Bulletin

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Most favoured nation clauses under the microscope in France: Act III

The anti-competitive effects of price parity clauses - or most favoured nation clauses - used by online travel agencies ("OTAs") in their contracts with hoteliers have been under increasing scrutiny by both national courts and EU regulators (see the February 2015 and June 2015 editions of the EU & Competition Law Bulletin). This topic has now been addressed by law-makers in France through a specific amendment to the French Code of Tourism which puts an end to price parity clauses in contracts between hotels and OTAs and calls for an immediate re-drafting of these contracts.

The price parity clauses in question stipulated that French contracting hotels had to provide OTAs with prices equal or better than those charged by the hotel directly to their clients ("direct booking channels") or to other OTAs or physical travel agencies ("indirect booking channels"). On top of these price parity clauses, OTAs frequently added booking conditions parity clauses which prevented French contracting hotels from offering to customers better booking conditions (e.g. free spa access, free breakfast, or free wifi) both on other direct and indirect booking channels.

The French Competition Authority ("FCA") launched an investigation regarding OTAs back in 2013. Not satisfied with Booking.com's initial proposed undertakings of December 2014 in order to avoid or alleviate a finding of

Key Contacts

For further details on these articles and other developments please contact one of the following authors or your usual Bryan Cave contact:

Robert Bell
Partner - London

Eckart Budelmann
Partner - Hamburg

Kathie Claret
Partner - Paris

Anita Esslinger
Partner - London & Washington D.C.

Luigi Zumbo
Partner - Milan*

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*Affiliated Firm.

liability, the FCA required further commitments from Booking.com. The revised Booking.com commitments of April 2015 extended the scope of Booking.com's elimination of price parity clauses and added the elimination of booking conditions parity clauses. However, the revised commitments still did not allow for contracting hotels to be able to publish lower rates on their own website, or through mobile applications. The FCA accepted these revised commitments (see the June 2015 edition of the EU & Competition Law Bulletin).

Nevertheless, notwithstanding such commitments, the Paris Commercial Court on 7 May 2015 issued a ruling specifically on the contracts between hotels and OTAs. This ruling signalled a different, more drastic, approach to the price parity clauses, which were pronounced null and void in application of Article L442-6, I, 2° of the French Commercial Code as they create a "significant disequilibrium" between the contracting parties.

This shift has since been confirmed by the French legislative power through a specific addition to the French Code of Tourism in August 2015 (Law n°2015-990 of 6 August 2015).

Pursuant to this new law, contracts in France between hotels and OTAs must necessarily take the form of an agreement whereby the OTA acts as the agent of the hotelier ("*contrat de mandat*"). If no such agreement is signed by and between a hotel and the OTA, a fine may be issued to the OTA's legal representative (in the amount of €30,000 for individuals and €150,000 for legal entities such as Booking.com or Expedia).

Moreover, the new contracts must specify room prices and the prices for other services offered.

Contracting hotels are now legally entitled to offer to the public better rates or booking conditions compared to those conditions offered by OTAs. This possibility offered to contracting hotels is absolute; it therefore does not differentiate between booking channels and it includes the contracting hotel's own websites or mobile applications, as opposed to the Booking.com commitments accepted by the FCA.

These legal provisions apply no matter where the OTA is located, as long as the booking relates to a hotel located in France.

The law entered into force immediately, which effectively put an end to those non-conforming contracts between hotels and OTAs in place before August 2015.

CMA receives cool reception over proposed banking 'shake-up'

On 22 October 2015, the Competition and Markets Authority ("CMA") published the provisional findings of its 18 month investigation into the UK's £16 billion small and medium-sized enterprise ("SME") and personal current account ("PCA") sectors, and opined that UK banks are not being put under sufficient competitive pressure to adequately protect the interests of customers and innovate in the market.

The banking sector is largely dominated by four main players which make up 85% of the SME banking market and 77% of the PCA banking market. The CMA has pronounced that these banks, and

others, are simply not working hard enough to compete for customers.

The CMA's main concerns are that customers are not given sufficient information on alternative bank accounts available to them, and that there is an unsubstantiated but deeply engrained resistance to switching bank accounts. The CMA's investigation revealed that 57% of consumers have stayed with their PCA provider for over 10 years, and 37% for over 20 years. Only 3% of customers switched their PCA in 2014 and only 16% researched alternative accounts. Additionally, over 50% of start-up companies looking for an SME account choose the bank with which they have a PCA.

The CMA's preliminary proposals seek to support the notion that it should be, and customers should feel that it is, easy to compare competitors in the market and switch accounts confidently. They also aim to enforce the underlying principle of an efficient market by ensuring that the banks which offer the poorest deals, the worst service, and the highest costs should be faced with the prospect of losing their customers to their competitors.

With this in mind, some notable features of the preliminary list of remedies are as follows:

Banks should be required to alert a customer to the availability of other banking service providers where that customer has been subjected to an inconvenience, such as the closure of their local branch or a loss of online services.

The online Midata government tool, which exists to enable customers to compare banking service providers in light of their own specific financial data, should be upgraded for improved ease of use.

An online SME banking comparison tool should be created; as such a program does not currently exist.

A campaign should be funded to raise customer awareness of the Current Account Switch Service ("CASS"). This service, launched in 2013, facilitates the switching of bank accounts by automatically transferring all payments and direct debits from an old account to a new one within seven days, and by forwarding all payments into the old account into the new account for a period of 36 months.

However, the above proposals were criticised by challenger banks and business lobbies who believe no real shake-up can occur without a break up of the four main UK banks and an end to free in-credit banking. The particular concern is that whilst customers believe their personal banking is 'free', they remain oblivious of charges, forgone interest and other profits enhancers used by banks. Aside from a break up of the larger established players, less extreme measures proposed by challenger banks include greater transparency over these charges.

The CMA aims to publish its final report around April 2016 in which it will provide further detail on all of its proposals and expectations.

German senior executive escapes competition law fines

On the 25 January 2015, the State Labour Court North-Rhine Westphalia handed down one of the most fundamental recent German decisions concerning manager liability.

In 2012 and 2013, the Federal Cartel Office (FCO – Bundeskartellamt) imposed fines amounting to EUR 191 million against GfT, a ThyssenKrupp subsidiary. GfT was member of a cartel of rail manufacturers, fixing the price of rails to the detriment of railway companies. In addition to the administrative fines, ThyssenKrupp paid another EUR 100 Million to reach a settlement with the firms damaged by the cartel agreements. After payment of the demands, ThyssenKrupp sued the at-the-time Managing director of GfT for reimbursement of the amounts.

The Labour Court Essen decided against ThyssenKrupp and ThyssenKrupp then appealed to the State Labour Court of Düsseldorf. The State Labour Court ruled that with regard to the civil liability, the court would stay the proceedings due to a pending criminal investigation against the former Managing Director of GfT.

Concerning the passing-on of the multimillion-EUR administrative fines imposed on GfT, the State Labour Court dismissed the case with reasoning which is of major importance for the field of manager liability in general. In the view of the court, the decisive aspect of the dispute was not, if a breach of duty of care by the former Managing Director sued was provable. Instead the court ruled that as a matter of law, the rationale for the fines imposed (Art. 81 GWB ((Law on Restrictions of Competition)), runs counter to the passing-on of the fines to the respective senior manager, and that no liability should pass to the senior manager in question.

The court came to this conclusion on the basis that where the law holds the companies themselves responsible and addresses them as the subjects of the fines imposed, the purpose is to educate the corporate management and establish organizational structures which introduce supervision and transparency, and help to detect and prevent anti-competitive decision-making at an early stage. The effect of administrative fines as tools of law enforcement would be undermined if the company could simply pass them on to its leading employees, avoiding corporate liability.

After an appeal was lodged against the judgment of the State Labour Court Düsseldorf, the final decision is now up to the Federal Labour Court Erfurt (Bundesarbeitsgericht). It remains to be seen which direction the Federal Court will take.

Italian Competition Authority opens an in-depth investigation into the home-treatment services sector

On 7th October 2015, the Italian Competition Authority (the “ICA”) opened an in-depth investigation into fourteen Italian companies (the “Accused Companies”) providing services in the home-treatment sector (particularly oxygen supplies) for an alleged infringement of Article 2 of Law No. 287/1990 (the “Italian Competition Law”); the prohibition of anti-competitive agreements or concerted practices.

The investigation stemmed from complaints filed by the Local Health Authorities of two Italian regions (Lombardy and Campania), which alleged anti-competitive conducts during tenders made for providing home-treatment services within their territories for patients affected by respiratory diseases. Tender procedures were based on a lowest bid mechanism so that the invitation containing the lowest discount to a set price won the tender.

The ICA found that the Accused Companies' behaviour was extremely coordinated so as to make very similar offers and not to participate in all the same tenders, although all the Accused Companies possessed the requirements to make offers.

Therefore, the ICA held that the Accused Companies tried to avoid competing with each other for the relevant tenders as they had the requirements to participate in all the tenders and there was no objective reason for not making invitations. Indeed, the reduction in the discounts offered by the Accused Companies was almost the same for all the tenders.

Further, the ICA alleged to have evidence about some inadmissible invitations made deliberately by some of the Accused Companies in order to lose the tender.

The ICA argued that this behaviour could not be the result of true competition and held that the Accused Companies had decided to illegally allocate markets by deciding the winner of the relevant tender before making invitations.

Through this strategy, the Accused Companies would sustain far lower costs which they would have borne by competing among them. Such higher costs will have caused harm to either the consumer or the Italian healthcare sector.

Therefore, the ICA found the conduct incompatible with Article 2 of the Italian Competition Law. In such respect, any agreement not to compete between undertakings would fall within such provision which forbids bid rigging and market allocation.

The ICA has recently increased its focus on the Italian healthcare sector as investigations of such a kind are becoming much numerous. However, the alleged wrongdoing is not proven at this stage and the investigation continues.

French companies make EU law regarding greater individualization of Penalties

Individualization of penalties is a fundamental principle of criminal and antitrust law. In our EU & Competition Law update of May 2014, we underlined that the French Supreme Court considered that the mere fact that a company which engaged in anti-competitive practices belonged to a corporate group was not sufficient ground to deem that other group companies played a role in, and should be sanctioned for, such anti-competitive practices.

The European Court of Justice ("ECJ"), in its decision C-597/13 of 17 September 2015, resolved, on final appeal, a case in which two French companies in the same group had been fined jointly and severally for having participated in a cartel concerning the market for paraffin and slack waxes.

In this case, the European Commission had found Total S.A., the French parent, and its subsidiary Total France, jointly and severally liable even though the parent had not actually participated in the cartel. The Commission based its decision on the fact that Total S.A., which held a 98% stake in Total France and admittedly had a "role of institutional coordination and control of strategic orientations", did not overcome the presumption that it had exercised a "decisive influence" over the commercial policy of its subsidiary. Both companies appealed the decision.

In two judgements of 13 September 2013 (T-548/08 and T-566/08), the General EU Court of First Instance upheld the decision of the European Commission as regards the joint and several liability, but reduced the fine imposed on Total France to take into account a shorter period of time in which the latter participated in the cartel. On the other hand, the fine imposed on Total S.A. was left unchanged, thus raising the question, on appeal, as to whether, given that the liability of the parent company derived from the actions of its subsidiary, the General Court could reduce the fine in one case and not the other.

The ECJ found that the General Court "erred in law" in not having regard to the degree of the parent company's actual participation in the cartel. The ECJ considered that the liability of a parent company must be capped at that of its subsidiary when its liability "is purely derivative of that of its subsidiary". Therefore, even though the ECJ left unchanged the European Commission's finding that Total S.A. did not overcome the presumption that it exercised a "decisive influence" over Total France, and therefore maintained the two companies' joint and several liability, the ECJ held that Total S.A. must benefit from the same fine reduction as granted to Total France.

CMA gets shirty over school uniforms

On 15 October 2015, the Competition and Markets Authority ("CMA") wrote an open letter to UK Head teachers, governing boards and school uniform suppliers, warning them that they may be in breach of Competition Law if their school uniform supply arrangements are found to be anti-competitive in nature.

Chapter I of the Competition Act 1998 ("CA") prohibits agreements which may affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition within the UK (Section 2 CA). The concern lies with school policies which require parents to purchase uniforms from a specific supplier or from the school directly, and which have the effect of reducing market competition, creating local monopolies, reducing choice, and increasing prices.

This is not the first time that the issue of schools appointing exclusive uniform suppliers has been in the spotlight. In 2006, the Office of Fair Trading ("OFT") urged school governors to permit parents to purchase uniforms from a choice of outlets after it reported that 80% of the 9,000 state schools in their study required uniforms to be purchased from a designated retailer or the school itself, and that the effect of this was a yearly price detriment of £32m to parents buying secondary school uniforms and £13m to parents buying primary school uniforms.

In 2011, the OFT reported that 74% of the state schools in their previous study continued to limit parents' options through the use of restrictive supply agreements, and in 2012 the OFT again

pressed schools to take action to introduce competition.

No enforcement action has been taken to date, and the CMA has now taken the reins. In its open letter of 15 October, the CMA has reminded UK schools and suppliers that restrictive uniform supply agreements may breach competition law and lead to investigations and fines, and advised them to review their uniform supply policies with this in mind.

The CMA has said that it will be monitoring the sector and taking enforcement action where necessary.

Italian Competition Authority urges parliament to make a stance on digital urban transport (the "Uber Case")

On 2nd November 2015, the Italian Competition Authority (the "ICA") made a public statement in favour of the enacting new rules governing the urban transport sector.

In particular, the ICA found that the current Italian legislation on the matter (Law No. 21/1992) should be reviewed in order to open competition among the operators.

To this extent the ICA asked the Italian Parliament to approve legislative provisions allowing non-professional drivers to operate in the urban transport sector, using a platform over smartphones and tablets.

Currently in Italy, urban transport is reserved only to licensed taxi drivers or car-hiring-service with drivers, to the detriment of consumers which cannot use alternative private means of transportation like in many other European countries.

In this scenario, it is not a surprise that the Court of Milan (in a contrary move to the ICA) ordered the pioneering company, Uber, to stop providing transport services through its digital application "UberPop" in all the Italian territory.

The Court of Milan held that the services provided by Uber through "UberPop" could not continue as there was no legislative provision governing the services and the current Italian legislation could not be extended to them.

The Court also found that without specific rules, consumers' safety may be endangered as, for instance, non-professional drivers had no obligation to take out an appropriate insurance policy to pay any damages that occur to persons being transported, in case of a car accidents.

In contrary to the rulings of the Court of Milan, the ICA found that it would be advisable for the Parliament to "create a third genre" of drivers different from the existing ones (taxi drivers and drivers operating in the car-hiring-services).

Finally, the ICA pointed out that the car-hiring services provided by Uber through the other digital applications "UberBlack" and "UberVan", although without specific legislation, should be considered perfectly lawful as they regard private urban transport with professional drivers.

In our view, the ICA's statements are very welcome. Consumers and consumers' associations have

been striving to put an end to the de facto Italian taxi drivers monopoly in the urban transport sector, which renders the sector un-competitive and with the reported highest fees in the European Union.