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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

**Summary Record: ANNEX TO THE SUMMARY RECORD OF THE 124th MEETING OF  
THE COMPETITION COMMITTEE HELD ON 27-28 OCTOBER 2015**

**Summary of Discussion of the Hearing on Across-Platforms Parity Agreements**

**28 October 2015**

**Paris, France**

*The attached document is an annex to the Summary Record of the meeting held on 27-28 October 2015.*

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**By the Secretariat**

**1. Introduction by the Chairman**

The Chairman, Mr Jenny, began the meeting by explaining that the session would focus on agreements between suppliers and retailers that specify a relative relationship between prices of competing products or between prices charged by competing retailers selling the same product. He acknowledged that the terminology is not established but explained that for today we will refer to these agreements as Across Platforms Parity Agreements, or APPAs.

He noted that this was an example where theory developed alongside cases. To help consider the issues raised by these agreements, the Chairman therefore introduced four experts: Professor Morten Hviid of the Centre for Competition Policy at the University of East Anglia; Dr Matthew Bennett from Charles River Associates; Antoine Winckler, Partner in the law firm Cleary Gottlieb Steen and Hamilton, and Professor Ariel Ezrachi of Oxford University.

The Chairman described APPAs as being characterised by two elements: (i) a vertical element, because they involve firms at different levels in the value chain, and (ii) a horizontal element, because they link prices of competing goods and/or of competing retailers. Another important peculiarity is that the parties to the agreement are suppliers and retailers, while final buyers are not, and are often not even informed of their existence, despite the agreement concerning the final price that they pay.

The Chairman said that the hearing had five goals. Firstly, it would seek to identify the key competition concerns with these agreements and the possible efficiency benefits of these agreements. Secondly, it would consider the extent to which these effects materialise. Thirdly, it would look at how these effects can depend on specific details of the agreement (for example the scope of the agreement or the structure industry in which they apply). Fourthly, it would hear about how these agreements are dealt with by competition authorities. Finally, it would identify under which conditions these agreements should be considered anti-competitive and prohibited.

**2. The growth of APPAs**

The Chairman then invited the delegate from Australia to report on the findings relating to APPAs within the Special Project conducted by the International Competition Network (ICN) on Online Vertical Restraints.

The delegate from Australia welcomed the timing of this hearing as a great opportunity to further explore issues raised by the special project, and identified this as a great example of co-operation between the OECD and the ICN. The special project had defined an APPA as a vertical agreement between a seller and a platform in which the seller agrees to charge a price on that platform that is no higher than the price the seller charges on other platforms. The delegate described these as a new form of vertical restraint in which a horizontal element links the retail price on one platform to the retail price on another platform (rather than linking wholesale prices as in a standard Most Favoured Nation agreement).

The delegate said that a survey of 130 members received 47 responses and found that while in most countries APPAs were subject to the same legal framework as other vertical restraints, a significant minority of agencies (23 %) reported that APPAs were not covered by their law. One agency said they were prohibited under a per se rule. Agencies reported that APPAs were an increasing concern though relatively few investigations have occurred thus far (8). The investigations typically involved conduct in industries undergoing disintermediation, carried out by large multinational companies that span several jurisdictions.

The conclusion was that the potential efficiencies and competition implications were generally less well understood than for other types of vertical constraints, and that there was an increasing concern over APPAs amongst agencies, as well as a desire to be able to better understand and analyse them. The timing of the roundtable was therefore helpful in contributing to that understanding.

### **3. The potential anti-competitive effects of APPAs and the efficiency defences**

The Chairman then invited Professor Hviid to present an analytical view of the effects of APPAs.

Professor Hviid said that the use of these restraints was increasing and that he would focus on the set of cases in which a platform retailer says to a producer: “you must not sell your goods at a lower price or more enticing conditions through another retailer.” He explained that these might be interpreted as either a classic price guarantee, or a variant of a most favoured nation clause. However he said that doing so might not be helpful. He explained that there is an extensive literature on the potential efficiencies of low price guarantees however most of those potential efficiencies do not carry over to APPAs since consumers may not be aware of the agreement. Similarly he explained that the horizontal element is not really a Most Favoured Nation (MFN) clause since it is not requested by, or agreed with, the customer in the way an MFN is, indeed the customer is often unaware of its existence. Rather it is requested by and agreed with a third party platform. It is therefore the market power of the platform that might be relevant to the analysis, rather than the position of the customer (as would be the case in a standard wholesale MFN case). Moreover many of the well-known MFN defences do not apply to APPAs. However he suggested that one MFN defence that may be relevant is the resolution of a potential free-riding problem.

Professor Hviid identified that in seeking to understand the effect of an APPA it was important to be aware of what was going on elsewhere. As examples he identified: a) moves from wholesale to agency business models; b) changes that release consumer from “lock-in” to a specific technology, and c) complementary products. For example he noted that price comparison websites are not just selling comparison and booking services, but are also collecting valuable big data on consumers and selling product evaluation services. Similarly he noted that the oddity in the book market of publishers not welcoming a retailer discounting their product and thereby growing the market for their product, needed to be seen in the context of the impact on the market for hardback books.

In considering the potentially harmful effects of APPAs Professor Hviid identified both direct and indirect effects. In regards to the indirect effects he said that APPAs act as the worst element of Retail Price Maintenance (RPM). This is because RPM and APPAs share the same explicit vertical element, but APPAs make explicit the horizontal price parity that is common but only implicit in RPM. He therefore recommended that APPAs be treated no less harshly than RPM. He also identified that APPAs could indirectly harm consumers by facilitating a move to an agency model which might raise prices if the seller market is less competitive than the retail market.

In regards to direct effects he explained that in the absence of an APPA, a platform that increased its commission would lead to the seller increasing the price it charged on that platform (to reflect the increased cost of selling there). This could reduce the sales made on the platform and hence discourage the platform from raising its commission. In contrast where the platform holds an APPA the seller would not be able to change the price on the platform relative to the price on other platforms. This would therefore eliminate the risk that increasing commission would lead to a loss of volume to a rival platform. Notably it would also eliminate the incentive for platforms without APPAs to undercut the commission charged by platforms with APPAs (since this would not earn them additional volume). Therefore prices of those with and without APPAs would be likely to increase.

Professor Hviid identified that APPAs may also deter entry via a low cost strategy (which might be particularly important in markets with network effects). However he noted that the excess profits generated by an APPA might also attract excess entry by high cost entrants that would not need to compete on price but rather on non-price factors (eg branding, quality).

The presentation concluded by noting the importance of testing whether the free-rider problem was an existential threat to all platforms, and analysing the magnitude of the anticompetitive effects. He noted that competition enforcement had been far ahead of economic theory on the effects of APPAs but that the theory that was emerging generally supported the agencies actions against APPAs. He said there was a strong case within the context of EU law to make APPAs a violation by object, particularly since an exemption was available to any firm that was able to demonstrate that APPAs were indispensable to resolving the free rider issue.

The Chairman noted that the European Union had dealt with a number of cases involving APPAs and so asked for their views on these types of agreement.

The delegate from the European Union suggested that APPAs were in part a new type of restriction with the potential to have familiar anti-competitive and efficiency effects. The delegate explained that there were a number of different categories of APPA. The first might, for example involve a producer requiring supermarkets to set a maximum price for its product that is linked to the price it charges for a rival brand on the supermarket's shelf. The second might be a shopping mall or platform that agrees with the retailers using the mall or platform that the latter do not sell the product at a lower price or better conditions at any other shopping mall or platform. In the third category the online platform operates as a distributor, the example here being the hotels case or the eBooks case, where the platform requires from the supplier that the latter's product is not found on any other platform or on the supplier's own website at better conditions. The delegate suggested that the hearing should focus on the last type of APPA. In these cases the concern is that the agreement might soften competition between platforms and/or foreclose entry by rival platforms. The delegate remarked that what are usually called intra-brand competition restrictions produce these potentially important anti-competitive effects.

The delegate said that APPAs arise for three reasons. The first reason is that online sales channels have shifted power from manufacturers to retailers. The second reason is that the Internet allows firms to quickly check and monitor adherence to the agreements. The third reason is that selling e-products makes it easier to act as an agent since there are no contract-specific risks such as transport or stocking costs.

The delegate said that there was an important difference between a commercial agency relationship under EU competition law and a genuine agency relationship and that being a commercial agent does not carry any exemption from the EU competition rules. In a genuine agency relationship the principal should cover all costs and risks. While online sales might involve less contract specific costs such as transportation, market specific investments were still likely to be made by the agent rather than the principal. The delegate said that while the question of whether a platform is a genuine agent under EU competition law can only be assessed on a case-by-case basis, but that at first sight it seemed difficult to find that online platforms were genuine agents.

The delegate identified that APPAs may also result in the use of RPM. For example, a producer in order to ensure that platform A has the best price needs to control the pricing of its product on other platforms. One way of doing so could be the use of RPM which is a hardcore restriction under EU competition law.

While the e-commerce sector is rapidly expanding, cross-border e-commerce is doing less well and this threatens to undermine the strength of the single market. The European Commission is therefore in the process of undertaking a sector inquiry into e-commerce which aims to identify restrictions that hamper cross-border e-commerce and will make its preliminary report in mid-2016.

The Chairman explained that the hearing would indeed focus on APPAs imposed by platforms. For the benefit of those not familiar with them he briefly set out the background on two online travel agency cases in Europe, namely HRS and Booking.com.

HRS is an online German travel agent where consumers can find and compare information on a wide range of hotels and book rooms. HRS had imposed on all hotels wishing to appear on its website a clause that required that they did not offer anywhere else better booking conditions (lower prices, maximum room capacity, most favourable booking and cancellation conditions) than the one offered on HRS (i.e. on other online travel agents or on their own website and through their offline booking facilities). The Bundeskartellamt prohibited the use of these agreements. The decision was confirmed after an appeal.

Booking.com is an online travel agent (OTA) where consumers can find and compare information on a wide range of hotels and book rooms. Booking.com had asked on all hotels wishing to appear on its website a clause that required that they did not offer anywhere else a better price than the one offered on Booking (i.e. on other OTAs or on their own website and through their offline booking facilities). The agreements imposed a similar parity also for other booking conditions offered by hotels, such as number of rooms available. When competition agencies around Europe started scrutinising these clauses and expressing concerns about their possible anticompetitive effects, Booking.com argued that these clauses were necessary to protect its investment in the facilities offered on its website. It offered to replace the agreements with a narrower one that only required the hotel not offer better booking conditions

(including the price) on its own website than the ones offered on Booking.com. This implied that hotels could offer different/ lower prices or more rooms on other online OTAs, as well as through its offline and loyalty programme sales channels. Sweden, Italy and France accepted these commitments, on the ground that the narrower clause allowed Booking.com to protect its investments while limiting considerably the impact of the price parity on competition. They thus closed the case. Other European countries following these changes in contractual terms, which Booking.com applied across Europe, closed or did not open proceedings against Booking.com. The Bundeskartellamt was not satisfied and preliminarily concluded that these commitments would not address concerns about a reduction in competition and that Booking.com had not proved that the narrow agreement was indispensable to protect its investments.

The Chairman began by asking Germany why their assessment of the indispensability of the APPA in dealing with the risk of free-riding differed from that set out by Sweden in its contribution. In particular Sweden had considered the viability of different business models and decided none were viable while Germany said the parties had not proved that they were not viable.

The delegate from Germany said that they had found that the APPA in the HRS case was not indispensable to the claimed efficiencies since alternative remuneration models could have solved the free-riding problem without restricting competition in the way that it was restricted by the APPAs. The delegate noted that the Booking.com case is still ongoing in Germany but that the Bundeskartellamt has issued a statement of objection with regard to the narrow MFN clause that Booking has offered.

The delegate made the point that while different outcomes had been reached in different European jurisdictions, these had applied the same theory of harm. He noted that the hotel sector is quite fragmented in Germany, two thirds of overnight stays in Germany happen in hotels with less than 20 rooms and that is quite different from other European countries.

The delegate confirmed that the Bundeskartellamt had concluded that OTAs could use other remuneration models to prevent free riding. First, it was not completely unreasonable to say that clients would be ready to pay a subscription fee. Second, since hotels benefit from being present on a platform that generates more turnover, it was not unreasonable to think that hotels would be willing to pay a fixed fee for being present on the platform. In particular, the delegate said that this fixed fee could be relatively small compared to the long-term benefits in terms of additional booking.

The delegate said HRS had argued that no other online travel agent was using a different remuneration model, that the commission model was the most efficient, and that therefore the assessment of less anti-competitive alternatives should be limited to this model. The Bundeskartellamt held that a commission model might be more efficient but that this would not mean that OTAs should not compete on commissions. The delegate said that the commission model currently in use might be the best model for Online Travel Agents (OTAs), but that this might be the case precisely because they were able to use APPAs to increase prices. The delegate suggested that if a competition agency prohibited the APPA (as Germany had done in the HRS case in 2013) it was plausible that OTAs would adopt other remuneration models that would prevent free riding. For example different models are used in Germany by other online platforms such as intermediation services in real estate where there is an online platform with a market share of 50% that requires users to pay a service fee. The delegate also suggested that two-part models that include a lump sum paid by the seller plus a commission might be feasible.

When asked whether the Swedish assessment of indispensability was wrong the delegate from Germany said that neither finding was wrong. Rather each authority had undertaken an assessment and there were different conditions in the different countries. It was therefore not surprising that their assessments reached different outcomes.

The Chairman noted that the UK's contribution said that it is not the case that narrow APPAs are incapable of giving rise to competition concerns that may warrant investigation. He said that it went on to say that the CMA is keeping under review the effects of remaining agreements held by Booking.com and Expedia. He suggested that in effect the UK was saying, "I don't know if it's proportionate." Given that uncertainty he asked the French competition authority how they arrived at the idea that the balance between potential anticompetitive effects and potential efficiencies was right for the narrower APPAs that were proposed by Booking.com.

The delegate from France said that in France the authority had accepted a commitment to eliminate the broad APPAs and maintain the narrow APPA. The decision was based on two factors. Firstly, that the narrow APPA restores competition between platforms. Secondly removing narrow APPAs risked reducing efficient investment in the platform given the high rate of free-riding. The delegate emphasised that these clauses are relatively new and the industry is rapidly evolving. The delegate said the authority planned to conduct an ex-post assessment of the effectiveness of the commitments after 18 months.

The Chairman asked firstly whether the French authority had considered whether there were alternative payment models available that would address the free-rider issue without requiring an APPA. Secondly, he asked whether there was any information on the reasoning of the French legislature, which had taken a different position from that of the authority.

The delegate from France said that all the alternative models had been looked at and it had been concluded that they all had difficulties. As a result, the commitments offered had seemed a reasonable solution. For example the delegate was concerned that a pay-per-click payment model would discourage hotels from using the platform since they would impose too much risk upon the hotels.

The second delegate from France described the reasoning of the French legislature. The delegate said the minister felt that the narrow APPA did not allow the hotels to have an independent pricing policy. The delegate said the minister was not convinced by the argument that the narrow APPA would allow competition between platforms. This was because the hotel might not want to create this competition if it meant that it had to set higher prices on its own online channel. In regard to the potential for lost efficiencies, the delegate said these risks were unproven and that a risk of free-riding was inherent in any Internet sales. In any case the delegate said that 78% of independent hotels in France do not have a website and so customers are unable to free-ride and book on the hotel's own website. Finally, the delegate noted that platforms offer additional services including presentation in multiple languages and so it was felt that a hotel website setting prices 6 or 7% lower than the platform would not be sufficient to induce free-riding. Finally, by prohibiting all APPAs it was felt that the legislation gives the hotel full control of its pricing policy.

The Chairman asked if the delegate from Sweden wanted to comment. He also asked whether the delegate from Sweden agreed that the competitive effect of APPAs can be different depending among other things on the habits of consumers, and that these habits also affected the strength of the free-riding concern. He asked whether they had studied the behaviour of Swedish consumers and whether this had helped them to reach a view on whether the narrow APPA was proportionate.

The delegate from Sweden said that APPAs had potentially restrictive effects, but that platforms created significant consumer benefits in terms of reduced search costs. The delegate said the authority had therefore wanted to see if there were ways, other than prohibiting APPAs that could remove the restriction on competition. The delegate said that anticompetitive restrictions were identified and the parties proposed remedies but that the authority did not want to tell the parties what type of model they should adopt. The delegate said the authority was satisfied with the outcome in this case.

The second delegate from Sweden said that the commitment to narrow the APPA makes it contractually possible for competing OTAs to get a better room price from hotels, for instance by offering hotels lower commission rates. However, in response to market testing, many hotels responded that the narrow APPA risked becoming a de facto wide APPA. This was because hotels that wanted to price differentiate between OTAs while restricted by a narrow APPA would need to price higher on their own channels than at least one OTA. The hotels said this would prevent them from price differentiating. Booking.com then further narrowed the APPA to allow hotels to set lower prices on their own offline sales channels.

The authority analysed the hotels incentives to price-differentiate between OTAs. It found that these incentives depended on the hotel's elasticity of demand and how lost sales would be reallocated across different sales channels. On the basis of that analysis they concluded that hotels would price differentiate and so Booking.com's revised commitments were accepted.

The delegate said that the robustness of the incentive analysis was tested using different assumptions about how sensitivity consumers were to price differences between OTAs and the hotel website, and between different OTAs.

The Chairman noted that the contribution from BIAC suggested that APPAs produce unambiguously positive effects. He asked BIAC whether this meant that APPAs were indispensable to solving the free rider problems.

The BIAC delegate said that an assessment on the facts of each case is necessary to determine whether in any given case APPAs are or are not indispensable to resolve free rider concerns. However, the delegate also said that there are strong indications that narrow APPAs could be indispensable and that there may not be alternatives.

The delegate said that BIAC were very concerned about diverging outcomes in Europe and believed that this might call for enhanced co-operation within the European Competition Network (ECN), possibly led by the EU. The delegate was concerned that different agencies had considered the same theory of harm but differed on whether to characterise a restraint as per se violations or as a violation by effect. The delegate suggested that not enough is known about the effects of APPAs to adopt legislation and that there is no room for authorities to adopt a per se approach.

The Chairman noted that the authorities had conducted the effects-based analysis that BIAC favoured and that this approach had led, as was entirely possible, to different results in different countries. He suggested that these differences were not a sign of a regulatory failure if they were based on objective circumstances that differ from country to country. In looking at the potential differences in these objective circumstances, the Chairman noted that Germany had said they had smaller hotels compared to other countries, but that Italy's submission said they also had smaller hotels. He also identified that Sweden had not looked at consumer behaviour while the Netherlands considered that it was important to do so. He suggested that the French legislation was a failure of advocacy. The Chairman then asked Hungary what questions it was asking in its sector inquiry and what it had learnt so far.

The delegate from Hungary explained that in 2013 the authority initiated a sector inquiry on the online room reservation market of the tourism sector with a particular focus on APPAs. It collected publicly available data, sent information requests to platforms and hotels, and conducted a consumer survey. The survey sought to understand Hungarian consumers' decision-making process and preferences, specifically those people who had recently booked accommodation.

The delegate said the survey found that most travellers used the Internet to book their accommodation based on information found on hotel websites and OTAs (60%). It found that domestic travellers prefer to purchase directly from the accommodation provider by booking on their webpage or calling them directly. Booking via an OTA was the third option. In contrast, those travelling abroad preferred to book on the accommodation providers' webpage, or through an OTA. Traditional offline travel agencies were also popular with those travelling abroad.

The delegate said that the survey found that three quarters of Hungarian travellers compare the search results of different OTAs at least occasionally with one quarter of them making the comparison every time. Three quarters contacted the accommodation provider directly using information found on an OTA, and half contacted the accommodation directly to try to negotiate prices from time to time. Price negotiation was more common among people with higher education and those that were heavy travellers. The delegate suggested that this shows that the OTAs fear of free-riding on their investments may be justified.

#### **4. The differences between wide and narrow APPAs**

The Chairman said that the survey results in Hungary suggested that the efficiency benefits of the APPAs were relatively small, for example the APPAs did not appear to be successful in preventing free-riding. He then asked Prof. Ezrachi whether there is a major difference between the narrow and the wide APPAs. In particular, he asked whether a number of narrow clauses led to the same effect on competition as a wide clause, and hence whether a lenient approach to narrow clauses risked leading to strong anti-competitive effects.

Professor Ezrachi noted that he had worked on this topic for Slaughter and May, who act for Booking.com and that my comments today do not reflect the opinions of Slaughter and May or Booking.com. He said the rationale for APPAs was often to resolve the hold-up problem, to come up with a tool that will enable investment in platforms, for example in demand enhancing features. He then identified that the existence of a platform creates a number of benefits for consumers (easier search) and hotels (risk sharing). He explained that search engines currently charge for search terms and per-click, therefore there are significant economies of scale for a platform purchasing search terms such as "Paris hotel" since the platform has a much better chance of converting that click into a reservation at

one of the hotels on its platform, than any individual hotel does. He suggested that an agency relationship therefore helped the hotel to reduce its risks. He then asked whether the benefits of APPAs justify the costs, and suggested that given the complexity an analysis of the facts of each case is necessary.

He suggested we there are two types of APPA, narrow and wide. In relation to wide APPAs he noted that there were four common theories of harm. The first is that price competition will be softened. The second is than entry is limited. The third is price uniformity. The fourth is that innovation will be limited. In contrast, where there are narrow APPAs, he suggested there would be incentives for platforms to compete with one another to reduce commission and innovate, and for low cost entry. However, he said there remain possible harmful effects. The first is that a multitude of narrow APPAs will have a de facto effect of a wide APPA. This will depend on whether the supplier has an incentive to set prices on platforms that undercut the price it sets on its own website. This will in turn depend on the volume of direct sales that it makes and the price sensitivity of customers that purchase directly. He cautioned however, that in the UK car insurance case suppliers with large volumes of (inelastic) direct sales did not list on the platform. The second concern is that the narrow APPA still eliminates competition between a platform and the supplier's website. He argued that each of these might be resolved by further narrowing the APPA, for example by removing offline sales from the scope of the agreement.

Prof. Ezrachi ended by noting the intervention by the French legislature was interesting because unlike other state interventions to promote employment or other social values, this action had been taken with the intention of improving competition. This overlap meant that in some way the state's analysis was being favoured over the analysis of the competition authority. He suggested that having done so it may have missed the target since it would lead to smaller hotels finding it more difficult to access customers.

The Chairman noted that the Italian contribution suggested that a narrow APPA was proportionate given the structure of the hotel market in Italy. However he pointed out that the structure in Italy was similar to the structure in Germany, who reached a different conclusion, and that it was quite different from Sweden, who reached the same conclusion. He therefore asked how the structure of the hotel market justified the decision that was taken.

The delegate from Italy explained that in Italy the hotel market was fragmented (as in Germany) but online reservations were not yet common. This meant that many customers did not search online, so for these customers there were no free-riding concerns. Similarly the delegate added that customers in loyalty programmes were also likely to approach the hotel directly and so for these customers there would also not be a free-riding concern. For other customers the free-riding concern did exist. The delegate suggested that the view of the Italian authority was that OTAs should be able to protect themselves against free-riding from other websites while ensuring that customers could still get better deals offline. This explained why the commitments that it accepted had ensured that offline prices were not included within the narrow APPA.

The Chairman then asked the UK what approach they had taken in their analysis of the private motor insurance market.

The delegate from the UK noted the recent experience of the UK competition authorities in this area: they had 1 at parity clauses used by Amazon Marketplace and that these had been removed by Amazon. The delegate said they had also examined agreements in the hotel online booking sector but had looked at those as RPM. They had closed the case while continuing to monitor the impact of the narrow MFN clauses in the market. The delegate explained that the UK had also conducted an investigation of the market for private motor insurance as a whole under its market study powers, and that one element of that investigation had been the prevalence of APPAs. The delegate reported that the use of price comparison websites (PCWs) in motor insurance had been growing rapidly and that a quarter of purchases, and over a half of new purchases, now occurred via PCWs. The delegate said that PCWs had had a beneficial effect for consumers by facilitating greater competition between different insurance provides and reducing search costs but that there were concerns about the use of APPAs (or retail MFNs as they are sometimes known). A high degree of single-homing was identified since few customers used more than a single PCW.

The delegate said that in that context, there were concerns that wide APPAs: softened price competition; discouraged new entry; and discouraged innovation that would benefit insurers, for example better fraud prevention mechanisms. In contrast, it was considered that narrow APPAs would not have the same anticompetitive effect in this market. On

the one hand these narrow agreements reduced competition between the PCW and the insurers direct channel. However the investigation found that the direct channel imposed little competitive constraint on the PCWs and so it was felt that even a network of narrow APPAs would not have a significant effect.

The investigation considered whether the APPAs were necessary for the viability of the PCWs. There was a concern that without a narrow APPA the customers would not trust that the PCW was offering an accurate price comparison and would stop using it. The delegate said that the investigation had not been able to identify other ways in which the PCW could be confident that insurers set prices on its website that were as competitive as those that the customer was most likely to see on the supplier's website (PCWs currently operate an agency model and do not currently set the prices that appear on their own website). The delegate said the authority had considered whether the agreements delivered additional investments by resolving a free-riding concern. It considered alternative ways to resolve these problems, for example anonymous results or building brand loyalty. It did not think those were credible. However, it thought that alternative pricing mechanisms might be credible. Furthermore it might also be credible to develop a tracking mechanism allowing a PCW to identify to an insurer that a customer purchasing directly had found the option on its website. However, it decided that they did not need to investigate these further given the expectation that the narrow APPAs would not create anticompetitive effects.

As a result, wide APPAs were banned. Behaviour by large PCWs that would have equivalent effects was also banned (for example threats to delist those insurers that priced below an agreed level). Narrow APPAs were allowed to remain in place and the authority was currently waiting to see what effect that its actions would have on prices.

## **5. The magnitude of the anti-competitive and beneficial effects**

The Chairman then asked Dr Bennett about the size of the effects that have been discussed, in particular when are APPAs likely to have large anticompetitive effects and when might they have large efficiency benefits?

Dr Bennett began by saying he had worked for the complainant on the Amazon case and for the defendant on the hotels case. He said CRA had also acted on US cases but he did not have any knowledge of those.

He said it appeared that everyone agreed that there was a significant free rider issue, the question was whether APPAs were indispensable to resolving it, and whether the benefit it delivered outweighed the anticompetitive effects of the agreements. When considering indispensability of the agreements he said that it was important to remember that platforms need to attract consumers and hotels and so charging a fee to use the platform might reduce the use of the platform and so reduce the value of the platform.

He said it appeared that everyone also agreed there was some degree of anticompetitive harm. For example, price competition is softened, and low cost entry is not possible. However he noted that higher cost entry, or entry where you compete on quality instead of price is made easier. This meant that authorities needed to decide what kind of entry they value most.

He said the key point he wanted to make was that the magnitude of harm depends on whether it is credible for sellers to delist. If sellers can delist from platforms, then that ability to delist will preserve some degree of competition. If platforms are highly substitutable for one another then the threat to delist becomes more credible (at the same time if they are not substitutable at all then the APPA will do little harm). Authorities should therefore be looking for platform's with market power since it is that power that makes it difficult for sellers to delist. He suggested that where a platform does not have market power it is likely that the harm is relatively small, and so might be outweighed by efficiencies. He suggested that the block exemption for vertical agreements with a market share less than 30% might therefore be in the right place.

He argued that a network of narrow APPAs in which no platform has market power was unlikely to be stable since there would be an incentive for platforms to deviate and charge lower commissions. Therefore it would be necessary in those cases where multiple platforms without market power held narrow APPAs, to look for tacit or explicit agreements.

In considering remedies he said he thought there was a strong economic justification for saying that wide APPAs are likely to be more harmful than narrow APPAs. He also addressed the question of APPAs that apply to offline sales. He noted that a number of countries have said that offline does not compete with online, in which case an APPA

cannot reduce competition. He added that APPAs that cover offline sales increase the incentive for sellers to delist. As such, he said there were circumstances in which narrowing the scope of the APPA would actually increase prices. Finally, he considered whether we should impose remedies on all platforms or only those platforms that do not have market power. In particular, he suggested that removing the APPAs of the platforms with market power should give smaller platforms an incentive to reduce their commission.

Prof. Hviid noted firstly that price comparison websites started by scraping the web for prices. This ability to scrape prices means that if a seller wants to delist from a platform it can prevent customers purchasing on that platform but it cannot remove its price listing on the platform. Secondly, he noted that willingness to multi-home suggests that what really matters on efficiencies is whether the free-rider problem destroys the viability of a platform intermediary. Therefore the important thing is whether a platform intermediary survives or not, and hence whether search costs are reduced and competition between sellers is stimulated or not, he therefore suggested that beyond this, whether or not the platforms make much money is not the concern of a competition authority.

Dr Bennett argued that authorities should care about how much is invested and not just whether there is, or is not a viable platform. He also suggested that if there are platforms where consumers are single homing then those platforms would have market power and that would be a concern.

The delegate from the European Union asked whether Dr Bennet thought there was scope for free-riding between platforms, rather than simply between the platform and the seller?

Dr Bennett replied that in hotels he found that platforms worried slightly more about free-riding by hotels than by other platforms, but that free-riding by platforms was still an important element. He said it came down to where you see competition as being more important.

The Chairman asked whether single-homing wouldn't suggest that there was no competition to be lost and hence the anticompetitive effect of the clause would have to be less important.

Dr Bennett replied that there may be some consumers that single home, and there may be competition to be the platform that they single home with. At the same time, there may be some that multi-home and there may be competition to be the platform on which they place their reservation.

Professor Heimler suggested that there might be a link between the commission and the free-riding, for example more free-riding leading to higher commission fees. This would mean hotels also benefit from reduced free-riding. Professor Heimler asked why the ability of platforms to offer loyalty rebates (for example the 10<sup>th</sup> room booking being free) was not sufficient to maintain competition.

Dr Bennett said there is a large literature on rebates and whether they are efficient. For example, whether the money made through a higher commission is then passed back to consumers via rebates.

Prof. Hviid said that there is a real possibility that the rent extracted as a result of the APPA is dissipated in over-investment in features and rebates. He noted that these rebates go to some people and not others, thereby creating distributional effects.

The Chairman asked the delegate from the Netherlands to explain what criteria they would use to assess future cases.

The delegate from the Netherlands said that the first thing the authority would look at is the degree of market power of the platform. It would look for example at consumer behaviour as if there's a large customer base that's single-homing, then the platform will have market power since sellers that want to reach this group need to go through this platform. It would also look at the market power of the sellers involved; the characteristics of the market (for example the degree of product differentiation); and whether there are other ways for platforms to attract consumers. The delegate also identified that the authority had discussed the OTA case with the Dutch hotel association some years ago when booking.com had just a small share of the market. However, it considered that if a decision is taken at one point in time it is important to monitor developments in the market to make sure that decision remained the right decision.

The Chairman then asked the US if they had cases looking at APPAs, and if so how they approached them.

The delegate from the United States said the issues were very complex. The delegate suggested that to understand the competitive effects means examining the facts of the case, the agreement and the market in which the agreement takes place. The delegate pointed to an example in which they challenged an MFN agreement that a health insurer had agreed with a large number of hospitals. This specified that the insurer be charged no more, and in some cases 40% less, than any other insurer. This difference was so large that some competitors were effectively excluded from the market. The delegate agreed that parity clauses could also enable investment and therefore recommended that the facts of a case be examined in order to determine whether enforcement was required

## **6. Legal Issues linked to the assessment of this type of APPAs**

The Chairman then asked Mr Winckler to present his contribution.

Mr Winckler began by explaining that he has represented defendants in the eBook case and a search engine, but that his views here did not represent those of his firm or his clients. He said that APPAs appear to be extremely widespread in the IT industry and it was therefore unsurprising that in Europe 14 national CAs have either recently investigated these clauses or are in the process of investigating them. The topic was therefore an important one, and the meeting was timely.

Mr Winckler asked what legal instruments can be used to deal with APPAs and what are the enforcement choices? He began with concerted practices (article 101 in the EU). He identified two initial relevant thresholds in the European system. The first is whether the APPA constitutes an appreciable effect on trade. He suggested that it is unlikely that it would do if there were a hotel somewhere in the suburbs of Rome having an APPA with a small platform. However, precedent says that if there are a number of parallel agreements that have the same economic purpose or effect, it could fall under 101. The second threshold effect is that these clauses are widespread, and used by transnational platforms, which means that there can be allocation problems. First a jurisdictional issue over who reviews the case, and also a substantive issue, what type of law would be applied.

He then differentiated between horizontal practices and vertical practices. In regard to horizontal practices he noted that in the eBook case both the European Commission and the DOJ put forward collusive theories of harm. These did not focus on the effects of the APPAs or the agency model, but on the way in which they were adopted. On vertical practices, he identified the block exemption on exclusivity when certain conditions have been met. However, he pointed out that the block exemption is inapplicable to any restriction that prevents the buyer from determining its sales price (eg RPM, which the vertical guidelines suggest can be equivalent to MFN). Therefore, he suggested it was questionable whether the block exemption would apply to APPAs quite apart from the issue of whether the 30% market share threshold is attained or not.

He noted that the EU vertical guidelines point to two possible efficiencies that would render RPM or MFNs acceptable: 1) Helping innovation, allowing market entry, and 2) preventing free riding. He said that in the EU eBooks case there is not a lot of explanation given as to why the introduction of a new platform was not sufficient to justify the existence of an MFN restriction.

He said that the agency model can look like a safe harbour for vertical agreements. This is because under EU law, to the extent somebody is an agent of a supplier, they form part of the same undertaking, the same economic unit, and therefore an agreement would fall outside the scope of article 101. He explained however that the key criterion for a genuine agent is whether the agent bears the financial or commercial risk. In a large number of cases, e-platforms do not buy the product or take risk in relation to the products that they distribute. He explained that the exception for agency can also be withdrawn in the case of cumulative effects of parallel agency agreements.

He suggested that as a result there are multiple legal theories and enforcement choices. It is not clear whether article 101 applies in a number of agency situations. Nor is it clear whether MFN can be equated to an RPM. It is also not clear whether agencies will look at things from a unilateral basis, i.e. the fact that one supplier imposes this clause on a platform or whether it's going to look at the multilateral situation. This creates a very complicated enforcement situation. He concluded that it is for now questionable whether APPAs do or do not constitute RPM. Even if they do not, they may or may not be exempted under the 30% market rule. In addition, there might be justification through efficiencies as in the hotel case. Therefore, at this stage the law is far from clear. Moving to dominance (article 102),

Mr. Winckler said that it has been suggested by some legal scholars that authorities should drop a concerted practices approach and look at these cases concentrating on market power and considering whether the practices have an exclusionary effect. He noted however that European authorities have been reticent in accepting efficiency defences.

Mr. Winckler finished by noting that the commission has re-opened an Amazon investigation, and is now not looking at a possible restriction on trade imposed on Amazon by the publishers, but is instead looking at the possibility that Amazon has imposed non-price APPAs on publishers. The non-price APPA being that the publishers are required to offer the same business model to Amazon that they have offered rival platforms. Business model here can include promotional activities and different remuneration methods.

The Chairman then asked Australia about its experience on APPAs.

The delegate from Australia briefly described a case in which Flight Centre, an offline travel agent, was alleged to have sought to reach price fixing agreements with a number of international airlines. The delegate explained that the case turned on market definition. Federal Court found a market for flight booking and distribution services, but on appeal the Full Federal Court found the market was international passenger air travel services, and said that flight centre was the agent of the airlines and so was not in competition with them and so could not fix prices with them. The authority is seeking leave to appeal to the high court.

## **7. Contrasts between APPAs and traditional vertical price restraints**

The Chairman asked Prof Hviid about the other types of APPA covered in his background paper.

Prof. Hviid said that the second set of cases were the reverse of those discussed. That is to say cases where the producer says to platform: 'you must not promote a rival product over mine'. He noted that an example was the American Express case that is ongoing in the US. He said the concerns were essentially the same as those discussed, except that the American Express case showed that APPAs did not need to focus on price and might instead be about parity in terms and conditions.

The Chairman then asked Romania how they had approached a retail case featuring APPA clauses.

The delegate from Romania explained that the case involved a series of RPM clauses initiated by producers and parity clauses requested retailers. The parity clauses meant that retailer A insured that when a producer's product was on promotion at its stores, the producers would not allow other retailers to match or beat the promoted price. At the same time the retailers all had traditional MFN clauses in their contracts to purchase from producers. The RPM agreement allowed the producer to control the price on the shelf and hence to ensure that the APPA was enforced during the promotions and hence to avoid price competition. The exclusivity clauses were temporary and so the delegate said there was little scope for them to create efficiencies through incentivising investment. The delegate also pointed out that promotions are very important in the context of Romanian food retail since 42% of household income is spent on food and drink, and so 50% of Romanians actively search for promotions.

The Chairman then asked Turkey about the relationship between APPA clauses and RPM.

The delegate from Turkey said they had some ongoing investigations but no decisions yet on APPA cases. The delegate expected however that their experience with RPM cases would be helpful given the similar issues in the assessment of RPM and APPAs.