# NARROW BEST-PRICE CLAUSES BETWEEN PLATFORMS AND HOTELS: GERMAN FEDERAL COURT OF JUSTICE OVERTURNS COURT DECISION THAT RULED THESE PERMISSIBLE UNDER ANTITRUST RULES

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**EU Antitrust, Competition, and Trade Regulation Alert**

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The German Federal Court of Justice (Bundesgerichtshof (BGH)) has recently published on 6 August 2021 the reasoning for its judgment of 18 May 2021 on best-price clauses, which overturned the previous decision of the Düsseldorf Higher Regional Court (Oberlandesgericht (OLG)). According to the reasoning of the BGH, Internet booking platforms that exceed the market share threshold of 30% are not allowed to prohibit hotel operators from offering accommodations at a lower price or on better terms on the hotel´s own website than on the platform's website.

## BACKGROUND

On 20 December 2013, the German Federal Cartel Office (Bundeskartellamt (FCO)) announced proceedings against the online hotel booking platform Booking.com with regard to extensive parity clauses (so-called “wide” best-price clauses), which prevented hotel operators from offering lower hotel prices, better booking, and cancellation conditions or terms of availability on websites of third parties, on the hotels' own website, or offline through any other distribution channels.

In response to the investigation, Booking.com agreed on 25 June 2015 to refrain from the abovementioned wide best-price clauses, but it insisted on so-called “narrow” best-price clauses, which only prohibit better conditions on the hotel's own website but allow for competition by other platforms or offline distribution. The FCO, however, ruled in December 2016 that the narrow best-price clauses violate antitrust law and prohibited their use from 1 February 2016 onwards.

An appeal by Booking.com against the decision of the FCO concluded with the judgment of the OLG Düsseldorf of 4 June 2019 (case no. VI-Kart 2/16 (V)) in which the court annulled the deviating decision of the FCO and decided that narrow best-price clauses do not violate antitrust law and may therefore be used. The court's reasoning was that the clauses are necessary to ensure a fair and balanced exchange of services between the platform operators and the contracted hotels.

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## DECISION OF THE COURT

As the OLGDüsseldorf has not allowed an appeal to the BGH, the FCO challenged the decision by way of a nonadmission complaint. The complaint was admitted by the BGH.

In its judgment of 18 May 2021 (case no. KVR 54/20), the BGH decided that narrow best-price clauses violate antitrust law and that Booking.com is not allowed to prohibit hotel operators from offering accommodations at a lower price or on better terms on the hotel´s own website than on the platform's website. The court found that the clauses restrict competition with regard to the offering of hotel rooms and are not necessary to ensure a fair and balanced exchange of services between the platform operators and the contracted hotels.

While the BGH acknowledged the possibility of a “free-rider problem” of hotel operators using the platforms to divert consumers from the platform's website to the hotel website by lower room prices or better contract terms, it deemed this reasoning as not sufficient to constitute an indispensable prerequisite for enabling the proper fulfilment of the contracts between Internet booking platforms and hotels. Furthermore, the BGH ruled undeniable efficiency gains associated with hotel booking platforms do not justify restrictions of competition caused by narrow best-price clauses, as again, the restrictions of competition were not deemed to be indispensable to attain these efficiency gains.

It is noteworthy however, that the BGH explicitly did not rule out the possibility that narrow best-price clauses might constitute a vertical agreement that falls under the scope of the exemption provided for in Article 2 General Vertical Block Exemption Regulation (Commission Regulation (EU) No 330/2010, “VBER”) and therefore be permitted if certain conditions are met. It also stated that narrow best-price clauses, although being similar to minimum price specifications, do not constitute a hardcore restriction as provided for in Article 4 (a) VBER. In the present decision the BGH did not consider whether the vertical block exemption applied to narrow best-price clauses for the reason that the market share of Booking.com exceeded the threshold of 30% of the relevant market provided for in Article 3 (1) VBER.

## WHAT IS NEXT?

Narrow best-price clauses remain a matter that continues to cause controversy among national competition authorities and legislators in Europe, with some countries like France, Italy, and Austria having prohibited by law the use of best-price clauses, while in Ireland and Sweden, for instance, national competition authorities accepted the continuing use of narrow best-price clauses as a commitment by Booking.com.

With the new ruling, the BGH has clarified that Internet booking platforms are prohibited from using narrow best-price clauses, at least if they exceed the market share threshold of 30% provided for by the General Vertical Block Exemption Regulation. There remains, however, the possibility that narrow best-price clauses may be permissible under the VBER if booking platforms using them do not exceed a market share threshold of 30%, a position currently also adhered to by the European Commission ("Commission"). As for the ongoing revision process of the VBER launched by the Commission, it remains uncertain if this will uphold in the near future, with most-favored nation clauses (MFN), especially in the hotel online booking sector, being one of the points under close scrutiny by the Commission. Among the possible solutions, the Commission is considering whether to exclude certain types of sales channels from the exemption of MFN clauses or whether to exclude MFN clauses as a whole from the block exemption and instead require an effects-based assessment.

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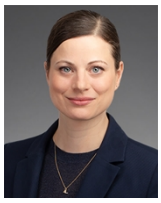

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