

# Dealing with divergence - a new way forward following the online hotel bookings cases?

April 2017

The European Commission and 10 European national competition authorities (NCAs) have recently published a report on the effects of most favoured nation clauses (MFNs) in agreements between hotels and online platforms. The report is the result of an unprecedented and major collaborative exercise between the Commission and NCAs that have little experience of carrying out investigations on a coordinated basis. In an environment where NCAs are reasserting their authority, the European Competition Network (ECN) Working Group formula established by Commissioner Vestager in this case may represent a step in the right direction towards achieving a consistent application of EU competition law without the Commission taking jurisdiction away from NCAs in similar cases in the future.

The ECN Working Group was established in December 2015 to address the first serious divergent application of EU competition law by NCAs. In April 2015 the French, Italian and Swedish NCAs accepted commitments from Booking.com replacing wide MFNs with narrow MFNs. Although these commitments were agreed with the tacit support of both the Commission and 25+ other NCAs in the EEA, the German authority took an opposing line and prohibited narrow MFNs in December 2015, much to the consternation of the other authorities. The picture was complicated further by the emergence of legislation in France (the *Loi Macron*) and Austria prohibiting the narrow MFN, lobbied for by powerful hotel associations (Italy is expected to pass similar legislation shortly).

Commissioner Vestager sought to try to mitigate the negative effects of this divergence by establishing the ECN Working Group comprising 10 NCAs and the Commission - it conducted a year-long monitoring exercise with a view to assessing and comparing the impact of the introduction of narrow MFNs (in Belgium, Czech Republic, Hungary, Ireland, Italy, the Netherlands, Sweden and the UK) on the one hand, and the prohibition of MFNs (in Germany and France) on the other.

The ECN Working Group published its [report](#) on 6 April 2017. The report provides a thorough assessment of the effects of the narrow MFN. It assesses the complex issues raised by narrow MFNs and their impact on national markets through a detailed comparative analysis. The French NCA noted in its [press statement](#) that such an exercise “*had never been conducted before, either in the framework of a pan-European workshop or at a national level*”.

The exercise marks the first major collaborative investigation between NCAs and the Commission: uniform information requests were sent to a sample of 16,000 hotels, 19 hotel chains, 20 online travel agents and 11 metasearch websites across all 10 participating Member States. Given the size of the data collected, the complexity of the analysis presented and the resources required, it would have been impossible for an NCA acting alone to achieve an equivalent result.

## Heightened coordination between the Commission and NCAs - the shape of things to come?

The ECN recognises the importance of more coordination going forward. In its [statement](#) of 17 February 2017 the ECN calls not for more Commission control, but instead for heightened “supra” coordination between the Commission and NCAs:

*“The ECN is committed to ensuring consistency in future cases. An early warning system has been agreed and introduced within the ECN: it allows discussing ongoing cases that raise novel issues at the earliest possible stage. It also facilitates early case allocation and/or coordination of novel cases with cross-border effects, run by several authorities.” (emphasis added).*

Uniform application of European competition law could, and arguably should, be achieved by the Commission taking sole jurisdiction of cases like the online hotel booking cases. However, given demands for higher participation by NCAs, the Commission may find the heightened coordination formula more attractive in the future. Such an approach would, however, only be successful if all NCAs support the conclusions.

## Divergence in the online hotel bookings cases

The ECN Working Group review has not resolved the divergence in the online hotel bookings sector. The German NCA’s (the *Bundeskartellamt* (BKA)) prohibition decision against Booking.com’s narrow MFN still stands and is the subject of appeal to the Higher Regional Court of Düsseldorf.

The ECN report - which found no evidence that narrow MFNs are anti-competitive - could mark the end of a long saga of investigations. Many of the participating NCAs have released statements that the introduction of narrow MFNs has improved competition on the market, and the UK NCA has explicitly [stated](#) that it “*has decided not to prioritise further investigation*” in the online hotel booking sector. The BKA, on the other hand, maintains its position that narrow MFNs restrict competition on the grounds that the German market is different.

The ECN Working Group’s findings should, however, make uncomfortable reading for the BKA. The findings of the ECN report are difficult to reconcile with the findings of fact and assumptions made by the BKA in its prohibition decision. No doubt this will be of interest to the Düsseldorf appeal court which has asked the BKA to reopen its investigation and answer 33 questions of fact that are pertinent to the BKA decision and do not appear to have been properly investigated. As to the assertion made in the BKA’s [press statement](#) that the “*specific circumstances of the national markets*” must be taken into account, the BKA has yet to explain how Germany is different. The ECN report concluded that it was rather similar!

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