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CASE CARD | 3 October 2024

Booking.com (C-264/23)

Price parity clauses

1. CASE SUMMARY

A. Summary of facts

Booking.com BV is an online travel agent ('OTA') established in the Netherlands. It offers a worldwide intermediation service for reserving accommodation through its online platform. Booking.com itself is not a supplier or buyer of accommodation services, nor does it set prices. These are set by the accommodations themselves. Their services are free for travellers, but the hotels, which want to make use of the services of Booking.com, pay a fee for reservations that are not cancelled.

When entering the German market in 2006, Booking.com imposed a 'wide price parity clause' in Germany, which prohibited accommodations making use of Booking.com from offering lower prices through their own sales channels or through sales channels operated by third parties – including competing OTAs.

In another case involving Hotel Reservation Service ('HRS'), the Bundeskartellamt (the German Federal Cartel Office) decided in 2013 that the wide price parity clause applied by HRS infringed EU and German antitrust law. The Bundeskartellamt also opened an investigation into the wide parity clause applied by Booking.com.

With effect from 1 July 2015, Booking.com, after consultation with the French, Italian and Swedish competition authorities, undertook to replace the wide parity clause with a 'narrow parity' clause, under which the prohibition to offer lower prices applied only to offers made by the accommodations through their own sales channels.

In December 2015, the Bundeskartellamt found that the narrow parity clause thus applied by Booking.com was contrary to EU and German competition law and ordered Booking.com to cease to apply it. In 2021, the decision was finally confirmed by the Bundesgerichtshof (the German Federal Court of Justice), which held that the narrow parity clause significantly restricted competition on the market for OTAs and on the market for hotel accommodation and could not be classified as an 'ancillary restraint', since it had not been established that, in its absence, the profitability of Booking.com would be compromised. In so doing, it quashed the judgment of the Oberlandesgericht Düsseldorf (the Higher Regional Court of Düsseldorf), which found that the narrow parity clause did restrict competition, but could nevertheless, as an ancillary restraint, be deemed necessary to enable Booking.com to receive fair remuneration for its provision of services.

Meantime, in 2020, Booking.com had brought an action in the Netherlands before the District Court of

Amsterdam, seeking amongst others a declaration that the narrow parity clause that it employs did not infringe Article 101 TFEU.

The District Court referred the matter to the European Court of Justice ('ECJ'), asking it to respond by preliminary ruling to the question of whether the price parity clauses – both wide and narrow – that are inserted into the contracts concluded between OTAs and affiliated accommodation providers must be classified as 'ancillary restraints', so that they are outside the scope of the prohibition of Article 101(1) TFEU. The District Court also asked the Court of Justice about the definition of the relevant product market in a situation in which an OTA acts as intermediary in transactions concluded between providers of accommodation services and consumers, which is important to determine the market position of Booking.com and other OTAs.

B. Legal analysis

B.1 - Ancillary restraints doctrine

As a brief reminder, the ancillary restraints doctrine is that if undertakings engage in cooperation that does not fall within the Article 101(1) TFEU prohibition because it has neutral or positive effects on competition, a restriction of the commercial autonomy of one or more of the participating undertakings does not fall within that prohibition either provided that that restriction is objectively necessary to implement the cooperation and is proportionate to the objectives of the cooperation.

To classify a restriction as 'ancillary', two conditions must be met:

- First, the objective necessity test: it must be determined whether the main operation, which is not anti-competitive, would be impossible ("strictly indispensable") without the restriction concerned. The fact that that operation is more difficult to implement or less profitable without the restriction concerned cannot be deemed to give that restriction the objective necessity required for it to be classified as 'ancillary'.
- Second, the proportionality test: it is necessary to examine whether the restriction is proportionate to the objectives of the main operation. To refute the ancillary nature of a restriction, the Commission and the national competition authorities may examine whether there are realistic alternatives which are less restrictive of competition than the restriction at issue. Those alternatives are not limited to the situation that would arise in the absence of the restriction in question but may also extend to other counterfactual hypotheses.

The ECJ recognizes that the main operation, namely the provision of online hotel reservation services by platforms such as Booking.com, has had a neutral, or even positive, effect on competition: these services lead to significant efficiency gains by enabling consumers to have access to a wide range of accommodation offers and to compare those offers simply and quickly, and by allowing accommodation providers to acquire greater visibility and thereby increase the number of potential customers.

By contrast, the ECJ considered that it had not been established that price parity clauses are objectively necessary for the implementation of the main operation and are proportionate to the objective pursued by it. So, parity clauses, both wide and narrow, inserted into the agreements concluded between OTAs and providers of accommodation services do not fall outside the scope of that provision on the ground that they are ancillary to those agreements.

B.2 - Definition of the relevant market

According to the ECJ, and in line with the Market Definition Notice, which in the meantime has been revised, interchangeability or substitutability are key to determine the relevant product market. For multi-sided platforms such as Booking.com, and in line with the revised Market Definition Notice, the relevant product market can be defined either as a whole, encompassing all user groups, or as separate markets for each side of the platform. Separate markets may be more appropriate if there are significant differences in substitution possibilities. Factors such as different providers for each user group and the degree of product differentiation are considered in this assessment.

The ECJ concluded that for OTAs the relevant market must be defined by examining the substitutability between online intermediation services and other sales channels from both a supply and a demand perspective.

2. QUOTES

"*According to settled case-law, if a given operation or activity is not covered by the prohibition rule laid down in Article 101(1) TFEU owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives pursued by one or the other. [...].*" (§51)

"*Accordingly, where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising the existence and aim of that operation or activity, it is necessary to examine the compatibility of that restriction with Article 101 TFEU in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 101(1) TFEU. [...]*" (§52)

"*In order for a restriction to be classified as 'ancillary', it is necessary to establish, first, whether the implementation of the main operation, which is not anti-competitive in nature, would be impossible in the absence of the restriction in question. The fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity'*

required in order for it to be classified as 'ancillary'. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 101(1) TFEU. [...]" (§53)

"*Second, it is necessary, where appropriate, to examine the proportionality of the restriction at issue to the objectives underlying the operation in question. Thus, in order to refute the ancillary nature of a restriction, the Commission and the national competition authorities may examine whether there are realistic alternatives which are less restrictive of competition than the restriction at issue. Those alternatives are not limited to the situation that would arise in the absence of the restriction in question but may also extend to other counterfactual hypotheses based, inter alia, on realistic situations that might arise in the absence of that restriction. [...]*" (§54)

"*It is important to specify that a distinction must be made between the concept of 'ancillary restraints' as it is examined in the context of Article 101(1) TFEU and the exemption based on Article 101(3) TFEU. Unlike the latter, the condition relating to objective necessity, in order to classify a restraint as 'ancillary' for the purposes of the application of Article 101(1) TFEU, does not require a balancing of the procompetitive and anticompetitive effects of an agreement. It is only in the context of Article 101(3) TFEU that that balancing may take place. [...]*" (§55)

"*It is apparent from the case-law [...] that, during the examination of the objective necessity of a restriction in relation to the main operation, it is not a question of analysing whether, having regard to the competitive situation on the relevant market, such a restriction is required to ensure the commercial success of the main operation, but of determining whether, in the particular context of that operation, the restriction in question is indispensable to the implementation of the operation.*" (§66)

"*In order to determine the market share held by Booking.com as a provider of online intermediation services to accommodation providers [...], it is therefore necessary to examine whether other types of intermediation services and other sales channels are substitutable for the intermediation services from the point of view of demand, on the one hand, from accommodation providers for those intermediation services and, on the other hand, from end customers.*" (§85)

"*The referring court must therefore, in order to determine the relevant market, verify whether there is actual substitutability between online intermediation services and other sales channels, irrespective of the fact that those channels have different characteristics and do not offer the same functionalities for searching for and comparing the offers of hotel services.*" (§86)

"*Article 101(1) TFEU must be interpreted as meaning that parity clauses, both wide and narrow, inserted into the agreements concluded between online hotel reservation platforms and providers of accommodation services do not fall outside the scope of that provision on the ground that they are ancillary to those agreements.*" (§1 of the

operative part)

"*Article 3(1) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices must be interpreted as meaning that in a situation in which an online hotel reservation platform acts as intermediary in transactions concluded between accommodation establishments and consumers, the definition of the relevant market for the purposes of the application of the market share thresholds provided for in that provision requires a concrete examination of the substitutability, from a supply and demand point of view, between online intermediation services and other sales channels.*" (§2 of the operative part)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Regulation 330/2010 (now: Regulation 2022/720)
- Market Definition Notice

4. PRACTICAL SIGNIFICANCE

The case offers an important application of the ancillary restraints doctrine to OTAs. Whilst the services which they offer do not fall within the Article 101(1) TFEU prohibition because they have neutral or positive effects on competition, wide and narrow parity clauses are not ancillary to their main business: they are not objective necessary (“strictly indispensable”) to ensure the economic viability of the OTA and not proportionate to the objective pursued.

The case is also one of the first addressing the definition of the product market for multi-sided platform, which in the meantime is also addressed in the 2024 Market Definition Notice.