

GERMAN COURT DECISION: NARROW BEST-PRICE CLAUSES BETWEEN PLATFORMS AND HOTELS ARE PERMISSIBLE UNDER ANTITRUST RULES

Date: 18 June 2019

Antitrust, Competition & Trade Regulation Alert

By: Dr. Annette Mutschler-Siebert, M. Jur. (Oxon), Marion Baumann, Helene Gerhardt

With its judgment of 4 June 2019 on best-price clauses, the Düsseldorf Higher Regional Court (*Oberlandesgericht*, “OLG”) annulled the deviating decision of the German Federal Cartel Office (*Bundeskartellamt*, “FCO”). According to the court’s ruling, Internet booking platforms may prohibit hotel operators from offering accommodations at a lower price or on better terms on the hotel’s own website than on the platform’s website.

BACKGROUND

On 20 December 2013, the German FCO announced proceedings against the online hotel booking platform Booking.com with regard to extensive parity clauses (so-called “wide” best-price clauses), which prevented hotel operators from offering lower hotel prices, better booking and cancellation conditions or terms of availability on websites of third parties, on the hotels’ own website or offline through any other distribution channels. Other antitrust authorities of European member states were investigating similar conduct at that time.

In response to the investigations and an earlier decision of the OLG Düsseldorf on the violation of antitrust law through the use of “wide” best-price clauses, Booking.com announced on 25 June 2015 that it would change its parity conditions with all contractual partners in Europe before 1 July 2015. It agreed to refrain from the above mentioned wide best-price clauses, but it insisted on so-called “narrow” best-price clauses: While previous wide best-price clauses excluded price differentiation because there had to be parity on all distribution channels, the narrow best-price clauses only prohibit better conditions on the hotel’s own website but allow for competition by other platforms or offline distribution. Booking.com argued that these narrow best-price clauses were indispensable to maintain the functionality of its platform; without them, there was a risk that hotel operators would undercut the platform’s prices to lead consumers to their own websites to save commission fees (“free-rider problem”).

In April 2015, the French, Italian and Swedish competition authorities accepted Booking.com’s commitments as sufficient for the attainment of competition and closed their investigation. The FCO, however, continued its probe and also issued a prohibition on Booking.com’s narrow best-price clauses for Germany. Andreas Mundt, president of the FCO, reasoned:

Firstly they [narrow best-price clauses] infringe the hotels' freedom to set prices on their own online sales channels. There is little incentive for a hotel to reduce its prices on a hotel booking portal if at the same time it has to display higher prices for its own online sales. Secondly, it still makes the market entry of new platform providers considerably difficult.

The request for an interim order against the prohibition was dismissed in May 2016 by the OLG Düsseldorf. The appeal against the authorities' decision is still pending.

DECI

SION OF THE COURT

In its judgment of 4 June 2019 (case No VI-Kart 2/16 (V)), the OLG Düsseldorf decided that the narrow best-price clauses do not violate antitrust law and may therefore be used. The decision is based on the results of a hotel and customer survey initiated by the court. The court found that the clauses do not restrict competition, but they are necessary to ensure a fair and balanced exchange of services between the platform operators and the contracted hotels. Such clauses allow the platforms to take precautions against unfair diversion of customer bookings, and they prevent consumers who have opted for the hotel in question by using the platforms from being diverted from their website to the hotel website by lower room prices or better contract terms.

The court has not allowed an appeal to the German Federal Court of Justice (*Bundesgerichtshof*); the decision can therefore only be challenged on absolute grounds of appeal (such as serious procedural defects) or by way of a non-admission complaint.

Andreas Mundt commented on the court's decision on the official Twitter channel of the FCO:

In view of the rapidly growing market for hotel portal bookings and the increasing reliance of hotels on the market leader Booking.com, with a recent market share of over 60 percent, we certainly regret that we were unable to convince the OLG Düsseldorf of our decision against Booking.com. Now we are waiting for the reasoning. Then we will decide whether to appeal.

For the time being, only the press release of the OLG Düsseldorf is available.

WHAT IS NEXT IN THE ANTITRUST DISPUTE OVER POWERFUL MARKET PLATFORMS AND BEST-PRICE CLAUSES?

In contrast to the less-rigid decisions of the national competition authorities in April 2015, since August 2015, strict parity conditions and narrow best-price clauses are restricted by law in France. Legislators in Austria, Belgium, Italy and Switzerland followed France's example, while in Sweden restraints by the Patent and Market Court at the Stockholm District Court came into force in 2018. In Hungary, the investigations of the competition authority Gazdasági Versenyhivatal continue and resulted in dawn raids at Booking.com's office in 2017. The UK's

Competition and Markets Authority, on the other hand, announced in 2017 that it would not pursue its investigations any further. Europe is, and will remain, a patchwork on this matter.

Even from a global perspective, powerful platforms, and especially Booking.com, pose new challenges to the competition authorities. In China, investigations have been discontinued on the grounds that “*they had bigger fish to fry*”. Nonetheless, China’s National Development and Reform Commission has continued its monitoring since 2015. In Japan, however, Booking.com confirmed dawn raids conducted by the Japan Fair Trade Commission on 10 April 2019.

In the meantime, despite the regulatory activities and the now-annulled authority's prohibition in Germany, Booking.com has apparently already found an information technology solution to maintain the best price irrespective of the hotel owners' collaboration: Markus Luthé, CEO of the German Hotel Association, explained: “*With Booking.basic, the platform always offers the cheapest rate of a hotel via third party sales partners even if the hotel deliberately does not provide it to Booking.com*”. It remains to be seen how this new approach to pricing and distribution will be judged under the different national rules and by the different national competent authorities.

KEY CONTACTS



DR. ANNETTE MUTSCHLER-SIEBERT, M. JUR. (OXON)
PARTNER

BERLIN
+49.(0)30.220.029.355
ANNETTE.MUTSCHLER-SIEBERT@KLGATES.COM



MARION BAUMANN
COUNSEL

BERLIN
+49.(0)30.220.029.306
MARION.BAUMANN@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.