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**The Booking.com decision of the
Bundeskartellamt**

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1. Introduction

The present study gives an overview of the world's top competition authority's Booking.com decision.¹ The so-called online travel agencies (further: OTAs) operate to a large extent as a platform like Uber. They connect businesses and consumers and request a commission for this. OTAs started to operate around the Millennium and have grown to unavoidable trading partners in tourism. In this article, we evaluate the only competition authority decision that includes a full competition analysis.

2. The decision of the authority

The Bundeskartellamt adopted a decision on 22 December 2015 in which it condemned the company Booking.com B.V. (further on: Booking.com) for the application of so-called narrow best price parity clauses and obliged the undertaking to change the general terms and conditions. The territorial effect of the decision of the authority is limited to German hotels and accommodations. Booking.com is the dutch subsidiary of the US-based Priceline, Inc. and is the leading hotel booking site in Germany. According to the decision, the general terms and conditions enforced by Booking.com, but also individual contractual terms applied by the undertaking, are anticompetitive and violate antitrust law by including so-called best price clauses. The investigation covered the application - having regard to its earlier decision in HRS - the so-called narrow price parity clauses. The narrow price parity clauses prohibit a lodging company to offer better prices on its own website or offer better minimum booking criteria.

The online reservation system of Booking.com allows consumers to book rooms directly with instant confirmation and up-to-date room prices. With a booking, a contractual relationship will be set up between the hotel and the consumer. In parallel, the consumer and Booking.com will also enter into a contractual relationship regarding the referral of the accommodation. The consumer does not have to pay any costs but will pay the set price for the accommodation to the accommodation provider. Moreover, there will also be a contract between Booking.com and the accommodation provider regarding the inclusion of the accommodation into the booking system. According to this agreement, the accommodation provider pays a commission of 10 - 50 % to Booking.com after each realised booking. For an average lodging company the three major OTAs (Booking.com, HRS and Expedia) represent by far the largest online source of income, although they try to do everything to reduce the dependency.

On 20 December 2013, the Bundeskartellamt already found - in the HRS case - that the best price- and condition clauses are anticompetitive. This is also confirmed by the Düsseldorf court on January 9, 2015. However, Booking.com still used the best price clauses and amended those as of 1 July 2015 to the so-called narrow best price clauses.

The investigation of the authority was focused on the intermediary service provided by the OTAs (the hotel room referral service), which includes search, comparison and booking. The relevant market didn't include the own website of the hotels, the specialised portals which do not provide all of these

¹ B9-121/13 Booking.com B.V., Booking.com (Deutschland) GmbH, HRS-Hotel Reservation Service Robert Ragge GmbH, Expedia Inc., Hotelverband Deutschland (IHA) e.V.

Disclaimer: The author has interests in the accommodation industry.

services together and the online travel agents, travel agents and metasearch engines. The definition of the relevant market was already confirmed by the Düsseldorf Court.

The best price clauses applied on the relevant market have an appreciable anticompetitive effect between the OTAs and the accommodation providers. The narrow best price clauses reduce the possibility for hotels to differentiate themselves by offering different prices. Although in principle the narrow best prices clauses allow for such a differentiation, prohibit however for the hotels to offer lower prices on their own websites, than on the website Booking.com. This leads to the anomalous situation that if a hotel would like to offer a lower price on an OTA website, then it would have to offer higher price on its own website, due to the narrow best price clause required by Booking.com. In practice, this means that lodging companies do not use price differentiation in practice. This also means that Booking.com is also not interested in the reduction of prices or in offering more favourable terms.

The anticompetitive effect of the narrow price parity clauses is enhanced by the price parity clause and the general terms and conditions defined by Booking.com. Based on these, while hotels offer at least one room for sale on an OTA website, the narrow price parity clauses have full effect. Moreover, the narrow price parity clauses foreclose the market for the benefit of the established OTAs.

The narrow price parity clauses also restrict competition on the accommodation provider level of the market. In this respect, competition between the hotels is concerned, since the hotels cannot offer better prices on their own website than on the OTA site. The restrictive effect is also strengthened because of the best price clause applied by Expedia.

Best price clauses are not eligible for an individual exemption. Booking.com could not prove that the conditions for the individual exemption are met. There are no efficiency gains, and Booking.com could also not prove that there is a free-rider phenomenon on the market, that is solved by the clauses.

The German competition authority expressly stated that the price parity clauses are unreasonable restrictions for the small- and medium-sized undertakings, which are dependent on Booking.com.

3. Competition law issues

3.1. The relevant market

The decision of the German competition authority is the only antitrust decision up-to-date, that defined the relevant market regarding the activities of Booking.com in a full competition law investigation. The Bundeskartellamt followed the principles for market definition used in its HRS decision, which approach was confirmed by the Düsseldorf court. According to the judgement, the relevant market is the supply market of intermediary services by OTAs (intermediation of accommodation), on which OTAs act as sellers and accommodation providers as buyers. The relevant market does not include the booking page of the accommodation providers, the specialised portals, travel agents with an online presence, travel organisers and meta-search engines.

Booking.com argued that the mere existence of price parity clauses proves the case for a broader market definition, namely the booking market as the relevant market. According to the argument, all the sales channels are equal. A similar example to the market concerned is the market for booking flights, where all the channels compete with direct bookings.

According to the Bundeskartellamt, the argument put forward by Booking.com is not justified, due to demand-side substitutability and therefore it is not justified to deviate from previous case law which

was approved by the courts. A unified and widely interpreted booking market cannot serve as a basis to the evaluation. The bundle of 'search, compare and book' is the relevant market.

On the demand side - from the hotels - the service is the brokerage of accommodation. Appearance on the Internet and the comparison is only an ancillary service to this. The display and making the portal more attractive is in the interest of the OTA since this is one way how they can shine in the competition with accommodation providers. The costs of this are however borne by the accommodation providers in the form of advertising and comparison service costs. The narrow market definition is also evidenced by the fact that HRS was able to increase prices in 2012 and to tighten the terms and conditions without the accommodation providers being able to effectively modify them.

The definition of a narrow relevant market is also strengthened by the presence of indirect network effects. Functional substitutability is limited amongst the services of accommodation providers due to network effects.

The other sales channels which were suggested are not part of the relevant market. The supply side substitutability for example by meta search engines are not ground to define another relevant market since at the time of the decision they are in fact not providing booking options, but merely redirect the consumer to the booking site of the hotel or an OTA.

In accordance with the judgement of the Düsseldorf Court, the Bundeskartellamt defined the relevant geographic market as national. The reasons for this included the center of economic gravity of hotel portals active in Germany, the regional presence, the content display of those portals, the advertisements, the development of those portals and finally, the demand options and actual behaviours and habits of guests.

3.2. The restriction of competition

According to the Bundeskartellamt, the agreement between Booking.com and accommodation providers is contrary to Article 1 of the German competition act (Gesetz gegen Wettbewerbsbeschränkungen, further: GWB) and Article 101 (1) TFEU and are anticompetitive, also by effect.

The best price clauses used by Booking.com are anticompetitive agreements according to competition law. Restrictions in general terms and conditions are typically agreements if they are mandatory on other undertakings. Contractual clauses that ensure that another undertaking has to offer equally favourable prices or conditions if certain conditions are met are also agreements. Finally, the Bundeskartellamt also notes that in the case of contracts used for the same or similar conditions should be dealt with together, not individually.

According to the competition authority, it is without a doubt that trade between the Member States may be affected and the contractual terms are capable of restricting trade between the Member States.

The narrow price parity clauses used by Booking.com had anticompetitive effect that was only strengthened by the terms used by other OTAs. The narrow price parity clauses used by the OTAs are unlawfully restricting accommodation providers. This approach has been approved by the Düsseldorf Court. The price parity clauses make it unrealistic to receive better conditions from other booking platforms. Moreover, such terms will foreclose the market for new entrants.

The Bundeskartellamt confirms that the right way to approach the question is to determine how the market would have evolved without the anti-competitive agreements (counterfactual). The authority,

therefore, cannot confirm the argument, that the narrow price parity clause is better compared to the wide price parity clause, because the question is not this, but rather whether there is a restriction of competition as a result of the clauses.

The anti-competitive effects of the narrow price parity clauses are straightforward. The accommodation providers can set different final prices for different OTAs compared to Booking.com. This behaviour might, in principle, be profitable for the accommodation provider, if the other OTA requires a lower commission because this would increase the profitability of the hotel. However, the narrow price parity clauses prohibit the hotel to offer better prices or availability conditions on its own booking site than on the site of Booking.com. In practice, the two factors will have the result that the hotel cannot independently and freely determine the price of its service. This is restricting the freedom of the undertakings to set prices, which has an anticompetitive effect also on the lodging market too. As long as the hotels are not free to determine their prices on their own websites, the setting of prices are not market-based and on the market of OTAs, the prices are not determined by demand. Moreover, the clause has the effect, that even if the hotel would give better prices at another OTA, it would still be forced to apply the higher price indicated on Booking.com on its own hotel website. The often mentioned theoretical advantages of narrow price parity clauses cannot prevail in practice and are strictly theoretical in reality.

The clauses also have the following anticompetitive effects: a) due to the lack of price discrimination, the hotels are not forced to offer better conditions or prices for the different OTAs; b) the anticompetitive effects are magnified due to the conditions on minimum stay, contingents and best price guarantees; and c) the narrow price parity clauses foreclose the market and have exclusionary effects.

Any factor compared to the counterfactual leads the competition authority to conclude that the clauses used by booking.com have anticompetitive effects. After a thorough investigation, the Bundeskartellamt could not identify one single, positive and realistic opportunity regarding the narrow price parity clauses.

However, the competition authority did not only identify anticompetitive effects regarding the OTA market but also regarding the hotels themselves, ie there was an anticompetitive effect regarding the actual hotel room prices.

In the latter case, the Bundeskartellamt has confirmed that one has to look at the counterfactual situation regarding the clauses.

Price parity clauses necessarily restrict the pricing possibilities and freedom of the hotels. The clauses eliminate the possibility of price discrimination, which is an inherent part of the price-setting freedom. Regarding the inter-brand competition of the hotels, this means that the hotel cannot offer better conditions regarding similar rooms than on the booking.com site. The clauses almost completely eliminate price as a competitive factor regarding direct online sales. As a result, the possibility of a price cut for the final consumer is eliminated, and the possibility for better price offers will be narrowed down to certain times. This eliminates one of the most important elements of the competition. The competition authority mentioned expressly, that the abolition of price parity would significantly increase price competition between the hotels.

The identified restrictions on competition are not only theoretical restrictions, they have clear anticompetitive effects.

4. The possibility of individual exemption

The Bundeskartellamt considered whether the terms determined by Booking.com satisfy the conditions for an individual exemption, and concluded that they are not satisfied. The president of the competition authority even said during the press event that “the consumers don’t get any appreciable benefit” from them.

According to the authority, none of the conditions for an exemption is satisfied. The clauses do not lead to efficiency gains. It was not possible to show any such benefit during the assessment. On the contrary, most of the times it was only possible to show harm to consumers, for example, the authority highlighted that the OTAs use the commissions only to their own benefit and do not increase consumer welfare in any way during their operation. Even the frequently voiced claim of "advertising a hotel" is not happening in reality, since the OTAs advertise themselves - very effectively - and not the hotels. The competition authority carried out a lengthy analysis of the efficiency gains, but could not identify any.

Interestingly, it was even suggested by Booking.com that revenue loss of the undertaking would be an adverse effect if price parity clauses would be abolished. However, the Bundeskartellamt rightly highlighted that the revenue loss would be detrimental only to the undertaking and would not adversely affect neither consumer welfare nor competition on the market.

The classic free-riding argument was also refuted by the German NCA. One frequently voiced argument of the OTAs is that, if there were no price parity clauses, the hotels would benefit out of their investments because, after the comparison on the OTA website, the consumers would book on the hotel websites. This argument shall, however, be treated similarly to the Cellophane fallacy by the competition authorities, due to the fact that if a proper evaluation of the competitive situation is carried out, the argument does not hold. Fortunately, the German authority assessed the market correctly. According to the NCA, the free-riding argument is not valid. There was no evidence that without price parity clauses the hotels would enjoy the benefits of investments borne by Booking.com. Other price comparison sites than OTAs are a good example, that price parity clauses are not necessary for the operation.

Booking.com could therefore not prove the second condition for an individual exemption, namely that consumers would receive a fair share of the efficiency benefits. The authority was even sceptical regarding efficiency gains in general since it found no proof of that. The argument is that allegedly consumers get a fair share of the benefits of increased market transparency and lower search costs. The authority in a plain and simple way refuted this suggestion and explained that price parity clauses do not in any way increase market transparency and lower search costs. This is evidenced by recent developments in the market in recent years.

The Bundeskartellamt also highlighted that the restrictive measures are not indispensable, even if we would accept the efficiency gains and that consumers get a fair share of those. As a matter of competition law, a restriction of competition is the result of these practices. The decision expressly underlined that OTAs do not present any innovation and do not invest into anything that increases consumer welfare. The authority noted as an important fact, that anticompetitive measures are not well placed to develop business models favouring consumers, only competition on the merits is leading to such outcomes and the restrictions imposed by Booking.com limit exactly this type of competition.

5. CONCLUSION

The erroneous conclusions of the Hungarian Competition Authority in its market investigation are highlighted not only by the German authority's decision but also by the developments in the last one and a half-year. In Hungary, the OTAs are gaining market share on an unprecedented scale, while in

other markets a very intense price competition had begun after the termination of the price parity clauses. The effect of the market study is that the industry's competitiveness decreased a lot and the consumers protected by competition law are directly harmed. The GVH made the error that it deemed the price parity clauses as indispensable for the operation of the market, while a proper analysis of the market shows that - as the Bundeskartellamt also highlights - price parity clauses are not indispensable for the achievement of the alleged benefits. Large international service providers prove that the same benefits can be achieved without restrictions to competition.

It is no coincidence that in countries where the competition authorities have not carried out substantive competition assessments, the legislators decided to prevent anticompetitive outcomes and protect consumer welfare on the oligopolistic market ruled by OTAs. The decision of the Bundeskartellamt was very clear in many ways. The narrow price parity clauses imposed by the OTAs are clearly anticompetitive and there are no - none - positive effects for the consumers. Keeping this in mind, currently, the most capable institution in Hungary to protect consumer welfare in this market is the legislator. Thus, as in several other Member States, it would be beneficial for the consumers if the price parity clauses would be prohibited by the legislator. There is no better example than the following: after the German competition authority prohibited the price parity clauses, a very intense competition began regarding the pricing of hotels for direct bookings and the OTAs.

An interesting fact is that - depending on the geographical area - Booking.com is spending 30 - 60% of all revenue on Google advertising. Taking into consideration the number of employees and the advertising spending, it is very clear that the commissions paid by the hotels (in the range of 15 - 50%) are mainly used to strengthen the market position of the OTAs and not to benefit the consumers. Taking into account the substantial amount, it is a realistic assumption that the hotels would use these amounts to improve their competitive positions in this super competitive market, in the form of lower prices or increased quality. This is especially true for the small and medium-sized enterprises, which is also highlighted in the decision of the NCA. The harmful effect is mostly on the level of the SMEs.

The Bundeskartellamt also noted expressly, that the abolition of the price parity clauses would directly increase the quality of the service since the OTAs would be forced to offer better service to the consumers. During the assessment of the individual exemption, the competition authority established that the narrow price parity clauses restrict price competition and competition in quality both between the OTAs and between the OTAs and the hotels. Following the market inquiry of the GVH, an intervention of the authority is not likely, therefore it is for the legislature to act in the interest of consumer welfare protection.