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France****4-5 December 2017**

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More documentation related to this discussion can be found at

[www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm](http://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm)

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## France

1. At the root of the issue of the extraterritoriality of commitments in competition cases lies the question of the territory in which the competition rules apply. Under the territorial principle, national competition rules apply to companies, regardless of nationality, if their conduct or operations have an effect within that national territory.

2. With the development of market interdependence and market players with an increasing globalised footprint, this established principle is now having to adjust to the reality of a globalised economy, accelerated by the explosion of the digital sector. Like its counterparts, the *Autorité de la concurrence* is confronted by the conduct of companies operating in international markets. The work it does and the solutions it chooses thus, in certain hypotheses, have an international dimension.

3. But should competition authorities have to take account of this extranational dimension when they examine the efficacy of commitments proposed by companies?

4. The experience of the *Autorité de la concurrence* has shown that, in practice, it is not the authorities that come up with extraterritorial remedies – since their purpose is to address competition concerns in the country concerned – but the companies themselves, which can decide, for reasons of their own, to voluntarily extend the geographical reach of their commitments (Adidas I. and Navx II. cases).

5. However, the issue is not devoid of interest, as the experience of the *Autorité de la concurrence* in the Booking.com case demonstrates. Alongside its Swedish and Italian counterparts and under the aegis of the European Commission, the *Autorité* worked on an enhanced cooperation basis to develop and negotiate commitments at European level in the online hotel booking sector valid in three jurisdictions, including France (Booking.com III. case).

6. This unprecedented method, which clearly demonstrates the challenges facing the competition authorities, especially when dealing with digital platforms, is expected to continue regarding European cooperation, in parallel with the reflection and work being done internationally on the subject of extraterritoriality (cooperation IV.).

### 1. The Adidas case: a ricochet effect in France

7. The Adidas case, opened at the *Autorité*'s own initiative, is an early example of how commitments made by a company in Germany could have implications in France.

8. In this instance, the Bundeskartellamt and the *Autorité* were prompted to conduct parallel investigations into practices used by Adidas in Germany and France to prevent its distributors from entering the online marketplace using selective distribution systems.

9. As a result of voluntary commitments made by the parent company in Germany to change the online distribution terms of its products, the Bundeskartellamt closed the case<sup>1</sup>.

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<sup>1</sup> Investigation closed on 2 July 2014.

10. The group's subsidiaries were responsible for implementing this new commercial policy. Thus the *Autorité's* investigation caused Adidas' French subsidiary to take the necessary measures to allow access to the online marketplace.

11. Following the opening of an investigation in France, Adidas voluntarily proposed to amend its contracts to allow its distributors to sell their products in online marketplaces, provided that these marketplaces were approved on the basis of similar criteria to those applied to its ordinary approved retailers. Having verified that distributors could genuinely enter online marketplaces, the *Autorité* closed the investigation<sup>2</sup>.

12. The parallel investigations therefore produced a ricochet effect in France from commitments made in Germany, due to the *Autorité's* intervention and the French subsidiary's decision to make the commitments applicable in France.

## 2. The Navx case: extraterritoriality from France to Europe

13. The Navx case illustrates the extraterritoriality on a larger scale of commitments made in this instance by Google.

14. Navx, a company using Internet-based marketing to sell databases identifying the location of fixed and mobile speed cameras, used the Google AdWords service for its online advertising. It reported to the *Autorité* the sudden termination of its contract following the suspension of its AdWords account by Google for violating its policy on devices to bypass traffic controls in France, which had been tightened up, and a discriminatory treatment by Google.

15. Having received a complaint from the company about Google's practices and a request for interim measures, the *Autorité* decided to order interim measures<sup>3</sup> since it believed that the conditions under which Google had applied the AdWords service's content policy lacked objectivity and transparency and caused it to treat speed camera database suppliers in a discriminatory manner in a context in which the Google search engine accounted for around 90% of all Internet searches carried out in France.

16. Among the injunctions placed on Google as interim measures, the *Autorité* called on Google to clarify its content policy and make it more transparent and to reinstate Navx's AdWords account.

17. It was as a result of these interim measures, as part of the ongoing investigation of Navx's complaint, that Google proposed to the *Autorité* commitments aimed at making the operation of its AdWords service more transparent and easier for advertisers to understand as regards devices to bypass traffic controls in France.

18. Following consultations with the sector, the *Autorité* accepted an improved version of the commitments put forward by Google and concluded the procedure in respect of it<sup>4</sup>.

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<sup>2</sup> Investigation closed on 18 November 2015.

<sup>3</sup> *Decision 10-MC-01 of 30 June 2010 on the request for interim measures submitted by the company Navx.*

<sup>4</sup> **Decision 10-D-30 of 28 October 2010 relating to practices employed in the Internet advertising sector.**

19. In addition to its commitments to clarify its content policy in France regarding devices used to bypass traffic controls, remarkably enough, Google has informed the *Autorité* that the improvements and clarifications it had made in application of the commitments would be voluntarily extended to all content accepted for the AdWords service (i.e. all advertisers using the AdWords service) in all countries to which the service relates. Google therefore decided itself to extend its commitments beyond French territory.

20. The commitment procedure, which is triggered on the basis of a strategic assessment by the company and at its initiative, can therefore lead to the extraterritorial application of the commitments decided on by the company itself as a result of its own arbitration process.

21. A procedure of this kind has the advantage of giving the operator the freedom to choose solutions to solve the competition problems identified by the competition authority. It is true that the prior imposition of interim measures, as in the case in question, can give the competition authority leverage when it comes to negotiating the commitments with the operator later on.

22. The commitment procedure is attractive both to the authorities and to companies because it leads to quicker resolution of cases and is more flexible, due to the fact that commitments are usually time-limited, which opens up the possibility of their review in the light of any subsequent changes in the market concerned. On this basis, commitments can avoid excessive obstruction of the markets and have proved particularly suitable for dealing with practices arising in new or rapidly changing markets, such as the digital economy.

### 3. The Booking.com case: coordinated extraterritoriality in the online hotel booking sector

23. The Booking.com case constitutes a further step towards taking account of the extraterritorial reach of remedies.

24. As a result of various complaints by hotel owners' associations against online hotel booking platforms, the largest of these being Booking.com, an investigation led, in Booking.com's case, to simultaneous, coordinated decisions by competition authorities in three European countries (France, Italy and Sweden<sup>5</sup>) to accept commitments.

25. In addition to groundbreaking cooperation between the French, Italian and Swedish authorities which produced this result (i), the case again highlighted a decision by the company in question to extend the reach of commitments made in three jurisdictions to the whole European Economic Area, prompting other competition authorities to accept these commitments and close their investigations (ii). The case is also of interest because it revealed that different remedies in different Member States could be justified by differences in the market, showing that not only does each practice fit into a particular context, but so does its solution (iii).

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<sup>5</sup> Decision 15-D-06 of 21 April 2015 on the practices used by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector.

### 3.1. A collaboration between three European competition authorities

26. The system for reporting complaints received by the various national competition authorities in the ECN quickly picked up the fact that several authorities received similar complaints in 2013 and 2014 from hotel owners' associations or hotel groups criticising the parity clauses introduced by online hotel booking platforms, especially Booking.com.

27. This sector lends itself particularly well to the adoption of remedies of supranational reach to competition concerns identified by the authorities because not only are some of the companies involved in it digital platforms with tools that can reach many countries more easily than in other sectors, but it is also part of the tourism sector, which by nature is international. The *Autorité* was prompted to study the practices of the international Booking.com platform as a result of complaints by French hotels. But the customers of these hotels mostly come from other countries. For example, 37.1% of recorded night stays in French hotels in the second quarter of 2017 were made by foreign guests; in the Paris area the figure is 59.1%<sup>6</sup>. The impact of remedies imposed in France to restore competition between online hotel booking platforms for booking offers in French hotels was likely to be limited if the guests of these hotels, especially foreign guests, were unaware of them. However, it is unrealistic to expect customers to be familiar with the different rules of operation of these platforms in different countries.

28. The adoption of a harmonised solution is also good for the companies involved, which then benefit from the same regulatory framework in several countries.

29. The competition authorities in the ECN, coordinated by the European Commission, set up a working group to discuss the different procedural options and harmonise the chosen solutions. During these discussions, many of the authorities expressed support for exploring the path of commitments. The three competition authorities that had made most progress with their investigations were designated lead authorities for the negotiation of these commitments, in close collaboration with the European Commission, which was coordinating discussions with the other authorities in the ECN.

30. The decision to restrict the negotiation of the commitments to three competition authorities made it easier to adapt to procedural differences between the countries and to coordinate investigation timetables. For example, according to the Italian competition authority's procedural rules, companies have a deadline of 90 days from the launch of an investigation in which to propose commitments. There is no such deadline for the other authorities, which had to reconcile this with their own specific procedural requirements.

31. The credibility of this investigation run collaboratively between three authorities, particularly for encouraging Booking.com to put forward satisfactory commitments, relied on the harmonisation of the investigation timetables. The meetings held to examine the commitments proposed by Booking.com were held on the same day, and the three authorities issued their decisions jointly on 21 April 2015, reducing the risk that the commitments proposed by Booking.com would be accepted by one authority but not by another.

32. The commitments proposed by Booking.com for a period of five years, and accepted by the French, Italian and Swedish competition authorities, were similar in all three countries.

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<sup>6</sup> INSEE, Informations rapides n° 209, 8 August 2017, <https://www.insee.fr/fr/statistiques/2964901>

33. Only France included an interim review of the efficacy of the commitments, enabling Booking.com and a number of hotel owners to share their comments at a hearing held by the *Autorité's* Board in December 2016. This assessment, published in February 2017, revealed that some hotel owners now had different prices on different online hotel booking platforms, though there was no sign as yet that competition was developing between platforms. In view of these initial results, the *Autorité* declared that it would remain vigilant concerning competition in the sector.

### 3.2. Extension of Booking.com's commitments to the European Economic Area

34. Booking.com's commitments were also voluntarily extended by the operator to other countries in the European Economic Area although, officially, extension of the reach of these commitments did not form part of the commitments accepted by the three competition authorities and Booking.com cannot be sanctioned for failing to comply with it. In this instance, the extension was nevertheless a logical consequence of the immense effort put in by the competition authorities and the Commission to coordinate and harmonise both the solutions for addressing the competition concerns and the most efficient territorial reach that of the European Union, to ensure the solutions would be fully effective.

35. The extension of the commitments was therefore a key element of the coordination within the ECN, in close collaboration with the European Commission, because it enabled other competition authorities to benefit from negotiations conducted by the French, Italian and Swedish authorities. Moreover, any failure to comply with this extension of Booking.com's commitments in another country in the European Economic Area could spur the competition authority of that country to open an investigation into Booking.com's practices.

36. Shortly after the authorities' decisions were issued, the Irish competition authority accepted commitments by Booking.com modelled on the commitments accepted by those three authorities, the Danish and British competition authorities<sup>7</sup> closed their investigations, and the Greek competition authority said it would not open a case on these practices because of the extension of Booking.com's commitments to Greece<sup>8</sup>.

### 3.3. Solutions tailored to national contexts

37. The Booking.com case also revealed that different remedies in different Member States could be justified by differences in the market and the national context.

38. A prohibition on the use by platforms of parity clauses in their contracts with hotel owners could therefore be decided in Germany. Moreover, the French government took action, after the decision, by introducing a ban on all price parity clauses<sup>9</sup>.

39. There is not necessarily a one-size-fits-all solution to solving transnational competition problems. The practice in question arose in a particular context, as did its solution. Coordination of the investigation of the case, the negotiations and the

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<sup>7</sup> CMA press release of 16 September 2015. The CMA nevertheless maintained its watch on the sector for a period of one year to monitor any developments and assess the appropriateness of opening a new case.

<sup>8</sup> Press release by the Greek competition authority of 22 September 2015.

<sup>9</sup> Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities. Similar legislation has been passed in Austria and Italy.

monitoring of the commitments did, however, prove particularly beneficial in providing a common understanding of the problem and a consistent response within the EU, though not always an identical one.

#### 4. EUROPEAN AND INTERNATIONAL COOPERATION ON THE EXTRATERRITORIALITY OF COMMITMENTS

40. While the Booking.com case was the result of unprecedented European cooperation, with the adoption of the same commitments by the French, Italian and Swedish competition authorities, it has also prompted ongoing European cooperation on a larger scale with the setting up of a working group consisting of the European Commission and ten competition authorities that belong to the European Competition Network (ECN), including France, to evaluate the effects of the different solutions implemented within the EU in online hotel booking cases.

41. As part of this, the various authorities have interviewed 16,000 hotels, including more than 3,000 in France, 19 major hotel chains, 20 online booking platforms and 11 "metasearch engines" using a standard methodology so that the different solutions can be compared. This survey was completed by the analysis of a database submitted by the major metasearch engines, allowing the commercial strategies of hotel owners with regard to the different online hotel booking platforms to be compared before and after implementation of the remedies.

42. This pan-European assessment of the different measures adopted is also novel. The use of this innovative process was considered justified because it concerned competition involving digital platforms, which can change very rapidly, and took account of concerns expressed by players in the sector.

43. On the basis of the results of the working group's work published in April 2017<sup>10</sup>, which show greater price differences between online booking platforms in most countries and reveal that nearly half of hotel owners interviewed are unaware of the changes that have occurred in the sector, the European Commission and the national competition authorities decided to keep monitoring the sector and continue their coordinated handling of the matter within the ECN.

44. There are other initiatives in existence internationally, e.g. within the International Competition Network (ICN), looking at the extraterritoriality of commitments. One particular one is the work being done by the Merger Working Group, co-chaired by the Autorité de la concurrence since 2015, with the publication of the "Practical Guide on International Cooperation"<sup>11</sup> in 2015 and the "Merger Remedies Guide"<sup>12</sup> in 2016. These documents offer agencies sets of good practices, enabling them to prioritise convergent solutions wherever possible.

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<sup>10</sup> [http://ec.europa.eu/competition/ecn/hotel\\_monitoring\\_report\\_en.pdf](http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf)

<sup>11</sup> <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>

<sup>12</sup> <http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf>