Free Riding - Here We Go?

Is the ECJ's judgement the end of narrow parity clauses?

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Getting a free ride is not always easy and can be a long and bumpy journey. The recent judgment in the Booking.com case is a testament to this. Below, we summarize the twists and turns of this landmark case.

The Journey Begins: Germany's Federal Cartel Office

The journey starts in Germany, where the Federal Cartel Office (FCO) first took action against Booking.com in 2013. The FCO challenged Booking.com's so called ***wide parity*** clauses, which prohibited accommodation providers from offering, through their own sales channels *or* through sales channels operated by third parties, rooms at prices lower than those offered on Booking.com. The FCO argued that these clauses restricted competition and harmed consumers by preventing other platforms from competing on price.

A bumpy ride for narrow parity clauses

In 2015, Booking.com, in agreement with the French, Italian, and Swedish competition authorities, replaced the wide parity clause from its general terms and conditions with a ***narrow parity*** clause, restricting hotels from offering better prices *on its own website*.

However, on December 22, 2015, the FCO, after consulting the European Commission, ruled that even the narrow parity clause ***violated EU and German competition laws*** and ordered Booking.com to stop using it, arguing that it restricted competition in both accommodation services and online intermediation services markets. The authority also noted that Booking.com's market share was too large for the clause to be exempt under the Vertical Block Exemption Regulation (VBER), and it did not meet the criteria for an individual exemption under Article 101(3) TFEU.

On June 4, 2019, the **Düsseldorf Higher Regional Court** partially upheld Booking.com's appeal against the 2015 decision. The court acknowledged that the narrow parity clause restricted competition but ***could be regarded as an 'ancillary restraint'*** necessary to enable Booking.com to receive fair remuneration for the provision of its services and to avoid free-riding. Consequently, the clause could not be regarded as an infringement of Article 101(1) of the TFEU.

The German **Federal Cour of Justice**, though, took another turn and overturned the decision of the Higher Regional Court in 2021. It found that the ***narrow parity clause significantly restricted competition*** on the market for online hotel reservation platforms and on the market for hotel accommodation. Such a clause could not be classified

as an "ancillary restraint" as it had not been established that the absence of such a clause would affect the profitability of Booking.com.

The Road to the European Court of Justice

After all this back and forth, in 2020, Booking.com brought an action before the **District Court of Amsterdam** for a declaration that the parity clauses applied by it do not infringe Article 101 TFEU, arguing that these clauses were only "ancillary restraints" necessary to ensure the proper functioning of its online intermediation services and that Booking's intermediation business would be put at risk without these restrictions.

The Amsterdam district Court decided to stay the proceedings and to approach the European Court, inter alia, with the following question:

*'Do wide and narrow parity clauses constitute an **ancillary restraint** in the context of the application of Article 101(1) TFEU?'*

The ECJ Judgment: A free ride for free riders?

On September 19, 2024, the ECJ delivered its judgment and made pretty clear that the answer to the question is "no". In its ruling, the Court highlighted that online hotel booking services provided by platforms like Booking.com have either a neutral or beneficial impact on competition. These services allow consumers to easily and quickly access and compare a wide range of accommodation options based on various criteria, while also enhancing the visibility of accommodation providers. However, it ***has not been proven that price parity clauses, whether wide or narrow, are objectively necessary for the implementation of that main operation and, second, are proportionate to the objective pursued by it***.

Regarding **wide parity clauses**, the ECJ found that these clauses can reduce competition among different hotel booking platforms and pose a risk of excluding smaller platforms and new market entrants. The same applies to **narrow parity clauses**. Although these clauses initially seem to have a less restrictive effect on competition and aim to prevent free-riding, they do not appear to be essential for ensuring the economic viability of the hotel booking platform.

The journey continues

This ruling is not only a significant milestone for hotels, but can also be seen as a victory for the FCO. For Booking.com, ironically, not much will change at all. This is because the Commission designated Booking.com as a gatekeeper under the Digital Markets Act (DMA) in May 2024, which prohibits the use of parity clauses of wide and narrow parity clauses altogether, cf. Article 5(3) DMA.

Still, the ECJ judgement cannot be interpreted as the end of parity clauses in general. Companies might still be able to use parity clauses under certain circumstances, albeit considerably more caution is required when using them. The ECJ made clear that price parity clauses, in principle cannot be classified as ancillary restraints but also found that the fact that price parity clauses tend to combat possible free-riding and are indispensable in guaranteeing efficiency gains can be taken into account in the context of Article 101(3) TFEU.

Moreover, in May 2022, the Commission adopted the new VBER providing a safe harbour for certain vertical agreements. While wide retail parity clauses used by online platforms are excluded from the VBER's safe harbour (Article 5 para 1 (d)), narrow retail parity clauses generally benefit from the safe harbour under the VBER. Additionally, for parity clauses of market players not operating an online marketplace the safe harbour applies provided both supplier and buyer have a market share below 30%. It remains to be seen how regulatory authorities will interpret the ECJ's judgement and its effects on the interpretation of the VBER.

BLOMSTEIN will continue to monitor the latest developments on parity obligations closely. If you have any questions on the judgement, the DMA or the VBER, Anna Huttenlauch and Marie-Luise Heuer will be happy to assist you.

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