Competition Law

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Booking.com v 25hours Hotel and South African Competition Law

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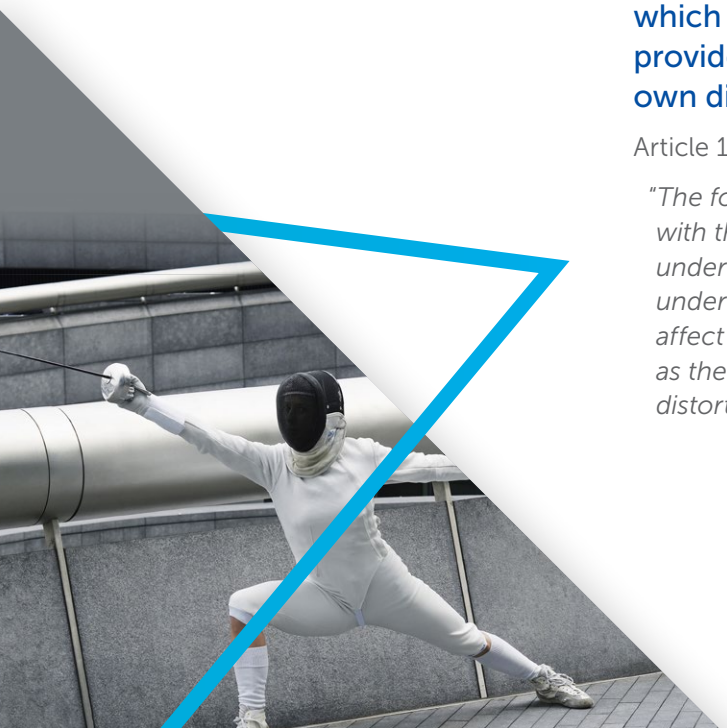
COMPETITION LAW ALERT

Restraints in focus: *Booking.com v 25hours Hotel* and South African Competition Law



In the case of *Booking.com BV v 25 Hours Hotel Berlin GMBH* C-264/23 (*Booking.com* case), the Retchtbank Amsterdam District Court requested that the Court of Justice of the European Union (CJEU) make a preliminary ruling interpreting parity clauses as ancillary restraints in the context of Article 101 of the Treaty on the Functioning of the European Union (TFEU). Booking.com uses two forms of parity clauses for its online intermediation services. First, a wide parity clause prohibits accommodation providers from offering rooms at lower prices than those offered on Booking.com through their own sales channels or through sales channels operated by third parties. Second, a narrow parity clause which only prevents accommodation service providers from offering lower prices on their own direct channels.

Article 101 states that:

> *"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention restriction or distortion of competition within the internal market."*

The CJEU

The court held that where it is determined that a clause that restricts competition between undertakings amounts to an ancillary restraint, it can escape the prohibition of anti-competitive agreements laid down in Article 101. In this regard, the ancillary restraint must be objectively necessary to the implementation of the main agreement and, second, proportionate to the objectives pursued by the undertakings involved.

When analysing the facts in the *Booking.com* case, the CJEU held that there was no evidence indicating that both narrow and wide price parity clauses are objectively necessary for providing online intermediation services. It held further that these clauses were not proportionate to the objectives pursued under the main agreement, that is, the offering of online intermediation services by Booking.com. That said, the *Booking.com* case did not outrightly prohibit the use of parity clauses in that it acknowledged that these clauses may be relevant in addressing free riding in the context of the efficiency gains arguments envisaged in Article 101(3) of the TFEU. In this instance, free riding could arise where accommodation providers benefit from customers using the Booking.com platform to access and compare accommodation rates provided by various service providers but subsequently completing their bookings directly through the individual accommodation providers' websites. However, this issue was left open.

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Assessing the overlaps in South Africa

A few points are notable when comparing the position taken regarding the use of parity clauses in the *Booking.com* case to the Competition Commission's Online Intermediation Platforms Market Inquiry (OIPMI). First, the *Booking.com* case found that the narrow parity clauses are less restrictive of competition and could be used to address the issue of free riding. However, in South Africa, the OIPMI found that both narrow and wide parity clauses impede competition. In particular, it found that narrow parity clauses prevent accommodation providers from reducing prices on their own channels to the benefit of consumers. To address this, Booking.com agreed with the Competition Commission that it would remove both wide and narrow parity clauses in its agreements with South African accommodation providers. Furthermore, the OIPMI recommended that the parity clauses be removed within the context of the online intermediation platforms due to their anti-competitive nature. While the OIPMI recommendations and the *Booking.com* case are not binding in South Africa, businesses operating across both Europe and South Africa are advised to align their agreements and operational strategies with South Africa's stricter stance on the removal of parity clauses. This alignment should be undertaken with due consideration of the fact that parity clauses are not strictly prohibited under European competition law.

The *Booking.com* case is also instructive for the characterisation of ancillary conduct in South Africa. The case of *Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission* (CAC) (unreported case no 155/CAC) (Dawn case) illustrates a key test for ancillary conduct for section 4(1)(b) of the Competition Act 89 of 1998. Although this case was decided in the context of restraints, the Competition Appeal Court outlined a test for assessing ancillary conduct, noting that a non-compete clause should be viewed in the context of the transaction and the circumstances of the parties. In this regard, the *Booking.com* case and the Dawn case are aligned in that they both seek to assess the ancillary conduct in the context of the main operation/agreement and other relevant facts of the case.

However, the two judgments also diverge in certain respects, reflecting distinct interpretations or applications of ancillary conduct. The Dawn case sets out that the appropriate test for assessing ancillary conduct is whether the restraint is reasonably required for the implementation of the main agreement. In contrast, the *Booking.com* case employs the "*necessity test*", which requires the ancillary conduct to be objectively necessary to ensure the economic viability of the main operation. In other words, where it can be demonstrated that the entity that would benefit from the ancillary conduct would be visibly economically disadvantaged by the absence of the parity clause, then such a clause would likely be found to fall outside the scope of ancillary restraints. These differences again emphasise the need for businesses operating in multiple jurisdictions to adjust their agreements and operational strategies to comply with the respective jurisdiction in which they operate or face the risk of non-compliance with competition regulation. After all, there is no one size that fits all.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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