

Unclassified

DAF/COMP/WD(2015)56

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

14-Oct-2015

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

HEARING ON ACROSS PLATFORM PARITY AGREEMENTS

-- Note by Germany --

27-28 October 2015

This document reproduces a written contribution from Germany submitted for Item 7 of the 124th OECD Competition Committee on 27-28 October 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competition-crossplatform-parity.htm

Please contact Ms. Cristiana Vitale if you have any questions regarding this document [E-mail: cristiana.vitale@oecd.org].

JT03384083

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RELEVANT FRAMEWORK AND DECISION PRACTICE IN GERMANY

1. Introduction

1. Across platform parity agreements (APPAs) are agreements whereby a platform operator obliges the suppliers or retailers who want to sell via his platform to offer prices and/or supply conditions to the opposite market side – in most cases consumers – that are not higher/inferior than the prices and/or supply conditions they offer on other platforms.¹

2. Competition enforcers around the globe are increasingly confronted with APPAs. Given the rapid growth of e-commerce and of online-platforms in particular, APPAs have a significant potential for distorting competition between distribution channels.² These developments have stimulated a lively debate about the competition assessment of APPAs that has resulted in an increasing number of contributions on this topic, as well as dedicated sessions at international competition conferences. While theoretical literature is growing rapidly, empirical analyses about the effects of APPAs are still rather limited.

3. This paper presents recent cases in which the Bundeskartellamt has dealt with APPAs.³ The decision against the Online Travel Agent (OTA) HRS adopted in December 2013 was the first decision in Europe against APPAs used by hotel booking platforms. In November of the same year the Bundeskartellamt terminated its proceedings against Amazon for enforcing price parity clauses on its online trading platform after the company agreed to give up the clauses. More recently the energy comparison website Verivox also removed the MFNs it had agreed upon with energy providers from its existing and future contracts after the Bundeskartellamt had started proceedings against it. A case against Booking.com concerning the implementation of a so called “narrow” MFN is still ongoing.

4. After a brief overview of the relevant economic and legal framework for assessing APPAs (section II), the paper illustrates the decision practice in Germany with a view to APPAs used by OTAs (section III) and concludes with some policy reflections on the assessment of APPAs (section IV).

¹ With regard to the parameter price an APPA corresponds to a best-price clause that platform operators impose on sellers or retailers. In this sense, APPAs are also indicated as retail-MFNs (Most Favoured Nation clauses). The terms APPA, MFN, price parity clause and best price clause are used to a certain extent indifferently in this paper.

² For more information on past and ongoing investigations by ICN members see also the ICN “Online Vertical Restraints Special Project Report”, 2015 at: <http://www.icn2015.com.au/download/ICN2015-special-project-online-vertical-restraints.pdf>.

³ See also the German contribution to the OECD Roundtable on Vertical Restraints for Online Sales 2013 at: <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>.

2. Relevant framework

5. An APPA is an agreement between the platform and the suppliers or retailers that sell via that platform that regulates the prices and/or supply conditions for third parties, the final consumers, who are not part of the agreement. Therefore APPAs are a special type of agreement: they are not vertical agreements in the strict sense, because the platforms act as intermediaries, but they have an inherent vertical element, because they involve and affect players that operate at different levels of the value chain.

2.1 Economic framework

6. From an economic point of view, APPAs can have anti-competitive as well as pro-competitive effects. On the one hand, APPAs soften competition between platforms because they lower the incentives for platforms to reduce their fees or commissions for the use of the platform. Theoretically, if a platform operator reduced the costs of using its platform, sellers would have an incentive to offer that platform better prices hoping to shift consumers to the cheaper intermediary. However, with MFNs in place, the sellers would be forced to reduce their prices also for the competing platforms. Since platform operators could not “translate” lower fees/commissions into lower prices offered exclusively on their platform, they would have no incentives to reduce fees/commissions in the first place. This ultimately results in higher prices for final consumers. APPAs also create barriers to entry. New platforms are prevented from gaining market shares by lowering the costs of using their platform if the incumbent platforms’ APPAs prohibit suppliers to offer better prices elsewhere. Given the importance of indirect network effects⁴ in two-sided markets, APPAs clearly make effective entry more difficult.

7. On the other hand, APPAs can prevent free-riding on the investments made by the platforms. The reasoning is simple: if clients use the platform to search and compare, but then buy or book elsewhere where it is cheaper (the free-rider), the platform cannot be able to recoup its investments. As a consequence, no platform has an incentive to invest in improving the quality of its services (hold-up problem).

8. It is not possible to draw a general conclusion about the effects of APPAs that is detached from the market under investigation and its conditions. The degree of market concentration (upstream and downstream), the market power of the firm imposing the agreement and the firm on which it is imposed, the share of the market covered by APPAs, as well as the stage of the market development in which such agreements are introduced, may change the picture completely. The overall effects of APPAs depend on whether the benefits that consumers obtain in terms of better service quality or new products/services outweigh the negative effects on competition between platforms.⁵

2.2 Legal framework

9. In Germany APPAs are covered by the ban on cartels defined in Section 1 of Act Against Restraints of Competition (German Competition Act, GWB) and Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).⁶ An agreement that violates Section 1 GWB or Article 101(1) TFEU might be justified under Section 2 GWB or Article 101(3) TFEU if it satisfies four cumulative conditions: 1) it must contribute to improving the production or distribution of goods or to promoting

⁴ The value of the platform for each group of users increases with the number of users on the other side.

⁵ S. C. Salop and F. Scott Morton (2012), Developing an Administrable MFN Enforcement Policy; Lear (2012), Can Fair Prices be Unfair? A Review of Price Relationship Agreements; F.E. Gonzales-Diaz and Matthew Bennet, “The law and economics of most-favoured nation clauses”, Competition Law & Policy Debate, Volume 1, Issue 3, August 2015, Symposium Parity Clauses, p. 46.

⁶ Member States’ competition rules conform in principle to those set out in the TFEU, in particular Articles 101 and 102 TFEU.

technical or economic progress, 2) consumers must receive a fair share of the resulting benefits, 3) the restrictions must be indispensable to the attainment of these objectives, and 4) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.⁷

10. Therefore, the balancing of anti-competitive and pro-competitive effects of APPAs requires, firstly, an assessment on whether the agreements are restrictive and, secondly, the substantiation of possible efficiency claims. The burden of proving efficiency claims lies with the parties. Competition authorities must then assess the economic importance of the claimed efficiencies and whether the efficiencies are sufficient to compensate for the anti-competitive effects of the restriction.

3. Decision practice in Germany

- **Amazon.** In November 2013 the Bundeskartellamt closed its proceedings against Amazon after the company agreed to remove a price parity clause from its contracts. Under the price parity clause sellers were prohibited from selling products they offered on Amazon cheaper through any other sales channel. Amazon is the largest online retailer in Germany and directly competes with sellers on its Marketplace platform. Since Amazon is primarily active as a dealer itself, the horizontal effects of the clause at retail level were the main concern in the case.⁸
- **Verivox.** In June 2015 Verivox, a comparison website for electricity and gas prices, also accepted to remove all best price clauses that it had agreed upon with energy providers from its existing and future contracts. This decision followed an investigation by the Bundeskartellamt.⁹ Energy comparison websites generally have a positive effect on competition as they enable consumers to switch provider more easily. According to the Bundeskartellamt, the best parity clause applied by Verivox could have reduced this effect by restricting the freedom of the suppliers to set their prices.
- **OTAs.** In December 2013 the Bundeskartellamt issued a decision prohibiting HRS to use an APPA whereby hotels were obliged to offer HRS the best booking conditions, i.e. their lowest room prices, their maximum room capacity and the most favorable booking and cancellation conditions. HRS appealed the decision. In January 2015 the Düsseldorf Higher Regional Court confirmed the assessment of the Bundeskartellamt. A proceeding against Booking.com for similar clauses is ongoing. In July 2015 Booking.com introduced the so called “narrow” MFN, whereby hotels are free to differentiate prices across platforms but cannot offer better prices on their own online distribution channel.¹⁰ The Bundeskartellamt has issued a Statement of

⁷ Neither the European Commission Block Exemption Regulation nor the European Commission Guidelines on Vertical Restraints include specific provisions on APPAs. The Guidelines on Vertical Restraints mention MFN clauses imposed by a supplier as a measure that can make a price fixing agreement more effective: “Direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-customer clause.” Guidelines on Vertical Restraints 2010/C 130/01, paragraph 48.

⁸ http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/26_11_2013_Amazon.html

⁹ http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/03_06_2015_Verivox.html

¹⁰ Booking.com first offered to implement the narrow MFN in Sweden, Italy and France as a commitment to address the competitive concerns expressed by the respective authorities. After the acceptance of the

Objections (SO), in which it expressed the view that this modified version of the clause does not fully address the authority's concerns about the restrictive effects of the MFNs.

3.1 *The HRS case*

11. The proceeding against HRS was triggered by complaints from hotels and the German hotel association. All major OTAs in Germany (HRS, Expedia and Booking) included APPAs in their contracts with hotels. However, HRS was, at the time, the dominant platform and the only one actively monitoring and enforcing the APPA by banning hotels from its platform if they failed to comply with the MFN clause. The case was opened in January 2010. The Bundeskartellamt issued a first SO in February 2012. After the first SO, HRS accepted to abstain from actively enforcing the MFN clause. Reactions to the first SO triggered further investigations. The Bundeskartellamt issued the final decision in December 2013 confirming the prohibition for HRS to implement MFNs.¹¹

3.1.1 *Anti-competitive effects*

12. The Bundeskartellamt identified three main competitive concerns. Firstly, APPAs restrict competition between platforms: should an OTA reduce its commission rate in exchange for lower hotel prices, bookings would not increase because, on account of the APPA, hotels would automatically adjust the price on all platforms. As a consequence, no OTA has an incentive in decreasing commissions in the first place. This mechanism clearly reduces the incentives for the platform to compete on commission rates and ultimately results in higher prices for accommodation. The facts of the market supported this conclusion. Despite the fact that Booking.com was quickly gaining market shares in the German market, in March 2012 HRS was able to increase its commission rate from 13% to 15%.

13. Secondly, the clause significantly increases the barriers to entry of new players. Potential new platforms could not offer lower commission rates in exchange for lower prices in order to gain market shares. Given the fact that the market for hotel reservations via platforms is two-sided and that network effects are a crucial factor for success, the APPA prevents new OTAs and, possibly, alternative business models, to reach a „critical mass“ by offering lower prices than the ones of the incumbent platforms. Again, circumstantial evidence indicated that this effect is not just theoretical. The newcomer JustBook tried to enter the market by developing an App that allowed customers to book hotel rooms last minute at very discounted prices. Hotels, however, refused to offer JustBook low last-minute prices because they were bound to APPAs included in the contracts with all major platforms.

14. Finally, the Bundeskartellamt identified a potential negative effect also on the competition between hotels: hotels could not react flexibly to the market conditions by differentiating prices across distribution channels and this might reduce incentives to lower prices in the first place.

15. The Bundeskartellamt therefore came to the conclusion that the APPA used by HRS violated Section 1 GWB and Article 101(1) TFEU unless HRS could show that the APPA generated efficiencies that outweighed the identified restrictions on competition.

commitments in these three countries, Booking.com replaced the wide MFN with the new narrow MFN in all EU countries.

¹¹ See also Silke Hossenfelder, “Horizontal effects of parity clauses implemented by online travel agents in contracts with hotel partners – The German case HRS-Decision confirmed by the higher Regional Court”, *Competition Law & Policy Debate*, Volume 1, Issue 3, August 2015, Symposium Parity Clauses, p.83.

3.1.2 Assessment of Efficiencies

16. According to the Bundeskartellamt the APPA used by HRS did not meet the criteria for an exemption under Section 2 GWB / Article 101(3): the efficiencies generated by the APPA were small compared to the anti-competitive effects, namely the elimination of competition between OTAs and the creation of entry barriers for new platforms and alternative business models. Most importantly, the APPA was not indispensable to protect those limited efficiency gains: OTA could use alternative remuneration models to protect themselves from free-riding on investments.

(i) Efficiency gains

17. The focus of the efficiency analysis was on the free-riding/investment hold-up argument previously illustrated. HRS claimed that many customers were actually using its platform to look for hotels and then booked the accommodations directly, asking for a lower price than the price displayed on the platform. There are, however, a number of conditions that have to be met before the risk of under-investment is real or significant. Firstly, the investment must be relationship-specific. Secondly, it must be a long-term investment that is not recouped in the short run. And thirdly, the investment must be asymmetric, that is, one party to the contract invests more than the other party.¹²

18. According to the data submitted by HRS, relationship-specific investments, i.e. the costs HRS incurred in order to include a hotel on its platform, were quite low. The average cost of photos, videos, text editing and translation per hotel amounted to about [0-5]% of the average annual revenue made by HRS per hotel. Considering that the contractual relationship between hotels and HRS lasted longer than one year and that the hotels often provided HRS with pictures, videos and descriptions themselves, the contract-specific investments for HRS were even lower compared to the revenues generated by the commissions. HRS did not provide data on investments in the functionality of the website, for example the costs of improving the search functions or the costs for client support.

19. Advertising costs were by far the biggest cost item for HRS. At the time of the investigation advertising expenditures were about 10 times higher than the hotel-specific investments. The costs for advertising on online search engines (e.g. Google) and meta search machines (e.g. Trivago) amounted to about 50% of the commission revenues generated by bookings initiated via search engines and meta search machines.¹³ These costs could not be considered relationship-specific and thus could not be used to claim a hold-up problem on investments. Furthermore, given the fact that the quality of the platform, in terms of usefulness and functionality, is a critical competitive dimension for the success of OTAs, even without best price clauses OTAs would not stop or significantly reduce investing in the services they provide.

20. In the course of its investigations, the Bundeskartellamt also examined a regression analysis submitted by the economic expert of HRS, which aimed at showing that higher prices tend to significantly decrease the conversion rate, i.e. the percentage of clicks that lead to a booking and, accordingly, the revenues of the platform.¹⁴ The Bundeskartellamt replicated the analysis and admitted that, according to

¹² Guidelines on Vertical Restraints, recital 107 (4).
http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

¹³ Advertising costs, including pay-per-click costs to search engines and meta search machines aim at increasing awareness about the platform and attracting clients to the platform. Given the importance of indirect network effect in two-sided markets, advertising expenditures are a crucial competitive variable for platforms. The costs of name bidding, i.e. of bidding on the platform's own brand name to get a better position in Google listing results, is also classified as advertising.

¹⁴ More specifically, HRS analysed the relationship between the share of offers in which the price was higher on the HRS website compared to other OTAs and the conversion rate.

the data, higher prices had a negative, statistically significant effect on the conversion rate, which was to be expected. However, it also pointed out that the regression model used by HRS had several limitations. One was the fact that other variables (stars, destination attractiveness, type of room) had, individually, a stronger effect on the conversion rate than the price differences.

(ii) Fair share for consumers

21. According to the second condition of Section 2 GWB / Article 101(3) TFEU, consumers must receive a fair share of the efficiencies generated by the agreement. If a restrictive agreement is likely to lead to higher prices, this condition is rather strict: In cases where the likely effect of the agreement is to increase prices for consumers, it must be carefully assessed whether the claimed efficiencies create real value for consumers that compensates for the adverse effects on prices.¹⁵

22. HRS claimed that customers benefit from the possibility to quickly search and compare prices, as well as from real-time booking options. The general value of the services that OTAs offer to hotel customers, however, cannot be considered part of the efficiencies that may outweigh the anti-competitive effects of APPAs. It is questionable whether and to what extent consumers benefit from the high advertising expenditures of OTAs. Also in relation to the investments in the functionality of the platform and client support, from which customers benefit directly, a trade-off between lower prices and better services has to be taken into account. Since the uniform imposition of APPAs prevents price competition between OTAs, customers cannot choose between different “mixes” of quality/service and price. Customer preferences as regards (higher) quality or (lower) prices can thus not be established as would usually occur in a market situation without APPAs. Even if the optimal level of quality for customers and, accordingly, their willingness to pay for the services is difficult to determine reliably, the Bundeskartellamt deemed it unlikely that customers would be willing to pay higher prices in order for the OTAs to recover all the investments they considered necessary to succeed in the market.

(iii) Indispensability of the restriction

23. According to the third condition of Section 2 GWB / Article 101(3) TFEU, an agreement must not impose restrictions that are not indispensable to the attainment of the efficiencies. This condition implies a two-fold test. First, the agreement (here the APPA) must be reasonably necessary in order to achieve the efficiencies. Secondly, the restrictions of competition that follow from the agreement must also be reasonably necessary for the attainment of the efficiencies.

24. In its decision the Bundeskartellamt concluded that OTAs could use other remuneration models to prevent free-riding. Considering the fact that hotels benefited considerably from being present on a platform, it could not be excluded a priori that hotels would be willing to pay a fixed fee to use the platform. Another possible option was a two-part tariff, i.e. a combination of a lump-sum fee and a per-booking commission. The fixed fee could be relatively small compared to the long-term benefits in terms of additional bookings. It was also not unreasonable to think that hotel clients would pay a service fee in order to use the platform. In this context, the Bundeskartellamt dismissed a survey submitted by HRS which intended to show that hotel customers would not be willing to pay a hypothetical fee of 5 euro to book via HRS: The sample of the survey was not representative, the formulation of the questions was biased (customers were asked straight after having completed a free booking) and the hypothetical price used was very (if not prohibitively) high.

¹⁵ Guidelines on the application of Article 81(3) of the Treaty, para 104.

25. According to HRS, the fact that currently no OTA is using other business models than the commission model with best price clauses proves that this remuneration model is the most efficient model and that the assessment of less anti-competitive alternatives should be limited to this model. Economic theory indeed supports the view that the commission model (based on payments for successful bookings) can be more efficient than listing fees since it may better align the interests of hotels with those of the OTAs. The Bundeskartellamt nevertheless rejected this argument. Firstly, the fact that a commission model may be more efficient does not mean that OTAs should not compete on commissions. Secondly, the commission model currently in use might be the result of OTAs being able to use anti-competitive price restrictions. With APPAs in place the commission model is surely the most profitable model; however, should OTAs be prohibited to use APPAs, it cannot be excluded that OTAs would develop other remuneration models, or other solutions in general, in order to prevent free-riding.

(iv) No elimination of competition

26. With regard to the fourth condition for the application of Section 2 GWB / Article 101(3) TFEU the Bundeskartellamt took into account that HRS, Booking and Expedia together accounted for 90% of the market and were all using APPAs in their contracts. On account of cumulative effects,¹⁶ best price clauses did not only eliminate price competition between the OTAs, but caused prices to be the same across all distribution channels. Also, the negative effect on competition in the market was strengthened by the fact that APPAs strongly inhibit market entry.

3.1.3 Summary

27. In the HRS case the Bundeskartellamt applied a high standard of proof. It assessed the empirical information and the analyses provided by the party and came to the conclusion that the claimed efficiency gains were not sufficiently substantiated. The free-riding argument was persuasive at first glance, but not supported by market data. Because network effects are a crucial factor for the success of OTAs, HRS invested a considerable amount of money in advertising in order to increase its visibility. According to the Bundeskartellamt, however, an agreement that in practice had the same effects as a price fixing agreement could not be defended on the ground that it fostered competition on other non-price dimensions, in particular advertising.¹⁷ Most importantly, the indispensability requirement was not satisfied: the parties failed to demonstrate that MFNs were indispensable to reach the claimed efficiencies. In the Bundeskartellamt's opinion, the proof of indispensability should not have been limited to the commission model currently in use. Other remuneration models were possible, which raised less competition concerns. The Bundeskartellamt also considered that the market for online hotel reservations is a very dynamic market. The market for bookings via OTAs is very concentrated in Germany, with few strong players accounting for 90% of the bookings. An innovative player, which would have offered a valuable service to consumers, was forced out of the market. The main concern of the Bundeskartellamt was to keep the market open for new platforms, but also, possibly, for alternative business models.

¹⁶ "The conditions of Article 101(3) may in particular not be fulfilled when access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements practised by competing suppliers or buyers." Guidelines on Vertical Restraints 2010/C 130/01, para 75.

¹⁷ Paolo Buccirossi expresses this concept effectively: „After all, the same justification could also be provided for a cartel: the cartelists could argue that their price fixing agreement is aimed at fostering competition in non-price dimensions that require investments on which rivals can free-ride." Paolo Buccirossi, "Parity clauses: Economic incentives, theories of harm and efficiency justifications", Competition Law & Policy Debate, Volume 1, Issue 3, August 2015, Symposium Parity Clauses, p.43.

The Booking.com case

28. Despite the Bundeskartellamt's prohibition decision in the case against HRS and the confirmation of the decision by the Düsseldorf Higher Regional Court, Booking.com continued to include a best price clause in its contracts. Therefore in April 2015 the Bundeskartellamt issued a SO ordering Booking.com to stop using APPAs. In reaction to competition concerns also expressed by other competition authorities across Europe, Booking.com offered to replace its original MFN clause with what has become known as a “narrow” MFN: hotels can differentiate prices between OTAs but cannot offer Booking.com higher prices than the ones they offer on their own direct online channel (on the hotel website but also on meta search machines that refer directly to the hotel website). The competition authorities of Sweden, Italy and France accepted Booking.com’s commitment to implement narrow MFNs.¹⁸

29. Besides the fact that the narrow MFN provides a clear advantage for the OTAs channel, it basically also eliminates the competitive pressure coming from the direct online distribution channel. The Bundeskartellamt believes that the narrow MFN would in practice have the same effect as the wide MFN. This is because 1) hotels may not be willing to always be at least as expensive as the most expensive OTA;¹⁹ 2) hotels are unlikely to “punish” OTAs that impose high commissions but are unavoidable trading partners: OTAs still have the possibility to disadvantage hotels that offer them worse conditions by lowering their ranking or excluding them from preferred-partner programs.

30. Booking.com argues that an industry-wide replacement of wide MFNs with narrow MFNs can be expected to generate significant downward pressure on OTA commissions. Even accepting that the narrow MFN may constitute, at least theoretically, an improvement compared to the “wide” MFN, the wide MFN is not the right counterfactual scenario to be considered. The crucial question is not whether a narrow MFN is better than a wide MFN, but rather whether the narrow MFN constitutes a restriction on competition and whether this restriction is compensated for by efficiencies that meet the conditions set out in Section 2 GWB / Article 101(3).

31. In the SO the Bundeskartellamt preliminarily concluded that the narrow MFN still restricts competition between platforms because it eliminates the competitive pressure of the direct channel. The fact that hotels could offer better prices to regular customers is not likely to have a significant effect, given that the majority of hotels in Germany are small/medium sized hotels who usually do not have as many regular customers as large hotel chains.²⁰ As Booking.com also failed to substantiate the efficiencies deriving from the narrow MFN, the Bundeskartellamt preliminarily also concluded that the clause could not benefit from the exception of Section 2 GWB / Article 101(3).

32. The proceedings against Booking.com may lead to different outcomes in different jurisdictions across the EU. The different outcomes are, however, not the result of differences in the identified theory of harm of APPAs or the type of potential efficiencies to be considered. One of the reasons for the different outcomes may be the differences in the relevant market conditions. Although Booking.com applies the same clause EU wide, the markets were defined by all authorities as national in scope. The main players and their market power are different across countries and the distribution structure as well: In some

¹⁸ However, the commitments in France and Italy were challenged by the national hotel associations. In parallel, MFNs have been prohibited (France) and are likely to be prohibited soon (Italy) by law.

¹⁹ From the perspective of the hotel, the incentive to lower its prices in exchange for a lower commission on one platform depends on whether the gain in terms of higher margins is offset by the loss generated by a reduction of bookings via its direct channel.

²⁰ Booking.com introduced an exception to the APPA for repeated customers: hotels can offer to “loyal” customers lower prices than the ones displayed on Booking.com.

countries, like Germany, small/medium sized hotels prevail; in other countries, like Sweden, the majority of hotels belong to international hotel chains. These structural differences have an impact on the possibility for hotels to react to high commissions and/or to possibly renounce the intermediation services of booking platforms. Another reason may be found in the fact that – contrary to Italy, Sweden and France – the Bundeskartellamt came to the conclusion that Booking.com failed to adequately substantiate its efficiency claims that could compensate for the (still) restrictive effects of the narrow MFN.

4. Conclusion

33. When assessing the effects of APPAs, competition authorities must balance potential restrictions on competition against potential efficiency gains. The assessment is possible only on a case by case basis because both anti and pro-competitive effects are likely to depend on the market power of the parties involved in the agreement, the type of market and market phase, and the availability of alternative (less restrictive) means to generate the claimed efficiencies. Admittedly, the substantiation of the efficiency claims is not an easy task for platform operators. Still, at least according to EU law, if a vertical agreement is found to be restrictive, the burden of providing evidence for the efficiencies that may derive from it lies on the parties.

34. The greater the risk for APPAs to distort competition, the higher must be the standard for the substantiation of the efficiency claims. When dealing with vertical restraints in online markets, the risk of under-enforcement is higher than the risk of over-enforcement.²¹ If the restraints impede new entry or eliminate competitive forces that might erode the market power of incumbent firms, under-enforcement might lead to significant and long-lasting harm. Given the rapid developments in online markets, online vertical restraints pose a substantial risk of irreversibly distorting competition between distribution channels. Agreements like APPAs, which have significant foreclosure effects, are particularly dangerous. APPAs protect platforms from competition from direct sales. They also raise entry barriers by making it harder for entrants to attract suppliers or retailers to their platform. Most importantly, they might prevent new business models from emerging.

35. The Booking.com case represents a good example of how differences in market conditions, but also different views as to the necessary degree of substantiation of the efficiencies arising from APPAs, might lead to different decisions across jurisdictions. Differences, if objectively justified, neither qualify as inconsistencies nor as cooperation failures. If markets are national in scope, companies that operate globally must be prepared to be confronted with different judgements.

²¹ Competition policy refers to over-enforcement as a Type I error (false positive, i.e. condemning a conduct that is not anti-competitive) and to under-enforcement as a Type II error (false negative, i.e. failing to condemn an agreement with restrictive effects).