

## Final Chapter of the Booking.com Saga? “Narrow price parity clauses” declared permissible by Higher Regional Court of Düsseldorf

### Summary

An online booking portal can oblige hotel operators not to offer rooms on their own website at a lower price than on the portal page. This was decided by the Düsseldorf Higher Regional Court on 4 June 2019. In doing so, the Court reverses the decision by the German Federal Cartel Office (“**FCO**”) of 22 December 2015 in which it declared all kinds of price parity clauses illegal and removes the discrepancy between the German practice and decisions in other European countries.

### Background

The specific case concerned the internet portal Booking.com. The portal acts as an intermediary for hotel companies in return for a payment of an agency fee for hotel customers. The portal operator's right to commission arises when the customer books via the hotel portal and not directly with the hotel.

In the past, Booking.com obliged hotels to always offer on its portal their lowest room prices, maximum room capacity and most favourable booking and cancellation conditions available across all online and offline booking channels (“wide price parity clause”). Since the Düsseldorf Higher Regional Court in proceedings against Booking.com's competitor HRS prohibited such “wide price parity clauses” in January 2015, Booking.com introduced a modified clause in July 2015, which allowed hotels to offer their rooms cheaper on other online portals but still required the prices which they display on their own websites may not be lower than on Booking.com (“narrow price parity clause”). However, the FCO also prohibited this practice and ordered Booking.com to completely remove such clauses from its contracts and general terms and conditions by 31 January 2016 as far as they affected hotels in Germany.

### Düsseldorf Appellate Court Decision

The decision of the Düsseldorf Higher Regional Court now puts German case law on “price parity clauses” in line with the practice of courts and competition authorities in many other European countries. In the most recent appellate court decision prior to the Düsseldorf Higher Regional Court's decision, the Stockholm Court of Appeal in Sweden decided on 9 May 2019 that Booking.com's narrow price parity clauses do not infringe competition law.

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Already in 2015, competition agencies in Sweden, France and Italy took the view that these clauses are permissible – contrary to “wide price parity clauses”.

“Wide price parity clauses” were found to restrict competition between portals because they reduce the economic incentives for portals to offer hotels lower commissions in return for more favourable prices and conditions of the hotels on the platform. Furthermore, “wide price parity clauses” may lead to foreclosure effects since they make it more difficult for new portals to enter the market. Finally, metasearch engines and comparison portals not active in the relevant market do not exert enough pressure to prevent a reduction in competition for commissions among hotel portals.

This is different for “narrow price parity clauses”: The Düsseldorf Higher Regional Court bases its decision on the results of a hotel and customer survey which it conducted as part of the case. The Court states that “narrow price parity clauses” are “necessary to ensure a fair and balanced exchange of services between the portal operators and the contracted hotels”. With such clauses, the booking portal may take precautions against an unfair redirection of customer bookings and therefore prevents “freeriding” on the investments of the portal into the market position of its search engine.

The Court did not allow a further appeal. The decision can only be challenged under narrow conditions (and even then only on points of law). The FCO will decide whether to appeal against the decision once the full text has been released (case no. VI-Kart 2/16 (V)).

## **Enforcement against price parity clauses – a global trend**

Since the FCO’s investigation into HRS in 2013, global enforcement of price parity clauses has been rife, and the regulatory landscape has become difficult for businesses to navigate. Booking.com itself has been investigated in several European countries, Australia and Asia, with differing opinions on the competition law compliance of the relevant clauses. Most recently, in April 2019, the Japanese Fair Trade Commission opened an investigation into the price parity clauses of Booking.com, Expedia and Rakuten Travel, following dawn raids at their premises.

In addition to active enforcement through investigations into online booking platforms and marketplaces like Amazon, several global competition authorities have published reports on price parity clauses, including the Danish Competition Authority in February 2019, or briefing papers, such as the British Competition and Markets Authority’s July 2017 “60 second summary”, addressed to hotels across the UK to raise awareness about the implications of enforcement action against price parity clauses. Some countries, including Italy, Austria and Switzerland, have passed legislation prohibiting the use of price parity clauses by hotels in their entirety. As a response to the global scrutiny of price parity clauses, several online platforms, including Amazon,

have amended or dropped such clauses from their standard form contracts in a number of jurisdictions.

## Conclusion and Comments

The Düsseldorf Higher Regional Court's decision is expected to have wide implications for the digital economy. Online platforms such as Booking.com and its competitors, as well as other price comparison websites will be encouraged to use (or continue to use) "narrow price parity clauses" in Germany. Additionally, the case strengthens legal certainty in Europe and removes some of the inconsistency between the approaches to price parity clauses across Europe.

Nevertheless, scrutiny of price parity clauses is far from over. Recent enforcement worldwide shows the focus global competition regulators place on ensuring a level playing field in the digital economy, and outcomes are not always consistent. Against this backdrop, it continues to be important that businesses carefully monitor their use of MFNs and compliance with the various and continuously changing legal positions across jurisdictions.

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