Booking.com

Response to the "Evaluation support study on the EU competition rules applicable to vertical agreements in the VBER and the Guidelines"

1. Introduction

A study commissioned by the European Commission in support of the evaluation of the Vertical Block exemption regulation ("support study") has assessed price parity clauses - also known as most favoured nation ("MFN") clauses - by reviewing some of the theoretical and empirical economics literature, conducting selective stakeholder interviews, and carrying out two econometric studies in the hotel sector.

The study alleges that narrow MFN clauses in the hotel sector restrict intrabrand competition and negatively affect consumer welfare. This view is based upon "qualitative insights gained from the stakeholder interviews and the results of the econometric analysis." In particular, the study claims that hotel room prices decreased significantly in those markets that banned MFN clauses (i.e. Austria, Belgium and Italy) and it therefore concludes that "the legislative ban on (narrow) MFN clauses appears to have increased consumer welfare."

However, a closer inspection of the study shows that its conclusions suffer from some major omissions and methodological shortcomings. The support study authors base their qualitative evidence only on interviews with accommodations (and it would appear that a particular focus has been the large chains — the accommodations with the most to gain from a weakening of the OTA competitive positioning).[1] Statements made by hoteliers seem to be represented in the study as given facts.[2] The study also overlooks the findings from its own review of the theoretical literature, and the recent case law which recognise the pro-competitive benefits of narrow MFNs. Furthermore, Booking.com was not given the opportunity to provide any input to the study. This biased approach fundamentally calls into question the independence and validity of this report. It is noteworthy that the study authors did not consult the OTAs that have been at the heart of the debate for a number of years now. Booking.com is therefore seriously concerned about the bias in this report and cautions against relying on its findings without thorough further analysis.

Our more detailed comments on the study follow below but our key concerns are:

1. The economic efficiencies of MFN clauses are not adequately reflected in the study, specifically the reduction in search costs for consumers.
2. The report does not reflect the positive impact on consumer welfare of increased interbrand competition and consequent reduction in pricing levels overall that have been driven by the presence and success of OTAs (see results from a study by Oxford Economics referenced below).

[1] As explained in section 2, OTAs reduce marketing and distribution costs of smaller accommodation providers in particular, and increases the competitive pressure larger hotel chains face.
[2] It is also noteworthy that the study reproduces negative statements by Hoteliers that are completely unrelated to MFNs.

3. The report does not factor in the risk of undermining the OTA business model in the long term through showrooming/freeriding and negative impact on consumer welfare – as expressly recognized by the Düsseldorf court, the leading case in this area. Absent narrow MFNs, many accommodations would use OTAs to market their premises but bypass paying for this service by offering lower prices on their own websites and capturing bookings directly.
4. Even though there is a separate section titled "analysis of competition law cases", there is hardly any reference made to the two important court cases (Germany and Sweden) which, after lengthy arguments and submission of evidence from all stakeholders, endorsed Booking.com's use of narrow MFN clauses. In particular, the study repeatedly refers to a prohibition decision by the Bundeskartellamt regarding narrow MFNs, but fails to state that this decision was overturned on the grounds that although narrow parity clauses restrict competition, they are necessary and proportionate given the investments made by Booking.com in promoting hotels. Instead, the study reproduces arguments that were rejected on appeal.
5. The accompanying econometric studies are not robust, suffer from methodological shortcomings, and do not reflect on other explanations for the observed price effects. Moreover, the conclusions are derived from the wrong counterfactual.
6. The study has omitted reference to recent independent econometric evidence that contradicts the support study's conclusions.
7. The report makes strong conclusions about potential anticompetitive effects of narrow parity clauses but does not take into consideration the overall competitive dynamics of the hotel sector and the wider competitive constraints on OTAs in the provision of hotel booking services (see Annex I).

We therefore take this opportunity to submit our views on the competitive effects of narrow MFN clauses, the support study's methodology and the derived results.

2. Economic efficiencies generated through narrow MFN clauses

Efficiencies for consumers

Online travel agencies ("OTA") such as Booking.com allow consumers to compare the price and quality of many more accommodation offerings than they could without OTAs – i.e. by searching for and checking each accommodation website individually and check for availability and prices Additionally, the standardized display of accommodations on OTAs makes it easier for consumers to compare properties on non-price factors. This increase in transparency and reduction in search costs results in direct benefits to consumers by helping them identify accommodation that best meets their needs. In doing so, it also enhances interbrand competition, resulting in lower prices, higher quality of offered room rates, and in some instances, new services/optionality valued by consumers (e.g. free breakfast, better cancellation options).

A study conducted by Oxford Economics[3] on behalf of Booking.com found that the presence of OTAs in the European Union reduced average daily rates ("ADR") by 4.2 percent for chain hotels and 10.0 percent for independent accommodations in 2019. This is in line with expectations that the benefits associated with OTAs will be higher in more fragmented segments. It is also in direct contradiction to the unsubstantiated claim made in support study by survey respondents "that there is no conclusive evidence

[3] The economic impact of online travel agencies in EU member states and Switzerland, Tourism Economics (part of Oxford Economics), 27 January 2020

of any positive impact by the OTAs on prices (i.e. lower consumer prices) in the past ten years, regardless of the growth rate of the hotel sector". In fact, EU consumers saved more than 20 billion Euros through the presence of OTAs in 2019 alone.[4]

Moreover, Booking.com invests substantially in customer service, consumer friendly multilingual websites, mobile applications, and customer review systems. All of this helps to foster trust and build consumer confidence in booking a property. During the COVID-19 crisis, Booking.com also facilitated cancellations for consumers who were having a hard time reclaiming their payments. According to the Oxford Economics study, OTAs induced an additional 133 million overnight stays in the EU in 2019 - through lower prices and higher consumer confidence. This generated economic benefits totaling 35 billion Euros.

Efficiencies for accommodations

It is not just consumers that benefit from OTAs, accommodations do equally. Most accommodations, in particular independent ones, either do not have a website (or a mobile enabled website) or have a website which is not of sufficient quality (no instant booking functionality and/or only one language) to generate a material volume of bookings. Moreover, marketing a direct distribution channel is a complex and costly activity. For example, Google search advertising for a term such as "Hotel Paris" can run up to 25 Euros per *click*. Conversion rates on Google are typically very low for independent accommodations – the high cost per click, complex implementation, and low conversion rates mean that for most independent hotels advertising on the internet is too costly, with limited certainty over the returns of this investment. However, an OTA can spread that risk across many properties and achieve a conversion at a much higher rate because of the variety offered on the platform. OTAs can therefore market accommodation rooms more efficiently than accommodations can themselves.

It is important to remember that only when a successful booking happens, and the customer has paid the accommodation for his or her stay, do we charge a commission to the accommodation for our services. It is essentially a risk free distribution channel for our partners. What is particularly attractive to accommodations is that we offer the opportunity to reach a global audience in 43 languages, we take care of customer service for these bookings, and we invest in marketing to create and channel demand. We also help accommodations to keep up with technological developments. In particular smaller and independent accommodations are having a hard time with this. For instance:

- A few years ago it was sufficient to just have a website with a real-time booking engine. Many properties are still struggling with that today.
- Then it was mobile technology. More than half of our bookings are already done on a smartphone. Technically, this means serving up your website in hundreds of different versions to fit the different screen-sizes or developing an app.
- Nowadays, many consumers don't even type anymore. They use their voice to interact with their smartphone. Booking.com is a major investor in AI technology and in particular in natural language processing to keep up with these developments in consumer behaviour.

Booking.com is essentially a technology partner for accommodations to reach a global audience and this will become even more important after the crisis because hoteliers will have less money to invest in technology.

[4] Ibid.

OTAs also give visibility to properties that otherwise would not have been found. This is particularly true for small and independent accommodations. These properties benefit from the global reach of platforms and incremental bookings through OTAs.

As a result, OTAs enable accommodations to attain higher occupancy levels than they would otherwise achieve and are particularly effective at helping accommodations attract foreign customers. It can spread the costs of advertising and marketing and generate bookings for accommodations at lower cost than accommodations could achieve independently. All of these benefits are recognised by the accommodations interviewed for the support study, in particular the independent ones, but we believe not properly taken into account in the conclusions evaluating MFNs.

3. Narrow MFNs are necessary to prevent free-riding

Given the commission-based business model of an OTA such as Booking.com (no cure, no pay), there is a substantial risk of free-riding on a platform's investments. Accommodations already benefit from the so-called billboard effect: just being on an OTA increases their sales via other distribution channels. If they can offer a lower price on their own website and actively promote this, consumers will increasingly use OTAs only to find a property (i.e. only for the search functionality) but conclude the transaction/booking on the property's website. This would severely undermine the viability and consumer benefits of OTAs in the long run as they cannot recover the costs of the investment required for the development and maintenance of a sophisticated and expensive marketplace. Narrow MFNs are an important way for an OTA as Booking.com to address these risks from free-riding by accommodations and consequently, to support the existence and development of platforms such as Booking which significantly benefit consumers and the competition between hotels/accommodations.

Indeed, the support study acknowledges the severity of this free riding risk. However, it then relegates it to only a footnote: "The prevalence of these effects has been studied in a series of papers for example by Anderson and co-authors, under the term 'billboard effects'. These papers find substantial empirical support for these free-riding effects: listing in an OTA is found to increase hotels own website sales by between 7.5% and 26%; sales on own website are found to be between three to nine times the incremental sales in OTAs; and OTAs are visited by almost two thirds of all online hotel direct customers." Anderson and Han (2017), using clickstream data, also show that 48 percent of customers that book on an OTA visit at least one hotel website before making that booking and 33 percent visit at least one meta search site prior to booking on an OTA. This illustrates the ample opportunity that exists for free-riding to take place.[5]

The German higher regional court - in line with previous decisions of other authorities - explicitly recognized the risk of free riding to OTAs in its decision on Booking.com's narrow MFN clauses concluding that such clauses are to be viewed as ancillary restraints that are essential to allow for the pro-competitive effects of OTAs to unfold in the market. The court emphasized the long term threat to the OTA business model if consumers experience over time that a lower price can always be found on a property's website. This would undermine the viability of OTAs, which only get paid for successfully intermediated transactions. In due course this would lead to reduced transparency and lower interbrand competition in the market.

4. Competitive effects of narrow MFN clauses

[5] Anderson, C. K., & Han, S. (2017). The billboard effect: Still alive and well. Cornell Hospitality Report, 17(11), 3-10.

According to most economic literature on the subject and as confirmed by the support study, the competitive effects of narrow MFNs are dependent on the particular circumstances. Narrow MFNs only restrict an accommodation's price setting in one narrow dimension while there are many ways to distribute one's inventory. For example, in Europe more than 50 percent of all bookings are made via off line distribution channels (e.g. telephone, walk-ins, direct mailings, wholesale, brick & mortar travel agents etc.). Only around 26 percent of bookings take place via OTAs (see Annex I for further details). In any case, whatever negative effects may potentially arise from narrow MFNs in terms of the loss of intra-brand competition need to be balanced against the positive effects (e.g. lower search costs, higher transparency, more inter-brand price competition leading to lower prices and more innovation) that are generated by OTAs. The accommodations market is highly fragmented – the principal driver of prices is competition between accommodations – few customers that search for accommodation have already determined the choice of accommodation and therefore, to the extent that price is a factor in consumer choice, the price differences between accommodations are likely to be far more important than the differences in price of a single accommodation on various platforms. The key factor that drives choice for the consumer is the variety of accommodations on offer at different prices and not the availability of a single accommodation on multiple platforms. It is therefore important to preserve the search benefits of OTAs that promote price competition between accommodations

Independent accommodations

For narrow MFNs to be affecting competition, they need to be binding. However, the support study notes with respect to small independent properties that OTAs offer them a more cost effective marketing channel than their own website: "Although the commission paid by this category of hotels is around 20%[6] of the revenue per booking (a rate roughly twice as high as the one paid by large chains), these rates are lower than the estimated marketing and IT costs necessary to ensure visibility on the market. Interviewees reported that without OTAs they would be unlikely to achieve a similar number of booked rooms." This means that even absent narrow MFNs, properties would not set a lower price on their own websites - unless they can free-ride on the billboard effect created through the investments of OTAs.

For independent properties, narrow MFNs therefore cannot negatively affect competition. Quite the contrary: by protecting the OTA business model from free-riding by larger hotel chains, MFNs enable independent properties to benefit from the lower distribution costs of OTAs, and thereby impose a higher competitive constraint on hotel chains. The investments that each independent accommodation provider would need to make to get the same visibility on the internet, i.e. their customer acquisition cost, would be far higher in the absence of OTAs and also far riskier given very low conversion rates. Very few independent accommodations as a result advertise on the internet. The independent accommodation sector would therefore be invisible on the internet without OTAs and it is difficult to imagine that undermining the OTA business model by prohibiting narrow MFNs would be of any benefit to this segment.

Hotel chains

The support study makes the claim - based on stakeholder interviews - that chains "make the majority of their sales through direct channels and their costs of marketing and 'distribution' are lower through their

[6] The claim that for independent properties the average commission rate is around 20 percent is likely to be wrong. For Booking.com it is much lower.

own websites compared to the fees requested by the largest online travel agencies (OTAs).” Moreover, it is claimed that hotels cannot engage in effective price differentiation across distribution channels because OTA’s rankings would punish such a behavior.

It is important to note that selling rooms through OTAs is one of many ways of distributing inventory. In fact, in the EU, the offline channel is still much more important than selling through an OTA. Accommodations can therefore offer any price they wish to offer to consumers anywhere offline (and of course can offer any price they wish in person, by telephone and direct email to a consumer). Moreover, they are free to offer cheaper rates to loyal customers (or closed user groups). This is particularly important for chains that may generate significant volumes of sales through their website. Booking.com's narrow price parity clause allows accommodations to offer cheaper rates than the rates they post on Booking.com to members of their loyalty schemes, provided that they do not publish or market those cheaper rates online (for example, on their websites or on metasearch sites).

Accommodations are also free to differentiate their prices and availability across channels, including on other OTAs.[7] Booking.com does not try to inhibit such a behavior. In fact, an analysis conducted by RBB Economics on behalf of Booking.com for the German court proceedings, in which Booking.com prevailed against the Bundeskartellamt, showed that on average in 42 percent of all investigated instances, the prices published on Booking.com differed by at least 5 percent from those published on a different OTA. For 90 percent of hotels, such price differences occurred at least once during the study period (the data set consisted of room night rates for 6.292 hotels in Germany published from October 2015 to May 2016 on TripAdvisor and trivago with a total of 5.8 million price data points).

Booking.com does not sanction price differentiation. However, an accommodation which does so might find its conversion rate drop on Booking.com because consumers may look at the property on our website but then book elsewhere. Since conversion is one of the many factors we use to proxy for the price/quality ratio of a hotel, over time this *might* lead to a less favorable position for the hotel. It is important to note the causality here: it is the consumer behavior that impacts the ranking, it is not a retaliatory measure by Booking.com. And it will only come to bear if properties are successful marketing their rooms outside of the OTA in question, i.e. if consumers use the price differentiation by booking elsewhere. A lower ranking is therefore the result of a price differentiation strategy, not an attempt to inhibit it.

Finally, it is important to note that chains regularly negotiate customized bilateral contracts with OTAs that offer lower commissions than standard contracts. This is justified due to the substantial investment by them in marketing to attract consumers and provide volume business. The marginal benefit of OTAs to large chains is therefore lower than for an independent hotel. Thus, chain hotels have a strong incentive to showroom on OTAs and redirect sales to their own channel. This explains their opposition to narrow MFN clauses.

5. Econometric analyses in the support study are conceptually flawed and methodology is questionable

[7] While the support study focuses on prices, there is another important competitive dimension for OTAs: room availability. Partners/accommodations can always divert their availability from one channel to another. No hotel puts all its availability on one channel and there is no availability parity. See Annex II for more context.

The conclusions of the support study are heavily predicated on the results of two econometric analyses that the authors undertake: one using country level data and one using property level data. Both studies suggest that following the prohibition of (the remaining narrow) MFNs in Austria, Belgium and Italy hotel prices[8] dropped significantly. This is taken as evidence that narrow MFNs lead to higher prices and lower consumer welfare.

However, there is a fundamental problem with the framing of the analysis: it assumes that OTAs will keep operating in the same way and offering the same level of services/quality following further prohibitions of narrow MFNs which is highly uncertain - particularly now given the additional financial pressures the travel industry is facing as a result of the COVID-19 crisis. It also runs counter to the widely recognized (including by the study authors) problems of free-riding which risk undermining platforms in the long-run.[9] As pointed out by the Dusseldorf court, such a risk will materialize only over time as consumers lose confidence in OTAs as offering the best prices, switch away and book direct, weakening the extent to which OTAs can invigorate effective interbrand competition. A comparison of prices with and without narrow MFNs shortly after they have been prohibited is therefore too static an approach that fails to take into consideration the longer term dynamic implications. A correct assessment would weigh the benefits generated by OTAs against any possible negative price effects that might result from narrow MFNs.

For example, even if the results of the country level regressions were taken at face value as estimates of the short-term effects of banning narrow MFN, (which we do not suggest, given the flaws with the analysis set out below), one would have to balance the 4.2 percentage points average reduction in prices reported by the support study, against the increase in prices (or a fraction thereof) that would likely arise from a weakening of role of OTAs. According to the econometric study by Oxford Economics, without OTAs prices of hotels would be higher, by 4.2% for chains and 10.0% for independent properties. Such a comparison already shows that the purported negative effects of narrow MFNs are far from obvious and need a more sophisticated analysis taking into account the trade-off with the efficiencies they generate. In any event, reduced prices are one facet of consumer welfare. The support study does not factor in the benefits of innovation and reduction in the search time spent on the part of consumers, which are driven by OTAs and would be lost in a scenario where the OTA business model is under threat and accommodations are allowed to free-ride.

Moreover, there are a number of limitations that call into question the validity and significance of the support study results. It is therefore paramount that, in line with good academic practice, the underlying data set used for the analyses be made public so that third parties can challenge and/or verify its results. We noted the following potential shortcomings:

For what concerns the country-level study:

- **Changes in other countries could be driving the apparent effect of the removal of narrow MFNs.** The charts showing the raw price trends suggest that it could be changes in other countries driving the apparent effect of the removal of narrow MFNs.[10] Indeed, we don't observe any

[8] Including motel prices but excluding the price of private accommodation lets which were not captured in the study, but are a growing part of the market.

[9] For example, as summarised on p.103 of the Study, where the platform is an intermediary whose function is to enable buyers and sellers to find the most appropriate match (such as online travel agents), once a match has been found the parties do not need the intermediary to conclude the transaction. Instead, the parties can free-ride on the intermediary's services by trading directly. If the intermediary performs a socially efficient economic activity, then preventing such free-riding would constitute a valid efficiency justification.

[10] Figure 13, p.371.

discontinuity or change in the trend in hotel prices in the countries imposing the ban (Italy, Austria and Belgium) following the ban. However, around the same time (2017 onwards), at least five of the 'control' countries exhibit accelerations in their hotel price inflation. The two-way fixed effect model adopted by the authors only controls for constant differences between countries, and time trends that are common across all countries, but not differences between countries that vary over time. Indeed, all such differences, unless captured by other control variables (which is not the case in this model) tend to be attributed to the explanatory variable of interest—in this case, the ban of narrow MFNs. The authors include a robustness check to test whether the common trend assumption holds, but such test is focused on the pre-2017 period, while the concerning increase in some countries' hotel prices is concentrated after. At the very least, the analysis should be re-run, excluding the five 'control' countries [11]with strongest potentially irrelevant price trends collectively, to see if the effect remains significant.

- **Omitted variables are likely biasing the result.** The decision to ban narrow MFNs is not random but is influenced by other factors, and the model is so minimal, it is likely that the estimated effect is picking up the impact of factors not included in the model. Examples of other factors that may have contributed to the divergence of price trends between Austria, Italy and Belgium, and other European countries in 2017/2018, that would have been misattributed to the ban on narrow MFNs in the model include:
  - the differential growth of Airbnb across Europe. The study period coincides with the expansion of Airbnb in Europe. If Italy, Austria or Belgium were more important growth targets for Airbnb than other countries, hotel prices would have increased less quickly than compared to other countries, and this effect would have been wrongly attributed to the ban on narrow MFN clauses.
  - variation in international demand for tourism and business trips. The control variables considered by the authors (GDP, etc) are mostly insignificant, but as acknowledged by the authors, "This might be due to the fact that the variables are domestic measures, but hotel prices are set by total demand that is also influenced by international tourism and business trips". This comment indeed acknowledges other factors may be biasing the results. For instance, Italy could have seen a decrease in demand from higher income countries and an increase from lower income countries throughout the period in analysis. This demand substitution pattern could have driven down prices and the model would mistakenly attribute this effect to the ban on narrow MFN clauses. There is only a limited test to account for spillover effects from Spain and Croatia but not for other countries or extra-EU demand.

For what concerns the hotel level analysis, the same concerns persist. Moreover:

- **The data is based on a biased sample.** The data has been scraped from TripAdvisor, a marketing channel that is used to different degrees, at different times, by different accommodation providers. Moreover, the sample only include hotels that were clients of Fornova, the company collecting the data. Such hotels are likely larger chains and are not representative of the whole market. Indeed, it is the segment that has the largest incentive to undercut OTA prices, and therefore the estimated effect will overestimate the average impact for the market as a whole.
- **The (adjusted) sample is very small.** As is a standard first step to avoid spurious results, the authors restrict their analysis to hotels for which the data has price data both pre and post removal of the narrow MFNs. However, as a result, the study is based on only 95 hotels in only 28 cities. To put this in context, over the whole time period, Fornova provided services to 4909 hotels, but it was only 95 that were large enough to not only hire Fornova but also to keep paying for its services throughout

[11] From visual inspection of the charts these appear to be: Portugal, Denmark, Spain, Slovenia, the Netherlands.

the three years in analysis (only 95 hotels out of the 4909 included in the initial sample satisfy this criteria). Such a small sample is easily biased, and cannot provide a robust representation of the market as whole.

- **No controls for differentiated nature of hotel offerings.** Price comparisons in the accommodation sector are notoriously difficult due to the differentiated nature of offerings (this is one of the reasons why OTAs are of such value to consumers). However, such differentiation is not adequately controlled for in this study. The search data provided by Fornova focuses on prices for the cheapest possible accommodation but fails to account for the different standards across different countries, cities and even different rooms within the same hotel.[12]
- **Fails its own robustness tests**. In any case, as the results fail the 'placebo test'—i.e., the apparent effect of the ban of narrow MFNs occurs *before* the bans were even introduced—the results need further investigation before being relied on for policy decisions.

These methodological shortcomings further call into question the significance of the presented econometric results. At best they are evidence that a careful weighing of the possible positive and negative effects of narrow MFNs is warranted.

The study also fails to take into account and discuss empirical evidence that contradicts the support study's findings. For example, Ennis et. al. show in a recent paper (March 2020) based upon real transaction data (and not on advertised prices that might in fact not be available) that there is only a marginal benefit associated for one category of properties only in Germany that comes with the prohibition of narrow MFNs compared to switching from wide to narrow MFNs.[13] The study concludes: "France and Germany went further and eliminated all price parity agreements. This stronger intervention was associated solely with a significant additional price reducing effect for mid-level hotels in Germany. Overall, wide MFNs are associated with higher retail prices. Regulating MFNs reduced prices with primary effects coming either from the narrow price parity intervention or, perhaps, from direct sales becoming cheaper than OTAs in both E.U. and non E.U. countries, and, interestingly, not from complete elimination of MFNs." It would be important to understand how and why this study differs from the support study and what this means for the overall assessment of narrow MFNs. Unfortunately, this study was not taken into consideration at all, not even in the literature review. The support study thus presents an incomplete picture of the available empirical evidence, which does not allow for the derivation of general conclusions.

6. Conclusion

The qualitative evidence of the support study shows that narrow MFNs have no negative effects on independent properties, which account for 85 percent of all OTA bookings, because the pricing constraint is non-binding and direct online sales are not a realistic option for the vast majority of independent hotels. For chains, which account for 15 percent of OTA bookings, a negative competitive effect of the narrow pricing constraint has not been substantiated. Contrary to the study's claim, properties can and do engage in price differentiation across distribution channels, which promotes platform competition.

The conclusions from the econometric studies are fundamentally flawed as they do not use the right counterfactual scenario. They fail to take into account the benefits generated through OTAs and do not balance them in any way with the purported negative effects of narrow MFNs. Moreover, the regression

[12] For instance one double room may not be the same as another, Wifi and breakfast may be included or excluded, free cancellations may be available or not – on different platforms and as a policy in different regions and at different hotels.
[13] Ennis, Sean F. and Ivaldi, Marc and Lagos, Vicente, Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change (May 2020). CEPR Discussion Paper No. DP14771. Available at SSRN: https://ssrn.com/abstract=3604003

models suffer from some severe limitations. At the very least a careful weighing of the pros and cons of narrow MFNs is needed. The empirical evidence is also at odds with other recent econometric studies that rely on more robust data sets.

The study also conflicts with the majority of findings by competition authorities and judicial proceedings across the EU. For example, in a joint statement, the three national competition authorities (French, Swedish and Italian) that accepted narrow MFNs in a commitment decision stated that narrow MFNs are “strik[ing] the right balance for consumers in France, Italy and Sweden, restoring competition while at preserving user-friendly free search and comparison services and encouraging the burgeoning digital economy.” The Dusseldorf higher regional court in Germany went even further. In overturning the ban on narrow MFNs imposed by the German competition authority, the court classified narrow MFNs as competition neutral ancillary restraints that are necessary to enable the benefits generated by OTAs. Any such weighing of the competitive effects associated with narrow MFNs is conspicuously absent from this study.

The evidence presented in this study lends no support to the claim that narrow MFN clauses in the accommodation sector are harming consumer welfare. Quite the contrary, it highlights that a careful analysis of the competitive effects of narrow MFNs is needed on a case-by-case basis.

ANNEX I: Industry background

Competitive dynamics of the accommodations sector

a. Booking.com operates in a highly competitive environment with a fast changing landscape in terms of players, products and customer choice. Booking Holdings Inc.'s 2018 annual report[14] notes that: "*[w]e compete globally with both online and traditional travel and restaurant reservation and related services. The markets for the services we offer are intensely competitive, constantly evolving and subject to rapid change, and current and new competitors can launch new services at a relatively low cost. Some of our current and potential competitors, such as Google, Apple, Alibaba, Tencent, Amazon and Facebook, have significantly more customers or users, consumer data and financial and other resources than we do, and they may be able to leverage other aspects of their businesses (e.g., search or mobile device businesses) to enable them to compete more effectively with us. For example, Google has entered various aspects of the online travel market, including by establishing a flight meta-search product ("Google Flights") and a hotel meta-search product ("Google Hotel Ads") that are growing rapidly, as well as its "Book on Google" reservation functionality and its Google Trips app."*[15] Google also views Booking.com as a direct competitor in vertical search for accommodations.[16]

b. The core value proposition of Booking.com is that it offers intermediary services to travellers, suppliers of accommodation and other travel providers. Through one or more of the Booking Holdings brands, customers can not just book a broad array of accommodations but also make a car rental reservation or arrange for an airport taxi; make a dinner reservation; or book a cruise, flight, tour or activity. The general industry trend is that all these different services are increasingly linked and this makes it impossible to definitively identify any specific market leader going forward.[17] For instance, the "Book on Google" functionality means the traveller does not leave Google to complete an accommodation booking.[18] Moreover, Google is the starting point for many travellers looking for information about accommodations, making them a key competitive force.[19] This expansion of Google into travel and the meteoric rise of AirBnb shows that the market is in a state of constant change and development and market entry is possible

[14] Available at: https://ir.bookingholdings.com/static-files/89094e34-8f33-4153-830f-f3db33342fa9 (last accessed on 27 August 2019, p. 5).

[15] The Google Trips app has since been withdrawn from August 2019 onwards and replaced instead with a new Google travel site; see: https://9to5google.com/2019/05/14/new-google-travel/ (last accessed on 27 August 2019).

[16] See CMA, Online platforms and digital advertising Market study interim report, para 3.36 (2019)

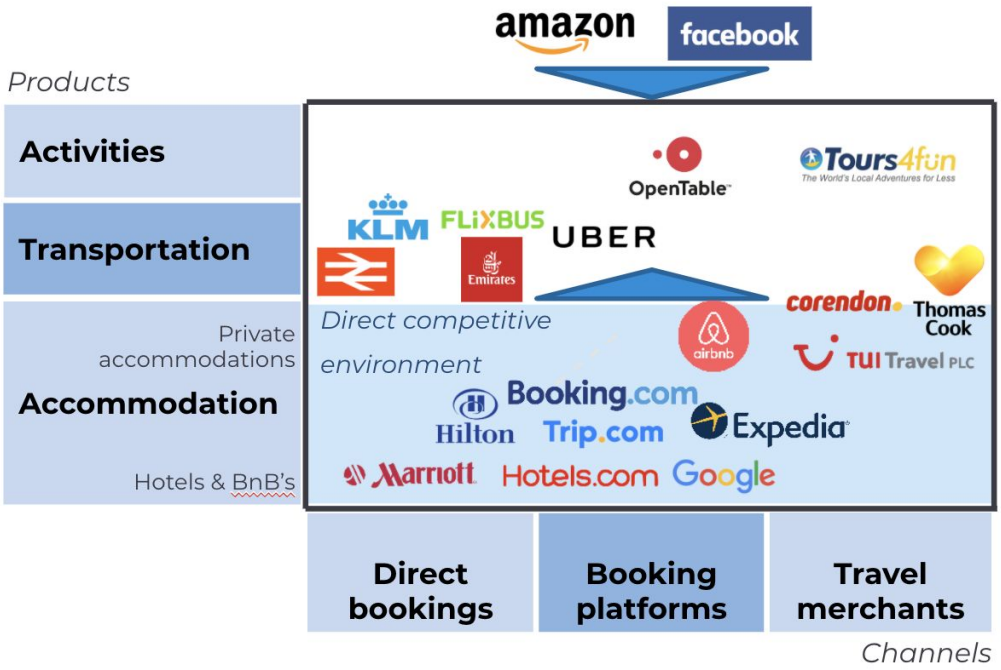
[17] Schaal Dennis, Google Travel Is Now One Step Closer to One-Stop Shopping, May, 14, 2019, https://skift.com/2019/05/14/google-travel-looks-more-like-an-online-travel-agency-by-putting-all-the-pieces-together/ (last accessed on 9 September 2019); and Schaal Dennis, Amazon Launches Flight Booking in India in a Supperapp Strategy, May 16, 2019, available at: https://skift.com/2019/05/16/amazon-launches-flight-bookings-in-india-in-a-superapp-strategy/ (last accessed on 27 August 2019).

[18] Customer data belongs to both Google and the hotel. Google has all the necessary capabilities for offering booking platform services (IT & data intelligence; consumer network; accommodation network; advertising budget; reliable brand; excellent marketing channels that allow efficient advertising).

[19] Schaal Dennis, Google's new hotel search is a greater threat to booking rivals, October 31, 2018, available at https://skift.com/2018/10/31/book-on-google-stands-out-more-forcefully-in-hotels-redesign/ (last accessed on 27 August 2019).

fairly quickly. Figure 1 below provides an overview of the competitive landscape in which Booking.com operates.

Figure 1
Competitive landscape for provision of intermediary services

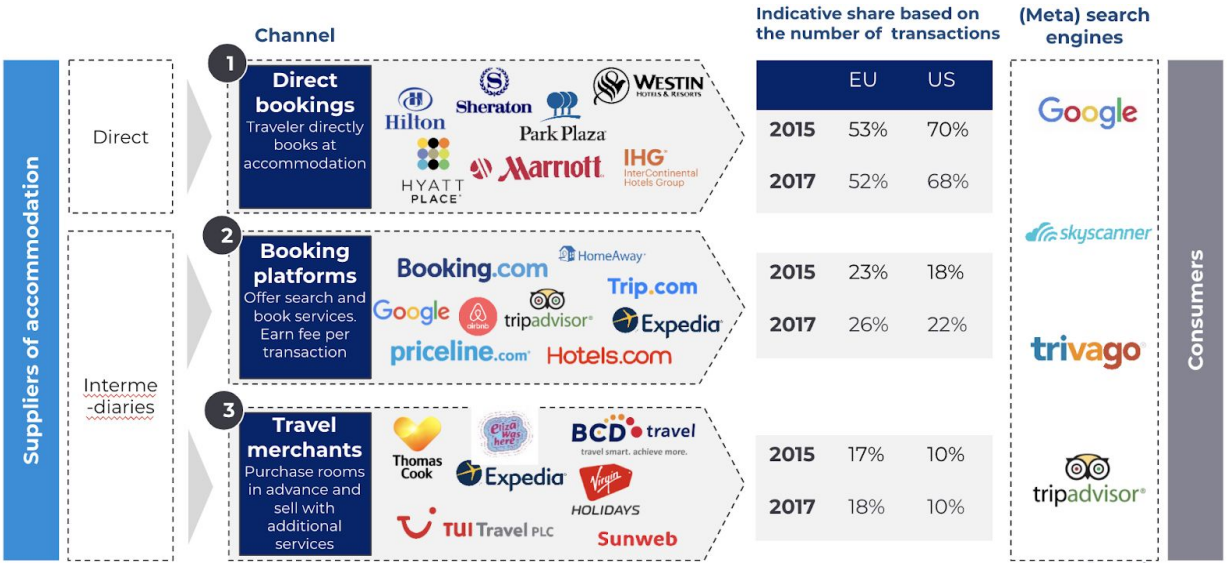


c. Even within the accommodation segment, the market landscape has changed considerably since the parity investigations of 2015. Many travellers in search of accommodation consider both hotels and private accommodation (including rentals) to be substitutes. Booking.com as well as other market players therefore now offer a wide variety of accommodation options, including private accommodation, within the same search. Customers then choose accommodation mainly based on the best deal available in terms of price and location. The type of accommodation is often of secondary importance, which means AirBnb is a direct competitor of Booking.com.[20] AirBnb has disrupted both the accommodation market and the accommodation intermediary market, in a manner unforeseen by authorities at the time of the parity cases, which were only around 4 years ago. Figure 2 below provides a simplified overview of the competitive landscape within the accommodation segment and shows how accommodations and

[20] AirBnb has recently also expanded its portfolio to include hotels and in April 2019 acquired HotelTonight, which specializes in last-minute hotel room bookings. In total, more than 25,000 hotels in around 1,700 cities offer their services via HotelTonight. See also, Dara Kher, Airbnb goes to battle against Expedia, Booking.com, March 13, 2018, available at: https://www-cnet-com.cdn.ampproject.org/c/s/www.cnet.com/google-amp/news/airbnb-goes-to-battle-against-online-travel-agents-expedia-booking-com/ (last accessed on 9 September 2019).

customers have a wide variety of options through which to sell their availability or book a room, respectively.[21]

Figure 2
Competitive landscape for provision of accommodation services online



d. In summary, the competitive environment has seen a transformation in the past five years and this momentum is expected to continue with large tech-driven players expected to enter or expand their presence in the market.[22] The existing significant competitive threat of Google in its dual role of the gatekeeper to online search and a competitor for provision of accommodation online, potential competition from other large tech players such as Amazon,[23] Facebook,[24] disruptive business models and growth of players like Trip.com, MakemyTrip, means that technological development in the industry is very fast and the market for provision of accommodation services online remains under constant competitive pressure. This is also to be seen in the context of the change in customer perception i.e. customer preferences changing to consider both hotels and private accommodation as substitutes.

[21] Accommodation suppliers use a variety of channels, and a variety of firms within a channel i.e. many accommodations sell through their direct channel, travel merchants and on booking platforms and use multiple booking platforms to generate room occupancy. Suppliers are also very flexible in adjusting the allocation of rooms and can change allocations granularly (e.g. per room per night) and often almost real time. This allows suppliers to directly adjust the availability (and pricing) of rooms between the direct channel and (various) booking platforms.

[22] Suzanne Rowan Kelleher, Google and Amazon's Disruption of the Online Travel Industry is looking Inevitable, June 30, 2019, https://www.forbes.com/sites/suzannerowankelleher/2019/06/30/google-and-amazons-disruption-of-the-online-travel-industry-is-looking-inevitable/#3728fca38e0f (last accessed on 9 September 2019).

[23] Seth Borko, New Skift Research Points to Amazon Playing a Larger Role in the Travel Industry, May 29, 2018, available at: https://skift.com/2018/05/29/new-skift-research-points-to-amazon-playing-a-larger-role-in-the-travel-industry/ (last accessed on 9 September 2019).

[24] Accommodations can advertise their services on Facebook, which now also offers booking functionalities.

e. Booking.com operates a **two-sided platform** whereby continued use and popularity with both sides of the market is critical, i.e. end-customers as well as accommodation providers (hereinafter referred to as "**accommodation partners**", which includes all types of accommodation available on Booking.com, i.e. hotels, motels, resorts, homes, apartments, bed and breakfasts, hostels and other properties). Booking.com's success depends on the one hand on accommodation partners having a credible and well-designed website to display their inventory that provides access to a wide range of customers and on the other hand ensuring that customers are matched appropriately with hotels that meet their needs and provide value for money, i.e. at best possible prices.

f. Further, the online accommodation market is characterised by multi-homing on both sides of the market (as shown in Figure 2): on the one hand, accommodation partners use different channels to distribute their inventory and do not allocate their availability exclusively to any one channel or OTA; and on the other hand, customers often search on multiple platforms or channels to find a suitable accommodation. The presence of active consumers and suppliers who use multiple channels, who are not dependent on a single platform or sales channel and can switch between platforms and other sales channels at almost no cost, is a key driver of, and evidence of, competition between platforms in the market. These features of the market also constrain the negotiating power of platforms towards accommodation suppliers; and intermediary platforms like Booking.com therefore have limited ability to influence price or allocation of inventory.

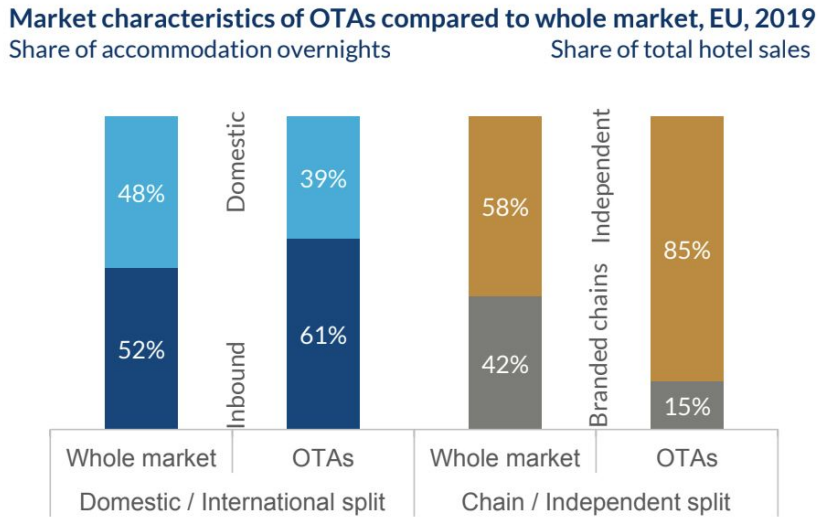
ANNEX II: Key results from Oxford Economics study

Oxford Economics was retained by Booking.com to identify and assess the impact of online travel agencies (OTAs) on tourism in the EU. To this end, an OTA influence score has been constructed (with two different methodologies) and then used as an explanatory variable in econometric analysis controlling for other factors.

OTA influence is essentially a measure of OTA's share of online travel research, in each country for each year. By using this as the explanatory variable in the analysis, it is possible to assess how changes in the use of OTAs (as distinct from changes in online usage) affect the key outcomes variables.

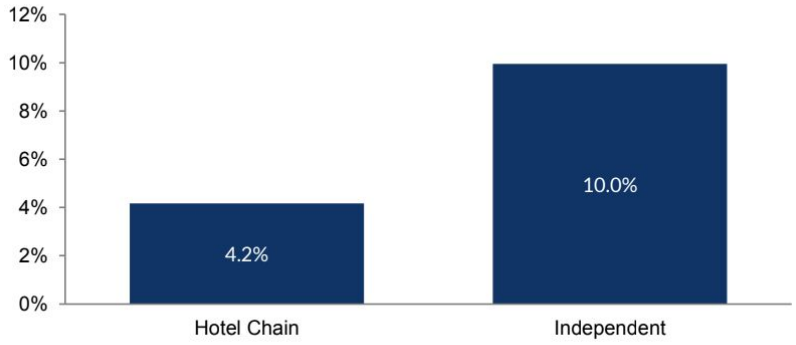
In particular, the study looks at three effects:

- The additional number of nights spent in EU destinations which would not have happened without the presence of OTAs;
- The extent to which ADR (average daily rates) have been reduced due to the presence of OTAs, and;
- The additional economic benefits of OTAs. This combines the OTA impact on nights and ADR to derive the impact on total travel spending, and the subsequent impact on GDP and employment in the tourism sector.



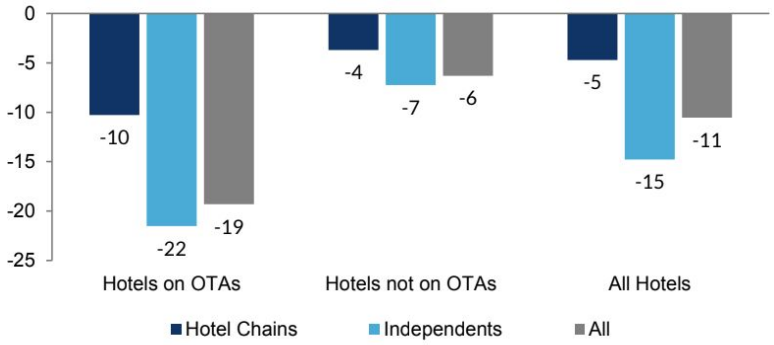
Source: Tourism Economics, ComScore, EUROSTAT

Increase in hotel rates if OTA's did not exist
% increase of hotel rates in the EU in 2019



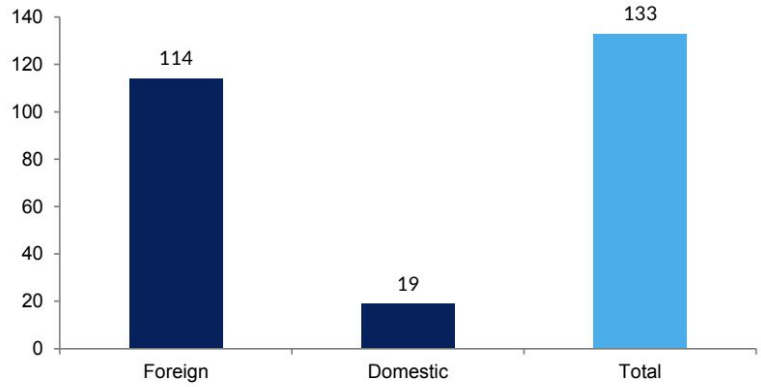
Source: Tourism Economics, ComScore, EUROSTAT

Total impact of OTA activity on average daily rates in 2019
Reduction on daily rates, euros



Source: Tourism Economics, ComScore, EUROSTAT

Total impact of OTA activity on overnights in the EU in 2019
Total additional overnights, millions



Source: Tourism Economics, ComScore, EUROSTAT