

THE ONLINE HOTEL BOOKING MONITORING EXERCISE

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1. INTRODUCTION

On the 6th of April 2017, the network of EU competition authorities (so called ECN) published its Report on the results of the monitoring exercise carried out in the hotel *online* booking in 2016.² The Italian Competition Authority took part in the monitoring working group, along with other national competition agencies (NCAs) and the European Commission.³ The follow-up evaluation aimed at verifying how recent changes introduced in the so called Most Favored Nation or “MFN”

clauses (or wide parities clauses), following a series of antitrust investigations in EU, affected the functioning of online booking national markets. MFN clauses, included by Online Travel Agencies (OTAs)⁴ in their vertical *standard* contracts with partners hotels, discipline hotels’ offers in their platforms. In brief, wide parity clauses oblige hotels to give the partner OTA the lowest room prices and best room availability relative to all other sales channels (other OTA, hotels own websites and *offline* channels).⁵ Instead, under narrow parity clauses hotels can offer lower room prices and better room availability on competing OTAs and on *offline* sales channels, but cannot offer lower room prices on their own websites.⁶

Since 2010, the national *online* hotel reservations markets, and specifically the parity clauses, have been put under scrutiny by several NCAs. Different approaches have been adopted to solve common competition concerns. Between

¹ Italian Competition Authority.

² The final Report is available at: http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

See also the ICA press release in its own web site: <http://www.agcm.it/en/newsroom/press-releases/2371-ica-publishes-report-on-online-hotel-booking.html>.

³ In addition to the Italian NCA, the monitoring working group consisted of the Belgian, Czech, French, German, Hungarian, Irish, Dutch, Swedish and UK national competition authorities and DG Competition. The Austrian and Swiss NCAs also participated during the design phase of the monitoring exercise.

⁴ Namely the major ones are Booking.com, Expedia and HRS.

⁵ That term is often combined with the promise to match (price matching) or beat (price beating) competitors’ prices. MFN clauses are not found solely in on-line intermediation, but are widely used in a number of others industries, and in a wide range of vertical agreements from long term industrial supply to distribution arrangements.

⁶ Narrow parity removes all parity obligations in respect of room availability: the hotel may offer more favourable room availability to particular OTAs or on its own website.

2013 and 2015, the Bundeskartellamt prohibited the parity clauses used by the two majors German OTAs (HRS and Booking.com).^{7,8} In 2015, the Italian, French and Swedish NCAs, in coordination with the European Commission, accepted Booking's commitments to replace wide parity clauses with narrow ones; a change which was later also applied unilaterally by Expedia.^{9,10}

As a result, in almost all EU member states, pursuant to prohibition or commitment decisions by national competition authorities and/or unilateral change of behavior by OTAs, the major OTAs abandoned wide parities clauses in *standard* contracts with hotels and/or switched to narrow parity ones.¹¹ In addition to the antitrust measures, in August 2015, the "*Loi Macron*" rendered null and void all OTA price

parity clauses in France,¹² as did an amendment to the law on unfair competition in Austria in November 2016.^{13,14} Those scattered interventions shed an uncertain picture in some EU jurisdictions in which different business models (no wide parities for the major OTAs and narrow or wide parities for majors or smaller ones)¹⁵ still coexist.

2. HARM TO COMPETITION FROM PARITY OR MNF CLAUSES

In Italy, the proceeding was opened following complaints filed by the main hotel industry associations against Booking.com and Expedia, alleging that MFN clauses may have qualified as anticompetitive agreements to be prohibited under article 101 of the Treaty on the

⁷ Bundeskartellamt decisions of December 2013 (HRS).

⁸ The OFT (now CMA) also investigated the online hotel booking sector between 2010 and 2014, though its case focussed not on MFN clauses but on restrictions on the ability of OTAs to offer discounted room prices.

⁹ The Italian decision (case number I779) issued on the 21st of April 2015 made legally binding the EU-wide commitments offered by Priceline Group's companies Booking.com BV and Booking.com (Italy) and closed, with respect to these companies, the investigation opened on May 7 2014. Commitments are effective as of 1 July 2015 for five years. Lately, Expedia, the second largest OTA in Italy, also decided unilaterally to applied the narrow MFN, which are effective as for August 2015.

¹⁰ The Ireland secured similar commitments from Booking.com on October 2015.

¹¹ In Germany, the narrow parities clauses were prohibited in 2015 for Booking.com, though the prohibition decision is still under appeal. Expedia is still applying narrow MFN in Germany but a proceedings was opened also against this OTA.

¹² See Article 133 of the Loi no 2015-990 du 6 août 2015 «pour la croissance, l'activité et l'égalité des chances économiques». According to some, there remain questions about the scope and enforcement of the OTA provisions of the "Loi Macron". The provision relies on private enforcement. Furthermore, it is unclear whether this article applies to price parity agreed voluntarily by hotels, for example as a condition of membership of an OTA's preferred partner program.

¹³ See 99. *Bundesgesetz: Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb 1984 - UWG und des Preisauszeichnungsgesetzes.*

¹⁴ Similar legislative intervention has been debated in the Italian parliament.

¹⁵ In Italy, Booking and Expedia are respectively the first and second operators of the OTA national market which is significantly concentrated.

Functioning of the European Union (TFEU) and national equivalents.¹⁶

The main competition concern was that wide parity clauses could soften competition between incumbent OTAs and foreclose entry or expansion by new or smaller OTAs. These effects could be amplified when similar clauses were applied by all competitors. According to the theory of harm, those vertical restrictions could reduce OTAs' incentives to compete on the commercial conditions they offer to hotels, including the commission rates charged to the latter.¹⁷ Indeed, the wide parity clause obliges hotels to offer the OTA the same prices and rooms that are offered on other *online* (including their own websites) and *offline* sales channels.¹⁸ Since with wide parities the same selling conditions (both in term of prices and room availabilities) would prevail on all OTAs, an OTA has no incentive to charge lower commission rates to hotels, since these lower rates would not lead to lower hotel prices on its

¹⁶ See case I779 - MERCATO DEI SERVIZI TURISTICI-PRENOTAZIONI ALBERGHIERE ON LINE, opening of proceedings, 07/05/2014. In this case the complaint was brought by Federalberghi, but similar complaints have been filled in other MS and also against HRS.

¹⁷ Like a traditional travel agent model, commissions remunerate for the service of intermediary that OTAs provide to the hotels partners. Customers pay directly the room to the hotel, while this latter is in turn required to pay a booking fee to the OTA.

¹⁸ Under the wide parity hotels were indeed obliged to offer to the contracted OTA price and room availability that was not worse than that offered to all others selling channels (other OTAs' used by the same hotel or own website). The extent to which all major OTAs applied an MFN clause, reduced hotels' incentive to treat OTAs differently.

platform. Lack of a 'rewarding' or "penalizing" mechanism for low or high commissions rates applied by the OTAs would result in an appreciable adversely effect on horizontal competition across platforms.¹⁹ The use of such clauses by the leading platforms would thus be capable of softening competition and/or foreclose new platforms, to the detriment of final consumers.

The same concerns have been raised across other European jurisdictions. As a consequence of their national investigations, the Italian, French and Swedish NCAs, under the coordination of the EU Commission, made legally binding the replacement of wide MFN clauses with narrow ones which had been offered as a commitment by Booking.com. Booking.com, and ultimately also Expedia, have adapted their EEA-wide policy to those commitments. The shift to narrow parities was considered appropriate to alleviate the competition concerns, as it implied a significant reduction of the scope of the MFN clauses. Narrow parity was expected to restore hotels' abilities to differentiate prices or room availability between platforms and stimulate intra-brand competition in the OTA market, taking into account the risk of hotels free-riding on the investments made by the platforms, such as the cost of marketing and visibility through search engines. Hotels are,

¹⁹ In other words, an OTA will not be afraid to increase his fee, as the hotel is bound by the parity clause to charge him a price not higher than that charged to other OTA, so other platforms will also have fewer incentives to reduce their fees in order to receive better pricing or room conditions.

indeed, left the option to freely set prices and conditions on other OTAs and on their direct *offline* channels, as well as in the context of their loyalty programs. The revised parity clauses would only apply to prices and other conditions publicly offered by the hotels through their own direct *online* sales channels, providing them substantial increase in their margin for maneuver with respect to other OTAs and to the hotel's *offline* channels.²⁰

3. THE EX POST MONITORING EXERCISE AND ITS RESULTS

The monitoring exercise covered various aspects of the way hotels market and sell their rooms in the period January 2013 to June 2016.²¹ Over that period, the share of sales made on OTAs have increased, at the expenses mainly of the *offline* channel, this is particularly true for those hotels that do not belong to a

chain and need to rely on some form of intermediation to enhance their visibility.²²

Attention, thus, was given to evaluate how changes into the contractual terms and conditions applied to *standard* contracts between OTAs and hotels did affected the functioning of the *online* booking sector. In light of the theories of harm applied by the NCAs that have investigated the use of parity clauses by OTAs, the monitoring exercise focused on three elements: *i)* room price differentiation by hotels between sales channels; *ii)* room availability differentiation by hotels between sales channels, and *iii)* OTA commission rates.

To further understand the impact of the changes in MFN clauses, the monitoring exercise was complemented by the analysis of room price data from major *metasearch* websites, i.e. the rooms' prices effectively observed in the market as the result of searches for rooms at a sample of hotels in given periods.²³

²⁰ That is, hotels remain free to advertise discounts online without publishing the amount of such discounts and to grant the OTA different availability conditions than through their own sales channels.

²¹ The NCAs addressed a uniform electronic questionnaire to a sample of 16,000 hotels located in the ten participating Member States, plus questionnaires to 20 online travel agents, 11 metasearch websites and 19 large hotel chains. The period captures, as mentioned, the effects of the antitrust interventions. The Bundeskartellamt's two prohibition decisions against OTA parity clauses (HRS in December 2013 and Booking.com in December 2015), as well as the 'narrow parity' commitments decisions of the French, Italian and Swedish NCAs addressed to Booking.com (April 2015, implemented July 2015), and unilaterally made effective by Expedia in August 2015.

²² Overall, the offline channel decreased its importance by nine point percentage, with *online* sales accounting in the first semester of 2016 of around 55% of total sales (41% OTAs and the rest hotels direct online sales). For independent hotels the OTA channel accounted in the I semester of 2016 about 42%, and direct online 13%; while for hotels belonging to chains, the OTA channel represent about 35% of their sales and the direct online 17%. The figures for Italy are of a slightly more importance of the *offline* channel and less of the OTAs, compare to the average EU.

²³ An econometric analysis of price differentiation between OTAs was run with the difference-in-differences tool. Room price data have been gathered from a major metasearch website was conducted providing that its data covered the period before and after the removal of wide parities and/or the switch to

A first key finding of the survey is the low level of hotels' awareness of the changes occurred in the contractual terms and conditions with OTAs. Nearly half responded that they did not know that the major OTAs could no longer enforce 'wide' parity clauses across the EU.²⁴ Only a fraction of hotels said that they differentiated their commercial behavior across channels/OTAs.²⁵ However, the monitoring exercise was run after quite a short period of time since the antitrust decisions were adopted and it is possible that the sector might not yet have fully adapted to changes made by the OTAs.

The analysis of the metasearch room pricing data provided insights on the extent to which a differentiation in the offers to OTAs has, indeed, occurred following the antitrust interventions.²⁶ Irrespective of the type of measure applied²⁷, a quantifiable level of price/product differentiation occurring between OTAs was found in almost all the

participating member states.²⁸ In particular, the analysis shows that the switch from wide to narrow parity clauses in Italy, as well as in other EU countries²⁹, influenced positively the price and/or room differentiation between OTAs by hotels, in the last couple of years. In other words, the effect of the removal of wide parities was an increase in the degree of differentiation between the prices offered in different OTAs.³⁰ This suggests that hotels are, to a certain extent, taking advantage of the opportunity to varying their commercial policy between OTAs and are able to do so in response to differences in the competitive offers of these OTAs. It appears that hotels belonging to chain are the main drivers of the increase in price/room differentiation on OTAs. The findings in the analysis suggest that for Italy price/room differentiation is a more generalized hotels practice, as the category of independent hotels posted too different prices or/and product on different OTAs.

Following the antitrust interventions, parity obligation were rendered null with respect to

narrow ones. The most used metasearch sites are TripAdvisor, followed by Trivago, Google and Kayak.

²⁴ Some inconsistencies in some of the replies suggest that hoteliers may not have fully understood some of the questions in the survey.

²⁵ One quarter of respondents said that they had changed their behaviour in relation to room pricing and one tenth in relation to room availability.

²⁶ See Appendix 1 of the monitoring Report that describe the econometric analysis of price differentiation between OTAs carried out by the monitoring working group.

²⁷ That is a significant reduction of the scope of the MFN clauses, allowing large OTAs to require parity only on offers made by the hotels through their own direct online sales channels or prohibition of parity clauses.

²⁸ Price differentiation was defined as the case where at least one OTA price differs by more than 5 percent from one other OTA price; room differentiate relates for example to different categories of room, inclusion of breakfast, differing cancellation rights.

²⁹ Those are Belgium, Czech Republic, Germany, Hungary, Ireland, Sweden and United Kingdom.

³⁰ In the same line, a positive effect was found in France following the switch to narrow parity clauses and the entry into force of the Loi Macron and in Germany following the prohibition of Booking.com's narrow parity clause; the effect occurs after Booking.com actually disappplied its parity clause in February 2016, pursuant to the Bundeskartellamt's prohibition decision of December 2015.

room prices that hotels make available through customer loyalty schemes, provided that the hotel does not publish discounted prices *online*. According to the survey, less than half of the respondents use some form of customer loyalty scheme to offer lower prices or more favorable conditions to their customers, those are most common when the narrow parities are applied and for chain or large hotels. Approximately the majority of the surveyed hotels reported that sales via their loyalty scheme had increased in the twelve months following the switch to narrow parity clauses.

4. NEXT STEPS

In light of the findings of the monitoring exercise, the ECN recognized that the measures applied to the parity clauses have generally improved conditions for competition and led to more choice for consumers. However, based on the results, there are evidences that the sector might not yet have fully adapted to the changes made by the major OTAs' to parity clauses.

The lack of awareness by hotels of the removal of wide parity clauses may risk to slow substantial changes in hotels' practices. Potentials benefits spanning from the enhanced flexibility could be further exploited by hotels making use of the possibility to differentiate their offers on the OTAs or via hotels consumers loyalty schemes.

The ENC agreed to keep the *online* hotel booking sector under review and to re-assess the competitive situation in due course. In

order to help the sector to make full use of the measures that have already been taken, the Italian Competition Authority, as well as others NCAs, has taken steps to raise awareness among Italian hotels of the changes made by the main OTA including *ad-hoc* communication to clarify and improve their understanding.