

Articles

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Managerial Liability for Competition Law Fines 330

The German Federal Court of Justice generally affirms the possibility of managerial liability for fines under German law, including for competition law fines. However, it refers the question to the ECJ as to whether this is compatible with art.101 TFEU. This case note analyses the order for reference. It points out that the presentation of German law lacks a clear reference to the principle of offsetting advantages and disadvantages (“Vorteilsausgleichung”) and a statement on the distribution of the burden of proof in this respect. Finally, the case note emphasises the need for an overall assessment of German law against the background of the ECJ’s ASG 2 decision and predicts a cautious response from the ECJ, which leaves leeway for national law. As a result, managerial liability for competition law fines is not only considered permissible under European law, but also required under European law.

MARGHERITA COLANGELO

The Controversial Assessment of Parity Clauses: From the Booking.com Cases to the Digital Markets Act 342

The antitrust treatment of parity clauses in digital markets has been controversial, as evidenced by various proceedings involving digital platforms, particularly in the online hotel booking sector. This paper examines the use of parity clauses in cases concerning online travel agencies, ranging from national antitrust investigations to the preliminary ruling of the CJEU in the Booking.com case. It then analyses the treatment of parity clauses in the light of recent developments in the European regulatory framework, with particular reference to the Vertical Block Exemption Regulation and the Digital Markets Act, which imposes an outright ban on such clauses for platforms designated as gatekeepers.

HÉCTOR PÉREZ PALOMARES

Revisiting the Dual Nature of Abuse and the AEC Framework: Insights from Booking.com and the Evolving EU Competition Framework 349

This article examines two crucial issues raised by the recent Booking.com decision from the Spanish Competition Authority. First, it analyses how exploitative abuse is gaining renewed attention as a distinct category of dominance. Second, it explores the evolving role of the as-efficient competitor (AEC) test and its underlying principle in the analysis of exclusionary abuse. The article outlines the theoretical foundations of the different categories of abuse, the particular features of exploitative conduct in Booking.com, and the increasingly indistinct boundaries between exploitative and exclusionary abuses—particularly in digital platform markets where conduct often produces overlapping effects. Through doctrinal analysis and case studies, the article highlights emerging models for the operationalisation of a more flexible and integrated framework that better captures the complex nature of dominance and harm in digital markets. It also traces the development and significance of the AEC test over time, identifying the two main opposing doctrinal views regarding the legal status of the test-and-principle binomial, and critically assesses its strategic use and inherent legal limits, especially beyond traditional pricing-based exclusionary abuses. Crucially, the article engages with recent regulatory and jurisprudential developments to anticipate potential future evolutions in the approach to both exploitative abuse and the AEC test.

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