

# POLICY BRIEF

## EUROPEAN TRANSPORT REGULATION OBSERVER

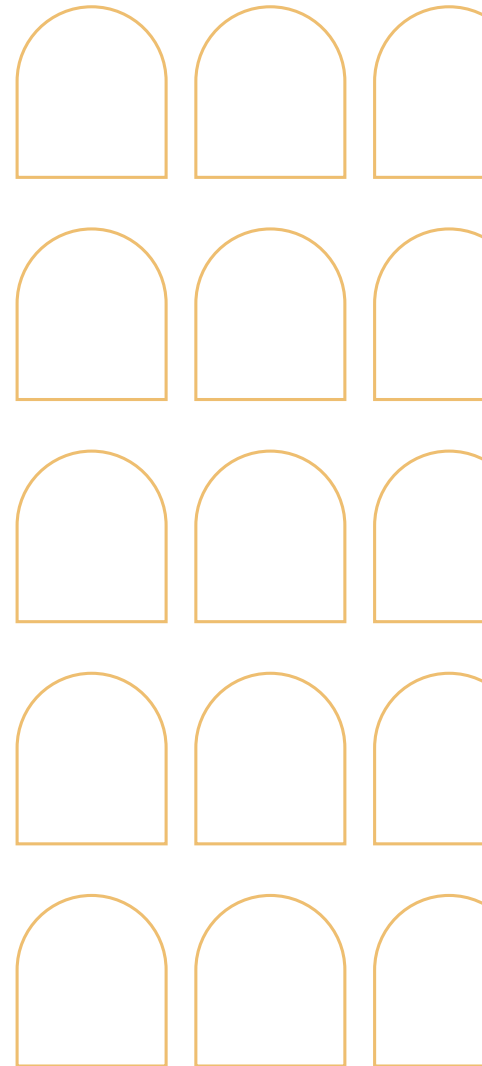
### Aviation and Multimodal Digital Mobility Services in the EU

#### Highlights

Multimodal digital mobility services (MDMS) are instrumental to fostering multimodality as they promote comparability, transparency, and the selling of products across operators and modes. MDMS stand to directly benefit passengers by helping them to navigate, access and compare an increasingly complex and diverse range of transport offerings. Services that support multimodal transport can also render transport more efficient and sustainable by improving the consumer access to broader variety of transport options.

As part of its [Sustainable and Smart Mobility Strategy \(SSMS\)](#), published in 2020, the European Commission committed itself to assessing the need for regulatory action on rights and duties of multimodal digital service providers and to issuing a recommendation to ensure public service contracts do not hamper data sharing and support the development of multimodal ticketing services, together with an initiative on ticketing (Action 37).

In view of this, a [public stakeholder consultation](#) for the implementation of MDMS was carried out, and a legislative proposal to advance MDMS is planned for 2023. This Commission initiative will seek to implement Action 37 of the SSMS and address existing challenges for MDMS services. The latter will focus on ticketing, booking and payment services by addressing a number of market-related problems, namely potential resistance by some transport service



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providers to provide access to all their data to other actors (much more present in rail) and potential discriminatory practices by online intermediaries in access to their services. Remedies in the form of access regulation can be considered, but what kind of access obligations? What lessons might be learnt from horizontal regulation (particularly the Digital Markets Act and the Data Regulations): asymmetric regulation, FRAND access conditions? Whether the liberalisation and competition of the EU Aviation Market necessitates a lighter form of regulation?

Against this backdrop, the 11th Florence Intermodal Forum brought together stakeholders representing aviation policymakers, airlines, travel intermediaries, meta-search companies, consumer organisations, and academics, among others, for an aviation-focused discussion on multimodal digital mobility services in the EU.

## What Regulation for Multimodal Digital Mobility in Europe?

A comment by Juan Montero and Matthias Finger, Florence School of Regulation – Transport Area

Digitalization has the potential to substantially improve mobility. However, doubts remain as to how such benefits will be distributed across the mobility ecosystem, and especially how to make sure that digitalization ultimately benefits the passengers. Regulation has the potential to accelerate digitalization and its benefits, particularly when it supports the fair distribution of the value created.

Digitalization can improve the available information about the different mobility options, thus empowering passengers to make better decisions in terms of prices, but also in other terms of the sustainability of their traveling arrangements, as well as in terms of service quality, for example when something goes wrong during the trip, as well as when it comes to redress and compensation. In short, digitalization improves the overall efficiency of complex systems such as the transport ecosystem (Montero and Finger, 2021a).

The benefits of digitalization are furthermore often facilitated and accelerated by the emergence of new players: the digital platforms. Coming typically from outside the industry, digital platforms are often in a better position to identify and unlock complementarities across mobility providers, as well as across transport modes (so-called “network effects” in economic terms). Passengers often perceive that it is these platforms that bring them the benefits of digitalization in terms of comparison sites and new ticketing options.

However, experience also shows that digital platforms often come to compete with the traditional players when it comes to the appropriation of the value created thanks to the network effects. Indeed, the network effects that the digital platforms are able to create tend to be more powerful, and these network effects often lead to market concentration, winner-take-all

dynamics and enable the platforms to monopolize the value they create thanks to and on top of the activities of the traditional players. This explains why traditional players often behave strategically in their relationships with digital players, as they are afraid to be “platformed” (Montero and Finger 2021b).

Nevertheless, we think that a well-designed regulatory framework can indeed accelerate digitalization for the benefit of passengers in three different ways:

First, regulation can facilitate the exchange of data and information across the mobility ecosystem, notably by fostering interoperability. Some industry segments are obviously more mature in terms of standards facilitating the exchange of information than others. Indeed, aviation is clearly more mature than rail or urban transport. In short, standardization efforts and more generally the creation of data spaces can certainly accelerate digitalization.

Secondly, regulation can level the playing field among the involved actors by improving the incentives for all actors to collaborate. Experience in other industries shows that the balance of power between the traditional service providers on the one hand and new digital players on the other can evolve. Even though it is probably too early to export the obligations imposed on gatekeepers in the Digital Markets Act to the digital mobility platforms, regulators should be prepared to do so if the need arises. For the time being, access regulation under Fair Reasonable and Non-discriminatory (FRAND) conditions provides a sufficiently flexible framework for the regulation of the evolving relationship between traditional service providers and digital platforms. Indeed, a FRAND access regulation, because of its flexibility, could provide the right incentives both for mobility service providers to share their data with digital platforms, and for digital platforms to share the value generated with mobility service providers. To be clear, FRAND access regulation does not substitute the commercial negotiation of access terms which seems the most adequate instrument for the definition of the delicate balance of rights and

obligations in such a complex ecosystem. But, the more we understand digital intermediation, the more we become aware of its complexity as well as of the difficulty to substitute commercial relations with regulated ones. As a matter of fact, regulation can define the boundaries for the negotiation thanks to the definition of black, grey and white conditions in secondary legislation or in soft law. Some examples of limitations to be imposed upon digital platforms could be the prohibition of self-preferencing, the prohibition to use data provided by the intermediated party to compete with it, the obligation to share transaction data back with the intermediated party and others more. Also, transparency in the pricing of the platform services seems a more reasonable approach than price regulation, at least at this stage. Inversely, some limitations that could be imposed upon mobility services providers are the obligations to provide basic information such as routes, timetables and some basic pricing information, but other prices and discounts should be left to commercial negotiations. Regulation can also provide incentives for the parties to reach agreements or at least to define procedures to solve disputes.

Thirdly, regulation can protect passengers from bad practices and loopholes in a digital mobility ecosystem. Passengers are indeed the weakest link in multisided markets. But, in our opinion, there is no role for a FRAND regime in the relationship between digital platforms and the passengers. Just as the relationship between service mobility providers and passengers is heavily regulated, the relationship between platforms and passengers will require rules. Regulation can reinforce the passengers' position by introducing transparency and specific safeguards on the display of offers, for example. A mere reference to neutral display might actually be more confusing than effective, while the introduction of specific obligations on ranking and display may well protect passengers in a more effective way.

Montero, J. & M. Finger (2021a). Digitalization, efficiency and convergence. In *A Modern Guide to the Digitalization of Infrastructure* (pp. 289-308). Edward Elgar Publishing.

Montero, J., & Finger, M. (2021b). *The rise of the New Network industries: regulating digital platforms*. Routledge.

# Main Takeaways from the Discussions

By Francisco de Abreu Duarte, European University Institute Law Department

## 1. Introduction

Multimodal digital mobility services (**MDMS**) are crucial in promoting multimodality in transport by facilitating comparability, transparency and the selling of products among different modes and operators. MDMSs can directly benefit passengers by helping them navigate, access, and compare an increasingly complex and diverse range of transport options, thereby rendering transport more efficient and sustainable. As part of its [Sustainable and Smart Mobility Strategy](#) (SSMS), the European Commission has committed to evaluating the position of multimodal digital service providers, and to providing recommendations that support the development of multimodal ticketing services. A public stakeholder consultation was conducted to implement this strategy and a legislative proposal to advance MDMS is expected in 2023. This initiative will focus on fair comparison, transparency of transport possibilities, ticketing and booking, and will address market-related problems such as the reluctance of some transport operators to collaborate with MDMS and potentially discriminatory practices by digital intermediaries. Access regulation may be considered, and lessons from horizontal regulation, such as the Digital Markets Act and the Data Act proposal, will be taken into account.

Against this regulatory background, the 11<sup>th</sup> Florence Intermodal Forum gathered in Florence, Italy for a multistakeholder conversation between policymakers, airlines, travel intermediaries, intermediary platforms, consumer organisations and academics. The discussion focused mainly on aviation, although other means of transport also provided valid inputs (e.g. rail).

The forum discussed critical questions on the future of multimodal mobility, focusing on the interaction between airlines and MDMS in the distribution market and discussing the most

suitable approach to ensure cooperation and a level playing field for all players.

The following questions were raised in the discussion.

- Is regulating content sharing in the air transport market necessary to better integrate airlines in MDMS? Is there a market failure? What kind of obligations should be imposed? On which airlines?
- What potential obligations should be considered for digital intermediaries selling or relinking to air mobility products? Which intermediaries should be regulated?
- What are the necessary and proportionate FRAND conditions in this context? Who decides what FRAND is?

### a) General Considerations

The forum began with some general considerations on the question of regulatory action. The precise question that animated this session was whether regulatory intervention – such as a legislative imposition of mandatory FRAND obligations or a mandatory integration of transport operators by MDMS - was needed to define fair conditions potentially applicable to different multimodal digital service providers and transport operators. This opening theme was present throughout the conversation, with opposing views on whether regulation on this topic was needed at all, and if so how it should be crafted.

It became clear from the start that this topic is contentious and the stakes are high for all the players involved. The key objective of the forum was then set to be to listen to and engage with the different positions in a constructive debate, and ultimately find what is best for EU consumers. This would mean striking a regulatory balance on what optimal regulatory action would look like ('To regulate when we need it and deregulate when we don't need it.' For instance, on CRS).

Following Action point 37 of the [Sustainable and Smart Mobility Strategy 2020](#), the Commission considered regulatory action to address numerous challenges related to MDMS, namely

by looking at i) potential market-related problems, such as potential resistance by some transport operators to granting access to their content to other actors, and potentially discriminatory practices by digital intermediaries in access to their services; ii) regulation remedies in the case of non-compliance; iii) the compatibility of new regulation with existing/upcoming legislation such as the Digital Markets Act, the Digital Governance Act and the Data Act; and finally iv) whether the specificities and level of liberalisation of the aviation market make a lighter form of regulatory intervention appropriate.

These key issues were the subject of a presentation by the Commission which described the core principles of the upcoming MDMS legislative initiative which will be formally introduced later in 2023.

### **b) The Commission legislative proposal to advance Multimodal Digital Mobility Services (MDMS)**

The debate was initially framed by introducing the general principles behind the upcoming legislative proposal on MDMS by the Commission. Preparation of an impact assessment (which will include a revision of the CRS Code of Conduct) is already underway.

The initiative has the following core objectives.

- To improve the ability of passengers to **compare and purchase transport tickets and mobility products** in and across transport modes, thereby promoting **more efficient and sustainable multimodal trips**;
- To foster competition and innovation in the development of **multimodal digital mobility platforms** by establishing an EU policy framework for ticket distribution across transport modes;
- To ensure **a level playing field between all players** active in the ticket distribution market by introducing **common key principles** (such as neutral display) and integrat-

ing the **remaining sector-specific provisions** in the revised CRS Code of Conduct;

An important dimension of this proposal is that it will apply to all modes of transport (air, rail, coach and maritime) and target the relationship between MDMS (including both B2B and B2C) and transport operators such as airlines. This means that players such as content aggregators, travel management companies, online travel agencies and metasearch engines are considered together with services that play a similar role even if they are provided by the transport operators themselves.

The legislative initiative is then divided into a layered framework of obligations based on the key concept of fair, reasonable and non-discriminatory duties (FRAND). Originally, FRAND obligations were thought to confer access rights to standard essential patents<sup>1</sup> while preserving the rights of the original patent-holder. They have often been used as competition law remedies to restore market equilibrium when a dominant player abuses its power. They can guide players in a voluntary or mandatory manner by creating a framework for discussion of the terms and amounts of access rights.

The forthcoming Commission initiative (as presented during the workshop but subject to subsequent changes based on stakeholder feedback and political validation) divides the FRAND framework into i) voluntary and ii) mandatory duties. These are then further complemented with horizontal mandatory obligations stemming from iii) consumer law protection and iv) technical mandatory requirements on interoperability (including API standards), resulting in a total of four layers. According to the Commission, these four layers can be described as:

- **Type 1 - Voluntary FRAND provisions**, which will guide agreements between MDMS and transport operators through use of a principle-based framework. These principles will include guiding points on access to content, booking fees, look-to-book ratios, marketing restrictions and the transparency of terms

<sup>1</sup> Lerner and Tirole, 'Standard-Essential Patents,' 123 *Journal of Political Economy* (2015) 547.

and conditions (e.g. how fees for access are calculated).

- **Type 2 - Mandatory FRAND provisions**, which vary between the B2B and B2C markets.

- » **B2B Market.** Mandatory FRAND obligations based on arts. 3 and 6 of the Code of Conduct and applied to all global distribution systems, not only CRS but also new content aggregators. Likewise, there will be an obligation to integrate willing air operators (which are already covered by MDMS due to their geographical and modal scope) **only if the MDMS would have over 50% share of all (air) tickets sold in the E.U. (market threshold).**

- » **B2C Market.** In a similar fashion, the mandatory FRAND will include an obligation to integrate willing air operators (with the geographic and modal scope already offered by MDMS) **only if MDMS had over 50% share of all (air) tickets sold in the E.U. There would also be an obligation on air operators to enter into commercial agreements with willing MDMS, only if the air carrier had over 50% of seat-km in the EU.**

- **Type 3 - Mandatory Consumer Protection Provisions**

- » These are obligations imposed on all MDMS irrespective of FRAND, including principles such as fair display, bans on self-preferencing and paid prominence and obligations to apply minimum unbiased filtering options for consumers.

- » They also include displaying information on GHG emissions by a trip (when available from transport operators) and aligning their objectives with those of public authorities (e.g. data critical for mobility management)

- **Type 4 - Mandatory technical requirements** to facilitate cooperation, which apply to all players irrespective of FRAND obligations.

- » Reference standards for booking/payment APIs (in all modes and all geographies).

- » Reference common booking/payment API standards to apply to all new agreements if requested by either side.

- » Standards can be differentiated by mode: e.g. TAP-TSI for rail; NDC and EDIFACT for aviation.

Both forms of FRAND access were then detailed by the Commission, which deepened understanding of the FRAND framework. According to the Commission, the FRAND framework should be understood as based on some foundational principles.

- **Access to content /display of content**

- » Transport operators provide access to all content and all types of tickets (discounts / promotional offers / lower fares / ancillary services);

- » MDMS integrate all content with equal care in a timely manner and comply with fair display and no self-preferencing;

- » MDMS provide data feedback to operators (statistics, after-service, fight against fraud, customer identification).

- **Compensation fees** (commission on sales/ booking affected – distribution / re-linking), which should be:

- » not generally imposed, meaning no obligation to pay a fee/ no minimum fee in the MDMS Regulation, based on commercial freedom;

- » fair – linked to objective and transparent criteria (e.g. volume of tickets sold);

- » reasonable – linked to costs incurred by MDMS rather than the value of the ticket. Costs should include R&D, quality of service, etc;

- » No discrimination – equal treatment for equal conditions.

- **Costs related to linking MDMS and operator systems**
  - » There can be one-off technical adjustments (typically borne by the MDMS).
- **Transparency and other guarantees**
  - » There must be guarantees of security and fraud prevention on both sides;
  - » There must be transparency as to how compensation is calculated;
  - » MDMS need to be transparent about fees consumers pay for the service (compared to the fare price).
- **Other issues**
  - » Look-to-book ratios should be non-discriminatory and there should be a prohibition on marketing restrictions (e.g. restrictions on selling through metasearch or other price comparison websites, restrictions on brand-bidding, restrictions on offering discounts).

The presentation of the initiative under discussion led to two sets of core questions that were present in the following discussions.

1. Can a FRAND framework be effective in bringing multimodality and a level playing field? And if so what are the essential FRAND elements for operators? Likewise, what are the essential FRAND elements for MDMS (B2B and B2C)?
2. Beyond what threshold do MDMS become indispensable for air operators? At what point is it necessary to enable access to air operators' content to ensure multimodality?

The presentation of this layered approach motivated strong comments by the stakeholders present, who reacted with different arguments against some of the principles behind the initiative.

The most substantial point raised by intermediaries concerned the **threshold for mandatory FRAND for air carriers** (more than 50% of the seat-kms of the entire EU-wide market offer for

air). The participants noted that no airline currently has this level of market power or is likely to have. They also questioned the Commission about how it calculated this market power, whether by looking at corporate groups or individual airlines or looking at the whole market instead of specific individual routes. This is because in many cases airlines can have a certain amount of market power on some routes and decide not to share fare content with a digital intermediary. Even if they do not meet the threshold, this action on specific routes can reduce intermediaries' bargaining power to discuss the terms of access to content. However, on the other hand, digital intermediaries can have stronger countervailing powers when negotiating on routes or geographical areas in which the transport operator has less market power.

The Commission clarified that mandatory FRAND presupposes a strong market failure, and the lack of such a market failure combined with a different structure of the markets justifies different thresholds for different modes.

Some smaller airlines also raised concerns related to the compatibility of this framework with closed air PSO agreements, in which the bargaining power of airlines is substantially different.

Forum participants also raised questions regarding the other two mandatory dimensions (consumer protections and technical provisions), although these received less attention during this first session. Participants questioned whether these also depended on the threshold. The Commission immediately responded negatively. **These obligations (types 3 and 4) will apply to every MDMS irrespective of its market power.**

Finally, participants discussed the voluntary framework. They enquired whether the voluntary nature of those FRAND would nonetheless impact players which choose to not follow them. **The Commission clarified that the voluntary FRAND obligations are meant as guidelines, and non-adherence to them would not be considered a breach.**



## 2. Lessons from other pieces of legislation (the DMA, the Data Act Proposal and Consumer Law)

The second session focused on building knowledge regarding FRAND conditions and understanding how they have been interpreted in other parts of the EU legal system.

FRAND should be understood as **a set of obligations that regulate access conditions**. These access obligations exist to provide access to services that have some type of exclusivity (patents, non-replicable infrastructure, essential facilities) from which market power is often generated, often in vertically integrated markets. Originally, the concept focused on standard essential patents, in which an undertaking holds special rights over an asset which is nonetheless critical for the larger industry. By respecting FRAND conditions, patent holders can avoid stronger remedies by competition authorities and even fines by showing good faith in granting access to other market players.

An essential dimension of these original FRAND conditions was establishing a negotiation framework to achieve data access agreements. For example, under the common standard in the [Huawei v. ZTE](#) judgment, the patent holder and other players should provide offers and counter-offers to achieve an agreed solution. If no agreement can be reached, then the case could be submitted to an independent third party to decide.

Similar FRAND reasonings permeate legislation on the Digital Single Market. For example, in the Digital Markets Act (DMA), article 6(12) mandates gatekeepers to apply fair, reasonable and non-discriminatory access conditions for business users so that they can access software application stores, search engines and online social networking services. This naturally echoes notable previous competition law cases such as the Microsoft case. Similarly, the DMA imposes obligations that mirror those proposed by the Commission in the MDMS legislative initiative. For example, in article 6(5) the DMA prohibits gatekeepers from self-preferencing and

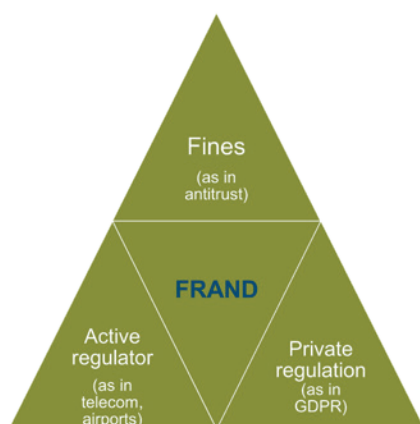
mandates FRAND reasoning to apply to ranking all the same.

Likewise, in the Data Act proposal article 8 (1) frames data access to data holders under the same FRAND conditions. Moreover, the terms of the compensation for this access must be reasonable (article 9(1)). When the parties fail to reach an agreement on the meaning of reasonable compensation, the proposal also provides recourse to alternative dispute settlement bodies which work as independent third parties.

In some sense, FRAND conditions represent a middle ground between different types of regulation and enforcement. On the one hand, they respect the contractual freedom of the players involved, allowing them to reach optimal agreements based on their availability to compensation for access. This is typical of private regulation schemes in which data subjects can have some self-regulatory freedom to reach the best deal (e.g. GDPR) according to commercial freedom. On the other hand, mandatory FRAND obligations presuppose a more active regulator which sets the terms of the access discussion. In this sense, the freedom of data holders and data seekers is constrained by the existing case law and specific principles which reduce the margin of discretion of the parties involved.

Perhaps more importantly, FRAND obligations in competition law serve as a less intrusive remedy to later competition law fines. By respecting these conditions players can demonstrate that they negotiate in good faith and in this way reach a safe harbour. This can steer antitrust fines away from companies and incentivise access without further public intervention.

Fig 1. FRAND conditions as a middle ground



Beyond these principles, the forum discussed the key role of consumer law. Some members held that these conditions would only make sense if understood as a second step after passenger rights.

The idea of passenger rights as the fundamental basis for the MDMS proposal was justified because passengers are often left in a weak position. Hence, EU legislation should primarily focus on protecting passengers independently of the entity they are interacting with (transport operator or MDMS). Type 3 obligations like those proposed in the MDMS initiative are crucial even more than voluntary and mandatory FRAND and can sometimes even mimic them (e.g. prohibition of neutral display).

Some members found the comparison between FRAND conditions and the DMA to be misleading. They argued that the DMA is structured for the big dominant players in the digital sector, a reasoning which does not really translate well to digital intermediaries in the airline sector. This is mostly because the relevance of online travel agencies (OTAs) is not comparable to the large digital gatekeepers that the DMA addresses. Some members provided examples of this commercial imbalance between platforms and airlines, noting that sometimes large airlines will not provide the entirety of content fares or avoid sharing discounted rates to the detriment of the intermediary.

The intersection between passenger rights and commercial imbalances led one member to frame the debate with this key question:

**Should we treat transport content (including airlines) as a public good that needs to be made available to all passengers or instead as a regular market?**

This division was then further exemplified by some airline representatives who argued, for example, that when comparing clothes, users do not have access to platforms that compare all available prices by brand. Neither are all clothing companies available to provide all product-content for a price comparison and resale tool. Why should transport, and in particular airlines, be obliged to allow all MDMSs to resell their transport services (regardless of the quality and service provided) and be more open and transparent about their own products?

This contentious point divided opinions and opposed some members with divergent views. For example, against the comparison with retailing some members reminded the audience that the MDMS objectives were ultimately public objectives to incentivise sustainable and multi-modal transport. If content sharing with intermediaries fosters this greener means of transport then it becomes clear that transport goes beyond mere commercial interests.

Moreover, some airline representatives reminded the forum that retaining the freedom to choose who to share fare content with can ultimately protect consumers. In the past, many airlines encountered problems when intermediaries gave consumers low-level services, for example, during Covid19. Ultimately, consumers will always partly attribute service flaws to the airline, which at that point cannot control how information is delivered on fare prices, schedules, delays, etc. Retaining control over who they share their data with is key to ensuring good quality service.

Representatives of smaller airlines introduced another important dimension, namely how FRAND implementation could actually be vital in their niche market. In their opinion, access by intermediaries to airline data is essential to foster competition among airlines, i.e. by allowing smaller aviation companies to present their offers in aggregators and OTAs. Without these

mandatory FRAND conditions, airlines will have fewer incentives to share their content and intermediaries might lose relevance in the long run. This would have an indirect impact on smaller airlines which are highly dependent on these intermediary services.

At this moment, the discussion was strongly focused on mandatory FRAND. The moderators therefore decided to recentre the debate around equally important voluntary FRAND. This made sense, given that the high threshold proposed would make voluntary FRAND the most likely to be used.

Participants then delved deeper into the details of FRAND conditions, suggesting that even defining voluntary access conditions should be questioned. Unsurprisingly, a key element in the discussion was pricing. All the participants agreed that pricing is a key dimension of a FRAND negotiation. However, under which terms? For example, can OTAs reduce prices below the original fares (even below cost) to gain market momentum, or does neutral display prohibit this? Similarly, data protection dimensions should also apply and consequential liability must also be clarified by regulation. If airlines continue to bear the risk of liability for data protection infringements, the incentives to integrate further data access would be even fewer. Moreover, in big open platforms like Google Flights it is unclear who ultimately is responsible for incorrect data or misleading information.

Some members suggested that the key to FRAND access could be better information, not just more information. From a passenger rights perspective, we ultimately want passengers to make informed choices. Therefore, FRAND access conditions should target rankings and filters. This could ultimately be the meaning of the obligation of neutral display, a safety net that does not prevent other filters but serves as a minimum guarantee of good information for consumers. However, some other members disagreed and reminded the forum that neutral display obligations make sense in a scenario in which all (or almost all) content is accessed. At this stage, OTAs and other services do not have

access to all fare content and so neutral display would not be the main issue.

The discussion on self-preferencing continued but was somewhat put to a halt by a member who alerted that in most cases intermediaries are not selling anything of their own. Unlike e-commerce platforms, these services simply aggregate and filter supply but they are not vertically integrated as they do not provide transport services themselves. However self-preferencing obligations make much sense when the transport company vertically integrates and starts providing digital intermediation services (e.g. a rail aggregator developed by a railway undertaking).

At this stage, Professor Finger provided a point of order that introduced two essential dimensions to the discussion. It seems that MDMSs could be looked at from two different perspectives.

1. As **mere distributors**, a neutral place for information gathering in which consumers can obtain information about different modes of transport;
2. As **true intermediary platforms**, providing added value to the value chain and mediating between consumers and other businesses.

According to the perspective, the FRAND conditions applicable would be different.

### **3. How to ensure access to travel data in the aviation sector?**

This session refocused attention on the aviation sector and how to ensure that access to content can become a reality in that market.

Participants started by discussing the active role of content aggregators and OTAs in the aviation market and the extent to which they bring added value to the market. Here participants made it clear that the market, even at the content aggregation level, is competitive.

Some big players underlined that they were already allowing massive access to their content and that this practice had been ongoing for a long time. Some of these representatives rejected the idea of a conflict and instead praised the

dynamic intermediation market that has arisen in recent years. However, bigger operators argued that some freedom must be maintained even in good content sharing cases. For example, in terms of interoperability technology, some big airlines wish to push for better standards like NDC and away from older technology such as EDIFACT. To nudge intermediaries to adopt these standards, some airlines are charging those who continue to access information according to older standards a surplus, effectively incentivising mainstream standard adoption. Likewise, many airlines are developing increasingly more complex products which intermediaries do not easily display. Some airlines argued that what must be avoided with mandatory FRAND or type 3 obligations (based on passenger rights) is that, ultimately, the consumer is in a worse position because some intermediaries will add hidden charges to the original fares. During Covid-19, for example, intermediaries failed to inform passengers of changing conditions, which ultimately damaged the airlines' reputation. In the opinion of these participants a general mandatory obligation to share all content will ultimately harm the objectives that the Commission is trying to reach, including protecting passenger rights.

Some other members responded by questioning whether there is an alternative to regulating full access to content. This is because if the market is left to itself many companies will continually scrape airlines' websites and obtain the information in any case. One member asked the question: *is it better to have a controlled content access agreement or continually suffer web-scraping attacks?*

The debate then continued with a more detailed discussion on what types of content should be accessed.

A non-contentious element among attendees was access to scheduling. If the Commission wants to promote multimodality, then passengers must be able to at least access the options for the different modes of transport between point A and point B. This is already enabled by Delegated Regulation 2017/1926 on Multimodal Travel Information Services. However, even

in this specific apparently innocuous case, intermediaries make important content-ranking decisions. Therefore, some participants rejected the idea of neutral display as simple fiction: **as long as commercial interests are involved, any ranking becomes a choice.** Perhaps the best idea is transparency, akin to the Digital Services Act, in which consumers understand why a certain ranking is being implemented and can maybe turn it off completely. Most importantly, these content rankings cannot be discriminatory.

At this point, while mandatory FRAND conditions had been well debated, the moderators re-introduced a direct question related to voluntary FRAND: *Are airlines comfortable with this? Are the incentives there to promote these voluntary conversations?* No clear answer was obtained from the participants.

Two important questions were raised at this point instead.

**Are there market players in aviation that have such market control that justifies market intervention? What should the threshold be to be meaningful in air?**

**From the passengers' perspective, as products become more complex can comparison and reselling become a problem for passengers? Should we address this matter and use regulation to prevent market failures?**

Representatives of digital intermediary services unanimously responded with a rejection of the 50% market threshold and advised that a smaller number would be required in the air sector. These representatives were also generally unconvinced of the actual usefulness of voluntary FRAND conditions.

At this point, it was evident that air and railways are very different in terms of market concentration and market failures, and so would be the thresholds in the future legislation. While the threshold for air carriers is 50% of seat-kms in the EU, for rail the threshold is 50% of passenger-kms in domestic markets.

This session then concluded with some agreement on how to display content, and what content could be accessed, but with a **larger consensus that the air and rail markets might require different approaches.**

#### **4. Conclusions: to regulate or not to regulate access to content in the aviation sector?**

In the final substantive session, participants representing the different interests at stake took the floor to discuss whether regulation of MDMS was necessary. It was stressed that the possible ways forward presented during the workshop were subject to further adjustments based on stakeholder feedback and political validation.

In the opinion of some of the most prominent airline players, continual investment should be put into technology and interoperability access standards. They also confirmed that many airlines already cooperate with content aggregators and MDMS to this effect. However, they maintained that regulation should only be passed when a clear market failure is identified, which is not the case according to their position.

On the contrary, they argued that the aviation market is highly competitive and that novel standards such as NDC will be likely to foster even greater market dynamics. In this sense, the sort of access obligations proposed could actually hinder innovation instead of promoting it. This is because the market did not react very well when access duties were imposed in the past, and problems arose between intermediaries and content providers (airlines). Ultimately, consumers can also be better off if the market is left to self-regulate because more complex products will be created, and that complexity will always respond to consumers' needs.

Some smaller airline operators challenged this position. Unlike larger airlines, smaller players depend on intermediaries to reach key consumers. The representatives of some of these smaller airlines recognised that they could not compete with big players if it were not for content aggregators and OTAs. Interoperability

should exist to allow these MDMSs to continue to grow and promote better market equilibrium between airlines. However, this would not suffice *per se*. Display obligations are crucial for smaller players because they avoid intermediaries engaging in bidding wars in which only more prominent airlines can compete. Such a business model – in which each intermediary can rank offers or content as they please – would also deeply hurt smaller airlines, especially when their routes are not as attractive as some others.

Representatives of the MDMS side also shared their views on what balanced regulation could look like. In principle, these participants argued that these services want to work with everybody and have an economic incentive to do so. However, if all the regulatory obligations fall on the MDMS side, from display obligations to bans on self-preferencing, then the business becomes less and less attractive for anyone. While MDMS want to foster good collaboration between all players involved, they feel this regulation – especially with such a high threshold – means that all obligations fall on one side of the market, which is unfair. **According to their views, there should be more reciprocity in the obligations imposed.**

These three views agreed that MDMS bring added value to the market but disagree on exactly what that value is. Most disagreements stemmed from this question. One member ultimately challenged the room: **“is it not better we exist instead of paying a search engine or ads?”**

At this late moment in the discussion, participants returned to the key question behind all the discussion: **what is the ultimate goal of this legislative initiative?**

One could think of three potential main drivers:

1. To **protect consumers**, meaning achieving the most balanced solution to protect their rights as passengers;
2. To **achieve mobility objectives**, namely by making transport greener, more sustainable and more affordable through multimodality;
3. To create **industrial policy** by fostering a boom of digital intermediaries in the transport business.

FRAND obligations normally focus on point 3, to stimulate a growing market that is blocked by more established and dominant firms. However, the existence of a multimodal transport policy for Europe might depend on passengers being more aware of their options and having a choice among different modes. MDMSs provide this and make travelling easier. In this sense, both 1 and 2 are relevant in such a regulatory approach.

In order to be effective, in this MDMS legislative initiative the four types of obligations (voluntary FRAND, mandatory FRAND, consumer law and technical standards) must work together. The conclusion was that market players will have fewer incentives to use voluntary schemes without clear consequences in the case that the framework is ignored. Moreover, in terms of consumer law frameworks, one must be careful when framing a FRAND dialogue – mandatory or not – to only then establish a very comprehensive baseline for all players involved.

The forum concluded with a **wrap-up** of the key points that the Commission should address when designing the new MDMS proposal.

1. Different transport modes have different market considerations that shape the discussion. Rail and aviation, for example, clearly have different challenges in terms of access to content for ticket distribution and market competition;
2. It is essential to abandon and replace the CRS Regulation with an updated alternative. However, at this stage it is not fully clear what exactly this alternative should be and how interventive it should be;

3. The 50% of seat-kms in the EU threshold remains a contentious point in aviation. To craft a multi-modal piece of legislation, a balance must be struck between market needs and players.
4. It is essential to identify each policy objective and match each provision to the policy objective pursued. The MDMS proposal must be a coherent narrative that accommodates all that was said at the forum and justifies each policy decision made.

While FRAND remains an essential part of the MDMS proposal, it also became clear that the regulator should be careful about being over-prescriptive. The direction might be to push for a more voluntary approach and then later progress from there. For the mandatory elements in the proposal, the difficulty will always lie in setting the line – or the threshold – in a way that promotes multimodality and sustainable transport but does not hinder innovation and competition.

## **An ambitious regulatory framework can help unlock opportunities for multimodal travel in Europe**

A comment by Koen Baekelandt, Head of Enterprise Regulations, Amadeus IT Group

### **The multimodal challenge for the EU Commission**

The EU Commission is developing a new regulatory framework to enable multimodal travel by ensuring that digital platforms (Multimodal Digital Mobility Services or “MDMS”) can combine air, rail, ferry, and other ground transportation in a single trip. By enabling more competition between operators across transport modes, consumers can make more sustainable trip choices, thus realising a modal shift in Europe and giving consumers the benefits of a single market for mobility. This new regulation needs to ensure that:

1. Consumers have access to travel information on competing multimodal offers and the ability to search, book, pay, and receive travel documents to make better and more sustainable (less carbon-intensive) travel decisions;
2. Consumers can choose between different MDMS, most importantly including independent intermediaries, to be confident that the information provided by them is comprehensive, transparent, and accurate;
3. Intermediaries have access to content that allows them to aggregate transport information following FRAND (fair, reasonable, and non-discriminatory) principles, combining modes and operators using objective ranking criteria, thus offering consumers a real choice between competing offers;

## **What should an ambitious regulation look like?**

### *Access to data*

The key enabler of multimodality remains access to operators’ data in the key transport modes, including air and rail, as the key environmental benefits will come from rail replacing short-haul air and car travel. A new regulation must therefore include an obligation for large airlines and railways to make static and real-time data on fares, schedules, availability, optional services, delays, changes, etc. (“content”) available to all MDMS on FRAND terms and conditions. Today many large airlines and railways resist sharing data, including those that are indispensable to consumers. It is key to include large airlines because, without their content, consumers will not use MDMS to compare and substitute flights with trains.

The new regulation also needs to balance content obligations of the operators with corresponding obligations for MDMS to treat all operators in a non-discriminatory manner, including an obligation for all MDMS platforms to integrate, upon request, all transport operators on FRAND terms. This should apply equally to MDMS that are owned or controlled by a transport operator (i.e., vertically integrated MDMS), Mega online platforms such as Google Flights, and aggregators.

It is important to recognise that MDMS that are controlled by transport operators will normally not have the incentive to integrate competing transport operators, such as a small airline. In a market where vertically integrated MDMSs are controlled by an indispensable operator, they must allow the integration of competing transport operators in their own MDMS on terms similar to their own.

### *Level playing field*

To enable true like-for-like comparison for consumers to search and book a multimodal trip, all MDMS must be treated equally, based on the merits of their activities: there must not

be any special treatment of aviation-specific or rail-specific platforms as this would undermine the objectives behind this initiative and unlevel the playing field at transport mode level. Air, rail, coach, and other transport modes' offers must be visible in a single display so that consumers can compare and choose the best option, including more sustainable combinations.

This means that there should not be any distinction between business-to-business (B2B) or business-to-consumer (B2C) MDMS. If B2B MDMS do not have access to the content of large transport operators on FRAND terms, then most B2C platforms will not be able to provide a comprehensive multimodal offer to consumers, as B2C players (except Google) rely on B2B technology partners like Amadeus to efficiently aggregate the content of hundreds of transport operators.

#### *Transparent ranking criteria*

Finally, the regulation should oblige all MDMS to apply non-discriminatory and transparent display and ranking criteria, provided MDMS obtain FRAND access to information of transport operators. A platform without any relevant transport content is useless for consumers.

To promote transparency, choice, and innovation, the regulation should specify ranking criteria that consumers can select:

- a. a minimum set of mandatory search options (including CO<sub>2</sub> emissions if MDMS receive the information from the transport operators or a neutral source);
- b. optional criteria depending on what the user wants to see

and oblige all MDMS to apply these criteria in a non-discriminatory manner.

Vertically integrated MDMS and Mega B2C platforms should be subject to these and additional obligations, including non-discriminatory treatment of competing MDMS versus their own

MDMS in terms of content and a self-preferencing ban. Such sector-specific regulation would complement existing rules such as competition law and the EU Digital Markets Act.

#### **Conclusion**

Unless the MDMS regulation ensures the above, the Commission's sustainability ambition may well remain a political aspiration, failing to unlock a modal shift that is estimated to reduce carbon emissions equivalent to 16 million cars per year<sup>1</sup> and hampering the willingness of existing and new intermediaries to invest in technology solutions for multimodal travel. Without it, EU consumers and the environment will continue to bear the costs of a fragmented passenger transport market.

<sup>1</sup> White Paper by Kearney, November 2022, available at <https://www.kearney.com/digital/article/-/insights/digitally-driven-multimodality-can-supercharge-sustainable-growth-of-european-passenger-mobility>



## Integrating airlines in MDMS

A comment by Vasiliki Christidi, Group General Manager, SKY express

Any airline operator wants to maximise its commercial efforts and capabilities, reach the largest possible pool and sell as many seats as possible, in every route of its network. Consumers want as many choices as possible, with potentially infinite number of combinations of routes, travel time options, environmentally sustainable choices and – most importantly – price, at the convenience of a hand held device. Regulation is addressing the changing world of mobility for the future by multimodal solutions, building on the benefits of the new interconnected digital world. Fact of the matter remains that each and every consumer will, at any given point in time, need to move from a point A to a point B.

In the new multimodal world, the regulator is challenged to open the road to the future of mobility, by combining the competitive European aviation market, with the monopolised fragmented rail market (not excluding the road and ferry transportation), through the unassailable and increasingly significant global digital platform intermediaries. One needs to acknowledge that the end result of the regulation would be to generate a new service, a product, currently not existent. We would then be, consequently, led to a debate about ownership, control, benefits and liabilities over this new multimodal service.

Using horizontal regulation to create the seamless multimodal service would entail applying a minimum set of uniform rules across different markets, in a manner that creates no or minimal distortion to the stand alone services' ecosystem, the stand alone services themselves and, effectively, to each of the market's ability to further develop competitively. However, when taking the consumer or the supply perspective and in order to effectively regulate either of them, we need to answer the following question: Who is the owner of this new multimodal service?

Inevitably, regulation faces the dilemma of offering additional power to the digital intermediary since such a structure may only work if the

aggregator has the right and obligation to administer the booking and manage revenues and refunds, stripping aviation operators from control over fares. Therefore, the debate is about the leverage of commercial power and the control of revenue production. But, dis-aggregating revenue from operations unavoidably generates concerns about the independent ability of aviation operators to manage connectivity, manage operational efficiency and guarantee aviation safety. This is especially evident if we consider the case of PSO operators, who guarantee the preservation of connectivity as a fundamental mobility right with a social dimension.

Somewhere around here, we realise that there is an elephant sitting in the room, for whom no one is willing to talk about! So, instead, we discuss on which fair, reasonable and fit for purpose conditions for each independent component we should introduce to treat any potential market failures of a new virtual seamless multimodal service. In this environment no consensus can be readily expected in the real economy. While digital platform intermediaries would be expected to act as the glue, they might not yet acknowledge their de facto negotiating advantage, emanating from their access to consumers and data. Nonetheless, it is a fact that the growth of the digital ecosystem is expanding and its significance is increasing, breaking the boundaries of traditional communication of products and services. Airlines are, rightly, reluctant to surrender their control over the fares, revenue and data, for many reasons, none of which can be merely attributed to indifference or fear of the airlines over the new digital future. Airlines have always been at the cutting edge of new technologies and early adopters of interconnected global distributions systems. Being truly global, even in their domestic network operations, there is literally no disincentive for adopting any new technology going forward, provided that this does not restrict their ability to control their product. Moreover the aviation industry and its consumers today enjoy the fruits of a well-earned competitive market and should not be requested to onboard inefficiencies of other industries, just for the benefit of aligning with them. We should be free to

control the quality of the distribution networks of our choice and protect our product and its commercial offer, as this is not irrelevant to the right of the consumer to enjoy our service per se as provided by the 'responsible for the service' airline.

Having said that, the same rules and obligations, oversight and audit would need to apply for every digital intermediate aggregator and alternative mode operator to the same standard as that required by any European air carrier. This includes the full exchange of data, assuming liability towards the consumer, dealing with disruptions and cancellations, offering true transit or transfer connecting assistance between modes and transportation platforms, as any added-value service will need to account for the true value of the digital intermediaries and any participating mode of transport. These are issues that cannot be left to the market to negotiate, as it could lead not only to loss of quality of service but potentially a free ride for other stakeholders. The allocation of responsibility should not be a matter of negotiation or dispute resolution.

One should wonder again; when the starting point is facilitating a traveller (wishing to move from any point A to any B) to assess all possible connection modes and combinations, would it not be more efficient to use all new digital tools, big data and Artificial Intelligence to align all possible itineraries and provide real-time travel information, as a starting point for any future development of products and services? It is important for the airlines, the consumers and the welfare of the aviation ecosystem that the competitive aviation market continues to evolve forward, and, ultimately, it is safety critical that any airline controls its product and its business model.

## Aviation and MDMS: the passengers' perspective

A comment by Delphine Grandsart, Senior Researcher, European Passengers' Federation

Today, planning, booking and executing multimodal journeys – especially long-distance, international ones – is risky, difficult and time-consuming. Even though a multimodal offer might be the best option, passengers may not consider it due to a lack of awareness and the absence of a one-stop-shop, covering all modes (including first and last mile). Here's why Multimodal Digital Mobility Services (MDMS) have an important role to play, making it easier for passengers to plan, book and pay for their multimodal trip, allowing them to make an informed choice in an integrated transport system, using each mode to do that for which it is the most efficient in achieving an affordable, reliable, sustainable end-to-end journey.

The topic of conditions for access to data (all transport modes) and license agreements for (re) selling mobility services – as crucial enablers for integrated multimodal information and ticketing systems – has been discussed at length in the Multimodal Passenger Mobility Forum (MPMF)<sup>1</sup>, which was established in December 2021 as a stakeholder platform to assist the European Commission in the preparation of policy initiatives in the field of sustainable multimodal mobility for passengers.<sup>2</sup> Despite diverging interests of participants, there was an overall consensus on the need to share more data and for the cooperation between operators and MDMS to take place in the framework of negotiated distribution agreements under FRAND (fair, reasonable and non-discriminatory) terms.

In EPF's view, data sharing and readiness to conclude distribution agreements between operators and MDMS should be the default option, i.e. the norm. Whereas the same principles should apply to all modes, the concrete application of what exactly constitutes 'FRAND' will vary according to the use case. Therefore,

besides featuring FRAND as a core standard in the upcoming MDMS Regulation, further guidelines or implementing acts per sector (a PSO public transport service versus a commercial service, for example), including specific requirements targeting common unfair practices, should be developed, defining what practices (do not) qualify as FRAND.

Another important issue to consider is how the available transport options are presented to passengers. Here, it is useful to recall the principles underlying the CRS Code of Conduct (Regulation 80/2009, originally introduced to ensure that airlines would not promote their own services over those of competitors by mandating a 'neutral display' for computerised reservation systems), which was announced to be merged with the new regulatory initiative on MDMS. There was a broad agreement within the MPMF on the continued need to avoid self-preferencing, which is relevant for all modes (e.g., platforms operated by large railway undertakings) and MDMS.

In EPF's view, the principles of the CRS Code of Conduct that relate to consumers – transparency, fair competition, neutral display – should apply to all distribution channels, allowing passengers to compare and choose not only between the offers of different air carriers but also between different (combinations of) transport modes. This means that the results of any travel query through any kind of MDMS, should be presented in a neutral, unbiased way, avoiding self-preferencing and allowing a like-for-like comparison. Since the ranking of travel options has a big impact on consumer choice, in EPF's view, it is preferable that any ranking be done, as is the case now according to the CRS CoC, based on objective criteria and/or criteria that the passenger can choose. It would be good to include other criteria as well besides price and travel time, for example, accessibility or environmental impact.

Integrated multimodal information and ticketing are necessary as a first step. On top of that, an adequate level of protection for passengers when

<sup>1</sup> COMMISSION DECISION of 3.12.2021 on setting up the Multimodal Passenger Mobility Forum, C(2021) 8688 final

<sup>2</sup> The outcome of the MPMF meetings was published on 2. February 2023 and is available here: [https://transport.ec.europa.eu/news/multimodal-passenger-mobility-forum-final-report-2023-02-02\\_en](https://transport.ec.europa.eu/news/multimodal-passenger-mobility-forum-final-report-2023-02-02_en)

using combinations of different transport modes is needed to make multimodal travel a convenient, reliable and safe choice. The roles and responsibilities of intermediaries (MDMS) need to be clarified: Who is responsible for providing (real-time) information, addressing complaints, handling compensation requests, re-routing passengers, and providing assistance in case of disruptions? Such questions are relevant not only to air but also to multimodal trips. Whereas they fall out of the scope of the MDMS initiative as such, the EC is considering them in the context of another complementary effort to achieve “Better protection for passengers and their rights”.

To conclude, passengers need a neutral, comprehensive and reliable overview of available travel options to make an informed choice. Buying multimodal tickets should be easy, affordable and offer protection in case something goes wrong. MDMS alone will not solve everything, but it is definitely a piece of the puzzle – both for short and long-distance travel. Informed consumers are essential to any truly competitive market. Moreover, the social, economic and ecological benefits from collaboration and integration will be far greater and should be prioritised over individual companies’ business interests. The principal role of the EU should be to promote ‘whole journey’ thinking as an important driver to modal shift and to create the policy framework to facilitate this, as well as to safeguard and advance the interests of consumers.

## FSR Transport

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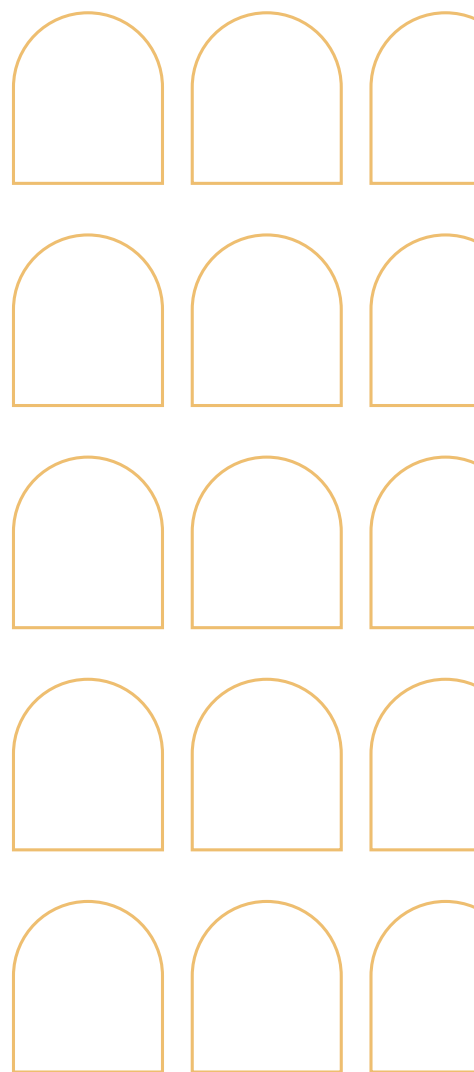
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