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Booking.com's „narrow" MFN clauses now also permissible in Germany, Court of Appeals rules

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On June 4, 2019, the Düsseldorf Court of Appeal quashed the decision of the Federal Cartel Office ("FCO") prohibiting Booking.com to operate so-called narrow most favored nation (MFN) clauses (or best price clauses) on its hotel booking platform with hotels in Germany, see press release here. It thereby set a (preliminary) end to a long saga of diverging enforcement of EU competition law at national level on MFN clauses used by digital hotel platforms, at least regarding the outcome. (The court did not allow further judicial review, which renders an appeal by the FCO cumbersome, as it would need to challenge this formal decision first in separate proceedings.)

The decision might have a significant impact on the analysis of MFN clauses used by digital platforms in Germany. But it might still mark a divergence in the legal analysis of such clauses across jurisdictions.

I. Background

Booking.com presents hotels on its digital booking platform and offers further services. (When customers book a room on the platform, the hotels need to pay a commission to Booking.com.) Booking.com, like other hotel portals such as HRS and Expedia, used to agree so-called wide MFN clauses with hotels, *i.e.*, that the hotels would always offer the portal the best prices and conditions as they offered through other Internet channels, including other hotel portals and their own Internet sites. The FCO prohibited this practice in proceedings against platform HRS, mainly because it restricted price competition among portals and prevented market entry in that space (see here), and the Düsseldorf Court of Appeals upheld the FCO decision (press release in German here).

II. Narrow MFN clauses

Following the court's HRS ruling in Germany, Booking.com changed its practice towards applying so-called narrow MFN clauses, *i.e.*, the hotels could not offer better prices or conditions on their own Internet sites (but could do so on other platforms). The FCO continued proceedings against these MFN clauses and prohibited Booking.com from operating these in Germany in 2015 (see convenience translation into English here).

III. National enforcement across the EU

Other national competition authorities (NCAs) in the EU opened proceedings into Booking.com's practice as well, but overwhelmingly came to the conclusion that the narrow MFNs could be

exempted under Article 102(3) TFEU. They could in essence be justified in order to prevent free riding from hotels (customers finding the hotel on the platform but then booking the rooms at better prices on the hotel's own Internet site) and thus protect the platform's investment.

In contrast, the FCO rejected that there was an actual free riding problem for the hotel portal. The different outcomes in enforcing EU antitrust law to the same business model by NCAs across the EU triggered a controversial discussion and illustrated the limits or pitfalls of decentralized enforcement of Article 101 TFEU.

IV. The current Court of Appeal's decision – same result as other NCAs…

In Booking.com's appeal in Germany, the court now quashed the FCO's decision. The court found narrow MFN clauses to be compatible with antitrust law, because they are necessary to ensure a "*fair and balanced contractual exchange of services between the portal and the hotels*". In particular, they were deemed necessary and proportionate to prevent a "*disloyal re-channeling*" of portal customer bookings away from the portal towards the hotels' own Internet sites through better prices or conditions offered on these.

While the press release does not mention the term free riding, the reasoning allows to say that the court – other than the FCO – apparently accepted that this could be an issue for the platform. Looking at the outcome, the court now came to the same result as the other NCAs regarding the narrow MFNs in question.

V. … but different legal analysis?

However, it seems that the court followed a different legal analysis. The wording in the press release and reports about the oral hearing suggest that the court considers the narrow MFNs as a type of **ancillary restraints** to the overall agreement between portal and hotels. That means the MFNs would not even qualify as restriction of competition (falling within the scope of Article 101(1) TFEU), but as necessary to enable implementing the actual agreement. (And indeed, the concept is not new under German competition law.)

In contrast, the FCO and the other NCAs – more in line with traditional assessment of MFNs under EU antitrust laws – considered the MFNs as restriction of competition, but then reviewed whether the restriction could be exempted under Article 101(3) TFEU because of free-riding issues. The Düsseldorf Court of Appeals does not seem to carry out an exemption analysis, but considers the free riding problem already as part of the Article 101(1) TFEU analysis. The different paths leading to the same result may still have some practical implications (Of course, this and the following is subject to confirmation in the full judgment to be published.)

VI. Some takeaways

The **burden of proof** between the two legal assessments is different. While the party invoking an exemption under Article 101(3) TFEU needs to fully demonstrate that the conditions are met (in the current case Booking.com) the authority has the burden of proof regarding that there is a restriction of competition in an ancillary restraints analysis. Indeed, the FCO rejected Boking.com's submission on the exemption in the administrative proceedings, and did not have to investigate on its own whether there were free-riding issues. Now the court apparently initiated a survey of hotels and customers regarding the question before it came to its decision. So it may have become more cumbersome for the FCO to find that MFN-type of clauses operated by digital

platforms actually restrict competition.

When relying on the concept of ancillary restraints under Article 101 TFEU, the question of **market shares** (and market power) would not seem as relevant as in the traditional restriction of competition/exemption analysis: market shares are relevant to the question whether the (assumed) restriction of competition is appreciable and whether the Commission's vertical block exemption regulation (VBER) applies (when both parties' market share is below 30%). In contrast, if an MFN clause qualifies as ancillary restraint, there would be no need to deal with market shares. In other words: the decision may have made it easier for platforms with market power to justify MFN-type clauses (as far as potential vertical restrictions are concerned) – unless this practice would amount to an abuse of a dominant position.

The decision will likely have a direct impact on the pending FCO's proceedings against Expedia. (Even though Expedia's share was supposedly below 30% and its MFN clauses would have arguably benefited from the VBER in any event.) Overall, the decision could facilitate the permissibility of MFN-type clauses in the digital economy in Germany in general.

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