

## Case Summary

9 March 2016

---

### 'Best price' clause of online hotel portal Booking also violates competition law

Sector: Online hotel booking platforms

Ref: B9-121/13

Date of Decision: 22 December 2015

---

The Dutch hotel booking platform Booking.com B.V. ('Booking') provides intermediation services in Germany and Europe for the booking of hotel rooms and, to a small extent, other accommodation (for brevity referred to as 'hotels' in the following). Booking is part of the US company group Priceline, Inc. Its portal is by far the leading hotel booking portal in Germany and Europe, with a clear lead over the portals HRS (predominantly active in Germany) and Expedia (active in Europe and beyond).

Booking's General Terms and Conditions in their version of 1 July 2015 contain so-called 'narrow' MFN clauses (in this context also referred to as 'best price' clauses). Under these clauses the hotels listed on Booking.com are prohibited from offering their rooms at cheaper rates on any other online distribution channel (with the exception of other hotel booking portals) and in particular on their own websites.

On 22 December 2015 the Bundeskartellamt prohibited Booking from applying its best price clauses and ordered the company to delete them from its contracts and General Terms and Conditions by 31 January 2016 as far as they affected hotels in Germany. Two years before, on 20 December 2013, the authority had already prohibited Booking's competitor HRS from applying similar clauses. The decision against Booking was immediately enforceable. Booking filed a complaint against it at the Düsseldorf Higher Regional Court on 22 January 2016 and requested on 1 February 2016 that the appeal have a suspensive effect on the Bundeskartellamt's decision.

The Bundeskartellamt holds the view that with its best price clauses (even in their 'narrow' version) Booking violates Section 1 of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) and Art. 101(1) of the Treaty on the Functioning of the European Union (TFEU). For a violation of these provisions it is irrelevant whether the narrow best price clauses are less damaging to competition than the previously used

wide clauses. The only relevant question is whether the narrow clauses constitute an appreciable, non-exempt restriction of competition compared to a scenario where such clauses are not applied. This is the case.

The market affected is the German market for the sale of hotel rooms via hotel portals (hotel portal market). In this market Booking's best price clauses appreciably restrict competition between the hotel portals and between the hotels. As Booking has a market share of (significantly) more than 30%, its best price clauses are not exempted under the Vertical Restraints Block Exemption Regulation (Vertical BER). They also do not qualify for an individual exemption under Section 2(1) GWB / Art. 101(3) TFEU. In the Bundeskartellamt's view, by applying the best price clauses Booking has unfairly hindered small and medium-sized hotels, which are dependent on it, and in doing so has also violated Section 20(1) in conjunction with Section 19(1), (2) no. 1 GWB.

#### Details of the case:

Booking's system allows for direct bookings of hotel rooms with instant confirmation at the current rate. For this purpose, Booking maintains contractual relations with the hotel customers on the one hand and the hotel companies on the other. By booking a hotel room via the hotel portal, the hotel customer enters into an intermediary agreement with Booking. Booking does not charge the customer for its services. The customer solely pays the room price to the hotel booked. Hotels have to conclude a contract with Booking to feature in its reservation system. The contract provides for a standard commission of [10-15]% of the room price payable to Booking for each hotel reservation made via Booking's portal. Depending on, among other factors, the ranking of the hotel on the portal, the commission can also amount to [30-50]%. The two other major hotel portals in Germany, HRS and Expedia, use very similar business models. HRS, however, no longer uses best price clauses in Germany since the Bundeskartellamt has prohibited it from doing so. For the typical German hotel, hotel booking portals are the most important online sales channel. However, the hotels are increasingly trying to reduce their dependence on the hotel portals by strengthening their own online sales activities.

In its decision of 20 December 2013 against the HRS hotel portal, the Bundeskartellamt had already established that the 'wide' best price clauses used by HRS violated antitrust law. In the clauses HRS had obliged the hotels represented on its portal to always offer it rate, conditions and availability parity (so-called 'wide' best price clauses). The Bundeskartellamt's decision was confirmed by the Düsseldorf Higher Regional Court in January 2015. HRS did not make use of its leave to appeal the Court's decision.

Despite these rulings in the HRS case, Booking continued to use its best price clauses. After several European competition authorities had expressed concerns about the clauses, Booking changed its General Terms and Conditions as of 1 July 2015, introducing a narrower version of the clauses. Three European countries (France, Sweden and Italy) have declared binding the voluntary commitments made by Booking to cease applying its wide best price clauses in their national markets. These decisions do not make any conclusive statement on the legal assessment of best price clauses.

The proceedings initiated against Booking by the Bundeskartellamt in December 2013 focused on the wide best price clauses used by Booking at that time. The narrow clauses introduced by Booking with effect from 1 July 2015 did not represent an aliud but a minus compared to the previously used wide clauses. With the amendments undertaken by Booking parts of the proceedings became moot. The proceedings were continued nevertheless as the narrow best price clauses also raised competition concerns.

The relevant product market is the market for intermediation services provided by hotel portals ('hotel portal market'). It comprises a convenient bundle of services ('search, compare and book') for customers looking for hotel accommodation. In geographic terms, the market must be defined as Germany-wide. The relevant market does not include the websites of hotels, specialized portals that do not offer this service bundle, online travel agencies, tour operator portals or meta search engines. These market definitions, which were also used in the HRS proceedings, have been largely confirmed by the Düsseldorf Higher Regional Court.

Booking's best price clauses significantly restrict competition between the hotel portals and also between the hotels.

The narrow best price clauses restrict the incentive for hotels to offer different prices for their rooms on different hotel portals. Technically the clauses allow for such differentiation. However, since the hotels are still prohibited from offering better room prices on their own website than on Booking's portal, they can only match a lower price offered on another portal if they lower the price on Booking's portal as well. If a hotel wished to lower its room prices on one specific hotel portal only, the narrow best price clauses would force it to display the higher price offered on the Booking portal on its website as well. This considerably diminishes the attractiveness of the hotels' own online sales channels and appreciably restricts their pricing sovereignty. As long as the hotels therefore refrain from differentiating prices (although in technical terms they could), Booking will have little incentive to lower its commissions or grant other favourable conditions to them.

Booking's claim that with the introduction of its narrow best price clauses the hotels have begun to differentiate their prices on the three large hotel portals therefore raises questions as to the empirical basis on which Booking founds this claim. To the extent that hotels in Germany differentiate prices despite the restrictions imposed on them by the best price clauses, this can be explained by the fact that

- (1) the Bundeskartellamt has already prohibited HRS from using comparable best price clauses,
- (2) Booking has undertaken to the Bundeskartellamt not to enforce its best price clauses for the duration of the proceedings, and
- (3) the hotels presumably expected the Bundeskartellamt to prohibit Booking from further using its best price clauses.

The anti-competitive effects of the narrow best price clauses are reinforced by Booking's best price guarantee for hotel customers and the obligation of hotels to provide Booking with a minimum of available rooms as laid down in Booking's General Terms and Conditions. As long as hotels must always make at least one room (from each room category) available on Booking's platform the narrow best price clauses will not cease to have a strong effect on the hotel's pricing policy. In addition, the narrow best price clauses have a foreclosure effect as they hinder potential competition for the established hotel portals from newcomers.

The clauses also restrict competition in the hotel market, in particular price competition between the hotels. Bound by the narrow best price clauses the hotels are not able to offer better room prices on their own online sales channels than on the Booking portal. Contrary to claims by Booking, the anti-competitive effect of the narrow best price clauses is not lessened by the fact that they do not apply to closed user groups. Closed user groups are customer loyalty programmes. Customers who wish to participate in these loyalty programmes have to register as members. The rates offered to such groups are not publicly available. Since the hotels are prohibited from marketing the room prices they have offered to their closed user groups also on their online sales channel, any price competition that might have theoretically been possible on account of such offers is hindered by the resulting lack of price transparency. The anti-competitive effects of the narrow best price clauses cannot be "compensated for" by abandoning other, previously applied competition restrictions (e.g. for offline transactions). This does not "neutralize" the

anti-competitive effects of the clauses but merely reduces the overall impact of the competition restraint to some extent. Solely the prohibition of best price clauses (also in their narrow form) eliminates all remaining competition restraints and allows the hotels to actually make use of their price-setting scope.

The anti-competitive effect of Booking's narrow best price clauses is further enhanced by the best price clauses Booking's competitor Expedia continues to use.

As Booking's share of the market clearly exceeds 30%, its best price clauses are not exempted under the Vertical Restraints Block Exemption Regulation (Vertical BER). The question of whether the Vertical BER is at all applicable to the Booking case can therefore be left open.

Booking's best price clauses also do not qualify for an individual exemption. Booking has not been able to demonstrate and prove to a sufficient extent that the requirements for an individual exemption are met.

- (1) The general advantages of hotel portals as cited by Booking are not a result of Booking's narrow best price clauses and can therefore not be claimed as efficiency gains by Booking. Insofar as Booking invokes potential revenue declines following a deletion of its best price clauses, it has put forward neither any reliable facts about the extent of a potential decline in sales nor the extent to which the absence of such a decline could lead to any efficiency gains.
- (2) Booking has also not been able to prove a relevant free-rider problem which could be solved by applying the narrow best price clauses. In particular, Booking has not brought forward sufficient proof that without the narrow best price clauses the portal has less incentive to invest in its quality or that the advertising investments undertaken by Booking had an overall pro-competitive effect despite the anti-competitive impact of its best price clauses. Not only Booking but also the hotels surveyed by the Bundeskartellamt have stressed that hotel portals are a very relevant distribution channel (also for end consumers) and that they will maintain this relevance irrespective of the expansion of other distribution channels on account of their significance for the hotels' occupancy rate. The higher the quality of a hotel portal, the greater its customer reach and, consequently, the likelihood of successful bookings.

- (3) Booking has also not been able to provide sufficient evidence that, if there were any efficiency gains, consumers would receive a fair share of them. Narrow best price clauses neither increase market transparency nor do they reduce the search effort for hotel customers. The market performance of hotel portals in recent years shows no signs (in fact, quite the contrary) that hotel portals would no longer be able to operate profitably if they ceased to apply best price clauses and that end consumers would then have to switch to the less comfortable meta search engines.
- (4) In addition, the best price clauses do not satisfy the requirement of indispensability. Alternative business models seem feasible, such as listing fees paid by the hotels combined with a variable compensation per booking. Even if currently none of the established hotel portals seem to be working on an alternative to the current commission model, this is no proof that only the current model is efficient. Rather, this could indicate that the hotel portals are trying to evade innovation pressure by restricting the pricing sovereignty of alternative distribution channels, thus securing their market lead. In any case, the existing model could also be continued with - lower - commissions combined with other forms of payment.
- (5) In view of the fact that several exemption criteria were not met (as described above), the Bundeskartellamt could leave open the question of whether Booking had provided sufficient proof to show that competition was not eliminated through the use of the best price clauses. An elimination of substantial competition seems likely, however, if one considers the fact that the narrow best price clauses not only restrict competition between hotel portals and between hotels, but also largely eliminate the competitive pressure the hotels could theoretically exert on the hotel portals through their own online sales channels. Other indicators that competition could be eliminated are the fact that Booking differentiates its commissions (sometimes charging very high commissions) and the strong position of hotel portals among the hotels' distribution channels. Another aspect is the hotels' dependency on the market leader Booking, which has been able to significantly expand its market position in recent years under the "cover" of its best price clauses. The question of whether these circumstances were sufficient to affirm that competition had been eliminated within the meaning of Section 2(1) GWB and Article 101(3) TFEU could be left open since the first three exemption criteria were not met, as explained above.

Lastly, the use of the narrow best price clauses by Booking constitutes an unfair impediment of the small and medium-sized hotels dependent on it.

The Bundeskartellamt has exercised its discretion and ordered Booking to end the established infringement. As a further remedy, Booking has been ordered to remove the best price clauses from its General Terms and Conditions and from individual agreements by 31 January 2016, to the extent that they relate to hotels and other accommodations located in Germany.

Several Member States of the European Union are still conducting proceedings to examine the use of best price clauses by hotel portals in their contracts. As in the proceedings against HRS, the Bundeskartellamt has closely cooperated with the European Commission and the other European states within the European Competition Network (ECN). It will participate in an evaluation (scheduled for 2016) of the different measures which the competition authorities within the ECN have taken with regard to the use of best price clauses by hotel portals.