



CLYDE&CO

**Distribution of Tickets: Competition
Law Concerns
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Outline

- Changes to ticket distribution
- Legislative framework
- Restrictions on agents
- GDS issues
- Price parity restrictions
- 'Screen scraping'
- Travel agent incentives
- Concluding remarks

Changes to ticket distribution

- Traditional model – Global distribution system
 - Airline → GDS → Travel agent
- Internet, low cost carriers direct sales and also ‘legacy’ carriers
- Online travel agents eg Expedia who access GDS
- Meta-search eg Skyscanner, Google, scrape/compare/direct back
- Airline connect with agents via API
- Emerging IATA ‘New Distribution Capability’

EU legislative framework

- Art 101(1) TFEU – prohibition of anticompetitive agreements
- Art 101(2) – prohibited restrictions void
- Art 101(3) - Exemption of agreements - positive effects, restrictions indispensable

- Vertical Restraints Block Exemption 330/2010 + Vertical Guidelines
 - Restrictions permitted if both parties < 30%
 - Except certain ‘hardcore’ restrictions imposed by ‘supplier’ on ‘buyer’ [distributor/agent]

- Art 102– may be abuse if party imposing restrictions ‘dominant’

And national equivalent rules

Restrictions on agents I - is agent 'genuine'?

- Definition of agent: *'person vested with power to negotiate and/or conclude contracts on behalf of another person (the principal)... for the...sale of goods or services supplied by the principal.'*
- If 'genuine' agent, Art 101 not apply to restrictions on agent
- 'Genuine' agent - not accept financial or commercial risk eg:
 - risk of non-payment, liability to customer
 - market-specific investments (not just premises, personnel) (Vertical Guidelines paras 13-21)
 - travel agent acting for numerous competing principals who have numerous agents - not 'genuine' (Flemish Travel Agents ECJ 1987)

Restrictions on agents II – ‘hardcore’ restrictions

- Resale price maintenance - ban on agent sharing commission with consumer so as to discount principal's price

(Vertical Guidelines para 43; EC Decisions 1991 - IATA passenger and cargo agency programmes – ban removed)

- Customer or territorial restrictions – to whom / where agent can sell tickets
 - Restriction on sales to non-EEA not hardcore
- These and other hardcore restrictions listed Art 4 VBER

Restrictions on agents III – accreditation of travel agents

- Selective distribution
 - IATA passenger and cargo agency programmes – system for accreditation of agents (EC Decisions 1991)
 - Included arrangements for payment of airlines
 - Travel agent insolvencies - could airlines add further safeguards against non-payment?
 - Matter of assessment under Art 101(3) criteria

GDS Issues I

- Full content agreements - full range of fares provided by airlines
- Price parity - no differentiation on other GDS or direct .com
- Pro: ensure all fares on GDS, enable travel agents to provide consumer benefit
- Con: limit airline ability to negotiate with other channels, lower own prices

GDS Issues II

- Lufthansa €16 booking fee for fares through GDSs
- Complaint by GDS under CRS Code of Conduct Reg 80/2009
 - CRS obligation of non-discriminatory display of airline fares on travel agent screens
 - Argued airline reservation system = CRS
- Investigation closed by EC June 2018

- EC investigation of Amadeus and Sabre (November 2018)
 - Full content and price parity
- New complaint by GDS against Lufthansa under Art 102 –refusal to supply (December 2018)
- EC Survey into Regulation 80/2009 for evaluation (launched September 2018)

Price parity restrictions I

- Not addressed in EC Vertical Guidelines or case law
- Various NCA investigations – hotel sector - inconsistent results
- France, Italy, Sweden, coordinated with EC - Booking.com 2015
 - ‘wide’ price parity ‘you won’t undercut my platform on your own channel or any other sales channel, including other OTAs’ – prohibited
 - reduced competition between OTAs, no incentive to lower price
 - ‘narrow’ price parity ‘you won’t undercut my platform in your direct sales’ – permitted
 - prevent ‘free-riding’ and enable transparency.
 - Similar conclusion Private Motor Insurance (UK CMA, 2015)

Price parity restrictions II

- Germany – both wide and narrow prohibited
 - No incentive for hotel to reduce price on OTA if cannot reduce its own website price (German NCA, HRS 2013, upheld on appeal; Booking.com 2015)
 - Free rider argument (so OTA can recoup investments) - rejected
- Certain EU countries' legislation prohibit any price parity (including narrow) in hotel/platform contracts (France, Austria, Italy and Belgium)
- ECN Report online hotel booking 2017 – some evidence removal of 'wide' parity increased price differentiation between OTAs

Pointers/questions on EU analysis of price parity

- If agent incurs significant IT expense – ‘independent’?
- Even if ‘genuine’ agent, only restrictions on agent outside Art 101
- If either party > 30% VBER, Art 101(3) conditions satisfied?
- Withdrawal of VBER if agreement anticompetitive
- Assume platform ‘buyer’/agent (as opposed to supplier)
- Article 102 – if platform ‘dominant’ – abuse?

Price parity case on airlines - Australia

- Australian NCA: ban on airlines charging less on own websites - price-fixing - fine AUS \$12.5m (Flight Centre v ACCC 2016)
- High Court:
 - although 'agent', Flight Centre not obliged to act in airlines' interests
 - competitors in market for sale of international tickets
 - attempt to fix airlines' prices showed FC + airlines competitors

Cases against OTAs for screen-scraping

- Screen-scraping + making unauthorised bookings
- Ryanair cases in national courts against (inter alia):
 - Google + eDreams - 'copycat' website – settled Irish Court 2015
 - PR Aviation – website terms prohibited use of content for commercial purposes unless licence (ECJ 2015; Database Directive 96/9)
 - Viaggiare – argument that Ryanair refusal abuse of dominant position, rejected by Milan Appeal Court 2015
 - Case ongoing against Expedia in US

Abuse of dominant position – Article 102 TFEU

‘Abuse by one or more undertakings of a dominant position within the internal market or a substantial part of it shall be prohibited...in so far as it may affect trade between member states’

- Dominance – market share important factor, 50% - dominance presumed
- Dominance measured with reference to relevant market
- Special responsibility of dominant firms
- Objective justification – no abuse

Abuse - incentives

- Rebates if growth on sales over 1 year, payable on all sales
- Foreclosure of competitors
- BA/Virgin EC fine €6.8m fine 1999, upheld ECJ 2007
 - dominant share of sales through UK travel agents
 - 'tended to foreclose' Virgin
- Caveats on BA/Virgin
 - Intel v Commission ECJ 2017 – 'effects approach' – Domco provides evidence on lack of foreclosure
 - Pre-widespread use internet + impact of online /direct sales

Concluding remarks

- Careful consideration required for:
 - agreements with agents including OTAs under VBER and/or Art 101(3)
 - restrictions, and rebates/growth incentives on agents – if airline dominance
- Lack of clarity or EU guidance on parity and platform/supplier relationship
 - ‘wide’ requires greater Art 101(3) justification than ‘narrow’
 - possible clarification through case enforcement eg GDS case, and EC review of VBER and/or review on CRS Code

THANK YOU !

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