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Dutch Torpedo at Work – AG Collins' Opinion in the Booking Case

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On June 6, 2024, AG Collins rendered his opinion in the referral request by the Amsterdam District Court ("ADC") regarding price parity clauses and product market definition in the context of litigation involving Booking.com ("Booking"), the online platform acting as an intermediary between end customers and hotels, also called online travel agent (OTA).

Summary

The case reflects an interesting procedural manoeuvre to achieve a review by the Court of Justice. The opinion itself provides an overview of the existing ancillary restraints test and clarifies the distinction to an individual exemption under Art. 101(3) TFEU, as well as an interesting quasi-obiter dictum (price parity clauses are not hardcore restrictions under the (old) VBER). Overall, the opinion suggests that it will be an uphill battle for Booking to rely on ancillary restraints to justify its past price parity clauses and that an individual exemption may in principle be the more appropriate approach. On market definition, the AG largely defers to the Commission's new Notice on market definition.

While ultimately the result does not seem wrong, the systematic approach raises a few issues. The opinion seems to insert a new element into the ancillary restraints test, i.e., that the restrictions need to be indispensable and proportionate to ensure the OTA's economic viability. This seems odd and leads to several unanswered questions. In addition, the AG's reference to specific alternative, less restrictive measures than price parity clauses, which were suggested by some parties in the proceedings, may raise questions in the future on how far such alternative measures may change the business model or the main operation in an ancillary restraints analysis under Art. 101(1) TFEU, outside an abuse of dominance scenario.

Background

The proceedings reflect a long saga of public antitrust enforcement against price parity (or best price) clauses of OTAs in Europe which have developed into civil damages litigation. Below is first an overview of the history of enforcement actions underlying the case.

Public enforcement history

The BKartA first prohibited HRS' wide price parity clauses, i.e., that hotels could not offer better prices on other online Booking platforms or through any other sales channel, as an infringement of Art. 101(1) TFEU) in 2013. The decision was upheld upon appeal and became final.

Proceedings against Booking's price parity clauses started in Germany and other EU member states in 2013. In 2015, other NCAs accepted Booking's commitment to only apply narrow price parity clauses to prevent free-riding, i.e., that hotels could place better offers on other intermediation platforms while being prevented from offering lower prices on their own websites. Only the BKartA prohibited even the narrow price parity clauses, rejecting that free-riding existed to a meaningful extent (see a Kluwer Competition Law Blog on the decision here).

In 2019, the Düsseldorf Court of Appeals quashed the decision, finding that the narrow price parity clause constituted ancillary restraints to the main agreement between the platform and hotels, as they were necessary to prevent free-riding and thus, did not fall within Art. 101(1) TFEU (see a Kluwer Competition Law Blog here).

In 2021, the German Federal State Court (BGH) lifted the ruling: the ancillary restraints doctrine would not apply, as the restrictions were not objectively necessary to carry out the main agreement, and the balancing of pro-competitive and negative effects on competition should be done under Art. 101(3) TFEU. The BGH also rejected Booking's free-riding justification under Art. 101(3) TFEU, and ultimately confirmed that the narrow price parity clauses infringed Art. 101(1) TFEU (see coverage in Kluwer Competition Law Blog here).

Private proceedings underlying the referral

In 2020, many hotels brought follow-on damages litigation against Booking in Germany. In reaction, Booking filed a request for declaratory judgment with the ADC in the Netherlands, that its narrow price parity clauses did not infringe Art. 101 TFEU (the "Dutch torpedo"). Some hotels joined the Dutch proceedings with counterclaims requesting follow-on damages from Booking. It is in this context that the current request for referral occurred.

Referral questions

The ADC asked the Court of Justice two questions:

- whether wide and narrow price parity clauses constitute an ancillary restriction in the context of Art. 101 TFEU; and
- if the (old) VBER is applied, how to define the relevant product market when transactions are mediated by an online travel agency platform (OTA).

The ADC explains the first question with conflicting positions taken by the Düsseldorf Court of Appeals and the BGH on the narrow price parity clauses. The second question becomes relevant if

price parity clauses do not qualify as ancillary restraints, in which case they might have benefitted from the (old) VBER if Booking's share did not exceed the 30%-market-share threshold. The ADC notes the parties' diverging views on whether the hotels' own direct sales channels (offline and online) are part of the relevant product market. It seems a possible contradiction between a theory of harm that price parity clauses restrict competition by the hotels' own direct sales channels and a product market definition excluding the hotels' own direct sales channels.

AG Collins's opinion

Q1 – Conditions for ancillary restraints vs. individual exemption

AG Collins refers to standing caselaw on ancillary restraints and its two conditions (para. 45):

- the main operation is neutral or has positive effects on competition, and
- the restriction of the commercial freedom of one or more parties to the operation is objectively necessary to implement that operation and proportionate to the objectives

If these conditions are met, the restriction also falls outside of Art. 101(1) TFEU). The test for determining "objectively necessary" is whether the operation would be impossible to carry out without the restriction; it is not sufficient if the implementation would only be more difficult or less profitable without the restriction (para. 46). It needs to be likely that without the restriction the main operation is not implemented or to proceed.

He clarifies that the objective necessity condition for the ancillary restraints test in the context of Art. 101(1) TFEU and the indispensability condition for an individual exemption under Art. 101(3) TFEU should not be mixed. As a result, the objective necessity test needs to be carried out at "a more abstract level": Restrictions only meet the test if necessary for the main operation to "function under any circumstances". In contrast, the balancing of actual pro-and anticompetitive effects takes place under Art. 101(3) TFEU (para. 47).

Referral case

AG Collins states that the main operation, i.e. the provision of online booking services, is clearly pro-competitive. He concludes the real question is whether the wide and narrow price parity clauses can be qualified as objectively necessary and proportionate to carry out the services (para. 48).

Based on several parties' submissions in the referral proceedings, he notes that the price parity clauses do not appear indispensable, and there does not seem to be an inherent link between them and the OTAs' main activity. "Nor do they appear objectively necessary in order to secure the economic viability of OTAs", as the files suggest that after the price parity clauses were prohibited, the OTAs continued their services and even "thrived" in some Member States. He also refers to submissions that there are less restrictive measures to meet the legitimate goal of preventing free-riding, like a listing fee for participating hotels. He thus questions whether in this case the conditions for ancillary restraints would be met.

He stresses that these considerations do not prejudice the outcome of an analysis under Art. 101(3) TFEU, where preventing free-riding is a legitimate goal and may justify an individual exemption if the relevant conditions are met (para. 49). He suggests that OTAS can generally advance free-riding arguments under Art. 101(3) TFEU rather than in the context of an ancillary restraints test.

Conclusion on Q1

He suggests that the Court answers to the preliminary question that an OTA's wide and narrow price parity clauses for hotels are not ancillary restraints, "unless they are indispensable and proportionate to ensuring the OTA's economic viability, which is for the referring court to determine without prejudice to its analysis under Article 101(3) TFEU" (para. 53).

Quasi-obiter dictum: parity clauses no hardcore restrictions

AG Collins finds that neither the OTA's wide nor narrow price parity clauses constitute hardcore restrictions under Art. 4 of the old VBER, even though this issue was not part of the referral request but was discussed in the referral proceedings (para. 50): The concept of resale price maintenance would not fit, as OTAS provide intermediation services to hotels, but the hotels do not resell these services to end customers. Moreover, the price parity clauses did not prevent hotels from lowering the sales prices for the transactions intermediated by the OTAs. He also refers to Art. 5(1)(d) of the new VBER, pursuant to which wide price parity clauses are qualified as "excluded", but not as hardcore restrictions, and to the new Vertical Guidelines confirming that narrow price parity clauses can benefit from the VBER. Since the old VBER did not exclude wide price parity clauses, generally wide and narrow price parity clauses could thus fall under the old VBER. This finding seems important for other OTAs whose market shares would let them benefit from the (old) VBER.

Q2 – relevant product market definition

AG Collins sets out the main question in this context: is the relevant product market broad and comprises other on- and offline channels (Booking's position), or is it narrow and includes only the provision of online intermediation services by platforms to hotels (e.g. Germany's and the Commission's position) (para. 54-57).

Principles for multi-sided markets

AG Collins fully endorses the Commission's new Notice on market definition regarding the treatment of multi-sided markets (as is the case for OTAs). Where a platform connects different user groups on different platform sides, the demand from one user group may impact the demand from the other (indirect network effects) (para. 66). There are two appropriate ways of defining the relevant product market in this type of scenario (para. 67): (i) all products offered by the platform, encompassing all user groups or (ii) define separate but interrelated product markets for the

products offered on each platform side. He notes that several factors may impact the determination, including whether the platform is a transaction or non-transaction platform. He also notes that, unlike some competition authorities, the new Notice does not opt for defining a single market in case of transaction platforms and separate markets in case of non-transaction platforms.

Referral case

AG Collins notes that Booking provides online intermediation services both to hotels and to end customers and is thus active in a two-sided market. The ADC needs to determine whether the relevant product market should be defined to encompass both platform sides/user groups or separate markets on each platform side.

To apply Art. 3(1) of the old VBER to the case, i.e. to determine the market share for the 30% threshold, AG Collins states it is necessary to calculate shares of Booking as a provider of online intermediation services to hotels and to consider whether it is appropriate to include other online intermediation services or other sales channels if they are substitutable from the perspective of the hotels and of the end customers (para. 70). (For this approach he refers to the new Vertical Guidelines regarding Art. 3(1) VBER, which is identical to the provision in the old VBER). Other sales channels/online intermediation services include offline travel agency services, hotels' direct sales channels or services of metasearch engines. AG Collins observes that apart from Booking, all other parties reject that these other services are substitutable with Booking's online intermediation services because they would lack the same search and comparison functionalities together with the possibility of making a booking.

Effect of other decisions

AG Collins confirms that the ADC needs to consider the decisions and rulings in Germany, according to which the relevant product market is limited to online intermediation services, as prima facie evidence (pursuant to Art. 9(2) damages Directive, into the scope of which the case falls due to the hotels' counterclaim in the Dutch litigation). The ADC may also consider any other relevant evidence, and in this context, he mentions that Booking did not object to the product market definition in the appeal proceedings before the BGH (para. 71). He also suggests considering precedents from other competition authorities, including in merger cases, like the recent prohibition of the Booking Holdings/eTraveli Group by the Commission, which Booking has appealed with General Court, but during which it did not specifically challenge the product market definition (para. 72).

No contradiction between narrow market definition and theory of harm

The AG finally rejects that finding a restriction of competition between Booking's platform and the hotels' own websites would be a contradiction if they did not belong to the same product market (a point raised by the ADC, see above). He says the concept of product market definition only aims to capture the most direct competitive pressure, but the competitive assessment may also deal with competitive constraints from outside the relevant product market (para. 73).

Conclusion on Q2

The AG proposes the Court to answer that Art. 3(1) of the old VBER should be interpreted in a way that it is necessary to define the relevant product market capturing an OTA's intermediation between hotels and end customers by assessing "whether other sales channels are substitutable from the point of view of hotels and end customers, in order to calculate an OTA's market share as a supplier of online intermediation services to hotels" (para. 74).

Comments

From a merely ***procedural perspective***, the Dutch torpedo here has been successful, insofar as it allowed Booking to get a referral to the Court of Justice, which the BGH in Germany refused to do. This may well become a model for other cases where NCAs investigate EU competition law instead of the Commission, and their decisions are reviewed by national courts without recourse to Luxemburg. In ***substance***, however, while AG Collins needs to respond in general terms and not decide the case at hand, it becomes clear that he is skeptical of Booking's position, at least based on the court files.

Ancillary restraints vs Art. 101(3) TFEU

The AG's approach confirms the General Court (and BGH) that a balancing of actual pro- and anticompetitive effects can only take place in the context of Art. 101(3) TFEU. And that the objective necessity and proportionality test for ancillary restraints should take place at a more abstract level than the test for indispensability under Art. 101(3) TFEU. At the same time, he seems to suggest that an individual exemption may be the more appropriate level to consider price parity clauses as justification for preventing free-riding. Unfortunately, it remains unclear whether this is a general point, in which case this would merit more reasoning (which the BGH provided in its ruling), or just a suggestion in this particular case.

Is "economic viability" now part of the test?

Moreover, it is puzzling that AG Collins seems to have slightly twisted the existing ancillary restraints test, namely by saying the restrictions need to be indispensable and proportionate for ensuring the OTA's "economic viability" instead of for implementing the "main operation". There is no explanation for this. It seems he got inspired by the facts in this case, i.e., that Booking "thrived" even after the clauses were prohibited, which the BGH considered as evidence that price parity clauses were not objectively necessary to implement the main transaction. The AG's approach does not seem necessary and raises all sorts of follow-up questions:

- Is this a new test only for OTAs or for all ancillary restraints reviews? The opinion and any judgment will likely be read as the latter.
- If it only applies to OTAs, why would they need a special ancillary restraints test?

- What does economic viability mean in this context? Would an operator of the main transaction need to show that the company would turn insolvent otherwise?
- Is the concept of economic viability really a meaningful condition for indispensability in this context? Necessary for implementing a main operation is not the same as safeguarding the overall economic viability of the operator, in particular, if the operator has several economic activities.
- How does the economic viability condition work in cases where the operator is part of a larger group? Does it then apply to the undertaking as defined under antitrust law, i.e. the entire economic entity, or just the corporate entity active?

What is the future of ancillary restraints?

If this is really supposed to be the new general test, it is doubtful which restrictions could still qualify as ancillary restraints at all. To give an example (which may or may not fly): would Pronuptia have passed the economic viability test with the restrictions imposed for operating its franchise model? (That the various restrictions imposed on Pronuptia's franchisees fell outside of Art. 101(1) TFEU was essentially an ancillary restraints review.) Moreover, it seems the test would be overly difficult to meet in the digital economy: any platform also operating an end customer side could simply be told to use it for achieving advertising revenues, which may well ensure its economic viability.

If the AG wanted to acknowledge that the element of economic viability may be a meaningful way to demonstrate that certain restrictions were not objectively necessary in an ex-post-analysis, like the BGH did, he might rather have suggested that the ADC can consider the economic viability of Booking when applying the test ex-post in the case at hand.

Finally, economic viability may be a handy shortcut argument in an ex-post analysis (as it was used by the BGH and the BKartA). However, in practice, companies need to carry out this analysis typically in an ex-ante review, e.g. in a company's self-assessment, and then the element seems even more opaque and possibly prohibitive.

Alternative measures – change of business model?

When reading the opinion, the question is how far alternative less restrictive measures can go in the proportionality test. The AG refers (without any qualification) to the submissions of various parties that Booking could have imposed alternative, less restrictive measures, like listing fees for hotels and click-per-view payment obligations. These alternatives (also suggested ex-post) would likely result in a fundamental change of Booking's business model: it is a huge difference if a platform starts based on a model that hotels only pay a commission fee in case of a booking, or if they always have to pay a listing fee on top of that (and presumably one high enough to effectively prevent free-riding). It is doubtful that imposing such a listing fee from the outset would have enabled Booking to generate the network effects it has achieved – which are generally positive from an antitrust perspective.

It is important to stress that the analysis here is not related to the abuse of dominance or practices of a digital gatekeeper covered by the DMA, but concerns ancillary restraints, a general concept

that does not depend on market shares or market power. That means the analysis, including suggesting possible alternative, less restrictive measures, would also apply to smaller players than Booking, and would go beyond the scope of OTAs.

The question is whether under Art. 101 TFEU, notably the proportionality test for ancillary restraints, one must indeed consider "alternative, less restrictive measures" even if they are tantamount to changing the underlying business model and thus, effectively changing the "main operation". This is not a question AG Collins had to respond to in the current case – but some of the submissions he refers to beg the question. To stay within the Pronuptia example: would this not be similar to telling Pronuptia it could operate its bridal concept stores (or sell bridal products) by using sales agents instead of establishing a franchise system – then the various obligations on the shop operators would have been less restrictive of competition?

Role of a party's submissions in other cases?

The AG's statements on considering precedents on market definition, and that Booking did not object to the product market definitions upon appeal in Germany or in the context of appealing a merger prohibition in Luxemburg: as a practitioner, I do not find that convincing. Of course, courts may consider all sorts of facts. But they should be careful not to establish a de facto preclusion of arguments because a company did not make them in other cases. This seems even more so regarding appeals to the General Court, where the procedural rules impose very strict limits on the length of submissions. And in other cases, this may simply lead to inserting additional paragraphs, to get on record that you objected to some finding made somewhere by a court or a competition authority within the EU.

By the way, Booking has announced to abandon any price parity clauses in the future because it has been designated as a gatekeeper and its intermediate platform as core platform service under the DMA, with Art. 5(3) DMA prohibiting price parity clauses. So, the ruling will not affect Booking's practice in the future, but the underlying referral case as well as other companies who operate or want to operate price parity clauses.

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