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**Anti-competitive Best Price Clauses – follow on claims by German hotels**

## **European Court of Justice backs German hotels in their dispute with Booking.com**

In today's ruling in Case C-264/23, the European Court of Justice (ECJ) has set the limits to the dominant booking platform Booking.com and provided legal certainty across Europe. "Booking.com attempted to play off the courts in EU member states against each other. With its 'torpedo lawsuit' filed with the District Court in Amsterdam, Booking.com sought to undermine the final ruling of the German Federal Court of Justice, which had found the platform's best price clauses to be in clear violation of EU competition law. The top European judges have now put an end to this", commented Markus Luthe, Chief Executive Officer of the German Hotel Association (IHA). "We hope that after this landmark ECJ ruling, the underlying court proceedings before the Amsterdam District Court will quickly resume, and that the compensation claims of German hotels resulting from many years of anti-competitive best price clauses can be promptly addressed."

Booking.com and 62 German hotel companies have been involved in this legal dispute before the Amsterdam District Court since mid-2020. A parallel case involving another around 1,700 hotels is pending before the Berlin Regional Court. The hotels are seeking damages compensation from Booking.com for the harm caused by the violation of EU competition law as a consequence of the so-called wide and narrow best price clauses. A corresponding cease-and-desist order had already been issued against Booking.com by the German Federal Cartel Office in 2015, and the Federal Court of Justice confirmed this decision in 2021. In the spring of 2023, the Amsterdam District Court suspended the proceedings and referred two questions to the ECJ for clarification. First, the Amsterdam District Court wanted to know whether the contested best price clauses constituted a so-called "ancillary restraint" to the hotel portal contract, which would negate the antitrust violation of these clauses. Secondly, the court asked for clarification on how the relevant markets in relation to hotel booking portals should be defined.

On both points, the ECJ today clearly rejected the arguments put forward by the Amsterdam-based platform, following the opinion of Advocate General Anthony Collins from June 6, 2024: The best price clauses are not to be considered as admissible "ancillary restraints," and there exists a separate relevant product market for hotel booking portals, in which Booking.com holds a market share of over 60%.

The ECJ largely confirmed the position of the German Federal Court of Justice, stating that for the recognition of a restrictive clause as an "ancillary restraint," it is essential that the clause is objectively indispensable for the proper execution of the relevant contract. "This excuse, repeatedly put forward by Booking.com, has been invalid since the Federal Cartel Office's prohibition in Germany in 2015, and is now definitively off the table", summarized IHA Managing Director Tobias Warnecke. "It is simply not enough for Booking.com to claim, without substantiation, that the execution of the contract would be more difficult without the restrictive clause. The best price clauses used by Booking.com thus violate European competition law, according to the ECJ."

Regarding market definition, the ECJ referred the Amsterdam District Court to the general rules for delineating relevant markets. It emphasized that the Amsterdam court should seek guidance from the prohibition decision of the European Commission in Case M.10615 (Booking Holdings/eTraveli Group) and should also take into account that Booking.com did not separately challenge the market definition applied in that decision. This market delineation corresponds to that of the Federal Court of Justice in its ruling of May 18, 2021.

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#### **About the German Hotel Association (IHA)**

The German Hotel Association (IHA) is the industry association representing the hotel sector in Germany. It includes around 1,600 establishments from all categories of independent, chain, and cooperative hotels among its members. The IHA advocates for the interests of the hotel industry in Germany and Europe vis-à-vis policymakers and the public and offers numerous hotel-specific services. The abbreviation "IHA" stands for the former German section of the International Hotel Association.