The FCO prohibits booking.com's "narrow" best-price clause

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The FCO has ended the year 2015 with quite a bang when it prohibited internet hotel portal booking.com to continue to use its "narrow" best-price clauses on December 23, 2015. The decision includes an order to remove this clause in general t&cs and contracts by the end of January 2016 as far as hotels in Germany are concerned.
Booking.com had originally applied a so-called "wide" best-price clause, *i.e.*, a most favored nation (MFN) clause obliging hotels to offer on booking.com's platform the lowest prices, the maximum room capacity and best booking and cancellation conditions on any online and offline booking channel. Previously, the FCO had already prohibited competing platform HRS to use this type of clause in 2014, saying it infringed Article 101 TFEU. Proceedings against the best price clauses of the remaining big hotel portal Expedia are pending. (The top three players HRS, booking.com and Expedia together reportedly account for roughly 90% market share in Germany.)

Following the FCO's statement of objections in March 2015 – after the Düsseldorf Court of Appeals upheld the FCO decision in HRS in January 2015. – booking.com offered commitments to apply "narrow" best price-clauses for the next five years, *i.e.*, the hotels would only be obliged not to offer better prices on their own websites, but could, for instance, offer better prices on competing hotel portals. The FCO remained skeptical, while booking.com implemented the new clause EEA-wide in July 2015.

In the meantime, several NCAs within the ECN had opened proceedings against booking.com because of the best-price clauses. In the end, the other NCAs either dropped proceedings after booking.com implemented the "narrow" best price clause (including Denmark, Greece, Ireland, Norway and Poland) or they formally accepted the commitment by way of decision, notably Italy, France and Sweden. No other NCA has rejected the commitments.

The rationale given for the "narrow" best-price or MFN clause is to prevent free-riding from hotels and thus to protect the platform's investment. (Hotels would likely not attract a similar degree of interest for their offer absent the hotel reservation platform and should thus not be able to re-direct traffic to their own websites offering cheaper rates). The FCO does not deal with a possible free-riding justification in its press release on the prohibition. It says that even the narrow best price clause infringes the hotels' pricing freedom, and hotels would only have little incentive to lower prices on other hotel portals if they have to offer higher prices on their own websites. This would also prevent market entry from new hotel portals. The FCO does not see any benefits for consumers. Hopefully, the published decision will shed some more light on the FCO's reasoning. (In HRS the FCO briefly dealt with the issue and found that the platform's investment was relatively small and not sufficient to justify a MFN.)

The reasons for the divergence among NCAs in accepting the commitments are unclear: are the market conditions different in Germany than in the other countries? Do market shares or the platform's investment differ by country? The FCO decision will likely not provide further insight on these aspects – the FCO does not have jurisdiction outside Germany and will limit the decision to market conditions in Germany.

The legal test should be the same across the EU as far as Article 101 TFEU is concerned. (In HRS, the FCO also based its decision on Section 20 ARC, *i.e.*, the abuse of quasi-dominance, as it found that hotels were dependent upon the HRS platform.) However, the current case suggests that there is a lack of coherent application of Article 101 TFEU within the ECN.

One explanation for the FCO's stricter approach may be that traditionally, MFN clauses have been viewed critically in Germany, as former (now abolished) Section 14 ARC prohibited any restriction of an undertaking's pricing freedom as resale price maintenance. One would expect this approach to be abolished with the introduction of Reg. 1/2004. But maybe some of the underlying thinking has survived: In HRS the FCO found the best price clause to have similar effects as resale price maintenance and thus be tantamount to a hardcore restriction – which is why the FCO even contemplated withdrawing the benefit of the VBER if it had applied. The same idea is expressed in the FCO's working paper on digital platforms. If this constituted a general approach on MFNs in cases market shares exceed 30%, it could contravene the Commission Guidelines on Vertical Restraints.

Another reason, to which the FCO also refers in public discussions, is that there is the HRS precedent in Germany, upheld by the Court of Appeals, which also binds the FCO in the proceedings with the other big hotel platforms. Unless circumstances in booking.com were sufficiently different, it would be difficult for the FCO to deviate from its own precedent.

Irrespective of the position taken on the best price clause in substance, the different outcomes within the ECN are unsatisfactory, not only for booking.com, hotels and consumers, but also for regulators (and legal advisors). It is not surprising that there may be differences in applying Article 101 TFEU within the ECN from time to time. But they should not result in contradictory decisions, if possible. Reportedly, there is a working group within the ECN now to monitor the effects of the remedies (of booking.com and Expedia) and an understanding that NCAs would refrain from opening new proceedings on their own in this context. But that still does not resolve the problem of diverging decisions. And the FCO will likely still continue proceedings against Expedia.

In retrospect the hotel platform cases may not have been ideal for parallel enforcement by several NCAs – and one question is why the Commission did not take them on or over (pursuant to Article 11(6) of Reg. 1/2004). Presumably it would have been the best-placed authority to carry out an investigation, and it would also have followed a uniform legal approach in applying Article 101 TFEU. Booking.com has appealed the decision with the Düsseldorf Court of Appeals. It may try to have the Court refer the question to Luxembourg, but this is not guaranteed.