Consumer Choice and Fair Competition on the Digital Single Market in the Areas of Air Transportation and Accommodation
Consumer Choice and Fair Competition on the Digital Single Market in the Areas of Air Transportation and Accommodation

Abstract
Through a series of case studies this study provides an overview of measures implemented by states and firms that may harm competition and consumer choice. It explores the extent to which EU Law may apply to prevent such restrictive practices. This document was prepared by Policy Department A at the request of the European Parliament's Committee on the Internal Market and Consumer Protection.
This document was requested by the European Parliament’s Committee on the Internal Market and Consumer Protection.

AUTHORS
Giorgio MONTI, European University Institute (Italy)
Susanne AUGENHOFER, Humboldt University, Berlin (Germany)

ADMINISTRATOR RESPONSIBLE
Mariusz MACIEJEWSKI

EDITORIAL ASSISTANT
Irene VERNACOTOLA

LINGUISTIC VERSIONS
Original: EN

ABOUT THE EDITOR
Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:
Policy Department for Economic, Scientific and Quality of Life Policies
European Parliament
B-1047 Brussels
Email: Poldep-Economy-Science@ep.europa.eu

Manuscript completed in October 2018
© European Union, 2018

This document is available on the internet at:
http://www.europarl.europa.eu/supporting-analyses

DISCLAIMER AND COPYRIGHT
The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of the European Parliament. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LIST OF ABBREVIATIONS</strong></td>
<td></td>
<td>5</td>
</tr>
<tr>
<td><strong>EXECUTIVE SUMMARY</strong></td>
<td></td>
<td>6</td>
</tr>
<tr>
<td><strong>INTRODUCTION</strong></td>
<td></td>
<td>8</td>
</tr>
<tr>
<td><strong>1. OVERVIEW</strong></td>
<td></td>
<td>9</td>
</tr>
<tr>
<td>1.1.</td>
<td>Consumer choice and fair competition</td>
<td>9</td>
</tr>
<tr>
<td>1.2.</td>
<td>Legal instruments</td>
<td>9</td>
</tr>
<tr>
<td>1.3.</td>
<td>Standards for assessing the need for EU-level regulation</td>
<td>11</td>
</tr>
<tr>
<td><strong>2. ACCOMMODATION SERVICES: STATE REGULATION LIMITING VACATION RENTALS</strong></td>
<td></td>
<td>13</td>
</tr>
<tr>
<td>2.1.</td>
<td>Policy analysis</td>
<td>14</td>
</tr>
<tr>
<td>2.2.</td>
<td>Legal assessment</td>
<td>14</td>
</tr>
<tr>
<td>2.3.</td>
<td>Is more EU intervention needed?</td>
<td>16</td>
</tr>
<tr>
<td><strong>3. ACCOMMODATION SERVICES: AIRBNB VERSUS HOTELS</strong></td>
<td></td>
<td>17</td>
</tr>
<tr>
<td>3.1.</td>
<td>Policy analysis</td>
<td>17</td>
</tr>
<tr>
<td>3.1.1.</td>
<td>Legitimate reasons for regulating service providers.</td>
<td>17</td>
</tr>
<tr>
<td>3.1.2.</td>
<td>Appropriate tools for addressing these issues</td>
<td>17</td>
</tr>
<tr>
<td>3.2.</td>
<td>Legal assessment</td>
<td>18</td>
</tr>
<tr>
<td>3.3.</td>
<td>Is more EU-level intervention needed?</td>
<td>19</td>
</tr>
<tr>
<td><strong>4. ACCOMMODATION SERVICES: ONLINE TRAVEL AGENTS</strong></td>
<td></td>
<td>20</td>
</tr>
<tr>
<td>4.1.</td>
<td>Policy assessment</td>
<td>20</td>
</tr>
<tr>
<td>4.2.</td>
<td>Legal assessment</td>
<td>21</td>
</tr>
<tr>
<td>4.2.1.</td>
<td>Competition Law by National Competition Authorities</td>
<td>21</td>
</tr>
<tr>
<td>4.2.2.</td>
<td>National law response</td>
<td>21</td>
</tr>
<tr>
<td>4.3.</td>
<td>Is more EU-level intervention required?</td>
<td>22</td>
</tr>
<tr>
<td><strong>5. AIR TRANSPORT AND HOTEL: TARGETED ONLINE PRICES</strong></td>
<td></td>
<td>23</td>
</tr>
<tr>
<td>5.1.</td>
<td>Policy assessment</td>
<td>23</td>
</tr>
<tr>
<td>5.2.</td>
<td>Legal assessment</td>
<td>24</td>
</tr>
<tr>
<td>5.2.1.</td>
<td>Competition law</td>
<td>24</td>
</tr>
<tr>
<td>5.2.2.</td>
<td>Consumer Law</td>
<td>25</td>
</tr>
<tr>
<td>5.2.3.</td>
<td>Sector Specific Regulation</td>
<td>26</td>
</tr>
<tr>
<td>5.3.</td>
<td>Is EU intervention needed?</td>
<td>26</td>
</tr>
<tr>
<td><strong>6. AIR TRANSPORTATION AND TRAVEL: BOOKING FEES</strong></td>
<td></td>
<td>27</td>
</tr>
<tr>
<td>6.1.</td>
<td>Policy discussion</td>
<td>27</td>
</tr>
<tr>
<td>6.2.</td>
<td>Legal assessment</td>
<td>27</td>
</tr>
<tr>
<td>6.3.</td>
<td>Is EU intervention needed?</td>
<td>27</td>
</tr>
</tbody>
</table>
7. AIR TRAVEL: COMPUTER RESERVATION SYSTEMS 28
   7.1. Policy discussion 28
   7.2. Legal assessment 29
   7.3. Is further EU intervention needed? 30

8. SUMMARY AND CONCLUSIONS 32
   8.1. Lessons from the case studies 32
   8.2. State regulation 33
   8.3. Prices 33
   8.4. Enforcement 34

REFERENCES 35
LIST OF ABBREVIATIONS

**CRS**  Computer Reservation System

**NCA**  National Competition Authority

**OTA**  Online Travel Agent

**PSS**  Passenger Service System

**UCPD**  Unfair Commercial Practices Directive
EXECUTIVE SUMMARY

Background

This study is the result of a number of recent developments that have given rise to concerns in the digital single market. On the one hand, cities and governments are regulating the sharing economy (in particular new modes of transport and accommodation provision) in ways that restrict market access to new kinds of service provider. On the other hand, undertakings selling services online are able to engage in business practices that may be perceived to be unfair to consumers, for example personalised pricing.

The study examines a range of case studies in the accommodation and air transport sector to determine what the risks to fair competition and consumer choice are, whether EU Law is sufficiently well-equipped to address them, and what (if any) further legislative action may be recommended.

Results from the case studies

A number of large cities in the EU are placing limits on the use of properties for short-term lets. Cities are concerned that the proliferation of such lettings reduces the availability of housing stock for residents and visitors staying in residential neighborhoods create nuisances. Under EU Law these regulations may be allowed if they do not discriminate and are the least restrictive way of protecting the public interests identified. Many cities are cooperating with online platforms to achieve a balanced regulatory framework.

Member States may consider imposing upon new accommodation providers the same regulatory framework that applies to hotels. This might safeguard consumer interests but risks also raising entry barriers unnecessarily. EU Law requires that Member States monitor the adequacy of their regulatory frameworks so as to eliminate unnecessary barriers to the provision of services. Current technological innovations provide an opportunity to update existing regulation for traditional services.

The conduct of online travel agents vis-à-vis hotels has been addressed by national authorities. There is a tension between the approach selected by competition authorities and national regulators. The result is divergent regulation for online travel agents. Further cooperation among national competition authorities should be encouraged.

There is some evidence of personalised pricing. This may be a concern either because consumers are discriminated by their willingness to pay or because personalised pricing may tend to have adverse effects on weaker parties. Personalised pricing is difficult to tackle under competition law, while there is some scope that certain forms of price information may be found to be misleading by the application of consumer law.

Hidden booking fees may constitute infringements of EU consumer law in situations where the consumer has invested considerable time in making a booking before she discovers there is a processing fee.

Passenger service systems may not be caught by the existing regulatory framework that applies to similar platforms, the Code of Conduct for Computer Reservation Systems. The Code is presently under review and it will be important that this review considers the impact of new technological developments to determine how to revise the Code.
General recommendations

Member States are prone to regulate these new market realities either to ensure what they believe are fair conditions in the market, or to safeguard other non-economic interests, or because they wish to protect certain industry sectors may arise. Such regulation may have a harmful effect on consumer choice and competition. EU Law is well equipped to balance the competing interests of competitors and consumers.

Firms in these markets may well fix unfair prices, however direct price regulation is to be avoided. At the same time the means we have available to regulate unfair pricing could be incomplete given novel technologies. More evidence gathering is needed to determine how to amend the existing regulatory framework.

Regulation is only effective if the law can be activated frequently enough to deter or secure compliance. The presence of a dedicated agency can be useful provided that agency is well-funded and independent. Co-regulatory efforts, whereby the state collaborates with market actors, can provide a helpful means of resolving market failures.
INTRODUCTION

Technological developments have brought changes to the way air transport and accommodation services are provided and purchased. In the field of air transport and accommodation provided by hotels, there is increased transparency of prices thanks to on-line platforms that reduce search costs. In the field of accommodation services, on-line platforms have facilitated the growth of a business model where individuals are able to advertise their spare rooms or spare properties for rent, competing with established hotels. This is one instance of the so-called sharing economy. Platforms like Booking.com, Skyscanner and Airbnb are well known and profitable new enterprises that represent these new developments. Business models based on online platforms and the sharing economy are likely to develop even further in the future and the pressure to regulate will continue.¹

For the purposes of this study, the focus is on the regulatory challenges that are faced when ensuring that these developments yield consumer choice and fair competition. Our first step is to define these two terms and then to outline the legal framework that safeguards these benefits (section 1). The remainder of this study is structured in the following manner: we take one or both industries with an example of current practices that have raised controversies and legal challenges. For each, we discuss three things: (a) the policy dimension; (b) the legal issues that arise; (c) whether there should be further EU level regulation to address the issue. The purpose of this approach is twofold.

First it allows one to see the kinds of legal challenges that have arisen as these new business models gain a foothold. Using specific examples allows us to explore in detail how the existing legal framework applies.

Second, it allows us to map the adequacy of existing policy tools and provides a framework for determining whether further legislative intervention by the EU may be required.

¹ E.g. Commission Proposal of 26 April 2018 for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM (2018) 238.
1. OVERVIEW

1.1. Consumer choice and fair competition

Consumer choice means that consumers have a variety of similar products or services to choose from. For instance, a tourist wishing to book a flight on-line has access to a variety of airlines and to a variety of platforms from which she can purchase her ticket. Competitive markets can normally be expected to provide an adequate amount of consumer choice. Online platforms can enhance consumer choice because they provide a convenient means for new businesses to enter the relevant market (think of how Airbnb has facilitated the emergence of more accommodation choices for travellers); they can also serve to increase information about different options so that consumers can choose the best deal. Consider for example the claim made by the website Trivago: by visiting it the consumer can compare the hotel prices from over 400 websites, and a database which contains 1.8 million hotels in 190 countries.2

Fair competition has a double meaning: (i) fairness between the provider of services and the consumer, and (ii) fairness between competitors offering similar services.

When it comes to fairness towards the consumer, the concept is relatively uncontroversial: consumers are normally the weaker party in transactions, suffering from informational asymmetries and at times from the market power of the seller, and so it is important that the terms of the contracts they sign are fair.

The issue of fairness between competitors of providers of similar services is captured vividly in press reports about the rivalry between unlicensed Uber and licensed taxi service providers. The latter are subject to considerable regulation (e.g. to ensure that the car is roadworthy and the driver is able to provide a safe journey) while Uber is not. This means that Uber is able to provide a cheaper service at the expense of licensed taxi service providers, just because one is not subject to regulatory costs. From this perspective, it may be appropriate for the regulator to strike a balance between choice and fairness, for example by requiring that Uber is subject to the same regulation as licensed taxis: this will likely raise the costs of new drivers, and so reduce choice, but it could render competition more fair. This kind of trade-off is complex and controversial, as we explain below.

Another aspect of fairness, which is largely excluded in this study, is that between platform providers and the providers of services. For example, the relationship between a person wishing to rent their house and a platform, like Airbnb. This relationship may be exploited by the platform, and some legislative steps have been discussed in this regard.3 The present report focuses only on the supply of services to consumers.

1.2. Legal instruments

These aspects of consumer choice and fair competition are addressed by the interaction between national law and European Union Law. Below, we provide a map of the relevant legal instruments that we consider more fully in the study.

The Treaty provisions on free movement (especially the free movement of services) provide a basis for challenging state regulation that creates entry barriers that reduce choice and competition. Member States may of course justify restrictive legislation if it pursues a legitimate public interest. Of relevance in this context is also the Services Directive, which is

---

2 www.trivago.it. This data is provided in the home page.

3 Above, n 1.
designed to facilitate the entry of new service providers. These rules provide for so-called ‘negative integration’. That is to say, they can be used to challenge national legislation and request that this is revised by the Member States. These EU rules provide that Member States may justify national laws that create entry barriers if these serve the public interest. It is for States to explain why certain restrictions to the provisions of service are necessary to protect the public interest.

The Treaty provisions on competition law provide a basis to challenge actions of firms which reduce choice and competition. Conduct that has no cross-border effect may be caught by national competition laws, which in most instances is broadly similar to EU competition law. However, it should be borne in mind that the rules on competition only apply in certain circumstances: when firms are dominant (e.g. Article 102 TFEU prohibits the abuse of a dominant position, meaning firms should hold at least some 40 to 50% of the relevant market) or when there is an agreement between firms (e.g. Article 101 TFEU prohibits agreements that restrict competition). It follows that there is conduct which has anticompetitive effects that may not fall within the scope of the competition rules.

As a result of the limitation of competition law, the EU has, in certain contexts, passed sector-specific legislation to address specific market failures. An example we refer to below is computer reservation systems. A better-known example is the regulatory framework for telecommunications where national regulatory authorities are tasked to control the conduct of actors with significant market power.

Consumer protection laws protect consumers when they enter into a specific transaction and the rules try to ensure that the transaction is fair for the weaker party. The aim of national consumer law is not to make the market more competitive, but to ensure fairness in the transaction. EU consumer law, however, is also designed to make the consumer more confident to shop across the internal market, thereby stimulating competition among traders located in different member states. The two principal pieces of consumer legislation are the Unfair Contract Terms Directive, which serves to regulate unfair standard terms in contracts when these are to the detriment of consumers and the Unfair Commercial Practices Directive which allows one to challenge the conduct of sellers which distort the economic behavior of the consumer, e.g. misleading practices.

In the two markets discussed in this study, all of these four kinds of rules may be engaged. The table below sets out which rules apply to which policy aim.

---


5 Ibid.
### Table 1: Matching policy aims with existing laws

<table>
<thead>
<tr>
<th>Rule</th>
<th>Policy Aim</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treaty rules on free movement and the Service Directive</td>
<td>Consumer Choice</td>
</tr>
<tr>
<td>National rules (which may infringe EU free movement law)</td>
<td>Fair competition to protect users and competitors</td>
</tr>
<tr>
<td>Competition Law</td>
<td>Consumer choice through the protection of the competitive process</td>
</tr>
<tr>
<td>Sector Specific Regulation</td>
<td>Consumer choice and fair competition to protect users and competitors</td>
</tr>
<tr>
<td>Consumer Law</td>
<td>Fair competition to protect users and to stimulate cross border trade</td>
</tr>
</tbody>
</table>

This table provides the analytical framework that is applied here, but it is not free from controversy. In particular, for the purposes of this study we take the view that competition law is only concerned with consumer choice, and not with fairness. However, at times the enforcement of EU competition law is said to pursue fairness as an aim. The problem is that while there are occasional references to fairness in public documents and some decisions, there isn’t a systematic fairness standard that emerges. In contrast, the Commission has constructed a fairly robust legal framework to check the impact that the conduct of firms may have on consumers’ welfare and choice. For a recent discussion of the aims of EU competition law, see Ezrachi ‘BEUC Discussion Paper on the Goals of EU Competition Law and the Digital Economy’ (2018).

Furthermore, for the purposes of this study we consider that competition law disciplines the supply side of the market (consumers are thus entitled to choice among competing offers) while consumer law disciplines the demand side of the market (consumers do not sign contract with unfair terms). The relationship between these two rules is largely complementary. Monti ‘The Revision of the Consumer Acquis from a Competition Law Perspective (2007) 3 European Review of Contract Law 296 where this simple distinction is summarised but also criticised.

**1.3. Standards for assessing the need for EU-level regulation**

In determining whether there should be EU-level regulation, we adopt the following framework.

First, one has to appreciate whether there are market failures that existing rules are unable to capture. In fast-moving markets it bears keeping in mind that the legal system may be slow to react but that, with proper incremental development, agencies and courts may be able to interpret existing rules to address market failures. Rushing to legislate may be imprudent. Regulation may also stifle competition by, among others, raising entry barriers. Accordingly, the costs of regulation should be considered.

Second, most platforms create two-sided markets. For example a platform like booking.com brings together suppliers of services (hotels) and those wishing to obtain the service...
(travellers). At times it may be more appropriate to regulate one side of the market to benefit the other side. For example, controlling the way a hotel booking platform deals with hotels may be the best way to enhance consumer choice.

Third, the EU legislator is faced with competing forces if there is indeed a market failure. On the one hand, if there is considerable cross-border activity in an economic sector, this will pull in the direction of EU level intervention. On the other hand, Member States may have different preferences on how they go about regulating a specific problem and this might pull towards leaving it to Member States. An intermediate solution is to allow Member States to experiment with regulatory models and to then use these to devise an EU-level instrument. From this it follows that the legislator should opt for EU level regulation only where the negative externalities that result from fragmented national regimes are so severe that national regulation or national experimentation is insufficient to remedy this market failure.

---

8 We draw on de Streel 'Online Intermediation Platforms and Fairness: An assessment of the recent Commission Proposal' (2018) p.23
2. ACCOMMODATION SERVICES: STATE REGULATION LIMITING VACATION RENTALS

KEY FINDINGS

A number of large cities in the EU are placing limits on the use of properties for short-term lets. Cities are concerned that the proliferation of such lettings reduces the availability of housing stock for residents and visitors staying in residential neighbourhoods create nuisances.

Under EU Law these regulations may be allowed if they do not discriminate and are the least restrictive way of protecting the public interests identified. Many cities are cooperating with online platforms to achieve a balanced regulatory framework.

The growth of platforms like Airbnb has led to social problems in a number of cities. The concern is that some owners are letting out their second homes or apartments for short-term lets for tourists because they find it more profitable to operate in this way than to rent their houses to long term to residents. This causes two kinds of concerns: first that tourists live in residential neighbourhoods and can create nuisances (for example visitors may be unaware of how to dispose rubbish adequately); second in cities with a shortage of houses for residents, this practice reduces further the accommodation available. Thus while choice is increased for tourists, it decreases for residents.

A number of cities have passed regulations to limit the right of homeowners to let properties for action rentals. One of the strictest in the EU is found in the City of Berlin, we use this as a case study. The City of Berlin has passed a law that limits the use of Airbnb for vacation rentals, precisely to ensure that residents have access to accommodation.9 The law itself suffers from some enforcement glitches: distinguishing people who sublet empty flats (illegal) from people who have a spare room that they let (legal) is tricky because the enforcers cannot get access to the databases of platforms like Airbnb due to privacy concerns. In addition, property owners who are penalised are challenging the imposition of a fine. Litigation on these matters is ongoing and publicly available information is lacking. It also appears that the procedure to impose a fine is quite long. This suggests that the legal framework devised may not be adequate to address the issues that come up. Nevertheless, the mayor of Berlin expects that when fines begin to be imposed this will have a deterrent effect.10

---

9 Zweckentfremdungsverbots-Gesetz (ZwVbG), see: https://www.parlament-berlin.de/ados/17/IIIPlen/vorgang/d17-1057.pdf. At the time of writing we are not aware of any law review article that discusses this legal instrument, but this website offers interesting analysis: https://www.citylab.com/life/2018/03/berlin-airbnb-vacation-rental-regulation-law/556397/.
2.1 Policy analysis
There are two competing issues: on the one hand, Airbnb and similar platforms allow landlords to optimise the use of their property; they also expand accommodation choices for consumers.

The Airbnb platform provides a degree of protection for both sides (e.g. the landlord is insured against loss caused by the tenant) so the transaction is welfare-enhancing. At the same time the concerns about the adverse impact that such rentals have on the quality of life of residents and the shortage of houses that it causes are real, and need to be balanced with the welfare enhancing aspects of the business.\textsuperscript{11} In other words, we have a tension between consumer choice and legitimate policy concerns of certain cities.

2.2 Legal assessment
Under European Union Law, the steps taken by the city of Berlin (and those taken by other cities) could be challenged for infringing the right to provide services protected by Article 56 TFEU: foreign tourists wishing to visit Berlin are unable to receive a service in that city. The Services Directive would also apply to place limits on such policies. For instance, an authorisation scheme to allow for the provision of a service is only allowed if the following conditions are met: '(a) the authorisation scheme does not discriminate against the provider in question; (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest; (c) the objective pursued cannot be attained by means of a less restrictive measure.'\textsuperscript{12}

Based on these provisions, the Member State (or the local authority) wishing to defend these restrictive measures would have to establish a legitimate public interest and explain that the measure in question is non-discriminatory and proportionate to achieve the protection of that public interest. Addressing a shortage of housing for residents is likely to be accepted as a valid public interest: the Court of Justice of the EU (CJEU) has been accommodating when it comes to recognising national policy considerations. Specifically, the CJEU has already held that ‘guaranteeing sufficient housing for the low-income or otherwise disadvantaged sections of the local population’ is a valid national policy that may be invoked.\textsuperscript{13} It is a short step from here to suggest that preserving sufficient housing stock to ensure residents have affordable housing would be accepted.

States will however struggle to justify that the measures designed to achieve such objective are proportionate and the CJEU’s case law reveals that the State has to provide convincing evidence that the restriction on free movement is necessary to protect a legitimate public interest.\textsuperscript{14} The Commission has taken a fairly strict approach in a Communication on the sharing economy, looking specifically at initiatives like a ban on the use of property for vacation rentals. The Commission takes the view that bans should be a measure of last resort and may well be disproportionate:

\textsuperscript{11} For an interesting study gathering data on Airbnb, see: http://www.airbnbvbsberlin.com.
\textsuperscript{13} Joined Cases C-197/11 and C-203/11, Libert ECLI:EU:C:2013:288. See also Case C-370/05 Festersen ECLI:EU:C:2007:59 where the Court accepted that a state could restrict the use of land to preserve traditional forms of farming.
\textsuperscript{14} For a review, see Chalmers, Davies and Monti European Union Law 3\textsuperscript{rd} ed (Cambridge University Press, 2014) ch.20.
number of days per year. This would allow citizens to share their properties on an occasional basis without withdrawing the property from the long-term rental market.\textsuperscript{15}

This interpretation may be criticised: if you own a property and wish to let it for tourist use only to be told that you may only let it for a certain number of days per year, then it follows that you would either let it for those days and leave it empty the rest of the time, or rent it for the long term and then not let it to tourists. In other words, a temporary ban would not have an effect different from a total ban on the number of properties available to residents. In addition, a time limit generates the need for resources to ensure compliance, and it may be cheaper to enforce a total ban than a partial one. Accordingly, it is not clear that a temporary ban is less restrictive than a total ban to secure the availability of housing stock. A more proportionate approach would be to limit the number of properties that may be used for short term rentals, but this may be more difficult to police absent a system of compulsory registration for those who rent their properties.

A particularly noteworthy development may be found in the Memorandum of Understanding between the City of Amsterdam and Airbnb.\textsuperscript{16} The City of Amsterdam bans home rentals for periods greater than sixty days a year. This is said to balance the freedom of property owners with the policy objectives of maintaining housing stock. When it comes to enforcement of this obligation, we find that the City and Airbnb have agreed to share this. For instance Airbnb has agreed to send automatic messages to hosts who are coming up to the 60 day limit to remind them of their legal obligations and it has also agreed to place an automatic block on hosts once they reach this limit.\textsuperscript{17} Moreover, to avoid recidivism, the City may inform Airbnb of an address whose owner has been penalised for infringing this rule and as a result of this Airbnb agrees to remove the property from its platform for at least two years.\textsuperscript{18}

The City of Amsterdam sees this as a model for cooperation with other platforms, and it appears the Commission sees this as a best practice in developing an EU-wide model.\textsuperscript{19} It clearly serves to reduce its monitoring costs, passing these to the platform, and may ensure better compliance. More studies will be necessary to establish its effectiveness. One preliminary assessment suggests that the number of illegal lettings was declining even before this agreement because the City of Amsterdam had increased its enforcement actions.\textsuperscript{20} One must also wonder whether the costs that this scheme imposes on Airbnb will be affordable by smaller platform providers. If regulation raises entry barriers there is a risk that the platform market becomes less competitive so that dominant platforms might emerge which can exploit their position both against the suppliers of property (e.g. asking for higher commissions or setting unfair terms) and against the consumers wishing to stay in those properties (e.g. setting higher prices).

\textsuperscript{15} European Commission, \textit{A European Agenda for the Collaborative Economy} COM(2016) 356 (final), p.4

\textsuperscript{16} Nieuwsarchief, ‘Amsterdam and Airbnb announce new unique agreement’ (1 December 2016) https://www.amsterdam.nl/nieuwsarchief/persberichten/2016/persberichten-1/amsterdam-and-airbnb/. The full text of the agreement is available at this website.

\textsuperscript{17} Ibid paragraphs 3.2 and 3.4

\textsuperscript{18} Ibid. paragraphs 3.8-3.9


2.3 Is more EU intervention needed?

It is not clear that at this stage one needs to address this issue further at EU level. Insofar as firms like Airbnb are concerned, there are legal means by which they may challenge restrictive regulations.21

One might argue that the kind of legislative initiative that may be needed is some harmonisation on the regulatory framework to limit the use of properties for short-term lettings.

However, it is submitted that this is very much a local issue affecting certain cities and it is preferable for cities to develop regulatory models that suit their needs: after all, each city will face different kinds of social problems and the kind of regulation that is needed may differ.

The EU could assist in allowing cities to network to compare and evaluate different regulatory models, a process from which best practices may emerge.22

21 And some are concerned that these actors have too much influence on the policy space. See Haar, Unfairbnb – How online rental platforms use the EU to defeat cities’ affordable housing measures (Corporate Europe Observatory, May 2018).

22 An example of this working well is the European Competition Network, where national competition authorities meet regularly and identify best practices to handle shared concerns.
3. ACCOMMODATION SERVICES: AIRBNB VERSUS HOTELS

**KEY FINDINGS**

Member States may consider imposing upon new accommodation providers the same regulatory framework that applies to hotels. This might safeguard consumer interests but risks also raising entry barriers unnecessarily.

EU Law requires that Member States monitor the adequacy of their regulatory frameworks so as to eliminate unnecessary barriers to the provision of services. Current technological innovations provide an opportunity to update existing regulation for traditional services.

A concern with platform-based accommodation services is that property owners can bypass planning control regulations that hotels are subject to. In other words, while there may be more competition and consumer choice as a result of the growth of the sharing economy, there is a risk that hotels and Airbnb hosts are not competing fairly. The question thus arises whether the kind of regulations that are imposed upon hotels should be also required of homeowners who rent their property via a platform.

### 3.1 Policy analysis

This issue raises the same tensions as those noted in section 2: can we regulate new firms in the public interest when this may threaten their new business model? It requires reflections on the appropriate balance between facilitating the development of enterprise and protecting the public interest. One helpful way of considering this issue is the following: first considering legitimate reasons why regulation may be necessary, second exploring how such regulation may be best designed.

#### 3.1.1. Legitimate reasons for regulating service providers.

- **Externalities**: the regulator should consider how far the agreement between a property owner and a tourist could cause harm to third parties: for example the degree to which these agreements have an adverse effect on the availability of parking spaces in the neighbourhood.

- **Informational asymmetries**: the regulator should ensure that the tourist is provided with an adequate degree of safety. Online the tourist may see only certain aspects of the property to allow her to judge its quality. Less visible aspects (e.g. the availability of a fire escape route) will be less visible.

- **Universal access**: the regulator should ensure that there is no discrimination on grounds of race or disability.

#### 3.1.2. Appropriate tools for addressing these issues

Traditionally, one establishes a framework establishing standards, which are then enforced through inspections. This may be supplemented by giving a right to damages – e.g. a person denied accommodation because of their race may seek damages from the would-be host.

However, a pervasive feature of digital markets is that consumers rate services (and at times providers also rate consumers).

---


Some studies show that this approach might at times provide better results than regulation: consumer’s ratings can be entered quickly and are transparent, while if one were to complain about the quality of service in a hotel to public authorities the procedure is likely to be time consuming and much less transparent. With particular reference to the services provided by the sharing economy the Commission recommends that when reviewing requirements about issues like access, quality and safety, the legislator should consider whether rating systems might be an appropriate means to protect consumers. In the Commission’s view this reflection ‘can contribute to higher quality services and potentially reduce the need for certain elements of regulation, provided adequate trust can be placed in the quality of the reviews and ratings.’ Of course the need to have trust in rating services is vital, and it might be that regulation is needed to ensure that providers of rating services deliver accurate results.

Another way of ensuring that market failures are avoided is to support self-regulation. For example, Uber does not allow any driver to join its network, but it establishes a set of pre-requisites. If so might these suffice or is it legitimate for the legislator to set out national-level requirements for all drivers, whether providing services via Uber or via a traditional taxi company? The regulator will need to keep a close eye on how far self-regulation might eclipse the need for state controls.

3.2 Legal assessment

Testing if states or cities are restricting the provision of accommodation services unlawfully follows the framework discussed in section 2. However there is a deeper issue which we can note here. This is that these new business models require that states rethink the appropriateness of their regulatory framework for the relevant industry as a whole. For instance, the emergence of Uber calls upon states to rethink whether the system of taxi regulation is up to date. It is beyond the scope of this study to discuss this point in detail, but two issues are worth noting.

First, this is a matter that is addressed in part by the Services Directive. Article 5 provides that ‘Member States shall examine the procedures and formalities applicable to access to a service activity and to the exercise thereof.’ The review is designed to consider whether these procedures should be simplified. The Commission is of the view that the emergence of new business models is a good time for Member States to revisit existing legislation and to ask if the aims it pursues are still valid and if the restrictions imposed are proportionate. In section 3.1 we have provided some guidelines on how this might be carried out.

Second, a question may arise as to whether the duty to comply with national regulation is to be imposed upon the provider of the service or on the platform. The matter has been the subject of litigation in the context of Uber’s platform: the firm insisted that it provides an information society service (it links passengers to drivers) and so free from national regulatory requirements applying to transport firms.

However the ECJ held that it is a transport service, subject to national laws, because it exercises decisive influence over how the service is provided.

25 Edelman and Geradin (above n 23).
26 Above, n 15, page 4.
29 Above n 15.
The reason for this finding is that Uber does more than match passengers and drivers but selects drivers and regulates certain aspects of their conduct. Generalising, one has to explore how far the platform is simply an intermediary between a host and a traveller or whether it controls the way the service is provided. If the latter then it may be appropriate for the regulator to impose duties on the platform, as we have seen above (section 2.2).

### 3.3 Is more EU-level intervention needed?

The existing legal setup requires Member States to review national regulatory frameworks to ensure that they afford market access to new service providers. It is not clear whether it is appropriate for EU Law to step in to harmonise national regulatory frameworks at this stage. It would be prudent to allow states to revisit national regulations. Indeed, certain Member States have begun to consider legislation to ensure that emerging businesses that use novel technologies are regulated in a manner equivalent to competitors operating along more conventional lines. Insofar as this legislation respects EU Law, there seems little for the EU legislator to do at this stage.

---

31 Ibid. especially paragraphs 38-39

4. ACCOMMODATION SERVICES: ONLINE TRAVEL AGENTS

KEY FINDINGS

The conduct of online travel agents vis-à-vis hotels has been addressed by national authorities. There is a tension between the approach selected by competition authorities and national regulators. The result is divergent regulation for online travel agents. Further cooperation among national competition authorities should be stimulated.

Another phenomenon that has been facilitated by the digital revolution is the emergence of online travel agencies (OTAs). OTAs like Booking.com provide a service whereby hotels can list their rooms on their website, paying the website when a booking is made. There are a number of OTAs and hotels also sell via their website and through traditional sales channels (e.g. travel agents that have a physical presence). At the time of writing, a particular competition law concern has arisen: OTAs would request that hotels do not advertise their rooms for sale at a lower price elsewhere online. This is known as a price parity clause. It means that the consumer would not see different prices across platforms. This conduct was challenged by a number of National Competition Authorities and by national legislators.

4.1 Policy assessment

Price parity clauses risk stifling price competition among OTAs. This theory of harm seems to overlook the fact that OTAs stimulate competition among hotels. To a degree OTAs serve like a price-comparison website (they are not technically price comparison websites, of course): consumers become much more aware of the hotels they could stay at and the prices and facilities of each. Since OTAs increase the amount of information, they stimulate competition among hotels. It follows that hotels should reduce their prices now that OTAs make competition between hotels more fierce. In the regulation of vertical restraints, the rule of thumb is that provided there are no restrictions on inter-brand competition then restrictions on intra-brand competition are not something we should worry about: in other words it is better to make sure that two hotels compete for clients and if this competition exists, the fact that two OTAs are not competing on the price of that room is less of a worry. A counter-argument is that price parity clauses prevent competition among OTAs on commissions (this is a horizontal effect) and they could raise entry barriers for new platforms. However it is not clear why an established OTA or a new entrant might not have an incentive to cut commissions as a means of securing more sales in the hope that the market might ‘tip’ and it becomes the dominant platform. Moreover OTAs may well compete on other services and so one would have to trade off the risks of anticompetitive effects with the benefits consumers secure from the current OTA business model.

33 This is the vision championed by Moazed and Johnson Modern Monopolies: What it Takes to Dominate the 21st Century Economy (St. Martin’s Press, New York, 2016). This book offers business advice to people wishing to start platform-based businesses and their forecast is that for each business there will be inter-platform competition with only a few surviving.
4.2 Legal assessment

4.2.1. Competition Law by National Competition Authorities

The matter has been taken up at national level, with a variety of results, which we set out below.\(^34\)

First, competition authorities intervened: in Germany, action was taken by the German competition authority, which has condemned the use of price-parity clauses in 2013\(^35\) and 2015.\(^36\) In Italy, France and Sweden the three national competition authorities cooperated to reach a result that they all were able to agree on in 2015. This took the form of a commitment decision under which Booking.com agreed to remove wide price parity clauses (so that hotels could offer different rates to other OTAs) but they would retain narrow price parity clauses (so that hotels would not be able to set lower rates on their websites).\(^37\) This was then rolled out across the rest of the European Union, with the other competition authorities agreeing with the outcome.\(^38\) (As an aside, this is an excellent example of how the network of national competition authorities could work.)

4.2.2 National law response

However, the result achieved by National Competition Authorities was later quashed in certain Member States by legislative intervention:

In France the Loi Macron banned all forms of price parity clauses.\(^39\) In Italy, the so-called competition degree has also banned all forms of price-parity clauses.\(^40\) In these two jurisdictions the idea of the legislator is to enhance competition. It is quite striking that the legislator has a different idea about how to make markets work better for consumers than the national competition authority.

In Austria, according to Section 1a(4)(2) of the Unfair Commercial Practices Act price parity clauses are unfair and thus void. If this were not enough, the legislator has also provided that these clauses are an aggressive unfair commercial practice. The legislator admitted that the aim was to protect small hotels.\(^41\) From the perspective of Austrian Law this is problematic because the prevailing view is that the regulation of unfair commercial practices does not apply to contract terms.

As a matter of EU Law, the French, Italian and Austrian legislative initiatives can probably be challenged as restrictions on the provision of services. It appears clear that the legislation is designed to protect the rents of small hotels against the larger hotel chains, and it is not clear what public policy might justify the legislative intervention. On the other hand, the welfare effects of the two approaches adopted under competition law, banning all price parity clauses or banning only wide price parity clauses, are as yet unclear. The Commission carried

---

\(^{34}\) See generally, Augenhofer and Schwarzkopf 'Bestpreisklauseln im Spannungsfeld europäischen Kartellrechts und mitgliedstaatlicher Lösungen' NZKart 9/2017 pp.446-452.


\(^{38}\) Alfter/Hunold, WuW 2016, p. 525.

\(^{39}\) Loi n. 2015-990 du 6 aout 2015 pour la croissance, l’activite et l’égalite des chances économiques (which entered into force on 1 October 2016)

\(^{40}\) Article 50, Legge annuale per il mercato e la concorrenza, 04/08/2017 n° 124, G.U. 14/08/2017.

\(^{41}\) https://www.ris.bka.gv.at/Dokumente/RegV/REGV_COO_2026_100_2_1246341/COO_2026_100_2_1252728.pdf.
out an ex post study recently with ambiguous results: it seems that removing price parity clauses does not lead to lower commissions or to price competition across platforms. However, the study came just a year after the decisions and it may take some time for the regulatory impact to be determined: it will offer an excellent case study on which policy approach is preferable.  

Perhaps a more general point that emerges from this discussion is the value of experimentalist governance. While the divergences among Member States might tempt the legislator to act, some might argue that these divergences, if then studied for their impact, could allow for better learning of the optimal regulatory approach. This might, in due course, facilitate EU-wide legislation, but equally can facilitate convergence across national legislatures.

4.3 Is more EU-level intervention required?

At the time of writing we are seeing the emergence of an interesting governance modality: competition authorities are divided on the best approach and are committed to learning from each other. If this model of cooperation proves successful in this case it could be a catalyst for further cooperation among NCAs. The proposed Directive to strengthen NCAs is a step that can facilitate this kind of cooperation further by ensuring agencies are independent, adequately funded, and armed with similar enforcement instruments.  

---


5. AIR TRANSPORT AND HOTEL: TARGETED ONLINE PRICES

**KEY FINDINGS**

There is some evidence of personalised pricing. This may be a concern either because consumers are discriminated by their willingness to pay or because personalised pricing may tend to have adverse effects on weaker parties.

Personalised pricing is difficult to tackle under competition law, while there is some scope that certain forms of price information may be found to be misleading by the application of consumer law.

There is evidence that websites set their prices in a manner that is tailored to each of us. This means that providers discriminate on prices and this discrimination gets more and more precise as the website operator gets more information about us so that the price gets closer and closer to our reserve price. An additional, related, concern is geo-blocking: prices may vary depending on where the buyer is situated. It was evidence of this practice that led to the Geo-Blocking Regulation.\(^{44}\)

### 5.1. Policy assessment

The welfare effects of personalised prices may be discussed in the following manner. First, it is important to explain what kind of discrimination we are dealing with. Third-degree price discrimination (e.g. lower ticket prices for students and over 65s) are a common feature of many business models and are usually beneficial because those least able to pay the full price receive a discount. This type of price discrimination can be practised more frequently with the advent of new technologies. For example, Uber sets ‘surge’ charges when it sees that it services are in high demand, so the prices vary frequently during the day. Second-degree price discrimination occurs when the price varies when the quantity purchased changes (e.g. prices are lower the more units you buy). First degree price discrimination occurs when each buyer is offered a price that equals the highest price she is willing to pay to buy the product in question. Online sales where the website has considerable data about the user allow for this type of price discrimination (i.e. each consumer is set a price so that all the consumer surplus is transferred to the seller). For the present study we focus on the latter type: first-degree price discrimination.

The welfare effects of this practice are as follows: the volume of sales would be like that we would expect in a competitive market, but there would be no consumer surplus; instead the seller would increase its profits by being able to sell at higher prices to those willing to pay above the competitive price. In other words, if we are interested about total welfare, then first-degree price discrimination increases it by allowing more units to be sold. However, if we are interested in consumer welfare then we would be concerned at the higher prices being paid by some consumers.\(^{45}\)

---


\(^{45}\) For a helpful discussion, see Bishop and Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* 3rd ed (Sweet & Maxwell, 2010) pp.250-252
These adverse distributional effects have been discussed in a recent book (*Weapons of Math Destruction*) where the author laments the impact that platforms have on poor consumers who, as a result of the way algorithms work, end up paying relatively higher prices than those who are richer.\(^{46}\) At the same time, further studies are warranted to determine how widespread this practice is. For example, it has been suggested that some sellers may be reluctant to personalise prices for fear that consumers would object and migrate to other sellers who do not personalise prices.\(^{47}\) At any rate, the policy problems are twofold: (i) personalised prices reduce consumer welfare; (ii) personalised prices may be set to discriminate against a vulnerable group.

### 5.2. Legal assessment

Having noted that there may be an argument for being concerned about first degree price discrimination, we consider a range of options that may provide a way to prevent such practices.

#### 5.2.1. Competition law

It is not clear how far competition law can apply in these examples. The relationship is normally between a business and a consumer so there is no agreement that triggers the application of Article 101 TFEU (this only applies when the agreement is between two undertakings). If the business is in a dominant position, then matters become more plausible because this provision may be utilised to govern unfair and discriminatory pricing. This is specifically provided for in Article 102 TFEU, which gives two examples of abuse of a dominant position that may be relevant: Article 102 (a) states that an abuse may be ‘directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions’ and Article 102(c) states that an abuse may be ‘applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.’ Subparagraph (c) is not applicable because it discusses the relationship where a dominant firm is selling to other businesses downstream in such a way that one receives goods at a different price than the other and downstream competition is harmed.\(^{48}\)

However subparagraph (a) may be applicable. One possible argument is that the prices charged to some consumers are excessive insofar as they are much higher than the economic value of the service supplied.\(^{49}\) Recent case-law has served to explain methods by which one may determine if prices are unfairly high.\(^{50}\) Applying this case law however does not match the concern precisely. Remember that the harm is that each consumer is deprived of their consumer surplus. Excessive pricing would only condemn the highest prices charged to the richest buyers. Thus it might still allow for some first degree price discrimination, provided the seller avoids an excessive price. It should be added, for completeness, that competition agencies are reluctant to challenge instances of excessive pricing because it is hard to monitor compliance.

A bold competition authority might reason from first principles and argue that first degree price discrimination is itself abusive for treating consumers differently.

---

48 Case C-525/16, MEO — Serviços de Comunicações e Multimédia SA v Portuguese Competition Authority, ECLI:EU:C:2018:270.
50 Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome ECLI:EU:C:2017:689.
It is true that Article 102 is interpreted in a flexible manner, but it would be important for a new type of abuse to be defined clearly so that firms are able to comply with a new prohibition.

### 5.2.2. Consumer Law

EU consumer law could apply to these practices. For example Article 5 of the Unfair Consumer Practices Directive (UCPD) prohibits misleading commercial practices. This vague language is supplemented by Article 6, which provides elements to determine what is misleading. This covers instances where the information is factually correct but deceives the average consumer. In the specific context of pricing, reference may be had to ‘the manner in which the price is calculated, or the existence of a specific price advantage.’ There does not appear to be any specific case law on this issue, but it is arguable that if a website does not make it clear that the price a consumer sees is personalised and it is higher than the price the consumer would have received if, for example, he was booking through a mobile device instead of a laptop, that this might constitute a misleading practice. More information is needed. Of interest will be a study commissioned by the German Ministry of Justice (due 31 October 2018) on credit scoring. This is a phenomenon where a person’s credit score is available on-line and might be used to determine the prices offered to individual consumers. Given that often the system by which one's score is not available to the consumer, so that they cannot correct it, it may be that prices set by reference to such score is contrary to the UCPD.

Sticking to the UCPD for a moment and looking at price comparison websites, another challenge may be brought, as revealed by a case in front of the German Federal Supreme Court. The court held that the provider of a price comparison website had to disclose to the consumers whether the providers whose prices were visible were paying a commission to the website in order to be listed. On the facts of the case, the services in question were funeral services and the website only provided listings of those providers who paid a commission. It was held that the consumer expected that the website gave them an idea of what was available on the market as a whole, and so it was misleading. It is important to note that the proposed Directive on better enforcement and modernisation, one of the two directives presented by the European Commission within the framework of the New Deal for Consumers, suggests an amendment of the UCPD, regulating exactly the case the German Federal Supreme Court decided. According to the suggested No. 11 of Annex I of the UCPD paid online queries fall under the same category as paid editorial content. While the proposed amended form might make it easier for judges to declare such commercial practices as unfair, the German judgement shows that the current version of the UCPD provides for a sufficient legal framework.

---

51 BGH Judgment of 27 April 2017 – I ZR 55/16
54 “11. Using editorial content in the media, or providing information to a consumer’s online search query, to promote a product where a trader has paid for the promotion without making that clear in the content or search results or by images or sounds clearly identifiable by the consumer (advertorial; paid placement or paid inclusion). This is without prejudice to Directive 2010/13/EU48.”


5.2.3. **Sector Specific Regulation**

For air transport services, Regulation 1008/2008 provides specific rules that can tackle the issue. Article 23(2) reads as follows: ‘Without prejudice to Article 16(1), access to air fares and air rates for air services from an airport located in the territory of a Member State to which the Treaty applies, available to the general public shall be granted without any discrimination based on the nationality or the place of residence of the customer or on the place of establishment of the air carrier’s agent or other ticket seller within the Community.’ This suffices to address geo-blocking, but there is an enforcement gap because no national public enforcement body can ensure this rule is followed.

5.3. **Is EU intervention needed?**

As discussed above, this is a tricky issue for intervention. Studies that focus on the welfare effects of first degree price discrimination suggest that the presence of negative effects is unclear. However, from the perspective of distributive justice there are legitimate concerns that certain forms of personalised pricing harm weaker members of society. The discussion above suggests that there is scope for exploring how far existing rules may apply. A final remark is that any legislative initiative would have to consider the effectiveness of price controls. For an example where prices are personalised (insurance) the EU legislator has intervened to prevent that a person’s car insurance premium is not set according to gender, but it has been suggested that insurance firms use other proxies for gender (e.g. the size and colour of the car) to continue to offer personalised prices based on gender for this is a major determinant of risk.\(^{55}\)

---

\(^{55}\) Oxera (above n 48) p.4
6. AIR TRANSPORTATION AND TRAVEL: BOOKING FEES

**KEY FINDINGS**

Hidden booking fees may constitute infringements of EU consumer law in situations where the consumer has invested considerable time in making a booking before she discovers there is a processing fee.

Consumers buying goods on-line may find that in addition to the cost of the service a booking fee is required. On the one hand a booking fee may represent an adequate reward for the service provided, but it may also be an unexpected fee that the user is asked to pay at the very end of a long online procedure.

6.1. Policy discussion

It is often said that on the internet, competition is one click away. However, this is an oversimplification. If a consumer commences a long booking process, entering all relevant details, and only at the very end she discovers that there is a booking fee for using a credit card, the consumer may not wish to start the transaction all over again on another website only to avoid paying a relatively small surcharge for using a credit card. If a company is allowed to mislead the consumer in this way, then all online providers will have an incentive to also add hidden charges later on in the booking process.

As a result, the market is unlikely to solve the problem of hidden charges and some regulation is required.

6.2. Legal assessment

In a matter litigated recently in Germany, it was found that Expedia was forbidden from setting a booking fee for a flight which led to a price which was higher than the ticket price offered by Lufthansa on its website. The court held that Expedia had to allow buyers to use at least one common means of payment without the fee being imposed. The basis for the judgment is Article 19 of the Consumer Rights Directive which prohibits traders from charging consumers a fee for using a given payment method which is greater than the cost borne by the trader for using that payment method. The legal issue at play was that Expedia did not allow consumers to buy a ticket without paying the fee because the consumer had to use a specific card (Visa) to make the purchase.

However, this judgment generally suggests that consumer law is fairly well-equipped to deal with hidden charges.

6.3. Is EU intervention needed?

From the judgment discussed above, it appears that EU intervention is not needed at the level of substantive rules. The legislator however should consider how far there is an efficient legal procedure to ensure that the rules are applied and enforced. The absence of regulatory agencies may mean that these practices may not be deterred adequately.

---


57 Directive ....
7. AIR TRAVEL: COMPUTER RESERVATION SYSTEMS

### KEY FINDINGS

| Passenger service systems may not be caught by the existing regulatory framework that applies to similar platforms, the Code of Conduct for Computer Reservation Systems. The Code is presently under review and it will be important that this review considers the impact of new technological developments to determine how to revise the Code. |

Some large airlines own reservation systems through which flights may be booked, so-called Passenger Service Systems (PSS). A complaint has been sent to the European Commissioner for transport regarding (in part) the fee that Lufthansa is charging for bookings that are made outside of its PSS and indicating that other large airlines are following suit. These fees are referred to as distribution cost charges. A number of members of the European Parliament tabled a question for the Commissioner for transport in relation to this matter, noting that these extra charges have been imposed since 2015. It appears that the Commission’s investigation is ongoing.

#### 7.1. Policy discussion

This issue was originally regulated by the Code of Conduct for Computer Reservation Systems (CRS). A CRS differ from a PSS because the former includes information about more than one carrier. The current version of the Code dates from 2009. The aim of this code of conduct is twofold: first that smaller airlines may be listed on other airlines’ CRSs as a way of stimulating competition among airlines; second that there should be competition among CRSs. In this case the concern is about facilitating competition among providers of distribution systems to book flights. The policy behind this Code is to stimulate fair competition at various levels of the value chain. To appreciate the ongoing controversy, it is important to explain the evolution of the value chain in this market.

The original design of the value chain may be described as follows: upstream are airlines, which provide information to CRS providers. CRS providers in turn provide all the information at their disposal to a travel agent who then sells flights. Thus CRS are a two sided market, and originally the main CRSs were owned by large airlines. It meant that the CRS owner had little interest in allowing rivals to include their flights on their system, especially when it came from low-cost carriers. It was thus necessary to ensure that all airlines had access to all CRSs (since travel agents would normally only buy the services of one CRS) in order to stimulate competition among airlines and also to try and stimulate competition among CRS providers, both of which would favour consumer choice. The existing design of the Code catered for these issues well.

The new market structure is different: first there is less vertical integration as the three major CRS systems are no longer controlled by airlines.

---


59 Parliamentary Question on 27 September 2017 (O-000075/2017 (B8-0604/2017)). See also the oral question posed by Cláudia Monteiro de Aguiar specifying that Lufthansa’s handling fee for tickets bought outside its system is EUR 16 and that British Airways’ charge is EUR 9.50 (EP Debate, Wednesday, 25 October 2017 – Strasbourg).

60 For discussion see Monti EC Competition Law (Cambridge University Press, 2007) pp.234-236.

Second, and more importantly, the way airplane tickets are purchased has changed: in addition to CRS-facilitated purchases consumers can now buy tickets directly from the airline’s website; moreover travel agents now compete with On-line Travel Agents (OTAs) and by meta-search engines (e.g. Skyscanner) who gather data on all websites that sell flights, allowing the consumer to compare offerings from different websites, including those of the airlines and OTAs. In this newly configured market one can expect competition among different websites selling tickets as well as among airlines: the market is made more transparent and consumers are able to find the best price and other conditions.

Market failures however are possible: first airlines are now vertically integrated insofar as they have a personal booking system. There may thus be an incentive to exclude OTAs or meta-search engines by providing them with incomplete data or charging users for the use of other systems than its own.

7.2 Legal assessment

The Code applies to every CRS owner, irrespective of market power. The bulk of the legal obligations are imposed on CRS providers who have to treat the two sides of the market fairly: Article 3 provides that CRS providers should not set unfair conditions on airlines and should load and process the data they obtain from airlines. This facilitates competition among airlines. Article 6 forbids a person selling a CRS to a subscriber from requiring that the subscriber does not obtain any other system to book flights. This means that a travel agent may have more subscribe to more than one system, stimulating competition among CRSSs.

Under competition law one would only be able to impose such onerous obligations if the owner of a CRS dominated the market in such a manner that it was indispensable for the industry as a whole, but no CRS was ever so overwhelmingly dominant.

In addition to imposing an obligation on CRS providers, Article 10 deals with situations where an airline owns a CRS and obliges the airline to ensure that information about its flights is made available on equal terms to its CRS and to those owned by others. This means that an airline cannot favour its CRS at the expense of others. There has been intervention applying this aspect of the Code already, when it was found that Lufthansa was trying to squeeze a competing CRS by offering electronic ticketing exclusively on its own CRS system. The Commission found this practice contrary to the Code of Practice.62

However, it is not clear how far the Code remains applicable given the new market configuration. We are not privy to all the facts pertaining to the ongoing procedures noted above, but a few general remarks may assist in explaining why the Code probably needs to be updated.

The Code imposes obligations on CRS providers. A CRS is defined as ‘a computerised system containing information about, inter alia, schedules, availability and fares, of more than one air carrier, with or without facilities to make reservations or issue tickets, to the extent that some or all of these services are made available to subscribers.’63 The question then is whether an airline’s PSS falls within this Code. There are good literal arguments why this Code is inapplicable: first it provides that the CRS has information about more than one carrier, so a booking system for a single airline might not qualify.

It is also unclear if it applies to a PSS of an airline alliance (e.g. Star Alliance): here the PSS would offer flights of more than one undertaking, but these undertakings are collaborating in such a way that they provide would-be travellers integrated services, and they do not solely collaborate in the creation of a PSS platform. From a policy perspective, however, it would

---

63 Ibid. Article 2(4).
appear inappropriate to allow PSS owners to be able to use this system in such a way as to foreclose other downstream providers, not least because we now have a more diverse set of players: travel agents, OTAs and meta-search engines. Accordingly a policy-based reading of the Code suggests that it should apply to PSSs.

Should the Code apply to PSSs as well, then Article 10 of the Code could be engaged: this applies to ‘parent carriers’. That is to say, airlines who control a CRS. This Article, as noted above, requires that the carrier does not discriminate against competing CRS providers and also that it does not discriminate in favour of its own CRS. This does not mean that the surcharges would be prohibited. The airline may well justify such a surcharge if it is to cover the costs of making data available to third parties. This appears to be implicit in the way airlines label this surcharge (distribution cost charge). In this context the Commission will have to assess whether indeed there is a cost that an airline faces in distributing information to competitors and whether the fees charged are proportionate to those costs.

If the Code does not apply, it may well be possible to apply general competition law, however this avenue is not easy. The theory of harm could be constructed in the following manner: by charging travel agents an extra fee, it is encouraging them to abandon competing systems and favouring its PSS. An airline that enjoys a dominant position in the PSS market may well be accused of an abuse by foreclosing market access to rivals. However, it is unlikely that this new form of service provision is dominating the market, it appears to be a new way for airlines to sell their tickets. One might alternatively challenge the agreements between an airline and the travel agents against whom surcharges are imposed as a tactic that has the object of excluding competitors. Article 101 after all has been applied to vertical restraints that risk having a foreclosure effect.

7.3. **Is further EU intervention needed?**

The CSR Code of Practice is a good example of a situation where the Commission has been provided with specific regulatory powers over a sector, where it is difficult to apply competition law because there isn’t a dominant player in the market, but where anticompetitive effects may arise via unilateral conduct. At the same time it will be important to see how the Commission proceeds with this case to identify whether the Code of practice needs revision in light of developments in digital markets. It should be noted that in parallel to the case at hand the Commission is also carrying out a review of the Code, and a report is expected in 2019.

It is submitted that the Commission’s review should consider the extent to which, in the medium term, we can expect competition between CRS and PSS provision and how far there is a risk that airlines might exclude CRS and if his creates a risk that consumers have higher search costs. To put this more concretely: if the evidence shows that consumers, thanks to meta-search engines and OTAs can easily compare prices of different sellers and different airlines then the emergence of PSS, and the likely reduction in the economic value of the CRS business model, will not raise competition concerns. In this very optimistic scenario it may be that the Code is unnecessary. On the contrary, if the evidence shows that the emergence of PSS leads airlines to foreclose CRS and to make access to clear information to meta-search engines difficult, then it may be that the Code should be revised to include both CRS and PSS providers, since these are the two types of platform whose regulation is necessary to ensure competition among airlines and among OTAs, meta-search engines and travel agents.

---

64 The possible need for revision was pointed out by the Commission’s representative in the EP debate on 27 September 2017.

An additional aspect to reflect upon is on the adequacy of the resources to enforce this Code to ensure timely enforcement. If the findings support the view that regulating PSS provision is necessary then more resources will definitely be required, and greater enforcement will require that the parties’ procedural rights are also safeguarded.
8. SUMMARY AND CONCLUSIONS

**KEY FINDINGS**

In addition to specific recommendations for each case study, which we recall in section 8.1, we make the following three general remarks.

Member States are prone to regulate these new market realities either to ensure what they believe are fair conditions in the market, or to safeguard other non-economic interests, or because they wish to protect certain industry sectors may arise. Such regulation may have a harmful effect on consumer choice and competition. EU Law is well equipped to balance the competing interests of competitors and consumers.

Firms in these markets may well fix unfair prices, however direct price regulation is to be avoided. At the same time the means we have available to regulate unfair pricing could be incomplete given novel technologies. More evidence gathering is needed to determine how to amend the existing regulatory framework.

Regulation is only effective if the law can be activated frequently enough to deter or secure compliance. The presence of a dedicated agency can be useful provided that agency is well-funded and independent. Co-regulatory efforts, whereby the state collaborates with market actors can provide a helpful means of resolving market failures.

The purpose of this study was to consider how far the current regulatory framework facilitates consumer choice and fair competition in the transport and accommodation markets. These industries have given rise to a range of different issues, for which there are multiple sources of law that one might apply. In section 8.1 we summarise the key points from each case study, the other three sections draw some more general conclusions.

**8.1. Lessons from the case studies**

Cities’ limits on the use of properties for short term rentals (section 2) restricts the free provision of services, but there may be good policy reasons (e.g. protection of housing stock for residents) that may justify such restrictions as a matter of EU Law.

Cities requiring that those offering short term rentals through their property comply with the same regulatory framework that hotels are subject to (section 3) may be designed to ensure fair competition between hotels and new entrants but may be challenged as restricting the free provision of services. As with other technological developments that reshape markets, Member States should revise existing regulations to make them compatible with new market realities.

The contractual relationship between OTAs and hotels (section 4) is regulated in different ways across the EU, sometimes on the basis of competition law, sometimes on the basis of consumer law and sometimes with sector-specific regulation. The actual economic welfare effects of OTA-hotel price parity clauses are uncertain, but the divergence in the regulatory framework is also explained by protectionist efforts designed to protect smaller hotels. It is premature to legislate at EU level given the current uncertainty about the economic effects of price parity clauses.

Targeted online prices (section 5) are generally free from regulation even if one might be concerned about the unfairness of such pricing choices. There is scope, under consumer law, to challenge certain price setting conduct when it constitutes an unfair commercial practice, but the situations where this applies is limited.
Further study is needed on the mechanics for setting personalized pricing and on the frequency of such practices before considering further regulation.

Hidden booking fees (section 6) are probably caught by EU consumer law when the consumer faces a fee after having sunk considerable efforts in making a booking. The consumer may be unwilling to start the booking elsewhere from scratch just to avoid a relatively small fee. No new regulation is needed but given the small cost to the consumer a system of public regulation appears important to deter such practices effectively.

The Code of Conduct on computer reservation systems (section 7) is an example of sector specific regulation that keeps prices in check to ensure competition between airlines and between providers of computer reservation systems. The emergence of new systems owned by airlines calls into question whether the scope of coverage of the Code should be expanded. However, a policy-based interpretation of the existing rules suggests the Code applies to PSS already.

8.2 State regulation

The major barriers to the development of new services are state (or local) regulations, as noted in sections 2, 3 and 4. Here the regulatory toolbox suffices to capture deliberately protectionist measures, and discussions between Member States and the Commission, as well as via citizen complaints, can address these matters without recourse to the infringement procedure. For measures where states are legitimately trying to balance competing interests (e.g. facilitating the growth of new accommodation facilities and services with the maintenance of housing stock), we welcome initiatives like that of the Netherlands to include platforms in enforcing prohibitions while we remain sceptical about the 60-day limit for short-term rental use. In our view, cities should experiment with different regulatory models and discuss among each other how to balance the growth of private lettings facilitated by platforms with the provision of housing for residents and other public interest considerations.

8.3 Prices

When it comes to unfair pricing (discussed in sections 5, 6 and 7), the study highlights that there are limits to what may be achieved via competition law, consumer law and sector-specific regulation. The competition rules only address unfair prices when set by dominant firms, or when these prices are set as a result of anticompetitive agreements. The Booking.com saga discussed in section 6 suggests that there is scope for anticompetitive coordination in the digital economy as much as this risk exists in other markets, but controlling prices directly is more complex. Personalised pricing is a matter that may be best addressed via consumer law provisions, but these would need to be revised. It is beyond the scope of this study to consider how the new data protection regulation may reduce the amount of information that may be collected for the purposes of designing tailor-made offers. Some forms of unfair pricing may be caught by existing consumer law provisions. Generally, one should be cautious about regulating prices, for this can stifle innovation and entry.


67 See also European Committee of the Regions Opinion, Collaborative economy and online platforms: a shared view of cities and regions (ECON-VI/016) paragraph 46, also supporting such networking.
8.4. Enforcement

Rules are only effective if they can be applied so as to either deter harmful conduct or to affect the way the market operates to ensure fair competition and consumer choice.

In the context of restrictive practices supported by Member States an additional feature that could be introduced in the law-making process is ensuring that the impact of regulation on competition is considered. For example, in the context of Booking.com an assessment of the legislation in France and Italy which reverses the decision of the national competition authorities (discussed in section 4.2.2), one should test how far the law protects hotels rather than consumers. Likewise the Memorandum of Understanding between Amsterdam and Airbnb (discussed in section 2.2) could be reviewed ex ante and ex post to test for its impact on choice and competition as well as for its impact on housing stock.

In the context of consumer protection law, rights are plentiful but enforcement remains weak. The procedure of sweeping websites to test for unfair terms is to be welcomed and warrants further study. These exercises, carried out jointly by the Commission and national consumer agencies serve to identify clear infringements of the laws and secure quick amendments to websites. They should not be considered as the sole solution, but they reveal that resources are necessary to secure compliance.
REFERENCES

- Augenhofer and Schwarzkopf, Bestpreisklauseln im Spannungsfeld europäischen Kartellrechts und mitgliedstaatlicher Lösungen NZKart 9/2017
- European Commission, A European Agenda for the Collaborative Economy COM(2016) 356 (final)
- European Commission Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM (2018) 238 (final)
- European Commission, A New Deal for Consumers, COM(2018)183 (final)
- European Committee of the Regions Opinion, Collaborative economy and online platforms: a shared view of cities and regions (ECON-VI/016)
- Haar, Unfairbnb – How online rental platforms use the EU to defeat cities’ affordable housing measures (Corporate Europe Observatory, May 2018)
- Monti EC Competition Law (Cambridge University Press, 2007)
- Monti ‘The Proposed Directive to Empower National Competition Authorities: Too much, too little or just right?’ (2017) 3(3) Competition Law and Policy Debate 40
- Oxera, ‘When algorithms set prices: winners and losers’ Discussion paper, 19 June 2017
Through a series of case studies this study provides an overview of measures implemented by states and firms that may harm competition and consumer choice. It explores the extent to which EU Law may apply to prevent such restrictive practices. This document was prepared by Policy Department A at the request of the European Parliament’s Committee on the Internal Market and Consumer Protection, Committee).