

# Intermediaries and data: Conflicts of interest?

---

Miranda Cole

30 January 2020

**COVINGTON**

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG LONDON LOS ANGELES

NEW YORK PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

# First stop – look at the data

---

- Starting point for discussion about competition law assessment of the use of data
  - What is the data, and what is being done with it?
    - Not just about the personal-non-personal split
  - Is the data raw, processed or the output of analytics?
  - Is the data replicable/fungible/available from multiple sources?
  - Beyond that, is the data indispensable to compete – relevant not only to access discussions

## First stop – look at the data

---

- Combination of “data-isation” across sectors highlights the need to be specific
- Consider both the range of sectors and mix of raw, aggregated and derived/inferred data:
  - agriculture
  - manufacturing and predictive maintenance
  - digital health
  - online (targeted) advertising
  - ecommerce
  - log in tools and analytics
- Some sector-specific regulation (CRS Code, PSD2 etc)

# Intermediaries and Use Cases Differ

---

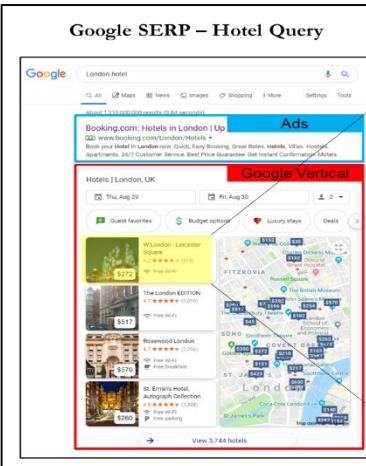
## ■ Intermediaries

- Provide an environment for “transactions” to occur
- Lead to savings on transaction costs (in part through internalization)
- Are multi-sided (with inherent externalities)
- Can generate revenue in many ways (including the supply of data services)

# Intermediaries and Use Cases Differ

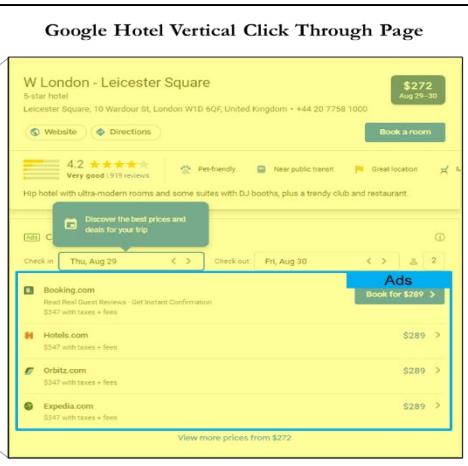
- Online (targeted) advertising
  - Information about users used to target
  - Information about service advertised provided to populate ads – HPA (now Hotel Ads) and PLA
    - Differentiation between ads and competing service?

Google SERP – Hotel Query



This screenshot shows a Google search results page for the query "London hotel". At the top, there's a blue "Ads" section from Booking.com. Below it is a "Google Vertical" section featuring a map of London with pins for various hotels like The London EDITION, Fitzrovia, Soho, and Covent Garden. To the right of the map are hotel cards for "The London EDITION" (\$517), "Rosedew London" (\$529), and "The Berkeley" (\$569). A red box highlights the "Google Vertical" section.

Google Hotel Vertical Click Through Page



This screenshot shows a "Google Hotel Vertical Click Through Page" for "W London - Leicester Square". It features a large yellow header with the hotel's name and a price of \$272 for Aug 29-30. Below the header is a "Discover the best prices and deals for your trip" button. The main content area lists several booking options with their respective prices: Booking.com (\$272), Hotels.com (\$289), Orbitz.com (\$289), and Expedia.com (\$289). A "View more prices from \$272" link is at the bottom.

# Intermediaries and Use Cases Differ

---

- eCommerce - AMZN investigation re whether it “uses commercially sensitive information available to [its] marketplace operations, regarding ... products listed by third party sellers or transactions with third party sellers on Amazon’s marketplace, for the purposes of Amazon’s retail activities, including ... in the selection of the Featured Offer...” In particular, the EC is investigating:
  - “the **standard agreements between Amazon and marketplace sellers**, which allow Amazon’s retail business to analyse and use third party seller data. In particular ... whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition.”
  - “the role of data in the **selection of the winners of the “Buy Box”** and the impact of ... potential use of competitively sensitive ... seller information on that selection

# Potential Theories of Harm?

---

- Article 101
  - Exchanging commercially sensitive information (e.g., costs or prices) – degree of aggregation/ whether raw or derived matters here
    - Also look at information available to all and third party solutions
  - Alignment of costs or product features
- Article 102
  - Exploitative abuses (e.g., requirement that ad feed can be used for own product) – question of how the data is used (important to differentiate between role as intermediary and supplier of competing product in making assessment)
  - Preferencing – again, a question of how the data is used (and whether it is used in providing intermediary services or competing services)

# Remedies not straight forward

- HPA/PLA example because competing product is built on the appropriated feed
  - Consequence of cease and desist would be competitors disappear from SERP, other than SEM ads
  - Requiring a license fee raises compulsion issues and challenge of the appropriate payment
  - Requiring that the competing product be populated other than as ad displays could be characterised as redesigning products, even though:

