

# The Recent Booking.com Judgment in Germany: Another Piece in the Price Parity Puzzle in Europe

July 2, 2019

## Introduction

On 4 June 2019, the Higher Regional Court of Düsseldorf (*Oberlandesgericht* or *OLG*) annulled the 22 December 2015 decision by the German Federal Cartel Office (FCO) that prohibited Booking.com from applying so-called ‘narrow’ best price clauses in its contracts with hotels in Germany.

Best price clauses, also known as ‘parity’ or ‘most favoured nation’ (MFN) clauses, are provisions in agreements between hotels and online travel agents (OTAs) whereby the hotels guarantee to offer the same or better rates and conditions for hotel rooms than those offered either: (i) on any other offline or online sales channel, e.g. on other OTAs’ websites (‘wide’ parity clauses) or (ii) on the hotels’ own website (‘narrow’ parity clauses).

Competition authorities in Europe – especially in Germany – have tried to tackle the use of parity clauses since at least 2010. In fact, that year marks the beginning of a long saga against parity clauses in Europe which resulted in a patchwork of national investigations and regulatory interventions that concluded in parity clauses being completely banned, allowed only partially as ‘narrow’ parity clauses or not being regulated at all.

The OLG Düsseldorf’s judgment of 4 June 2019 is the latest significant development in this debate. What is ‘unusual’ about this case is not so much the conclusion reached by the German Court that Booking.com’s ‘narrow’ parity provisions are permissible – which actually puts Germany in line with prior decisions adopted by national competition authorities (NCAs), e.g. in France, Italy and Sweden – but the way it reached that conclusion. The Court’s press release suggests that the Court relies on the ‘ancillary restraints’ doctrine to justify Booking’s ‘narrow’ parity provisions. Assuming this is the case – which will be confirmed upon publication of the full judgment – it would constitute a rather unconventional method to assess the effect of parity clauses on competition.

## Where it All Began: The HRS Prohibition Decision in Germany

To get a better grasp of this latest development and to understand where we are in terms of regulating parity clauses in Europe, it is worth starting from the beginning: the 2013 HRS prohibition decision in Germany.

In early February 2012, the FCO announced that it had issued a statement of objections against the online booking portal HRS-Hotel Reservation Service (HRS) – at the time the leading OTA in Germany – for a possible breach of §1 and §20 of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen* or *GWB*); which are the equivalent to Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU). According to the FCO, HRS applied parity clauses in its agreements with hotels whereby they would always grant HRS the best room price,

highest room availability and most favourable booking and cancellation conditions than those offered on any other sales channel (i.e. 'wide' parity clauses).

One year and a half later, on 20 December 2013, the FCO reached the conclusion that HRS' practices should be prohibited and ordered the company to delete all parity provisions from its terms and conditions and contracts with hotels. What followed was an industry-wide domino effect. In parallel to the FCO's prohibition decision, investigations were initiated by national competition authorities in Sweden, Italy and France, among others. In January 2015, the OLG Düsseldorf upheld the HRS decision. Subsequently, the major OTAs committed to delete all parity clauses from their contracts with hotels. However, Booking decided to take a more 'creative' approach: instead of completely deleting its parity clauses with hotels, Booking decided in July 2015 to 'narrow' its 'wide' parity clauses. According to this new arrangement, hotels would be able to offer better deals on other sales channels (e.g. offline and on other OTAs' online platforms) but not on the hotels' own websites – unless they offer the same or better conditions on Booking.com.

## The Booking.com Saga in Germany

The FCO immediately took offense with Booking's new strategy. On 23 December 2015 – almost exactly two years after the HRS prohibition decision – it decided to prohibit Booking.com's 'narrow' parity clauses and ordered Booking.com to completely delete such provisions from its terms and conditions and contracts with hotels.

In its decision, the FCO held that such 'narrow' parity provisions reduce the incentives of hotels to offer better deals on other OTAs' websites, even if this was formally allowed under the new Booking scheme. The FCO's reasoning was that hotels that have offered better deals on other OTAs' booking platforms would only be able to match those better conditions on their own website if they also match those better deals on Booking.com. According to the FCO, this would have a chilling effect on the market for OTA online platforms and would also reduce the attractiveness of the hotels' own websites, therefore also negatively impacting the market for hotels in Germany.

Booking appealed the FCO decision in February 2016 and, on 4 June 2019, the OLG Düsseldorf took a U-turn on 'narrow' parity clauses. While we are currently waiting for the full judgment to be released, the Düsseldorf Court provided some interesting insights in a press release.

In essence, the Court agreed with Booking.com that its 'narrow' parity clauses are necessary to avoid customers from free-riding on Booking's online booking portal. In its press release, the Court explained that Booking.com works by connecting hotels and customers for a fee charged to the hotels for every transaction (i.e. booking) made through the platform. Customers have therefore an easy 'one-stop shop' where they can see all available rooms and best prices at a glance. If, however, hotels are able to offer better deals on their own websites, customers would be incentivised to gather valuable information on Booking.com and then make the final booking on the hotel's own website, with the resulting loss in revenue for Booking.

To reach this conclusion, the Court based itself – among other things – on customer and hotels surveys which support the view that 'narrow' parity provisions are necessary to ensure a fair and balanced exchange of services between Booking.com and the hotels. On the same day the OLG Düsseldorf's press release was published, the FCO said that it will await the full text of the judgment in order to decide whether to appeal the decision. However, this may be an uphill battle as the German Court noted in its press release that its judgment may only be subject to appeal under rather limited grounds pursuant to §74(4) GWB.

The German hotel association *Hotelverband* Deutschland also immediately reacted to the judgment noting that an appeal is indispensable given that the Court's legal construct is theoretical and as a consequence of additional studies and customer surveys there is now ample evidence that free-riding is not an appreciable market phenomenon

but rather only an evasive defense advanced by Booking.com.

## The Debate on Parity Clauses in Europe

The debate on parity clauses in the online hotel booking sector in Europe is somewhat a confusing one. Various NCAs have investigated price parity clauses since at least 2010, reaching diverging positions. A few months before the December 2015 prohibition decision against Booking.com's 'narrow' parity clauses in Germany, the French, Italian and Swedish NCAs announced in April 2015 that they have reached EU-wide coordinated commitments from Booking.com on its 'wide' parity provisions. In a joint statement, the three NCAs announced that Booking.com agreed to eliminate its 'wide' parity clauses and to change them to 'narrow' parity clauses. Booking.com decided to apply this change EU-wide from July 2015. Meanwhile, a number of EU Member States were debating whether to allow or prohibit parity clauses. Following the Booking.com commitment decisions adopted in April 2015, France completely banned all parity provisions ('wide' and 'narrow') in the so-called Loi Macron adopted in August 2015. Austria followed suit in November 2016, and just recently Italy and Belgium completely banned parity clauses through similar legislation, in August 2017 and July 2018, respectively.

An opportunity to reach a consensus on the topic and to adopt a harmonised EU-wide approach on price parity clauses in Europe might arise with the upcoming review of the Vertical Block Exemption Regulation (Regulation 330/2010) which the Commission anticipates will be adopted in the second quarter of 2020.

## How to Justify 'Narrow' Parity Clauses?

Putting the current debate around parity clauses in Europe aside, what is clear is that 'wide' parity provisions are generally considered to be more harmful to competition than 'narrow' parity clauses. The understanding is that 'wide' parity clauses reduce the incentives of OTAs to compete against each other which may potentially lead to higher commission rates to hotels and therefore higher prices for consumers. 'Narrow' parity clauses, on the other hand, may generate mixed results as they may prove to be an unavoidable instrument to avoid free-riding on the investment made by OTAs. One question that arises therefore is on what basis can 'narrow' parity provisions be justified?

The recent judgment by the OLG Düsseldorf in the Booking.com case may shed some light on this question. According to some news reports, during the oral hearing held on 9 February 2017, the presiding judge, Mr. Jürgen Kühnen, said that he was surprised that none of the parties had assessed the parity clauses in light of the 'ancillary restraints' doctrine. In addition, some commentators in Germany have said that the OLG Düsseldorf may have relied on the so-called *Immanenztheorie* which is a German legal construct under §1 *GWB* and roughly the equivalent of the 'ancillary restraints' doctrine under Article 101 TFEU.

The ancillary restraints doctrine exempts competition restrictions from the application of Article 101 TFEU and its national equivalents if those restrictions are directly related and objectively necessary to the implementation of a contract that is overall compatible with competition law. If the Düsseldorf Court indeed applied the 'ancillary restraints' doctrine, the German approach would be a rather peculiar way to validate such clauses. Indeed, the conventional approach would be to assess, under Article 101(3) TFEU, the harmful effect of the clause against its alleged pro-competitive benefits, which would conform with our understanding of the way the two sides initially presented their case before the Court.

The identification of ancillary restraints and the assessment of the criteria of Article 101(3) TFEU are two completely separate issues. This is very clear if one reads paragraph 30 of the Guidelines on the application of Article 101(3) TFEU which explains that: "The application of the ancillary restraint concept must be distinguished from the application of the defence under Article [101](3) which relates to certain economic benefits produced by restrictive

agreements and which are balanced against the restrictive effects of the agreements. The application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects. Such balancing is reserved for Article [101](3)”

In the case of ancillary restraints, the Article 101(3) TFEU Guidelines clarify at paragraph 31 that: “The assessment of ancillary restraints is limited to determining whether, in the specific context of the main non-restrictive transaction or activity, a particular restriction is necessary for the implementation of that transaction or activity and proportionate to it. If on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction would be difficult or impossible to implement, the restriction may be regarded as objectively necessary for its implementation and proportionate to it”.

The main criteria therefore to determine whether a certain restriction of competition is ‘ancillary’ seems to be the objective necessity and proportionality of the restriction that is ancillary to the main non-restrictive transaction or activity. Article 101(3) TFEU on the other hand contains a test based on a number of cumulative criteria that try to determine whether an agreement which is restrictive to competition may be exempted because its efficiencies outweigh the negative effects on competition.

If we examine the recent Booking case in light of the ancillary restraints doctrine, the question to answer is whether Booking’s ‘narrow’ price parity provisions are objectively necessary and proportionate to its main non-restrictive activity, which is the provision of online hotel booking services. Unfortunately, we will have to wait until the full judgment by the OLG Düsseldorf is published to ascertain whether and how the Court applied the ancillary restraints doctrine to the facts of the case and on the basis of what evidence it concluded that such clauses are objectively justified. We will follow-up on this important issue in due course.

## Your Key Contacts



**Yves Botteman**

Partner, Brussels

D +32 2 552 29 52

[yves.botteman@dentons.com](mailto:yves.botteman@dentons.com)



**Dr. Josef Hainz**

Partner, Berlin

D +49 30 2 64 73 241

[josef.hainz@dentons.com](mailto:josef.hainz@dentons.com)



**Dr. Jan Heithecker**

Of Counsel, Berlin

D +49 30 26473 250

[jan.heithecker@dentons.com](mailto:jan.heithecker@dentons.com)



**Daniel Barrio**

Associate, Brussels

D +32 2 552 29 58

[daniel.barrio@dentons.com](mailto:daniel.barrio@dentons.com)