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HEARING ON ACROSS PLATFORM PARITY AGREEMENTS

-- Note by France --

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This document reproduces a written contribution from France submitted for Item 7 of the 124th OECD Competition Committee on 27-28 October 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competition-crossplatform-parity.htm

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1. Introduction

1. The use of “Across Platform Parity Agreements” (APPAs) has been widespread for several years in the e-commerce sector, especially in agreements entered into between e-commerce platforms and sellers¹.

2. The contractual arrangements entered into between a seller and an e-commerce platform provide for a seller to commit to offer a price on the platform that is no higher than the one applied on other platforms, including those offered by new entrants.

3. This type of agreement is deemed to be one of the forms that a “Most Favoured Nation” (MFN) clause can take². Unlike other forms of MFN clause, the parties to an APPA agree to a pricing commitment that does not involve their other transactions but merely those that one of them (the seller) enters into with a third party who is not a party to the agreement (the buyer).

4. APPAs can also involve elements other than price, such as availability or conditions of sale (delivery, cancellation, etc.) of products or services offered to customers. They can also cover distribution channels other than online platforms (such as the seller’s own online and offline distribution channels).

5. APPAs are commonly referred to as Most Favoured Nation clauses (“MFN”)³ or “parity clauses”.

1.1 One special form of price relationship agreements (PRA)

6. “Price Relationship Agreements” (PRAs) are pricing agreements that consist in fixing the prices of goods offered by a seller in relation to other prices⁴.

7. A seller’s prices may be set in reference to the prices of competing sellers. For example, a retailer can guarantee to its customers that it is offering lower prices than its competitors, and this guarantee may go hand in hand with a commitment to reimburse the difference, or even more than the difference⁵. In long-term contracts with downstream companies, sellers can also include “English clauses” whereby they commit to align themselves on the prices employed by competing sellers.

¹ A “platform” is an intermediary that acts as a marketplace and enables sellers and buyers to meet and enter into transactions between them. The marketplaces (Amazon Marketplace, Price Minister, etc.), hotel reservation platforms (Booking.com, Hotels.com, etc.), mobile app stores (App Store, Google Play), e-book and ibook platforms (Amazon, iBooks Store), etc. are examples of e-commerce platforms.

² MFN clauses are themselves a form of price relationship agreement (PRA) that refers to competitors’ prices (see below). In fact, MFN clauses guarantee the best prices or best conditions from among those available in the market, while PRAs define a link between the prices of competitors, without this necessarily being the best price. For example, buyers may require their suppliers to sell goods to them at a price that is half the price at which the goods are sold to competing buyers.

³ This usage is inaccurate since “MFN clauses” also cover other practices that are described below.

⁴ "Can ‘Fair’ Prices be unfair?" "A review of price relationship agreements", September 2012, report prepared by LEAR for the Office of Fair Trading (OFT).

⁵ Conseil de la Concurrence Decision no. 07-D-50 dated 20 December 2007 concerning practices in the toy distribution sector, noted that Carrefour’s practices consisted in reimbursing ten times the difference in cases where consumers found an item that was cheaper elsewhere. This enabled it to exercise a policy

8. On the other hand, prices may be set in reference to prices offered to competing buyers when a seller commits to a customer not to sell its products at higher prices than to its other customers.

9. Finally, prices that are the subjects of the agreement can be applied to third parties to the agreement. This is the case when a seller forces its distributors to set pricing with reference to the retail price of competing products (for example, lower prices than the prices of competing products)⁶. This is also the case where platforms require sellers not to set lower prices on competing platforms or other distribution channels. These are the APPA practices that are the subject of this contribution.

10. Although each of these practices involved linking prices to those charged by competitors, they had different grounds and anti-competitive effects. This contribution focuses on the APPAs.

1.2 *The diversity of the sectors involved*

11. APPAs were implemented in Europe in several economic sectors characterised by strong growth in online sales.

12. In the online hotel bookings sector, hotel booking platforms such as Booking.com, Expedia and HRS⁷ incorporated APPAs into their general conditions of sales. Under these conditions, the platforms required hoteliers to provide them with room rates, number of nights and offer conditions (booking conditions, inclusion or not of breakfast, etc.) at least as favourable as those offered on competing platforms, as well as across all other distribution channels (online and offline), including the hotel's own distribution channels (Internet website, telephone, e-mail, at the hotel's booking desk, etc.).

13. Along with a number of other national competition authorities in Europe, the Autorité de la concurrence issued a ruling on "parity clauses" in proceedings that concluded with commitments being made by Booking.com to amend the contentious clauses⁸.

14. Such clauses have also been used in the online sales sector for e-books. In an initial case, the Commission found that Apple and four major electronic book publishers had conspired to make Amazon change its distribution contracts with these publishers (under which Amazon was setting the retail prices of books) into agency agreements (under which publishers set the retail prices of books). In order to attract publishers to its new iBooks Store platform in 2009, Apple proposed to publishers that a new distribution system be set up based on agency agreements, allowing publishers to set the retail price of e-books. These agency agreements contained an MFN clause, maximum retail-price tables and a 30% commission rate for Apple. As a result of the MFN clause, the low prices offered by Amazon were automatically passed on to the iBooks Store platform. To avoid prices becoming too low across the whole market (i.e. on both Amazon and iBookstore), publishers exerted pressure on Amazon to change its contracts by withdrawing

based on the prices of competing distributors and allowed it to check that the Retail Price imposed by toy manufacturers was respected.

⁶ The *Imperial Tobacco* decision by the OFT in April 2010, overturned by the UK Competition Appeal Tribunal in 2011, dealt with these practices.

⁷ Online Travel Agencies (OTAs) represent the main online booking channel for hotel stays - about 70% of online bookings in France - (Phocuswright, "European Online Travel Overview", December 2013), the remainder being made on the hotels' own Internet sites. Only a few OTAs have a direct link with hotels, these are mainly OTAs specialising in hotel bookings, such as Booking.com, Expedia or HRS in France. These platforms distribute hotel stays that are generally sold in isolation and made available to them by the hoteliers.

⁸ Decision no. 15-D-06 of 21 April 2015 on the practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector.

their books from the Amazon platform. Apple and the publishers in question agreed to certain commitments which were accepted by the Commission in December 2012 and July 2013⁹.

15. The Commission opened investigation on 11 June 2015 in a second case in the online e-books sales sector, with a view to analysing certain clauses contained in contracts between Amazon and publishers. These clauses required publishers to inform Amazon about more favourable or alternative terms offered to Amazon's competitors and/or offer Amazon similar terms and conditions as to its competitors, or through other means ensure that Amazon is offered terms at least as good as those for its competitors¹⁰.

16. Similar clauses were also applied by Amazon Marketplace in the United Kingdom and Germany in the e-commerce sector in general. Investigations were opened in the United Kingdom and Germany in late August 2013, as a result of which Amazon announced its intention to remove these clauses from its general conditions of sale throughout the European Union, leading to the closure of these investigations.

17. Such clauses were also applied to sectors as diverse as online fast food sales in Finland and private motor insurance in the United Kingdom¹¹.

18. This contribution examines the pro- and anti-competitive effects of APPAs (2) and the criteria used for assessing APPAs under competition law (3). An illustration through solutions adopted by the Autorité de la concurrence in the Booking.com case, as well as cases brought before the Commerce Tribunal of Paris on online hotel booking platforms and recent legislative developments (law no. 2015-990 of 6 August 2015 on growth, activity and equal economic opportunities will be presented in conclusion (4).

2. Are the effects of Across-Platform Parity Agreements pro or anti-competitive?

2.1 Multiple anti-competitive effects

19. The economic literature on APPAs is still nascent. Competition authorities have only very recently begun to analyse these practices¹².

⁹ Commission, 12 Dec. 2012, COMP/39.847 – ebooks for Apple, Hachette Livre, Harper Collins, Simon & Schuster, and Macmillan and the Commission, 25 July. 2013, IP/13/746 for Penguin.

¹⁰ Press Release, “Antitrust: Commission opens formal investigation into Amazon’s e-book distribution arrangements”, Brussels, 11 June 2015.

¹¹ The Competition and Markets Authority issued a ruling on the legality of the clauses known as “narrow MFN” and “wide MFN” in a final decision dated 18 March 2015, available at the site <https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation>.

¹² The main investigations by the competition authorities have been in the following sectors: Ebooks(in Europe and the United States), marketplaces (Amazon marketplace case) in the United Kingdom and Germany, hotel booking platforms in Europe, private motor insurance comparison websites in the United Kingdom, and airline ticket distribution by travel agencies in Australia (the latter case is differs from the others on the basis that the APPA was imposed by a bricks and mortar travel agency to protect itself from online travel agencies). It is also worth highlighting that anti-competitive mechanisms similar to those of the APPA can also be found in “no surcharge rules” practices in the means of payment industry. These require merchants to offer identical retail prices, whether the products are purchased in cash or by card (see Autorité de la concurrence opinion no. 09-A-35).

20. However, existing economic analyses¹³ and parallels drawn up with other practices similar to those of the APPAs (retail price maintenance, other price relationship agreements) make it possible to identify three possible main types of anti-competitive effects associated with APPAs¹⁴ :

- With respect to intrabrand competition, APPAs are liable to soften competition pressure between platforms;
- Still in the context of intrabrand competition, APPAs can have foreclosure effects on small platforms and new entrant platforms ;
- Finally, as regards inter-brand competition, in certain market configurations, APPAs are likely to soften competition between suppliers by preventing promotions targeted at certain customers, and even to favour collusion between suppliers by allowing greater transparency of prices charged to consumers.

2.1.1 *Softening of competition between platforms*

21. When the suppliers themselves set the retail prices of the products they are selling via platforms, these prices may vary from one platform¹⁵ to another in the absence of an APPA. A platform can thus win market share by offering lower commission. Suppliers would be incentivised to attract consumers to that platform to reduce the cost of commission they have to pay by offering lower retail prices than those set on other platforms.

22. Conversely, the setting up of an APPA breaks this pro-competition mechanism, even when only one platform implements such a clause. Suppliers cannot attract consumers to cheapest platform asking them the lowest commission by means of lower retail prices of stays, since they are constrained to offer the lowest retail prices to the platform that applies an APPA¹⁶. Where all the platforms apply an APPA, the supplier is forced to offer the same prices on all the platforms, regardless of their level of commission.

23. Furthermore, when an APPA is implemented, a supplier is forced to pass on an increase or decrease in the rate of commission to all of its distribution channels. The pass-through of an increase in the rate of commission for a given retail pricing platform is thus diluted across the distribution channels and a platform that significantly increases the level of commission will in the long run lose very few consumers.

¹³ See articles by Foros, Ø., H. J. Kind, and G. Shaffer (2014), “*Turning the Page on Business Formats for Digital Platforms: Does Apple’s Agency Model Soften Competition?*”, SNF Working Paper No 06/14, Boik, A. and K.S. Corts (2013), “*The Effects of Platform MFNs on Competition and Entry*”, working paper and Johnson J.P. (2013), “*The Agency Model and MFN Clauses*”, Mimeo.

¹⁴ Lear (2012), *Can Fair Prices be Unfair? A Review of Price Relationship Agreements*, OFT report 1438.

¹⁵ For example, in the case of a representation contract between platforms and their suppliers. This is what has happened in the case of online hotel bookings, private motor insurance comparison websites in the United Kingdom and Amazon Marketplace.

¹⁶ In the hotel sector, the French, Italian and Swedish authorities also considered this mechanism to have been broken when clauses were applied demanding parity of availability of overnight stays allocated to the various distribution channels.

24. The APPAs have thus the effect of reducing competition between platforms on the level of commission. They lead to the setting of supra-competitive rates of commission and an increase in retail prices. The only constraint applied to a rate of commission requested by a platform comes from the possibility that suppliers will leave the platform if the commission demanded is too high. Thus, price competition between platforms is not entirely removed by the APPAs, since the platforms can attract more or fewer suppliers, depending on the rates of commission they apply. However, if suppliers are obliged to have a presence on certain platforms in order to access consumers, the constraints on the rates of commission applied by these platforms are very limited in the presence of an APPA.

25. In the hotel sector, online booking platforms have become the preferred channel for consumers searching for a hotel. They are indispensable to hotels if they want to reach consumers and the vast majority of hotels are therefore referenced on these platforms, despite the commission demanded¹⁷. Furthermore, on this market, the market share of a platform does not necessarily reflect its true market power. When such a platform gives preferential access to consumers who cannot be reached via other platforms, they can thus represent an essential partner to a supplier, even if the platform represents a relatively limited share of the supplier's sales¹⁸.

26. In practice, it could be observed that the rates of commission charged by the main hotel booking platforms in France were set at a high level (10 to 30% of the retail price including VAT for reserved stays) thus ensuring them high levels of profitability, in a context of significant increase in the number of bookings¹⁹.

27. Finally, aforementioned decision no. 15-D-06 concluded that APPAs (covering rates and availability) were depriving hotels of the use of two levers, namely retail price levels and the number of rooms allocated, in reaction to the commission rates practised by Booking.com.

2.1.2 *Foreclosure effect on small platforms or new entrant platforms*

28. APPAs could also lead to foreclosure effects on competing platforms. This practice does not allow the competitors of a platform applying an APPA to attract internet users by offering lower commission, something that would later be passed on to consumers through lower retail pricing. Thus, the launch of a new platform can only succeed in this type of market if it is capable of attracting a sufficient number of internet users to attract suppliers, and vice versa. Where there is an APPA, a small platform or a

¹⁷ For a hotel, not being referenced on a platform that is much visited by consumers, when rival hotels are on it, means taking the risk of losing customers to competing hotels. This is what Farrell and Klemperer (2007) call "marginal network effects". (Farrell, J. and P. Klemperer (2007). 'Coordination and Lock-In: Competition with Switching Costs and Network Effects'. In Armstrong, M and Porter R (eds.), Handbook of Industrial Organization, 1967–2072).

¹⁸ In the online hotel booking sector, even the booking platforms with a market share lower than 30% seem to have a genuine market power in relation to the hotels, due to their strong presence in certain countries and their privileged access to consumers in those countries and the perishable nature of hotel bookings (any unsold booking is by definition lost for the hotel, once the date has passed). In addition, the coexistence of significant fixed costs and variable costs per booking sold is relatively low (hotels' profit margins on variable costs are high and each unsold night's stay represents a high opportunity cost for a hotelier). Similarly, in the case concerning the private motor insurance comparison websites in the United Kingdom, the CMA considered that the four main comparison sites, each owning 25% of market share, could each exert strong market power on private motor insurances due to their exclusive access to a particular segment of consumers.

¹⁹ In 2014, Priceline, the parent company of Booking.com, had an operating profit (EBIT) of 3 billion euros, i.e. 34.6% of its turnover.

new one no longer have a pricing instrument available to them and can only differentiate themselves from others on the grounds of reputation, visibility and possibly quality if it is to attract consumers. The platforms already in place usually have a significant advantage in these various aspects.

29. The example of online hotel booking platforms is, once again, enlightening: in this sector, the market share of the European market leader, Booking.com, has grown continuously and rapidly since 2008. “Multi-homing”, practised by users on both sides of the market (hoteliers and hotel customers often use several platforms simultaneously) is of such a nature as to render the positions of operators more fluctuating by limiting the network effects. A “winner takes all” phenomenon can however be observed, where the size of a platform is a decisive criterion in its growth and the largest player eventually walks away with virtually the entire market. This suggests that APPAs reinforce the network effect to the advantage of the largest platform.

2.1.3 *Reduction in inter-brand competition*

30. Lastly, APPAs can reduce competition between suppliers and cause an increase in retail prices²⁰. On the one hand, these agreements make it costly, and even impossible, for suppliers to offer targeted and periodic price reductions via certain distribution channels or for certain types of customer. On the other hand, by increasing the transparency of the prices offered to consumers, these practices can facilitate collusion between suppliers, in the same way as retail price maintenance (RPM) agreements in certain contexts.

31. Nevertheless, these effects remain ambiguous and need to be assessed on a case-by-case basis. The impossibility for suppliers to price discriminate depending on the distribution channels or customers can also lead to lower average retail prices. Increased pricing transparency in respect of consumers can increase inter-brand competition by reducing consumer search costs (see below).

32. Thus, the net effect of APPAs on competition between suppliers depends on search costs, the possibility of tacit coordination and the feasibility of price discrimination leading to an increase in average pricing.

33. In the online hotel booking sector, the French, Italian and Swedish authorities did not consider APPAs to have had the effect of reducing inter-brand competition, i.e., between hotels. The hotel offer is fragmented in France and Italy and hotels can change their retail prices several times a day. APPAs therefore do not prevent periodic promotions, even if they make them more expensive (since promotions need to be made across all distribution channels and therefore reach all consumers). Finally, hoteliers are strongly reluctant to APPAs, which is not compatible with the idea that these clauses reduce competition between hoteliers²¹. This does not, however, preclude the possibility that the effect of the APPAs is to soften inter-brand competition in other sectors.

²⁰ This effect is more hypothetical in the case of marketplaces, since APPAs impose a uniformity of prices sold by a given distributor for each of the products it markets via the platform, knowing that competing distributors can sell these same products at different prices on the same platform.

²¹ For instance, in a civil action brought in Texas against APPAs implemented by the main online travel agencies in the online hotel bookings sector, the Court of Texas held that such practices were not the result of generalised conspiracy between the hotels and the online travel agencies, contrary to the claim made by the claimant, since the hotels seem to be rather victim of these practices rather than supporting them. (See following link: <http://cases.justia.com/federal/district-courts/texas/txndce/3:2012cv03515/222550/136/0.pdf?ts=1411577864>).

34. Economic analysis thus leads to identify multiple, potentially restrictive effects of the APPAs. It should further be noted that the anti-competitive effects are not necessarily linked to the market power of the platforms; APPAs can also reduce competition between distribution channels even when the platform has a market share of less than 30%²².

35. Indeed, if an APPA applies to a significant share of the suppliers present on these platforms, its scope extends beyond the market share of the platform that imposes it, guaranteeing that all competing platforms, and even all distribution channels, will display higher prices for a significant proportion of suppliers present on these platforms. These competing platforms will then have little incentive to reduce the level of commission they charge. Moreover, implementation of an APPA by a platform generally encourages competing platforms to do the same in order to protect themselves against the risk of displaying retail prices that are higher than those of platforms imposing an APPA.

36. The mechanisms for softening competition between platforms described above²³ can also be applied, at least partially, even when platforms implementing an APPA have less than 30% market share. A platform that only represents a small proportion of bookings can link a majority of suppliers – who may also be present on other platforms - via APPAs and competition between platforms will consequently be reduced. On the other hand, the suppliers' share of a market that is covered by such clauses can be an interesting criterion for assessing the anti-competitive effect of APPAs, more so than the market share of the platform itself.

37. Foreclosure effects can also occur even when an APPA is applied by a small platform. Even if large platforms do not implement an APPA, they are protected from competition of new-entrant platforms or platforms already present in the market, in the same way as the platform applying an APPA, since retail prices cannot fall below the retail prices displayed on a platform that applies an APPA. Thus, small or new-entrant platforms cannot differentiate themselves or increase their market share by offering lower commission to suppliers.

38. In short, an APPA implemented by platforms with low market share is certainly far less harmful to competition than one that is applied by all the platforms or by platforms with high market share. It nevertheless remains likely to soften competition between platforms and create foreclosure effects.

Similarly, in a decision concerning private motor insurance comparison websites, the CMA noted that, given that APPAs encountered considerable reluctance on the part of car insurers, APPAs may not allow them to achieve higher profit margins by raising retail prices.

²² Market share can be assessed on the basis of the percentage of transactions (either in volume or value) made on the platform at hand in the total number of transactions made by the supplier either indirectly via the platforms or directly (through its own channel).

²³ Platforms with no APPA may be reluctant to apply high commission rates, so as to protect themselves against higher retail prices than other platforms. Furthermore, if a small platform has an APPA, it can hope to gain market share by obtaining retail prices lower than those of other platforms in exchange for lower commission rates. In return, this can lead other platforms to reduce their commission rates to protect themselves against the risk of having higher retail prices, etc. Given the high transparency of Internet pricing and the platforms' inability to control retail pricing, platforms could be in competition vis-à-vis suppliers in terms of obtaining a better price guarantee (in the strictest sense). The result could lead to fairly lively competition "for the market" between platforms, provided that this did not involve foreclosure effect, which could be the case if the APPA were implemented for a platform with sufficient market power. In short, when an APPA is implemented by a platform with limited market power, it is not unavoidable to suppliers and must set commission rates that are sufficiently competitive to attract them to its platform.

2.2 *What efficiency gains are associated with APPAs?*

39. Two main efficiency gains are often put forward by companies to justify the use of an APPA:

- These agreements would protect investments made by platforms from the free-riding of other operators;
- These agreements would reduce customer search costs, thereby reinforcing inter-brand competition, i.e., between the suppliers referenced on these platforms.

40. In the context of an investigation into the merits of the case, the analysis of the possible efficiency gains of an APPA is made in the light of the four cumulative conditions for individual exemption of article 101(3) of the TFEU²⁴.

2.2.1 *APPAs can reduce free-riding*

41. Free-riding occurs when a market player turns efforts engaged by another player to its own advantage. A frequently quoted example of free-riding deals with the diversion by a pure player distributor of “additional” efforts exerted by a bricks and mortar distributor. A customer can then benefit from pre-sales services offered by an offline distributor for choosing the product (advice, testing options, etc.), and the customer may then purchase the product online from a pure player whose prices are lower.

42. The European Commission’s guidelines on vertical restraints take account of this free-riding, for example by allowing a supplier to make the acceptance of a distributor into its selective distribution network conditional upon it having one or more bricks-and-mortar points of sale²⁵(§ 54). Similarly, these guidelines consider that the protection against free-riding could be one of the efficiency gains permitted by retail price maintenance practices examined in the context of the application of article 101(3) of the TFEU (§225). APPAs, which are similar to the practice of retail price maintenance (see below), likewise make it possible to combat free-riding by preventing the “free-riders”, who offer no “additional” services leading to efficiency gains, from offering lower prices and thus capturing demand.

43. The guidelines nevertheless specify that several criteria need to be respected if the prevention of free-riding is to constitute an efficiency gain arising from vertical restraint. Firstly, the risk of free-riding must be genuine. The services provided by distributors must thus be capable of being diverted (for example, they must precede the sale) and these services must actually be necessary for the consumer to buy the product (for example, the product needs to be new or technically complex). The product in question also needs to have a certain value, otherwise customers would not bother to devote time to purchasing the product at a place other than the one where they received advice. Then the operator liable to be the victim of free-riding should not have the option of imposing promotion or service obligations on its distributors. n

²⁴ a) The agreements must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress, b) consumers must receive a fair share of the resulting benefits, c) the restrictions must be indispensable to the attainment of these objectives, d) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the product in question.

Given that the commitments proposed by Booking.com met the competition concerns that had been put to it, the Autorité de la concurrence did not perform an in-depth analysis of the efficiency gains associated with APPAs in its decision no. 15-D-06. A detailed analysis of satisfaction of the four cumulative conditions for individual exemption pursuant to article 101(3) is not appropriate in a settlement procedure, aimed at solving competition problems in a short period of time.

²⁵ See §54 of the European Commission guidelines concerning vertical restraints.

such a case, this ban on vertical restraint would lead the distributor, as a result of the free-riding threat, to cease making any “additional” efforts, something that could result in reduced economic efficiency.

44. This analysis could be applied to the online hotels booking sector, even though it differs in a number of ways from the classic distribution context described above.

45. Booking platforms offer various pre-sales services. These include, first and foremost, visibility on the Internet, linked to the auction of key-words on search engines and comparison websites and the know-how that accompanies such activity²⁶. Platforms also provide other services that facilitate comparison and choice of hotels by consumers (website usability, description of hotel in the user’s language, photographs, hotel classification, moderation of customer comments, access to consumers throughout the world, introduction of local teams responsible for managing the relationship with the hotels and hotel customers). All these services benefit to the consumers, firstly because they improve the information available to them, and second because they strengthen competition between hotels, especially by making visible those hotels which, due to limited financial resources, could not otherwise be visible on the Internet.

46. Since the platform is only remunerated by the receipt of commission at the time of the booking, namely commission paid by the hotelier, customers may thus, without additional cost, compare hotels thanks to the services provided by a platform but book their stay directly with the hotel or on another competing platform.

47. Furthermore, several factors suggest that in the total absence of an APPA there would be a real risk of free riding in the online hotel booking sector, but this risk would vary depending on the distribution channel.

48. Firstly, the “suppliers” of hotel booking platforms – the hoteliers – are also their competitors and themselves set the room rates sold on the platforms as well as the number of rooms available for each date. The supplier (the hotel) can thus easily divert the demand to its own booking channel (for example, by increasing the sale price of the rooms displayed on the platform), and thus exempt itself from paying commission. It can also divert demand to a competing distribution channel that is less expensive for the hotel because it does not provide any pre-sales service.

49. Secondly, consumers can easily free ride on the platform where they have obtained the information needed for their choice of hotel. The identity of the hotel on the platform cannot remain secret and can thus easily be found on another platform or contacted directly. The cost of staying at a same hotel can easily be compared on the Internet once the hotel has been chosen²⁷ and the high cost of the transactions – an average of several hundred euros – will encourage net-surfers to seek the best available offers. Furthermore, customers are capable of performing all of their searches and the act of purchasing at home on the Internet and the services are delivered immediately, without the delay of delivery that is

²⁶ These investments in Internet visibility represent nearly 30% of the turnover of Priceline, the group to which Booking.com belongs. Source: *Le Monde de l’économie* of 9 December 2014. Such investments are also made to a large extent by comparison sites, such as Tripadvisor, Trivago, Kayak and Google Hotel Finder. It is thus unlikely that the latter would replace booking platforms if they were to reduce their investments.

²⁷ This is unlike the private motor insurance comparison sector in the United Kingdom, where each search for insurance on a platform requires the completion of a form that will take about ten minutes.

typical of manufactured products sold over the Internet. Indeed, empirical data demonstrates the acute price sensitivity exhibited by consumers in this sector²⁸.

50. Nevertheless, the risk of free riding varies depending on competitors' identity. It is apparently greater if the hotel is in a position to offer lower prices on its Internet website a price than those shown on the booking platforms. The website of the hotel chosen on the initial platform can in fact be identified without investment from the hotel in terms of Internet visibility (while a competing platform would have to incur such investments) and a booking made on its own Internet website is not subject to commission (so that the price of a booking could always be less on a hotel's own website). Similarly, if the lower price offered by the hotel is not displayed on its own Internet website but is offered offline, customers would have to contact the hotel directly, wait for its answer and pay by phone, etc.: transaction costs will then be higher, limiting the scope of free riding²⁹.

51. The effects of free riding also need to be examined with respect to pre-sales services, taking account of the fact that the main investments made by hotel platforms concern Internet visibility (auction of keywords on search engines, pay per click on comparison websites, commission shared with other websites offering bookings). Since a hotel pays a commission to a platform only when a booking of a stay is made on the platform, the profitability of such investments depends on the number of bookings made on the platform but their actual cost depends on the number of visits to the platform (due to the "cost per click" that the platform pays to the various advertising media on which it has a presence). By creating a drop in the "conversion rate" on platforms, i.e., the proportion of number of bookings to number of visits to the platform, an increase in free riding would correspondingly reduce the profitability of these investments in terms of visibility³⁰.

52. This reduction in the profitability of investments would have a negative impact on the viability of the smallest platforms and would run counter to the aim of encouraging competition between platforms. Furthermore, the rates of commission could increase and the visibility of hotels that do not have the financial resources to get visible on Internet by their own means.

53. Yet several factors can put these arguments into perspective. Firstly, the lack of price competition between platforms linked to APPAs could lead these platforms to over-invest in Internet visibility. Secondly, the scope of the reduction in investments that would result from a total ban on APPAs would be difficult to determine. On the one hand, this might suggest that platforms whose viability is always assured would keep investing in the visibility of their platforms, even in case of a sharp increase in free riding, since it is an important factor in the competition between platforms. On the other hand, by reducing the number of key-words on which they bid or the amounts paid for purchasing keywords, platforms would appear less frequently in internet users' search results, to the benefit of hotel websites with the means to invest in the keywords abandoned by platforms to the detriment of inter-brand competition, since other hotels will then be less visible.

²⁸ On the one hand, despite the existence of an APPA implemented by all operators involved in the sector, consumers look at a large number of Internet sites before finalising their hotel bookings. On the other hand, it has been observed that non-compliance with an APPA by hotels will significantly reduce their conversion rate on platforms. A survey performed as part of the investigation of this case showed that the great majority of consumers preferred to make a booking on a hotel site if it displayed prices 10% lower than those displayed on Booking.com.

²⁹ More than 50% of customers reserving French hotels via hotel booking platforms are foreign people.

³⁰ For example, for a 4% conversion rate and a CPC of 0.50 euros, the cost of a booking for an OTA would be an average of 12.50 euros. If the conversion rate drops to 2.5%, for the same CPC of 0.50 euros, the cost of a booking increases to 20 euros.

54. Finally, the existence of efficiency gains of APPAs linked to overcoming the risk of free riding should be assessed with respect to any less restrictive competition alternatives. Depending on the goods and services under consideration, the APPAs then constitute a more or less effective alternative.

55. In the case of hotel platforms, the alternatives that are less competition restrictive than APPAs seem to entail serious limitations. These alternatives consist, for example, of attempting to reduce the risk of free riding by increasing the incentives to consumers to make their purchases through the platform. Services accompanying the sale or the after-sales services of better quality than those offered on the “free-riding” websites represent a significant additional cost and their efficiency could be reduced. In particular, in the case of hotel platforms, services likely to be provided by the platforms to increase their conversion rate (secure card payment, cancellation fee), can also be offered by hoteliers so that they will be able to reduce the risk of free riding³¹.

56. Another possibility lies in the attempt to guarantee adequate remuneration for pre-sales services performed by the distributor (for example through a fixed lump-sum fee or pay per click), accompanied, however, by additional restrictions for referenced suppliers. With respect, in particular, to pay per click, hotels are themselves reluctant to pay platforms in proportion to the number of visits rather than the number of bookings. Such a contractual scheme would encourage platforms to develop the number of visits rather than the number of bookings and their interests would thus less closely match those of the hotels (who are seeking to obtain the maximum number of bookings). Furthermore, pay per click rather than per booking would transfer the risk of visits without effective bookings from the platforms (able to mutualise the risk) to the hotels.

57. Finally, tools that can trace the bet surfer’s and require a hotel to pay a commission when a booking on the hotel’s own website follows a visit to the platform appear to be inefficient.

2.2.2 APPAs could reduce consumer search costs

58. By making prices and conditions of sale uniform across all distribution channels, APPAs could also reduce customer search costs, thus strengthening inter-brand competition. Conversely, in the absence of an APPA, the variety of prices proposed, combined with the search costs borne by the consumers to find the best price, would enable suppliers to be in less frontal competition and further reduce the incentive for consumers to use platforms for purchasing their products³².

59. The analysis of this type of efficiency gains nevertheless should be treated with some caution. For example, the European Commission does not mention them among the possible efficiency gains associated with vertical restraints. More generally, the relevance of this justification depends on the significance of consumer search costs.

³¹ This differs from sectors such as the online sales of manufactured goods, in which the platform could guarantee, for example, reliability and speed of delivery of a product to consumers.

³² See the article by Stiglitz and Salop (1977): “Bargains and Ripoffs” A Model of Monopolistically Competitive Price Dispersion”, *The Review of Economic Studies* : “*The central implication of costly information gathering is that the equilibrium will not occur at the perfectly competitive price. This is a fairly straightforward observation: suppose every firm did charge the perfectly competitive price. Then some firm(s) could raise their prices slightly without losing any customers. Consumers would be unwilling to gather the extra information needed to switch stores or brands. Clearly there is a limit on the price increases at one store that consumers would be willing to tolerate without leaving. However, since the relative store prices determine the gains from a search, then as every store raises prices slightly, the cycle of price rises by a few stores may occur again. Hence prices throughout the market may continue to rise*”.

60. In the case of hotel platforms, for example, the information provided by them and sought by consumers is not restricted to the prices of overnight stays. Even if the prices vary for the same overnight stay, consumers should continue to use the platforms, which will keep fostering inter-brand competition. Furthermore, the cost of seeking information over the Internet is relatively low for this type of product. The fact that prices vary depending on the platforms does not, therefore, constitute a major obstacle to inter-brand competition³³. Similarly, the fact that the commitments made by Booking.com in the context of decision no. 15-D-06 grant the hotels the right to offer lower prices offline or to customers who are members of loyalty programmes, should not remove the confidence of net-surfers in the reliability of the information offered on platforms, nor deter them from using these platforms³⁴.

3. How should across platform parity agreements be assessed under competition law?

61. APPAs are included in vertical agreements concluded between suppliers and distributors/resellers and as such may constitute vertical restraints within the meaning of article 1(b) of Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (hereinafter the “Vertical Block Exemption Regulation” or “VBER”)³⁵ and should consequently be analysed in the light of the VBER.

3.1 *The legal nature of the agreements and its impact on competition analysis*

62. There has been some debate over the question of the legal qualification of agreements including APPA, namely “distribution agreements”, “agency agreements” or some other type of agreement as the qualification carries important consequences on the way APPAs are dealt with by the competition authorities and on the choice by the online platforms of the business model governing their relationships with suppliers.

63. In the e-commerce sectors, several online platforms have chosen an intermediation model where prices are determined by the suppliers rather than by the online platforms. These agreements are sometimes referred to by the online platforms themselves as “agency agreements”. This includes for instance the contractual relationship between Apple and the publishers (in the e-books case), between Amazon and the sellers (in the Amazon Marketplace case) and, between Booking.com and the hotels (in the Booking.com case).

³³ Conversely, the CMA, in its aforementioned decision concerning private motor insurance comparison websites, considered that it was appropriate to authorise “narrow” APPAs, i.e., between a comparison website and insurers. If this were not the case, internet users, who need to fill in a detailed form each time they consult a comparison website, would no longer trust comparison websites for comparing private motor insurance rates, and this would reduce inter-brand competition.

³⁴ Conversely, the UK’s competition appeal tribunal overturned a commitment decision of the OFT on the grounds that commitments made by Booking.com, Expedia and the IHG hotel group would reduce transparency in the marketplace and thus inter-brand competition. In the context of these commitments, price reduction possibilities were restricted to loyalty programmes and the reduced prices were not visible on comparison websites and thus not accessible to all internet users. Conversely, commitments made by Booking.com to the French, Italian and Swedish authorities authorise hotels to offer lower prices on competing platforms, these prices being accessible to the public in general on these platforms or on comparison websites referencing these platforms.

³⁵ A vertical restraint means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty” (Article 1(b) of the Regulation).

64. In this last case, the aforementioned decision no. 15-D-06 of the Autorité de la concurrence, stressed the specificities of the model used by most Online Travel Agents (OTAs). OTAs act as intermediaries between hotels and their customers. They neither buy nor sell hotel nights and are paid by the hotels by a commission proportionate to the amount of the night(s) booked (between 10% and 30% of the retail price inc. VAT, depending on the platforms and the model chosen). The hotel, for its part, sets the amount of the nights as well as their availability. This model enables hoteliers to control the price of their nights and the number of nights available on each date and to vary them at any time³⁶.

65. This model is different from a standard distribution model, in which wholesalers (tour operators, for example) purchase nights and subsequently resell them to their customers at a price they set. This classic distribution model was for instance used by Amazon before Amazon was coerced into using the “agency contract” model by publishers (the e-books case).

66. Depending on whether online platforms are held to be “genuine agents” or “traditional distributors”, article 101(1) of the TFEU applies or not to some of the clauses included in the agreement concluded between online platforms and suppliers.

- If the agreement does not constitute a “genuine agency agreement”, the vertical restraints contained in the agreement may fall within the scope of Article 101(1) of the TFEU. The question then arises of their possible exemption in application of the VBER unless the agreement contains one or more hardcore restriction. But, precisely, retail price fixing by the suppliers may be analysed as Retail Price Maintenance (“RPM”) which, pursuant to Article 4(a) of the VBER, are hardcore restrictions removing the benefit of the VBER from the agreement as a whole. It is therefore necessary to assess whether the efficiencies resulting from these RPMs are such that the conditions of Article 101(3) are fulfilled;
- If the agreement constitutes a “genuine agency agreement”, the restrictions relating to the sale by the agent of the goods and services on behalf of the principal are legal and the agreement does not fall within the scope of Article 101(1) of the TFEU. However, it cannot be deduced from the above that the restrictions imposed by the principal on the sale of goods and services to other agents are automatically legal. The guidelines (point 18) distinguish the clauses which form an inherent part of an agency agreement (restrictions imposed on the agent to guarantee compliance with the commercial strategy set by the principal) from other clauses governing the commercial relationship between the principal and the agent. To the extent that an APPA restricts the principal’s commercial policy, it may be subject to the same treatment as that applied to the exclusivity clause referred to in the guidelines: Article 101(1) of the TFEU applies, and then the question arises of the application of a block exemption or an individual exemption.

67. The OFT and the Bundeskartellamt have ruled on the legality of contracts between hotels and platforms and considered that these contracts do not constitute genuine agency agreements. The OFT focused its analysis on Retail Price Maintenance (RPM) clauses while acknowledging the efficiency gains arising from the possibility for hotels to set their own prices for hotel nights³⁷.

³⁶ This control of the retail price by hotels is particularly appropriate, in a context in which hotel nights are of a perishable nature and can be the subject of “yield management” and where it is the hotels that bear most of the risks, especially that of unsold nights.

³⁷ OFT, Hotel online booking: Notice of intention to accept revised commitments to remove certain discounting restrictions for Online Travel Agents, 20 December 2013, OFT1514. Decision overturned by the Appeal Court on 26 September 2014.

68. In any event, as indicated above, regardless of the qualification of these agreements – distribution agreement or agency agreement – these clauses can be caught by competition law. The French legislator decided to define, in the Law no. 2015-990 of 6 August 2015 for economic growth, activity and equal economic opportunities (known as the “Macron Law”), the legal form that contracts entered into between online booking platforms and hotels must take. The Macron Law imposes the use of a “mandate contract” as defined by the French Civil Code and bans any clause designed to restrict the hotels’ freedom to grant customers any reduction or pricing advantage, of any nature whatsoever. These relevant contextual elements can be taken into consideration but are not binding upon the Autorité de concurrence in its assessment, especially considering that the concept of “mandate” under civil law may not entirely tally the concept of agency under competition law.

3.2 *The legal analysis grid of Across Platform Parity Agreements*

69. While it is important to provide manufacturers and service-providers with the possibility of organising the sale of their goods and services online as they see fit, competition law also attempts to prohibit restrictions that would excessively restrict the possibility of marketing them freely online.

70. Because APPAs have the ability to restrict economic operators from freely setting their commercial policy and from freely fixing their prices, they may constitute a restriction of competition that is prohibited under article 101(1) of the TFEU.

71. In the VBER, the general assumption is that, absent a significant market power either upstream or downstream, vertical restraints are likely to be pro-competitive as they serve efficiency purposes. As market power is difficult to measure, it is proxied by the market share of the parties. Thus, if each of the parties has a market share below 30%, a vertical restraint is, generally, supposed to satisfy the conditions set in Article 101(3) TFEU and therefore to be legal. However, if the market share of any of the parties to the agreement is above 30%, each practice must be assessed on its own merits balancing its pro- and anti-competitive effects.

72. This general assumption admits some exceptions. Some practices are qualified as hardcore restrictions (article 4 of the VBER). For them, the general presumption is reversed: even if none of the parties seem to enjoy market power, the agreement is presumed to fall within the scope of Article 101(1) of the TFEU and to fail to meet the conditions of Article 101(3) TFEU. In these circumstances the vertical restraint is presumed to be illegal, but the parties have the possibility to plea for a legal exemption in individual cases.

3.2.1 *Assessing APPAs in the same way as “Retail Price Maintenance” (RPM)*

73. As stated above, RPM is a hardcore restriction under the VBER. Like RPM, APPAs lead to retail price uniformity of the products across various distribution channels. At the very least, if APPAs are not implemented across all platforms, they lead, in the same way as minimum retail prices, to retail price floors for a particular product. Some economists³⁸ have noticed that RPM can be distinguished into two elements: a vertical element (whereby an upstream firm sets final downstream retail price) and a horizontal element (whereby the upstream firm sets identical retail prices across all downstream intermediaries/retailers). This horizontal element of RPM functions in a very similar way to APPAs. And it is precisely this horizontal component that is responsible for the main anti-competitive effects associated with RPM, while the “vertical” component of RPM would explain the main efficiency gains. Economists therefore suggest that, for the sake of legal consistency, APPAs should be treated in the same way as RPMs.

³⁸ See, in particular, the article by A. Fletcher and M. Hviid (2014). “Retail Price MFNs: Are they RPM ‘at its worst?’”. Center for Competition Policy Working Paper 14-5.

74. The Bundeskartellamt, in its prohibition decision against HRS issued on 20 December 2013, in the hotel booking sector, left open the possibility of defining APPAs as restrictions by object, due to their similarity with RPM³⁹.

3.2.2 *Assessing APPAs implemented by online platforms holding a market share above 30%*

75. APPAs implemented by online platforms holding market shares above 30% and suppliers can violate antitrust rules that prohibit restrictive business practices as well as abuses of a dominant market position considering the softening of competition between platforms and the foreclosure effect on small platforms or new entrant platforms they can produce, as shown above.

76. The Autorité de la concurrence assessed on both legal bases the APPAs implemented by Booking.com in the online hotel booking sector in its aforementioned Decision 15–D-06. The European Commission also opened an investigation on 11 June 2015 into the online sales of e-books, in order to determine whether the MFN clauses included by Amazon in its contracts with publishers actually constituted an abuse of Amazon’s dominant position⁴⁰.

3.2.3 *Assessing APPAs implemented by online platforms holding a market share below 30%*

77. The sector in which APPAs are implemented may consist of online platforms holding market shares above 30% and online platforms holding market shares below 30% or may consist only of platforms holding market share below 30%. The market share threshold of 30% above which agreements are presumed to benefit from the block exemption could allow APPAs implemented by platforms holding a market share below 30% to escape from competition law even though the widespread application of APPAs in a given sector is likely to produce anti-competitive effects (see above).

78. There are a number of legal instruments to address such situations. Apart from the possible qualification of APPAs as “hardcore restrictions” within the meaning of Article 4(a) of the VBER discussed above, a withdrawal of the block exemption is possible⁴¹. Upon individual assessment, the benefit of the block exemption might:

- either be withdrawn on the grounds that the APPAs implemented by each operator considered independently of the APPAs implemented by its competitors and their cumulative market share give rise to anti-competitive effects in the relevant market;
- or be withdrawn on the grounds of the cumulative effects resulting from the coexistence on a same market of similar APPAs whose anti-competitive effects are thereby reinforced.

79. In both cases, the Commission or the competition authority of a member state can withdraw the benefit of the block exemption (Article 29 of Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 (101) and 82 (102) of the Treaty, and recitals 13 and 14 of the VBER). The Commission may also withdraw the benefit of the exemption by regulation where parallel networks of similar vertical restraints cover over half the relevant market (Article 6 of the VBER).

³⁹ Bundeskartellamt decision of 20 December 2013, Case of B9-66/10 HRS.

⁴⁰ Press release, “Antitrust: the Commission opens formal investigation into Amazon’s e-book distribution arrangements», Brussels, 11 June 2015.

⁴¹ It should nevertheless be noted that “a withdrawal decision can only have ex nunc effect, which means that the exempted status of the agreements concerned will not be affected until the date at which the withdrawal becomes effective” (point 77 of the Guidelines).

4. Recent cases and legislative developments in the online hotel booking sector

80. Further to complaints lodged by the main French hotel unions and the Accor group about APPAs granted to OTAs, the Autorité de la concurrence accepted in its decision n°15-D-06 of 21 April 2015 the commitments offered by Booking.com to remedy the competition concerns identified.

81. In parallel to this investigation, two lawsuits were brought by the Minister in charge of economy before the Paris Commercial Court against Booking.com and Expedia based on alleged unfair practices.

82. The legislator also enacted a law, the Macron Law, which forbids price parity clauses in the hotel online booking sector.

4.1 *Anticompetitive practices: decision by the Autorité de la concurrence in the booking.com case*

83. The Autorité de la concurrence decided to pursue the commitment route in the Booking.com case. The Autorité considered indeed that a commitment procedure could achieve a rapid solution, determined by and in the market, tailored by the competition authority's assessment. This assessment must itself meet a demanding standard, that of the relevant, proportionate, effective and verifiable nature of the commitments accepted. In addition, the procedure makes it possible to monitor commitments and review them, where appropriate, as the sector evolves.

84. The procedure took place within the European context of an unprecedented enhanced cooperation procedure with the Swedish and Italian authorities and in close coordination with the Commission. The three national authorities obtained similar commitments from Booking.com which were since extended by Booking.com throughout the European Economic Area⁴².

85. The Autorité considered that removing the “wide” parity clauses while maintaining a “narrow” parity clause, justified by the free riding risk, addressed the competition concerns identified by the Autorité.

86. Booking.com undertook, for 5 years, from 1 July 2015 to:

- Remove any price parity obligations, not only with respect to competing platforms, but also off-line hotel channels, as well as rates not published or marketed online and offered by hotels.

87. The hotels may thus freely set lower rates and/or better commercial conditions on platforms that are in competition with Booking.com. They can also, in particular, offer rates lower than those displayed on the Booking.com website via their offline sales channels (on-site bookings, bookings by telephone, fax, e-mail, instant messaging, travel agency bricks-and mortar points of sale, etc.), as long as these rates are not published on the hotel's own Internet website. They can also offer rates that are lower than those displayed on the Booking.com website to customers benefiting from loyalty programmes.

88. On the other hand, one restriction continues to be applied to hotels: they cannot market to the public through their own online channels (their own Internet website or mobile phone applications for example) rooms at a rate lower than that offered on Booking.com.

- Hotels are no longer being forced to offer conditions that are at least as advantageous as those granted to competing platforms and on hotel offline channels.

⁴²

<http://www.autoritedelaconcurrence.fr/pdf/avis/15d06.pdf>

89. Hotels can thus offer more advantageous conditions than those offered on Booking.com other online booking channels and through their own online channels.

- Complete removal of the availability parity obligation. Hotels can thus allocate Booking.com a number of rooms that is fewer than that offered to other platforms and/or through their own channels.
- Booking.com will not implement measures equivalent to the parity obligations that Booking.com has committed to abandon.

90. In its decision, the Autorité de la concurrence considered that Booking.com's commitments should improve competition between platforms and allow the commissions levied on the hotels to fall. They also give hotels some countervailing power by considerably improving their commercial and pricing freedom; while maintaining at the same time the OTAs' (Online travel agents) economic model which provides consumers with powerful research and comparison services. Furthermore, the Autorité de la concurrence will carry out an assessment with the participation of both parties on the effectiveness of the commitments by January 1st 2017 at the latest. This assessment led by the Autorité de la concurrence should make it possible to establish whether the implemented commitments have allowed competition to be boosted significantly and in particular whether they led to a fostered competition between platforms, to a reduction in commission levels and a broadening of competitive offers.

91. The Autorité de la concurrence considered that a "narrow" price parity obligation was an appropriate and balanced tool to drive competition in the hotel online booking sector while still protecting the investments made by the online booking platforms. The approach adopted by the CMA in the private motor insurance market in the United Kingdom is substantially similar⁴³.

4.2 Restrictive practices: procedure brought by the minister before the commercial court

92. On 2 October 2013 and 6 May 2014, the Minister in charge of the economy (DGCCRF) brought a lawsuit against Expedia and Booking.com before the Paris commercial court on the legal basis of articles L. 442-6 I 2° (significant unbalance in the rights and obligations of parties) and L. 442-6 II d (automatic grant of more favourable conditions to competitors) of the commercial Code.

93. The two lawsuits against Booking.com and Expedia are not only about price parity clauses but also availability parity clauses, prospection, intellectual property rights, contractual liability and hotels ranking by Booking.com. The lawsuit against Expedia concentrates on its part on price, conditions and availability parity clauses.

⁴³ In the UK private motor insurance sector, the CMA, adopted on 18 March 2015, a final decision in which it considered that the benefits of narrow MFNs (where an insurer and price comparison website agreed that the insurer would not offer the same policy at a lower price on its own website as it offered through the price comparison website) may offset the reduction in intra-brand competition between the insurer and the price comparison website. Thus the price comparison websites and providers of private motor insurance may continue to enter into narrow MFN arrangements. However, the CMA also considered that wide MFNs (where an insurer and a price comparison website agreed that the private motor vehicle insurance policy offered by the insurer through the price comparison websites will not be sold at a lower price on other price comparison website) are unlikely to provide any significant beneficial effects over and above those provided by narrow MFNs. Thus the CMA prohibited wide MFNs and behaviour by large price comparison websites that seeks to replicate the effects of wide MFNs across platforms.

94. The Minister requested the judge, in particular, to consider these clauses void and to order the termination of practices including such clauses for the future.

95. Both lawsuits are still on-going and do not proceed at the same pace.

96. In the Minister vs. Booking.com case, legal proceedings are in progress.

97. In the Minister vs. Expedia, the Paris commercial court issued its decision on 7 May 2015. The court confirmed in part the Minister's analysis insofar as it declared void the clauses allowing Expedia to automatically get the best conditions regarding prices and special offers in its agreements with hotels.

4.3 *Legislative initiative with law no. 2015-990 of 6 August 2015 for the economic growth, activity and equal economic opportunities*

98. The Law no. 2015-990 of 6 August 2015 for the economic growth, activity and equal economic opportunities provides that any price parity clause is forbidden.

99. The article 133⁴⁴ provides that the relationship between online reservation platforms and hotels is now defined as a "mandate contract" and that hotels remain totally free to grant their customers any reduction or rebate, and any clause to the contrary shall be deemed null and void.

100. Should an online reservation platform operate without a written "mandate contract" or should a price parity obligation be included in the contract, a substantial fine of up to EUR 30 000 or EUR 150 000 may be imposed. A fine of up to EUR 7 500 or EUR 30 000 may be imposed if the compensation of the agent is not freely set by parties.

101. The law applies to all online hotel booking platforms.

⁴⁴ Article 133 of law no. 2015-990 of 6 August 2015 on growth, activity and equal economic opportunities is codified at articles L. 311-5-1 to L. 311-5-4 of the Code of Tourism.