



European  
University  
Institute

# Choice & Fair Competition in the Digital Single Market: air transport and accommodation

Giorgio Monti

*Presentation prepared for Policy Department A at the request of IMCO  
Committee*

1. What EU Law regulatory tools are available?
2. How far do these suffice to guarantee choice and fair competition?

Based on six case studies

- ☐ Policy issue
- ☐ Legal assessment

# Four Types of measures available to intervene

## 1. Internal market law (**state action**)

- Negative integration (e.g. Article 56 TFEU)
- Positive integration (e.g. Data Protection Regulation)

## 2. Competition law (**private actors**)

- Theory of harm
- Abuse of dominance or agreement needed (**=gaps**)

## 3. Sector-specific regulation

- (e.g. Computer Reservation Systems)

## 4. Consumer protection law (**transaction-specific**)

# Accommodation Services

## Restriction of Airbnb business

- **Policy issue**
  - Berlin City forbids letting empty flats on Airbnb
  - Motives: (i) nuisance; (ii) housing shortage
- **Legal assessment**
  - Restricts service provision (Article 56 TFEU)
  - Justification if the law is: (a) non-discriminatory; (b) justified by a legitimate goal; (c) proportionate
- **Is harmonisation premature?**



# Accommodation Services

## On-line travel agents (OTAs)

Hotels

Own website

Booking.com

Expedia

### OTA requests

- 1) No website may offer a lower price
  - (wide MFN)
- 2) Own website cannot offer lower price
  - (narrow MFN)

- **National Competition Authorities (2013-15)**
  - Germany: all MFN clauses unlawful
  - Other NCAs: narrow MFN clauses allowed
- **National legislatures (2015-17)**
  - France & Italy: special law bans all MFN clauses
  - Austria MFN clauses as unfair commercial practices
- **Assessment**
  - Welfare effects unclear
  - Protecting hotels, OTAs, or guests?

# Air transport and accommodation: price discrimination

- **Policy issues**
  - Personalised pricing
  - Varying prices (e.g. equipment/time)
  - Geo-blocking (define...)
- **Legal assessment**
  - Competition law only if dominant; remedy tricky
  - Unfair Consumer Practices Directive: misleading prices?
  - Air transport: Regulation 1008/2009 on geoblocking
  - Data Protection approach?

# Air transport and accommodation:

## Booking fees

- Expedia sets booking fees for credit card payment; consumer cannot make payment without fee
- Must Expedia provide the consumer the option of paying for the ticket without fees (e.g. bank transfer)?
  - Consumer Rights Directive, Art 19

### Discussion:

- If there is competition among platforms why is Expedia's fee a problem?
- Difference between competition analysis (choice among options) and consumer analysis (fairness of transaction)

# Air Travel:

## Computer Reservation Systems

- CRS owner charges fee for bookings made outside its system
- Legal analysis:
  - Code of Conduct for CRS: (i) Promotes competition between CRS systems; (ii) Promotes access to CRSs by all airlines
  - Fees for other uses raises costs of rivals, strengthening CRS owner (Arts 10.4, 10.5)

**General reflection:** sector-specific regulation allows one to identify market specific concerns; but risk of over-regulation

# Reflections on conventional law enforcement tools

- State measures: well-settled legal principles, but **need active watchdog to review restrictive regulation (NCAs?)**
- **Competition law is not a repair-it-all system:**
  - Competitive harm linked to consumer welfare
  - Scope of the rules limited (e.g. unilateral conduct controlled only for dominance)
- Consumer law:
  - Might be developed to address unfair conduct
  - What remedies deter/solve such unfairness?
  - **Needs public enforcement**

# Alternatives?

- **Regulating algorithms**
  - Preventing actions that lead to price discrimination
- **Rethinking data protection**
  - Default rule is that internet surfers give no consent to their data used?
- **Promote price comparison websites**
  - Undermine consumer exploitation by strong brands, might favour less well-known SMEs