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How to define relevant markets in the tourism sector?

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How to define relevant markets in the tourism sector?

1. Introduction¹²

One of the sectors that gets a lot of attention recently is the travel industry. This is mainly due to the emergence of online travel agencies, like Booking.com or Expedia and the increase of their power. Most of the issues that are relevant to the discussion are not new in competition law, most-favoured nation clauses, two-sided platforms, oligopolistic interdependence, etc. are all well-known issues. The nature of the distribution network and models is, however, undergoing a lot of change and at some points, the approach of competition authorities seems to be wrong. It is widely known that a key issue in competition assessments is the definition of the relevant market. This is a make or break issue for well-known reasons.³

2. Market definition

The definition of a relevant market *“in effect allows attention to be focused on the “important” or “primary” competitive constraints which exists between products”*⁴.

The textbook procedure of market definition is that it is necessary to define the demand and supply side substitution. There are several ways to define relevant markets and some ways are more theoretical than others. One of the sources which can be defined as a starting point is the notice of the European Commission on market definition.⁵ The notice goes like this:

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

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

² The author has investments in the hotel and travel industry. This article is a part of an article series, therefore I will use some part of other relevant articles written recently if that is necessary in this article.

³ See e.g. CARLTON, Dennis W.: Market Definition: Use and Abuse. *Competition Policy International*, 3/1. 3., BAKER, Jonathan B.: Market Definition: An Analytical Overview. *Antitrust Law Journal*, 74/1. 129., TOWNLEY, Christopher: The Relevant Market: An Acceptable Limit to Competition Analysis? SSRN eLibrary. Link: <http://ssrn.com/paper=1894815>.

⁴ BISHOP, Simon and WALKER, Mike: *The Economics of EC Competition Law: Concepts, Application and Measurement*. London, Sweet & Maxwell, 2010. p. 108.

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

A key issue in market definition is demand side substitution: *“the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer.”*⁶

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

3. The distribution chain

The channels to sell hotel rooms are colourful. At the two end, there are the hotels on the one hand and consumers on the other. A hotel might sell the room directly to the consumer or use a third party to realise a booking. The ways and methods how these can be contractually set up is endless, the typical ways, however, can be categorised based on the parties who take part in selling the hotel room:

- direct channels
- retail travel agents
- two-tier retail travel agents (host retail travel agent and home-based retails travel agent)
- tour wholesaler
- speciality channeler
- tour-wholesaler and retail travel agent
- speciality channeler and tour-wholesaler
- speciality channeler and retail travel agent
- speciality channeler, tour-wholesaler and retail travel agent

In the distribution chains highlighted above, the parties might use different ways to sell the available free rooms offered. A hotel might use a direct channel like its own website, newsletter, etc. to sell the room. An online travel agent might sell the rooms directly to consumers without owning any hotel room. A global distribution system (GDS) might be used to sell the rooms to retail travel agents, who later sell those rooms to the consumers. The number of brands around the world in the distribution chain is endless, a huge number of undertakings take part in the distribution of hotel rooms.

The large number of undertakings usually also means that there is intense competition on the market. But this is not necessarily the case since in the distribution chain there might be levels which might raise competition concerns. If there are “bottlenecks” in the distribution chain that might lead to consumer harm at the end. An oligopolistic market structure can cause harm to consumers without actual anticompetitive agreements. And there is a long list of theoretical problems that might be listed here, therefore we will look at some issues that might raise concerns in the distribution chain. An all this leads us back to the market definition. This is the tool we use in competition law to create a meaningful framework to discuss any competitive concern.

4. A (non-business traveller) consumer perspective

Consumers are looking for an accommodation. Their demand might be characterised by the type of travel they undertake. A business travel might lead to different demand characteristics than a family holiday. It is useful to distinguish between business travel and non-business travel. Business travel is all travel where the costs of the travel are paid by the employer of the traveller or a third party, who define the framework of the possibilities for the traveller. Non-business travels are those where the consumers themselves have to pay the costs of the travel. In this article, I will only deal with the latter type of travellers, consumers, since business travel shows a completely different characteristic regarding demand than non-business travel.

⁶ Im. para 15.

A traveller wants to book a hotel room for the stay at a particular place and this demand is usually connected to a search process. In very rare circumstances there are no search involved, but even in the case of repeat customers (loyal bookers), there is search involved at some point to find the suitable accommodation.

A typical consumer has some expectations regarding the accommodation when searching for a place to stay. This depends a lot on the aim of the travel and on several other factors. E.g. in the summer, a large number of travellers would like to have air-conditioning, a particular consumer might want to stay in a hotel with at least three stars, etc. So these demand characteristics will define which accommodations are suitable. One can easily argue that there is intense competition between the accommodation providers whatever the demand characteristic of a particular traveller might be. Of course in some situations, like if the consumer is only willing to visit one place where there is only one accommodation, this is not true, but, we shall exclude marginal consumers out of our analysis.

The consumer in search to find the suitable accommodation might use different ways to achieve this aim. The final product the consumer will buy is the hotel room. But is the competition really taking place on this level?

5. Competition for the consumer booking

A consumer is looking for a way to book a suitable accommodation. Probably the most important aspect of competition in the vertical chain is taking place at this level: getting a realised booking. This cannot be easily drawn into a typical travel distribution graph, since apart from wholesalers only, basically everybody is present on this level: accommodation providers, online travel agents, traditional travel agents, meta-search engines, etc. For most consumers, it is probably not relevant what the channel for booking is if that will lead to a suitable booked room.

5.1. The SSNIP-test

Starting with the hypothetical form of market definition, it would be interesting to see what would happen in the case of a small but significant non-transitory increase in price (SSNIP test), but is very difficult to say in practice. So would the consumers change the channel to book a room if the price of a particular channel would increase by a significant amount?

The SSNIP test, or Hypothetical Monopolist Test⁷ as is also called is a theoretical approach: *“The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (“hypothetical monopolist”) likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market [...] The SSNIP is intended to represent a “small but significant” increase in the prices charged by firms in the candidate market for the value they contribute to the products or services used by customers. This properly directs attention to the effects of price changes commensurate with those that might result from a significant lessening of competition caused by the merger. This methodology is used because normally it is possible to quantify “small but significant”*

⁷ The original formulation in government document can be found in the 1982 Horizontal Merger Guidelines. See also: Horizontal Merger Guidelines. U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION: 1992, revised 1997.

adverse price effects on customers and analyse their likely reactions, not because price effects are more important than non-price effects.”⁸

The direct price⁹ for travelling consumers is zero whatever channel is the one the traveller finds, and therefore that cannot be increased by 10 percent. If the consumer will choose Google to find a room or booking.com, or a hotel website directly, there is no direct cost associated with that particular channel. However, in an ever growing number of countries with the abolishment of price parity/most-favoured nation clauses, the consumer might find different prices at different channels.

Just for the sake of argument. If particular business models are established and prove to be profitable, or even are thought to be the only way how a particular business model can work successfully, that usually means there is a great benefit to the undertakings concerned and/or also the consumers. One key aspect of the business model used by online travel agents are the price- and availability clauses (further on: price parity clauses). The fact is that basically no online travel agent service is established which charges directly to consumers for the bundle of search, compare and book. Even though it is a hypothetical argument – like the hypothetical monopolist test itself – one could argue, that an introduction of even a small fee would basically drive away consumers to other channels and online travel agents, where they can search freely at zero cost for accommodation. The main characteristic of the service that is the most relevant to consumers is that they can search on specialised portals for accommodation. Comparison and the possibility of easy booking is a secondary and valuable service to that. But in our hypothesis, if an online travel agent would charge for any of these services, the consumers would switch to other distribution channels, like metasearch engines or search engines and hotel websites. Even with the existence of specialised online travel agents, consumers still spend plenty of time researching hotels, prices and other terms and conditions, before they book. The same is also true for other channels. If consumers must pay an extra price for using a particular channel, the average consumers most probably would switch to other providers, without the extra costs.

Here we must make an important note. Until recently price parity was heavily enforced by the online travel agents and they used all their market power to deter any accommodation provider to violate price parity. Recently with the legislative prohibition (like in France or Austria) and with the prohibition of first the wide-price parity clauses and later the narrow price parity clauses in Germany we can start collecting data on the effect of a price tag (higher prices) on OTA bookings. This might take some time, since most of the online travel agents – at the time of writing the article – still advertise and highlight that they offer the best price or that they guarantee the best price or match the best price. It is not clear however whether customers really know that this only means that they must ask for the same price (like in the case of Expedia¹⁰) if they find a better one and not that they offer the best price at the time of booking.

A recent study looked at the effect of the Bundeskartellamt prohibition.¹¹ The study has some interesting data, with the last update in April 2017. The study compared countries where there are narrow best price clauses and countries in which the best price clauses were abolished, like France, Germany and Austria. The researchers used a meta-search engine called Kayak, which means that data might lack some important aspect (as is also noted by the authors), since not all hotels list their direct

⁸ Horizontal Merger Guidelines. U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION: 2010. 4.1.1 and 4.1.2.

⁹ We exclude the fact that travel habits and personal data is also valuable for online travel agents and could have a monetary value and therefore treated as a form of payments.

¹⁰ See here: <https://www.expedia.com/p/info-other/guarantees#1?mcicid=hp.bpg>.

¹¹ HUNOLD, Matthias, KESLER, Reinhold, LAITENBERGER, Ulrich and SCHLÜTTER, Frank: Evaluation of Best Price Clauses in Hotel Booking. ZEW Discussion Paper No. 16-066. Link: <http://ftp.zew.de/pub/zew-docs/dp/dp16066.pdf>.

prices on this particular meta-search engine. Despite this, the study shows very clearly that the abolition of the price parity clauses led to the decrease of room prices. Which in turn means consumer welfare gain in line with competition policy. This is a logical outcome of the abolishment of price parity clauses. However there are also other interesting conclusions. One of them is that, if an online travel agent abolished price parity requirements, more hotels became active on the channel and existing hotels also offered more rooms. Again, a clear benefit to consumers. As is that if an online travel agent does not use price parity requirement, that means that hotels publish offers more frequently. The data also confirms the effects of price parity clauses. If price parity is enforced, prices do not deviate significantly from the prices at the online travel agencies. A clear loss in consumer welfare.

5.2. Hotels and demand for sales channels

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

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

For the commissions applied by the online travel agents, using the classical approach to market definition, a SSNIP could lead to different outcomes. One possible argument would be that hotels would not use any alternative channel more extensively, if they think that those other channels are less efficient on a cost per acquisition basis. The other argument would be that hotels would try to use other channels and try to lower the number of acquisition of guests via online travel agents. In order to choose this possibility, the cost per acquisition shall be lower than the commission they have to pay to online travel agents.¹² It is however really difficult to measure the effectiveness of any of the channels. It may be that a future hotel guest only checks an online travel agent website or app and books a hotel based on that, but it is also possible that the same guest was targeted with a Facebook ad, checked the rating on TripAdvisor and Google and finally used the booking.com app to book the hotel due to the convenience factor that the online travel agent app gives the consumer.

Basically, the main service providers, are competing for the same thing: booking of the consumer via their platform or site.¹³ If any of the service providers increase their price, hotels are trying to calculate whether they shall rebalance their ‘marketing mix’ and spend more money on alternative channels. For example, if an online travel agent increases the minimum level of commission, the hotel might reallocate fund to Facebook advertisements or to give extra savings to loyalty programme members to make direct bookings more favourable.

Even though there was not enough time for the market to accommodate to the abolishment of price parity clauses in some Member States and the geographical reach of the abolishment is only limited,

¹² Online travel agents have not changed their effective commission rate recently. See further EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016) p. 8.

¹³ Some service providers have not yet introduced direct booking possibilities (like search engines), but Google and Facebook are both experimenting with this possible feature.

one still see in the recent study¹⁴ that online travel agents did not start a price competition, there is no substantial effect on the commission rates. In other words, online travel agents did not start to decrease commission rates to attract hotels to use their platform. On the contrary, online travel agents started to acquire competitors at all levels of the distribution chain.¹⁵ The effects of these acquisitions and the general increase in the level of concentration at all levels of the distribution chain confirms the findings of this article, namely competition is taking place at all levels, focusing on consumer acquisition at any level.

One of the most interesting issues regarding competition for the consumers' bookings is the fact that the online travel agents are among the largest buyers of ads at search engines. The largest online travel agents are among the top5 ad buyers of search engines. In 2013, Priceline was the second largest advertiser, Expedia the fourth in the US¹⁶. The same was true for 2014.¹⁷ And the trend is probably similar also in the years since 2014.¹⁸ Booking.com even got dedicated marketing team the Google as one of the largest ad buyers.¹⁹ This is not surprising: *"In recent months there's been considerable noise in the industry after Priceline Group Inc released its Form 10-K 2016 Annual Report detailing the unimaginable sums of money they spent in online advertising in 2016. It wasn't only the \$3.5B that impressed, but also the fact that it represented an increase of nearly 30% year on year."*²⁰

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

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

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

¹⁴ HUNOLD, Matthias, KESLER, Reinhold, LAITENBERGER, Ulrich and SCHLÜTTER, Frank: Evaluation of Best Price Clauses in Hotel Booking. ZEW Discussion Paper No. 16-066. Link: <http://ftp.zew.de/pub/zew-docs/dp/dp16066.pdf>.

¹⁵ For the latest such acquisition see: M.8416 - The Priceline Group / Momondo Group Holdings (17.07.2017).

¹⁶ See PETERSON, Tim: Amazon Tops List of Google's 25 Biggest Search Advertisers. Link: <http://adage.com/article/digital/amazon-tops-list-google-s-25-biggest-search-advertisers/294922/>.

¹⁷ Who Are Adwords Biggest Ads Spenders? Link: <https://www.sekkeistudio.com/blog/2015/08/who-are-adwords-biggest-ads-spenders/>; See also Online travel agents Lead Top Travel Advertisers in Paid Search. Link: <https://www.adgooroo.com/resources/blog/otas-lead-top-travel-advertisers-in-paid-search/>.

¹⁸ See e.g. EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016) p. 22: There has been a marked increase in online travel agent payments to metasearch websites and to Google in the period mentioned.

¹⁹ See SCHULTZ, E.J. and PASQUARELLI, Adrienne: Online Travel Agencies Go on Summer Spending Spree. Link: <http://adage.com/article/news/online-travel-agencies-summer-pending-spree/309570/>.

²⁰

http://hotelmarketing.com/index.php/content/article/how_booking.com_and_expedia_build_their_traffic_online.

MFN clauses like the ones applied by online travel agents are supposedly to have several positive effects.²¹ MFN clauses usually stipulate that a hotel offers its rooms to an online travel agent on terms regarding price and availability that are at least as good as the best terms available publicly anywhere, including the websites of the hotels.

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

The general aim of competition is to protect, even to increase consumer welfare. If both hotels and travellers are consumers on this two-sided markets²², increase of welfare on any of the sides of the market is pro-competitive, if the gains outweigh the loss on the other side or even better, if both sides gain.

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

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

Both the market investigation of the Hungarian Competition Authority²³ and of the European Commission, or more specifically, the European Competition Network (ECN)²⁴, provide for clues regarding how hotels see the role of online travel agents on the market.²⁵

²¹ See however on the contrary in the accommodation industry: HUNOLD, Matthias, KESLER, Reinhold, LAITENBERGER, Ulrich and SCHLÜTTER, Frank: Evaluation of Best Price Clauses in Hotel Booking. ZEW Discussion Paper No. 16-066. Link: <http://ftp.zew.de/pub/zew-docs/dp/dp16066.pdf>.

²² See also ZIMMER, Daniel and BLASCHCZOK, Martin: Most-Favoured-Customer Clauses and Two-Sided Platforms. Link: <https://ssrn.com/abstract=2749044>.

²³ GAZDASÁGI VERSENYHIVATAL: Végleges jelentés az online szálláshelyfoglalás piacán lefolytatott ágazati vizsgálatról. (2016).

²⁴ EUROPEAN COMPETITION NETWORK: REPORT ON THE MONITORING EXERCISE CARRIED OUT IN THE ONLINE HOTEL BOOKING SECTOR BY EU COMPETITION AUTHORITIES IN 2016. (2016)

²⁵ Although one shall be careful to rely on direct responses from hotels not tested with alternative methods.

The report of the ECN sheds light on some interesting figures. The switch from wide parity clauses to narrow parity clauses by Booking.com and Expedia led to an increase in room price differentiation between online travel agents by hotels in eight of the then participating Member States.²⁶ The prohibition of Booking.com's narrow price parity clause led to an increase in room price differentiation between online travel agents by hotels in Germany.²⁷ The clear effect was seen after the abolition of the narrow price parity clause in 2016.²⁸ This is an indication that the economic benefits of price differentiation can be "harvested" on a competitive market. The report specifically tested the extent to which hotels which are not subject to narrow parity publish lower room prices on their own website than the prices they offer on online travel agents. The results show that the majority of hotels did undercut their online travel agent partners most of the time.²⁹ In case of existing narrow price parity clauses this was clearly not the case. Interpreting the results show us that there is a clear consumer welfare loss in this case, due to the fact that prices of hotels tend to be higher in case the hotels have to ensure parity.³⁰

There was no such clear differentiation however regarding availability.³¹ Hotels have an interest to sell as many rooms as possible, especially if they can charge lower prices on their own websites. So abolishing price parity meant in practice lower prices, but similar availability.³² This is also a good indicator that the market is competitive and hotels are in a difficult position if they would like to increase room prices on this competitive market.

Changes to the price parity clauses was also evaluated in the report. One of the key findings is that the major sales channel (offline) lost share to the second largest channel: online travel agents.³³ This shows that there is substitutability between the channels.

5.3. Supply side substitution

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

These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not

²⁶ EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016) p. 7.

²⁷ Im. See also HUNOLD, Matthias, KESLER, Reinhold, LAITENBERGER, Ulrich and SCHLÜTTER, Frank: Evaluation of Best Price Clauses in Hotel Booking. ZEW Discussion Paper No. 16-066. Link: <http://ftp.zew.de/pub/zew-docs/dp/dp16066.pdf>.

²⁸ EUROPEAN COMPETITION NETWORK: Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016. (2016). p. 13.

²⁹ See im. p. 14.

³⁰ The commission charged by online travel agents are a clear cost that makes the rooms more expensive.

³¹ EUROPEAN COMPETITION NETWORK: REPORT ON THE MONITORING EXERCISE CARRIED OUT IN THE ONLINE HOTEL BOOKING SECTOR BY EU COMPETITION AUTHORITIES IN 2016. (2016) p. 8.

³² See also im. p. 17.

³³ See im. p. 19.

substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas. [...]

When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.”³⁴

One of the big questions is whether online travel agents really are a separate market, or are hotels, or other market participants competitors, so that they shall be included in the relevant market. The relevant market “seeks to restrict attention only to those products or services which have a “significant” impact on competition”³⁵. The report of the ECN has also some findings that are relevant for our purpose.³⁶ The report states that across the Member States, 30% of the hotels that responded contract directly with metasearch sites. Direct contact between metasearch websites and hotels still generate a relatively small share (6%) of total bookings. However, both the share of hotels and that contract directly with metasearch websites and the share of bookings generated by metasearch websites has increased since 2014 and these shares are larger for chain and high category hotels.³⁷ The increase since the changes in parity clauses also show that there is substitutability between metasearch sites and online travel agents.

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

Supply side substitution means that supplying the demand can be achieved quite quickly. Niels et al. argue that there are three criteria for supply side substitution to be serious: no sunk costs, swiftness

³⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law. OJ C 372, 9.12.1997, p. 5–13. paras 20 – 23.

³⁵ BISHOP, Simon and WALKER, Mike: *The Economics of EC Competition Law: Concepts, Application and Measurement*. London, Sweet & Maxwell, 2010. p. 108.

³⁶ EUROPEAN COMPETITION NETWORK: REPORT ON THE MONITORING EXERCISE CARRIED OUT IN THE ONLINE HOTEL BOOKING SECTOR BY EU COMPETITION AUTHORITIES IN 2016. (2016).

³⁷ *Im*. p. 22.

and scale.³⁸ It is up to be decided how effectively undertakings can enter the online travel agent market. Current data shows that even though there are hundreds of online travel agents, only very few do have real significance.

6. Conclusions

The article showed that separating the different undertakings based on their place in the supply chain might be wrong for a competitive assessment. The real competition in the present state of the market is to get a consumer on board of a booking channel, be it a hotel website, an online travel agent or a meta-search engine. Even the general search engine of Google is competing for consumers who search and compare and book. Arguing that because searching, comparing and booking can be carried out at one place those firms are on a separate market might be an artificial division of the market. We still need more data to see the competitive forces in work after the abolishment of price parity clauses in some Member States. The available data shows that by abolishing price parity, consumers gain, consumer welfare increases. If one would consider metasearch engines, hotels, online travel agents, etc. as competitors, that would have far reaching consequences on the agreements they can concluded in order not to infringe Article 101 (1) TFEU for example.

³⁸ NIELS, Gunnar author, JENKINS, Helen author and KAVANAGH, James author: *Economics for competition lawyers*. Oxford, Oxford University Press, 2016. pp. 58-60.

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