically that hotels change their prices daily, or even more frequently. If demand is lower than total availability of the hotels, one can say that traveller consumers will receive a fair share of the consumer welfare.

If demand by travellers is less than availability, hotels will try to sell all rooms. Their willingness to go down with prices is defined by their average total cost and average variable cost. Commissions charged by OTAs is a variable cost. The cost changes with the number of bookings received, since most of the times commissions are set as a percentage of the booking price.

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<sup>31</sup> See also ZIMMER, Daniel and BLASCHCZOK, Martin: Most-Favoured-Customer Clauses and Two-Sided Platforms. Link: <https://ssrn.com/abstract=2749044>..



Both the market investigation of the Hungarian Competition Authority and of the European Commission, or more specifically, the European Competition Network (ECN)<sup>32</sup>, provide for clues regarding how hotels see the role of OTAs on the market.<sup>33</sup>

The report of the ECN sheds light on some interesting figures. The switch from wide parity clauses to narrow parity clauses by Booking.com and Expedia led to an increase in room price differentiation between OTAs by hotels in eight of the then participating Member States.<sup>34</sup> The prohibition of Booking.com's narrow price parity clause led to an increase in room price differentiation between OTAs by hotels in Germany.<sup>35</sup> The clear effect was seen after the abolition of the narrow price parity clause in 2016.<sup>36</sup> This is an indication that the economic benefits of price differentiation can be "harvested" on a competitive market. The report specifically tested the extent to which hotels which are not subject to narrow parity publish lower room prices on their own website than the prices they offer on OTAs. The results show that the majority of hotels did undercut their OTA partners most of the time.<sup>37</sup> In case of existing narrow price parity clauses this was clearly not the case. Interpreting the results show us that there is a clear consumer welfare loss in this case, due to the fact that prices of hotels tend to be higher in case the hotels have to ensure parity.<sup>38</sup>

There was no such clear differentiation however regarding availability.<sup>39</sup> Hotels have an interest to sell as many rooms as possible, especially if they can charge lower prices on their own websites. So abolishing price parity meant in practice lower prices, but similar availability.<sup>40</sup> This is also a good indicator that the market is competitive and hotels are in a difficult position if they would like to increase room prices on this competitive market.

Changes to the price parity clauses was also evaluated in the report. One of the key findings is that the major sales channel (offline) lost share to the second largest channel: OTAs.<sup>41</sup> This shows that there is substitutability between the channels.

#### *Supply side substitution*

We will cite the notice of the European Commission on supply side substitution lengthier. According to the notice of the European Commission: "Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

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<sup>32</sup> EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016)

<sup>33</sup> Although one shall be careful to rely on direct responses from hotels not tested with alternative methods.

<sup>34</sup> EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016) p. 7.

<sup>35</sup> Im.

<sup>36</sup> Im. p. 13.

<sup>37</sup> See im. p. 14.

<sup>38</sup> The commission charged by OTAs are a clear cost that makes the rooms more expensive.

<sup>39</sup> EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016) p. 8.

<sup>40</sup> See also im. p. 17.

<sup>41</sup> See im. p. 19.

These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas. [...]

When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.”<sup>42</sup>

One of the big questions is whether OTAs really are a separate market, or are hotels, or other market participants competitors, so that they shall be included in the relevant market. The relevant market “seeks to restrict attention only to those products or services which have a “significant” impact on competition”<sup>43</sup>. The report of the ECN has also some findings that are relevant for our purpose.<sup>44</sup> The report states that across the Member States, 30% of the hotels that responded contract directly with metasearch sites. Direct contact between metasearch websites and hotels still generate a relatively small share (6%) of total bookings. However, both the share of hotels and that contract directly with metasearch websites and the share of bookings generated by metasearch websites has increased since 2014 and these shares are larger for chain and high category hotels.<sup>45</sup> The increase since the changes in parity clauses also show that there is substitutability between metasearch sites and OTAs.

From a supply side substitutability point of view metasearch sites are clearly competitors to OTAs, even though this is hardly realized in any of the national competition authorities decisions or in reports. They provide the same functionality basically to consumers, even though a consumer might take some additional steps to achieve a similar result, but this might be countered by the benefits of really finding the better or best price comparing not only hotels, but also booking platforms. For example TripAdvisor makes it possible to directly book with the hotel using the TripAdvisor account, it compares hotel prices and a consumer can achieve similar results to OTAs, namely search, compare and book. The latter step might require some additional steps, like registering with the sales channel that has the best price, but still this is not really a burden that should lead to a conclusion that OTAs are therefore a different relevant market.

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<sup>42</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law. OJ C 372, 9.12.1997, p. 5–13. paras 20 – 23.

<sup>43</sup> BISHOP, Simon and WALKER, Mike: *The Economics of EC Competition Law: Concepts, Application and Measurement*. London, Sweet & Maxwell, 2010. p. 108.

<sup>44</sup> EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016)

<sup>45</sup> *Id.* p. 22.

## **Conclusions – the business model fallacy**

The relevant market serves basically one single aim: to set the landscape where one can evaluate the competitive situation. This also means that by defining the relevant market, we draw the line in the sand and also define who is competitor to whom. Recent investigations and evaluations in relevant decisions all miss the point that competition is for visibility of the booking channel between hotels, OTAs, metasearch sites, travel agents, etc. Most consumers are in practice happy to switch between channels if they can see the difference on cost to them, namely how certain channels decrease their consumer welfare. None of the channels have certain characteristics that make them unique and which is necessary for the functioning of the market.

One of the main arguments of the OTAs is that without price parity clauses their business model would not function. Competition law however does not provide safe heaven for business models that decrease consumer welfare. Having built a business model that cannot function without restricting competition is not a get out of jail card. Competition law recognizes necessary restrictions to competition for a market to function, but those cases require some public interest consideration most of the time.<sup>46</sup> This is not present for OTAs, apart from the fact that they might lose market share. Some consumers might still value their service and pay an extra charge for the convenience, the reliability of consumer reviews, etc. but some would not.

From a consumer perspective the different sales channels are substitutable services to book a hotel and can these channels, including in particular metasearch engines, can also be combined. Research shows that consumers still shop around and check several OTAs, channels, metasearch engines, etc. therefore the savings provided by OTAs for consumers in convenience is probably also overstated.

One key idea in competition law is to look at counterfactual situations. The counterfactual situations to the present one are almost in all cases better for consumers.

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<sup>46</sup> See e.g. C-309/99. J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap. ECLI:EU:C:2002:98 and C-519/04 P. David Meca-Medina and Igor Majcen v European Commission. ECLI:EU:C:2006:492.

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