

Online hotel bookings – a joint European approach or a most favoured nation?

Ten competition authorities across Europe have formally been investigating online hotel bookings. A key issue at stake is whether obligations on hotels to make their best prices available (“**MFNs**”) on Online Travel Agent (“**OTA**”) platforms are anti-competitive.

There are two main types of MFN clause under consideration:

- **Broad MFN** – requires hotels to give OTAs the same or better room rates, conditions and availability as on any other channel – including competitor OTAs.
- **Narrow MFN** – requires hotels to give OTAs parity in respect of rates and conditions published on the hotels’ direct online channels.

On 21 April, the French, Italian and Swedish authorities announced their decisions to accept identical commitments from Booking.com to settle their investigations. Booking.com has undertaken to remove its ‘broad MFNs’ but is permitted to implement ‘narrow MFNs’.

This case is of interest because it involves:

- unprecedented coordination between all the national competition authorities (“**NCAs**”) to address a European wide competition concern (these cases are typically dealt with by the European Commission and not at national level); and
- the first case where there is, despite the level of coordination, a real risk of an inconsistent application of European law.

UNPRECEDENTED COORDINATION

“With coordination from the European Commission, our three authorities have collaborated in an unprecedented way in our investigations into online hotel reservation platforms.”¹

The French, Italian and Swedish authorities (“**three NCAs**”) were appointed by the European Competition Network (“**ECN**”) to take the joint lead with the understanding that other NCAs would not duplicate their activities, but would be informed and have an opportunity to contribute to the process. A working group was established open to all interested NCAs whose activities were carefully coordinated by the European Commission through the ECN.

¹ The President of Italian Competition Authority Giovanni Pitruzzella, the President of the French Competition Authority Bruno Lasserre and the Director-General of the Swedish Competition Authority Dan Sjöblom’s joint declaration, 21 April 2015.

The level of coordination between the NCAs has been unprecedented and has included:

- coordinated response to Booking.com's offer of commitments
- coordinated announcement of their intention to accept the commitments subject to market investigations
- discussion of the commitments within the ECN
- coordinated feedback
- a joint announcement on 21 April to accept identical commitments.

Given the level of close cooperation and involvement through the ECN, it seems likely that the other NCAs will follow the lead taken by the three NCAs (except, possibly, for the German Bundeskartellamt ("BKA") – see below).

It is an open question whether this exceptional procedure will be followed in other similar cases and whether the NCAs are in a better position than the European Commission to achieve a coordinated set of commitments on a European wide basis. Much will depend on what approach the BKA decides to take.

RISK OF INCONSISTENT APPLICATION OF EUROPEAN LAW

Despite the exceptional and extensive coordination within the ECN, the BKA has signalled its intention to reject exactly the same commitments accepted by the three NCAs after detailed investigations.² The BKA has issued a Statement of Objections to Booking.com indicating its intention to prohibit its parity provisions.

The BKA's opposition to "broad MFNs" is well known – the BKA issued a prohibition decision in respect of HRS' MFNs in 2013 and this was upheld by the Düsseldorf Higher Regional Court on appeal. However, the Court's judgment is not a justification for an inconsistent approach in this case given that it related to broad MFNs; not narrow MFNs. In fact, narrow MFNs, which the three NCAs found *do not* restrict competition,³ have not been analysed by the BKA nor the Düsseldorf Court.

The BKA's suggestion that it may take a different approach to the other NCAs in respect of narrow MFNs would result in a material divergence in the application of European law.

The BKA has defended its position by claiming different market circumstances in Germany. A spokesperson for the authority is reported to have said that:

*"While we are of course working with our European neighbours to ensure uniformity, here we are talking about different national markets with different market conditions. In addition, different tools were used by the authorities. There is no inconsistency."*⁴

² Bundeskartellamt press release from 2 April 2015: "The Bundeskartellamt's statement of objections gives Booking.com the opportunity to review its position on the issue. In line with the Düsseldorf Higher Regional Court's decision in the parallel proceedings against HRS the Bundeskartellamt regards Booking's proposals for a compromise (commitments) as insufficient."

³ Swedish Competition Authority, Decision dated 15 April 2015, Ref. 596/2013, paragraph 26.

⁴ As quoted in the Global Competition Review, Tuesday 21 April 2015.

A prohibition of Booking.com's "narrow MFNs" on this basis seems difficult to justify:

- **Market characteristics** – the BKA has not identified any unique features of the German market that would justify a divergent approach. In fact, similar conditions apply in each of the four countries: Booking.com is the leading OTA with only two significant competitors; OTA terms and conditions are broadly the same; and consumers and hotels have similar demands.
- **Instruments used** – whilst making no findings as to infringement, the three NCAs accepted commitments on the basis that the "narrow MFNs" addressed all of their competition concerns. Generally speaking, it is possible to address the same competition concern by a prohibition decision and a commitments decision. But a decision by the BKA prohibiting the very same conduct that the three NCAs found did not restrict competition would be using different tools to achieve different outcomes and involve an inconsistent application of competition rules.
- **Inconsistency of assessment** – the BKA and the other NCAs agree that OTAs and hotels' direct websites are not in the same market. The logical conclusion from this is that restricting hotels' direct online prices is not a restriction of competition and the three NCAs acknowledged this in their decisions. Given the BKA agrees with the other NCAs in respect of market definition, it is difficult to see how it could come to a different view on competitive effects. Moreover, while the three NCAs recognised that the narrow MFN is necessary to protect the efficiency benefits that OTAs bring,⁵ the BKA is highly sceptical of this argument.

THIS INCONSISTENCY OF APPROACH REALLY MATTERS

If the BKA chooses to prohibit narrow MFNs, this will lead to different legal frameworks for online platforms in Europe. How is this consistent with Chancellor Merkel and the European Commission's commitment to develop a single European digital economy? Inconsistent decisions will make it more difficult for companies to invest in online services in Europe and push investment to other parts of the world. In Chancellor Merkel's own words: "We need the right framework for improving the investment conditions throughout Europe for digital services, irrespective of who is offering these services."⁶

COMMISSION HAS POWER TO INTERVENE TO TAKE JURISDICTION AWAY FROM BKA

The Commission has the power to intervene under Article 11(6) of Regulation 1/2003 and relieve competition authorities of their competence in respect of an open investigation. Therefore, it could conceivably take jurisdiction from the BKA.

Such intervention is unprecedented – but the Commission's Notice on cooperation within the Network of Competition Authorities (2004/C101/03) suggests that Article 11(6) is an exceptional power that exists for the express purpose of preventing precisely these types of conflicting decisions by Member States.

⁵ The Swedish NCA said in its decision: "*If the hotel was completely free to control the relationship between prices on the hotel's own channels and prices on Booking.com, the hotel would have the possibility to free-ride on Booking.com's investments. Booking.com would therefore face significant risk of not being compensated for the services it provides to the hotels..... the vertical price parity substantially reduces the risk that hotels free-ride on investments made by Booking.com. This in turn allows Booking.com to receive remuneration for its search and compare services so that the services can continue to be offered on the market to the benefit of consumers.*"

⁶ Chancellor Merkel, in her speech at CeBIT, the exhibition and conference for IT and digital business, 16 March 2015.

Hopefully, the close coordination of all the NCAs and the European Commission will result in the end with a consistent outcome on the substantive application of European law. The BKA still has the opportunity to align itself with the other three competition authorities, who concluded that: “The commitments offered by Booking.com strike the right balance for consumers in France, Italy and Sweden, restoring competition while at the same time preserving user-friendly free search and comparison services and encouraging the burgeoning digital economy.”⁷

* Slaughter and May acts for Booking.com



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⁷ The President of Italian Competition Authority Giovanni Pitruzzella, the President of the French Competition Authority Bruno Lasserre and the Director-General of the Swedish Competition Authority Dan Sjöblom's joint declaration, 21 April 2015.