I. Introduction

In the last decades and in many sectors, intermediation online has grown exponentially with the development and expansion of the Internet. The category of so-called cybermediaries is very wide and heterogeneous, and comprises: Internet access and service providers (ISPs); data processing and web hosting providers, including domain name registrars; Internet search engines and portals; e-commerce intermediaries; Internet payment systems; participative networking platforms, etc. Differences between the actors involved are moreover not clear-cut, as Internet intermediaries may play several roles simultaneously, sometimes competing with one another (e.g., as intermediaries, end-users and content/service providers). The main functions conducted by online intermediaries may be summarized as follows: i) to provide infrastructure; ii) to collect, organize and evaluate dispersed information; iii) to facilitate social communication and information exchange; iv) to aggregate supply and demand; v) to facilitate market processes; vi) to provide trust; and vii), to take into account the needs of buyers and sellers or users and customers. Intermediaries operating in e-commerce – who typically allow vendors and buyers to get in touch – often also provide ancillary services such as quality guarantees, monitoring and control activities, and so on.

Recent case-law in Europe and the US has drawn attention to the legal implications of online intermediation in leisure markets, in particular in digital travel market services, a field where there has been an increase in activity. The article first analyses the growing role of intermediaries in this market and the concerns that have arisen under competition law, paying particular attention to the increasing use of some forms of MFN clauses. The analysis is conducted in the light of several cases brought before national competition authorities for alleged violation of competition rules. The article then examines the uncertain legal relationship between intermediaries and the final client in order to establish if consumer protection laws should and could be extended to such intermediaries and if they may be considered liable for unfair commercial practices.

II. Internet intermediaries in travel market services

Online travel agencies (OTAs) have gained ground at the expense of brick-and-mortar shops, and have developed several business models on the basis of a consumer-based approach often adopted in e-commerce. OTAs carry out inter-media tion activity, mainly in the supply of final tourist services, through the commercial promotion on their website of various offers available in the market, allowing customers to access through a unique platform a wide range of services (hotel rooms, air tickets, package tours, etc.).

With regard to business models, the benchmark is the agency model, which reproduces the traditional system of the travel agency, where the intermediary facilitates the transaction between the supplier of travel services and the buyer, earning profit from the sale fee. This model is, for instance, adopted by Booking.com (which operates only in the hotel booking sector) and implies that customers have to pay directly to the hotel, which is in turn required to pay a commission to the intermediary. The agency model is particularly widespread in the case of online platforms and it differs from the wholesale model: whereas in the former, suppliers set final prices and the profits are shared among suppliers and resellers on the basis of prearranged percentages, in the latter suppliers fix wholesale prices which are subsequently marked up by resellers. An alternative model is the so-called merchant model, in which the supplier sells an amount of services (e.g., hotel rooms, cars for rent, etc.) at a prearranged price – typically below the normal price – to the reseller, who marks up the net rates and finalizes the transaction. In addition to these main models, there exist several versions elaborated by intermediaries in order to create their own business profile.

Thus, on the one hand, OTAs allow customers to access a wide range of suppliers and to compare their offers; on the other hand, they give suppliers an attractive showcase and the opportunity to contact a large number of consumers. This twofold function is a common feature of several platforms, whose main value lies in the facilitation of the transactions among economic agents such as upstream suppliers and downstream consumers. For this reason, online platforms, together with media and credit cards, are considered a typical example of two-sided or multi-sided markets.
Although a universally accepted definition is still lacking, economic literature has highlighted the fundamental features of two-sided markets, i.e.: distinct groups of customers who rely on each other but also on the platform to intermediate transactions between them; indirect externalities across groups of users; and the non-neutrality of the price structure, meaning that the price structure of the platform affects the level of transactions. Thus the platform, which reduces transaction costs, thus facilitating the meeting between demand and supply, sells two different services to each customer group, the demand of one group depending on the demand of the other and, generally, vice versa. The platform typically internalizes the indirect network effects arising between the customer groups, so that the value of the platform on one side increases together with the number of users on the other side.

These indirect network effects, which are typical of online intermediation, lead to the classic “chicken-and-egg” problem for intermediaries, who are impelled to adopt price and product strategies aimed at finding a balance between their own interests and those of the other parties involved, the price structure being a decisive element. Economic literature has identified two kinds of indirect network effects, i.e. usage externalities (which exist when two economic agents need to act together to use the platform to create value) and membership externalities (arising when the value received by agents on one side increases with the number of agents participating on the other side). The main challenge for a platform is to reach as many agents on both sides as are required to obtain a “critical mass” in order to manage the indirect network effects. The features mentioned above may lead a two-sided platform to adopt a “divide and conquer strategy”, where the price may notably differ from the marginal cost, i.e. may be lower than it or be zero on one side (generally this is the case of the group generating the higher level of indirect network effects) and subsequent losses are compensated by applying a higher price on the other side.

Without dwelling for too long on the various models elaborated by the economic literature, it is easy to apply the general principles identified above to platforms offering travel and leisure services, which are the object of this paper, and discover the features of two-sided markets. First of all, these platforms allow interaction between two distinct groups of agents (i.e. consumers and upstream suppliers, such as hoteliers, restaurateurs, etc.). Usage externality occurs as consumers and suppliers benefit when the platform is used in order to make a reservation, whereas membership externality derives from the fact that the value of the system for consumers is directly proportional to the variety of suppliers it gives them access to. As for the price structure, upstream suppliers may be required to pay both a membership fee, in order to enable their presence on the platform, and a usage fee at the moment of the reservation, against no cost or a very low cost for consumers.

Ill. Online intermediation, two-sided markets and competition law

The analysis of competition law implications of online intermediation postulates dealing with two preliminary issues, i.e. the application of traditional competition rules to e-commerce and then, specifically, to two-sided platforms. With regard to the first point, it is worth noting that on the one side the existence of new kinds of anticompetitive conducts typical of e-commerce has been generally excluded, while on the other side there exist some relevant features which require particular attention. The main effects of e-commerce on competition have been identified by scholars as: i) the reduction of search costs, due to the high availability of information online; ii) the modification of distribution costs, linked to the changes in the relationship between supplier and consumer and to the proliferation of intermediation and disintermediation; iii) the enlargement of the geographic range of transactions; iv) the emergence of new forms of asymmetric information typical of e-commerce. Moreover the presence of multi-sided platforms is a complex issue, considering that as most economic studies have been typically devoted to single-sided firms, their application to multi-sided markets requires adequate adjustment in order to avoid misleading results. Emerging online channels in a certain market may lead to fundamental changes in the sector concerned, influencing revenues elaborated for two-sided markets apply also to multi-sided ones. Among the huge literature on two-sided markets, see also: B Caillaud and B Jullien, ‘Competing cybermediaries’, (2001) 45 Eur. Econ. Rev. 797; B Caillaud and B Jullien, ‘Chicken and Egg: Competition among Intermediation Service Providers’, (2003) 34 RAND J. Econ. 309; G Parker and JEW Van Alstyne, ‘Two-Sided Network Effect How to Measure Product Design?’, (2005) 51 Mgmt. Sci. 1494; M Armstrong, ‘Competition in Two-Sided Markets’, (2006) 37 RAND J. Econ. 688. For a broad overview on this topic, see DS Evans and R Schmalensee, The Antitrust Analysis of Multi-Sided Platform Businesses, in Oxford Handbook on International Antitrust Economics [RD Blair and DD Sokol (eds), Oxford University Press (2015)], and University of Chicago Institute for Law & Economics Olin Research Paper No. 623, available at http://ssrn.com/abstract=2185373 accessed 28 March 2016.

6. OECD, Two-Sided Markets (2009), at 28 et seq.
8. This goes for positive indirect network effects. On this see L Filistrucchi, D Geradin and E van Damme, ‘Identifying Two-Sided Markets’, (2013) 36(1) World Competition 33; Caillaud and Jullien, ‘Competing cybermediaries, n 5 above, at 798. See also: Evans and Schmalensee, n 5 above, at 7; JC Rochet and J Tirole, ‘Two-Sided Markets: A Progress Report’, (2003) 37(3) RAND J. Econ. 645 [explaining that two-sided markets theory is related to the theories of network externalities (from which it borrows the notion that there are non internalized externalities among end-users) and of (market or regulated) multi-product pricing (from which it borrows the focus on price structure and the idea that such structures are likely to be distorted by market power rather than price levels) and that the starting point for this theory is that an end-user does not internalize the welfare impact of his use of the platform on other end-users].
9. Caillaud and Jullien, ‘Chicken and Egg’, in n 5 above, at 309-310; Rochet and Tirole, n 8 above (affirming that “the price structure matters, and platforms must design it so as to bring both sides on board”).
10. Rochet and Tirole, n 8 above; Evans and Schmalensee, n 5 above, at 8-9.
11. B Jullien, ‘Competition in Multi-Sided Networks: Divide-and-Conquer’, (2011) 3(4) American Economic Journal: Microeconomics 51; B Jullien, ‘Two-Sided B to B Platforms’, in Oxford Handbook of the Digital Economy (M Peitz and J Waldfogel eds., Oxford University Press, 2012). In the model elaborated by Rochet and Tirole (n 5 above, at 1007) another factor relevant for determining pricing is the presence of some categories of consumers (i.e. marquee buyers, i.e. marquee buyers, i.e. marquee buyers who are loyal to their platform; high surpluses on the seller side and making the platform more attractive for the sellers) and captive buyers (buyers who are loyal to their platform, independently of prices, e.g. because of long-term contracts or sunk-cost investments); the optimal pricing strategy in this case is to reduce the price to the former and increase it to the latter. On this point, see Evans, n 7 above, at 197-198.
12. Evans and Schmalensee, n 5 above, at 4-6 [referring to OpenTable, which enables consumers (for free) to make, and restaurants (who pay a fee) to accept, reservations for tables over the Internet as emblematic example].
both for the market in general and for individual firms and their business strategies.\textsuperscript{14}

The following paragraphs examine the main relevant issues which competition law assessment finds critical.

1. The definition of the relevant market

The first question antitrust authorities have to solve concerns the definition of the relevant market. First of all this implies establishing whether e-commerce creates a new market separate from brick-and-mortar retailing or competes with it. As there is a lack of specific criteria to apply to digital markets, this evaluation is to be made necessarily on a case-by-case basis and may be determined by several factors, such as the features of goods or services sold online compared with those available off-line and the level of prices applied. Of course, from a geographic point of view digital markets have wider dimensions and are generally not confined to local boundaries, their place of transaction being irrelevant.

Among the many controversial questions about the definition of the relevant market in the case of two-sided platforms, it is fundamentally important to assess how many markets need to be considered. Some scholars have recently considered the crucial distinction between two-sided transaction- and two-sided non-transaction markets, the former being characterized by the existence of a transaction between the two sides and, consequently, by the applicability of a two-part tariff (i.e. the possibility for the platform to impose a price both for membership and for usage): according to such an approach, in the case of two-sided transaction markets (e.g. credit cards) only one market should be defined, whereas in the case of two-sided non-transaction markets (e.g. media) two connected markets should be defined.\textsuperscript{15}

However European authorities have not adopted a unique approach, as the existing case law demonstrates (Google/\textsuperscript{16}DoubleClick, Travelport/Worldspan,\textsuperscript{17}Mastercard\textsuperscript{18}and Visa Europe\textsuperscript{19}). Travelport/Worldspan is of particular interest for this study as it concerns a merger in the market for electronic travel distribution services through a global distribution service (GDS). In this case the Commission has explicitly considered the market as two-sided: GDSs act as intermediaries, on the one side allowing travel service providers (such as airlines, hotels and so on) to sell their services to travel agents and final customers and on the other side allowing travel agents to have access to these services and book them for their final clients. In line with the economic theory of two-sided transaction markets, the Commission has defined only one relevant product market. By contrast, in the case of credit cards, whereas in the first decisions both US and EU authorities considered only one relevant product market, in recent European cases more than one market has been defined.\textsuperscript{20}

Leaving aside the various uncertainties affecting the application of two-sided market theory, however, it is generally agreed that the features of these markets require specific attention. In particular, the relationships between the different groups of users and services offered to each group must be considered in order to define the relevant market and evaluate market power.\textsuperscript{21} According to economists, a correct analysis of multi-sided markets must include all groups served by the platform.\textsuperscript{22} The same approach must be applied to entry barriers, which are linked to reputation building strategy, and to the existence of high sunk costs for the platform, creating network effects which in turn favour the acquisition of market power.\textsuperscript{23} Then the tendency towards “winner takes all” is frequent in digital markets, where competition often has a cyclical trend as successful platforms tend to acquire a significant, but frequently transitory, market power and to maintain it by developing improvements in the innovation process.\textsuperscript{24} Again, the application to two-sided-markets of traditional assessment methods (such as the SNIPP test) requires essential adjustments.\textsuperscript{25}

2. Online platforms and parity clauses

As mentioned above, it is generally affirmed that e-commerce and two-sided markets have not led to new forms of anti-competitive conduct different from those existing in traditional retailing up to now. However one of the key concerns of competition authorities is the frequent use by digital platforms of a type of agreement where the upstream seller undertakes to charge on the electronic platform a price that is not higher than the price charged on other platforms, including the new entrants. The adoption of this kind of contractual clauses in digital markets has not been studied widely yet by legal scholarship, but attention has been drawn to them by recent case-law, starting with E-books and the investigations on OTAs.\textsuperscript{26} Different names have been proposed by the
existing literature, such as Across-Platforms Parity Agreements (APPAs), Retail Price MFN and platform MFN agreements. These clauses are generally traced to the category of Most Favored Nation Clause (MFN, also known as parity clauses), typically included in B2B long term contracts, where the supplier undertakes to guarantee the best price conditions to the intermediary concerned compared to any other dealer.

In MFN clauses the so-called best/low price guarantee (LPG) is often combined with the promise to match (price matching) or beat (price beating) competitors’ prices. From a competition law point of view, the evaluation of such clauses is controversial. At first sight, they appear to offer potential benefits to consumers, for instance in terms of price transparency, reduction of transaction costs (in particular of bargaining and search costs) and trust deriving from brand reputation. However, LPGs also give rise to competition concerns, as they may serve to acquire or strengthen monopoly pricing by preventing other retailers from competing on the market by offering lower prices.

With regard to the recent practice in digital markets, there are basically two types of MFN clauses, according to whether the clause ensures that the price and terms quoted through the platform will not be higher than those available on the upstream supplier’s website (“narrow MFN”) or on other platforms or any other channel (“wide MFN”). Moreover, through the adoption of the agency model the final price is fixed by the upstream supplier and not by the reseller as is usual in the wholesale model: this would lead, according to some scholars, to a form of resale price maintenance (RPM), although the agreements in object do not fix a certain price, the upstream supplier being free to set it.

These agreements imply the existence of several platforms available to users and the possibility for the seller to be connected to a number of them (multi-homing). Although they are vertical agreements, their main anticompetitive effects are realized on a horizontal level and concern the foreclusion of market entry for new resellers, the reduction of competition and the facilitation of collusion between resellers which is already favoured by the availability of information and price transparency typical of the Internet. These conditions provide a greater incentive for platforms to increase fees imposed on suppliers (and, consequently, the final price). A retailer will not be afraid to increase his fee, as the supplier is bound by the parity clause to charge him a price not higher than that charged to other resellers, so other platforms will also have fewer incentives to reduce their fees. Moreover, if platforms agree on the fee level, free riders will have less incentive to reduce fees deviating from the collusion due to the parity agreements, as such a reduction will be transferred to the users of other platforms: in particular, if the supplier has concluded this kind of agreement with several resellers, as a combined effect this will lead to the application of the same price on the various platforms.

Several reasons may be adduced in order to explain the recurrence of MFN clauses in digital markets. Successful platforms often have a strong contractual power over suppliers, as they give access to a significant number of typically loyal consumers, allowing platforms to impose parity clauses as an unavoidable condition of service. The higher degree of market transparency plays a major role, as it implies lower monitoring and enforcement costs, making it easier to detect deviating conduct than in other contexts. Economic justification of parity clauses, this can be identified in the protection of the investment sustained by the intermediary in order to build a reliable platform and to reduce free-ridding. However, from the perspective of competition policy there are various knots to untie. Firstly, a platform’s significant market power appears to be the only explanation for a supplier to be induced to accept these clauses, unless the supplier benefits in some way from such agreements (for instance, achieving a form of reverse payment from the platform). Furthermore, parity clauses require a complex assessment by antitrust authorities who must determine if these
clauses can be assimilated to RPM.\textsuperscript{40} This implies relevant consequences, considering the divergence between the European approach, under which minimum price fixing is still considered per se illegal, and the US approach, where it is now subject to the rule of reason after the Supreme Court’s decision in Leegin.\textsuperscript{41}

3. The legal nature of Internet intermediaries

Another problematic issue concerns the legal nature of Internet intermediaries, i.e. if they should be considered as genuine agents or independent resellers. Competition rules generally reserve special treatment for agency agreements, both in the EU and in the US.\textsuperscript{42} In the European context, as clarified by the 2010 Guidelines on Vertical Restraints, the determining factor in defining an agency agreement for the purposes of Article 101(1) is the financial or commercial risk borne by the agent: the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market.\textsuperscript{43} In these cases, the agent operates as an auxiliary of the principal, so that these agreements are excluded from the scope of Article 101(1). Otherwise the agent is considered as an independent undertaking and the agreement with the principal is subject to common competition rules. This assessment is made case-by-case, the qualification given to their agreement by the parties or national legislation being irrelevant.\textsuperscript{44}

Far from being a purely academic issue, in the case of digital platforms there are opposing views on this point.\textsuperscript{45} Some authors consider the substantial market-specific investments and the fact that in the existing case law MFN clauses are requested by the platform which imposes an essential condition of the principal’s pricing strategy would preclude a finding of a genuine agency relationship.\textsuperscript{46} Similarly, as for regulators, at the EU level, in the words of the former Director-General for Competition, online booking platforms may be considered as resellers, due to the significant investment they have made in advertising, software and customer support.\textsuperscript{47}

Differently, other authors argue that, where the intermediary, as in the case of OTAs, neither sells nor buys the products involved, but earns a commission on sales executed on its platform, it does not bear any risk with regard to the activity of the principal, thus it seems to be hardly assimilated to a reseller.\textsuperscript{48} In the absence of an exhaustive answer on the legal qualification of the principal-agent relationship in digital markets, the latter appears to be a strong argument as it reflects the typical case occurring in online settings, where platforms do not usually undertake contract or relationship specific investments, but more generally invest in the improvement of the platform itself.\textsuperscript{49}

IV. Recent case law on OTAs

OTAs have recently been the object of competition concerns both in the EU and in the US. This paragraph analyses the relevant case law with the purpose of highlighting the different approaches and solutions adopted by the competent authorities.

1. EU

In the European context, an initial investigation into the online hotel booking sector was launched in September 2010 by the Office of Fair Trade (OFT), after a complaint brought by a small OTA, Skoosh. The OFT issued a Statement of Objections two years later alleging that Booking.com, Expedia and InterContinental Hotels Group plc (IHG) had infringed competition law. In particular, the OFT found that Booking.com and Expedia each entered into separate agreements with IHG which restricted each OTA’s ability to discount the rate at which room-only hotel accommodation bookings are offered to consumers. The OFT declared that such infringements are, by their nature, anti-competitive, in that they can limit price competition between OTAs and increase barriers to entry and expansion for OTAs that may seek to gain market share by offering discounts to consumers.\textsuperscript{50} The OFT closed the investigation on 31 January 2014, accepting the commitments proposed by the defendants under which OTAs would be free to use their commission revenue or margin to fund discounts to consumers who meet certain criteria (i.e. Closed Group Members who have made at least one prior booking with the OTA concerned).\textsuperscript{51} However the decision adopted

44 In several cases the EU Commission has considered the inexistence of the conditions of a genuine agency agreement as grounds for finding the opposite: for example, ECJ, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, Coöperatieve Vereniging ‘Stuker Uitje’ UA and others v Commission [1975] ECR-1663; ECJ, Case C-266-693 Bundeskartellamt v. Volkswagen AG and YAG Leasing GmbH [1985] ECR-I-3477. It is worth noting that this issue has been the object of a judgment of ECJ regarding travel agents, in their traditional brick-and-mortar form: on that occasion, the Court stated that a travel agent must be regarded as an independent agent who provides services on an entirely independent basis; moreover, as he sells travel organized by a large number of different suppliers who in turn sell travel through a very large number of agents, a travel agent cannot be treated as an auxiliary organ forming an integral part of a tour operator’s undertaking (CJEU, Case C-262/03, ASBL Vereniging van Vlaamse Reseurovers c. ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten, [1987] ECR 3801). More recently, whether the agent acts for one or several principals is considered not material for the assessment under the 2010 Guidelines (see § 13).
46 Baccarissi, n 13 above, at 30.
48 Akman, n 26 above.
51 In detail, under the proposed commitments: (i) OTAs and hotels may offer discounts, up to the level of their commission or margin, off the headline room rates in UK hotels to any EEA resident who has joined a “closed group” and made a previous booking with that OTA or hotel at the headline rate; and (ii) OTAs cannot publicize information about the specific level or extent of discounts outside the closed group. Skyscanner’s appeal related primarily to this latter publicity restriction.
by the OFT has recently been quashed by the Competition Appeal Tribunal (CAT), which decided on the appeal brought by a meta-search website, Skyscanner, questioning the accepted commitments and their likely effects on competition and remitted it to the OFT’s successor, the Competition and Markets Authority (CMA). It is worth noting that in its Statement of Objections the OFT did not identify rate parity obligations as a distinct competition concern: the OFT stated that the existence of rate parity obligations was capable of reinforcing and exacerbating any prevention, restriction or distortion of competition arising from discounting restrictions, but it abstained from investigating the extent to which rate parity obligations were capable of breaching competition rules. Nor did the OFT clarify whether OTAs should be considered as genuine agents or resellers: on this point, although Booking.com obviously declares itself to be an agent, this interpretation seems to be implicitly refused by the OFT’s declaring the anticompetitive nature of the conducts to be under scrutiny.

In the meantime, other national competition authorities (NCAs) began investigations into the online hotel booking sector. On 20 December 2013, the German Bundeskartellamt prohibited the portal HRS from continuing to apply its best price clause and ordered the company to delete it from its contracts and general terms and conditions by 1 March 2014, insofar as the clause affected hotels in Germany. The decision was confirmed when the Düsseldorf Higher Regional Court rejected HRS’s appeal. After that judgement, the German authority issued a similar decision against Booking.com with regard to the use of best price clauses in its contracts with hotels in Germany, refusing the commitments offered by the OTA to replace its original MFN clause with a “narrow” MFN, as proposed in the investigations opened by other NCAs.

As a matter of fact, in May 2014 the Italian national competition authority (Autorità garante della concorrenza e del mercato, hereinafter AGCM) began an investigation against Booking.com and Expedia. In this case the complaint was brought by Federalberghi, the association of hoteliers, with regard to the Best Price Guarantees offered by Booking.com and Expedia, who – thanks to their large market share – request high fees from hotels and bind them to the lowest tariff available on any other channel (online and off-line).

As concerns the type of violation, AGCM referred to vertical restrictions being capable of significantly reducing competition on prices and supply conditions, both between platforms and different sale channels (OTAs, hotels’ websites, agencies). The Italian competition authority affirmed the anticompetitive nature of MFN clauses, from which derives that the price and the conditions of each specific offer made to consumers through Booking.com or Expedia are the minimum price and the best conditions available for that offer. In other words, the provision of such clauses by two of the leading platforms on the market would be capable of determining a greater downward inflexibility, both of the fees requested to hotels and of accommodation prices, to the detriment of final consumers.

The same concerns that parity clauses may restrict competition between big OTAs in object and other OTAs and hinder new booking platforms from entering the market are shared by other NCAs, such as in France and Sweden. In their national investigations the Italian, French and Swedish NCAs collaborated under the coordination of the EU Commission. Booking.com proposed commitments such as in the UK case, but, after market tests, it modified them, reducing significantly the scope of MFN clauses on prices, conditions and room availability. In a nutshell, under the final and accepted commitments, MFN clauses will only apply to prices and other conditions publicly offered by the hotels through their own direct online sales channels, whereas they will remain free to set prices and conditions on other OTAs and on their direct off-line channels, as well as in the context of their loyalty programs.

As a consequence of these investigations, Booking has decided to implement the commitments agreed with the French, Italian and Swedish NCAs throughout Europe. Also Expedia, with the declared aim of facilitating the closure of the open investigations into such clauses on a harmonised pan-European basis, even if supporting the compliance of such clauses with competition law, has established to adapt its policy to those commitments. Moreover, in the UK, the CMA has recently closed its investigation declaring that the case is not currently an administrative priority, and has not taken any decision as to whether the competition rules has been infringed, announcing that it will continue monitoring the effects of the commitments in order to reach a final view on this point.

2. US

A different approach has been adopted in the US, where MFN clauses are generally considered by antitrust jurisprudence as pro-competitive. In particular, on February 2014 the District Court of the Northern District of Texas, Dallas Division, decided the case In re Online Travel Company (OTC) Hotel Booking Antitrust Litigation, regarding the class action against major US hotel chains and OTAs brought by consumers claiming the defendants had colluded through an industry-wide conspiracy to impose rate parity across room booking websites in order to eliminate intra-brand competition (i.e. within competition among each hotel’s online distribution channels, including its own website and OTA-run websites). There are several defendants in this case: the first group includes twelve collectively dominant hotel chains in the US; the second group is made up of nine OTAs (four of which – Expedia, Orbitz, Priceline and Trivago – accounted for 94% of all OTA-hotel bookings in 2011); a third category of defendants is solely occupied by EyeVoyage, a travel industry news company that allegedly facilitated the price-fixing conspiracy in this case through its annual industry conferences. According to the plaintiffs, collusion was supported by at least two agreements: first, the OTA defendants entered into a horizontal agreement not to compete with each other; second, each hotel defendant and OTA defendant signed vertical RPM agreements providing Best Available Rate and MFN clauses aimed at granting that

52 Skyscanner Ltd v CMA, [2014] CAT 16.
54 Autorité Garante della Concorrenza e del mercato (AGCM), proceeding No. U/779, 7.5.2014.
56 See, for instance, Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995).
each OTA would not discount below each hotel website’s published rate and that each hotel was providing each OTA with its lowest online rate. As a consequence, under this “RPM scheme” the OTA began to offer a near-identical best price guarantee, knowing that it was the only price available on the market, even among competitors.

The Court dismissed the action, focussing on two essential points, i.e. the existence of an agreement or a collusion relevant for antitrust laws and the misleading nature of Best Available Rate clauses. With regard to the first point, evidences alleged by the plaintiffs were not judged as satisfying the standards set by the Supreme Court in Twombly for pleading a § 1 of Sherman Act conspiracy. According to the Court, defendants’ parallel adoption of similar business strategies was not suspicious or suggestive of an agreement, and common economic experience gives a simple explanation for the common interest of hotels and OTAs to conclude similar RPM agreements instead, that is the protection of their own businesses: for the hotels, an RPM agreement allows them to control the prices at which their rooms are sold online; for OTAs, the two-term RPM agreement, including the MFN clause, gives them an assurance that the minimum rate it must publish will not be undercut by the hotel itself or an OTA competitor. With regard to the second point, the Court also challenged the argument asserting the deceptive or unfairness of rate guarantees under the consumer protection statutes, agreeing with defendants in arguing that the guarantees merely provide assurance to the customer that the prices offered are at least as low as any other published price, and then provide a remedy to the consumer if the price quoted cannot meet that assurance.

Finally, it is worth mentioning that plaintiffs subsequently modified their original claim, dropping the hotels as defendants and directing their complaint solely to OTAs as entering into a per se unlawful horizontal agreement to fix prices and RPM agreements that unreasonably restrained trade. According to the changes made by the plaintiffs, who based their arguments mainly on the alleged suspect timing of the conducts under complaint, rate parity agreements are a necessary tool to effectuate the underlying agreement not to compete between defendant OTAs. However the Court considered once again the assertions of plaintiffs as being too vague and failing to demonstrate the existence of a conspiracy.  

3. Controversial issues

Returning to the European context, many critical questions remain. First of all, uncertainties exist about the correct anti-trust qualification of the subjects and the conducts under scrutiny in the case law mentioned above. The focus of the investigations conducted by national competition authorities is on the role of OTAs: their market power is generally strongly stressed, although they are not identified as holding a dominant position (either individual or collective); a general reference to Article 102 TFEU may be found only in the French and in the German investigations against Booking.com, but the NCAs did not apply it. As has already been said, the conducts in object are generally considered within the category of vertical agreements, in particular in the form of minimum RPM. However, except in the English case, the other investigations and the decisions taken by NCAs are directed against only one party to the agreement. It is worth noting that in the case of an agreement, hotels should not be considered as victims, but as willing participants, like OTAs; otherwise it would be more appropriate to consider these conducts as unilateral, to be judged anticompetitive only when OTAs hold a dominant position. In other words, it is a well-established principle that an agreement requires the existence of a concurrence of wills between at least two parties of their common intention to conduct themselves on the market in a particular way and that those who participate in an agreement cannot claim damages (except the Courage case). From this derives the clear risk of a distortive interpretation of the concept of agreement, which has often been subject to a broad view by competition authorities (firstly, the Commission) allowing Article 101 TFEU to be applied to unilateral behaviours in the absence of evidence of dominant position.

The investigations examined also confirm the current tendency at EU level to deal with cases in digital economy by way of commitments decisions, a strategy which leaves many questions untested including the finding of a dominant position. Moreover, from a strictly legal point of view, the absence of a clear assessment may have critical consequences also on the effectiveness of the commitments and on legal certainty. This results to be a concrete danger, considering that, after the commitments by Booking.com were accepted, the French Constitutional Council has adopted legislation banning all types of parity clauses (including those that were allowed under the commitments made binding against Booking.com by the French NCA) and similar provisions are under consideration in Italy. The Commission has not dissipated doubts on the various points mentioned in the previous pages. Again, the former Director-General for Competition pointed out two elements arising from case law in the online booking sector: first, the shifting of the balance of power in favour of the intermediary; second, the combination of RPM with retail price parity clauses, resulting in a strong potentially anticompetitive effect. It should be noted that if such an approach is confirmed (thus assimilating parity clauses at issue to RPM and applying the per se ban of minimum RPM to the cases examined), this would confirm a divergence between the EU and the US. As a matter of fact, economic theory has demonstrated the existence of the pro-competitive effects of minimum price fixing and such an approach has been implemented in the US in Leegin. Although this may suggest a need...
for a rethink of the presumption of illegality, at present the EU authorities still seem to resist adopting a more flexible approach.  

From the investigations analysed there emerges a general view in the EU that agreements including MFN clauses in their wide form violate competition law, whereas there is no unanimous approach to the narrow version of the same clauses, as the divergence between the approaches adopted by the German NCA and other NCAs in the EU testify. The lack of a coherent view on these clauses is strictly related to the absence of a robust general theory on the matter, which in turn is reflected in the absence of an assessment by competition agencies in the majority of cases. For these reasons, it is reasonable to expect the European Commission to provide guidance on these issues in the Sector Inquiry into e-commerce launched in May 2015.  

V. Data markets  

“Data markets” are one of the growing areas of interest of both economists and of competition lawyers. Their dynamics have not been yet sufficiently ascertained and the point on which most scholars agree upon is that they are highly mobile and that they are far from being a “mature market”. This situation is bound to become more and more important as gradually “Internet of Things” (IoT) technologies are implemented, pouring out trillions of data over an extremely limited time span. Furthermore “Big Data” is the basis for the so-called “Data-Driven Innovation” (DDI) which attracts huge investments and research. In this context the role of online intermediaries is pivotal because of the immense informational assets they create and accumulate. This is true with regards to each enterprise which collects and stores information concerning its clients and suppliers. However with online intermediaries there are various elements which substantially alter the nature and the value of such data.  

a) The intermediary entity collects information on both subjects entering into contact through the platform.  

b) These data are generally quite detailed: origin, preferences, spending capacity, fidelity to the service provider, occupancy rate (for hotels and airlines) and are clearly invaluable for market researches.  

c) The trans-national nature of the platforms allows them to collect data from all around the world.  

d) The data do not concern only one firm but a whole sector. Owing to the high concentration of intermediaries the data tend to be statistically consistent and data from all intermediaries are not necessary for a reasonably clear picture of the whole system.  

Obtaining such data – essential for their business – does not cost intermediaries anything because it is the natural result of their activity. Sometimes the clients themselves provide further valued data through their comments and judgements (e.g. the comments posted by clients on the hotel facility after their stay). It is worth noting that while the comment forms in hotels or airlines are hardly ever filled in, intermediaries establish a trust relationship which allows them to collect an extremely high number of replies. This creates a community in which each client, through his or her comments, provides guidance to future clients.  

All these data have an enormous value both for the intermediaries and the undertakings of the sector. The intermediaries can easily detect, well in advance, market trends and deadwood, and therefore can suggest new agreements, revise prior ones, create connections between offers of different services (travel – hotel; theatre – restaurant; ancillary services). Enterprises clearly need such information to enter the market, to focus on a segment, to choose appropriate pricing strategies, to understand where competition is more challenging. Clearly one cannot know the data concerning one single operator, but aggregate information can be equally useful and reliable.  

These data, furthermore, are essential for an operator in one sector – e.g. an airline – which needs to know market trends in a connected sector. Antitrust policies have usually been used to dismantle informational monopolies during liberalization of public utilities run by a single state-owned company (e.g. data held by the owner of the telecoms network; the telephone directory; but more recently by airport or railway infrastructure managers).  

In the case of online intermediaries considerable amounts of data are stored by an undertaking which operates in a competitive market. How does market power to be calculated? Surely the number of clients and the revenues are significant data. But when it comes to calculating the amount of data held (as if data were the raw material for the provision of such services) there are no reliable indicators of an “informational market power”.  

In the present stage of the evolution of online services it appears unlikely that intermediaries collude among themselves, via exchange of sensitive information (as in financial and insurance markets). It is more likely – also on the basis of what emerges from the cases analysed in para. IV – there may be, if one or more companies were to be found in a dominant position (or, at least, with a SMP), abusive practices under form of discrimination (also on prices) in access

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66 The ban on minimum price fixing has been reaffirmed by Regulation (EU) No 338/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, OJ L 102/1, 23.4.2010 (see Article 4).  
68 The term “essential” is used in both its literal meaning and in the antitrust sense: in fact it is highly debated whether data (and Big Data) represent an essential facility that they should be made available to competitors. This aspect is clearly investigated in I Graef, ‘Market Definition and Market Power in Data: The Case of Online Platforms’, available at <http://ssrn.com/abstracts=2657772> (accessed 28 March 2016), at para. 4.3. See also D Možina, ‘Retail business, platform services and information duties’, (2016) 1 EuCML 25.  
71 See preamble 32 of the 1995/52 Directive (the so-called ‘full competition’ directive in the telecommunications sector).  
72 See ECJ, Case C-136/11, Westbahn Management v. OBB-Infrastruktur published in the electronic Reports of Cases [2012].  
to essential information or through tying contracts or clauses.

A precedent in the air transport sector might be Computer Reservation Systems (CRSs) which have been the object of intense EU intervention from a regulatory and antitrust perspective. Currently all CRSs are independent – as to ownership and control – from airlines and therefore operate as independent intermediaries. It is useful however to recall Directive 2009/80/EC which regulates data concerning the sale, reservation, and ticketing of airline and railway services: article 7 states that CRSs may provide such data to third parties provided this is done on the basis of equal treatment and non-discrimination to all airline members. Clearly the data must be aggregated, removing all personal information concerning travelers, and may not be used to unduly influence the choices of travel agents.74

One might wonder to what extent, in a regulatory environment, some of these provisions might be applied to online intermediaries of travel and hotel services, especially where non-discrimination between service providers and fair treatment of end users is concerned. There is a clear need, beyond concerns about competition, to protect consumers from deceptive commercial practices which distort their choices and undermine fair trade.

Widening the perspective, data could be seen as a raw material essential in the information society to the functioning of an enterprise.75 Information shares with other goods the nature of “public good” and therefore is non-exhaustible and non-rival: however its non-material consistency renders difficult its formalization in economic terms.76 One could compare online intermediaries in this sector to search engines, which also play an intermediary role in two-sided markets, providing information to users and information about users to third parties. At the same time one could try to distinguish between traditional advertising services such as newspapers and television, on one side; and online providers, on the other. The former offer a limited space or time to a rather generic readership/audience and provide only some presumptive data concerning their number, and social, age and gender groups.

The latter offer extremely tailored advertising services directed at a selected – thanks to careful profiling – public whose numbers are immediately verifiable, as are their social and economic groups. In this case the data which have been already acquired and which are collected during the process are the main factor of production.

In the case of travel, hotel and entertainment intermediaries the data market appears to be more restricted, although they frequently advertise their services on search engines (typically: when searching for information on a location, one is immediately offered travel and accommodation services by the intermediaries). In order to understand this market better it might be helpful to see how much of the intermediary’s resources is spent on information services. One could venture a guess that the expenditure is proportionally lower in those services for which the intermediary receives a fee, higher for those in which the intermediary is mainly an advertising medium (e.g. TripAdvisor).

To all this should be added the systematic acquisition of personal data through so-called cookies which preserve data about those accessing a certain web-page.77 In order to better define the information market it would be necessary to estimate how many data are collected, who collects them, at what cost, and if there are secondary uses. A very provisional conclusion is that studying online intermediaries one realizes that, nowadays, data are an indispensable factor of production and the dynamics of data markets cannot be ignored when trying to cope with competition issues.

VI. Consumer protection in intermediary online services

It is an acquired notion, in both academic studies and in administrative practice that consumer protection is part of market regulation, because undertakings are burdened with specific obligations concerning the way products are manufactured and services rendered, and legal relations with consumers are strictly disciplined. At the same time consumer welfare (or detriment) is the yardstick to measure the admissibility, from a competition point of view, of agreements, mergers or commercial practices.

In online intermediary services the entity that enters into contact with the service provider via the platform is generally a consumer. There are however several cases in which it is a professional (e.g. an undertaking making a flight or hotel reservation for its manager). What we are here trying to ascertain is not what are the rights and obligations that arise between the typical parties (hotel/client; airline/passenger; restaurant/patron) but if the intermediary is in some way and to what extent bound by the very detailed consumer legislation.

The answer does not appear to be straightforward78 and requires, at least, a cursory analysis of the legal relationship that comes into existence once a client of a final service uses an intermediary to conclude such a contract. These are some of the hypothetical scenarios:79

a) The intermediary offers services that have been indicated (in quantity, price, and characteristics) by the provider. Through its platform it puts in contact the two parties of the deal receiving a fee from the provider without asking the consumer any fee.

b) The intermediary informs the consumer that he/she will have to pay a fee for the service rendered by the platform.

c) The intermediary limits itself providing commercial information concerning the service provider, but does not, generally, make it possible for a contract to be concluded between the latter and the consumer.

75 This analysis is conducted in the travaux préparatoires and in the text of the 98/2003 Directive of 17.11.2003 on the re-use of information of the public sector.
76 In the Magill case (C-241/91, Radio Telefis Eireann v. Commission) the ECJ had qualified the information related to TV programming an “essential facility”.
79 J Sénichal, ‘The Diversity of the Services provided by Online Platforms and the Specificity of the Counter-performance of these Services – A double Challenge for European and National Contract Law’, (2016) 1 EuCML 39, at 40 speaks of “tenuous border between intermediation and distribution”.

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Only in this last case – and setting aside issues concerning deceitful advertising or misleading commercial information – would it appear reasonable to exclude any involvement of the intermediary in the hypothetical non-performance by the service provider.\(^{80}\)

In the other two cases one must go more into detail.

i. In a few countries (Italy, Belgium) the intermediary states that the relationship with the client is governed by the 1970 International Convention on Travel Contracts (the CCV convention). According to such a convention a “travel intermediary” is “any person who habitually or regularly undertakes to perform the contract defined in paragraph 3, whether such activity is his main business or not and whether he exercises such activity on a professional basis or not”. And para.3 states that an “intermediary travel contract” “means any contract whereby a person undertakes to provide for another, for a price, either an organized travel contract or one or more separate services rendering possible a journey or sojourn. ‘Interline’ or other similar operations between carriers shall not be considered as intermediary travel contracts”.

This qualification poses a series of questions, the first being that the CCV convention has been ratified, in Europe, only by Italy,\(^{81}\) Belgium and San Marino, and therefore can hardly be considered in a trans-border EU context or in other countries which are not parties to the convention\(^{82}\).

The second remark is that when the CCV was regulating “travel intermediaries” it was envisaging, typically, a small travel agency and individual partnership, a small company which had to help establish a legal relationship with much bigger undertakings (airline, railway, and hotel). The allocation of duties and risks was therefore limited. But can one say the same when considering the economic strength of most of the intermediaries which retain a significant market power relevant from a competition law perspective? Is the rationale for an exclusion of liability still valid?\(^{83}\)

ii. The relationship between service provider and intermediary is an agency contract;\(^{84}\) the service provider is the principal and the intermediary is the agent. The question is when the latter establishes a relationship with the client is it acting on behalf of the principal (disclosed principal) or not (undisclosed principal)? The various European legal systems have each a very detailed agency law (whether in their civil or commercial codes, or through case law) and it is therefore difficult to provide a uniform reply. However, generally speaking, the agent is responsible towards its principal, and not – except in the cases of fraud – towards the third party.\(^{85}\) In order to overcome this difficulty one could imagine a “two-sided” agency in which the intermediary is agent both to the service provider and to the client.\(^{86}\) This might reinforce the client’s position, but, in the absence of a specific binding contract between client and intermediary it is not easy to state that the latter is, in general, liable towards the former for non-performance of the contract by the service provider.\(^{87}\)

This solution seems reasonably viable when both parties, the service provider and the client, pay a fee to the intermediary. But even when there are no monies actually paid by the client to the intermediary, one could argue that a valuable consideration is given by the client in the form of his/her personal data, which we have seen are among the most valuable assets of online intermediaries.\(^{88}\) Those data are not only necessary in order to render the intermediary service, but have a further economic value, both for profiling that specific client, and for creating an aggregate data-bank.

iii. A further variation of this model could be that of considering the intermediary as a broker, a professional figure which can be organized either as an individual firm or as a very solid and organized undertaking. Again one must consider that European legal systems differ widely in setting the rules for contracts of brokerage. In civil law jurisdictions the relationship – which in some cases can be created by the mere fact of acting as middle-man – is generally disciplined by the Codes. There is also a growing concern for consumer protection especially in the field of real estate brokerage. However at the end of the day the duties imposed on the broker are rather simplified and it is difficult to extend them to a joint liability with the parties in the case of non-performance of their obligations.

iv. Finally one could suggest that online intermediation, seen from the side of the client-intermediary relationship is a sui generis contract which is characterized by a series of factual or legal elements:

- The intermediary has a very strong economic and social identity and promotes its brand in order to attract a growing clientele.

\(^{80}\) But other intermediaries also try to present their activity as mere advertising services: e.g. “Through the website we (Booking.com B.V. and its affiliate (distribution) partners provide an online platform through which all types of temporary accommodation (for example, hotels, motels, hotels and bed & breakfasts, collectively the "accommodation (s)"), can advertise their rooms for reservation, and through which visitors to the website can make such reservations.” (italics added).

\(^{81}\) And in fact e-Dreams on its Italian website qualifies itself as a travel intermediary with specific reference to the CCV. However, not dissimilarly, the UK website states that: “2.1. Through this Website, eDreams offers a search and comparison service of travel products or services available on the market, as well as an intermediary service for the purchase of the services You select. A purchase on this Website is considered any order for products or services made with an obligation to purchase and which has been confirmed by eDreams. When You purchase travel products or services through this Website, it is formalized into an agreement directly with the Travel Provider/s. eDreams does not enter into the contractual relationship relating to the products or services that You purchase, unless expressly indicated as such. Any query or consultation relating to products or services purchased must be directed to the corresponding travel Provider.”

\(^{82}\) It is interesting to note that in the 2013 version of the Spanish Ante-proyecto of the new Código Mercantil there was an entire Section devoted to travel and tourist contracts, which included an Article (454.9) which substantially reproduced the provisions of the CCV. However in the final 2014 version the whole Section has been suppressed.

\(^{83}\) In a recent decision by the Paris Tribunal de Commerce, Ministry of the Economy v. Expedia (7 May 2015), it was held that the fact that the intermediary exonerates itself from any risk creates a significant contractual unbalance with the service provider and are therefore invalid.

\(^{84}\) Here there is a further linguistic difficulty: “agency” has different meanings for lawyers and for competition economists.

\(^{85}\) For some Italian decisions which apply agency and the CCV to the traveller/travel intermediary relationship, see Court of Cassation 19 January 2000, No. 696; and Giudice di Pace Bari 4 April 2008 (available at GiurisprudenzaBarese.it).

\(^{86}\) The Italian Court of Cassation has suggested this solution in a case (8 October 2009, No. 21388) applying the CCV convention.

\(^{87}\) According to the Italian Competition [and Consumer Protection] Authority in the e-Dreams decision (case PS 1442) online travel intermediaries are obliged to control the activity of service providers, especially in the way they present their offers, and inform consumers on eventual changes and mistakes occurring during the reservation procedure (at para. 105).

\(^{88}\) One can assume that this is a firm point in legal and economic debate: see Sénéchal, n 79 above, at 43.
• This publicized role of the intermediary creates a legitimate reliance in the public when it uses the services offered by the intermediary.  

• The service offered is not otherwise available on the market (the client would have to search, one by one, each airline, each hotel, each restaurant etc.).  

• The intermediary’s digital booking system is highly personalized, with a form that has been prepared by the intermediary and is received and stored by the intermediary who only subsequently forwards it to the service provider.

The legal basis for such a relationship – and the ensuing liability – might be found in articles 12-15 of the e-commerce Directive (2000/31/EC). Traditionally these provisions are interpreted in an extra-contractual setting, but they could easily be transposed in a contractual context, considering that the intermediary does not limit itself to providing access to information coming from the service provider, but surely elaborates such information in its booking form, asks for further information and presents it differently the way it was originally found on service provider’s web-site. One could therefore maintain that the intermediary is not engaged in an activity of mere conduit, caching or hosting.

Looking at things from a policy perspective it is apparent that the reasons – clearly stated in the preamble of the e-commerce Directive – that justify a relaxation from liability for certain online operators do not apply to online intermediaries. Nor can the general idea underlining all these services, i.e. that by using them the consumer accepts the terms and conditions, unilaterally set by the intermediary and containing multiple self-proclaimed clauses of exoneration from liability, be considered compatible with EU consumer protection law.

89 For the tendency to extend contractual liability to entities which appear to be providing a service, see article 423-4 of the Spanish Anteproyecto of the new Codigo Mercantil which, in the Section devoted to “automated contracts” states that the owner and the entity that runs a public space where this is an automatic vending machine are jointly liable together with the owner of the machine and the service provider for non-performance of obligations arising from the automated contract.

90 In the TripAdvisor decision (cited in the following paragraph), the Italian Competition Authority excludes that the intermediary can qualify itself as a ‘hosting provider’ in order to escape liability because it develops an autonomous activity based mainly on the classification and organization of the available information (at para. 106). But see the contrary view in Wendehorst, n 70 above, at 31.

91 See preambles 42 (“The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient”) and 43 (“A service provider can benefit from the exemptions for “mere conduit” and for “caching” when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.”).

92 See e.g. Booking.com: “By making a reservation through Booking.com, you enter into an agreement (legally binding) with the accommodation provider at which you book. From the point at which you make your reservation, we act solely as an intermediary between you and the accommodation, transmitting the details of your reservation to the relevant accommodation provider and sending you a confirmation email for and on behalf of the accommodation provider. When rendering our services, the information that we disclose is based on the information provided to us by accommodation providers. As such, the accommodation providers are given access to an extranet through which they are fully responsible for updating all rates, availability and other information which is displayed on our website. Although we will use reasonable skill and care in performing our services we will not verify if, whatever the solution, it is, however, clear that the sector requires predictable rules applicable at least throughout the whole EU. Uncertainty is of little aid to all parties involved, not only intermediaries but also consumers and service providers.

Some elements may be found in the 1997/7/EC Directive on the protection of consumers in distance contracts: article 3, para. 3, letter k) explicitly excludes from its application passenger transport services, with the exception of pre-contratual information (article 8), and payment fees (articles 19 and 22).

And the ECJ in the Easy Car case has stated that car rental services fall within the “passenger transport services” exception. Going in the opposite direction the ECJ in its e-bookers case has stated that the informational duties set out by article 23 of Regulation 2008/1008 apply not only to airlines but also to intermediaries selling tickets online.

VII. Misleading advertising

Increasingly, online intermediaries in the travel, accommodation and catering sector are coming under scrutiny by the Courts and by consumer protection authorities which challenge their commercial information as misleading.

and cannot guarantee that, all information is accurate, complete or correct, nor can we be held responsible for any errors (including manifest and typographical errors), any interruptions (whether due to any temporary and/or partial breakdown, repair, upgrade or maintenance of our website or otherwise), inaccurate, misleading or untrue information or non-delivery of information. Each accommodation provider remains responsible at all times for the accuracy, completeness and correctness of the (descriptive) information (including the rates and availability) displayed on our website. Our website does not constitute and should not be regarded as a recommendation or endorsement of the quality, service level, qualification or (star) rating of any accommodation made available.


94 See the various proposals contained in a research commissioned by the European Parliament in 2009 [‘Study on online hotel reservation systems’] (IPAM/ECO/FWC/2006-038/LOT 4/C1/SC8) among which: “b) Community law could provide, where a website acts only as agent for a hotel, that the website should in all its content (including the contents of websites it provides hyperlinks to) ensure that: i) the role of the agent and the role of the hotel is clearly separate and distinguishable; ii) the contract of accommodation with the hotel is clearly and unambiguously distinguished from the website’s terms of use; iii) The agent should be prohibited from including in its website terms of use matters which properly belong to the contract between the hotel and the consumer; iv) Whenever a website wishes to convey information about the performance of the contract of accommodation it must do so in a way which clearly indicates the authority for the statement comes or is derived from the hotel and not the agent, c) Community law could ensure that a non-contracting consumer who acquires in a legally permitted manner an entitlement to stay in a hotel can exercise the same rights as a contracting consumer regarding the performance of the accommodation contract.”.


The practices which are challenged concern the availability of seats on flights, the exact amount of the charge put on the debit/credit card of the consumer; and the cost of call-centre assistance. 97

A further aspect of increasing relevance is the ranking of service providers by the intermediary. The leading cases have been brought in front of the Paris Tribunal de Commerce on the basis of claims brought by the French Association of hotels restaurants and cafés (Synhorcat), against Expedia for unfair competition. The French judges qualified as a deceptive practice the undisclosed fact that the way in which each service provider is presented by the intermediary depends on an advertising contract between the intermediary and the hotel or restaurant. 98

In a similar case brought by the Italian Hotel Association (Federalberghi) 99 against TripAdvisor, the Italian competition authority ascertained that it was impossible to establish if the evaluations, allegedly coming from actual customers, were authentic and therefore could be relied upon, or if instead – as the intermediary had to admit – no controls were made to verify that the comments had not been orchestrated (in one sense or the other), rigging the final rankings. 100

As one can see these cases indicate a growing responsibility of intermediaries towards their clients.

Strictly speaking one is faced with an administrative and non-contractual liability, but it is easy to envisage this trend as a move towards a more substantial and contractual liability.

VIII. Conclusive remarks

The topic of online intermediaries is destined to grow in importance together with the increasing role they play in a digitally driven economy, and not only in the transport, tourism and entertainment sectors. One is faced with new aspects that, for the moment, do not appear to have been sufficiently studied especially if one looks at them from the perspective of the economic and legal relations that come into place in two-sided markets.

The kinds of analysis commonly applicable to relations between undertakings which are in a vertical or horizontal relationship do not appear to be automatically applicable in two-sided markets. Also, if one thinks of regulatory or anti-trust interventions, it is not altogether clear if consumers would actually benefit from action on the pricing policies of intermediaries. More predictable instead appears to be the answer in relation to the widespread practice of tying contracts between intermediaries and service providers. At any rate one is still looking at markets that are not yet mature. On the one hand their geographical extension remains to be determined. On the other hand there do not appear to be significant barriers to access by new competitors, with the exception of very high advertising costs in order to promote the new, competitive service.

Even more uncertain is the exact nature, from a private law perspective, of the legal relationship which is established between the service provider and the intermediary, and between the latter and its clients.

One striking feature is that whilst the travel and tourism sector in the EU is highly regulated and offers passengers and tourists an extremely high level of protection, there is great uncertainty about the legal relations between online intermediaries and clients and very strong national differences that surely constitute a significant obstacle in the development of services which are intrinsically trans-border.

It is therefore reasonable to expect, sooner or later, from the EU authorities some kind of regulatory intervention – welcomed by some parties, opposed by others – aimed at raising the protection of e-consumers to the “high level of protection” required by article 169 TFEU. 101

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100 The decision was, however, struck by the Rome Administrative Tribunal (TAR Lazio), July 13, 2015 n. 9355, in (2015) Diritto informazione informatica 494.

101 Busch, Schulte-Nölke, Wiewiorowska-Domagalska, Zoll, n 78 above, at p. 3f. suggest a “Platform Directive” as a new EU legislative instrument.