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Mandatory rate parity clause involves substantial risks

Caution with new terms of Booking.com!

Late last week Booking.com informed its hotel partners via e-mail that the booking platform will continue to insist on rate parity with respect to the hotel websites, notwithstanding the warning by the German Competition Authority (Bundeskartellamt) dated April 2, 2015. The new terms of Booking.com would come into force automatically, when the hotel partners continue the cooperation with the portal after July 1. "Obviously, competitive pressure by the self-distribution of hotels is an eyesore for Booking.com and is tried to be nipped in the bud by these clauses," criticizes Markus Luthé, CEO of the German Hotel Association (IHA). "With this approach, the market leader under the booking portals disregarded not only the competition authorities and the case-law in Germany, but with the concerted implementation of the new terms and conditions across the European Union also duped the French National Assembly, which recently has brought on the way a comprehensive legal ban against these parity clauses."

The German Hotel Association (IHA) holds that also the modified rate parity demanded by Booking.com is still unequivocally incompatible with the applicable competition laws. Any hotel that accepts such anti-competitive clauses and thus makes them part of its contracts, participates itself in an infringement of German and European competition law, which might even lead to the imposition of heavy fines. As regards the latter it should be noted that according to case law by the European Commission and the European Court of Justice (C 189/02P), it is not sufficient for an undertaking to escape liability under the competition rules to address an anti-competitive agreement with inner aversion and let it unapplied in practice. Rather, sanctions can be escaped only through an explicit and unequivocal objection.

"Many hoteliers will rightly raise the question, whether objecting to the new terms and conditions of Booking.com could not lead to reprisals such as e.g. a downgrade in ranking or even a delisting. Insofar it should be emphasized that any initiatives of Booking.com in such a direction would constitute an abuse of dominance and Booking.com, particularly considering the ongoing proceedings before the German Competition Authority, would risk a fine of up to 600 million Euros. "The decision as to whether objecting the new conditions of Booking.com or not is up to each hotelier himself", Luthé explains the legal position of the German Hotel Association (IHA).

For IHA it is also important to note that Booking.com tries to suggest to the hotels that the new terms and conditions are exactly as agreed with the French, Italian and Swedish competition authorities. However, a look at the details reveals notable discrepancies:

- To the authorities of these countries, Booking.com has committed itself "to not enter into or enforce obligations that require accommodations to offer the same or a greater number of rooms, of any type, on Booking.com as those offered on any other OTA, or as is reserved for the accommodation itself." (paragraph 2.1). The same applies for end customers (paragraph 1.2).
- However, in the new terms and conditions Booking.com sets forth: „Accommodation agrees to give at all times (subject to availability) some availability for all rooms and room types and is encouraged to provide Booking.com with fair access to all rooms and room types (including various applicable policies and restrictions) and rates available during the term of the Agreement (during periods of low and high demand (including during fairs, congresses and special events)).“

„We demand from Booking.com to deal with the hotel industry in Germany in a legally compliant, fair and reliable manner and to refrain from any attempt of fleecing its hotel partners“, Luthe summarizes the position on the German Hotel Association (IHA).

About the German Hotel Association (IHA)

The German Hotel Association (IHA) is the national trade association for the hotel industry in Germany. IHA represent more than 1.400 hotels in Germany ranging from all categories of individual hotels, chain hotels and hotel cooperations. The primary role is to lobby government across Germany and in Europe, representing the views of the hotel industry and promoting and protecting the interests of all operators in the industry. IHA also provides members with a wide range of services designed to keep them informed of industry issues, help grow their business and save them money and time.