

Newsletter, 1st March 2016

Most favored nation clauses under scrutiny (II) Hotel online booking platforms – a never ending story?

Following the prohibition of “wide best price clauses” by HRS in 2013, the German Federal Cartel Office now ordered Booking to stop using “narrow best price clauses”

Two years after ordering HRS to abandon the use of “wide” best price clauses,¹ the German Federal Cartel Office (“FCO”) now requested Booking.com Deutschland GmbH/Berlin and Booking.com B.V./Amsterdam (“Booking”) to eliminate “narrow” best price clauses from its contracts.² The decision brings yet another investigation into hotel booking platforms to an end, currently pending before various National Competition Authorities in Europe (“NCAs”). The FCO’s approach sticks out as one of the rare prohibition decisions in the sector. Moreover, the German regulator rejected commitments that were previously accepted by a number of other NCAs and said to have been backed up by the European Commission. Hence, the FCO once more lives up to its reputation to significantly influence the approach to pan-European business practices in the online sector. Its strict approach will likely require changes also to other intermediary online platforms operating in Germany.

Wide and narrow MFNs

When the FCO started its proceedings against Booking, the hotel booking platform still applied so called “wide best price clauses” under which hotels were obliged to always offer the hotel booking platform their lowest room prices, maximum room capacity and most favorable booking and cancellation conditions available on all online and offline booking channels. Such wide best price clauses were subject to the FCO’s first prohibition decision against HRS.³

During the proceedings Booking therefore offered to introduce a modified best price

clause, allowing hotels to offer rooms cheaper on other hotel booking platforms but still requested that the prices which hotels display on their own websites may not be lower than on Booking’s portal (“narrow best price clause”).

The FCO rejected Booking’s commitments and prohibited the use of narrow best price clauses as far as they effect hotels in Germany. The FCO considered such clauses to restrict Sec. 1 German Act against Restraints of Competition (“ARC”) and Art. 101 (1) Treaty on the Functioning of the European Union (“TFEU”) by effect. As Booking’s market shares exceeded 30%, the FCO found the Vertical Block Exemption Regulation No. 330/2010 (“VBER”) to be unavailable and also declined a justification under Sec. 2 ARC, Art. 101 (3) TFEU due to a lack of efficiencies.⁴

Reasoning of the FCO

The FCO’s approach against Booking remains in line with its previous decision against HRS (meanwhile confirmed by the Higher Regional Court of Düsseldorf on 9 January 2015⁵).

The FCO explains that since hotels are not free to set prices autonomously for their own websites, narrow best prices offer little incentives for lowering prices on intermediary online platforms if at the same time a higher price has to be presented on the hotel’s own website. Furthermore, the market entry for new platforms is made difficult, following the low incentives for hotels to offer their rooms cheaper on a new online platform, while being

¹ FCO, case no. B 9 – 66/10 – [HRS](#), decision of 20 December 2013.

² FCO, case no. B 9-121/13 – [Booking.com](#), decision of 22 December 2015.

³ For more details see Commeo Newsletter, [Most favored nation clauses under scrutiny](#), 27 May 2014. Note: the term “Most favored nation clauses” (“MFN”) is used as synonym for best price clauses.

⁴ The FCO also found Booking to abuse a position of relative market strength in relation to small and medium sized hotels, pursuant to Sec. 20 (1) in conjunction with Sec. 19 (1), (2) No. 1 ARC, see FCO, case no. B 9-121/13 – [Booking.com](#), para. 302-315.

⁵ Düsseldorf Higher Regional Court, Judgment of 9 January 2015, VI-Kart 1/14 (V) – [HRS](#).

coerced by a narrow best price clause to keep higher prices on their own website.

The FCO turned down Booking's main argument that narrow best price clauses mitigated the risks of free riding by customers merely using hotel booking platforms for information purposes to eventually achieve better deals booking directly with the hotel.

Comment

With its decision against Booking, the German regulator once more takes an independent route when dealing with best price clauses in the context of online platforms. The FCO's decision is deviating *inter alia* from the approach taken by the French, Italian and Swedish NCAs, that accepted commitments to only use narrow MFN clauses to end their investigations against Booking.⁶ These commitments were a long overdue attempt within the European Competition Network (ECN) to approach best price clauses by hotel booking platforms in Europe more coherently. The UK competition authority announced in the meantime to close the probes into Booking and other hotel booking platforms, but to monitor the use of best price clauses in the future.⁷ Proceedings in various EU-Member States and outside of Europe are still pending.⁸

Even though the Commission recently announced to take the lead in addressing vertical online restrictions of European scope, it seems too late to still get a grip on the deviating positions regarding hotel booking platforms. Whether the decisions by the German FCO and other NCAs are merely the result of bad timing or whether they filled a vacuum regarding vertical enforcement within the ECN at the time, remains debatable. The fact that the FCO was one of the first national authorities to investigate hotel platforms, however, led to the practical consequence of an early court ruling confirming its prohibition decision against HRS.⁹ Different from other NCAs, the FCO was hence no longer free to align its approach with a probable consensus in the ECN, even had it been so inclined.

A recent settlement decision against Verivox¹⁰, however, suggests that the FCO is in fact rather determined not to soften its approach on MFNs in the context of online platforms. To bring the FCO's investigations to an end Verivox, a

comparison website for the supply of electricity and gas sales, agreed to abandon best price clauses. According to the FCO, Verivox thereby recognized the decision making practice in Germany.

As regards hotel booking platforms, the German story is not over: Booking is expected to appeal the decision by the FCO. Moreover, an investigation against a third hotel booking platform in Germany, Expedia, is still pending. Different from the competing platforms, HRS and Booking, market shares of Expedia are well below 30%, making best price clauses potentially available for an exemption under the VBER.¹¹ This is if the VBER was found to be applicable. The Higher Regional Court Düsseldorf left this question open, but tended to deny a vertical relationship between hotels and hotel online platforms pursuant to Art. 1 (1) lit. a) VBER.¹² So, watch this space – the saga of hotel booking platforms has not come to an end in Germany.

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⁶ Note that the French commitments became obsolete by enactment of the *Loi Macron*, prohibiting best price clauses altogether. Comparable legislation in Italy is currently under way.

⁷ FCO, case no. B 9-121/13 – Booking.com, para. 73.

⁸ *Ibid.*, para. 74.

⁹ Düsseldorf Higher Regional Court, Judgment of 9 January 2015, VI-Kart 1/14 (V) – HRS.

¹⁰ FCO, press release of 3 June 2015, [Verivox vows to stop using 'best price' clauses](#).

¹¹ See FCO, case no. B 9-121/13 – Booking.com, para. 243.

¹² *Ibid.*, para. 246 et seq., referring to Düsseldorf Higher Regional Court, Judgment of 9 January 2015, VI-Kart 1/14 (V) – HRS.