

7 December 2017

HRS Best Price Clauses

## German Hotel Association supports hotels in asserting claims for damages against HRS

Anyone who causes harm to others must be responsible for it. This also applies to seemingly untouchable hotel booking portals - all booking portals without exception. The fact that HRS interfered with the entrepreneurial freedom of hotels through the application of best-price clauses, prevented the market entry of new booking portals and limited (commission) competition between the hotel booking portals is a legally binding fact after the dismissal order of the Federal Cartel Office dated 20 December 2013 and the confirming decision of the Higher Regional Court of Düsseldorf dated 9 January 2015. In accordance with the principles of European and German antitrust law, the affected hotels are therefore entitled to compensation for the damage caused, for example, by excessive commission payments and losses in direct sales. The German Hotel Association (IHA) will support hotels located in Germany herein and offer a cost-effective procedure. We also expressly draw the attention to the possible expiry of the statute of limitations at the beginning of January 2018", says IHA CEO Markus Luthe.

This time frame makes it impossible to manage any claims for damages due to the use of best-price clauses against the three large booking portals simultaneously: Booking.com's appealing proceedings against the Federal Cartel Office's decision to dismiss the case may take several more years before it becomes final and the investigations by the German Competition Authority against Expedia have not even been completed. In view of this situation, we approached of course HRS and looked for an amicable, low-noise solution to the further procedure. However, HRS was not prepared to discuss an 'industry solution' with the hotel association", explains Luthe.

The German Hotel Association (IHA) assumes that it is highly probable that the judicial enforcement of antitrust claims for damages by hotels against HRS will be successful. For reasons of cost and efficiency, the deadline should first of all be suspended and the claims secured. For this reason, the German Hotel Association (IHA) has entrusted the law firm Haver & Mailänder with taking appropriate measures for participating hotels. The hotel association will neither provide legal services to the hotels nor guarantee the existence and enforceability of the claims. If hotels should be interested in this joint approach, timely feedback is requested by 31 December 2017 at [hotel@haver-mailaender.de](mailto:hotel@haver-mailaender.de).

All hotels located in Germany, which were at some point between 2005 and 2017 contractual partners of HRS subject to most-favoured-nation clauses and have sold rooms via the HRS booking portal, are individually invited to join the proceedings. A corresponding form for the authorization of the law firm Haver & Milanänder for the purpose of taking measures that interrupt or inhibit the limitation period can be downloaded from the homepage of the German Hotel Association at <http://www.hotellerie.de> This first right-preserving step must be completed by 31 December 2017 and is free of charge for all hotels concerned.

According to our estimates, the enforcement of claims for damages in proceedings of this magnitude may involve costs for expert opinions, lawsuits, etc. in the amount of approximately 2.5 million euros. This amount would have to be raised prior to the initiation of follow-up steps by the participating hotels. The law firm Haver & Mailänder will propose a distribution key based on past HRS commission payments, which should be the fairest and most appropriate approach. "Hotels shall rest assured that without their explicit and prior written consent, no cost-binding action will be taken", Luthe continues. All hotels now entrusting as recommended Haver & Mailänder with the execution of measures to interrupt the statute of limitations will be informed by the law firm on their individual share of the costs in January 2018 and will then be able to decide freely on the continuation of the proceedings in full knowledge of the maximum cost risk."

The hotel association also expressly points out that owners, managing directors and board members of hotel companies are subject to a statutory obligation to provide financial security, which makes it mandatory to pursue valuable claims of the company insofar as this complies with the company's interests within the scope of the Business Judgment Rule. This exercise will have to be carried out separately for each hotel. For compliance reasons and to ease the burden on decision-makers, it is recommended that the respective considerations and decisions are documented, in particular if assertion of the claims should be refrained from.

"We call on all hoteliers concerned, despite the hectic phase of the hotel industry at the end of the year, that this important topic should not be put off for the long term or suppressed as unpleasant. Let's send us a strong sign of the industry to all companies in the portal economy that illegal actions must not pay off", appeals Otto Lindner, Chairman of the German Hotel Association (IHA), to the industry. ■

---

About the German Hotel Association (IHA):

Der Hotelverband Deutschland (IHA) ist der Branchenverband der Hotellerie in Deutschland. Its members include around 1,300 hotels from all categories of individual, chain and cooperation hotels. The IHA represents the interests of the hotel industry in Germany and Europe vis-à-vis politics and the public and offers numerous hotel-specific services. The acronym "IHA" stands for the former German section of the International Hotel Association.