Data scraping and abuse of dominance in travel services: story of an antitrust guerrilla

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Viaggiare s.r.l. v Ryanair Ltd, Tribunale di Milano Sez. Imprese, Judgment n.7825 of 4 June 2013.

An airline's refusal to grant access to its database and booking procedures to a travel agency amounts to an abuse of dominant position in the market of travel and touristic services.

Facts

Viaggiare, an online travel agency, sued Ryanair in front of the Court of Milan, alleging that the airline is undertaking unauthorised activity in the realm of travel services, which amounts to an abuse of dominant position and unfair competition under the relevant Italian rules. Additionally, the plaintiff demanded that the Court declared that the defendant's practice of excluding any commercial intermediation in the booking of tickets was unlawful. It also sought compensation for a campaign of defamation launched by Ryanair against online travel agencies (OTAs) via the media. Ryanair objected to the application of Italian jurisdiction, because the general terms for the use of its website specify the exclusive choice of the Irish forum ex art.23 Regulation 44/2001. The defendant contested being classified as involved in the travel services sector and claimed to be the victim of an illegal activity of screen scraping; in other words, the extraction of data from its website, in violation of the relevant IP provisions.

In declaring its jurisdiction in the case, the Court ruled that Ryanair had acted in breach of the relevant competition provisions and that its claim to prevent any commercial intermediation in the sale of its flights consisted in an abuse of dominance in the downstream market of travel agencies' services. The Tribunal fined the airline for defamatory practices.

Legal context

In principle, any undertaking—whether dominant or not—should have the right to choose its trading partners and to dispose freely of its property. However, in the guidance rules on Abusive Exclusionary Conduct by Dominant Undertakings, the European Commission considered a refusal to supply as an enforcement priority if three cumulative circumstances are present: (a) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market; (b) the refusal is likely to lead to the elimination of effective competition on the downstream market; and (c) the refusal is likely to lead to consumer harm (para.80, COM(2008) 832).

Analysis

Preliminarily, it has to be said that jurisdiction issues can easily be resolved by applying art.5 Regulation 44/2001, which states that in matters relating to tort, delict or quasi-delict, the jurisdiction belongs to the courts of the place where the harmful event occurred (or may occur). In competition matters, this place is located where the market turmoil has arisen. Since Viaggiare offers its services in Italy, the link with Italian courts shall be considered established.

On the merits, the plaintiff's position is that the defendant maintains a dominant position in three distinct European markets: the market for aerial transportation, the related market for agency services, and the supply of information regarding its own flights. Ryanair denies being dominant in the first and second markets, in which it only sells its tickets. With regard to the third market it professes not to be a monopolist, but claims to have an industrial property right.

There is no doubt that, in this case, the issue at stake relates to the market for the provision of information needed for exerting agency services. In this regard, the Court of Milan ruled that the three conditions were met. The Court addressed the first two conditions together. For the first question, whether an objective necessity of the service for effective competition does actually exist, the Court resorted to the essential facilities doctrine. According to this theory, the holder of an essential infrastructure that is needed by other firms in order to compete on the downstream market is committing an abuse when it denies access to its infrastructure. In a landmark case (*Microsoft v Commission* (T-201/04) [2007] E.C.R. II-3601), it was stated that the law does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market. Rather, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely. In order to evaluate this circumstance, the Commission assesses whether competitors can duplicate the input produced by the dominant undertaking by creating an alternative source of efficient supply. If we consider Ryanair's website as an infrastructure, bearing in mind that within Europe the airline is a monopolist on 49 routes and has more than half the market share on the other 19, we shall conclude that its exclusionary conduct creates a practical impossibility for online travel agencies (OTAs) to offer their services on a relevant portion of the market. What is more, the offer of travel packages toward other destinations can be impeded entirely, due to the unavailability of intermediate stopovers. Because this commercial practice consists of a refusal to supply *erga*

omnes, it is surely capable of eliminating effective competition in the downstream market. In fact, since Ryanair sells its own tickets, demand that also could be served by the foreclosed competitors is diverted away from them to the sole advantage of the dominant firm, giving birth to a monopoly. The second condition shall therefore be considered met as well.

The Court then examined the third condition, whether consumers end up being harmed by the practice, which refers to whether the negative consequences of the refusal to supply in the relevant market outweigh the negative consequences of imposing an obligation to supply. Here the solution is not so clear-cut. In doing this assessment, the Commission considered claims by the dominant undertaking that a refusal to supply is necessary to allow the dominant undertaking to realise an adequate return on its investments. Ryanair sets up its defence also on the ground of intellectual property, and namely the EC Directive 96/9, which states that the owner of a database can receive protection against misappropriation of the results of the financial and professional investment made in obtaining and collecting the contents. In our case, however, it is clear that the access to the database remains only instrumental to the rendered service, and has no intent to free ride anyone else's work. On the contrary, in providing the service, OTAs contribute to revenue creation for the airline in the form of ticket sales. In addition, it cannot be overlooked that ECJ's jurisprudence is clear in acknowledging that abusive behaviour can originate from an exclusive right, if this prevents the creation of a new product with potential demand. The same Italian Constitution provides [art.41 Constitution] that the freedom of trade encounters limits originating from social utility, such as those safeguarded by competition. Here the point is that the airline does not exclude the consumer from buying its tickets, and by selling its tickets directly it lets the buyer save the intermediary fees. Additionally, it is clear that the possibility of comparing and combining itineraries instantaneously would benefit the consumers, while the harm—if any—would only consist of higher research costs rather than an increase in price. Also, it is contestable that, as stated by the Court, the refusal to supply gives Ryanair control over the derived market for additional services (insurance, transportation from and to the airport). In fact, those ancillary markets are very open to competition, as is evident by the recent price wars between providers of insurances and transportation from and to the airports, which generated efficiencies in the form of price reductions. Therefore, the Court should have been a bit more cautious in assessing the presence of this third element.

Practical significance

With this judgment, the Court takes quite a strong position on the efficiency of intermediary fees. Perhaps a more cautious balance could have been established. Also, since most of the data are not static, the only way to gather updated information is to continuously (and invasively) interrogate the website. Whereas in common law jurisdictions this can amount to a trespass, in civil law jurisdictions it can very well configure a breach of contract. In fact, according to the E-Directive (Electronic Commerce Directive 69) and art.1333 of the Italian Civil Code, a contract has been concluded between the website owner and the data scraper, in form of an unilateral offer to provide a service subject to its terms of use, which have been accepted by the scraper in the moment of the query. Such provisions explicitly exclude the right of scraping for commercial purposes. Therefore, the practice shall be deemed unlawful. And this raises a few cognate questions: once the legitimacy of screen scraping has been established, can the air carrier follow on with use of technological measures to protect its website? Is the availability of data a right of the agencies or a duty imposed on the carrier? Aren't such terms of use equally enforceable against individual users and agencies? What about potential ticket hoardings? How do we cope with the fact that a systematic interrogation can help competitors unmask an undertaking's industrial strategies, in particular, pricing techniques and profitable market niches to sneak into? In sum, a bevy of open questions are to be resolved, sooner or later.