

## A contribution to “Shaping competition policy in the era of digitisation”

### 1. Introduction

Booking.com welcomes this opportunity to share its views on possible future challenges that digitisation poses on competition policy.

As one of Europe’s well-known platforms, we operate at the forefront of the digital economy. Via our online platform, Booking.com offers a global intermediation service to travelers and travel providers. Our business model is based on a very simple and consumer-focused idea: taking the friction out of travel. The three topics raised in the call for contributions concern Booking.com to a certain extent. We would therefore like to provide some general views on these topics.

In the below paragraphs, we believe that effective competition policy (and enforcement) in the digital age does require a more sophisticated understanding of competitive dynamics in digital and particularly multi-sided markets. A new competition framework or policy toolbox is however unnecessary. For example, we believe that using (more recently) developed economic theory on digital platform markets enables a successful application of existing competition law.<sup>1</sup>

A better understanding of digitisation is essential to adequately apply competition law to digital markets. There is also a great need to consider if the enforcement of the current framework needs reconsideration. Digitisation and technological developments imply fast changes in markets. Adequate competition law enforcement within the current framework, requires equally fast responses with the required knowledge, as well as having a coherent approach across Europe to maintain a level playing field.

The below paragraphs show that a better general understanding of digitisation is essential before even considering changing/reshaping the current competition law framework. We will specifically look at online platforms and illustrate how Booking.com functions as a digital platform. We will then proceed with giving some considerations on competition law enforcement in the digital era. Finally, we will give recommendations on shaping competition policy in the era of digitisation.

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<sup>1</sup> See also article M.C. Iacovedis, J. Jeanrond (2018). Overcoming methodological challenges in the application of competition law to digital platforms - a Swedish perspective, *Journal of Antitrust Enforcement* (1-22), in which the authors clearly explain that the existing competition law framework does not need to be changed in the context of digital platforms.

## 2. Booking.com as a digital platform

### 2.1 Booking.com and the benefits of online platforms

As mentioned, Booking.com offers an intermediation service via its online platform to travelers and accommodations or other travel providers.<sup>2</sup>

Booking.com fulfills the definition of a two-sided platform, as it serves travelers and travel providers. Indirect network effects are also a characteristic of the functioning of our platform. The more travelers use Booking.com to search for example for an accommodation, the larger is the interest of accommodations to offer their rooms through Booking.com's website and, vice versa, the more accommodations offer rooms through Booking.com, the more travelers will find our platform attractive to search for an accommodation.

Before commenting on the specificities of a (digital) platform like ours, we think it is important to recall the enormous benefits digital platforms have and still create for consumers. As Nobel Prize winner Jean Tirole states:

*"...the most significant transactions costs are no longer transportation costs, but rather assessing what is on offer and choosing who to do business with, along with the signalling costs (seeking to convince potential trading partners of one's reliability). Our almost infinite sources of information, and the limited time we have to process and understand them, put intermediaries and platforms that help us find these partners at the heart of the economic process. The more the other costs (transportation, customs, duties, listing) fall, the more important the costs associated with signaling, reading, and selecting become, and the more we need sophisticated platforms to match the buyers and sellers. These platforms supply precious information about both the quality of what is on offer and who would be the best match, by communicating the reputation of vendors (the ratings of hotels on Booking.com...).... They put us in contact with partners who are either more reliable or just better suited to our needs. They enable us to find a way, at low cost, through the maze of offers... The ease of finding suppliers leads to trade that would otherwise be unimaginable. It often also causes prices to fall by putting suppliers in competition."*<sup>3</sup>

The pro-competitive benefits of digital platforms - increased market transparency, lower search costs, easy market access for firms seeking access to a wide network of potential customers and a much bigger choice for consumers - are widely recognized by economists.

These benefits for consumers should not be undervalued and taken into account when assessing digital platforms from a competition law perspective.

### 2.2 Digital platforms and market power

Platforms are not a new business model. However with digitisation the number and importance of platforms (two-sided and or multi-sided) has increased.

Unfortunately there seems to be a tendency to regard digital platforms as a new phenomenon and presume that these platforms - because, for example, strong network

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<sup>2</sup> On our platform customers can also book experiences for example.

<sup>3</sup> J. Tirole (2017). *Economics for the Common Good*, Princeton, p. 381

effects and/or data collection - have a priori market power (or will obtain it) and will somehow or at some point exploit that in a detrimental way to competition and consumers.

his prejudice of market power of digital platforms is concerning. It can lead to biased debates when it comes to competition law enforcement, or even worse the possibility of applying competition law in a welfare detrimental way.

We understand that with market power (i.e. dominance) comes a special responsibility. But competition law should intervene only in case of anti-competitive practices that are welfare detrimental.

Anticompetitive practices can only be determined (i.e. the application of competition law) by first defining the relevant market and competitive forces in which the practice takes place.

The flourishing economic literature of these past few years on digital platforms in general and two-sided platforms especially shows that a good understanding of the type of digital platform and the specificities of the market in which each platform operates is important before making any general assumptions on market power and possible intervention from a competition law angle. Unfortunately we believe that to date authorities, while acknowledging two-sidedness of a platform have more than often only focussed on one side of the market, therefore failing to adequately capture all competitive forces that affect the competitive environment for a (digital) platform.

For example; Caccinelli and Toledano (2017) carried out a comparative analysis of four competition proceedings against Booking.com's rate parity clauses in France, Germany, Italy and Sweden. Their study shows that a due consideration of economic specificities of two-sided markets is still limited. Although authorities recognize the two sides of the market they only focus on one of them, and thus fail to coherently integrate into their analysis the consequences and the magnitude of the corresponding externalities.<sup>4</sup> Auer and Petit (2015) also note that in other competition cases the two-sided platform theory has only been used scarcely.<sup>5</sup>

We believe that when one fails to correctly define the relevant market and the competitive forces in which a digital platforms operates this can lead to intervention by authorities that can be socially inefficient and welfare-detrimental.

### 3. Digital platforms and some key economic considerations

#### 3.1 Transaction vs. Non transaction platform

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<sup>4</sup> C. Caccinelli, J. Toledano, (2017). *Assessing Anticompetitive Practice in Two-Sided Markets: A Comparative Analysis of four Antitrust Proceedings against Booking.com*, <https://www.econstor.eu/bitstream/10419/169452/1/Caccinelli-Toledano.pdf>

<sup>5</sup> D. Auer, N. Petit, (2015). *Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy*, <https://orbi.uliege.be/bitstream/2268/207347/1/Petit%2c%20Nicolas%2c%20Auer%2c%20Dirk%20-%20Two-Sided%20markets.pdf>

A crucial distinction when it comes to analyzing digital platforms from a competition law perspective revolves around transactions and non-transaction platforms.<sup>6</sup> While economic literature has extensively acknowledged this distinction, European practice has, as far as we know, remained unresponsive.

Two-sided non-transaction platforms are characterised by the absence of a transaction between the two sides of the market and, even though an interaction is present, it is usually not observable by the platform. The platform is thus unable to set a per-transaction fee or a two-part tariff.

Two-sided transaction platforms are instead characterised by the presence of a transaction between the two groups of platform users. The two sides of the platform interact directly and immediately through a transaction. A customer on one side can consume his product or service only if the corresponding customer on the other side consumes his product or service too. This leads to important cross-platform networks. As a result, the platform is not only able to charge a price for joining the platform but also a price for using it. Booking.com is a two-sided transaction platform.

So why is this distinction important when analysing digital platforms in the context of competition law? In transaction markets where cross-platform network effects are important, defining a single two-sided market ensures that the assessment as a whole is based on the full set of possible competitive and efficiency effects, and no effect is arbitrarily excluded.<sup>7</sup> For example, alleged harm on one side needs to be weighed against potential benefits on the other side, when applying competition law.

Unfortunately, authorities have not yet considered this distinction in their decisional practice. Acknowledging the importance of this distinction when analysing the competitive dynamics and effects on digital markets is critical to ensure a realistic assessment of such markets.<sup>8</sup>

### 3.2 Multi-homing

Aside from distinguishing whether a two-sided platform is a transaction or a non-transaction platform, a relevant feature to characterize competition in a two-sided market is the observation of whether customers “single-home” or “multi-home”. Customers/suppliers are said to “multi-home,” when they use more than one platform; they are said instead to “single-home” if they use only one platform to make/decide on their purchase of a product and/or service.

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<sup>6</sup> OECD (2018). *Rethinking antitrust tools for multi sided platforms*, p.13.

<http://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>

<sup>7</sup> Filistrucchi L., Geradin D., van Damme E., and Affeldt P.(2014). *Market Definition in Two-Sided Markets: Theory and Practice*, Journal of Competition Law and Economics, Volume 10 (2), pp. 293-339 and OECD (2018). *Rethinking antitrust tools for multi sided platforms*, p.15.

<sup>8</sup> The US Supreme Court recent 2018 ruling on *Ohio et al. v American Express Co.* has fully accepted the approach of calling for the definition of a single market encompassing both sides in the case of two-sided transaction platforms (transaction platform).

For instance, Booking.com is a platform characterized by multi-homing on both sides of the platform. Travel providers (i.e. suppliers of accommodations) multi-home, meaning that they use different channels to sell/distribute their availability and do not allocate exclusively their availability to one channel.<sup>9</sup>

Customers/travelers are also known to multi-home, as they often search on multiple platforms or other channels to find a suitable accommodation or other travel provider.<sup>10</sup>

The presence of active consumers and/or suppliers who use multiple channels and who are not loyal to a single platform is a key driver and evidence of competition between platforms. But it also constrains the negotiating power of platforms towards for example suppliers. It is therefore essential to assess the competitive environment in which a digital platform is active, when exploring to what extent a digital platform is confronted with multi-homing or single-homing

As far as we understand, the concept and importance of single-homing vs. multi-homing has not yet been fully acknowledged when analyzing digital platforms from a competition law perspective. It is however an important concept to differentiate and understand how different digital platforms function, and should be part of the competitive assessment.

### *3.3 Tipping vs. new entrance*

When referring to digital platforms, some are concerned that as platforms grow and profit from network effects they might reach a tipping point after which no effective competition can be re-established. This has triggered a discussion as to whether early intervention might be needed by competition authorities to ensure digital markets do not tip.<sup>11</sup>

We believe these discussions feed the current trend that a priori market power asks for intervention. The current competition law framework aims to intervene only if there is a clear anti-competitive infringement. Market power as such does not infringe competition law. The mere idea that possible market power requires intervention would mean a complete system change from an ex-post regime<sup>12</sup> to a preemptive one. This can have a

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<sup>9</sup> Suppliers of accommodation use a variety of channels, and a variety of firms/options within a channel. For example, many accommodations sell both through their direct channel, travel merchants and on booking platforms and use multiple booking platforms to generate room occupancy. Suppliers are very flexible in adjusting the allocation of rooms. The allocation can be changed granularly (e.g. per room per night) and often almost real time. This allows suppliers to directly adjust the availability of rooms between the direct channel and (various providers of) booking platforms. Please note that the direct distribution channel is by far the still most important channel through which accommodations sell their availability (in Europe over 50% of bookings are done through this channel). For example an accommodation can allocate/sells its availability directly (walk-ins, brand.com website etc), through different online platforms and/or through travel merchants.

<sup>10</sup> For example for a single booking a customer can visit several booking platforms, use a meta search site and a hotel's direct website.

<sup>11</sup> H. Schweitzer, J. Haucap, W. Kerber, R. Welker, *Modernisierung der Missbrauchsaufsicht für marktmachtige Unternehmen*, 29 August 2018.  
[https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.pdf?\\_\\_blob=publicationFile&v=15](https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.pdf?__blob=publicationFile&v=15)

<sup>12</sup> Excluding the current EU merger regulation which is ex-ante.

devastating impact on incentives to innovate, entrepreneurial spirit and lead to great uncertainty.

It is also important to stress that the environment in which digital markets/platforms function can change extremely fast because of technological advancement. A market player tending to market power can just as well be outplayed in the following year by a new market player.

A clear example of the dynamics of digital markets is how Airbnb has disrupted both the accommodation market and the accommodation intermediary market, and has become a clear competitor of Booking.com. This was unforeseen by authorities (and still is in some cases) at the time of the parity cases, which was only 3 years ago.

Although we acknowledge the difficulty to predict these kind of market dynamics when applying competition law, these dynamics are an essential component in a fast-changing environment and should be acknowledged when applying competition law. Without a clear anti competitive infringement, competition authorities should not in any way intervene in markets.

#### 4. Competition law enforcement in the era of digitisation

The previous paragraphs outlined some economic concepts that should be applied when analysing digital platforms from a competition law perspective before considering changing the current framework regarding competition policy.

When it comes to competition law enforcement in the era of digitisation, we do however believe some changes are necessary for the current competition law framework to be applied correctly.

##### *4.1 Fast and efficient enforcement*

Because of the pace of technological changes and the impact this has on (digital) markets, it is important that competition law enforcement is able to enforce quickly and efficiently, with an accurate understanding of the technological changes when enforcement is necessary. Therefore we advocate for a further strengthening of the Commission's staff resources with regard to competition economists and data scientists to enable the Commission to adequately assess the economic dynamics in digital markets and enforce in an efficient manner.

##### *4.2 Close cooperation and alignment between EU competition authorities and DG Comp*

In the digital environment, many market players are active in multiple European jurisdictions. If Europe wants to achieve a single Digital Single Market, it is essential that close cooperation between authorities takes place but also that there is a uniform interpretation and application of the competition rules when it comes to digital markets/platforms.

The Booking.com parity case has been very unfortunate and a clear example to avoid if Europe wants to achieve a Digital Single Market to the benefit of consumers.<sup>13</sup> In this case, different authorities have come to different conclusions, which has led to a strongly fragmented landscape across Europe and has opened the door for political debate. Early, clear and harmonized guidance by the ECN or the European Commission would have provided clarity, prevented fragmentation, and strengthened the Digital Single Market, while avoiding unnecessary loss of time and administrative costs for businesses.

## 5. Conclusion

We believe that a change in the current framework of competition law is not necessary. However, a better understanding of the competitive environment in which digital markets operate is essential for effective competition enforcement. Just like any other market, digital markets requires rigorous economic analysis of the dynamics of a market to understand whether there is a potential competition law issue.<sup>14</sup> Digitisation, therefore, does not need a new competition law framework. It does require reconsideration of important elements of the way how competition law is enforced. In addition, it is essential for competition authorities and policy-makers not to lose sight of the bigger picture: EU competition policy should serve to provide consumers with choice, transparency, competitive prices and quality, and at the same time create a framework that supports the European economy and businesses.

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<sup>13</sup> C. Caccinelli, J. Toledano, (2017) mention in their paper: *“Booking.com’s parity case is particularly interesting: given the transnational nature of the platform, these authorities decided to coordinate their investigations with the aim of finding a common response to the same competition concern. Despite these coordination efforts, their study highlights practical and conceptual divergences concerning both country- and non-country-specific features, although we did not find in the decisions clear justifications supporting such heterogeneous approaches.”*

<sup>14</sup> J. Tirole (2017). *Economics for the Common Good*, Princeton, p. 400