

**ADMINISTRATIVE PROCEEDINGS
DECISION
PURSUANT TO SEC. 32 (1) OF THE ACT AGAINST
RESTRAINTS OF COMPETITION (GWB)**

– Public Version –

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Decision

in the administrative proceedings

1. Booking.com B.V.

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Herengracht 597

1017 CE Amsterdam

Netherlands

– Respondent 1 –

2. Booking.com (Deutschland) GmbH

Behrenstrasse 19 (Bldg. 1)

10117 Berlin

– Respondent 2 –

Legal representatives for 1 and 2:

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Dr. Nadine Herrmann

An der Alster 3

20099 Hamburg

3. HRS-Hotel Reservation Service Robert Ragge GmbH
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50676 Cologne

– Intervening Party 1 –

Legal representatives:

Hengeler Mueller

Dr. Christoph Stadler

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40213 Düsseldorf

4. Expedia, Inc.
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U.S.A.

– Intervening Party 2 –

Legal representatives:

King & Wood Mallesons LLP

Tilman Siebert

Karolinen Karree

Karlstrasse 12

80333 Munich

5. Hotelverband Deutschland (IHA) e.V.
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10117 Berlin

– Intervening Party 3 –

Legal representatives:

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regarding examination of a violation of section 1 of the German Act against Restraints of Competition (German Competition Act, GWB) / Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), the 9th Decision Division ruled as follows on December 22, 2015 in accordance with section 32 (1) GWB:

1. It is hereby found that the clauses on rate and condition parity agreed between Respondents 1 and 2 and their contracting partners in sections 2.2.1 and 7.2 (a) of the General Terms and Conditions in the version thereof dated July 1, 2015, in the form for "Preferred Membership," and in other individual agreements whose content corresponds thereto, infringe antitrust law to the extent that they concern hotels and other accommodations located in Germany.
2. Respondents 1 and 2 are hereby prohibited from continuing to implement the aforementioned clauses to the extent that they concern hotels and other accommodations located in Germany.
3. Respondents 1 and 2 are ordered to remove the best price clauses (MFN-clauses) from the agreements or the General Terms and Conditions underlying such agreements, as the case may be, to the extent that they concern hotels and other accommodations located in Germany by January 31, 2016.
4. In the case of individual contracts, the order set out in section 3 above would also be satisfied by timely changes to the contracts at the next possible date, even if these do not become effective until after the deadline has expired.
5. The proceedings are discontinued in all other respects.

The fee for this decision is set at

EUR [...]

(in words:[...] euros).

Grounds

A. Summary

- (1) The Dutch Booking.com B.V. ("Booking"), part of the American group company Priceline, Inc., is by far the leading hotel booking platform in Germany and in Europe. With the best price clauses agreed with its hotel partners in its General Terms and Conditions and in individual agreements, Booking infringes applicable antitrust law. The subject of the present proceedings were most recently the so-called "narrow" best price clauses, by means of which Booking obtains rate and condition parity in conjunction with minimum availability from the accommodations represented on its booking portal in respect of the room offers placed online by the undertaking itself.
- (2) The Booking system enables direct bookings with instant confirmation for the current hotel room rates. For this purpose, Booking maintains contractual relationships with hotel customers on the one hand and hotel companies on the other. By booking a hotel room via the hotel portal, an intermediary agreement is formed between the hotel customer and Booking. No costs are charged to the hotel customer for the intermediary service of Booking; he pays solely the room price to the booked hotel. There is an agreement between Booking and the hotel companies on the inclusion of the related hotels in the Booking reservation system. The agreements provide that the hotel must pay a standard commission of [10-15]% on the overnight price to Booking for each realized individual booking. The commission amount may be as high as [30-50]% depending on various factors – such as in particular the ranking of the hotel on the portal. The other two major hotel portals in Germany, HRS and Expedia, use largely similar business models, although HRS no longer utilizes best price clauses in Germany since their usage was prohibited by a corresponding order by the Bundeskartellamt. For average German hotel companies, the hotel portals remain by far the most important online sales channel, but the hotel companies are undertaking increasing efforts to reduce their dependence on the hotel portals by strengthening their own online sales.
- (3) The Bundeskartellamt had already established in its decision of December 20, 2013 in the HRS case that the best price clauses used by this hotel portal, by means of which HRS hoped to obtain comprehensive rate, condition and availability parity from its hotel partners represented on its booking platform (so-called "wide" best price clauses), infringe antitrust law. This has been confirmed by the Düsseldorf Higher Regional Court in its decision of January 9, 2015 – which is now legally binding.
- (4) Nevertheless, Booking continued to practice and enforce the best price clauses that it was using at the time. Booking did however convert them to "narrow" best price clauses effective July 1, 2015 by amending its General Terms and Conditions. The motivation for this was that a number of European competition authorities had expressed concerns about the clauses used by Booking. In three European countries (France, Sweden and Italy), Commitment Decisions were adopted with which Booking's narrow best price clauses were accepted. These decisions do not have the

effect of an exemption, but merely take the competitive concerns expressed by these competition authorities into account with regard to the respective local market conditions.

- (5) The subject of the proceedings initiated by the Bundeskartellamt in December 2013 is thus the now amended narrow best price clauses, which do not represent an aliud, but a minus compared to the wide best price clauses in force until July 1, 2015. The amendment of the clauses led to a partial completion of the proceedings, but it has been continued in other respects. Booking had sufficient opportunity both before as well as after the introduction of its narrow best price clauses to respond to the competitive concerns expressed by the Bundeskartellamt, and indeed made comprehensive use of this opportunity.
- (6) The relevant product market is – as in the case of HRS – the market for intermediary services of the hotel portals (“hotel portal market”), which includes the service bundle of “search, compare and book” that is convenient for hotel customers. In geographic terms, the market must be defined as Germany-wide. The relevant market does not include, for instance, the hotels’ own websites, specialized portals that do not offer this bundle, online travel agencies, tour operator portals or metasearch engines. The Higher Regional Court of Düsseldorf has ultimately also confirmed the definitions of both the product and geographic market which the Bundeskartellamt had come up with in the context of the HRS case.
- (7) In this market, the best price clauses used lead to appreciable competitive restraints between the hotel portals, as well as between the hotel companies.
- (8) First of all, the narrow best price clauses limit the incentive for hotel companies to differentiate their room prices on the various hotel portals. Although the narrow best price clauses do allow – in purely technical terms – such price differentiation, they nonetheless still prohibit the room price from being lower on the hotel’s own online sales channels than on Booking’s platform. As a result, the hotel may only implement a room discount given on a hotel portal also on its own website if that price has also been reduced on the Booking’s platform. However, if a hotel operator would like to specifically lower the room price only on a hotel portal other than Booking, according to the narrow best price clauses used by Booking it would be forced to demand the higher price offered via Booking on its own online sales channels. This significantly diminishes the attractiveness of the hotel’s own online sales channel and appreciably restricts the pricing sovereignty of hotel companies. As long as hotel companies consequently make little or no use in practice of the options for price differentiation that the narrow best price clauses technically allow, the incentives also remain low for Booking to lower its commissions or grant other favorable conditions to the hotel companies.
- (9) The restrictive effects of the narrow best price clauses are reinforced by the best price guarantee provided to the hotel customers and the minimum availability set forth in the Booking’s General Terms and Conditions. As long as hotels must make at least one room (from every room category) available on Booking’s platform at all times, the narrow best price clauses can develop their full effects. The narrow best price clauses also result in a market foreclosure with regard to potential competition with the established hotel portals.

- (10) In addition, the narrow best price clauses also limit competition in the hotel market. This affects price competition between hotel companies, because the hotel bound by the narrow best price clauses is not allowed to offer any cheaper room price via its own online sales than on Booking's platform. The anti-competitive effects of the narrow best price clauses used by Booking are in any case reinforced by the best price clauses used by Expedia.
- (11) In view of Booking's market share of (significantly) more than 30%, the best price clauses are not exempted under the Vertical-BER. Insofar as it is applicable to the present scenario at all, an exemption is ruled out in light of Booking's high market shares.
- (12) The best price clauses also do not fulfill the conditions for an individual exemption. Booking has not been able to set forth and prove the conditions for an individual exemption to a sufficient extent. The general advantages of the hotel portals cited by Booking do not represent efficiency gains which result from the best price clauses in use. Insofar as Booking invokes potential revenue declines resulting from the elimination of the best price clauses, it puts forward neither reliable facts about the extent of any decline in sales nor the extent to which the absence of a decline in sales could lead to any efficiency gains. In particular, Booking was incapable of proving that a relevant free-rider problem exists which could be solved by the application of narrow best price clauses. Insofar as Booking points out that the online advertising activities of a hotel portal are more efficient than online advertising activities of individual hotel companies, it can be observed that not every online advertising campaign benefits the individual hotel. Booking was similarly unable to prove that consumers were allowed a fair share of any resulting benefits. In addition, the use of narrow best price clauses is lacking indispensability, because alternative business models appear to be practicable. It can therefore remain open whether the narrow best price clauses lead to the elimination of substantial competition.
- (13) Finally, the application of best price clauses by Booking also represents an unfair impediment of the small and medium hotel enterprises that are dependent upon it.
- (14) The Bundeskartellamt has exercised its discretion in such a way that the established infringement must be discontinued. As a further remedy, Booking is ordered to remove the best price clauses used from its General Terms and Conditions and from the individual agreements by January 31, 2016 to the extent they relate to hotels and other accommodations located in Germany.
- (15) The disgorgement of profits announced to Booking remains reserved for a separate order of the Bundeskartellamt once this decision becomes final.
- (16) The parts of the infringement that were discontinued through the amendment of the General Terms and Conditions effective July 1, 2015 are considered settled; the proceedings were discontinued in this respect.

B. Statement of facts

I. Booking and other online sales channels

- (17) Booking, which belongs to the U.S.-based Priceline Group, acts as an intermediary in Germany and other Member States of the European Union for individual hotel rooms and, to a lesser extent, overnight stays in other accommodations (guesthouses, apartments, apartment hotels, motels, resorts, bed and breakfast establishments and hostels) that, like hotels, offer individual overnight accommodations on a commercial basis (for ease of reading, the remainder of this text typically continues to refer to “hotels,” “hotel partners,” “hotel prices,” etc.¹). This intermediary activity takes place via the portal booking.com and the domains derived there from, such as booking.de. In 2013, Booking achieved by far the most earnings (commissions/margins) from online intermediary activities involving individual hotel rooms located in Germany, in the amount of EUR [170-230] million, ahead of HRS² and Expedia.³
- (18) The Booking system enables direct bookings with immediate confirmations at the then-current hotel room prices. Booking maintains contractual relationships with the hotel customers and the hotel enterprises. When a hotel room is booked via the hotel portal, an intermediary agreement comes into existence between the hotel customer and Booking. Booking does not charge the hotel customer any fees for the intermediary service; the customer only pays the room price to the hotel that has been booked. There is an agreement between Booking and the hotel enterprise regarding the hotel’s inclusion in the Booking hotel reservation system. The agreements provide that the hotel is required to pay Booking a standard commission of [10-15]% for each individual booking realized and, for preferred accommodations, commissions of up to [15-20]% on the overnight accommodation price; Booking’s standard commission is within the scope of the standard commissions for all larger hotel portals that operate in Germany.⁴ Discounts or higher commissions that apply by way of deviation are agreed individually between the hotel enterprises and Booking. On an individual basis, and depending on various factors, such as the hotel’s ranking on the hotel portal, the Booking commissions can be as much as [30-50]%.⁵ HRS and Expedia use largely comparable business models; these hotel portals thus do not operate as resellers, but rather purely as intermediaries.
- (19) The hotel portal with the second highest sales figures in Germany after Booking is now HRS, and the third strongest is Expedia. All three hotel portals have further expanded their positions on the market in online sales of hotel rooms in recent years both by increasing their sales and by

¹ In its General Terms and Conditions, Booking also does not distinguish among the types of accommodations, instead using the term “accommodation” (*Unterkunft*) as an umbrella term for the accommodations offered on its portal.

² Hotel Reservation Service Robert Ragge GmbH, Cologne.

³ Expedia, Inc., Bellevue, WA, U.S.A.

⁴ See overview of commissions for 2013 (page 12 et seq. of the file, “*Fragebogen Wettbewerber 2014*” [Questionnaire competitors, 2014]).

⁵ See hotel correspondence attached to the email from Hotelverband Deutschland dated March 5, 2014, page 518 a) et seqq., 518 b) of the file, and most recently, hotel correspondence in the email from Hotelverband Deutschland dated September 28, 2015, page 4,164 et seqq. of the file. Hotelverband Deutschland estimates that the spreads in the commissions for hotel portals in Germany lead to the average effective commission rate for the portals currently being in the range of 20 to 25% (written statement of Hotelverband Deutschland dated August 31, 2015, page 4,083 et seqq., 4,099 of the file).

acquiring metasearch engines⁶ or smaller hotel portals: Booking has done so, *inter alia*, by acquiring the metasearch engine Kayak (2013), Expedia by acquiring the metasearch engine Trivago (2013) and the hotel portal Ebookers (2015), and HRS by acquiring the hotel portal Hotels Now⁷ (2012). In comparison, the share held by the smaller hotel portals that operate in Germany has continued to shrink. For example, Lastminute, ehotel and Unister act as intermediaries for hotel rooms in Germany only to a minor extent in comparison to the three large providers Booking, HRS, and Expedia.⁸

- (20) According to the overview prepared in the “*Hotelmarkt Deutschland*” [The German Hotel Market] industry report in 2015, end customers book about one-third of their hotel room accommodations online and two-thirds offline (for example, by phone, via travel agencies, and on a “walk-in” basis).⁹ The hotel portals are by far the most important online sales channel for the hotels, and this channel is of particular importance due to the easily accessible and extensive information provided there and the extensive reach with regard to hotels and end customers. If one takes the information in the “*Hotelmarkt Deutschland*” industry report from 2015¹⁰ as the basis and then considers the proportion of overnight stays that are booked via hotel portals to those booked online via the hotels’ own websites,¹¹ the result is approximately 70 to 30, with the hotel portal business in Germany being largely split among three providers: Booking, HRS, and Expedia.
- (21) The hotels’ own websites are placed on the Internet by the hotel enterprises; they are also directly linked via other online channels, such as, in particular, metasearch engines (like Kayak and Trivago),¹² although this has been to a lesser extent so far. In the case of bookings on the hotels’

⁶ Metasearch engines enable a summarized price comparison and forward the user, if interested, to websites via which they can book the services sought. Metasearch engines specializing in travel and hotel services offer a direct link to travel and hotel portals and, in individual cases, also to hotel chains or individual (large) hotels. On this point, see, most recently, the detailed description in the industry study titled “*Hotelmarkt Deutschland*” [The German Hotel Market], 2015, p. 256 et seq., and Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 98 with further references. **Note:** *this reference and any references hereinafter are to the version published at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2013/B9-66-10.pdf;jsessionid=9BEE4A35F9CEAECA9DF70D312D0C17B6.1_cid387?_blob=publicationFile&v=2; margin numbers may vary from other versions.*

⁷ This is a mobile hotel portal in the form of an app; on this point, also see Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 27.

⁸ See Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 191 et seq., and Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 141 et seq.; **note:** *this reference and any references hereinafter are to the version published at http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2015/VI_Kart_1_14_V_Beschluss_20150109.html; margin numbers may vary from other versions.*

⁹ See “*Hotelmarkt Deutschland 2015*” industry report, p. 241. According to a Euromonitor forecast, the online proportion for Western Europe, currently approximately 30% of hotel sales, is expected to rise to 40% by 2017 (see note in “*Hotelmarkt Deutschland 2015*” industry report, p. 240).

¹⁰ See overview table in the “*Hotelmarkt Deutschland 2015*” industry report, p. 241.

¹¹ A website – also known in German as a *Webauftritt* (*Internetauftritt*), *Webpräsenz* (*Internetpräsenz*), and *Webangebot* (*Internetangebot*) – is a virtual place in the World Wide Web where there are generally multiple Web pages (files) and other resources; see <https://de.wikipedia.org/wiki/Website>.

¹² Direct connection possibilities via further metasearch engines, such as Google Finder and TripAdvisor, are important in the United States in particular (see <http://www.tnooz.com/article/us-watchdog-approves-expedia-merger-with-orbitz/#sthash.Xdfh47mE.dpuf>, September 16, 2015), but are still in the market launch

own websites, there are naturally no commissions for the hotel enterprises. Nonetheless, sales through the hotels themselves are not “free of charge.” Hotelverband Deutschland estimates that the purely technical costs of maintaining an online booking feature on the hotel’s own website amount to 2–5% of the sales earned there. Added to that are the costs of marketing and reach generation,¹³ which vary widely according to the hotel’s marketing strategy, so that average costs on the order of 5–7% can apply.¹⁴

1. Booking’s best price clauses

a) Best price clauses up until June 2015

- (22) Up until June 30, 2015, the partner agreements for accommodations between Booking and the hotels included as one element best price clauses with a wider scope (hereinafter “wide best price clause(s)”), in which the hotels bound by the contractual agreements agreed to provide Booking with the lowest room prices as a basic principle and to guarantee that Booking always receives at least as low prices as the hotel offers, or allows to be offered, online or offline via other sales channels, and that Booking would not be placed in a worse position than other sales channels with regard to availability or the terms and conditions of booking and cancellation.
- (23) The best price clause in the version thereof dated August 8, 2014¹⁵ (“Old T&C”) was worded as follows:

[...] 2.2 Parity and room restrictions

2.2.1 The Accommodation shall give Booking.com rate and availability parity (“**Parity**”). “Rate Parity” means the same price or a better rates for the same accommodation, same room type, same dates, same bed type, same number of guests, same or better restrictions and policies, such as breakfast, reservation changes and cancellation policy as are available on the Accommodation’s websites, apps, or call-centres (including the customer reservation system) or directly at the Accommodation, with any competitor of Booking.com (which includes any online or offline reservation or booking agency or intermediary) and/or any other (online or offline) third party that is a business partner of or in any other way related with or connected to the-Accommodation. [...]

Availability Parity means that the Accommodation provide Booking.com such availability (i.e. rooms available for booking at the Platform) that are at least as favorable as those provided to

phase in the German market (for a detailed view of this, see “Hotelmarkt Deutschland 2015” industry report, p. 252 et seqq.).

¹³ Spending on marketing and generating reach should typically be estimated as being higher for large hotel chains than for small and medium-sized hotels. Email from Hotelverband Deutschland dated October 2, 2015 (page 4,169 of the file).

¹⁴ InterConti (IHG) estimates that the costs of selling via a party’s own website amount to 6.6% of the sales figure earned through such activity; in the study dated May 18, 2015, that has been presented by Booking, RBB Economics assumes (page 3,181, 3,186 of the file) that the average website costs for all hotels are about 5% of the online sales figure earned on such sites.

¹⁵ Text of the General Terms and Conditions dated August 8, 2014, see the enclosure with the letter from Booking dated February 3, 2015 (page 1,796 et seqq., 1,800 et seqq. of the file).

any competitor of Booking.com (which includes any online or offline reservation or booking agency or intermediary) and/or with any other (online or offline) third party that is a business partner of or in any other way related with or connected to the Accommodation. [...]

- (24) Section 7 of the General Terms and Conditions contained rules on the term, termination, and suspension of the agreement. Section 7.2 (a) provided that any party to the agreement could terminate the agreement with immediate effect and without prior written notice [...] in the event [...] of a violation of the rate parity guarantee.
- (25) In addition to the partner agreement for accommodations, the hotel partners were able to commit to fulfill further services by signing the “*Formular zur Preferred Mitgliedschaft*”¹⁶ [Preferred Membership Form]. The service categories included, *inter alia*, above-average conversion, above-average availability, and a lower average cancellation rate in comparison to all other accommodations with which Booking cooperates in the respective area. With regard to the parity requirements, the agreement said as follows:

Preferred Membership is an essential element of the Partner Agreement for Accommodations that you have signed (the “Agreement”) and of the General Terms and Conditions (the “Terms and Conditions”). Booking.com selects qualified Accommodations (the “Qualified Accommodation”) that fulfill and uphold the following service categories (the “Service Categories”).

Service Categories

[...]

f. ongoing rate and availability parity.

If you do not fulfill one of the Service Categories, you no longer have any claim to Preferred Membership and will be listed again as a Standard Accommodation without delay. In this case, the (standard) commission agreed in the Partner Agreement for Accommodations will apply again. [...]

- (26) “Preferred Membership” offered the hotels preferential depiction on the Booking website (high ranking and “thumbs up” label). Booking itself advertises the fact that about 70% of its bookings go to Preferred Partners.¹⁷ The Bundeskartellamt does not have any information to the contrary.¹⁸
- (27) Booking supported the enforcement of the best price clauses provided in section 2.2.1 of its Terms and Conditions through a best price guarantee, meaning promises made by Booking to the

¹⁶ Sample agreement as Exhibit QE 12 to the Booking brief dated August 8, 2014 (page 1,548 of the file); in English, “Preferred Partner Programme.”

¹⁷ Letter from Booking dated April 7, 2014, to a German hotel (page 1,515 of the file) and email from Hotelverband Deutschland dated July 17, 2014 (page 1,507 et seq. of the file).

¹⁸ Booking did not respond to an inquiry from the Decision Division regarding this point, instead referring only to the number of hotel partners based in Germany that participate in the “Preferred Partner Programme” (see Booking response letter dated September 9, 2014 (page 1,759, 1,762 of the file)).

end customer that the best room price would be offered on Booking's hotel portal and it would not be possible to find any lower price online with the same booking dates and booking conditions.¹⁹ According to section 2.5.6 of the Terms and Conditions, the hotel is obligated to adjust its own price immediately in the event of any discrepancy and to refund the price difference to the relevant guest.

- (28) Booking also actively enforced the best price clauses. In 2013 and last year, in 2014, as well, Booking demanded that individual hotels located in Germany adjust their rates and room availability to the rates and availability offered on other portals and threatened to remove the hotels from Booking's booking system or lower their rankings if they refused. In cases of refusal, Booking blocked the hotels or implemented price reductions vis-à-vis the hotel customers on its own initiative. In other cases, Booking demanded that hotels disburse the price difference between their price and the best price to the hotel customers themselves.

b) Best price clauses from July 1, 2015, onward

- (29) Based on commitments that Booking had made vis-à-vis the French, Italian, and Swedish competition authorities in return for these authorities' discontinuing their proceedings, Booking changed its General Terms and Conditions Europe-wide as of July 1, 2015.²⁰ The best price clause in the current version of Booking's General Terms and Conditions²¹ now reads as follows:

"[...] 2.2 Parity and Minimum Allocation

2.2.1 The Accommodation shall give Booking.com Rate and Conditions Parity. "Rate and Conditions Parity" means the same price or a better rates for the same accommodation, same room type, same dates, same bed type, same number of guests, same or better amenities and add-ons (e.g. free breakfast, wifi, early/late checkout), same or better restrictions and policies such as reservation changes and policy as made available by the Accommodation.

Rate and Condition Parity does not apply in respect of rates and conditions:

offered on any other OTA;

offered on Offline Channels, provided that these room rates prices are not Published Online or Marketed Online; and/or

that are Unpublished, provided that these room rates are not Marketed Online.

¹⁹ See section 1 of the General Terms and Conditions, under "*Bestpreisgarantie*" [best price guarantee].

²⁰ Booking has changed its commitments several times. The last guarantee made to the Bundeskartellamt (in German) was made to the Bundeskartellamt in an email dated March 29, 2015 (Sunday) and is enclosed in copy on page 2,556 of the file. A commitment that was changed again then became the subject of the decisions by the respective competition authorities in France, Italy, and Sweden; it was brought to the attention of the Bundeskartellamt in Booking's first letter of May 19, 2015 (see page 3,108 et seqq. of the file). In this letter, Booking also announced that it would shift its General Terms and Conditions accordingly in Germany as well, effective as of July 1, 2015.

²¹ General Terms and Conditions dated July 1, 2015, text transmitted by email by Booking that same day (page 3,781 et seqq.).

- (30) In addition, the new Terms and Conditions contain further provisions that are important to the application of the “narrow” best price clause.

2.2.2 Minimum Allocation

The Accommodation commits itself to make available a minimum number of rooms available for reservation via the Platforms, as set out in the Accommodation Agreement or the System (the “Minimum Allocation”). Booking invites the Accommodation to provide additional availability for all room types for certain periods as may be available or requested from time to time.

[...]

2.2.4 Booking shall be entitled to give a discount on the room price at its own costs to its closed user group²² members.

2.2.5 Within the spirit of this Agreement and subject at all times to Clause 2.2.1 and 2.2.2, the Accommodation agrees to give at all times (subject to availability) some availability for all rooms and room types and is encouraged to provide Booking.com with fair access to all rooms and room types (including various applicable policies and restrictions) and rates available during the term of the Agreement during periods of low and high demand (including during fairs, congresses and special events).

- (31) The provisions of section 7.2 of the General Terms and Conditions of July 1, 2015, on the immediate termination of the agreement in the event of a breach of contractual obligations have largely remained the same; section 7.2 (a) now speaks of a violation of the *rate and condition parity guarantee*. This echoes the current wording in section 2.2.1 of the revised General Terms and Conditions.
- (32) The current form for “Preferred Membership” is largely the same as the previous form; however, the service categories that refer to the best price clauses have been adjusted. These now read as follows:²³

Qualifying Performance Criteria

a. [...]

b. *higher than average availability percentage compared to all accommodations which are serviced by Booking.com in each accommodation’s destination;*

[...]

²² In its General Terms and Conditions dated August 14, 2014, section 2.2.1 (text enclosed with Booking’s letter of February 3, 2015, page 1,800 et seqq. of the file), Booking defines a closed user group as [a] group in which users, *inter alia*, actively decide in favor of a membership and have filled out a customer profile. The defining characteristic of a closed user group is that the rates offered there are not (directly or indirectly) publicly available, nor are they made publicly available. The current General Terms and Conditions of Booking do not define the term, but continue to refer to a “closed user group.” The matter concerns a customer loyalty program (currently under the name “Genius” in Booking’s case).

²³ Email from Booking dated July 10, 2015, with text of the sample form attached (page 3,920, 3,922 of the file).

f. an unbroken record of Rate and Conditions Parity and the agreement to give at all times (subject to availability) some availability for all rooms and room type.

- (33) Booking also continues to support the enforcement of the adjusted best price clauses in section 2.2.1 of its General Terms and Conditions through a best price guarantee vis-à-vis the end customer. Pursuant to section 2.5.6 of the new General Terms and Conditions, the hotel is now obligated to adjust its price on the Booking platform and reimburse the respective guest for the price difference “[...] in the event of a right to rate or condition parity.” Furthermore, Booking has announced that Booking itself will compensate for the difference between the booked price and the lower price in *[all] other booking channels*.²⁴
- (34) The Bundeskartellamt has no indication that Booking is no longer enforcing the best price clause in the version that has been applicable since July 1, 2015. Rather, the hotels expect Booking to enforce the now-narrower best price clauses more strictly than before.²⁵

2. Best price clauses of other hotel portals

- (35) The other portals with high sales figures in Germany that have or have had best price clauses comparable to the best price clauses of Booking that applied up until June 30, 2015, are HRS and Expedia. Pursuant to the prohibition order issued by the Bundeskartellamt in the “HRS best price clauses” case of December 20, 2013,²⁶ HRS struck its best price clause from its General Terms and Conditions and the relevant individual agreements by March 1, 2014, at the latest.²⁷
- (36) The best price clause of Expedia in effect at this time continues to apply. Pursuant to the contractual terms and conditions that apply between Expedia and its hotel partners, it refers to rates and availability and to other conditions of booking and cancellation on the hotel’s own or third-party sales or booking channels. The hotel is obligated to reimburse Expedia for the price difference between the best price and the booked price if a guest complains about this. In the event of breach of contract by the hotel, the general provisions, such as the portal’s ability to suspend the booking option, apply – without any particular reference to the best price clauses.²⁸
- (37) In a separate letter sent to the hotel enterprises – without changing the wording of the general terms and conditions – Expedia waived the enforcement of its most favored customer clauses for accommodations within the EEA effective as of August 1, 2015, and for a term of not less than five years, to the extent that these clauses concern other hotel portals or offline sales and refer to prices, conditions, and/or availability of rooms.²⁹

²⁴ See <http://news.booking.com-to-amend-parity-provisions-throughout-Europeesp>. (June 25, 2015).

²⁵ See page 17 of the file, “Fragebogen Hotels Juni 2015” [Questionnaire hotels June 2015].

²⁶ See Bundeskartellamt, December 20, 2013, B9-66/10 – HRS. The Düsseldorf Higher Regional Court rejected the appeal by HRS in a decision rendered on January 9, 2015 (Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS), and HRS did not appeal.

²⁷ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 141 et seqq.

²⁸ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 50.

²⁹ Letter from Expedia dated August 4, 2015 (page 4,003 et seqq. of the file).

II. Complaints from the hotel industry

- (38) Hotel enterprises and their organizations complain about the restraints on competition imposed by the old best price clauses of Booking and the other hotel portals; they also object to the new “narrow” best price clauses, however. In addition to the statement issued by Hotelverband Deutschland (IHA) e.V. (“Hotelverband Deutschland”), which triggered the proceedings, the Bundeskartellamt has received complaints in this regard from the umbrella association of European hotel and restaurant organizations (“HOTREC”) (see point 1 [below] in this regard) and the Intercontinental Hotel Group (IHG) (see point 2 [below] in this regard). Based on the best price clauses of Booking – which have been amended on short notice in Germany as well – and on the intended comparable change by Expedia, the Bundeskartellamt, with the aim of expediting the proceedings, took the annual conference of Hotelverband Deutschland on June 10, 2015, as an opportunity to talk with representatives of the German hotel industry to review how the hotels are responding to the changes in the best price clauses (see point 3 [below] in this regard).

1. HOTREC

- (39) In HOTREC’s view,³⁰ the narrow best price clauses do not lead to hotels granting better prices and room availability to individual hotel portals in exchange for lower commissions. Should the competition authorities in Europe approve such clauses, HOTREC says, the matter would rest with identical prices and conditions on all hotel portals, as hotels are not generally willing to offer comparable rooms on their own websites at higher prices and less favorable conditions.³¹ HOTREC says that as the largest hotel portal with the strongest network (in Germany and in Europe), Booking itself will benefit most from the narrow best price clauses, while other hotel portals will not be granted better prices or conditions for the simple reason that hotels will expect the largest number of bookings to be on the Booking portal.³² HOTREC says that the superior position of the large hotel portals in comparison to the hotels is already apparent from the fact the Booking, in particular, saw no reason to do away with its best price clauses after the Bundeskartellamt rendered its decision in the “HRS best price clauses” parallel case.³³
- (40) The continued application of best price clauses on the hotels own websites prevents the expansion of the hotels’ own Internet presence (a marketing channel which is vital for the future of any hotel) and thus deprives the hotels of a further possibility of holding their ground in negotiations with hotel portals.³⁴ The allegation of a “free-riding problem” on the part of Booking is

³⁰ HOTREC is an umbrella organization representing hotels, restaurants, and cafés in Europe. The industry stands for 1.7 million businesses, about 99.5% of them small and medium-sized businesses. HOTREC brings together 44 national hotel and restaurant associations from 27 European countries. The objectives of HOTREC are to represent the interests of the hospitality industry vis-à-vis EU institutions and to improve cooperation between the national hotel and restaurant associations (see www.wko.at of August 4, 2015). The HOTREC statement of January 30, 2015, was issued in connection with the negotiations regarding commitments in France, Sweden, and Italy, page 1,784 et seqq.

³¹ HOTREC statement, loc. cit., section 2.a.

³² HOTREC statement, loc. cit., section 2.b.

³³ HOTREC statement, loc. cit., section 2.c.

³⁴ HOTREC statement, loc. cit., section 2.d.

a pretext, diverting attention away from the fact that – conversely – the hotels represent an important input for the hotel portals.³⁵ The possibility of price differentiation on the hotels' own websites by the setting up of closed user groups is a purely theoretical concept which is not practicable, given its complexity and the large number of small and medium-sized hotels. Without this possibility, the hotels are also deprived of the only effective means of also advertising the more favorable room prices.³⁶

2. IHG

- (41) IHG is expressly against any form of best price clause in hotel portal agreements. The hotel company emphasizes that generally hotels will not be willing to offer more favorable prices and conditions on individual hotel portal pages than on their own websites.³⁷ Booking is restricting the hotels' freedom of action on other, similarly effective, online sales formats³⁸ Without the possibility of a price differentiation by the hotels via their own website and via marketing channels for hotel rooms generally, there is no adequate competitive pressure on the commission rates charged by the hotel portals.³⁹ The best price clauses would also – even in their “narrow form” – foreclose the market, for they would make it very difficult for newcomers to enter the market with the help of a low price strategy.⁴⁰ The purpose of competition law is not to protect certain business models, but to protect competition as such.⁴¹
- (42) From the perspective of the avoidance of “free riding” by hotels, therefore, the main consideration cannot be to protect Booking's self-advertisement of its portal on the Internet, for this is for the benefit of Booking itself and would only strengthen its market power.⁴² Hotels which would not be able to close the access to the hotel portal⁴³ would have to continue to pay high commission rates instead of being able to market their remaining rooms via their (more favorably priced) own website.⁴⁴ Against this background, there also cannot be any appropriate participation on the part of the consumers. Without competitive pressure, there would be no limit to the advertising expenditure of Booking. This expenditure would be borne by the hotel guests who book their rooms via Booking.⁴⁵ Finally, Booking can still itself profit from a complete removal of the best price clauses, because the price differentiation which would then be possible would be made known by means of metasearch engines, and Booking itself has purchased a metasearch engine

³⁵ HOTREC statement, loc. cit., section 2.d.

³⁶ HOTREC statement, loc. cit., section 2.d.

³⁷ IHG statement, section 8.9.

³⁸ Here, IHG names Google, Hotel Finder and Tripadvisor.

³⁹ IHG statement (page 3,684 et seqq. of the file), section 8.20.

⁴⁰ IHG statement, loc. cit., section 8.20.

⁴¹ IHG statement, loc. cit., section 9.8 et seq.

⁴² IHG statement, loc. cit., section 9.16 et seqq.

⁴³ This is the case according to Booking's new General Terms and Conditions, as a minimum quota is required.

⁴⁴ IHG statement, loc. cit., section 9.31.

⁴⁵ IHG statement, loc. cit., section 9.16.

(Kayak).⁴⁶ The best price clauses are also not essential for efficiency (for example in the form of the avoidance of “free riding”). On the one hand, there are alternative payment models (e.g. Pay-Per-Click or listing fees), and on the other hand, technical solutions in the form of “user tracking technologies” are possible. With this technical solution, a hotel that has received a booking via its own website can participate in the costs for the customer’s “search and compare” on the hotel portal.⁴⁷

3. Discussions between the Bundeskartellamt and representatives of the German hotel industry

- (43) The subject of the hotel survey carried out by the Bundeskartellamt on June 10, 2015 was the use of various sales channels, in particular the hotel portals and online bookings via hotels’ own websites, as well as Booking’s best price clauses which on that date still applied and at that time had been announced for July 1, 2015.⁴⁸ The purpose of the survey was to gain as broad a picture as possible concerning the viewpoint of the various hotel groups in regard to Booking’s present General Terms and Conditions and its intended new General Terms and Conditions. To this end the Bundeskartellamt made it clear to the German Hotel Association as the organizer of the annual congress that the aim was to have discussions with those in favor, those against and those with no conclusive opinion concerning Booking’s previous and new best price clauses, and that it would be desirable to be able to talk to representatives of different types of hotel and with representatives of the German Hotel and Restaurant Association (DEHOGA).⁴⁹
- (44) The Bundeskartellamt had a total of thirty individual discussions with representatives of nine individual hotels, six hotel chains⁵⁰ and five hotel cooperations,⁵¹ as well as representatives of the German Hotel and Restaurant Association (DEHOGA) at national level and several DEHOGA⁵² regional associations (North Rhine Westphalia, Baden-Württemberg, Bremen, Mecklenburg-Vorpommern and Saxony).⁵³ Almost 600 hotel businesses belong to the hotel chain representatives that were interviewed, while the representatives of hotel cooperations included almost 500 businesses. Of the roughly 33,000 classic accommodation industry businesses in

⁴⁶ IHG letter, page 3,674 of the file.

⁴⁷ IHG statement, loc. cit., section 9.27 with reference to the practice of Tripadvisor.

⁴⁸ The assurances of Booking, which were accepted by the competition authorities in France, Italy and Sweden in April 2015, were brought to the attention of the Bundeskartellamt with Booking’s (first) letter of May 19, 2015 (see page 3,108 et seqq. of the file). In this letter Booking also announced that it would apply its General Terms and Conditions in Germany also from July 1, 2015 onwards. The content of the assurances published on this date was explained in broad outline to the hotels and thus became the subject of the hotel survey (cf. page 10 of the file “Questionnaire hotels June 2015”).

⁴⁹ Page 1 of the file “Questionnaire hotels June 2015.”.

⁵⁰ This includes just under 600 hotels.

⁵¹ This includes approx. 500 hotels.

⁵² DEHOGA is the abbreviation for the German Hotel and Restaurant Association. Of the approximately 33,000 businesses of the classic accommodation industry in Germany (hotels, guest houses and boarding houses), around 21,000 are members of the regional associations of DEHOGA, giving DEHOGA (whose representatives were interviewed by the Decision Department) a market coverage of over 60%.

⁵³ See page 3 et seqq. of the file “Questionnaire hotels June 2015.”

Germany (hotels, guest houses and boarding houses), around 21,000 are members of the regional DEHOGA associations, giving DEHOGA a market coverage of over 60%. In terms of classification, all hotel categories (no classification or 1 to 5 stars) were represented in the survey, with a distribution of star categories over all German hotels focusing on 3 to 4 stars.⁵⁴ In accordance with a request made to the hotel association,⁵⁵ the Bundeskartellamt was able to speak to representatives of accommodation enterprises who have expressed very different opinions on the best price clauses.⁵⁶ Booking's assertion that the hotel association had a negative influence on the result of the survey, particularly during the hotel congress, is totally unfounded.⁵⁷

- (45) The interviews comprised questions concerning the marketing channels used by the hotels taking part in the survey, see section a) below; concerning restrictions in the competitive freedom of action as a result of the old General Terms and Conditions, see section b) below; concerning the possibilities for the use of greater competitive freedoms following the introduction of the new General Terms and Conditions from July 1, 2015 onwards, see section c) below; and relating to future possibilities for the further development of hotel room marketing on the various channels, see section d) below.

a) Marketing channels used by the hotels

- (46) Concerning their marketing situation, most of the hotels taking part in the survey stated that 30-50% of all their bookings are made online; the other hotels stated otherwise (with clear deviations in some cases). Regarding the proportion of bookings via their own website (in relation to online bookings) the majority of hotel enterprises gave a figure of 20-30%; here also, there were clear differences based on the size of the hotel and its business orientation, with a share of 50% in the case of certain hotels with a "theme" (for example motor sports), and less than 10% in the case of some small private hotels, hotels with a pronounced regional travel business, and hotels geared to business customers from Germany (in the case of the latter, the proportion of bookings via hotel portals was correspondingly high).

b) Wide best price clauses

- (47) In regard to Booking's old General Terms and Conditions, which included wide best price clauses for all sales channels, the main problem cited by the hotels was the inadmissibility of price differentiation on their own sales channels as compared with the hotel portal. As a matter of principle, the reaction to such a ban on price differentiation is very negative. In the survey a clear majority of the hotels indicated that they placed a high value on the pricing sovereignty to which

⁵⁴ See on this point the detailed statements made by the Hotel Association in two emails of July 29, 2015 (page 4,019 et seq. of the file).

⁵⁵ See page 1 of the file "Questionnaire hotels June 2015".

⁵⁶ The answers given by the persons interviewed are documented individually, see page 3 et seqq. of the file "Questionnaire hotels June 2015".

⁵⁷ See on this point the email of the Bundeskartellamt of June 9, 2015, page 1 et seq. of the file "Questionnaire hotels June 2015".

they are entitled, and which they regard as an entrepreneurial necessity in regard to the risk of non-utilization or under-utilization of their hotel businesses (a risk which is borne solely by the hotels, and not by any hotel portal such as Booking). The hotel businesses taking part in the survey regard this sovereignty as being curtailed, in an objectively unjustified manner, both by the best price clauses applied by Booking before July 1, 2015 and also by the amended best price clauses applied since that date. In particular, the hotels cited the amount of the current commission charged by the hotel portals as particularly disturbing. Against the background of the dependence of small and medium-sized hotels in particular on the portals as far as the occupancy rate of their hotel is concerned, the commission rates are seen as “oppressive” and “stifling.”

c) Narrow best price clauses

- (48) The hotels acknowledge that the narrow best price clauses of Booking in the General Terms and Conditions applicable from July 1, 2015 can in theory bring greater competitive freedom than the clauses used in the previous General Terms and Conditions, but in practice they still regard themselves as heavily restricted in the price-setting options open to them. In particular, there is in principle no financial incentive to offer lower room prices than as stated on their own website, in return for the lower commission charged by a hotel portal. It is precisely on a hotel's own website that there must be the option of providing special offers for the hotel's own (regular) customers; this is something that customers expect. Insofar as a hotel might nevertheless decide to grant a hotel portal a more favorable price, this would only be worthwhile on the most powerful hotel portal with a wide coverage. Such a portal would (in turn) be Booking.
- (49) From the point of view of the hotels taking part in the survey, the removal of availability parity provides no advantage (as far as price-setting options are concerned) as long as hotels are not able to offer lower prices on their own website than on the hotel portals.
- (50) The possibility of price differentiation in offline sales (e.g. by telephone, by email, or at the hotel desk) which now exists in the new General Terms and Conditions is certainly seen by smaller individual hotels as an expansion of their freedoms in comparison to the previous scheme. However, the clear majority of the hotels, including those in the smaller and medium-sized group, pointed to the strongly increasing importance of online marketing. “The clear goal is the expansion of online marketing, there is no future in offline.”⁵⁸ Against this background, the ban on online publication or marketing of room prices offered offline (which is also included in the Booking's General Terms and Conditions) was regarded as a considerable restriction.
- (51) The use of price and conditions differentiation in so called closed user groups, as now specified in section 2.2.1 of Booking's new General Terms and Conditions, was classified as of little practical use and therefore not significant as far as the expansion of freedom of action is concerned. In any case, the majority of the hotels taking part in the survey does not have any closed user groups

⁵⁸ According to a Euromonitor forecast, the proportion of hotel sales via online channels will increase from approx. 30% at the present time to 40% in 2017, see “*Hotelmarkt Deutschland 2015*” industry report, p. 240 with further references.

and rule out the setting up of such groups as being too time-consuming. "Closed user groups are not an option for small and medium-sized hotels, because their clientele is too small." Just one large individual hotel and one large hotel chain were able to envisage setting up a closed user group, for example for certain professional groups.

d) Future development of hotel marketing

- (52) In regard to the question of future possibilities for the further development of hotel room marketing on the various channels, the hotels taking part in the survey unanimously awarded first place to online marketing and (here) the hotel portals. Hotel portals are "indispensable" for achieving good occupancy rates; only they have a wide scope and would be able to bring in additional customers (particularly from abroad) to the hotels. However, the innovations provided by the hotel portals have declined. For example, in the opinion of some hotel enterprises the future pricing trend should be charging fixed base room prices, with individual pricing for additional services (e.g. sports or wellness facilities); this is not currently possible with hotel portals.
- (53) In the past, according to their own estimation, hotels have been too reliant on hotel portals in online marketing, and have therefore "become dependent." The hotel portals now control the data of the hotels and their customers, and function as suppliers for channel management⁵⁹ and booking software, which are important for many hotels. It is to be expected that hotels will (still) not offer any commission reductions, and that they will (as is already the case with Booking) "cut hotels off from direct contact with customers"; the possibility cannot be excluded that the narrow best price clauses in the General Terms and Conditions will be enforced even more stringently in future, if they are accepted by the competition authorities.
- (54) Concerning the role of the metasearch engines, most hotels had very little to say. Access is difficult, particularly for smaller and medium-sized hotels. Metasearch engines "will not take every hotel," and the marketing costs associated with the use of this channel (cost per click) are high. However, the point was also made that it is only with metasearch engines that any "uninfluenced grading according to price" is possible. Since a hotel's own website is "switched off" (including on the metasearch engines) as a result of Booking's narrow best price clauses, they would not play any role as far as the hotels are concerned while the best price clauses remained in force.

C. Proceedings

I. Proceedings against Booking before the Bundeskartellamt

- (55) The proceedings pending here were instituted by letter dated December 19, 2013 following a complaint from the German Hotel Association against Booking's best price clauses in their version at the time.

⁵⁹ Via "channel management," hotels are able to check the availability of their rooms on the various online channels.

- (56) In a letter dated February 18, 2014, the Bundeskartellamt informed Booking that it considered the best price clauses then in force agreed between Booking and its hotel partners to be prima facie in contravention of competition law and, as an explanation, also sent the previously issued prohibition decision against HRS.⁶⁰ Booking initially made a detailed statement in response on April 29, 2014,⁶¹ followed by a number of supplementary written pleadings. Up until the drafting of the present decision, Booking had filed more than 30 briefs or opinions with the Bundeskartellamt, the scope of which adds up to about 400 pages. In addition to this, Booking filed more than 50 Exhibits (excluding amended versions or translations of Exhibits or briefs) with the Bundeskartellamt, some of which contain comprehensive economic assessments and legal opinions, and which again amounted in total to more than 800 pages. Furthermore, on three occasions, namely on May 8, 2014, on June 5, 2014, and on December 16, 2015, personal hearings of Booking and its legal representatives took place at the premises of the Bundeskartellamt. The Bundeskartellamt took note of the content of all these documents as well as the meetings with Booking and considered them in the context of the present decision.
- (57) By decision of the Bundeskartellamt of March 7, 2014, HRS was summoned to attend the proceedings as an interested third party, and the German Hotel Association and Expedia were summoned to attend the proceedings as interested third parties by decision of the Bundeskartellamt of May 14, 2014.
- (58) In spite of the Bundeskartellamt's notices to this effect,⁶² Booking saw no reason to effectively suspend the application of the best price clauses for the duration of the proceedings such that the suspension was also to be communicated to the hotels concerned. Booking took the position here that the waiver of enforcement declared (solely) vis-à-vis the Bundeskartellamt was a business secret with respect to the hotels concerned.⁶³
- (59) By letter of January 19, 2015, Booking also formally offered the Bundeskartellamt the commitments it had given to the French, Italian and Swedish competition authorities regarding the introduction of the so-called narrow best price clauses.⁶⁴ By way of addition thereto, the following documents were sent on February 3, 2015:

- Booking study on "Efficiencies arising from the proposed narrow MFN arrangements in the EEA" dated September 11, 2014. In this study Booking provides explanatory notes on the efficiency gains for hotels and consumers (which in its view are significant) and

⁶⁰ Page 448 et seqq. of the file.

⁶¹ Page 2,781 et seqq. of the file.

⁶² Letter of the Bundeskartellamt of February 18, 2014 (page 448 et seqq. of the file), July 2, 2014 (page 1,178 et seqq. of the file) and August 19, 2014 (page 1,755 et seqq. of the file).

⁶³ See letter of Booking of June 23, 2014 (1,172 et seqq. of the file, 1,721 et seqq. of the file and 1,747 et seqq. of the file), July 10, 2014 (1,185 et seqq. of the file, 1,725 et seqq. of the file and 1,751 et seqq. of the file) and of August 8, 2014 (page 1,544 et seqq. of the file and page 1,689 et seqq. of the file) and August 14, 2014 (page 1,728 et seqq. of the file).

⁶⁴ See page 1,769 et seqq. of the file.

the disadvantages in the event of the non-application of the (narrowly worded) best price clauses (free riding by the hotels, increasing search costs, reduced transparency for consumers, decreasing brand-internal competition between hotels).⁶⁵

- RBB Economics study entitled “The role of OTAs in reducing search costs and enhancing competition between hotels,” dated September 11, 2014. In this study RBB provides explanatory notes on the advantageous influence of hotel booking portals on the structure of hotel prices as a result of the reduction in search costs for the consumer.⁶⁶
- Booking investigation into the effects on the conversion rates of infringement by the hotels against the parity clauses (February 2012). Booking comes to the conclusion that price deviations of the hotels have an effect on the booking rate (conversion).⁶⁷
- A further study by Booking, “Efficiencies: Narrow MFN Proposal - Consumer and Accommodation Surveys” of December 19, 2014, which is based on a survey carried out by GfK among accommodation providers and consumers concerning their use of hotel booking portals, including a report on methodology by GfK. In Booking’s opinion the results of the survey provide clear proof backed up by figures that hotel booking portals give rise to efficiency gains within the meaning of Article 101 (3) TFEU, and that a narrowly worded best price clause is essential for these efficiency gains.⁶⁸

(60) In a letter of March 13, 2015,⁶⁹ Booking sent the Bundeskartellamt an assessment of the statements received by the competition authorities in France, Sweden and Italy in the context of the market test⁷⁰ carried out by them concerning the commitments offered by Booking. In addition the European hotel association HOTREC⁷¹ and the InterContinental Hotels Group⁷² also sent the statements they had made in the context of the market test directly to the Bundeskartellamt.

(61) On March 30, 2015 the Bundeskartellamt informed Booking in a first statement of objections (providing Booking with the obligatory right to be heard) that it intended to prohibit Booking’s best

⁶⁵ Booking.com “Efficiencies arising from the proposed narrow MFN arrangements in the EEA of September 11, 2014 with annex 1 “Response to the Bundeskartellamt’s analysis of Article 101 (3)” (page 1,820 et seqq. of the file and 1871 et seqq.)

⁶⁶ Economics: “The role of hotel booking portals in reducing search costs and strengthening competition between hotels,” dated September 11, 2015 (page 1,893 et seqq. of the file).

⁶⁷ Investigations by Booking.com into the effects on (Booking.com’s) conversion rates of infringement by the hotels against the parity clause (no date indication) (page 1,900 et seqq. of the file).

⁶⁸ Booking.com “Efficiency gains: a proposal for a narrowly worded MFN clause – consumer and accommodation survey” of December 19, 2014 (pages 1,908 et seqq. of the file) and GfK “Consumer and hotel survey. A methodology report created for Booking.com” October 2014 (pages 1,948 et seqq. of the file).

⁶⁹ Page 2,229, 2,231 et seqq. of the file.

⁷⁰ The market test was carried out by the three competition authorities from December 15, 2014 to January 31, 2015 with support from the European Commission.

⁷¹ Page 1,783 et seqq. of the file.

⁷² Page 3,673 et seqq. of the file.

price clauses in their version at the time in their entirety and that it rejected the commitments offered by Booking, as they were insufficient to eliminate the existing anticompetitive concerns.⁷³

(62) Booking then reacted with two briefs on May 19, 2015. In a first brief⁷⁴ Booking pointed out the commitment decisions that had been made by the competition authorities in France, Italy and Sweden in the meantime⁷⁵ and announced that it now intended to implement these commitments all over Europe, i.e. also in Germany, and to thereby restrict its previous best price clauses. At the same time Booking petitioned for the declaration that the proceedings pending with the Bundeskartellamt are limited to clauses that extend beyond the parity requirements contained in the binding commitments vis-à-vis the Swedish, French and Italian competition authorities. Alternatively, Booking petitioned that a statement from the Commission of the European Union be obtained pursuant to Article 11 (5) Directive 1/2003 before the issue of a declaratory judgment and order to cease the infringement with regard to a “narrow” best price clause corresponding to the aforementioned commitments. Furthermore, the letter contains another study

- RBB Economics “Modelling the impact of removing wide MFNs on competition on commissions between OTAs in Germany of May 18, 2015.”⁷⁶ In it, an economic model is utilized to estimate the effects of an industry-wide application of the narrow best price clauses on hotel prices and portal commissions.

(63) In the second brief of May 19, 2015 Booking addressed the statement of objections by the Bundeskartellamt.⁷⁷

(64) On June 10, 2015 the Bundeskartellamt interviewed representatives of hotels, hotel chains and hotel co-ops as well as representatives of two state hotel associations⁷⁸ on the use of various marketing channels in supplement to the market findings obtained in the past few years,⁷⁹ particularly the hotel portals and the online bookings via hotel websites, as well as on the best price clauses of Booking that were applied at that time and on Booking’s planned amendment of its General Terms and Conditions in accordance with the commitments made vis-à-vis the competition authorities in France, Sweden and Italy. The objective of the survey was to obtain an in-depth picture of the viewpoint of the representatives of the various hotel groups with regard to

⁷³ Page 2,578 et seqq. of the file. The General Terms and Conditions of August 14, 2014, loc. cit., applicable on this date, were affected.

⁷⁴ Page 2,781 et seqq. of the file.

⁷⁵ The full text of the competition authorities’ decisions can be found in the annex to Booking’s first letter dated May 19, 2015, page 2,578 et seqq.

⁷⁶ For German version, see page 3,158 et seqq. of the file.

⁷⁷ Page 3,131 et seqq. of the file.

⁷⁸ On the occasion of an association conference of the Hotel Association of Germany, the Bundeskartellamt conducted thirty individual meetings with representatives of nine individual hotels, six different hotel chains and five different hotel co-ops as well as representatives of the state associations of North Rhine-Westphalia, Baden-Württemberg, and Saxony, see page 1 et seqq. of the file “Questionnaire hotels June 2015” for further details.

⁷⁹ See Bundeskartellamt, December 20, 2013, B9-66/10-HRS.

the prior General Terms and Conditions of Booking as well as regarding the assessment of other marketing channels by the hotels.

- (65) In its email dated July 1, 2015, Booking informed the Bundeskartellamt of its new General Terms and Conditions applicable as of that day, which serve to implement Booking's commitments to the so-called narrow best price clauses and make them applicable Europe-wide. In its email of July 15, 2015, Booking sent the Bundeskartellamt the form for the so-called "Preferred Membership" in effect as of July 1, 2015.
- (66) Intervening Party 3 also repeatedly gave its opinion, inter alia on the statement of objections and on the reaction of Booking to it received thus far in its letter dated August 31, 2015⁸⁰, and in its letter dated December 14, 2015.⁸¹
- (67) The Bundeskartellamt once more granted Booking the right to be heard, in particular to acknowledge the fact that the first statement of objections of March 30, 2015 was issued prior to the introduction of the narrow best price clauses. To this end, it did not merely draft a statement of objections statement of objections in the usual style, but the Bundeskartellamt, in view of the particular circumstances of the individual case, also provided the parties with a draft of the present decision; Booking and the Intervening Parties each received this draft decision by letter of October 30, 2015. At the same time, a deadline was initially set for all of the parties to submit comments by November 20, 2015.⁸² By letter dated November 5, 2015, Booking requested to extend the deadline until December 23, 2015.⁸³ On November 11, 2015, the Bundeskartellamt extended the deadline for submitting comments at first until November 30, 2015.⁸⁴ Within this timeframe, Booking responded to the draft decision by letter of November 30, 2015 totaling about 300 pages (more than 100-pages response plus additional Exhibits, including two "empirical studies" on the price-setting behavior of hotels and a further opinion on economic analyses of the Bundeskartellamt),⁸⁵ while simultaneously again requesting an extension of the deadline to December 23, 2015 in order to submit "further economic analyses/studies," albeit without specifying their subject matter and their relation to the extensive analyses and studies already submitted. At the same time, Booking requested that the Bundeskartellamt temporarily stay the proceedings and reconsider its decision.⁸⁶ The Bundeskartellamt thereupon informed Booking by letter of December 2, 2015⁸⁷ that it would not reach its decision on the present case before December 18, 2015 at 12:00 (noon) and advised it to submit further documentation by this point in

⁸⁰ Page 4,083 et seqq. of the file.

⁸¹ Page 5,251 et seqq. of the file.

⁸² Page 4,296 et seqq. of the file.

⁸³ Page 4,554 et seqq. of the file.

⁸⁴ Page 4,571 et seqq. of the file.

⁸⁵ Page 4,600 et seqq. of the file.

⁸⁶ Exhibit QE 65 to Booking brief of November, 30 2015 (page 4,605 et seqq. of the file), margin no. 1.1.

⁸⁷ Page 4,831 et seqq. of the file.

time so that it still can be taken into account in the decision-making process. In addition, the Bundeskartellamt granted a hearing to Booking at its request for the third time in the course of these proceedings in the form of a meeting in Bonn on December 16, 2015; Booking put forward additional arguments in the course of this meeting.⁸⁸ Booking allowed the last opportunity to comment granted until December 18, 2015 to pass without again commenting by brief or with “other economic analyses/studies.”

- (68) The Bundeskartellamt notified the European Commission about the commencement of the proceedings pursuant to Article 11 (3) Directive 1/2003 and informed it of the planned issue of this decision pursuant to Article 11 (4) Directive 1/2003.⁸⁹ In addition, the Commission was regularly updated about the progress of the proceedings and content of this decision.

II. Proceedings against Expedia at the Bundeskartellamt

- (69) On the basis of a complaint by the Hotel Association of Germany in October 2013 against Expedia⁹⁰ having the same content, the Bundeskartellamt initiated proceedings for the purpose of reviewing the permissibility under cartel law of the best price clause it uses, and notified Expedia of this in a letter dated December 19, 2013.⁹¹ Expedia responded to the complaint in a letter dated March 28, 2014. The hotel association and the hotel portals HRS and Booking are intervening parties.

III. Proceedings in other countries

- (70) The competition authorities in France, Italy and Sweden declared the commitments of Booking regarding the so-called narrow best price clauses to be binding through formal decisions on April 15 and 21, 2015.⁹² Booking has been using the new General Terms and Conditions that include the best price clause in the narrower version in these countries on the basis of these decisions since July 1, 2015, and also in all other countries in the EEA.
- (71) The French parliament adopted the so-called Loi Macron on July 9, 2015.⁹³ Accordingly, parity clauses are completely prohibited in the marketing of hotel rooms – i.e. also in the narrower

⁸⁸ Transcript, page 5,276 et seqq. of the file.

⁸⁹ The European Commission confirmed that it received the notification letter from the Bundeskartellamt on March 30, 2015. The consultation in accordance with Article 11 (4) Directive 1/2003 took place on April 29, 2003.

⁹⁰ The text of the complaint of the Hotel Association of Germany is identical to the complaint directed at Booking's best price clause. The proceedings of the decision-making department directed at Expedia's best price clause are being conducted under file no. B9-120/13.

⁹¹ Letter of December 19, 2013 (page 382 of file B9-120/13).

⁹² Acceptance decision of the Swedish competition authority of April 15, 2015 (Swedish original text at page 2,948 et seqq. of the file and English translation at page 3,067 et seqq. of the file). Acceptance decision of the French competition authority of April 21, 2015 (French original text at page 2,868 et seqq. of the file and English translation at page 2,991 of the file) and acceptance decision of the Italian competition authority of April 21, 2015 at page 2,967 et seqq. of the file and English translation at page 3,087 et seqq. of the file).

⁹³ See www.gouvernement.fr/action/lepojet-de-loi-pour-la-croissance-l-activite-et-l-egalite-des-chances-economique of July 13, 2015.

form.⁹⁴ The commercial court in Paris had previously, on May 7, 2015, disallowed the best price clause Expedia had used vis-à-vis several French hotels.⁹⁵

(72) The Italian hotel association Federalberghi applied for the reversal of the commitment decision of the Italian competition authority in Italy. There has not been a court decision yet. The Italian House of Representatives – but not yet the Italian Senate – adopted a statutory prohibition of the most favored clauses on October 6, 2015, which prohibit hotels from offering the customer better conditions itself than third parties.⁹⁶

(73) In Great Britain the Competition Appeal Tribunal reversed the decision of the British competition authority about the acceptance of Booking's and Expedia's commitments regarding a restricted application of best price clauses for procedural reasons and remanded it back to the competition authority.⁹⁷ Meanwhile the British competition authority has decided to dismiss the proceedings; but at the same time it decided to continue observing the application of best price clauses in the market.⁹⁸

(74) A number of other competition authorities in Europe, in particular the competition authorities in Belgium, Austria, Switzerland, the Czech Republic, Hungary, Poland, and Norway, but also authorities and courts in the USA, Canada, and Australia, continue to deal with the question of compatibility of best price clauses with the competition law applicable in the respective country.⁹⁹

D. Legal analysis

(75) Booking violates section 1 GWB and Article 101 (1) TFEU and simultaneously sections 19, 20 GWB through the best price clauses it has agreed on with its hotel partners – including with regard to the “Preferred Partner” program operated by Booking – for hotel prices, room availability and booking and cancellation conditions as effective July 1, 2015.

(76) Booking was granted sufficient opportunity to comment – contrary to its submission – even after it introduced its narrow best price clauses and thus received a fair hearing (see under I.). The best price clauses utilized by Booking – including with regard to the “Preferred Partner” program

⁹⁴ Hotel portals are also prohibited from offering hotel rooms at a lower price than the price that the hotel is asking.

⁹⁵ Tribunal de Commerce de Paris, case 2013072241, judgment of May 7, 2015, 13th Chamber, NO RG: J2015000040. Article L.442-6 I 2 of the Code de Commerce is the legal basis.

⁹⁶ This parliamentary decision was adopted with only four opposing votes and over 400 yes votes. See www.federalberghi.it/comunicati/comunicati.aspx?IDEL=236#.VhYZFmPDVGM (“Italian Loi Macron”).

⁹⁷ Competition Appeal Tribunal, Judgement [2014] CAT 16 Skyscanner v. CMA, <http://www.catribunal.org.uk/238-8651/Judgement.html>.

⁹⁸ www.mlex.com “UK regulator closes probe into IHG, Expedia and Booking.com,” statement of CMA dated September 16, 2015.

⁹⁹ The competition authorities in Denmark have dismissed their proceedings (end of August 2015) as have those in Ireland (October 2015); Booking refers to the status of the proceedings in Austria and Denmark (Booking's letter of August 4, 2015, page 3,982 et seqq.), in Great Britain and Greece (Booking's letter of September 25, 2015, page 4,140 et seqq. of the file) as well as in the Netherlands (Booking's letter dated October 12, 2015, page 4,255 et seqq. of the file), p. 3.

operated by Booking – as effective July 1, 2015 are the subject matter of the proceedings (see section II. below). The ex officio duties to investigate were fulfilled, the facts of the case were sufficiently investigated (see under III.). These clauses noticeably restrict competition within the meaning of section 1 GWB or Article 101 (1) TFEU (see section VI. below) in the relevant hotel portal market (see section IV. below), which is to be identified as being Germany-wide in geographic terms (see section V. below). An exemption from the prohibition of competition-restraining agreements under the Vertical BER is out of the question in the present case (see section VII. below). The prerequisites for an individual exemption under section 2 GWB or Article 101 (3) TFEU have also not been fulfilled (see section VIII. below). By applying the best price clauses Booking is simultaneously also violating the prohibition of placing unfair restraints on dependent enterprises within the meaning of sections 19, 20 GWB (see section IX. below).

I. Granting of a fair hearing and fair proceedings

(77) Booking's submission that the handling of the proceedings – in particular, the setting of deadlines – by the Bundeskartellamt truncated its right to be heard (see under 1.) is incorrect. Prior to the amendment of the best price clauses effective July 1, 2015, Booking not only received a reasonable opportunity to comment on the competitive concerns expressed by the Bundeskartellamt for approximately one and a half years and for another half a year after this change, but also took extensive advantage of this opportunity (see under 2.).

1. Pleadings of Booking

(78) Booking argues, first, that the deadline provided by the Bundeskartellamt for submitting comments on the draft decision of October 30, 2015 was "significantly too short" and impeded its right to be heard "de facto substantially".¹⁰⁰ The Bundeskartellamt had set forth its opinion with respect to the competitive assessment of the narrow best price clauses in greater detail for the first time in this draft decision. A period of "just one month" to comment was disproportionately short and rendered impossible the timely completion of further economic analyses/studies commissioned by Booking.¹⁰¹

(79) Booking further submits that the Bundeskartellamt did not conduct the proceedings in a fair and impartial manner.¹⁰² With reference to the Charter of Human Rights of the European Union and the European Convention on Human Rights,¹⁰³ Booking argues that the Bundeskartellamt had given the impression of having already had a pre-formed opinion before completing the necessary investigations; as a result, it had not been impartial.¹⁰⁴ For this reason, the Bundeskartellamt did

¹⁰⁰ Booking brief of November 30, 2015 (page 4,600 et seqq. of the file), p. 2; and Exhibit QE 65 to Booking brief of November 30, 2015 (page 4,605 et seqq. of the file), margin no. 5.25 et seqq.

¹⁰¹ Booking brief of November 30, 2015, p. 2

¹⁰² Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 5.1 et seqq.

¹⁰³ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 5.3 et seqq.

¹⁰⁴ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 5.8 et seqq.

not carry out a fair and balanced investigation of the facts of the case, either.¹⁰⁵ Meetings were primarily conducted with and evidence was primarily obtained from the complainant, while the Bundeskartellamt refused to speak with Booking; nor did the Bundeskartellamt request all the relevant information from Booking.¹⁰⁶ Moreover, the evidence submitted by Booking was not given the actually appropriate consideration and attention.¹⁰⁷

2. Analysis of the Bundeskartellamt

(80) Booking's right to a fair hearing under section 56 (1) GWB in conjunction with section 28 of the Administrative Procedure Act (VwVfG) has been respected (see under a.); furthermore, the criticism regarding the handling of the proceedings expressed by Booking is not justified (see under b.).

a) Grant of a fair hearing

(81) Booking's right to a fair hearing under section 56 (1) GWB in conjunction with section 28 VwVfG has been respected. Prior to the amendment of the best price clauses effective July 1, 2015, Booking not only received a reasonable opportunity to comment on the competitive concerns expressed by the Bundeskartellamt for approximately one and a half years and for approximately another half a year after this change, but also took extensive advantage of this opportunity. The submission of more than 30 pleadings and opinions to the Bundeskartellamt over the course of a two-year administrative proceedings, the scope of which adds up to about 400 pages, and in addition thereto of more than 50 Exhibits which partly contain extensive briefs such as economic assessments or legal opinions, the scope of which again amounts to a total of more than 800 pages, refutes Booking's claim that it was not given sufficient opportunity to comment. In addition, at the request of Booking, personal hearings of Booking and its legal representatives took place at the premises of the Bundeskartellamt on three occasions, namely on May 8, 2014, on June 5, 2014, and on December 16, 2015.

(82) This decision comes as no surprise for Booking, either; already with its statement of objections of March 30, 2015, the Bundeskartellamt informed Booking that it rejects the commitments offered by Booking, i.e. the introduction of narrow best price clauses, as inadequate.¹⁰⁸ Accordingly, Booking has been aware of the competitive concerns of the Bundeskartellamt with regard to narrow best price clauses not only since receipt of the draft decision on October 30, 2015 – unlike it has now argued – but ever since the first statement of objections of March 30, 2015, i.e. for more than eight months now.

¹⁰⁵ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 5.14 et seqq.

¹⁰⁶ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 5.15 et seqq.

¹⁰⁷ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 5.23 et seqq.

¹⁰⁸ Page 2,578 et seqq. of the file. This related to the General Terms and Conditions in effect at the time of August 14, 2014.

- (83) In addition, by providing a draft decision rather than a pure hearing letter, the Bundeskartellamt informed Booking beyond the usual scope of the grounds upon which the previously announced decision would presumably be based in order to thereby alleviate any doubts as to the fair treatment of Booking. The deadline to respond originally set for November 20, 2015 was at first extended upon request to November 30, 2015. On November 30, 2015, Booking initially responded to the draft decision with a 300-page opinion (including Exhibits). On the occasion of its application for a further extension of time until December 23, 2015, Booking was then again given the opportunity to comment until December 18, 2015.
- (84) The following considerations were pivotal for the decision of the Bundeskartellamt to shorten the comment period through December 23, 2015 requested by Booking by a few days and to decide the present case before the end of December 2015:
- (85) For more than two years – throughout the cartel administrative proceedings – Booking had the opportunity to comment, also on the statement of objections by the Bundeskartellamt of March 30, 2015 in which the authority rejected the announced introduction of narrow best price clauses as inadequate due to the existing competitive concerns.
- (86) Booking did in fact make extensive use of the opportunity to comment, not only by numerous briefs and opinions including Exhibits both before and after the change from the wide to the narrow best price clauses effective July 1, 2015, but also orally in several personal hearings.
- (87) The relevant facts were not fundamentally changed by the amendments effective July 1, 2015 compared to the time of the statement of objections dated March 30, 2015.¹⁰⁹ Even Booking's older comments on the wide best price clauses largely relate in substance to the "subset" of narrow best price clauses.
- (88) What was new in the proceedings since the statement of objections of March 30, 2015 was essentially a non-representative survey of hotel companies carried out by the Bundeskartellamt within the framework of its ex officio investigation duties following Booking's announcement that it would amend its best price clause effective July 1, 2015. The results of these interviews were notified to Booking by letter of the Bundeskartellamt dated July 9, 2015 (partial access to the file). Booking responded to this in detail, inter alia by letter of July 24, 2015.
- (89) Similarly, the antitrust analysis of the Bundeskartellamt contained in the draft decision sent on October 30, 2015 contains only few significant developments compared to the statement of objections dated March 30, 2015. First, the antitrust concerns set out in the sent draft decision had for the most part already been expressed much earlier, namely in the decision of the Bundeskartellamt of December 20, 2013 – confirmed by the Düsseldorf Higher Regional Court on January 9, 2014 – in the parallel case "HRS best price clauses." Second, Booking has been aware since March 2015 at the latest that the commitments offered were not able to eliminate the

¹⁰⁹ See in detail below margin no. 106 et seqq.

competitive concerns of the Bundeskartellamt; moreover, the cartel administrative proceedings were continued despite the change to narrow best price clauses after July 1, 2015.

- (90) Given the already long duration of the proceedings, the acceleration principle (section 10 VwVfG) was also decisive in terms of not allowing the decision closing the proceedings to be further delayed due to the end of the year.
- (91) Finally, it was to be considered that an acceleration of the proceedings was also in the interests of the Intervening Party HRS. Only a prohibition order against Booking was capable of making a substantial contribution to the restoration of a “level playing field” amongst these competitors, where HRS is not de facto disadvantaged by complying with the decision of the Bundeskartellamt from 2013 that had in the meantime become final, while Booking – despite the decision of the Düsseldorf Higher Regional Court confirming the HRS ruling – was not even willing to waive the enforcement of the disputed best price clauses for the time being.¹¹⁰
- (92) There was therefore a need for action. In weighing these concerns, the limitation of the final comment period requested by Booking by a few days, which was negligible in comparison to the overall duration of the proceedings, appeared acceptable.

b) Fair and impartial proceedings

- (93) Contrary to Booking’s opinion, the Bundeskartellamt also conducted the present proceedings in a fair and impartial manner; principles of due process were not violated.
- (94) Booking’s assumption that the Bundeskartellamt had already had a pre-formed opinion prior to completing the necessary investigations and was therefore not impartial is rebutted by the fact that the Decision Division expressed its competitive concerns at the latest with its statement of objections of March 30, 2015 and thus took a clear position. Particularly in order to grant a fair hearing, the expression of such a preliminary competitive assessment is necessary, as otherwise a potential addressee would be unable to prepare for an impending decision and to bring forward corresponding arguments in order to perhaps address the competitive concerns of the competition authority.
- (95) The Bundeskartellamt also carried out a fair and balanced investigation of the facts of the case in the course of the two-year proceedings. Amongst other things, all relevant aspects of the extensive submission of Booking were noted and taken into account. Booking also had ample opportunity in the framework of the obligations to cooperate applicable in cartel administrative proceedings to present any information in its possession that it deemed relevant and that went beyond the investigations of the Bundeskartellamt – for example, the underlying data material of the studies submitted –, e.g., in response to the statement of objections dated March 30, 2015. To the extent Booking failed to do so, this does not constitute a defect in relation to the investigations conducted by the Bundeskartellamt that would allow the inference of a violation of the principle of

¹¹⁰ See in detail above margin no. 58.

impartiality. The Bundeskartellamt simply collects the evidence necessary for the decision in cartel administrative proceedings (section 57 (1) GWB),¹¹¹ while the parties may be subject to certain obligations to cooperate with regard to information within their sphere of influence. The violation of these obligations may cause adverse inferences to be drawn for the related parties, without at the same time calling into question the principles of fair proceedings.¹¹²

- (96) The fact that the Bundeskartellamt expresses competitive concerns in the context of a statement of objections at any given time – such as in this case on March 30, 2015 – does not, however, result in it being prevented from conducting any further investigations thereafter – as in this case for instance the survey of hotel companies on June 10, 2015. On the contrary, the Bundeskartellamt is obligated until the cartel administrative proceedings is concluded to continuously subject its competitive concerns to a critical assessment and to scrutinize them accordingly, also including – where necessary or opportune – further related investigations. The hotel survey that was carried out was appropriate here because the announced amendment to the best price clause effective July 1, 2015 could have resulted in changes to the relevant facts and because the Bundeskartellamt wanted to determine how this was perceived by affected hotel companies. However, unlike Booking now wants to suggest, this does not allow the contrary conclusion that the Bundeskartellamt was biased and partisan in the handling of this supplementary investigation or during its subsequent decision-making process.
- (97) Similarly, the fact that the Bundeskartellamt ultimately arrived at the present prohibition and thus assesses the relevant facts differently from Booking does not suggest that the evidence submitted by Booking was “not given the appropriate consideration and attention.” The present assessment of evidence and antitrust analysis of the facts by the Bundeskartellamt may not correspond to those of Booking; nonetheless, this does not give rise to a procedural flaw in terms of a violation of the principle of impartiality.

II. Subject matter of the proceedings and partial conclusion

- (98) Contrary to Booking’s opinion (see 1. below) the best price clauses agreed with the hotel partners of Booking are the subject matter of the proceedings – including with regard to the “Preferred Partner” program operated by Booking – as effective July 1, 2015; the present proceedings were not to be dismissed as such nor were they to be initiated again; nothing was concluded in its entirety; the ex officio investigation duties were fulfilled (see 2. below).

1. Booking’s pleading

- (99) Booking initially states with regard to the subject matter of the proceedings that the “Preferred Partner” program was not originally made part of the subject matter of the proceedings by the Bundeskartellamt; therefore, any order by the Bundeskartellamt to cease the infringement could

¹¹¹ See in detail below margin no.118 et seqq.

¹¹² See BGH, 14 July 2015, KVR 77/13 – Wasserpreise Calw II.

not extend to it.¹¹³ If the Bundeskartellamt were nevertheless to include the “Preferred Partner” program operated by Booking into its order to cease the infringement, this would violate the principle of equality.¹¹⁴ In its HRS Decision¹¹⁵ the Bundeskartellamt expressly did not make HRS’s top quality seal the subject matter of the order to cease the infringement; asymmetrically expanding the subject matter of the proceedings against Booking is not justified since this results in unequal treatment of things that are essentially equal.¹¹⁶

(100) Booking further pleads that an order to cease the infringement is generally precluded in the present case. Since the French, Swedish and Italian competition authorities accepted Booking’s respective commitments, Booking revised the content of its own General Terms and Conditions as of July 1, 2015 and adjusted them to the commitments EU-wide (“narrow” best price clauses).¹¹⁷ If the Bundeskartellamt now wants to prohibit the General Terms and Conditions amended as of July 1, 2015, then it would have to dismiss the prior proceedings in their entirety and initiate new proceedings against these revised General Terms and Conditions.¹¹⁸ Since the Bundeskartellamt, however, did not initiate new proceedings, only the former best price clauses are the subject matter of the present proceedings, and this matter was fully resolved in the meantime due to the mentioned amendment as of July 1, 2015.¹¹⁹ Initiating new proceedings was also mandatory because the Bundeskartellamt would have been able to appropriately consider the efficiency gains associated with the narrow best price clauses only in the context of newly initiated proceedings.¹²⁰

(101) Furthermore, claims Booking, neither the Bundeskartellamt’s HRS Decision¹²¹ nor the decision of the Düsseldorf Higher Regional Court affirming it¹²² develops any prejudicial effect in light of the present proceedings. The subject matter of the proceedings in the present case, the narrow best price clauses applicable since July 1, 2015, does not represent a “minus” as compared to the previous version of the best price clauses or to the subject matter of the HRS proceedings, but an “aliud.”¹²³ Booking’s narrow best price clauses are neither comparable to the subject matter of the

¹¹³ Booking brief dated September 9, 2014 (page 1,696 et seqq. of the file), p. 2 et seqq.

¹¹⁴ Booking brief on warning dated May 19, 2015 (page 3,131 et seqq. of the file), margin no. 24.

¹¹⁵ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 47.

¹¹⁶ Booking brief on warning dated May 19, 2015, margin no. 26.

¹¹⁷ Booking brief on acceptance of commitments dated May 19, 2015 (page 2,781 et seqq. of the file), margin no. 21 et seqq.

¹¹⁸ Booking brief dated July 14, 2015, p. 4 et seq.; Booking brief on acceptance of commitments dated May 19, 2015, margin no. 53 et seq.

¹¹⁹ Booking brief dated July 14, 2015 (page 3,909 et seqq. of the file), p. 3 et seq.; Booking brief on acceptance of commitments dated May 19, 2015, margin no. 42.

¹²⁰ Booking brief dated July 14, 2015, p. 5 et seqq.; Booking brief on acceptance of commitments dated May 19, 2015, margin no. 43.

¹²¹ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS.

¹²² Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS.

¹²³ Booking brief on acceptance of commitments dated May 19, 2015, margin no. 187 et seqq.; Exhibit QE 65 on Booking brief dated November 30, 2015, margin no. 2.83 et seqq.

HRS proceedings nor to the wide best price clauses previously used by Booking;¹²⁴ the case allegedly changed fundamentally.¹²⁵

2. Analysis by the Bundeskartellamt

(102) Contrary to the opinion of Booking, the best price clauses in the “Preferred Partner” program operated by Booking are the subject matter of the present proceedings without this being a violation of the principle of equality (see a. below); the amendment of the best price clauses by Booking as of July 1, 2015 did not require the Bundeskartellamt to dismiss the current proceedings and initiate a new investigation (see b. below). It solely follows from this change that the subject matter of the proceedings was reduced in terms of a “minus,” and the present proceedings are therefore not concluded, either (see c. below).

a) Inclusion of the “Preferred Partner” program in the decision

(103) On the merits the present proceedings also cover Booking’s “Preferred Partner” program; that the Bundeskartellamt exercised its discretion to take up the issue in this direction is not only lawful, but the subject matter of the proceedings was clarified to Booking early on with regard to its scope.

(104) The Bundeskartellamt made it repeatedly clear in the current proceedings that Booking’s best price clauses in the “Preferred Partner” program operated by Booking are the subject matter of the proceedings. Even in the letter¹²⁶ of the Bundeskartellamt dated February 18, 2014, Booking is asked questions about the “Preferred Partner” program; and in the letter¹²⁷ of the Bundeskartellamt dated July 2, 2014 to Booking it says that the Bundeskartellamt was dealing with the application and implementation of the best price clauses at issue “in all of their manifestations.” Being consistent, the hearing letter of the Bundeskartellamt dated March 30, 2015¹²⁸ addresses the best price clauses in Booking’s “Preferred Partner” program in detail under cartel law aspects.

(105) The fact that the Bundeskartellamt made the best price clause in the “Preferred Partner” program a subject matter of the proceedings does not push the boundaries of its discretion to take up a matter; specifically, the principle of equality has not been violated. It is correct that the Bundeskartellamt expressly did not include the top quality seal of HRS – which has certain parallels to Booking’s “Preferred Partner” program, but was markedly lower in economic importance at the time of the HRS Decision – in its order to cease the infringement in the HRS

¹²⁴ Booking brief dated July 14, 2015, p. 7; Booking brief on acceptance of commitments dated May 19, 2015, margin no. 187 et seqq.

¹²⁵ Booking brief dated July 14, 2015, p. 2 et seqq.

¹²⁶ Bundeskartellamt letter to Booking dated February 18, 2014, p. 6.

¹²⁷ Bundeskartellamt letter to Booking dated July 2, 2014, p. 1.

¹²⁸ Bundeskartellamt letter to Booking dated March 30, 2015 (page 2,587 et seqq. of the file), margin no. 2, 5, 12, 13, 38.

Decision.¹²⁹ In all other respects, the Bundeskartellamt always emphasized that it would continue observing closely whether the use of the top quality seal by HRS was having a similar effect on the market as the best price clauses contained in the General Terms and Conditions and in individual contracts of HRS, and would then intervene, if necessary.¹³⁰ Contrary to Booking's economically much more significant "Preferred Partner" program,¹³¹ such effects could not be determined so far, but are certainly not precluded in the future. However, this cannot be called an unjustified "asymmetrical expansion of the subject matter of the proceedings" to the detriment of Booking. Rather the general legal principle applies that there is no right to "equal treatment in illegality" In other words, a party committing a violation of cartel law cannot invoke for its substantive justification or with the objective of challenging proceedings initiated in this regard that similar violations by its competitors were not or are not being prosecuted, provided that this is not arbitrary behavior by the cartel authority or an inappropriate differentiation.¹³² In the present case the clearly greater economic importance of Booking's "Preferred Partner" program as compared to HRS's top quality seal induced the Bundeskartellamt to initiate proceedings in this regard. Finally, it should be noted that the distortion of competition to the detriment of HRS by the earlier conclusion of the HRS proceedings more than compensates any unequal treatment of Booking through a – hypothetical – expanded subject matter of the proceedings.

b) Initiation of new proceedings not necessary; partial conclusion

(106) It was not necessary in the present case for the Bundeskartellamt to discontinue the ongoing proceedings and to initiate new (investigative) proceedings, either due to the circumstance that commitments by Booking were accepted in France, Sweden and Italy in the last few months (see aa. below) or due to the circumstance that Booking revised the content of the best price clauses as of July 1, 2015; this merely results in a partial conclusion leading to the partial discontinuation of the proceedings and their continuation on all other aspects (see bb. below).

aa) Acceptance of commitments in France, Sweden and Italy

(107) The decisions of the French, Swedish and Italian or any other competition authorities are neither formally nor substantively binding with regard to the present proceedings.

(108) Firstly, the acceptance of commitments by Booking in France, Sweden and Italy cannot develop any binding effect for the affected German hotel portal market under the aspect of extraterritorial jurisdiction alone. It is correct that, apart from domestic regulations, all national competition authorities within the European Union are bound by the same European cartel law regulations.

¹²⁹ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 46 et seq.

¹³⁰ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 47.

¹³¹ Booking itself advertises that around 70% of its bookings go to preferred partners (Booking letter dated April 7, 2014 to a German hotel, page 1,515 of the file) and email from Hotel Association of Germany dated July 17, 2014 (page 1,507 et seqq. of the file).

¹³² See Kopp/Ramsauer, *Commentary on the VwVfG*, 15th edition, Munich, 2014, section 40 VwVfG, margin no. 24 et seqq. with further references; Knack/Henneke, *Commentary on the VwVfG*, 10th edition, Cologne, 2014, section 40 VwVfG, margin no. 62 with further references.

Nevertheless, the decision of another national competition authority to accept commitments or dismiss cartel proceedings cannot bind the Bundeskartellamt. Such a binding effect is not formally provided nor would it be appropriate in the current constellations since geographically different domestic markets are the subject matter of the respective decisions.

- (109) Secondly, the acceptance of commitments by the competition authorities in France, Sweden or Italy in no way means that this would be associated with an exemption or the like with regard to the best price clauses at issue, either concerning the French, Swedish or Italian hotel portal markets or with a view to the German or other hotel portal markets in Europe. On the contrary, the acceptance of commitments in these three countries merely means that the competition authorities there declare that, within the bounds of their discretion, they do not wish to make use of their authority to order the activity to cease because their competition law concerns based on the preliminary analysis of the facts have been adequately eliminated through the commitments offered. In deviation from the present case, a final fact-finding and a final analysis under competition law specifically do not take place in such cases. A decision on commitments does not contain a binding statement about the lawfulness or unlawfulness of the behavior giving rise to the decision, i.e. the use of best price clauses.¹³³ Therefore, the Bundeskartellamt is acting in complete conformity with the respective rules of Directive 1/2003 by issuing a prohibiting decision itself.¹³⁴
- (110) In this context it must also be taken into account that the number of national competition authorities within the EU that decided to accept the commitments offered by Booking is negligible. The best price clauses utilized by Booking are currently being reviewed in some European countries, others have dismissed their proceedings.¹³⁵
- (111) Furthermore, it must be taken into account that the commitment decisions in France and Italy in no way represent the respective conclusion of the dispute. In Italy, for instance, there is a complaint of the Italian hotel association against the commitment decision pending in court and in October 2015 the Italian House of Representatives brought forth a statutory prohibition of most favored clauses which forbid hotels themselves from offering the customer better conditions than third parties.¹³⁶ In France the Tribunal de Commerce de Paris declared the best price clauses of Expedia to be impermissible for now, albeit not for cartel law reasons. In addition, the French legislature has meanwhile generally prohibited the best price clauses used by hotel portals (Loi Macron).¹³⁷ From a substantive standpoint the commitment decision made by the French competition authority has become at least partially obsolete through this law.

¹³³ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 188.

¹³⁴ Council Regulation 1/2003/EC, recital 13.

¹³⁵ See margin no. 70 above.

¹³⁶ See margin no. 72 above.

¹³⁷ The so-called Loi Macron was adopted by parliament on July 10, 2015 (<http://www.gouvernement.fr/action/le-projet-de-loi-pour-la-croissance-l-activite-et-egalite-des-chances-economique>, July 13, 2015).

bb) Booking's amendment of the best price clauses as of July 1, 2015

(112) The circumstance that Booking revised the clauses used by it, including the best price clauses, as of July 1, 2015 with the stated goal of wanting to adapt them to the commitments it made EU-wide ("narrow best price clauses") does not mean, contrary to what Booking believes, that the Bundeskartellamt should have dismissed the already ongoing administrative cartel proceedings or even initiate new proceedings.

(113) It need not be addressed whether Booking even achieved its declared goal, namely to incorporate all of the commitments made in France, Sweden and Italy EU-wide into the amended General Terms and Conditions as of July 1, 2015; Intervening Party 3 most recently expressed doubt about this publicly.¹³⁸ It is decisive, however, that the restraints on competition addressed by the Bundeskartellamt have only been dealt with to a slight degree by Booking's amendment this is shown in a comparison of the conditions created through the best price clauses prior to July 1, 2015 and the conditions after this date.

(114) Therefore, a partial disposition of the original procedural material has (only) occurred insofar as the best price clauses applicable since July 1, 2015 now stipulate that Booking no longer forbids the hotels from

- offering the same or more favorable rates and booking conditions for end customers via other hotel booking portals;
- offering more favorable rates and booking conditions for end customers via offline marketing channels, provided that they are not published or advertised online;
- offering a higher room availability through other marketing channels than on Booking; however, Booking now demands a minimum availability of the respective hotel rooms on its portal.

(115) However, all more favorable offers on online marketing channels remain prohibited, whether they be on the hotel's own website, the importance of which is now increasing based on the newest investigative results, or the marketing of hotel rooms through metasearch engines or other existing or potential online channels yet to be developed. The present proceedings are thus also not concluded with regard to these aspects, but were able to be continued at the discretion of the Bundeskartellamt. Within the context of the continued proceedings the Bundeskartellamt can simply and appropriately analyze the competitive effects of the amendment of Booking's General Terms and Conditions as of July 1, 2015, including the efficiency gains declared by Booking (see below). Only insofar as the mentioned partial completion has occurred can the proceedings be dismissed.¹³⁹

¹³⁸ Press release by the Hotel Association of Germany dated June 29, 2015 (www.hotellerie.de/de/verpflichtende-ratenparitaetsklausel-birgt-erhebliche-risiken-vorsicht-bei-den-neuen-agbs-von-booking.com)

¹³⁹ See no. 5 of the operative part of this decision.

c) Current subject matter of the proceedings is a “minus” not “aliud”

(116) This also directly results in the non-completed material of the proceedings not being “aliud” but a “minus” as compared to the (partially) completed material of the proceedings. The relevant situation has not changed so fundamentally that this would be a full completion of the originally initiated cartel administrative proceedings, but it has merely been reduced to the extent described. The best price clauses that have been made the subject matter of the proceedings took effect before the amendment of the General Terms and Conditions by Booking as of July 1, 2015; prior to this date additional restraints on competition were merely added; only those have been resolved through the amendment as of July 1, 2015. The anti-competitive “residue” remains beyond this date as a “minus” relevant to the proceedings until the end and is discontinued only with the present decision.

(117) Moreover, it should be noted that the principle of non-formality of the administrative proceedings in accordance with section 10 VwVfG means that not every change in the factual situation must be taken into account by discontinuing the current proceedings and opening a new one. The associated efforts (inter alia repeating all summoning procedures of third parties) would be contrary to the concept of section 10 VwVfG. It is essential for the rights of the parties affected by the proceedings that they are granted an adequately fair hearing concerning the subject matter of the proceedings which is ultimately addressed by the competition authority decision concluding the proceedings. It has already been shown that this took place here to a sufficient extent.

III. Ex officio duties to investigate were fulfilled

(118) Contrary to Booking’s submission (see 1. below), the relevant ex officio duties to investigate were fulfilled in the present case (see 2. below).

1. Booking’s submission

(119) Booking argues that an order to cease the application of the current narrow best price clauses without a wide-ranging new investigation has to be dismissed due to procedural and discretionary errors.¹⁴⁰

(120) Solely through newly initiated proceedings and within the framework of supplementary investigations¹⁴¹ the Bundeskartellamt could have appropriately assessed the efficiency gains associated with narrow best price clauses in particular.¹⁴² By issuing an order to cease without a thorough examination of the revised best price clauses within the framework of a new investigation,¹⁴³ the Bundeskartellamt would violate the ex officio duties to investigate incumbent

¹⁴⁰ Booking brief on acceptance of commitments dated May 19, 2015, margin no. 45 et seqq.

¹⁴¹ Booking brief on acceptance of commitments dated May 19, 2015, margin no. 44.

¹⁴² Booking brief dated July 14, 2015, p. 5 et seqq.; Booking brief on acceptance of commitments dated May 19, 2015, margin no. 43.

¹⁴³ Booking brief on acceptance of commitments dated May 19, 2015, margin no. 53 et seq.

upon it under sections 54 (1) GWB, 24 VwVfG.¹⁴⁴ In any case, the Bundeskartellamt based its judgment solely on information provided by the Hotel Association and regularly accepted this without question, despite the fact that the Hotel Association cannot even be considered as a general interest representative of German hotel companies, but rather as a representative of particular individual interests.¹⁴⁵ In addition, by issuing an order to cease, the Bundeskartellamt would exercise the discretion granted to it in accordance with section 32 (1) GWB in error of law, because it did not properly clarify the facts of the case in contravention of due process principles under the rule of law.¹⁴⁶

(121) This was also reflected by the fact that some national competition authorities announced plans to review the actual impact of the narrow best price clauses at a point in time no earlier than 12 months after their entry into force, i.e. no earlier than mid-2016. Such an adjournment in connection with a later evaluation based on an empirical study was also reasonable in the present proceedings and certainly required prior to issuing an order to cease.¹⁴⁷ From the perspective of Booking,¹⁴⁸ the Bundeskartellamt should therefore empirically examine with due diligence, starting in the summer of 2016, the following aspects in particular:

- the degree of price differentiation between hotel portals;
- the degree to which hotels offer lower prices on hotel portals than on their own website;
- the changes in commission rates since the introduction of the narrow best price clauses;
- the use of customer loyalty programs.

(122) Booking therefore encourages the Bundeskartellamt to examine the actual impact of the narrow best price clauses starting in the summer of 2016 together with the other national competition authorities and to reach a decision on its competitive assessment only thereafter.¹⁴⁹ In order to create a “level playing field” with respect to HRS, the Bundeskartellamt could – while at least provisionally waiving an order to cease against Booking – simply repeal its now final and binding decision in the HRS case and allow HRS to also use narrow best price clauses.¹⁵⁰

¹⁴⁴ Booking brief on warning dated May 19, 2015, margin no. 2; Booking brief on acceptance of commitments dated May 19, 2015, margin no. 46 et seqq.

¹⁴⁵ Booking brief on warning dated May 19, 2015, margin no. 30 et seqq.

¹⁴⁶ Booking brief on acceptance of commitments dated May 19, 2015, margin no. 50 et seqq.

¹⁴⁷ Booking brief of November 30, 2015, p. 2 et seq.; most recently submitted in a personal meeting on December 16, 2015, see Booking presentation annexed to the transcript, slide 25.

¹⁴⁸ Most recently submitted in a personal meeting on December 16, 2015, see Booking presentation annexed to the transcript, slide 26 and transcript of December 17, 2015 under section 3 (page 4).

¹⁴⁹ Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 5.31 et seqq.

¹⁵⁰ Most recently submitted in a personal meeting on December 16, 2015, see transcript of December 17, 2015 under section 3 (page 4).

2. Analysis by the Bundeskartellamt

- (123) Booking's objection cannot be upheld that an order to cease applying the current best price clauses without a new investigation represents a procedural and discretionary error. Such further investigations with regard to the best price clause revised as of July 1, 2015 have been made in the meantime as part of the ex officio investigation under section 57 (1) GWB in conjunction with section 24 VwVfG, to the extent they were necessary or at least appeared opportune.
- (124) The Bundeskartellamt possesses discretionary powers within the context of the ex officio investigation pursuant to section 57 (1) GWB in conjunction with section 24 (1), first sentence VwVfG, pertaining to the type and scope of investigation to be conducted.¹⁵¹ It follows from section 24 (1), 2nd sentence VwVfG that the cartel authority can determine the type and scope of the investigation and is not bound by the parties' pleadings and applications for evidence; however, pursuant to section 24 (2) VwVfG it must in principle take into account all circumstances known to it that are relevant to the individual case, including those favorable to the parties.¹⁵² The framework is defined by the legal assessment on which the authority bases the case; the limits for the exercise of the discretionary powers are therefore determined by substantive law.¹⁵³ In this context, the competition authority is required pursuant to sections 57 et seqq. GWB to utilize those sources of knowledge which are reasonably accessible. Nature and extent of the investigation of the facts at issue are determined by the requirements of each particular case, while observing the principle of proportionality.¹⁵⁴ Pursuant to section 26 (2) VwVfG, the undertaking concerned is subject to duties to cooperate with regard to procuring the information necessary for the antitrust analysis. The undertaking is obliged to submit to the competition authority data from its sphere of influence which the authority cannot obtain itself in any other reasonable way.¹⁵⁵
- (125) With that said, the Bundeskartellamt primarily bases its decision on the results of the investigation in the HRS proceedings to the extent they are transferable to the present factual situation. These are facts known to the authority that were also published and therefore became general knowledge.¹⁵⁶

¹⁵¹ See Schneider in Langen/Bunte, Commentary on Cartel Law, 12th ed., Cologne, 2014, section 57 GWB, margin no. 13 with further references.

¹⁵² Düsseldorf Higher Regional Court, Nov. 5, 2014, VI-3 Kart 63/13 (V) – Biogas, margin no. 74 with further references.

¹⁵³ Düsseldorf Higher Regional Court, Nov. 5, 2014, VI-3 Kart 63/13 (V) – Biogas, margin no. 74 referring to BVerwG, Aug. 26, 1998, 11 VR 4/98 – Railroad line Uelzen-Stendal; Schneider in Langen/Bunte, Commentary on Cartel Law, 12th ed., Cologne, 2014, section 57 GWB, margin no. 1, margin no. 12 et seq.

¹⁵⁴ BVerwG, May 5, 2015, 9 C 12/14.

¹⁵⁵ BGH, July 14, 2015, KVR 77/13 – Wasserpreise Calw II; BGH, May 15, 2012, KVR 51/11 – Wasserpreise Calw, margin no. 17 et seqq.; BGH, July 22, 1999, KVR 12/98 – Flugpreisspaltung.

¹⁵⁶ In the Bundeskartellamt's HRS Decision dated December 20, 2013, B9-66/10, see particularly margin no. 58; the results of the interviews are a subject matter of the legal analysis.

- (126) In addition, in the present case the Bundeskartellamt took into consideration further materials and testimony regarding the relevant facts of the case, such as articles in the pertinent trade press, the *“Hotelmarkt Deutschland”* industry reports that appeared after the conclusion of the HRS proceedings, the expert statements submitted by Booking itself, among others, the written and oral testimony of Booking and other parties to the proceedings as well as the pertinent decisions of other competition authorities.
- (127) Furthermore, as part of the ex officio investigation in June 2015 the Bundeskartellamt researched the estimation of the competitive effects of the best price clauses revised shortly thereafter as of July 1, 2015, by personally interviewing a number of representatives from the German hotel industry. These investigation results are also documented accordingly.¹⁵⁷ Both in designing and executing the interviews and during their analysis, the Bundeskartellamt took into account the circumstance that the questioned hotel entrepreneurs are association members of Intervening Party 3 and represent their own business interests. This does not render the results of these surveys unusable in light of the competition-restraining effects of the current narrow best price clauses, as Booking believes, they should merely be acknowledged and analyzed with the requisite reservation like all other interest-driven file components.
- (128) Contrary to Booking’s opinion,¹⁵⁸ there is no obligation to wait until mid-2016 to examine the actual impact of the narrow best price clauses on the basis of an empirical study. Rather, for the reasons outlined above, a decision in this case is already opportune at the present stage in view of the existing investigation results, and this does not violate the applicable ex officio duties to investigate.

IV. Relevant product market

- (129) From an objective viewpoint the case law of the Düsseldorf Higher Regional Court assumes the market for the intermediary services of the hotel portals (hotel portal market) is offer-driven (see 1. below); the arguments Booking submits to refute this are not convincing (see 2. below) so that the relevant product market identified by the Bundeskartellamt and affirmed by the Düsseldorf Higher Regional Court remains (see 3. below).

1. Findings of the Düsseldorf Higher Regional Court

- (130) In its HRS Decision, the Düsseldorf Higher Regional Court¹⁵⁹ affirmed the relevant product market defined by the Bundeskartellamt¹⁶⁰ as correct. In the opinion of the Düsseldorf Higher Regional Court the best price clauses utilized by the hotel portals pertain to the offer-driven market for the hotel portals’ intermediary services (hotel portal market) in which the hotel portals as suppliers

¹⁵⁷ See page 3 et seqq. of the file “Survey Hotels 2015.”

¹⁵⁸ See margin no. 122 above.

¹⁵⁹ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 26 and 31.

¹⁶⁰ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 69 et seqq.

stand opposite the hotels as consumers. However, the hotels' own booking webpage, specialized portals, online travel agencies, portals of tour operators and metasearch engines are not part of the market. Business customers and private customers should also not be differentiated.¹⁶¹

2. Booking's pleadings

- (131) With regard to the defined relevant product market, Booking pleads that the mere existence of best price clauses speaks in favor of a broader product market – in the sense of a uniform booking market¹⁶² – than the Düsseldorf Higher Regional Court and the Bundeskartellamt had imagined to date. Hotels are not interested in an inefficient price differentiation through different marketing channels associated with an increased administrative burden; they consider all available marketing channels equal without differentiation.¹⁶³
- (132) Not the special bundle “search, compare and book” offered by hotel portals as a package of main and secondary services defines the relevant product market, but it should be understood as a uniform booking market including all distribution channels. The Bundeskartellamt allegedly fails to recognize the existing parallels to the flight booking market where portal marketing and direct marketing compete with one another; therefore, direct marketing by hotels also counts as part of the relevant product market in the present case.¹⁶⁴ The fact that HRS was able to enforce price increases and stricter conditions in 2012, by contrast, does not support the Bundeskartellamt's narrower relevant product market definition.¹⁶⁵ In addition, Booking's relatively low ratio of site visitors to actual bookings (“conversion rate”), which lies significantly below [20]%, also supports a broad uniform booking market.¹⁶⁶ Furthermore, the Bundeskartellamt did not adequately consider the ability of other providers in this uniform market, in particular certain metasearch engines or providers like “Google Hotel Finder”, to adapt their offer (supply-side substitution);¹⁶⁷ the services offered by them were in fact part of the relevant product market.¹⁶⁸ Metasearch engines especially exerted increased competitive pressure (“institutional restraint”) on hotel portals.¹⁶⁹
- (133) In addition, the Bundeskartellamt allegedly made the technical mistake of not including bookings via independent applications (“apps”), via marketing partners such as cooperating airlines,¹⁷⁰ and

¹⁶¹ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 28, 74 et seqq.

¹⁶² Booking's brief dated April 29, 2014 (page 709 et seqq. of the file), margin no. 87 et seqq.; Booking brief dated May 19, 2014 (page 960 et seqq. Of the file), margin no. 30 et seqq.

¹⁶³ Booking's brief dated April 29, 2014, margin no. 88 et seqq.

¹⁶⁴ Booking's brief dated April 29, 2014, margin no. 105 et seqq.

¹⁶⁵ Booking's brief dated April 29, 2014, margin no. 96 et seqq.

¹⁶⁶ Booking's brief dated May 19, 2014, margin no. 31 et seqq.; Booking brief dated June 11, 2014, margin no. 22 et seqq.

¹⁶⁷ Meanwhile, the Google Hotel Finder has been integrated into the regular search results of the Google metasearch engine; see “*Hotelmkt Deutschland 2015*” industry report, p. 253 et seqq.

¹⁶⁸ Booking's brief dated April 29, 2014, margin no. 91 et seqq.

¹⁶⁹ Booking's brief dated April 29, 2014, margin no. 94 et seq.

¹⁷⁰ Booking's brief dated June 11, 2014, margin no. 4 et seqq., 8 et seqq.

via metasearch engines¹⁷¹ in the relevant product market and therefore also not in the market share calculation.¹⁷² In addition, sales in the relevant market and sales outside this market were not sufficiently differentiated when calculating the sales.¹⁷³ The data basis identified by the Bundeskartellamt is nontransparent, distorted and invalid overall.¹⁷⁴ In any event, Booking's market shares are ultimately overvalued and actually lie below 30%.¹⁷⁵

(134) Finally, the Bundeskartellamt is supposedly arguing contradictorily when it assumes there is a narrower offer-driven market for the intermediary services the hotel portals provide online (hotel portal market) on the one hand, but on the other hand mentions conceivable alternative business models (service fees, cost per click, etc.) as part of the cartel law review of indispensability under Article 101 (3) TFEU.¹⁷⁶

3. Analysis by the Bundeskartellamt

(135) Booking's pleading on the relevant product market definition is not convincing when based on the demand-driven market concept, according to which all products are to be attributed to the relevant (demand-driven) market that are interchangeable by characteristic, intended use and price level to cover a certain demand;¹⁷⁷ therefore we leave it at the market definition undertaken by the Bundeskartellamt previously¹⁷⁸ and affirmed by the Düsseldorf Higher Regional Court¹⁷⁹ during the HRS proceedings. The relevant product market is limited to the hotel portal market and does not expand to a more broadly understood uniform booking market (see a. below); in addition, the Bundeskartellamt did not make a technical error in calculating the sales (see b. below); and finally, no internal contradiction exists between the relevant product market definition and the results of the review of the exemption prerequisites (see c. below).

a) No broad uniform booking market

(136) Contrary to Booking's opinion, it cannot be assumed that a broad, uniform booking market exists, but rather that the "Search, compare and book" bundle, a package consisting of a hotel portals primary and secondary services, defines the relevant market (see aa. below); the relevant intermediary service, which is the primary service, is significantly influenced by network effects (see bb. below); other sales channels outside of the hotel portal market, however, are not a part

¹⁷¹ Booking's brief dated June 11, 2014, margin no. 16 et seqq., 19 et seqq.

¹⁷² Booking's brief dated April 29, 2014, margin no. 116 et seqq.; Booking brief dated May 19, 2014, margin no. 12 et seqq.

¹⁷³ Booking's brief dated April 29, 2014, margin no. 7 et seqq.

¹⁷⁴ Booking's brief dated April 29, 2014, margin no. 121 et seqq.; Booking brief dated May 19, 2014, margin no. 4 et seqq., 17 et seqq.

¹⁷⁵ Booking's brief dated April 29, 2014, margin no. 116 et seqq.

¹⁷⁶ Booking's brief dated April 29, 2014, margin no. 114 et seq.

¹⁷⁷ BGHZ 170, 299 margin no. 4 – National Geographic II; BGHZ 178, 285 margin no. 15 – E.ON/Municipal works Eschwege; BGHZ 189, 94 margin no. 12 – MAN authorized repair shop.

¹⁷⁸ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 69 et seqq.

¹⁷⁹ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 26 et seqq.

of the relevant market (see cc. below). Furthermore, the French, Swedish and Italian competition authorities reached the same conclusion as the Bundeskartellamt (see dd. below) in their commitment decisions on how the market should be defined.

aa) “Search, compare and book” bundle as the relevant package of hotel portals’ primary and secondary services

- (137) According to the Düsseldorf Higher Regional Court,¹⁸⁰ it must be assumed that the service demanded by hotels relates to the intermediary service for hotel room bookings. Making rooms searchable online and letting users compare them with other hotels is a secondary service to the brokering service provided by the hotel portals. By doing this, hotel portals offer hotel customers the “Search, compare and book” functions in a service package that is comfortable for users.¹⁸¹ This is because – according to the Düsseldorf Higher Regional Court¹⁸² – success in brokering hotel bookings depends significantly on providing hotel customers with an attractive, informative and user-friendly website. These secondary services for hotel customers significantly affect competition among hotel portals because they affect user access (“Traffic”) to the website and therefore ultimately affect the portal’s economic success in brokering hotel room bookings. It must be noted that the hotel companies do not receive these advertising and comparison services at no cost, rather these services are paid for with their fee.
- (138) The relatively low conversion rate (ratio between site visitors and actual bookings) used as an argument by Booking is not relevant since this rate reflects the behavioral nature of an average consumer booking a room using portal offers who uses the internet frequently, especially for purposes of (price) comparison. The fact that ultimately a certain percentage of potential hotel customers make their reservations via a different route than Booking does not mean that Booking is a pure search engine or part of the same market as metasearch engines. Furthermore, this view would contradict how Booking perceives itself because it emphasizes the features of hotel portal offers in comparison with other online offers.¹⁸³
- (139) In particular, Booking’s argument that HRS was able to introduce price increases and tighten conditions in 2012 supports the narrower market definition of the Bundeskartellamt and the Düsseldorf Higher Regional Court because the hotels in question apparently did not have the option to switch to different providers, something they would have been able to do if the market were broader, as argued by Booking.

¹⁸⁰ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 35 et seqq.

¹⁸¹ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 73 et seqq.

¹⁸² Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 37.

¹⁸³ See in particular the RBB Economics study of September 11, 2014 commissioned by Booking entitled “The role of hotel booking portals on reducing search costs and increasing competition among hotels” (page 1,893 et seqq. of the file), the Booking study also of September 11, 2014 “Efficiency gains created by the proposed narrow MFN clauses in the EEA” (page 1,820 et seqq.) and the results of the GFK market survey presented by Booking: “Efficiency gains: Proposal for a narrow MFN clause and consumer and lodging surveys” of December 19, 2014 (page 1,908 et seqq. of the file).

bb) Indirect network effects

- (140) Furthermore, according to the Düsseldorf Higher Regional Court,¹⁸⁴ it must be assumed that the search and booking behavior of hotel customers is relevant for defining the relevant market to the extent that network effects¹⁸⁵ influence the functional substitutability of hotel portal intermediary services from the perspective of hotel companies.
- (141) All business activities must be assigned to a market if they are performed for remuneration. If a service – as is the case here – is performed for remuneration on one side (for hotels), but at no cost on the other side (for hotel customers), only the remunerated side is part of a market according to the decision of the Düsseldorf Higher Regional Court¹⁸⁶ in the HRS case. As it had in the HRS ruling,¹⁸⁷ the Bundeskartellamt is explicitly leaving this question open in the present case.¹⁸⁸
- (142) In this context, the Düsseldorf Higher Regional Court¹⁸⁹ recognized that the unremunerated side can influence market activity at least for the corresponding services and products performed for remuneration, in particular for activities involving the internet. For these types of markets, in particular, the benefit that a group of users (here: hotel companies) derives from a certain good or service often depends on how many users of another group (here: hotel customers) request this good or service (indirect network effects). This can influence how the functional substitutability of competing products with potentially similar characteristics but a significantly smaller customer base is evaluated. The absence of sufficiently strong indirect network effects can reduce a competing product's attractiveness to the point that it does not represent a comparable alternative to the customer.¹⁹⁰

cc) Other sales channels are not part of the relevant market

- (143) Ultimately, it must be assumed according to the Düsseldorf Higher Regional Court that hotels' own booking websites,¹⁹¹ metasearch engines (e.g. Holidaycheck, TripAdvisor, Kayak, Trivago

¹⁸⁴ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 43.

¹⁸⁵ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 81.

¹⁸⁶ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 43.

¹⁸⁷ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 73 et seqq.

¹⁸⁸ In more recent cases, the Bundeskartellamt referred to similar platforms for intermediary services in the real estate sector as transaction platforms (see Bundeskartellamt – under www.bundeskartellamt.de – case report B6-39/15 Merger Approval of Online Real Estate Platforms, June 25, 2015) and viewed the non-remuneration of one market side as a differentiating pricing strategy of the platforms that resulted in the internalization of indirect network effects, high discounts down to a price of zero for one of the user groups.

¹⁸⁹ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 43.

¹⁹⁰ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 43 with further references.

¹⁹¹ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 52 et seqq.; Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 88 et seqq.

and Check 24),¹⁹² specialized internet portals,¹⁹³ online travel agencies¹⁹⁴ and travel agency portals¹⁹⁵ are not part of the relevant market.

(144) The answer is left open as to whether and to what extent online sales (internet) and offline sales (telephone, e-mails, sales via stationary travel agencies and tourism organizations, etc.) can be distinguished¹⁹⁶ or not¹⁹⁷ from hotel services. The parallel drawn by Booking to the flight reservation market where, according to Booking, portal sales and direct sales are in direct competition with one another is not convincing because it lacks relevancy.¹⁹⁸

(145) The ability cited by Booking of metasearch engines or providers such as “Google Hotel Finder” to adapt their offer does not justify a different assessment. This ability – if one assumes it to be true – would allow only for the conclusion that such providers could more or less easily enter the relevant product market. At present, only hotel companies and hotel portals offer consumers the option to book hotel rooms. All other channels such as metasearch engines or “Google Hotel Finder” do not offer any of their own booking options; rather they merely direct the end consumer searching for a room to the booking offers of the hotel company or – at present more often – of the hotel portals. The fact that metasearch engines exert certain competitive pressure on hotel portals, as Booking believes, does not mean they should be assigned primarily to the relevant market in this case. This is because a certain amount of competitive pressure can also be exerted by providers on markets that are merely connected or related, especially when the commissions charged on the market in question are relatively high in comparison with other sales channels or with the costs of hotels’ own websites, as is apparently the case on the hotel portal market. These circumstances increase the pressure on consumers to potentially shop around for completely different alternatives or to use them while accepting the loss of (secondary) services that are extremely relevant to them. To the extent that competitive pressure is exerted from these offers, this situation must be considered during the competitive assessment (substitutive competition).

dd) Decisions of other competition authorities confirm this market definition

¹⁹² Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 56 et seqq.; Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 97 et seqq.

¹⁹³ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 71 et seq.; Bundeskartellamt, December 20, 2013, B9-66/10 – HRS at 91 et seq.

¹⁹⁴ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 71 et seq.; Bundeskartellamt, December 20, 2013, B9-66/10 – HRS at 93.

¹⁹⁵ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 71 et seq.; Bundeskartellamt, December 20, 2013, B9-66/10 – HRS at 94 et seqq.

¹⁹⁶ Bundeskartellamt, December 20 2013, B9-66/10 – HRS margin no. 74 et seqq.

¹⁹⁷ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 47 et seqq.

¹⁹⁸ Booking is referring to the merger decision of the European Commission (COMP M.6163) in which a uniform market for flight reservation is defined by online portals and the airlines’ websites from the end consumer’s perspective. This case is primarily about the perspective of hotels and their demand for intermediary services. From the perspective of end consumers, online reservations for flights and those for hotel rooms are not the same in light of the differences in terms of searchability on the respective websites.

(146) In their own commitment decisions, the French, Swedish and Italian competition authorities define this market and arrive at the same conclusion as the Bundeskartellamt. This once more supports the Bundeskartellamt's view.

(147) The French competition authority describes the special position of hotel portals in the hotels' (online) different sales formats in terms of the services offered by the portals for hotels (high visibility, network effects)¹⁹⁹ and for end consumers ("search, compare and book"²⁰⁰). The French competition authority views the hotel offers of groups like travel agencies that do not broker hotel rooms but instead buy and sell quotas²⁰¹ and the intermediary services of metasearch engines, whose customers are primarily hotel portals and who are paid by the number of clicks generated, as part of a separate market.²⁰² The Italian competition authority also describes²⁰³ the differences between online and offline sales and mentions the significant increase in online bookings due to the significant increase in internet use at the expense of offline bookings, the significantly greater reach of online sales and the different commission amounts.²⁰⁴ The Swedish competition authority also describes the special position held by hotel portals in hotels' sales mix²⁰⁵ and differentiates them from hotels' own websites and metasearch engines, the latter since booking a room via metasearch engines is indirect and possible only on the connected hotel portal.²⁰⁶

b) No technical errors made while determining revenue

(148) Booking's criticism is unfounded that the Bundeskartellamt had made technical errors by not including bookings via independent applications ("Apps"), sales partners – for example partner airlines – and metasearch engines into the relevant market and in its calculation of market share. It may remain open for now whether hotel bookings made via links to Booking embedded on external websites in partner programs (e.g. partner airlines) are similar enough to the packaged tour business that, as Booking claims, they should not be considered part of the relevant market. Even if this were the case, Booking's market share would still be well over the 30% threshold pursuant to Article 3 (1) of the Vertical BER (Vertical Block Exemption Regulation). Furthermore, the fact that Booking – as well as its competitors – includes the commission revenue generated from bookings of linked hotel room offers to the full extent in its total commission income argues against the inclusion of these revenues.

¹⁹⁹ French competition authority's Commitment Decision of April 21, 2015 (page 2,991 et seqq. of the file) margin no. 35 and 37.

²⁰⁰ French competition authority's Commitment Decision margin no. 34 and 43.

²⁰¹ French competition authority's Commitment Decision margin no. 34 and 43.

²⁰² French competition authority's Commitment Decision margin no. 44 et seqq.

²⁰³ Italian competition authority's Commitment Decision of April 21, 2015 (page 3,087 et seqq. of the file) margin no. 10 describes the particular sales services of hotel portals also in terms of the product bundle "Search, compare and book."

²⁰⁴ Italian competition authority's Commitment Decision margin no. 9.

²⁰⁵ Swedish competition authority's Commitment Decision of April 15, 2015 (page 3,067 et seqq. of the file) margin no. 11.

²⁰⁶ Swedish competition authority's Commitment Decision margin no. 9 et seq.

- (149) The Bundeskartellamt analyzed the bookings precisely and accurately,²⁰⁷ fulfilling the requirements specified in the decision of the Düsseldorf Higher Regional Court.²⁰⁸ It is not apparent that Booking or the other hotel portals questioned had provided any false information. Also, contrary to Booking's opinion, the Bundeskartellamt sufficiently differentiated between revenue generated on the relevant market and revenue generated outside of this market while determining revenue.²⁰⁹
- (150) In summary, the basis of data determined by the Bundeskartellamt on the basis of the present market definition is transparent, accurate and valid, contrary to Booking's pleading. Booking's market share has not been overestimated and has been above 50% for years and is expected to continue increasing,²¹⁰ something which will be examined more closely in a different section of this decision.²¹¹

c) No contradiction to the market definition during the evaluation of exemption requirements

- (151) Finally, the Bundeskartellamt does not argue inconsistently if it assumes on the one hand that the supply-side market for intermediary services performed online by hotel portals (hotel portal market) is narrow, but on the other hand mentions conceivable alternative business models during its analysis of competition law in terms of indispensability pursuant to Article 103 (3) TFEU (see below). This is the case because pointing out alternatives as part of its analysis of indispensability is not identical with the analysis of the relevant market definition. Even if alternative remuneration models were introduced, hotel companies – possibly to a different extent – would generally still demand intermediary services from hotel portals and these services would be offered to the hotel companies. The only thing that would change is these services would be remunerated differently. The market definition would not fundamentally change.

V. Relevant geographic market

- (152) Contrary to Booking's statements (see 2. below), the intermediary services of hotel portals to hotel companies must be considered a national geographic market according to the decision of the Düsseldorf Higher Regional Court (see 1. below).

1. Observations of the Düsseldorf Higher Regional Court

²⁰⁷ See page 23 et seqq. of the file "Questionnaire competitors 2014."

²⁰⁸ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 140 et seqq.

²⁰⁹ In particular, see Section C of the Questionnaire competitors (File: "Fragebogen Wettbewerber" page 25 et seqq. of the file; also see the supplementary clarifications of the Bundeskartellamt of December 9, 2015 in the case "HRS Best Price Clauses," copy in the case file p, 4,176, 4,182 et seqq.

²¹⁰ See page 1 et seq. of the file "Questionnaire competitors 2014."

²¹¹ See margin no. 243 below.

(153) The Düsseldorf Higher Regional Court²¹² determined that the relevant hotel portal market should be defined nationally and is therefore limited to Germany in this context.

2. Booking's pleading

(154) Booking²¹³ pleads, however, that in light of the Europe-wide uniform contract terms and conditions, the portal's presence in all major EU member states and the great demand from end consumers from other EU member states for hotels in Germany, the hotel portal market should be defined as European.

3. Assessment of the Bundeskartellamt

(155) The Bundeskartellamt's investigations in the present case have confirmed that the relevant hotel portal market is a national market.

(156) The economic focus of the hotel portals active in Germany, their local presence, the focus of their offerings, the focus of their advertising and market developments, the geographic options of hotel companies and customers to switch to a different provider and lastly the actual behavior and habits of consumers support this view.²¹⁴ For example, the Bundeskartellamt already determined²¹⁵ that Booking is also represented by several companies and several hundred employees in Germany who provide local support for hotels and customers in German and deal with regional particularities. The uniform contract terms and cross-border online presence mentioned by Booking are typical characteristics of internet portals and cannot be used to determine the demand-side perspective critical for defining markets. The fact that end consumers also book rooms from abroad does not argue against a Germany-wide market for intermediary services for hotels in Germany.

(157) Furthermore, the importance of hotels portals still varies greatly from country to country in Europe. Great differences in market share still exist in these countries.²¹⁶ Booking, for example, has the highest market share in Greece, Norway and Belgium at over 70%, but significantly lower market shares in Hungary at just over 40%. The differences in market share are even greater for HRS and Expedia. In Italy, for example, Expedia's market share is 15% but only 2.5% in Finland. HRS has well over 30% of market share in Germany but under 3% in Finland and Greece.

(158) In their commitment decisions, the French, Italian and Swedish competition authorities also considered the hotel portal market to be a national market, thereby confirming the

²¹² Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 78 et seq.

²¹³ Booking brief of April 29, 2014 margin no. 218 et seq.

²¹⁴ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 78 et seq.

²¹⁵ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 121 et seqq., 123, 130, 133.

²¹⁶ See European Hotel Distribution Study 2014: The Rise of Online Intermediaries (<http://etourism-minor.ch/mode/129>), most recently published in Swiss Hotel Distribution Study: Are OTAs winning the customer race? of February 2015, Prof. Roland Schegg, Institute of Tourism, HES-SO Valais, p. 17 (https://www.hoteleriesuisse.ch/files/pdf8/2015_Swiss_Hotel_Distribution_Study.pdf).

Bundeskartellamt's assessment. In the French competition authority's opinion, the main factors of importance are the local support for French hotels and the hotel portals' focus on the large share of foreign customers of French hotels.²¹⁷ The Italian competition authority points out the country-specific content of the Booking and Expedia portals in Italy and the fact that the terms and conditions of these portals in Italy refer to country-specific standard commissions.²¹⁸ Lastly, the Swedish competition authority describes how the hotel portals meet the demands of hotel companies conducting business on the Swedish hotel market for online intermediary services of their hotel rooms in Sweden.²¹⁹

VI. Restrictions on competition pursuant to Section 1 of the GWB or Article 101 (1) of the TFEU

(159) The narrow best price clauses that Booking has used since July 1, 2015 represent agreements between companies pursuant to section 1 GWB and Article 101 (1) TFEU (see 1. below). The inter-state clause is fulfilled (see 2. below). The best price clauses restrict competition on the hotel portal market and on the market for hotel rooms (see 3. below). The restrictions on competition are also appreciable (see 4. below).

1. Narrow best price clauses as agreements between companies

(160) The narrow best price clauses used by Booking are agreements pursuant to section 1 GWB or Article 101 (1). Declarations of intent are also considered agreements if one company is given freedom to unilaterally design the contractual relationship, as is the case with general terms and conditions that are binding on the other company.²²⁰ Clauses are also banned under agreements pursuant to section 1 GWB or Article 101 (1) TFEU if one company is legally obligated to guarantee its contractual partner its most favorable prices and conditions in certain circumstances, e.g. in relation to its own sales activities. If a variety of similar contracts exists, the entire contract system must be observed and not each individual contract (bundle theory).²²¹

(161) The narrow best price clauses used by Booking within and outside of its Preferred Partner program represent such agreements since it allows Booking to demand certain conduct from hotel companies, and this conduct is viewed by the parties as binding under Booking's contract terms. This affects a number of similar clauses that Booking has agreed upon with its hotel partners. The subject matter of this competition law analysis therefore covers all best price agreements currently existing between Booking and its hotel partners.

²¹⁷ See French competition authority's Commitment Decision of April 21, 2015 margin no. 101.

²¹⁸ See Italian competition authority's Commitment Decision of April 21, 2015 margin no. 12.

²¹⁹ See Swedish competition authority's Commitment Decision of April 15, 2015 margin no. 8 and 12.

²²⁰ See, for example, Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 139 et seq. with further references.

²²¹ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 140 with further references.

2. Impedes interstate trade

(162) Booking's use of the best price clauses in question fulfills both the ban criteria pursuant to section 1 GWB and Article 101 (1) TFEU because the restrictions on competition impede interstate trade.²²²

(163) This is because Booking's best price clauses affect Booking's competition with its domestic and European competitors. Providers on the hotel portal market are typically active in many European countries. They have contractual relationships with hotels that typically compete for domestic and foreign hotel customers looking for accommodations at a certain location. Booking, but also the other two large hotel portal providers in Germany (HRS and Expedia) have significant market positions on the hotel market both individually and combined. Lastly, given Booking's market position, Booking's best price clause has a significant effect on the chances that domestic and foreign providers have for entering the market.

3. Anti-competitive effects

(164) The narrow best price clauses that Booking has used since July 1, 2015 restrict competition on the hotel portal market (see a. below) and market for hotel rooms (see b. below) pursuant to section 1 GWB and Article 101 (1) TFEU. The anti-competitive effects of the narrow best price clauses are further enhanced by the best price clauses used by other hotel portals (see c. below).

a) Restrictions on competition on the hotel portal market

(165) The scope of narrow best price clause parities demanded from hotels has decreased since Booking changed its terms and conditions on July 1, 2015, as is described above.²²³ Price and conditions parities are no longer demanded for online-reservations via other hotel portals or offline reservations (at the hotel reception, via phone/e-mail, via a travel agency, etc.) so that hotels are now permitted to offer more favorable conditions via these sales channels. But the remaining narrow best price clauses restrict competition on the hotel market in particular for hotels' own website and other similar sales channels for hotel rooms, based on the general standards (see aa. below) set by the Düsseldorf Higher Regional Court in the HRS case, contrary to Booking's statements (see bb. below) and according to the opinion of the Bundeskartellamt (see cc. below).

aa) Observations of the Düsseldorf Higher Regional Court

(166) In its decision on the HRS case, the Düsseldorf Higher Regional Court confirmed the Bundeskartellamt's classification of wide best price clauses in the HRS proceedings²²⁴ as

²²² Compare with proceedings against HRS, Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 158 as well as Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 142 et seq.

²²³ See margin no. 106 et seqq. above.

²²⁴ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS margin no. 137 et seqq., 155 et seqq.

“effective” restriction of competition on the hotel portal market pursuant to section 1 GWB and Article 101 (1) TFEU.²²⁵

(167) In particular, the Higher Regional Court determined that the best price clauses used by HRS at the time restrict competition related to prices and commissions among hotel portals for the hotel companies who demand their intermediary services²²⁶ since they remove all economic incentive from the hotel portals to offer hotel companies lower commissions in order to be able to offer hotel rooms via the portal at more favorable prices and conditions in return.²²⁷ Furthermore, the Higher Regional Court believes the wide best price clauses in question lead to market foreclosure effects since they make it more difficult for new hotel portals to enter the market.²²⁸ Ultimately, the Düsseldorf Higher Regional Court found that metasearch engines and hotel comparison portals not active on the relevant market did not exert enough pressure as substitute companies on hotel portals to prevent the negative consequences of the – wide – best price clauses: a reduction in competition for commissions among hotel portals.²²⁹

(168) Of course, the Düsseldorf Higher Regional Court could not make conclusive observations about the narrow best price clauses used by Booking since July 2015 based on the subject matter of the prior HRS case. The Higher Regional Court²³⁰ did, however, refer in a general manner in its decision to the criteria to be used in such circumstances. According to these criteria, answering the question of whether restrictions on competition exist depends on the anti-competitive effects (present or potential) in each individual case if no anti-competitive purpose can be discovered in the agreement. The conduct in question must restrict competition to such an extent that it can be expected with sufficient likelihood that prices, product volume, innovations, diversity or quality of goods and services will be negatively affected. In order to determine this, the agreement’s effects on the existing economic, legal and actual market and competition conditions must be thoroughly assessed. The market position of the participants and competitors as well as existing hurdles for market entry play a role here, e.g. whether market foreclosure effects will likely be noticed.

bb) Booking’s pleading

(169) In Booking’s opinion, the current version of the narrow best price clauses in effect does not restrict competition among hotel portals (anymore). Since parity for prices and conditions now only applies for hotels’ own websites, competition among hotel portals cannot be restricted as a

²²⁵ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 80 et seqq.

²²⁶ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 94 et seqq.

²²⁷ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 99 et seqq.

²²⁸ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 109 et seqq.

²²⁹ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 121 et seqq.

²³⁰ Düsseldorf Higher Regional Court, January 9, 2015 VI-Kart 1/14 (V) – HRS margin no. 86 with further references.

matter of fact.²³¹ This is because hotel portals and hotel companies are active on different markets and do not compete with one another.²³²

(170) Booking goes on to state that the narrow best price clauses precisely enable hotel companies to differentiate their room rates and booking conditions between the booking portals – in contrast to the previous, wider version of the best price clauses. Thus, an economic model created on behalf of Booking²³³ indicated that *“in a world with narrow parity clauses, hotel companies would have a significant incentive to reduce their room rates on hotel portals that are willing to reduce their commissions in return.”*²³⁴

(171) The criticism of this economic model put forward in the meantime by the Bundeskartellamt²³⁵ was unconvincing; specifically, the following conclusions were drawn inter alia:

- The modeling – according to Booking – assumed that the relevant counterfactual scenario was one entirely without parity clauses, rather than one with wide best price clauses.²³⁶
- The static type of the modeling did not invalidate the results obtained.²³⁷ Although it may not account for all factors that are relevant to a forecast of competitive market results, it was nevertheless suitable to draw conclusions with regard to the pricing incentives of hotels in online direct sales and on the hotel portals.²³⁸
- In a situation entirely without best price clauses, it would be profitable for hotel companies to increase the room rate on each individual hotel portal²³⁹ or on all three major portals simultaneously²⁴⁰, while leaving the room rate unchanged on its own website. Most advantageous would be an increase in such a way that effectively no more bookings are made via the respective hotel portal or the three major hotel portals together, but only on the hotel's website.

²³¹ Exhibit QE 65 to Booking's brief of November 30, 2015, margin no. 2.2 et seqq..

²³² Booking's brief of May 19, 2015 on accepting commitments, margin no. 114.

²³³ RBB Economics expert opinion “Modelling the consequences of eliminating additional parity clauses on competition for commissions among hotel reservation portals in Germany” of May 18, 2015 (page 3,158 et seqq. of the file).

²³⁴ Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 2.9 with reference to the RBB opinion of May 18, 2015; see also Booking brief of May 19, 2015 on accepting commitments, margin no. 104.

²³⁵ See memo of the department for Economic Policy Issues of the Bundeskartellamt of July 6, 2015, p. 1 et seqq. (page 3,936 et seqq. of the file).

²³⁶ See opinion of RBB Economics of November 30, 2015, Exhibit QE 70 to Booking brief of November 30, 2015, p. 6 et seqq.

²³⁷ See opinion of RBB Economics of November 30, 2015, Exhibit QE 70 to Booking brief of November 30, 2015, p. 4 et seqq.

²³⁸ See opinion of RBB Economics of November 30, 2015, Exhibit QE 70 to Booking brief of November 30, 2015, p. 2 et seq., 4 et seq.

²³⁹ See opinion of RBB Economics of November 30, 2015, Exhibit QE 70 to Booking brief of November 30, 2015, p. 11.

²⁴⁰ See opinion of RBB Economics of November 30, 2015, Exhibit QE 70 to Booking brief of November 30, 2015, p. 12.

(172) The conclusions following from this economic modeling according to Booking also did not represent purely theoretical considerations. This is because another empirical study carried out on behalf of Booking led to the conclusion that the majority of hotel companies in Germany had in practice recently placed differing prices on the various hotel portals as well.²⁴¹ In this respect, data concerning the price differentiation on booking platforms included in metasearch engines (TripAdvisor and Kayak) had been evaluated. The data collected concerning the non-compliance of parity on the basis of a sample of 4,000 German hotels showed

- that [70-90]% of hotels had set a room rate at least once in a period of eight weeks on another hotel portal that was 5% below that of Booking, and
- that [15-35]% of hotels had set room rates during this period for at least half of the time on other booking platforms that were 5% below those of Booking.²⁴²

(173) As part of a further sample – thus Booking – it was also determined that in practice, some hotel companies even set higher prices on the hotel's own website than on hotel portals.²⁴³ Although no quantitative data was available in this regard, the sample nevertheless extended to 27 individual cases. An analysis of the existing incentives demonstrated that it often lies in the economic interest of a hotel company and is therefore economically sensible to be more expensive on the hotel's own website than on the hotel portals, especially if the latter reduced their commissions in return.²⁴⁴

(174) In this context, Booking further states:

- The proportion of bookings via the hotel's website was already so low, especially for smaller hotels, that although cannibalization does occur in this respect if the room rates on the hotel's website are more expensive than on the hotel portals, this cannibalization effect should be disregarded, however, because the share of online direct bookings is low at approximately 8% of the total hotel sales mix compared with offline sales (nearly 70%).²⁴⁵
- Although the proportion of online direct bookings is greater for large hotels or hotel chains, many of these reservations would "*probably*" be made by regular customers who would not

²⁴¹ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 5.31 et seqq.; the data base and the procedure of this sample were described in detail at the request of the Bundeskartellamt in an email from Booking dated December 17, 2015 (page 5,409 et seqq. of the file).

²⁴² Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 5.31 et seqq. and Exhibit QE 66 to Booking brief of November 30, 2015, p. 1 et seqq.

²⁴³ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.26 et seqq.

²⁴⁴ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.26 et seqq. with reference to the RBB opinion of May 18, 2015 p. 5.

²⁴⁵ Exhibit QE 65 to Booking's brief of November 30, 2015, margin no. 2.40 et seqq.; Booking's brief of May 19, 2015 on accepting commitments, margin no. 122.

book via a hotel portal anyway, even if the room rate was cheaper there.²⁴⁶ In this respect, then, there is also no cannibalization.

- Any remaining restrictions on competition from narrow best price clauses are made up for, however, by the option to offer different prices and conditions offline; for example, if a hotel portal lowers its commissions, hotel companies can also react to this by offering a better offline room price.²⁴⁷ The hotel companies also remain free to protect themselves from cannibalization in the online area by introducing closed user groups – combined with favorable prices and discounts.²⁴⁸
- Direct bookings on the hotel's website are also often more expensive or only slightly cheaper than booking through hotel portals.²⁴⁹
- Finally, the advantages of offering cheaper room rates on a hotel portal in return for lower commissions could be significant.²⁵⁰

(175) Booking further argues that the risk of narrow best price clauses closing off the market to new providers does not exist (anymore) since these providers could negotiate with the hotel companies by offering them lower commissions in return for lower room prices. Doing so would then induce hotel customers to book using their portal offer.²⁵¹

(176) Furthermore, the results of the hotel survey conducted by the Bundeskartellamt on June 10, 2015 contradicting these findings cannot serve as the basis of the Bundeskartellamt's dissenting opinion. The interviews conducted by the Bundeskartellamt were not representative enough in terms of the number of lodgings surveyed, the type of lodgings or their classification. Also, the questions asked by the interviewers were biased, and the results of the survey were skewed by the hotel association's propaganda and the prevailing negative mood at the hotel conference.²⁵²

(177) Finally – thus Booking – it should be stressed that neither the clauses it used concerning minimum availability²⁵³ nor those for the so-called “Best Price Guarantee” towards its customers²⁵⁴ intensified the (alleged) restraint of competition.

²⁴⁶ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.45 et seqq.

²⁴⁷ Booking's brief of May 19, 2015 on accepting commitments, margin no. 106; Exhibit QE 65 to Booking's brief of November 30, 2015, margin no. 2.51 et seqq.

²⁴⁸ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.51 et seqq.

²⁴⁹ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.55 et seqq.

²⁵⁰ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.63 et seqq.; Booking brief of May 19, 2015 on accepting commitments, margin no. 94 et seqq., 105.

²⁵¹ Booking's brief of May 19, 2015 on accepting commitments, margin no. 101; Exhibit QE 65 to Booking's brief of November 30, 2015, margin no. 2.72 et seqq.

²⁵² Booking's brief of July 24, 2015, margin no. 10 et seqq.

²⁵³ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.88 et seqq.

²⁵⁴ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.91 et seqq.

cc) Assessment of the Bundeskartellamt

(178) In light of the correct criteria set for evaluating the question of whether restrictions on competition exist, see (1) below, the Bundeskartellamt examined the present facts with sufficient breadth and depth and reached valid conclusions, see (2) below. According to these conclusions, the narrow best price clauses used by Booking have anti-competitive effects on the German hotel portal market, see (3) below.

(1) Criterion for reviewing the question of a restraint of competition

(179) Contrary to what Booking initially argued,²⁵⁵ the narrow best price clauses that are the subject of the proceedings must not be compared only with the wide best price clauses applicable until July 2015 – and thus with the status quo ante – in terms of their anti-competitive effects. If this were true, then any simple reduction in the anti-competitive behavior by the parties to whom the standard is addressed would be sufficient to eliminate the restraint of competition and would thus make it impossible for the antitrust authorities to pronounce a prohibition. Rather, the correct criterion for the presence of a restraint of competition is exclusively the competitive situation that would exist without an anti-competitive agreement.²⁵⁶ Booking now appears to follow this; it most recently stated that the relevant counterfactual scenario was one entirely without best price clauses, rather than one with wide best price clauses.²⁵⁷

(180) In addition, the anti-competitive effects of the narrow best price clause must not be balanced against any advantages for the hotel companies relative to the status quo ante – when the wide best price clauses still applied – for purposes of compensation. In reviewing the conditions for prohibition under section 1 GWB and Article 101 (1) TFEU, there is no place for such a balancing of the pro-competitive and anti-competitive effects of an agreement or clause formulated on the basis of section 1 GWB or Article 101 TFEU. In contrast, pro-competitive aspects – where they are factually correct – can play a role in evaluating the submission on the exemption conditions.

(181) Regarding the question of an “effected” restraint of competition in the conditions for prohibition, what matters – as was previously outlined²⁵⁸ – are the (current or potential) anti-competitive effects of the behavior in question that are expected in the specific case. To be able to determine the required distortion of competition, the effects of the agreement on the existing economic, legal, and actual market and competitive situation must be examined comprehensively, without

²⁵⁵ See RBB expert opinion “Modeling of the Effects of Eliminating Broad Parity Clauses on Competition for Commissions Among Hotel Booking Portals in Germany” dated May 18, 2015; see statement by the Bundeskartellamt (department G3) dated July 6, 2015 (page 3,936 et seqq. of the file).

²⁵⁶ See for example Emmerich in Immenga/Mestmäcker, Wettbewerbsrecht EU [EU Competition Law], 5th edition, Article 101 (1) TFEU margin no. 145 with further references.

²⁵⁷ See opinion of RBB Economics of November 30, 2015, Exhibit QE 70 to Booking brief of November 30, 2015, p. 6 et seqq.

²⁵⁸ See margin no. 166 above and Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 86 with further references.

the possibility that even more serious restraints on competition might have existed earlier – as in this case, with the earlier wide best price clauses – playing any role in this.

(182) Thus, it may be true that the narrow best price clauses in effect since July 2015 are less anti-competitive than the wide best price clauses that applied before then, especially because the new best price clauses, based on their wording, no longer restrict the hotel companies' freedom to set their prices in their online marketing. But the sole critical question in terms of satisfying the conditions for prohibition is whether the remaining restrictions, especially the retention of price parity for the hotels' own websites and for the hotel companies' other direct online activities relative to Booking – taking into account the elimination of price parity with respect to other hotel portals – in conjunction with the newly introduced minimum availability of rooms, which replaced the previous availability parity, constitute a perceptible restraint of competition compared with a hypothetical situation in which such clauses are entirely absent.

(2) Scope of the investigations and usability of the investigation results

(183) Contrary to Booking's belief, the Bundeskartellamt has investigated the present case with regard to the outlined criterion for reviewing the charge of anti-competitive behavior with adequate breadth and depth. The investigation results in this regard are readily usable; the objections about them raised by Booking – especially regarding the hotel survey conducted by the Bundeskartellamt on June 10, 2015 – are unfounded.

(184) On the one hand, the Bundeskartellamt bases its determination of a restraint of competition in the hotel portal market on the investigation results from the HRS proceeding,²⁵⁹ to the extent that they are applicable to the present scenario. This involves facts known to the authorities, the essentials of which were published and thus have become general knowledge. Contrary to Booking's suggestion, such facts known to the authorities need not be ascertained anew in a parallel or subsequent antitrust administrative proceeding.²⁶⁰ Thus, among other things, the Bundeskartellamt previously conducted extensive investigations of the market structure (which the Düsseldorf Higher Regional Court²⁶¹ also deemed sufficient with regard to the HRS proceeding), and it analyzed the results of those investigations accordingly. Not only did various companies in the travel and tourism industry express their opinions by filing briefs, thus contributing to a clarification of the facts of the case; around 2011, a survey was also conducted of major, medium-size, and small hotel companies and of companies heavily involved in brokering hotel rooms in Germany via the Internet. Another survey concerning the market data of hotel and travel portals took place in June 2012, and even at that point the Bundeskartellamt was taking into

²⁵⁹ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 53 et seqq.

²⁶⁰ Overall cf. Schneider in Langen/Bunte, op. cit., section 57 GWB, margin no. 3 et seq. with further references.

²⁶¹ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 93.

account the findings from the industry reports released annually under the title “*Hotelmarkt Deutschland*” [Hotel Market Germany].²⁶²

(185) On the other hand, as part of the proceeding under consideration here, the Bundeskartellamt took into account the findings following from the “*Hotelmarkt Deutschland 2014*” and “*Hotelmarkt Deutschland 2015*” industry reports. Moreover, Booking itself, as well as the other parties to the proceedings, expressed their opinion on the facts of the case, among other things, in numerous briefs; the Bundeskartellamt has taken note of these opinions and taken them into account. Booking also had the opportunity to express its opinion on the statements and assessments presented by the other parties to the proceedings. The studies and expert opinions submitted by Booking in this regard²⁶³ also address questions of the restraint of competition and the underlying aspects of the relevant facts and circumstances.

(186) In reviewing the anti-competitive effects of the best price clauses, the Bundeskartellamt also relies on the results of the hotel survey of June 10, 2015. It has already been pointed out,²⁶⁴ when it comes to the nature and scope of the investigations to be performed under section 57 GWB in conjunction with section 24 (1) VwVfG, the Bundeskartellamt clarification enjoys discretion²⁶⁵ through which under section 57 GWB in conjunction with section 24 (2) VwVfG it must take into account all circumstances that it deems relevant to the assessment, thus including those that are auspicious for the parties involved. The Bundeskartellamt believed that separate consideration of the proposed changes of the Booking general terms and conditions beginning on July 1, 2015 was necessary in order to allow a better understanding of the competitive effects from the standpoint of the affected potential buyer. Therefore, the Bundeskartellamt structured the hotel survey challenged by Booking broadly and without expectations as to outcome. Among the aspects of significance in this regard was the desire to hear not only the opinion of the intervening hotel association on the question of the anti-competitive effects of the revised best price clauses, but also the opinion of affected hotel companies themselves. At the same time, the Bundeskartellamt did not claim that this survey was representative, but a survey being representative in the statistical sense is not a condition for findings obtained from a survey being usable in antitrust administrative proceedings. Rather, the principle of free evaluation of evidence applies,²⁶⁶ under which subjective assessments or observations by surveyed market participants can be a relevant component of the official findings of fact in the specific case, if they are appropriately related to competition.

(187) Apart from this, in designing and conducting the survey as well as evaluating the results, the Bundeskartellamt – contrary to Booking’s insinuation – took into account the fact that the

²⁶² Overall cf. Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 53 et seqq.

²⁶³ See margin no. 56 et seqq.

²⁶⁴ See margin no. 118 et seqq.

²⁶⁵ See Schneider in Lange/Bunte, op. cit., section 57 GWB, margin no. 13 with further references.

²⁶⁶ See Schneider in Lange/Bunte, op. cit., section 57 GWB, margin no.14 et seqq.

surveyed hotel companies are association members of Intervening Party 3 and that they represent their own business interests. However, this does not make the results of this survey unusable with regard to the anti-competitive effects of the current narrow best price clauses, as Booking contends; rather, thus must simply be noted and evaluated with appropriate caution.

(3) Specific anti-competitive effects

- (188) The narrow best price clauses used by Booking have anti-competitive effects on the hotel portal market within the meaning of section 1 GWB and Article 101 (1) TFEU.
- (189) It is true that under the terms of the best price clauses a hotel company can now set (final) prices on another hotel portal that are lower than on Booking's portal; from a hotel company's perspective, this could be profitable if, for example, the other hotel portal charges a lower commission than Booking and this strategy does not result in a decline in profits for the hotel in the individual case or if applied over a longer period of time. At the same time, however, the narrow best price clauses used by Booking continue²⁶⁷ to prohibit the hotel company from offering a hotel room price on its own website or through other forms of online marketing that is lower than the price offered through Booking.
- (190) This has, first of all, two practical consequences, which is the key factor in assessing the anti-competitive effects of a given behavior: First, the hotel company is still unable to freely set the price for the service it provides based on criteria of its own choosing; this is an infringement of the hotel companies' pricing sovereignty, which also has the effect of restraining competition on the market for hotel rooms; as long as the hotel companies cannot freely set the prices on their own websites, the pricing latitude of the hotel portals is not controlled by direct marketing. Secondly, if the hotel company wanted to set a price on another hotel portal that was lower than that on Booking, it would have to accept the fact that in online sales outside the hotel portals – such as on the hotel's own website – prices would have to be higher than on this other, less expensive hotel portal owing to Booking's still-intrusive parity requirement.
- (191) Viewed in this light, the "freedoms" that the hotel companies were formally granted through the narrow best price clauses applicable since July 2015 in terms of price differentiation with different hotel portals are largely ineffective in practice. On the contrary, the hotel companies' incentives to differentiate prices for marketing via different hotel portals remain limited by the narrow best price clauses; see (a) below. In the absence of an incentive to differentiate prices for marketing via different hotel portals, the narrow best price clauses also reduce the incentives for the portal operators to offer better prices and terms to the hotel companies listed with them in competition with each other; see (b) below. The related anti-competitive effects are strengthened by the clauses used by Booking relating to minimum availability and the best price guarantee; see (c) below. Finally, the narrow best price clauses have market-foreclosing effects vis-à-vis potential newcomers; see (d) below.

²⁶⁷ See section 2.2.1 of the Booking General Terms and Conditions of Business.

(a) Limited incentives for hotel companies to differentiate prices at different hotel portals

- (192) First of all, the narrow best price clauses used by Booking restrict competition among the hotel portals because in terms of practical effects they – compared with a situation without best price clauses – significantly reduce the incentives for the hotel companies to differentiate prices for marketing their rooms via different hotel portals.
- (193) It is true that hotel companies have enjoyed such latitude in differentiating prices in purely formal terms since the introduction of the narrow best price clauses. If, however, a hotel company wanted to exercise this latitude in practice and offer a lower price than Booking's on a different hotel portal, then under the narrow best price clauses it cannot offer a price lower than Booking's in its own online marketing – and thus, in particular, via the hotel's own website, but also via other online marketing channels. This means that the room price in the hotel's own online marketing channels would be at least as expensive as on Booking, and thus by necessity more expensive than on the hotel portal where the lower price was offered.
- (194) Viewed in this light, it must be expected that the hotel companies would be very reluctant in practice to make use of the possibility of differentiated pricing behavior. This is because most hotel companies must be aware that marketing via the hotel's own website would, from the hotel customers' perspective, be highly unattractive owing to the higher room prices – relative to the less expensive hotel portal – in this scenario. Meanwhile, the number of hotels trying to boost their own online marketing is on the rise.²⁶⁸ As the hotel survey of June 10, 2015 showed, even now there are some hotel companies that do the vast majority of their bookings via their own website.²⁶⁹ When in doubt, however, hotel customers will always use the portal offering better prices for them to book their rooms, not the hotel's own comparatively more expensive website; as the Düsseldorf Higher Regional Court found, a customer who has decided on a specific hotel, a specific room category, and a travel time will generally book his room wherever he is offered the lowest room price and/or the most favorable pricing, booking, and cancellation terms.²⁷⁰ Thus, one would expect that the online booking traffic that is otherwise taking place via the hotels' own websites even today would be diverted from there, to a relative degree, to the hotel portal made more favorable by differentiated pricing behavior.

²⁶⁸ According to the results of an online survey conducted in 2014 by the German Hotel Association with its European partner associations, in which 1,193 individual and chain hotels were surveyed in Germany, as of the end of 2013, 95% of the participating hotels in Germany had their own website and 54% of the hotels had a real-time booking option on their website; during the period under review, from 2011 to 2013, real-time booking options increased sharply relative to bookings using reservation forms (see "*Hotelmarkt Deutschland 2015*" industry report, pp. 240 and 273).

²⁶⁹ The representatives of both DEHOGA North Rhine-Westphalia and DEHOGA Saxony estimate that the hotels that they represent get around half of their online bookings via their own websites; theme hotels (e.g., with a particular design or focused on a particular, narrow target group) stated that they get as much as 60% of their online bookings via their own websites, cf. page 19 et seqq. of the file "Fragebogen Hotels Juni 2015" [Hotel Survey June 2015].

²⁷⁰ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 104.

(195) However, this very situation would fundamentally run counter to the economic interests of the average hotel company, the result being that it would tend to make little or no use of the aforementioned price differentiation latitude. Instead, the clear tendency of the average hotel company is to strengthen its own online marketing, and this is true for a number of reasons. For example, marketing via one's own website and similar online marketing channels is significantly more advantageous from the hotel's perspective owing to the associated cost structure – in any event, no commissions are paid – and it is also easy to control; changes in room prices and terms in reaction to especially strong or weak demand can be effected on the hotel's own website quickly and efficiently, in-house.²⁷¹ The significance of the hotels' own online marketing channels may have increased in recent years, judging from the reservation figures, but on average it still remains at a low level in view of the best price clauses that still apply and the resulting poor opportunity for price differentiation. The ratio of overnight stays booked via the hotels' own websites to overnight stays booked via hotel platforms is currently around 30 to 70,²⁷² whereby essentially three suppliers share the portion provided via hotel portals. This means that on average, within a hotel's marketing mix, the hotel's own online marketing is just as significant as marketing via one of the three big hotel portals. The hotels' own online marketing channels are thus an increasingly important mainstay in the hotel companies' marketing mix. A hotel company that uses this mainstay will not give it up simply in order to use price differentiation leeway on hotel portals only.

(196) This finding is also supported by the investigation results in this case. The hotel survey of June 10, 2015 showed that hotel companies are concentrating on expanding as much as possible the sales volume via their own online channels.²⁷³ In this regard, another factor besides the aforementioned aspects is that customer service is easier for hotel companies via their own (online) marketing channels; in addition, some of the marketing formats preferred by certain hotel companies, such as basic room prices with additional services offered or package deals, are not portal-compatible. Many of the surveyed hotel companies want to improve their Internet sales based on their own marketing strategy, geared to the needs of the specific hotel and its principal customers (business customers, vacationers, theme hotels, wellness orientation, etc.).

(197) The increasing strategic importance of the hotels' own marketing channels is also clearly evident from the observations made by the intervening hotel association.²⁷⁴ In view of the relatively high commissions charged by hotel portals such as Booking, preserving or strengthening these marketing channels is also consistent with good business sense from the hotel companies' perspective. Thus, it seems plausible that average German hotel companies are now attempting

²⁷¹ See also Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 133.

²⁷² See "*Hotelmarkt Deutschland 2015*" industry report, p. 241: The share of overnight bookings via the hotels' own real-time booking websites rose from 5.9% in 2011 to 8.1% in 2013. Among online bookings alone, the hotels' own websites (8.1%) and hotel portals (20.9%) are in a ratio of approximately 30 to 70.

²⁷³ See result of the hotel survey, p. 16 et seqq. of the file "Questionnaire hotels June 2015."

²⁷⁴ Opinion by the Hotel Association dated August 28, 2015, p. 8 et seqq.

emphatically to no longer rely on the hotel portals exclusively or largely when it comes to online marketing, but rather to strengthen their own online marketing channels, even if they accord hotel portals an essential role in the marketing mix owing to current market conditions.

(198) The narrow best price clauses used by Booking force hotel companies to choose between supporting a comparatively inexpensive portal with lower room prices, whereby they remain “trapped” in the brokerage model, however (because demand will be concentrated on this inexpensive portal), or forcing an expansion of reservations via their own websites, but without being able to offer price incentives there. These restrictions result in a competitive situation that differs adversely from the situation without the narrow best price clauses. Because without that clause, the choice of marketing channel (own website or reservation portal) and the price-setting for the different marketing channels would be based on which channel would be economically advantageous from the hotel companies’ perspective; in addition, competitive pressure would be exerted on the commissions demanded by the hotel portals.

(199) Thus, it is also impossible to say why – as Booking contends – the hotels’ own online marketing is supposedly of only minor, negligible significance; if this were true, Booking could have deleted the best price clauses entirely, instead of reducing them to narrow best price clauses as of July 1, 2015.

(200) In the final analysis, the mechanisms set in motion by the narrow best price clauses thus give rise to a situation in which price differentiation by hotel companies with respect to marketing via different hotels portals is not happening and will not happen to an extent relevant to the market situation. Booking itself has in fact indirectly confirmed this finding through its reaction to the general statutory ban on best price clauses in France, by predicting that price competition would be *increased* by the elimination of best price clauses there.²⁷⁵

(201) Against this background, Booking’s submission that the hotel companies, were the narrow best price clauses to continue to apply, had significant incentives to reduce their room rates on those hotel portals that reduced their commissions in return is unconvincing, see under (aa), nor is it the case according to the findings reached that the majority of hotel companies in Germany – as Booking believes – place different prices on different hotel portals in practice, see under (bb). Ultimately, it can also be left open whether there are in practice individual hotel companies that set higher prices on the hotel’s websites than on hotel portals, see under (cc).

(aa) Supposedly theoretically demonstrable incentives to reduce the hotel room prices on hotel portals in return for commission reductions

²⁷⁵ See <http://www.tendancehotellerie.fr/articles-breves/communiquede-presse/4947-article/booking-com-predit-une-guerre-des-prix-exacerbee-avec-la-fin-de-la-parite-tarifaire>: “Press release: Booking.com predicts a ‘heightened price war’ with the end of price parity.”

- (202) Booking's argument on the basis of economic modeling²⁷⁶ that in a world with narrow best price clauses, hotel companies would have a significant incentive to reduce their room rates on those hotel portals that are willing to reduce their commissions in return, is unpersuasive.²⁷⁷ This is partly due to methodological aspects of this study; the modeling relied on by Booking does not map essential aspects of the relevant market, so that accurate conclusions can scarcely be drawn from it. In addition, the conclusions drawn by Booking from the model are in contradiction with the available evidence.
- (203) The essential aspects of the market concerned are primarily not depicted in the modeling because the incentives are only ever assessed in isolation for one hotel and one hotel portal in each case; the reactions of the other hotel portals to an isolated reduction in prices and the possibility of further reactions of the hotel, other hotels and possibly the hotel portals are disregarded.²⁷⁸ Thus, the depiction of any competitive interaction between the actors under consideration continues to be excluded. In the reality of the market considered here, it is to be assumed that the hotel portals observe one another and are capable of reacting to competitive advances of a single portal and will indeed do so; consequently, they are bound by mutual reactions.²⁷⁹
- (204) Moreover, not only the present investigation results, but also economic rationality indicate that in reality, such isolated price reductions do not regularly occur. The hotels surveyed by the Bundeskartellamt have repeatedly stated that they would not permanently undercut the prices on their own website on any of the hotel portals. They explain this with reputational effects vis-à-vis their customers and the lower costs of their own website as a sales channel.²⁸⁰ Furthermore, such an isolated price reduction would regularly fail not only due to the unwillingness of the hotel, but the other hotel portals would typically not accept such an isolated price reduction on another portal without reacting.

²⁷⁶ RBB Economics expert opinion "Modelling the consequences of eliminating additional parity clauses on competition for commissions among hotel reservation portals in Germany" of May 18, 2015 (page 3,158 et seqq. of the file).

²⁷⁷ Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 2.9 with reference to the RBB opinion of May 18, 2015; see also Booking brief of May 19, 2015 on accepting commitments, margin no. 104.

²⁷⁸ Another shortcoming of the modeling of RBB Economics is the failure to take account of costs on the part of hotel portals. In this respect, the marginal costs are relevant to the pricing, i.e. those costs that are added with an additional booking. The model includes on the one hand the commissions of the portals – in the amount of 14.4% in the initial constellation for all portals – which are to be borne by the hotel as costs and reduce its profit. Marginal costs for their own online direct sales in the amount of 5% of sales are also included for the hotel, which also reduce its profit. By contrast, in the model, no marginal costs whatsoever are incurred at the portals for the brokerage of bookings. This represents an inconsistency and will likely skew the results insofar as the incentives of the portals to reduce their commissions in exchange for price reductions of hotels are exaggerated in the model framework of RBB Economics.

²⁷⁹ Hotel portals utilize the market transparency created by metasearch engines (see also Exhibit QE 66 to Booking brief of November 30, 2015). Furthermore, they monitor and control the pricing behavior of their hotel partners (see above margin no. 22 et seqq.).

²⁸⁰ See result of the hotel survey, see for more details, page 1 et seqq. of the file "Hotel questionnaire June 2015."

(205) To the extent Booking concludes from this model that without best price clauses, the hotels could have an incentive to raise prices on the hotel portals and leave them at the current level on their own website, the shortcomings of a model with only *one* hotel and multiple unresponsive hotel portals is especially manifest:

- If the hotel were to increase its prices on one portal or on all of the portals so significantly that no further bookings were carried out via this portal or these portals, these portals would have an incentive to set their commission lower than the marginal costs of the hotel's own sales to generate revenue at all. There is thus a possibility of reaction of the portals already within the model.
- However, because the hotel is in competition with other hotels and at the same time must assume that it will not be able to guide all portal customers to its site,²⁸¹ it will scarcely choose to act in this manner simply because it would be likely to lose the portal customers to a competitor hotel. In this more realistic scenario, there are credible limits to a price increase of the hotel.

(bb) Supposedly widespread practice of price differentiation on various hotel portals

(206) Nor is Booking's factual submission that the majority of hotel companies in Germany utilize the narrow best price clauses in practice to actually place differing prices on different hotel portals comprehensible.

(207) Firstly, such a claim is lacking any factual basis. In particular, there are doubts as to the database from which Booking derives its assertion. It involves a vague mixture of data supplied by two metasearch engines (TripAdvisor²⁸² and Kayak²⁸³), to both of which Booking has a special relationships, without Booking disclosing this or explaining it in detail. Secondly, the criteria by which the approximately 4,000 hotels were actually chosen by Booking are not explained. Nor is it apparent how it was ensured during the study that prices for similar services were actually compared; namely additional services (Wi-Fi, breakfast, cancellation options, etc.) or additional costs (such as taxes) are frequently not or not correctly reported in metasearch engines. In addition, it was obviously not taken into consideration that the hotel portals – as the Bundeskartellamt has observed for instance in the case of Expedia – sometimes carry out commission splitting²⁸⁴ in order to be more attractive to the end customer. Different prices on the

²⁸¹ It is not without reason that the hotel's sales are not part of the hotel portal market; see above margin no. 135 et seqq.

²⁸² At TripAdvisor, special conditions likely apply for Booking; thus, Booking, according to Intervening Party 3, has stipulated exclusivity in the business model – direct booking with TripAdvisor – at least in the United States; according to this information, Booking is not yet practically represented in Germany on the direct connection tool. See opinion of Intervening Party 3 of December 14, 2015 (page 5,251 et seqq. of the file), p. 5.

²⁸³ Kayak is a subsidiary of Booking and the “hotels only prices” used for comparison come from packaged tours; in these cases, the rooms are therefore generally cheaper according to Intervening Party 3. See opinion of Intervening Party 3 of December 14, 2015, p. 5.

²⁸⁴ With commission splitting, the hotel portal shares its commission with the end customer, resulting in a lower hotel price for the end customer.

hotel portals in these cases are not due to a differentiated pricing strategy of the hotel companies, but rather the promotional activities of the hotel portals at their own expense. Although the practice of splitting commissions is readily admissible under antitrust law, it nonetheless distorts the representation within the framework of the empirical study conducted by Booking. Finally, the empirical study submitted by Booking entirely lacks a comparison of the state prior to July 1, 2015 (applicability of the wide best price clauses) and thereafter (change to narrow best price clauses).²⁸⁵ Consequently, it may well be the case that the observations cited by Booking correspond to a practice that cannot specifically be causally attributed to the application of the narrow best price clauses.

- (208) Regardless, the conclusions drawn by Booking could only rebut the findings of the Bundeskartellamt if the corresponding prices on the hotel's website had been evaluated. Booking does not set forth any of this, wherefore the study submitted is methodologically flawed and leads to unusable results.
- (209) Nonetheless, even the Bundeskartellamt believes that some hotel companies in Germany now occasionally carry out price differentiation on the three major hotel portals. But this alone does not lead to the conclusion – as Booking argues – that this would apply to the “majority” of hotel companies operating in Germany. Despite this, in making its corresponding allegations, Booking asserts the representative nature of its own findings while disregarding the methodological shortcomings identified above.
- (210) To the extent price differentiations of hotel companies in the distribution across different hotel portals actually occur, this is likely to be due to the fact that hotels in Germany no longer all feel bound to the best price clauses of the hotel portals and consequently autonomously determine prices on their own website as well. There are three relevant factors here. First, the Bundeskartellamt's decision in the HRS case, which has now become legally binding (after confirmation by the Düsseldorf Higher Regional Court), will likely have had an impact in this regard, as it banned the best price clauses used by HRS; subsequent thereto, HRS, as currently the second largest hotel portal in Germany, may no longer demand corresponding behavior from the hotel companies. Second, the conduct of Booking in the administrative proceedings of the Bundeskartellamt concluded by the present decision will likely have played a role in this regard; Booking had declared an enforcement waiver with respect to the best price clauses – at least to the Bundeskartellamt; the actual conduct of Booking on the market – in other words the failure to enforce these clauses – will likely have encouraged some hotel companies to try a price differentiation on the hotel portals in individual cases. Third, there is a certain expectation in the market associated with the continuation of the proceedings against Booking that the Bundeskartellamt will also prohibit the best price clauses used by Booking. This was also demonstrated by the investigation of the Bundeskartellamt in the context of the hotel survey of

²⁸⁵ A true comparison of market outcomes would actually require a comparison with the situation prior to the HRS decision of the Bundeskartellamt.

June 10, 2015.²⁸⁶ As a result, the incentives for hotel companies to differentiate their rates on the hotel portals only increase – as has already been pointed out – through the free pricing on the hotel owned online channels, because the hotel can only defend against the cannibalization of the hotel's own online channels by means of free pricing. In a regime of continued best price clauses only a smaller number of hotel companies will take the liberty of not always complying with the relevant obligations though.

(cc) Alleged widespread practice of setting higher prices on the hotel's websites

(211) The fact that there may indeed currently be individual hotel companies – as argued by Booking – which place higher prices in practice on their own website than on hotel portals – regardless of the economic reasons – does not contravene the above finding. General experience shows that it must be expected that in view of the large number of hotel companies in Germany, there will also be outliers in respect of a rational corporate pricing strategy.

(212) The relevant allegations by Booking may therefore ultimately be left unanswered. Nevertheless, it should be noted that also in the derivation of the relevant factual allegations by Booking, significant methodological flaws occurred.²⁸⁷ Some of the hotel companies are accounted for twice. In addition, the cases studied were clearly selected arbitrarily. Nor are the results surprising; it is known that specifically small and medium hotel operators in practice, time and again, do not or cannot immediately transfer a price reduction for a specific room offer on a hotel portal – for instance on the same night – to the hotel's website. Not all small and medium enterprises maintain their websites continuously; many hotel operators are unable to assign trained personnel specifically to channel management; in addition, even with correspondingly trained personnel, mistakes or transmission errors can always occur. It is significant that in Booking's study, the major hotel chains were specifically disregarded. For the larger hotel chains with a well-functioning channel management, Booking would likely have determined that they are practically never more expensive on their own websites than on the hotel portals. Moreover, in this study as well, identical services were not compared with each other (rooms with or without breakfast, Wi-Fi etc.).

(b) Limited incentives for the hotel portals to charge lower commissions or offer better terms

(213) The best price clauses used by Booking also restrict competition on the hotel portal market in that they – again, compared with the situation without best price clauses – reduce the incentives for the hotel portals to lower the commissions that they demand from their hotel partners or to offer them better terms.

²⁸⁶ See result of the hotel survey, page 1 et seqq. of the file "Hotel questionnaire June 2015."

²⁸⁷ See also opinion of Intervening Party 3 of December 14, 2015, p. 2 et seqq.

- (214) The intensity of competition on prices and terms among the hotel portals in recent years has been very weak despite the significant increase in the volume (in terms of value) of the hotel portal market.²⁸⁸ Competition among the hotel portals assumes the form of competition for commissions for the brokerage service in particular; other aspects that play a role relevant to competition include the attractiveness and user friendliness of the portal and the related customer accessibility and conversion rates (booking rates).²⁸⁹ The relatively high standard commissions charged by the important hotel portals in Germany – in the case of Booking [10 to 15]% of the room price²⁹⁰ – have nevertheless remained steady in recent years or have even risen by way of tiered commissions – in the case of Booking to as much as [30 to 50]% of the room price in individual cases;²⁹¹ the Düsseldorf Higher Regional Court has found the long-term immobility of levels of commission rates to be proof of the anti-competitive effects of the best price clauses under review.²⁹² The (wide) best price clauses previously used by HRS thus undermined the incentive for offering hotel companies lower brokerage commissions in exchange for being able to offer hotel rooms at better prices and on better terms on their portal.²⁹³
- (215) This finding is not changed fundamentally by the reduction of the wide best price clauses to narrow best price clauses by Booking as of July 1, 2015. As shown above,²⁹⁴ the hotel companies will not exercise the price differentiation latitude that they have now been formally granted with respect to different hotel portals to such an extent that relevant movement in the market would occur that could cause the hotel portals to engage in effective competition over their commission levels. As the experience from recent years as discussed above shows, without such price differentiation behavior by the hotel companies, under the current circumstances there is also hardly any serious incentive for the hotel portals to consider lowering their commissions. It can be said with sufficient probability that this situation would be different if at least the three key hotel portals in Germany were no longer to use (wide or narrow) best price clauses.
- (216) The resulting limitation of the hotel portals' incentives to offer the hotel companies lower commissions or better terms also has a reinforcing (feedback) effect on the anti-competitive effects of the narrow best price clauses described in (a) above; in other words, insufficient competition on prices or terms among the hotel portals further reduces the hotel companies' already weak incentives (owing to the narrow best price clauses) to differentiate prices in marketing their rooms via these same hotel portals.

²⁸⁸ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 94 et seq., 107.

²⁸⁹ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 103.

²⁹⁰ See page 13 of the file "Questionnaire competitors 2014."

²⁹¹ E-mail from the German Hotel Association dated September 28, 2015, page 4,164 et seqq. of the file.

²⁹² Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 107.

²⁹³ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 100.

²⁹⁴ See margin no. 192 et seqq. above.

(c) Increased restraints on competition through clauses on minimum availability and best price guarantee

- (217) The described anti-competitive mechanisms resulting from the narrow best price clauses are accompanied and strengthened by the supplementary clauses on minimum availability and by the best price guarantee declared to the end customer.
- (218) According to the minimum availability clauses that were also revised as of July 1, 2015, the hotel is – unlike under the wide best price clauses – no longer obligated to offer all available rooms displayed on other distribution channels also on the Booking platform. Under the minimum quota clauses introduced since July 1, 2015, however, Booking can demand that its hotel partners make a minimum number of rooms available for booking purposes²⁹⁵ or at least encourage them to grant it availability *at all times*.²⁹⁶ This applies especially to the “Preferred Partners,”²⁹⁷ which must provide Booking a certain quota of all rooms and room categories *at all times* (depending on availability). Under these clauses, therefore, the hotel company is obligated to make at least one room from each room category available via Booking *at all times*. Ultimately this means in turn that the narrow best price clauses have their effect at all times and for rooms in all categories. Without this new availability clause since July 1, 2015, the hotels could at least temporarily organize their online marketing in disregard of Booking’s narrow best price clauses. Thus, the rules on minimum availability strengthen the effects of the narrow best price clause.
- (219) This also applies to the best price guarantee that Booking offers its customers. With this guarantee that it provides on its website,²⁹⁸ Booking states that if a customer finds a lower price that is still available for an equivalent room in the same hotel, it will make up the difference between Booking’s price and the lower price. Under antitrust law, there is nothing that precludes Booking from splitting part of the commission it receives for booking a room with the end customer (commission splitting).²⁹⁹ However, the public announcement made by Booking, which is currently the most important hotel booking portal in Germany by far, that it would match any lower online price creates a risk for a cheaper competitor booking portal, which has lowered its commission in the expectation of lower room rates, that it will ultimately not generate any earnings. Therefore, in the present constellation, the best price guarantee offered by Booking reinforces the competition-restraining effect of the narrow best price clauses because it thus additionally decreases the incentive for this type of competitive behavior.

²⁹⁵ See section 2.2.2 of the Booking General Terms and Conditions of Business.

²⁹⁶ See section 2.2.5 of the Booking General Terms and Conditions of Business.

²⁹⁷ Booking itself underscores the significance of the Preferred Partner Program by advertising that 70% of its portal bookings are with its Preferred Partners (see e-mail from German Hotel Association dated July 17, 2014, page 1507 et seq. of the file).

²⁹⁸ See http://www.booking.com/general.de.html?aid=397599;label=gog235jc-index-de-XX-XX-unspec-de-com-L%3Ade-O%Aunk-B%3Aunk-N%3AAXX-S%3Abo-U%3Ac;sid=4542270eb8ba04c12698ad1cf46ec26f;dcid=4;tmpl=doc/rate_guarantee;openinfo=1

²⁹⁹ European Court of Justice (*EUGH*), October 1, 1987, Case 311/85 – *Vlaamse Reisbureaus*; Munich Higher Regional Court, January 27, 2005, Case 29 W 1400/04.

(d) Effects of market foreclosure

- (220) The narrow best price clauses also result in effects that partition the market, as they make market entry more difficult for new hotel booking portals.
- (221) On the one hand, a successful market entry by a new hotel booking portal depends on whether it is successful to an adequate extent in attracting hotels that want to have a presence on the booking portal. On the other hand, however, it depends on whether, as a result of its attractive offerings, the new hotel booking portal is successful in steering a sufficient number of end customers to its website and motivating them to book hotel rooms – and the findings of the Düsseldorf Higher Regional Court³⁰⁰ agree with this statement. In addition to the recognition factor of the brand and the user friendliness of the website, the price at which the booking portal offers the hotel rooms to the end customer is – as previously set forth – of primary importance for successful facilitation of hotel bookings. If, however, the newcomer does not have sufficient possibilities to offer rooms at lower prices than those hotel booking portals, which are already established on the market and are well-known to end customers, gaining market share at the expense of its competitors and thus achieving a successful market entry are made significantly more difficult.
- (222) As the hotel enterprises, which are subject to Booking's narrow best price clauses, will, as previously shown,³⁰¹ hardly take advantage of the differential pricing margins, which were formally granted to them, in actual practice, potential newcomers, however, can also only take very limited advantage of this, if at all. Even if some hotel enterprises should utilize the opportunities for differential pricing given to them, this would – for the reasons previously set forth – very probably remain an individual exception in the overall range of offerings by this type of newcomer. If, however, most of the offerings on the booking portal are not less expensive than on the established ones, it is difficult for the newcomer to attract potential customers successfully due to its limited reach. This effect is further reinforced by the best price guarantee³⁰² promised to their customers by established hotel booking portals. The chances of a successful market entry are therefore commensurately low, and market entry barriers remain high. Sometimes due to the reduction of wide best price clauses to narrow best price clauses, there is insofar no significant improvement in everyday practice.
- (223) De facto – based alone on the hitherto applicable wide best price clauses – there have not been any serious newcomers on the hotel booking portal market in years. It remains to be seen if and to what extent the direct booking of hotel rooms particularly via Google or TripAdvisor,³⁰³ which began in the USA, will spread to Europe and Germany; insofar, one need not address the question at this time of whether such offerings should be considered part of the market relevant

³⁰⁰ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 110.

³⁰¹ See margin no. 192 et seqq. above.

³⁰² See margin no. 217 et seqq. above.

³⁰³ See www.fvw.de/hotelfinder-direkt-bei-google-buchen/393/145474/11178

for Europe. Furthermore, there are currently no indications that any newcomers intend to enter into the hotel booking portal market in the foreseeable future. The increasing concentration on the hotel booking portal market observed in recent years, which has resulted in growing market share for the large providers – particularly Booking – and decreasing market share for the smaller providers and the takeover of some smaller providers, such as Ebookers by Expedia and Hotels Now by HRS, also speaks against it. JustBook, the new market participant³⁰⁴ mentioned by Booking, still has a very small market share³⁰⁵ and was taken over by Secret Escapes (booking portal for closed user groups)³⁰⁶ in early 2014; recently, Google acquired a majority stake in Secret Escape.³⁰⁷ To the extent that Booking is referencing market innovations in the form of heavily discounted last-minute offers on hotel rooms that can be facilitated via mobile devices,³⁰⁸ this is a niche product.³⁰⁹

b) Restraints on competition on the market for hotel rooms

(224) Contrary to Booking's remarks (see bb. below), in the opinion of the Bundeskartellamt, the narrow best price clauses – based on the general standards set forth by the Düsseldorf Higher Regional Court in the HRS case (see aa. below) – also resulted in restraints on competition on the market for hotel rooms (see cc. below).

aa) Findings of the Düsseldorf Higher Regional Court

(225) In its HRS decision, the Düsseldorf Higher Regional Court³¹⁰ confirmed the opinion of the Bundeskartellamt³¹¹ that the wide best price clauses that were at issue in that proceeding not only result in restraints on competition on the hotel booking portal market, but at the same time must also be categorized as a restraint on competition on the market for hotel rooms in accordance with section 1 GWB and Article 101 (1) TFEU.

(226) The Higher Regional Court based its reasoning primarily on the fact that a hotel enterprise that is bound by best price clauses cannot offer lower or cheaper room rates in its own marketing than the hotel booking portal applying the best price clauses.³¹² As a result of the best price clauses, hotel customers were deprived of the opportunity to obtain a cheaper room rate for the same hotel room via other marketing channels; this restrained the competitive relationship between the

³⁰⁴ Booking brief dated April 29, 2014, margin no. 164.

³⁰⁵ See margin no. 243 below.

³⁰⁶ See <http://www.gruenderszene.de/allgemein/justbook-stefan-menden-startup-helden?ref=gs111>; JustBook continues to facilitate the booking of hotel rooms using its app.

³⁰⁷ See <http://www.morgenpost.de/berlin-aktuell/startup/article205510267/Google-investiert-in-Luxusreisen-Startup-Secret-Escapes.html>

³⁰⁸ Booking brief dated April 29, 2014, margin no. 165.

³⁰⁹ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 114.

³¹⁰ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no., 124 et seqq.

³¹¹ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 164 et seqq.

³¹² Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 125.

various marketing channels (hotel's own direct sales with direct booking and third-party sales that facilitate hotel room booking through booking portals).³¹³

bb) Booking's arguments

(227) In Booking's opinion,³¹⁴ price competition between hotel enterprises is not impaired by the narrow best price clauses, as hotel operators were not being prevented from determining their room rates themselves. Not every contractual restriction of conduct has the effect of restricting competition.³¹⁵ The price competition between hotel companies does not primarily take place via the hotel's websites anyway,³¹⁶ but rather via the hotel portals.³¹⁷ In the offline segment, there is complete freedom to determine prices independently; this includes but is not limited to all offline sales channels, for example, at the hotel reception desk, when contacting the hotel by phone/e-mail, or through a travel agent. Furthermore, the hotel enterprises could bilaterally offer special prices to more precisely defined customer groups.³¹⁸ There were also exceptions, according to Booking, from the area that the narrow best price clauses apply to with regard to closed user groups (with password-protected user account and access to special offers and discounts).³¹⁹ All this ultimately even enhances the competition between hotel companies.³²⁰

(228) In view of this fact, Booking maintains that a distortion of competition between the hotel enterprises for the best prices for equivalent rooms could be ruled out. Rather, the hotel operators were able to effectively counteract increases in the commission of the hotel booking portals, as they could at any time put a stop to sales via individual booking portals, and hotel customers could at any time easily switch between the various online sales channels.³²¹ In any case, any competition-restraining effects of the narrow best price clauses were compensated by the hotels' new latitude in the sector of offline sales,³²² so that ultimately a restraint on competition could not be assumed. Without the narrow best price clauses, there might even be incentives for hotel companies to raise prices on the hotel portals.³²³

cc) Legal analysis by the Bundeskartellamt

³¹³ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS margin no. 131.

³¹⁴ Booking brief dated April 29, 2014, margin no. 174 et seq.

³¹⁵ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.99 et seqq.

³¹⁶ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.114 et seqq.

³¹⁷ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.125 et seqq.

³¹⁸ Booking brief dated May 19, 2015 on the acceptance of commitments, margin no. 106.

³¹⁹ Booking brief dated April 29, 2014, margin no. 182 et seqq.; Booking brief dated May 22, 2014 (page 1,617 of the file), margin no. 9 et seqq.; Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 2.133 et seqq.

³²⁰ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 1.9 et seqq. as well as 2.101 et seqq.

³²¹ Booking brief dated April 29, 2014, margin no. 168 et seqq.

³²² Booking brief dated May 19, 2015 on the acceptance of commitments, margin no. 106.

³²³ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 2.107 et seqq.

- (229) With regard to the general review criteria for the finding of a restraint on competition and regarding the scope of the investigation and the usefulness of the investigation results, we refer to what has been set forth above³²⁴ in order to avoid repetition.
- (230) The competition-restraining effect of Booking's narrow best price clauses is also derived from the fact that these clauses can directly restrict the freedom of the affected hotel enterprises to set prices on those sales channels, where they may not offer their rooms at more favorable prices and terms than on Booking's hotel booking portal due to the clauses, in other words, primarily on the hotel's own websites, but also on other online sales channels. While the hotel enterprise may continue to determine the room rate on Booking's portal themselves, it is denied important opportunities for differential pricing.
- (231) This results in a restraint on competition between the hotel enterprises for the best prices for equivalent rooms, as the hotel that is committed to the narrow best price clauses may not offer cheaper room rates itself in its own direct online sales than via Booking's portal. As previously set forth,³²⁵ this results in the circumstance that the incentive for hotels to vary their prices between hotel booking portals is just as low as the incentive of the hotel booking portals to offer lower agency commissions. Thus, Booking's best price clauses largely disable the price as a competition parameter between hotel booking portals and direct online sales by hotels. As a result, possible price reductions that benefit the customer do not materialize, as is the case for pricing strategies in the form of lower prices, e.g., for certain days or periods.³²⁶
- (232) In this way, the competition between hotels for the sale of different hotel rooms is also affected. As soon as there are incentives – once the (narrow) best price clauses have been discontinued – for the hotel enterprises to offer lower room rates, for example in their own direct online sales, than via hotel booking portals, this also benefits the competition on price between hotel enterprises with regard to the sale of their rooms to the end customer. However, as long as the narrow best price clauses are applied, this additional motivation for competition on price between hotel enterprises is absent.
- (233) Contrary to Booking's viewpoint, many German hotel enterprises are also interested in differential pricing across different sales channels; such differential pricing is not categorized by hotels as inefficient per se or as associated with excessively high administrative effort. This becomes clear not just from general life experience and from the arguments of Intervening Party 3, but is also unambiguously clear from the survey of hotel enterprises in June 2015.³²⁷
- (234) In this survey, a significant majority of hotels stated that they highly value their power to set prices, which they view as the entrepreneurial counterpart of the risk of non- or under-utilization of

³²⁴ See margin no. 179 et seqq. above.

³²⁵ See margin no. 192 et seqq. above.

³²⁶ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 125 et seqq.

³²⁷ See page 16 et seqq. of the file "Questionnaire hotels June 2015."

their hotel operations that is borne by them alone and not, for example, by a hotel booking portal such as Booking. The great majority of the surveyed hotels see this power to set prices as having been curtailed in an objectively unjustified manner both by the wide best price clauses used by Booking prior to July 1, 2015 and the narrow best price clauses, which have since been converted. Hotel enterprises insist on their freedom to determine the prices for the hotel rooms they offer at their own entrepreneurial risk on various sales channels and to be able to differentiate them without being prevented from doing so by the best price clauses used by Booking or other hotel booking portals on a more or less broad-based basis. The plausible interest in differential pricing on the part of hotels should, by the way, continue to increase if the number of bookings via hotel booking portals continues to rise compared to other sales channels and at the same time, the commission rate remains at the hitherto high level or climbs even further. The hotel can create incentives by way of differential pricing so that end customers turn to a cheaper sales channel.

- (235) The exception stipulated by Booking of the application area of the narrow best price clauses with reference to closed user groups also cannot mitigate their competition-restraining effects. After all, hotel enterprises may not³²⁸ market the room rates offered to their closed user group online. In this way, Booking curtails the price transparency on the Internet and again restrains price competition that would be at least theoretically possible. The small and mid-size hotels surveyed by the Bundeskartellamt also emphasized that closed user groups are of practically no commercial interest due to the associated effort.³²⁹ Small and mid-size hotels, however, belong to the largest group of hotel enterprises in Germany by far and have a significant impact on the hotel market in Germany.
- (236) Otherwise – contrary to what Booking would like to suggest – existing restraints on competition (here by way of the narrow best price clauses) cannot be “compensated” by the fact that elsewhere additional, previously applied restraints on competition (in the form of the wide best price clauses that have in the meantime been discontinued) have been more or less voluntarily eschewed. This does not represent compensation for restraints on competition in the sense of neutralization but only represents a reduction of the scope of the effected restraint on competition. Solely the present prohibition of the application of the (narrow) best price clauses results in the restraints on competition, which are still being effected, being discontinued and the full differential pricing margins being opened up for hotel enterprises for the first time. As they no longer have to set the same high prices on their own online sales channels in the future as on Booking’s hotel booking portal, the differential pricing strategy of these hotel enterprises, which could, for example, be based on sales figures or commission rates relative to a specific booking portal, could pay off for the first time. This will have positive effects – at least potentially on the

³²⁸ See section 2.2.1, second paragraph of the Booking General Terms and Conditions of Business.

³²⁹ See page 16 et seqq. of the file “Questionnaire hotels June 2015.”

competition between hotel booking portals by increasing the incentive to grant more favorable commission rates and terms.

c) Amplification of the identified competition-restraining effects by the application of best price clauses by other hotel booking portals

(237) The competition-restraining effect of Booking's narrow best price clauses on competition between hotel booking portals and on competition between hotel enterprises (market for hotel rooms) is amplified by the application of best price clauses by other hotel booking portals.

(238) Insofar, however, it must in fact be taken into consideration that, in the meantime, HRS is prevented from applying its old best price clauses due to the legally valid, definitive order by the Bundeskartellamt. Today, therefore, the best price clauses used by HRS up to the enactment of the prohibition decision (December 2013) can no longer amplify the competition-restraining effects of Booking's narrow best price clauses. With regard to legal considerations, it should, however, be argued that a market participant such as Booking would profit from the enforcement of standard-compliant behavior against a competitor such as HRS because the imbalance that has occurred on the market, which was caused specifically but not exclusively by the inadequate willingness on the part of other hotel booking portals to comply with the decisions of the Bundeskartellamt and the Düsseldorf Higher Regional Court in the HRS proceeding and to translate them to their own contractual clauses – in the sense of removing the best price clauses from their contracts without any further measures by authorities – would be perpetuated to the detriment of HRS.

(239) This legal question can, however, remain unanswered for two reasons. Firstly, at least Expedia, which is still one of the three most important hotel booking portals in Germany, continues to apply narrow best price clauses. It is true that Expedia has not changed its Terms and Conditions, which contain wide best price clauses; Expedia has, however, waived the enforcement of the wide best price clauses vis-à-vis its hotel partners; according to Expedia, this waiver has been in effect since August 1, 2015.³³⁰ In this way, Expedia is now de facto applying narrow best price clauses, the content of which now corresponds to those set by Booking; these best price clauses used by Expedia have a cumulative effect that amplifies the competition-restraining effects of Booking's narrow best price clauses that are at issue in this proceeding; it is true that Expedia's market share is significantly smaller than that of Booking; the cumulative effect is nonetheless appreciable and is thus relevant in the present context. Secondly, the prohibition of best price clauses by other hotel booking portals can at best cause their amplifying effect on the competition-restraining effects of the best price clauses at issue in this proceeding to be eliminated. This remains valid nonetheless for the identified competition-restraining effects that fulfill the prohibition even in isolation, even though they are no longer being amplified.

³³⁰ Expedia notified the Bundeskartellamt of its waiver with its letter dated August 4, 2015 and attached the appropriate declaration of waiver (sample) (page 4,003 et seqq. of the file).

(240) Furthermore, it is significant that there would be noticeable competition-restraining effects on the hotel booking portal market even if only one of the established hotel booking portals uses best price clauses. This is due not least to the fact that German hotel enterprises are in many cases listed concurrently on numerous established hotel booking portals. In this context, Booking also acknowledged that in the case of continued application of wide best price clauses by only one of the major hotel booking portals – in a hypothetical scenario – the narrow best price clauses used by the other hotel booking portals would result in “less positive” effects from a competition perspective³³¹ in other words, that the competition-restraining effect would then have more serious implications.

4. Appreciability

(241) The identified restraints on competition are also appreciable.

(242) The unwritten constituent fact of appreciability is not fulfilled if the restraint on competition only negligibly impairs market conditions due to the weak position of the participants on the relevant market. Generally, a quantitative assessment of the actual or possible effects of the agreement to be examined is made, which is carried out based on the position and importance of the participating enterprises on the market. It is primarily the market share of the participating enterprises that is relevant.³³² Furthermore, the commission’s practice and the *de minimis* notice issued by the commission³³³ are important, according to which the threshold of appreciability is a market share of 15% by at least one participant on the affected markets.³³⁴

(243) According to these standards, the narrow best price clauses used by Booking are not to be categorized as merely negligible or immaterial, but in fact, they represent an appreciable restraint on competition. Booking’s strong market position and high market share alone attest to this. After the investigation by the Bundeskartellamt, market share for 2013 was distributed as follows³³⁵:

Booking	50–55%
HRS	30–35%
Expedia	10–15%

³³¹ RBB Economics Expert Opinion “Modeling of the effects of elimination of additional parity clauses on competition for commissions between hotel booking portals in Germany (*“Modellierung der Auswirkungen der Abschaffung weiter Paritätsklauseln auf den Wettbewerb um Provisionen zwischen Hotelbuchungsportalen in Deutschland”*)” dated May 18, 2015, p. 11 et seqq.

³³² German Federal Court of Justice (BGH) WuW/E DE-R 115 (Collection of Decisions on Anti-Trust Law) – Carpartner; BGH WuW/E DE-R 289, 295 – Lottery gaming pool (*Lottospielgemeinschaft*); Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 139 with further references.

³³³ *Official Journal (ABl.)* 2001 C 368/13.

³³⁴ Item 7 b, p. 1 of the *de minimis* notice.

³³⁵ See Bundeskartellamt brief B9-66/10-B dated December 9, 2014, included in the file in the form of a copy, page 4,176 et seqq., 4,182, confirmed by the Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 141 et seqq.

Lastminute	0–5%
Ehotel	0–5%
Unister	0–5%
Ebookers	0–5%
Other	around 5%

(244) Considering Booking's market share that has been growing for years, there are currently no indications that Booking's market share could have fallen (significantly) in 2014. Rather, the development of the past years has shown that Booking was able to profit from growing earnings on the hotel booking portal market to a much greater extent than its competitors. Therefore, it is more likely that there are indications that Booking's market share has even increased further.

VII. No exemption under section 2 (1) Vertical BER

(245) Under sec. 2 (1) Vertical BER,³³⁶ the best price clauses used by Booking are not exempt from the prohibition under Article 101 (1) TFEU and section 1 GWB.

(246) It is already questionable if Vertical BER is even applicable to the activities of hotel booking portals in their present constellation; the Düsseldorf Higher Regional Court has expressly called this into question (see 1. below); if Vertical BER were nonetheless applicable on its merits, as Booking maintains (see 2. below), then Booking could meanwhile not invoke their privileged effect (see 3. below) based on their high market share alone.

1. Findings of the Düsseldorf Higher Regional Court

(247) The Düsseldorf Higher Regional Court³³⁷ has expressly called into question whether best price clauses of the present type used by hotel portals are to be even regarded as agreements within the meaning of Article 1 (1) (a) Vertical-BER and therefore fall within the scope of application of the Vertical-BER.

(248) A vertical agreement accordingly exists if it is formed between two or more companies of which each is active for the purposes of the agreement on a different level of the production or distribution chain and concerns terms under which the participating companies may order, sell, or resell goods or services. The hotel portal renders brokerage services to the hotel companies as buyers of these services so that both are active on a different level of the distribution chain and in this respect there is a vertical relationship between them. But the best price clauses govern neither the terms for ordering the intermediary services nor for the 'resale' of the services by the

³³⁶ Directive (EU) no. 330/2010 by the Commission dated April 20, 2010 regarding the application of section 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Vertical BER).

³³⁷ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 164.

hotel companies. Instead, the best price clauses primarily work to the detriment of the hotel companies with respect to the sale of their rooms. But the hotel portals acting as intermediaries – according to the Düsseldorf Higher Regional Court³³⁸ – do not have any vertical relationship with the hotels in this sales market. Lastly, the Düsseldorf Higher Regional Court was nonetheless able to leave open this question in the cited case (HRS).³³⁹

2. Argument by Booking

- (249) On the question of group exemption of the used best price clauses pursuant to the Vertical-BER, Booking argues that this is applicable on the merits in the present scenario in favor of Booking³⁴⁰ and that Booking – under the product market definition it considers correct (see above) – has only a market share of under 30%.³⁴¹
- (250) In addition, the best price clauses used by Booking did not constitute any core restriction within the meaning of Article 4 (a) Vertical-BER ;³⁴² the privileging of the conduct in question by the Vertical-BER therefore remains. The Bundeskartellamt in the present case has not withdrawn the resulting legal advantage in favor of Booking; if it had intended to do so, however, it certainly would not have been competent to do so but rather in the present case only the Commission would have been authorized.³⁴³

3. Analysis by the Bundeskartellamt

- (251) Article 2 (1) Vertical-BER does not indicate any exemption of the anti-competitive conduct in question in favor of Booking. Indeed, even if the Vertical-BER were applicable on the merits in the present scenario, an exemption would certainly not come into consideration given the high market shares of Booking.
- (252) An exemption under Article 2 Vertical-BER in any case does not apply because the market shares of Booking were (well) over 30% in 2014 and the best price clauses used by it for that very reason cannot enjoy any privilege through the group exemption. Indeed, under Article 3 (1) Vertical-BER, the exemption within the meaning of Article 2 Vertical-BER applies only if the provider's share in the relevant market in which it offers the contractual goods or services, and the share of the buyer in the relevant market in which it orders the contractual goods or services in any case are not more than 30%.³⁴⁴ Under Article 3 in conjunction with Article 7 Vertical-BER, the market share is calculated using the information for the preceding calendar year, that is to say 2014 here. The

³³⁸ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 165 et seq. with further references.

³³⁹ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 166.

³⁴⁰ Booking brief of April 29, 2014, margin no. 187 et seqq.; but left open in the later Booking brief of May 19, 2015 on acceptance of commitments, margin no. 130.

³⁴¹ Booking brief of April 29, 2014, margin no. 187 et seqq.

³⁴² Booking brief of April 29, 2014, margin no. 207 et seqq.

³⁴³ Booking brief of April 29, 2014, margin no. 217 et seqq.

³⁴⁴ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 168.

stated conditions, however, have not been recognizably satisfied in the present case even if precise figures do not yet exist for 2014; indeed, the market share of Booking as determined by revenues in the hotel portal market was well over 50% as early as 2013 with a growing trend and therefore in any case is above the threshold of 30%; this is also not seriously disputed by Booking – while adopting the market definition undertaken by the Bundeskartellamt.

(253) Therefore, the question,³⁴⁵ answered in the negative by Booking, as to whether or not the best price clauses in question are core restrictions not eligible for exemption within the meaning of Article 4 (a) Vertical-BER is irrelevant; the Bundeskartellamt further leaves open this question as previously in the HRS proceedings.³⁴⁶

VIII. No individual exemption under Section 2 GWB or Article 101 (3) TFEU

(254) The prerequisite conditions for an individual exemption under section 2 GWB or Article 101 (3) TFEU have also not been satisfied in the present case. For individual exemption under these provisions, two positive and two negative conditions must be satisfied: first, in the positive sense a) a contribution to the improvement of the generating or distributing of goods or the promotion of the technical or economic progress must be provided and b) a reasonable participation by the consumers in the resulting gain must be guaranteed; second – in the negative sense – c) the imposed competitive restrictions must be indispensable and d) competition may not be excluded for a substantial portion of the relevant goods.

(255) With respect to application of the correct standard of review – the comparison to a hotel room distribution through hotel portals without best price clauses – the best price clauses of Booking do not result in improving the generating or distributing of goods and also do not make any contribution to promoting the technical or economic progress (see 1. below). In the present case as well, neither a reasonable consumer participation can be determined (see 2. below) nor the indispensability of the competition restriction (see 3. below). Ultimately it can be left unresolved whether the fourth exemption requirement – no exclusion of substantial competition – is satisfied (see 4. below).

1. Improving the generating or distributing of goods

a) Findings of the Düsseldorf Higher Regional Court

(256) Regarding the (wide) best price clauses used by HRS, the Düsseldorf Higher Regional Court³⁴⁷ determined that they are not exempt due to the first precondition under section 2 GWB and Article 101 (3) TFEU.

(257) The Higher Regional Court on this point states that section 2 GWB and Article 101 (3) TFEU require, beyond the feature of improving the distribution of goods, that the agreement result in

³⁴⁵ Booking brief of April 29, 2014, p. 58 et seqq.

³⁴⁶ Bundeskartellamt, December 20, 2013, B9-66/10- HRS, margin no. 181 et seqq.

³⁴⁷ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 173 et seqq.

clear efficiencies. Genuine, comprehensible, and objective advantages that can be forecast on the basis of the agreement are required. Whether advantages result is to be determined by making a comparison to the condition that existed or would exist without the relevant anti-competitive agreement. Here, the advantages resulting from the agreement must be greater than the disadvantages resulting from it in order to be able to represent an advantage within the meaning of section 2 GWB or Article 101 (3) TFEU. The onus of demonstration and substantive burden of proof for the efficiency gains pursuant to Article 2 sentence 2 Directive 1/2003 falls on the companies that invoke the exemption.³⁴⁸ The Düsseldorf Higher Regional Court in its HRS decision has not commented on the remaining individual exemption conditions.

b) Argument by Booking

(258) Booking argues that a variety of efficiency gains – for consumers³⁴⁹ and for hotels³⁵⁰ – derive from the narrow best price clauses applicable as of July 1, 2015, and on this point refers to the studies submitted by it³⁵¹ which, among other things, supposedly elaborate the general advantages of the hotel portals over other distribution channels.³⁵² Thus, advertising through Booking is more efficient for hotel companies, entails less risk, and is more cost effective than independent online advertising.³⁵³ The Bundeskartellamt, in contrast, fails to adequately assess the free rider issue.³⁵⁴ It is argued that without best price clauses there is the fear that the conversion rates on the hotel portals would drop and that Booking would suffer sales losses. Instead, it is argued, without the narrow best price clauses there would be more bookings on the hotels' own websites because then the hotel rooms would probably be offered at a lower price there.³⁵⁵ At the same time, the general price level of hotel rooms would rise in the event of the elimination of the narrow best price clauses.³⁵⁶ The elimination of the narrow best price clauses would at any rate result in a reduction of quality on the hotel portals, undermine their advertising efficiency³⁵⁷ and the search effort for hotel customers would increase as a result.³⁵⁸

³⁴⁸ Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 173.

³⁴⁹ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 3.8 et seqq.

³⁵⁰ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 3.26 et seqq.

³⁵¹ See Booking.com: "Efficiency gains that arise based on the proposed narrow MFN clauses in the EEA" of September 11, 2014, with Annex 1 "Response to the analysis of the Bundeskartellamt of Article 101 (3)"; and Booking.com: "Efficiency gains: proposal for a narrow MFN clause – Consumer and accommodations survey" of December 19, 2014.

³⁵² Booking brief of May 19, 2015 on the acceptance of commitments, margin no. 134 et seq.

³⁵³ Exhibit QE 65 to Booking brief of 30 November, 2015, margin no. 3.28 et seqq.

³⁵⁴ Booking brief of April 29, 2014, margin no. 220 et seqq.; Exhibit QE 65 to the Booking brief of November 30, 2015, margin no. 3.45 et seqq.

³⁵⁵ Most recently submitted in a personal meeting on December 16, 2015, see Booking presentation annexed to the transcript, slide 22.

³⁵⁶ Most recently submitted in a personal meeting on December 16, 2015, see Booking presentation annexed to the transcript, slide 14 et seqq.

³⁵⁷ Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 3.58 et seqq.; most recently submitted in a personal meeting on December 16, 2015, see Booking presentation annexed to the transcript, slide 22.

c) Analysis by the Bundeskartellamt

(259) There is no individual exemption of the narrow best price clauses used by Booking due to the first precondition of section 2 GWB and Article 101 (3) TFEU.

(260) The efficiency gains required for individual exemption with respect to the improvement of the generation or distribution of goods are not discernible; in any case, in the course of the administrative proceedings Booking has been unable to prove such efficiency gains to a sufficient extent. For instance, the cited general advantages that hotel portals bring to the hotel companies do not represent any efficiency gains resulting precisely from the narrow best price clauses within the meaning of section 2 GWB and Article 101 (3) TFEU (see aa. below); it is also not sufficiently proved that the prohibition of the narrow best price clauses would result in a relevant reduction in sales at Booking (see bb. below), the extent to which a relevant efficiency gain – in the form of avoiding the purported free rider problem (see cc. below) or as a result of reducing the search effort for the end customer (see dd. below) – would even result from this contemplation.

aa) General advantages that hotel portals bring to the hotel companies are not efficiency gains from the narrow best price clauses

(261) In the present case it is not in question that hotel portals bring certain advantages in practice to the hotel companies; this includes – even based on the pleading by Booking³⁵⁹ – for instance the bundling of advertising or a higher conversion rate than on the hotels' own websites.³⁶⁰ Booking presented the attractiveness of its portal – for hotel companies and end customers – in a comprehensive study; among other things, it cites the generating of traffic, bundling of demand, higher occupancy rates for hotels, better access of the hotel companies especially to foreign customers, scale effects in technology and customer service, reduction of search costs for end customers and transparent pricing.³⁶¹

(262) These special features of hotel portals are also recognized by the hotel companies surveyed by the Bundeskartellamt; they all appreciate the hotel portals in principle and consider the use of them for distributing their hotel rooms at least under the current market conditions in the respective distribution mix quite overwhelmingly to be absolutely necessary.³⁶²

³⁵⁸ Booking brief of May 19, 2015 on accepting commitments, margin no. 142 et seqq.; most recently submitted in a personal meeting on December 16, 2015, see Booking presentation annexed to the transcript, slide 21.

³⁵⁹ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 138 et seqq.

³⁶⁰ See GfK "Consumer and hotel survey, a methodology report created for Booking.com," October 2014 (page 1,948 et seqq. of the file). The results of the survey were presented by Booking in a summary prepared by it entitled "Efficiency gains: proposal for a narrow MFN clause – Consumer and accommodation surveys" dated December 19, 2014 (page 1,908 et seqq. of the file).

³⁶¹ See Booking.com study "Efficiency gains arising based on the proposed narrow MFN clauses in the EEA" dated September 11, 2014 (page 1,820, 1,825 et seqq. of the file).

³⁶² See page 16 et seqq. of the file "Questionnaire hotels June 2015."

(263) Regarding the advertising efficiencies cited by Booking in this context, it should be noted that these are partly perceived by the hotel companies concerned as a “forced enrichment,” which in many cases does not even work in favor of the hotel company. Thus, Booking utilizes typical keywords in many cases that are entered by customers looking to book on search engines such as Google, so-called “name grabbing.” In this context, certain search terms such as “Hotel Munich” or certain specific hotel names are combined with the corresponding location information and “bought” from Google by Booking – but also by other hotel portals – at astonishingly high prices³⁶³ in such a manner that one of the first search results to appear in the list is the link to the website of the highest paying hotel portal, but not the link to the website of the hotel company actually intended by the seeker or a link to another “neutral” source or list of pertinent hotels in a specific city. If no “name grabbing” was implemented, the generic search function – such as that of Google – would often result in a hit on the corresponding link of the hotel’s website much higher in the result list. At what point the respective hotel actually appears in the hit list on the hotel portal is extremely heterogeneously configured in the individual case and depends on the relevant ranking of the relevant hotel portal; in some cases, individual hotels are practically buried on the last spots on the list and can hardly be perceived by the customers looking to book. Consequently, it can be said that viewed objectively, hotel portals which carry out online advertising such as Booking are conducting self-promotion, but not advertising that benefits all of the listed hotel companies equally.

(264) However, the advantages of hotel portals as such within the meaning of a distribution channel are not definitive for the question of efficiency gains to be answered in the present context under section 2 GWB and Article 101 (3) TFEU, but rather those advantages that result directly from the narrow best price clauses that are the subject of the proceedings; indeed, in the present context the competition restrictions in question and therefore the relevant subject matter of the proceedings result solely from the narrow best price clauses used, not, by contrast, the existence or the other characteristics of Booking’s hotel portal.

(265) Moreover, Booking itself is also not alleging that the advantages associated with the existence and the general characteristics of the hotel portal would be lost for the hotel companies without the narrow best price clauses, for instance because Booking would have to necessarily then leave the market.

bb) No sufficient proof of any relevant decline in sales as a result of deleting the narrow best price clauses

(266) Booking is also unable to provide sufficient proof that deleting the narrow best price clauses would result in such a relevant decline in sales that as a result, by reverse logic, there would be an advantage of the narrow best price clauses in terms of an efficiency gain. In this respect, Booking merely invokes the general notion that without the narrow best price clauses there would

³⁶³ See in detail the remarks in Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 3.26 et seqq., in particular margin no. 3.37 et seqq.

presumably be losses of sales without this being more precisely demonstrated or plausibly estimated in terms of amount; it is also not further demonstrated the extent to which the current business model might have to be modified in the medium term.³⁶⁴ Finally, Booking does not comprehensibly demonstrate the extent to which the absence of any decline in sales or even changing the present business model would constitute an efficiency advantage within the meaning of section 2 GWB and Article 101 (3) TFEU.

(267) A price differentiation by hotel companies in the sense that the room prices on the hotels' own websites or on similar channels become cheaper after deleting the narrow best price clauses than on the hotel portal of Booking, in effect results in certain declines in sales at booking.³⁶⁵ However, Booking has not presented anything reliable on what the scale of any such decline in sales could be and the extent to which this would even be relevant with respect to the efficiency review decisive in the present context. The conversion rate analysis carried out by Booking for the period of February 2012³⁶⁶ is confined to the comparison of conversion rates of hotel companies that complied with best price clauses to a greater and lesser extent on the hotel portals during this period. Here it was assumed that the conversion rate is influenced only by best price clauses.³⁶⁷ It had been shown in the HRS proceedings that the conversion rates may also be substantially determined by other influential factors such as the attractiveness of the travel destinations and the hotel categories.³⁶⁸ In the Booking analysis, however, these other relevant factors were not considered; it is therefore in effect only somewhat meaningful. If, however, the extent of a decline in sales is not clear, the absence of any such decline in sales can prove possible efficiency gains only with difficulty.

cc) No sufficient proof of efficiency gains by avoiding free riding

(268) Booking also does not present persuasive arguments on possible efficiency gains through the avoidance of free riding. The core of the free rider problem according to the logic of Booking's argument is the purported risk that differences in the hotel room prices might have a negative impact on the incentives of the hotel portals to make investments that in turn positively impact their service quality and therefore could intensify the quality competition between the hotel portals. Such a negative incentive effect, based on this logic, would result if investments in the quality of the portal could be amortized only insufficiently, because – due to the lower room prices

³⁶⁴ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 177. Similarly, the German Hotel Industry commented in 2012 (<http://blog.freizeitplan.net/tag/billboardeffekt>).

³⁶⁵ Bundeskartellamt, December 20, 2013, B9-66/10-HRS, margin no. 206.

³⁶⁶ Annex 3 to the Booking brief of February 3, 2015 "Investigations by Booking.com with respect to the consequences of a violation by hotels against the parity clause on (Booking.com's) conversion rates" (page 1,900 et seqq. of the file).

³⁶⁷ See conversion rate analysis, loc. cit., p. 1.

³⁶⁸ Bundeskartellamt, December 20, 2013, B9-66/10-HRS, margin no. 210.

in the same or other distribution channels³⁶⁹ –, the larger investments would not be countered by any sufficiently high booking numbers and therefore commission income.³⁷⁰

(269) However, the free rider problem in the present context in principle can be taken into account only on a limited basis.³⁷¹ Indeed, the comments by Booking on the extent of the free rider problem cannot be persuasive; see (1) below; the purported reduction of the incentive is also not sufficiently proved for investing in the quality of the hotel portal if the narrow best price clauses are limited; see (2) below. Finally, Booking does not provide any adequate proof that the narrow best price clauses prevent free riding and as a result protect the advertising investments of Booking; see (3) below.

(1) No sufficient proof for relevant free riding

(270) Booking does not sufficiently prove that there is even a relevant free rider problem in the present context. Free riding would exist here if hotel companies by their presence on a hotel portal were to profit because they can only be found there by the end customer and then obtained direct bookings through the hotel's own website.³⁷² In this context, Booking refers to the GFK study commissioned by it³⁷³ asserting that [40-60%] of the surveyed Booking customers in Germany had booked directly on the hotel's own website if a discount of 5% had been offered there.³⁷⁴ However, this is not persuasive with respect to the efficiencies in question here.

(271) First, it is not demonstrated that these hotel customers would have even previously used the information services of the hotel portal. Customers that had already booked on the Booking portal page were surveyed. The question was whether these customers would have booked on the hotel's own website *instead* if a discount of 5% had been offered there.³⁷⁵ The customers' response therefore does not provide any information about whether they would have first become informed on the hotel portal – and not on another website – and then switched to the hotel's own website and booked there. The Internet itself, however, offers the hotel customer seeking to book

³⁶⁹ Because the end customer can arrive at a hotel room booking by various channels, the free rider problem occurs across all distribution channels; a distinction needs to be made between this and the objective market definition made in a specific case that considers the various distribution channels possibly separately.

³⁷⁰ According to margin no. 107 of the Vertical guidelines there is a "free rider problem" whenever a trader profits from the sales efforts of a different trader.

³⁷¹ Fundamentally and extensively, Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 199 et seqq.

³⁷² If bookings via the hotel's own website is in direct proportion to the presence in Booking portals, this is also covered as a so-called billboard effect. There is a study on this by Chris Anderson from 2009: "The Billboard Effect: Online Travel Agent Impact on Non-OTA Reservation Volume (<http://scholarship.sha.cornell.edu/viewcontent.cgi?article=1001&context=chrrpubs>). Since that time, the content and scope of this effect is disputed: Does the Expedia billboard effect still exist for hotels? (<http://www.tnooz.com/article/billboard-effect-hotel-exists/>). With respect to the German market, see the comments in Bundeskartellamt, December 20, 2013, 69-06/10 – HRS, margin no. 204.

³⁷³ GFK "Consumer and hotel survey, a methodology report created for Booking.com," October 2014 (page 1,948 et seqq. of the file).

³⁷⁴ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 88 et seqq.

³⁷⁵ GFK Methodology report, loc. cit. Question A 9 (page 1,948 et seqq., 1,961 of the file).

a room a number of different information sources, each of which can be easily reached with a click (such as the various meta-search engines and hotel comparison portals) and does not force this customer onto a prescribed one-dimensional information channel. Because each click on Booking increases not only the visibility of the hotels listed on the portal but also the visitor numbers in the portal (and therefore the scope), this also benefits booking. It is the responsibility of the portal to improve its attractiveness for the customer – for instance in the form of particularly easy-to-use tools or other actions – so that the customer will in fact book there.

(272) Second, the narrow best price clauses themselves aim for different distribution channels, which even in the opinion of Booking³⁷⁶ due to their various characteristics tend to be attractive for other customer groups. While hotel portals offer the customer a convenient product bundle of “searching, comparing, and booking,” hotels own websites, in any case, currently tend to be directed at customers that want to become familiar specifically with the offers of a certain hotel, for instance because they are regular customers or because they are interested in special – possibly incompatible with the portal – offers from the hotel.³⁷⁷ It is inherent in the matter that for such customers there certainly can be shifts in sales when the hotels’ own websites are cheaper in the future. Many customers typically using hotel portals, however, do not have any knowledge of any cheaper online offers on the hotel’s own websites or similar online distribution channels or they have no time to filter out such offers from the Internet. The attractiveness of hotel portals that results from the already demonstrated number of advantages is therefore not decisively narrowed in the opinion of many customers intent on booking if the narrow best price clauses are prohibited and hotel rooms consequently may be offered more cheaply through other online channels.

(2) No sufficient proof of reduced incentive to invest in the quality of the portal

(273) Even if Booking, however, suffered certain losses in sales as a result of eliminating the narrow best price clauses, it is not been sufficiently proved that the incentive for investing the quality of the portal would decline and the customer’s search effort would be increased as a result. The opposite is the case; even if the number of bookings on the portal were to drop if the narrow best price clauses were eliminated, there would be an incentive to invest in the attractiveness of the portal by further developing the portals.³⁷⁸

(274) Booking itself – by referring to the surveys and economic analyses that it commissioned³⁷⁹ – and the hotel companies surveyed by the Bundeskartellamt³⁸⁰ stress that hotel portals in the

³⁷⁶ See the RBB Economics study submitted by Booking “Modeling the consequences of eliminating further parity clauses on the competition for commissions between hotel booking portals in Germany” from May 18, 2015 (page 3,158 et seqq. of the file), p. 5.

³⁷⁷ See page 16 et seqq. of the file “Questionnaire hotels June 2015.” In effect, Booking does not contradict this either: Booking.com, Efficiency gains: Proposal for a narrow MFN clause – Consumer and accommodation surveys of December 19, 2014 (page 1,908 et seqq.), p. 9 et seqq.

³⁷⁸ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS. margin no. 181; Bundeskartellamt. December 20, 2013, B9-66/10 – HRS, margin no. 205 et seqq.

³⁷⁹ See for instance Booking.com, Efficiency gains: Proposal for a narrow MFN clause—Consumer and accommodation surveys of December 19, 2014 (page 1,908 et seqq.), p. 7 et seqq., Booking.com, The narrow

distribution mix of the hotel companies occupy a position special for them and also for the end customers which will remain independent of the expansion of other distribution channels based on their significant contribution to the hotel's occupancy rate. The higher the quality of a hotel portal (e.g. the easier it is to find a hotel searched for by the end customer according to certain criteria), the greater is its customer range and therefore the chance that bookings can be successfully concluded. If a hotel portal attracts a lot of customers, the hotels listed there conversely profit. The more users a hotel portal therefore attracts on both sides, the more attractive in turn it becomes for new users (network effect). Booking therefore has a significant incentive without narrow best price clauses to invest in the quality of its portal; Booking in any case has not sufficiently demonstrated that this would be eliminated upon deletion of the narrow best price clauses or would be significantly reduced.

(3) No sufficient proof of negative consequences of any free riding on the advertising investments

(275) The risk of reducing incentives for investments in the quality of service exists especially whenever the particular investments of a hotel portal are contract-specific and so long-term that they cannot be amortized in the short term.³⁸¹ Moreover, a free rider problem can also have a negative impact on the general incentive of the hotels to undertake non-contract-specific investments to improve the quality of service (e.g., investments in the popularity of the portal).³⁸² For these investments, the question is the extent to which they may even be worthy of protection under cartel law perspectives. In the present case, the decisive factor is the extent to which the advertising investments made by Booking (while taking into account the competition-restricting consequences of their best price clauses) nonetheless have a competition-promoting effect. But Booking has not sufficiently proved this.

(276) Already in the HRS ruling, which is now *res judicata*, the Bundeskartellamt found that the contract-specific investments³⁸³ of the relevant hotel portal, i.e., the investments that arise only on the basis of the contractual relationship with a certain hotel company and cannot be used for the distribution of accommodation services of other hotel companies, such as investments in photos and text processing, are relatively low.³⁸⁴ There are no indications that this is different for booking. To the extent that there was even a desire to acknowledge a relevant free rider problem (see above), its consequences in this respect will therefore likewise be small. Booking itself has not

MFN clause will not have the same effect as the broad MFN clause of March 3, 2015 (page 2,231 et seqq. of the file), p. 12 et seqq.

³⁸⁰ Page 16 et seqq. of the file "Questionnaire hotels June 2015."

³⁸¹ See margin no. 107 d) Vertical guidelines.

³⁸² See margin no. 107 a) Vertical guidelines.

³⁸³ According to margin no. 107 d. of the Vertical guidelines, the risk of insufficient amortizing of investments, among other things, is only specific and significant if the investment cannot otherwise be used outside of a contractual relationship.

³⁸⁴ Bundeskartellamt, December 20, 2013, B9-66/10- HRS, margin no. 199 et seqq.

submitted any arguments either on its contract-specific costs or on any negative consequence of free riders on its contract-specific costs.

(277) But Booking points out that its general advertising investments, for instance in the form of buying advertising space, of paying for a high ranking on Google or other metasearch engines or by pay-per-click payments (“PPC”) to the metasearch engines are extremely high.³⁸⁵ For instance, it states that only its pay-per-click expenses for Google and other metasearch engines in Germany constitute between [30 and 60]% of its German commission sales from bookings that result from PPC advertising for Google and other metasearch engines.³⁸⁶

(278) To the extent that Booking, by contrast, makes such general, non-contract-specific investments, they serve in particular to improve its image and increase its popularity as such. Consequently, these investments are not lost for Booking through any free riding.³⁸⁷ Precisely because the hotel companies – according to Booking’s own statement – profit from the bundling of the advertising by Booking, they adapt their offering to the portal of Booking and therefore also magnify the network effect achievable by Booking. The value of the network effect for Booking becomes clear if one remembers that the hotels – thus far – practically did not need to render any financial consideration for inclusion in the Booking system.

(279) In addition, not all general (online) advertising investment of Booking benefits the hotel companies. Instead, Booking operates with significant financial expense which ultimately comes from the commission income, the so-called “name grabbing” on Google, which makes it difficult to discover the hotel’s own website and therefore directly booked there as a result of the intermediation of the hotel portal paying for this. Booking’s assumption that “name grabbing” in any event is beneficial to the small and medium-sized hotels that do not have a sufficient advertising budget³⁸⁸ is misleading. Booking pays (such high) amounts to Google precisely to move ahead of others, i.e., in front of the very hotel company that could be further ahead in the search list without name grabbing on Google due to the general search algorithm. In this manner, it is harder for the hotel company to directly access the end customer; this reduces the hotel’s chance to obtain its own reach and therefore increases the dependency on the hotel portals and the hotel’s willingness to accept higher commission payments for bookings in order to further increase its reach.³⁸⁹ In this manner, the advertising investments made by Booking increase the commissions to be paid by the hotel companies and have a price-driving effect on the hotel room prices to the detriment of the end customers.

³⁸⁵ Booking brief of May 19, 2015 on the acceptance of commitments, margin no. 139.

³⁸⁶ Booking.com – Efficiency gains that arise based on the proposed narrow MFN clauses in the EEA of September 11, 2014, (page 1,820 et seqq.), p. 12.

³⁸⁷ See in reference to HRS: Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 204.

³⁸⁸ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 168 et seqq.

³⁸⁹ See www.so-geht-hotel-heute.com/2015/02/offener-brief-an-peter-verhoeven-booking.com (June 12, 2015).

dd) Reducing search costs for hotel customers with respect to room prices adjusted by best price clauses cannot be an efficiency gain

(280) Finally, in the present case efficiencies within the meaning of section 2 GWB or Article 101 (3) TFEU cannot result from the fact that it is especially convenient for hotel customers looking to book – as Booking³⁹⁰ analogously believes – not to have to laboriously search for the cheapest room price given the room prices adjusted due to the narrow best price clauses.

(281) If one were to push this argument to the extreme, then the most wide-ranging price agreements would also offer efficiency gains that could argue for an exemption because all effort from the price comparison would be eliminated for the end customer if prices were on an absolutely equal level; this would mean in other words elevating the core effect of the competitive violation to the efficiency advantage. Even if one wanted to recognize the relevant efficiency advantage in the price of adjustment caused by the narrow best price clauses – in any case concerning the hotel companies' own online distribution – this would not be sufficient to outweigh the demonstrated competition-restricting effects of these clauses. In contrast to what Booking suggests, many end customers want terms and price differences and do not feel that they are disadvantaged or overwhelmed by the possibilities and preferences of comparing competitive prices and terms and discovering the booking options most favorable to them.³⁹¹

2. Reasonable consumer participation

a) Argument by Booking

(282) According to Booking's argument, the consumers also reasonably participate in the efficiency gains caused by the narrow best price clauses.³⁹² The market transparency increased as a result of the narrow best price clauses is said to result in lower room prices for the hotel customers and to reduce their searching costs.³⁹³ If the narrow best price clauses are eliminated, it is argued, advertising investments for Booking would be largely without consequence. The hotel companies, it is argued, must then themselves make significant investments in advertising as a consequence, which would drive up room prices.³⁹⁴

b) Analysis by the Bundeskartellamt

(283) If, contrary to the statements above, the first exemption requirement (efficiency gains through the use of narrow best price clauses) was to be regarded as sufficiently proved, then, however, no reasonable participation of the consumers within the meaning of section 2 GWB and Article 101

³⁹⁰ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 148 et seqq.

³⁹¹ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 184.

³⁹² Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 161 et seqq.; Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 3.62 et seqq.

³⁹³ Most recently submitted in a personal meeting on December 16, 2015, see Booking presentation annexed to the transcript, slide 19.

³⁹⁴ Booking brief of May 19, 2015 on accepting commitments, margin no. 170 et seqq.; most recently submitted in a personal meeting on December 16, 2015, see Booking presentation annexed to the transcript, slide 20.

(3) TFEU would be determined in the present case; in any case, Booking has not sufficiently proved any such thing.

(284) Indeed, first, the best price clauses by their nature are not suitable to reinforce the already existing quality competition between the hotel portals and substantially increase the quality of the portal offer in this way for the benefit of the hotel customers. Second, the narrow best price clauses increase neither the market transparency nor do they reduce the searching effort for hotel customers.³⁹⁵ Contrary to Booking's opinion, there is nothing arguing for the notion that hotel portals in the absence of sufficient sales could no longer operate profitably and then only – the less convenient – metasearch engines would have to ensure market transparency.³⁹⁶ The market performance of recent years rather clearly argues the contrary.

(285) Finally, Booking also does not sufficiently prove its claim that its advertising investments are largely ineffective without the use of narrow best price clauses. To the extent that hotel companies – after the narrow best price clauses are eliminated – would be less willing to pay high commissions to hotel portals, and instead preferably make investments in their own online presence, this could also limit the high advertising outlays of the hotel portals and reduce their use of funds to efficient costs.

3. Indispensability

a) Argument by Booking

(286) To substantiate indispensability of the narrower version of the best price clause, Booking states that the – purported – efficiency gains would be significantly narrowed without the best price clause as a result of free riding,³⁹⁷ in particular the advertising employed by Booking would not stand in any secured proportion to the achievable revenues, the end customers would have to make an increased searching effort without the consumer-friendly interface of the Booking portal and their business model would be cast in doubt in the medium-term on the whole in the absence of sufficient sales. The by far largest portion of the German hotels, it is argued, stated in the GFK hotel and consumer survey commissioned by Booking, that the commission model works well for their lodging.³⁹⁸ Without the best price clause, the hotel companies could increase their prices due to the reduced price transparency to the detriment of the consumer; only the narrow best price clauses, it is argued, can prohibit this.

³⁹⁵ On broad best price clauses, see Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 226 et seq.

³⁹⁶ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 164, 166.

³⁹⁷ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 171 et seqq.

³⁹⁸ Booking refers here to the GFK hotel and accommodation survey that the large majority of surveyed accommodations ([70-90]%) had been in agreement that a commission model works well for them (Booking.com, Efficiency gains: Proposal for a narrow MFN clause – Consumer and accommodation surveys dated December 19, 2014 [page 1,908 et seqq. of the file], p. 35).

(287) In addition, no hotel booking portal, it is argued, is currently working with an alternative business model, and certainly not HRS; the references of the Bundeskartellamt to alternative business models were unrealistic, either because they were not accepted in the market per se or because they were taken from other economic segments.³⁹⁹ Although the ruling against HRS, it is argued, is now legally final and the best price clauses are prohibited there, HRS indirectly continues to profit from the fact that best price clauses still exist with respect to the other significant hotel portals, Booking and Expedia.

b) Analysis by the Bundeskartellamt

(288) To the extent that one would want to consider the first two exemption requirements as being satisfied, best price clauses in any case would not be indispensable within the meaning of section 2 GWB and Article 101 (3) TFEU.

(289) The prerequisite condition for indispensability within the meaning of section 2 GWB and Article 101 (3) TFEU would be that the competition restrictions are necessary in order to achieve the – purported – efficiency gains. Competition restrictions can be considered only indispensable if alternatives appearing less restrictive would result in significant losses of efficiency. Here, the company that wants to invoke the exemption requirement must comprehensibly and plausibly explain and prove why alternatives to the agreement appearing realistic and less competition-restricting would be significantly less efficient.⁴⁰⁰ Nonetheless, Booking is unable to do this sufficiently in the present case. The indispensability is neither sufficiently proved by the fact that the hotel portals currently stick to their business models (see aa. below), nor by the fact that all other conceivable business models are said to be purportedly less efficient (see bb. below); instead, the continuation of a commission model by Booking in principle is further possible even after prohibition of the narrow best price clauses (see cc. below); moreover, a really efficient business model will emerge only after eliminating the existing competition restrictions by best price clauses in all established hotel portals (see dd. below).

aa) No sufficient proof of indispensability of the current business model

(290) Even if none of the established hotel portals are currently working on an alternative to the commission model in its current form, this is no proof that only the current model can be economical and efficient. Instead, this suggests equally well that established hotel portals like Booking want to continuously evade the pressure of innovation by securing their advantages in the marketplace through competition-restricting interference in the pricing sovereignty of alternative distribution channels.

³⁹⁹ Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 3.66 et seqq.

⁴⁰⁰ See margin no. 75 of the guidelines of the European Commission on application of article 81 (3) EC Treaty [= Article 101 (3) TFEU], (ABl. 2004/C 101/97) margin no. 75 and Bundeskartellamt, December 20, 2013, B9-66/10-HRS. margin no. 211 et seq. with further references.

(291) The hotels surveyed by the Bundeskartellamt, too, indicate that the development of the hotel portals lacks the force of innovation.⁴⁰¹ By contrast, it cannot be conclusively cited that – according to Booking – a large part of the hotel company surveyed by the GfK advocated a commission model of the hotel portals. Indeed, the hotel companies were not asked whether they could also imagine other business models or at least an adjustment of the commission model to distribution without best price clauses. To the extent that Booking addresses the situation of HRS according to the final and definitive prohibition of the HRS best price clauses, it nonetheless fails to recognize that HRS has already taken initial actions to adjust to this.⁴⁰²

bb) No sufficient proof of the lower efficiency of all other business models

(292) Booking has also not sufficiently proved why alternatives, appearing realistic and less competition-restricting, to a business model with best price clauses would be significantly less efficient. In this respect, Booking has referred only to contemplations already cited in the past that purportedly neither cost-per-click payments nor service fees are supportable for hotels or service fees for end customers⁴⁰³ and now in addition states that the current business model – with narrow best price clauses – works well. Although Booking emphasizes that it cannot be the task of the Bundeskartellamt to develop an alternative business model for Booking,⁴⁰⁴ it has not persuasively demonstrated that alternative models would be significantly less efficient than the previously used fee model.

(293) At issue are the various alternative business models that are entirely realistic even in the present case.⁴⁰⁵ In this respect, whether these models – as suggested by Booking – have already been actually put into practice in the relevant market is not definitive but rather whether alternative business models are at least “realistic” for instance because they are practiced in similarly structured markets. This is especially true when – as is the case here – the relevant market is characterized by pre-existing competition restrictions and therefore it cannot be ruled out that, simply for that reason, alternative business models have not been able to establish themselves.

(294) For instance, Intervening Party 3 has in fact demonstrated multiple realistic alternatives.⁴⁰⁶ In this context, it cites, among other things, listing fees (such as with the supplier platform www.wer-liefert-was.de) and the possibility of involving the guest in the search and comparison costs (example: lodging portal Airbnb). Other transaction platforms active in Germany, too, for instance in real estate, are not structured so that they are transaction-dependent: the largest real estate

⁴⁰¹ Page 16 et seqq. of the file “Questionnaire hotels June 2015.”

⁴⁰² HRS now itself states that the quality of the portal – e.g. the orientation to specific target groups and the transparency of the portal – is the actual added value of a portal but not best price clauses (*Süddeutsche Zeitung* on September 10, 2015, p. 17).

⁴⁰³ Booking brief of April 29, 2014, margin no. 234 et seqq.

⁴⁰⁴ Booking brief of May 19, 2015 on the acceptance of commitments, margin no. 181.

⁴⁰⁵ Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 216 et seqq. with further references.

⁴⁰⁶ Opinion by Intervening Party 3 of August 28, 2015 (page 4,084 et seqq.), p. 18 et seq.

platform “Immoscout” has a membership model, while “Immowelt” and “Immonet” require advertising space-related fees.⁴⁰⁷

(295) Booking by contrast, sweepingly and without any comprehensible explanation, rejects fees for end customers or cost-per-click payments or listing fees of the hotel partners although they would depend primarily on the hotels’ willingness to pay. The willingness to pay in turn can be influenced based on general practical experience by the respective amount of the required payment. Booking, for example, could also distinguish the amount of a fee as a function of the scope of the services rendered by it actually in the particular case. By contrast, for example, a pay model in the form of a combination of a fixed fee with variable compensation per booking could have the advantage that the willingness to pay and take on risk by any hotel company could be considered on an individual basis.⁴⁰⁸ Other payment models, too, such as performance-based fees, are conceivable.

cc) Continuation of the commission model even without narrow best price clauses not excluded

(296) On the other hand, it is also imaginable that the current commission model – favored by the hotel companies according to Booking – could be continued possibly in modified form without best price clauses. Here, for instance, payment models are considered that provide for fees and advertising in addition to the commissions as an additional source of revenue. Specific practical examples from the distribution of hotel rooms online show that financing can certainly rest on multiple pillars; for instance, trip advisor bases its financing on advertising, business listings (i.e., an additional flat rate for the entry of additional hotel contact information) and on booking commissions for direct links of the hotels.

(297) Finally, Booking – to the extent that there is no circumvention of a prohibition against best price clauses – is also free to establish economic incentives through lower commissions which cause the hotel companies to make it a better offer – setting lower room prices. As a result of such conduct, Booking itself would create good conditions that end customers becoming informed on their portal about hotel rooms will also book them there; the purported free rider problem would never even occur in this way, but at the least it would be diminished. Moreover, Booking itself by means of an economic analysis commissioned by it and submitted to the Bundeskartellamt confirms that this very – obvious – “alternative business model” would be possible.⁴⁰⁹

⁴⁰⁷ See Bundeskartellamt, Case study on the exemption of the merger of online real estate platforms, June 25, 2015, www.bundeskartellamt.de.

⁴⁰⁸ Bundeskartellamt. December 20, 2013, B9-66/10 – HRS. margin no. 218.

⁴⁰⁹ RBB Economics proceeds under the assumption that if the broad most favorable clauses were abolished, hotel and hotel booking portal could be capable of reaching an agreement with respect to reduction of their room prices and commissions. Moreover, clearly lower commission rates for every hotel booking portal are also said to be profitable. Both for Expedia and for Booking and HRS it is true that reductions in commissions below [5–10]% would be profitable under the condition that it sufficiently reduces the room price of the hotel (RBB Economics, modeling the consequences of eliminating further parity clauses on the competition for commissions between hotel booking portals in Germany dated May 18, 2015 [page 3,158 et seqq. of the file], p. 9 et seq.).

dd) Only the effect of market forces can result in an efficient business model

(298) If hotel customers in fact increasingly use the booking portals in the future only to obtain an overview of offers and prices without making any bookings there, the hotel portals would be required to adjust to this market situation and offer the booking customer corresponding added value.⁴¹⁰ The best solution for all parties ultimately as a result of the effect of market forces cannot be put into place until the competitive limitations created by the (narrow) best price clauses are ultimately eliminated at least concerning the established hotel portals.

4. Elimination of substantial competition

a) Booking's argument

(299) Finally, Booking argues that the now limited range of the narrow best price clauses still leaves the hotel partners with the option to respond to an unjustified increase in the booking commissions⁴¹¹ and that therefore effective competition is not excluded.⁴¹²

b) Analysis by the Bundeskartellamt

(300) Considering the first, second, and third exemption prerequisite, which is not satisfied in the present case, Booking's argument on the fourth exemption condition is irrelevant. The Bundeskartellamt therefore will leave unresolved the question of the essentialness of the demonstrated competition restrictions within the meaning of section 2 GWB and Article 101 (3) TFEU.

(301) The narrow best price clauses – as demonstrated – appreciably restrict price competition and also the quality competition between the hotel portals and the price competition between the hotel companies and largely exclude the competition pressure possible on the part of the hotel companies' own online channels to hotel portals.⁴¹³ Given the at times very high commissions by way of commission spreads⁴¹⁴ in favor of Booking and the parallels denied by Booking⁴¹⁵ to the HRS case, there are clear signs that argue for exclusion of competition. This is supported by the strong position of the hotel portals which has already been shown in the HRS case by the fact that hotels despite increased commissions of HRS have not migrated to other distribution channels.⁴¹⁶

⁴¹⁰ See also Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V)-HRS, margin no. 181.

⁴¹¹ Booking brief of April 29, 2014, margin no. 35 et seqq.; Booking brief of May 19, 2015 on the acceptance of commitments, margin no. 185.

⁴¹² Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 185; Booking brief of April 29, 2014, margin no. 245.

⁴¹³ See margin no. 164 above and Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no.228 et seqq.

⁴¹⁴ See page 12 et seq. of the file "Questionnaire competitors 2014." The standard commissions of the larger hotel portals in Germany in 2013 were around 15%. The German Hotel Association estimates that the average effective commission rate of Booking is currently 20–25% (response by the German Hotel Association on August 28, 2015, page 4,084 et seqq. of the file, p. 16).]

⁴¹⁵ Booking brief of April 29, 2014, margin no. s [sic] et seqq.

⁴¹⁶ Bundeskartellamt. December 20, 2013, B9-66/10 – HRS. margin no. 86.

In addition there is the hotels' dependency precisely on the market leader Booking, which has been able to significantly expand its market position – under the aegis of the initially wide, and then later narrow best price clauses – in recent years. Booking has been unable to sufficiently prove why all of these circumstances would not result in a substantial competition restriction. But whether these overall circumstances should be regarded as an exclusion of substantial competition within the meaning of section 2 (1) GWB and Article 101 (3) TFEU, in the opinion of the Bundeskartellamt can ultimately go unresolved given the above comments on the first three individual exemption requirements.

IX. Unfair impediment pursuant to section 20 (1) in conjunction with section 19 (1, 2) no. 1 GWB

(302) The Düsseldorf Higher Regional Court (see 1. below) has not addressed the satisfaction of elements constituting impediment as a result of the use of best price clauses in the HRS proceedings or has left this question unresolved, while Booking (see 2. below) denies that such elements have been satisfied. In effect, the Bundeskartellamt judges the conduct of Booking, however, analogously to the violation of section 1 GWB and Article 101 TFEU at the same time also as an unfair impediment pursuant to section 20 (1) in conjunction with section 19 (1, 2) no. 1 GWB (see 3. below).

1. Findings of the Düsseldorf Higher Regional Court

(303) The Düsseldorf Higher Regional Court⁴¹⁷ has expressly left unresolved the question affirmed by the Bundeskartellamt⁴¹⁸ as to whether the application of best price clauses of the present type, in addition to the violation of section 1 GWB and Article 101 TFEU, at the same time constitutes a violation of section 20 (1) in conjunction with section 19 (1, 2) no. 1 GWB (prohibition against unfair impediment) because this was not relevant in the case decided at the time (HRS).

2. Argument by Booking

(304) Concerning the allegation of unfair impediment, Booking argues that there is no room in the present case for application of national law (sections 19, 20 GWB) because Booking does not satisfy the element constituting prohibition as set forth in Article 101 (1) TFEU or because the conduct in question in any case is exempt under Article 101 (3) TFEU.⁴¹⁹

(305) In addition, Booking claims that it has neither a market-dominant position within the meaning of section 19 GWB⁴²⁰ nor relative market power within the meaning of section 20 (1) GWB over small and medium-sized hotels. According to Booking, these are not dependent on the platform

⁴¹⁷ Düsseldorf Higher Regional Court, January 9, 2015, VI-Kart 1/14 (V) – HRS, margin no. 193 with further references.

⁴¹⁸ Bundeskartellamt, December 20, 2013, B9-66/10- HRS, margin no. 235 et seqq.

⁴¹⁹ Booking brief of April 29, 2014, margin no. 246.

⁴²⁰ Booking brief of May 19, 2015 on the acceptance of commitments, margin no. 186.

and⁴²¹ could switch to a number of other marketing channels.⁴²² Finally, Booking argues that its conduct should also not be regarded as impeding or unfair within the meaning of section 19 GWB.⁴²³

3. Analysis by the Bundeskartellamt

(306) By applying the best price clauses, Booking has also violated the prohibitions pursuant to section 20 (1) in conjunction with section 19 (1, 2) no. 1 GWB – unfair impediment of the small and medium-sized hotel partners depending on Booking (see a. below). The Bundeskartellamt will leave unresolved the question of whether the use of the narrow best price clauses by Booking also violates the prohibitions pursuant to section 19 (1, 2) no. 2, 5 GWB and Article 102 TFEU – market power abuse – given its high market share in the German hotel portal market (see b. below).

a) Unfair impediment of the dependent hotels

(307) The use of the narrow best price clauses by Booking constitutes an unfair impediment of the small and medium-sized hotel companies dependent on it within the meaning of section 20 (1) in conjunction with section 19 (1, 2) no. 1 GWB.

aa) Applicability of the provisions

(308) Because Booking at the same time also satisfies the element constituting prohibition under Article 101 (1) TFEU and because the conduct in question is not exempt, the elements of national law (sections 19, 20 GWB) – in contrast to what Booking believes – all apply in the present case, see Article 3 (2) Directive 1/2003.

bb) Dependency of small and medium-sized hotel companies

(309) Booking is the addressee of the norm within the meaning of section 20 (1) in conjunction with section 19 (1, 2) no. 1 GWB because the small and medium-sized German hotels as buyers are dependent on the services offered by Booking so that sufficient and reasonable possibilities for switching to other hotel portals and no longer using Booking as a distribution channel do not exist.⁴²⁴

(310) Small and medium-sized hotel companies that continue to characterize the German hotel market⁴²⁵ are especially reliant on the marketing of their rooms through hotel portals because they

⁴²¹ Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 4.5 et seqq.

⁴²² Booking brief of April 29, 2014, margin no. 247 et seq.

⁴²³ Booking brief of May 19, 2015 on the acceptance of commitments, margin no. 186; Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 4.9 et seqq..

⁴²⁴ Concerning the hotel portal HRS, which even has and had a clearly weaker market position than Booking, see Bundeskartellamt, December 20, 2013, B9-66/10 – HRS, margin no. 236 et seqq.

⁴²⁵ In Germany, just over 60% of all classical lodging businesses and just over 45% of all hotels and bed-and-breakfasts offer less than 20 rooms. Only just over 8% of the hotels and bed-and-breakfasts have more than 100

are less known to potential hotel customers than the major hotel companies and cannot assert themselves over the hotel portals and the major hotel companies with respect to ranking on the search engines.⁴²⁶ Only a heavily promoted hotel portal like Booking whose name is well known in the market and which also occupies a top position in the Google ranking offers these hotel companies direct access to a large number of potential hotel customers.⁴²⁷ Small and medium-sized hotel companies may routinely market their rooms through multiple hotel portals, but Booking – in addition to HRS and Expedia – continues to occupy a special position in the hotel portal market given constantly rising market shares and is indispensable for filling up German hotels. While in recent years there has been an increasing consolidation of the Booking portals active in Germany, overnight stays in Germany continue to be accounted for at a rate of almost 2/3 by hotel companies that have less than 20 rooms.⁴²⁸

(311) The dependency established as a result of this is also unilateral while no typical small or medium-sized German hotel can currently forgo distribution through Booking with respect to its occupancy situation,⁴²⁹ Booking, conversely, is not reliant on the fact that individual hotels use its services, and can build up corresponding economic pressure and enforce comparably high booking commissions. For the question of the dependency of the small and medium-sized hotel companies it is also not relevant whether Booking is the only company in the market on which there is a dependency.⁴³⁰ In the German hotel portal market itself, which is largely dominated by three major hotel portals – Booking, HRS, and Expedia – the dependency is not necessarily confined to one portal in particular because the hotels are routinely present on several portals in order to reach various target groups and increase their general reach on the Internet. Booking has been the market leader for several years and is constantly increasing its lead.

cc) Unfair impediment

(312) Booking has also used its market position to impede the small and medium-sized German hotels unreasonably within the meaning of section 20 (1) in conjunction with section 19 (1, 2) no. 1

rooms. See “*Hotelmarkt Deutschland 2015*” industry report, p. 42, with reference to compilations of the Federal Office of Statistics.

⁴²⁶ The “*Hotelmarkt Deutschland 2014*” industry report, p.230, here refers to the study by Xamine GmbH (2012). According to this, a daily search engine marketing budget of approximately EUR 15,000 is necessary to penetrate the top 10 advertisers in the area of tourism. For HRS, the study by Xamine GmbH estimates a daily budget of around EUR 30,000 and for Booking a daily budget of over EUR 40,000 (see “*Hotelmarkt Deutschland 2013*” industry report, p. 215); the stated amounts based on the estimations of the “*Hotelmarkt Deutschland*” industry report, today is likely much higher (most recent industry report 2014, p. 230).

⁴²⁷ According to a survey of the Arbeitsgemeinschaft Online-Forschung e.V. (2014) almost every third hotel booking is now generated through online channels (“*Hotelmarkt Deutschland 2015*” industry report, p. 237). This does not yet consider that the initial contact with the hotel often takes place through an electronic booking and consequently bookings by telephone and other bookings follow.

⁴²⁸ As shown by the overview in the “*Hotelmarkt Deutschland 2015*” industry report, p. 42, almost 2/3 of the lodging businesses in Germany (hotels, bed-and-breakfasts, inns, and guesthouses) had less than 20 rooms.

⁴²⁹ See page 16 et seqq. of the file “Questionnaire hotels June 2015.” Even independent of the size of the hotel, the average room occupancy rate in the various cities in Germany is no more than 70% (see “*Hotelmarkt Deutschland 2015*” industry report, p. 33).

⁴³⁰ See e.g. Bechtold, *GWB*, loc. cit. section 20 margin no. 80.

GWB. An unfair impediment exists whenever the competitive freedom of action of another company is directly or indirectly influenced negatively and whenever a weighing of the affected interests – taking into account the objective of the GWB directed at the freedom of competition – does not result in a priority of the interest in this conduct over the competitive freedom of action of the affected companies.

- (313) The interest at stake for the affected small and medium-sized hotels is the ability to use the various existing online distribution channels for their price and terms differentiation. To that end, distribution via the hotel's own website is increasingly gaining in significance; it constitutes a particularly cost-effective distribution channel for these hotels which in their view is also especially easy and fast to manage. Therefore there are entrepreneurial incentives for the hotels to offer lower rates on their own distribution channels – for instance in phases of high occupancy – than on the simultaneously used hotel portals, which in their view are expensive. Under the best price clauses used by Booking, however, the affected hotels may not offer lower rates on their distribution channels; many affected hotel companies perceive this to be a massive interference in their pricing sovereignty and their entrepreneurial freedom.⁴³¹ The affected rights and interests of the hotel companies include in particular the pricing sovereignty of the hotel entrepreneur, who himself must fully bear the economic risk of utilization, and his entrepreneurial freedom to be able to determine himself the remaining terms and conditions for the distribution of his products and services and not be subject to the specifications of a (mere) intermediary.
- (314) In contrast to what Booking wants to suggest – for reviewing the unfair impediment it is not a comparison between the wide and the narrow best price clauses that is relevant, but rather a comparison between the narrow best price clauses and a situation without best price clauses. For instance, the possibility of the price differentiation via the various hotel portals over the *status quo ante* – at the start of these proceedings – may thus constitute progress. But the narrow best price clauses also cause an extensive interference in the stated rights and interests of the small and medium-sized hotel companies. Their interests, based on the statutory objective directed at competitive freedom, take priority over the interests of Booking to largely seal itself off from the competition through the best price clauses and secure its own booking volume.

b) Market abuse

- (315) The Bundeskartellamt will leave unresolved the question of whether Booking, given its high market share by using the narrow best price clauses, also additionally satisfies the special elements constituting abuse under Article 102 (2) (a) TFEU or section 19 (1, 2) no. 2 GWB or the general element constituting abuse under section 19 (1) GWB or Article 102 (1) TFEU, especially whether it is the addressee of the norm in this respect.

⁴³¹ This is clearly evident from the current survey of the hotel companies by the Bundeskartellamt. Smaller individual hotels in particular talk about “commission diktat” here. “Restriction of the price sovereignty,” “monopolizing the hotel business,” “large amount of gagging” and “restriction of entrepreneurial freedoms.” The DEHOGA makes similar comments “Problem is high commissions and lack of the possibility to react to the market” (see in particular page 16–18 of the file “Questionnaire hotels June 2015.”)

E. Actions pursuant to section 32 GWB

(316) As part of the discretion to which it is entitled under section 32 GWB, the Bundeskartellamt states that Booking has committed the violations described above and orders Booking to refrain from the established violations (see I. below) and to undertake corresponding remedial actions (see II. below). Disgorgement under section 34 GWB remains subject to a separate order (see III. below). Moreover, the proceedings are to be suspended with respect to the aspects settled in the meantime (see IV. below).

I. Cessation of the infringement under section 32 (1) GWB

(317) The argument by Booking (see 1. below) on the purported defectiveness of discretion and illegality of the present order to cease is unpersuasive (see 2. below).

1. Argument by Booking

(318) On the lawfulness of actions under section 32 GWB, Booking argues, first, that they are legally impermissible per se given the subject matter of the proceedings which has changed in the meantime without new preliminary proceedings; the purported infringement, it argues, is not ongoing but was terminated with the introduction of the new clauses on July 1, 2015.⁴³² In the absence of any justified interest, it argues further, not even a finding of a cartel law violation committed in the past is admissible.⁴³³

(319) Second, Booking argues that the order to cease also violates the cooperation duties of the Bundeskartellamt under Article 11 Directive 1/2003 since it prohibits a behavior with respect to which other national competition authorities in the EU – such as France, Sweden, and Italy – had accepted commitments by application of the substantive Union cartel law.⁴³⁴ According to the present status of proceedings outside of Germany, it is argued, the Danish competition authority has now suspended its proceedings;⁴³⁵ the British competition authority has finally accepted the narrow best price clauses;⁴³⁶ this applies equally, it is argued, to Holland and Ireland,⁴³⁷ the Austrian federal competition authority has announced, according to Booking, an intention to conclude proceedings against Booking in exchange for commitments⁴³⁸ and in Greece no

⁴³² Booking brief of May 19, 2015 on the warning, margin no. 45 et seq.; Booking brief of July 14, 2015, p. 2 et seq.

⁴³³ Booking brief of May 19, 2015 on the warning, margin no. 47 et seq.; Booking brief of July 14, 2015, p. 3.

⁴³⁴ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 55 et seq., 65 et seq.; Exhibit QE 65 to Booking brief of November 30, 2015, margin no. 2.75 et seq. and margin no. 6.1 et seq., 6.24 et seq.

⁴³⁵ Booking brief of September 2, 2015, (page 4,025 et seq.). p. 1 et seq. and October 12, 2015 (page 4,255 et seq.), p. 3.

⁴³⁶ Booking brief of September 25, 2015 (page 4,152 et seq.), p. 2 et seq. and October 12, 2015, p. 3. The British competition authority suspended the proceedings “for procedural grounds” (www.mlex.com “UK regulator closes probe into IHG, Expedia and Booking.com,” Statement by CMA on September 16, 2015).

⁴³⁷ Booking brief of October 12, 2015, p. 1 et seq. and p. 3.

⁴³⁸ Booking brief of August 4, 2015 (page 3992 et seq.), p. 1 et seq. and of October 12, 2015, p. 3.

proceedings have even been initiated.⁴³⁹ An order to cease, Booking argues, therefore casts into doubt the entire meaning and purpose of the ECN process,⁴⁴⁰ which, according to Booking, is incompatible with Article 11 Directive 1/2003.⁴⁴¹ At the same time, the portal argues, this constitutes an infringement of the Member State duty of loyalty under Article 4 (3) TEU.⁴⁴²

(320) Moreover, Booking argues, the national German market does not demonstrate any particular features in the present case that would justify a different handling of the case than in France, Sweden, or Italy – where commitments have been accepted; in any case, it is said, the Bundeskartellamt has not established any such particular features.⁴⁴³ In a case such as this one, at least an opinion from the Commission within the meaning of Article 11 (5) Directive 1/2003 should be obtained before an order to cease is issued;⁴⁴⁴ the Bundeskartellamt is said to have neglected this, however.

(321) On the dismissive position held by the Bundeskartellamt vis-à-vis the commitments offered at that time, Booking argues that the non-acceptance of these commitments was a defect of discretion. Indeed, the Bundeskartellamt's discretion in the present case with respect to the acceptance of the offered commitments is said to have been reduced to zero; finally, the narrow best price clauses are permitted under cartel law.⁴⁴⁵

2. Analysis by the Bundeskartellamt

(322) The present order under section 32 (1) GWB is appropriate, necessary, and reasonable to achieve the cessation of the aforementioned violation and therefore is free of any defective discretion (see a. below). Neither the previous course of the proceedings is opposed to this (see b. below) nor the duties to cooperate existing as part of the ECN (see c. below); the Bundeskartellamt was also not forced to accept the commitments originally offered by Booking (see d. below).

a) Proportionality of the present order to cease

(323) The present order to cease issued by the Bundeskartellamt pursuant to section 32 (1) GWB is proportionate to achieve its purpose, that means, appropriate, necessary, and reasonable, and therefore does not exceed the boundaries of the discretion of legal consequences to which the Bundeskartellamt is entitled. Under section 32 (1) GWB, the Bundeskartellamt can obligate companies to cease from violating a provision of the GWB or Article 101 or 102 TFEU. In

⁴³⁹ See overview of the status of proceedings outside Germany in the Booking brief of October 12, 2015, p. 3.

⁴⁴⁰ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 58 et seqq.

⁴⁴¹ Booking brief of May 19, 2015 on the acceptance of commitments, margin no. 65 et seqq.

⁴⁴² Exhibit QE 65 to Booking brief of November 30, 2015, margin no, 6.32 et seqq.

⁴⁴³ Booking brief of May 19, 2015, on the acceptance of commitments, margin no. 68 et seqq.

⁴⁴⁴ Booking brief of September 2, 2015, p. 6; Booking brief of August 4, 2015, p. 4; Booking brief of May 19, 2015 on the acceptance of commitments, margin no. 57.

⁴⁴⁵ Booking brief of May 19, 2015 on the warning, margin no. 50 et seqq.

accordance with European practices⁴⁴⁶ the order to cease covers both the finding as well as the prohibition of the violation.

- (324) The subject matter of the prohibition under cartel law is the best price clauses currently used by Booking which – as shown above – violates section 1 GWB and Article 101 (1) EVA because they restrict competition between the hotel portal Booking and other hotel portals and between the hotel partners of Booking and other hotels. The prerequisite conditions for exemption from the cartel prohibition under section 2 GWB and Article 101 (3) TFEU have not been satisfied. At the same time, the best price clauses violate the prohibition against unfair impediment and the prohibition of unfair impediment of dependent companies pursuant to section 20 (1) in conjunction with section 19 (1, 2) no. 1 GWB.
- (325) Booking is currently the market leader and together with HRS – the Bundeskartellamt has already determined and prohibited violations here – and Expedia is one of the three by far largest companies in the German hotel portal market. The prohibition of application of the best price clauses is therefore an appropriate and necessary measure to eliminate the competition restrictions caused by the best price clauses and at the same time the unreasonable conduct associated with their application in the relevant market for hotel portal services for hotels located in Germany. The measure is also still necessary in view of the fact that in the meantime, some hotel companies have begun, despite the best price clauses, to occasionally implement price differentiations in room sales.⁴⁴⁷ The anticompetitive violation identified is consequently not resolved by this; only the final and complete elimination of the utilized best price clauses can provide the hotel companies with the requisite legal certainty in this respect.
- (326) The finding and prohibition of the violation is also reasonable. It does not impose on Booking any disproportionate burden because it confines itself to compliance with the valid competition law. The (narrow) best price agreements between Booking and its hotel partners for their hotels located in Germany are covered in the version valid as of July 1, 2015. The order to cease is therefore sufficiently specified. As a result of limiting the present order to best price clauses in the contractual relationship between Booking and German hotels, the Bundeskartellamt limits the range of the order to its own jurisdiction.

b) Admissibility of an order to cease with respect to the previous course of proceedings

- (327) This also cannot be successfully opposed by arguing that based on the subject matter of the proceedings purportedly completely modified and therefore settled as of July 1, 2015, new preliminary proceedings should have been initiated and an order to cease is legally impermissible

⁴⁴⁶ See Bornkamm In Langen-Bunte, loc. cit., margin no. 21 et seqq. at section 32 with reference to EuGH, March 2, 1983 “GVL” Sig. 1983, 483 margin no. 23 =WuW/E EEA/MUV 593, 594; on the practices of the Bundeskartellamt, see Bundeskartellamt January 13, 2006 “E.ON Ruhrgas” WuW/E DE-V 1147 and Bundeskartellamt December 13, 2007 “Financial auditor duty” WuW/E DE-V 1459.

⁴⁴⁷ See margin no. 209 et seqq. above

per se without any such new proceedings. It has already been demonstrated above⁴⁴⁸ that only a partial settlement occurred as a result of reducing the subject matter of the proceedings and that the proceedings otherwise continue to be pending and will be ended only by the present order to cease. An error in the exercising of the discretion concerning legal consequences cannot be deducted from this.

c) No violation of duties to cooperate as part of the ECN

(328) The Bundeskartellamt – in contrast to what Booking believes – in the version of the present order to cease does not violate the duties to cooperate under Article 11 Directive 1/2003. The fact that other European competition authorities accepted commitments as part of their territorial jurisdiction or suspended their relevant proceedings, does not bind the Bundeskartellamt in its judgment of the present facts. This is evident not only from the fact that the facts underlying this decision concern a different territory and therefore another market – namely, the German hotel portal market. But this already follows from the fundamental consideration that decisions about commitments cannot have any such binding effect in other European member states because they only bind the competition authority issuing them.

(329) The meaning and purpose of the ECN – in contrast to what Booking fears – are also not called into question by the version of the present ruling. As stated above, the Bundeskartellamt engaged in an intensive exchange with the Commission and the competition authorities of the other member states and in doing so satisfied the existing duties to cooperate. The Bundeskartellamt – like the overwhelming number of other European competition authorities as well – has nevertheless not decided to accept the commitments as in France, Sweden, and Italy.

(330) Moreover, it is necessary to consider that Article 11 Directive 1/2003 does not have any third-party protective effect because the provision concerns only the cooperation between the Commission and the competition authorities of the Member States between one another, without establishing special or novel claims or subjective legal rights for the parties to the proceedings. Therefore, Booking itself could not invoke a – purported – violation of this procedural provision of Article 11 Directive 1/2003 if such a violation were to exist; in this respect, therefore, there is also no decision that is defective in its discretion. The same – no third-party protective effect in favor of Booking – applies for Booking's allegations that the Bundeskartellamt violated the Member State duties of loyalty under Article 4 (3) TEU, so that further comments in this regard are superfluous.

(331) Finally, it is also not possible to agree with Booking that in the present case at least an opinion from the commission should have been obtained, within the meaning of Article 11 (5) Directive 1/2003, before an order to cease was issued and that an order to cease is impermissible in its legal consequence without such an opinion, because it involves an error of discretion. A duty to obtain such an opinion in the present case is not indicated by the provision. Not obtaining such an opinion therefore cannot substantiate any error of discretion. The Commission would also not be

⁴⁴⁸ See margin no. 106 et seqq. above

authorized to give instructions to the Bundeskartellamt; instead, the Bundeskartellamt forms its opinion on the present facts free of instructions and independently and in so doing – like a court – is bound only by statute and law.

d) No compulsion to accept the commitments originally offered by Booking

- (332) Finally, Booking's statements that the Bundeskartellamt should have accepted commitments offered by Booking at the time because its discretion with respect to acceptance of the offered commitments had been reduced to zero, and that an order to cease is therefore now impermissible, are incorrect.
- (333) If companies as part of proceedings under section 32 GWB offer to take on obligations that are suitable to eliminate the concerns communicated to them by the competition authority after preliminary judgment, then the competition authority as part of its discretion can declare the commitments to be binding for these companies by issuing an order pursuant to section 32b (1) GWB. This is possible primarily in an earlier stage of proceedings.⁴⁴⁹ The content of the order is that the competition authority will not exercise its powers under section 32 GWB (save as provided in section 32b (2) GWB). The order can be limited in time. As part of the declaration of obligation, there is no finding of the violation in question by the competition authority.
- (334) Even if commitments are offered that are objectively suitable for eliminating the concerns of the competition authority, which is already not true in the present case, the authority is not obliged to accept these commitments. Indeed, an order under section 32b GWB constitutes a compromise to which no side can be compelled.⁴⁵⁰
- (335) Therefore, there is already no room from the outset for the reduction of discretion to zero as argued by Booking. Moreover, the order to cease here shows that the commitments offered by Booking at the time did not go far enough in the matter and therefore were certainly not suitable to remove the existing competitive doubts raised by the Bundeskartellamt. In such a situation, acceptance of commitments by a competition authority is already not possible because the requirements under section 32b GWB are not fulfilled; the question of legal consequence and therefore exercising of discretion is not even raised; a reduction of discretion to zero is simply inconceivable in such a scenario.

II. Required additional remedial actions under section 32 (2) GWB

- (336) Furthermore, Booking is ordered to remove the best price clauses agreed with its hotel partners by January 31, 2016 from the contracts or the general business terms and conditions underlying these contracts to the extent that they concern their hotels located in Germany. This order will be satisfied for individual contracts through timely notices of termination pending a change of contract at the next possible time even if they take effect only after the expiration of the deadline.

⁴⁴⁹ Bornkamm in Langen/Bunte, loc. cit., section 32b GWB, margin no. 5 with further references.

⁴⁵⁰ Bornkamm in Langen/Bunte, loc. cit., section 32b GWB. margin no. 16.

- (337) Pursuant to section 32 (2) GWB, the competition authority can, at its discretion, require a company that violates a provision of the GWB or Article 101 or 102 TFEU, to take all necessary remedial measures relating to conduct or structure that are necessary to effectively cease the established violation and are proportionate with respect to the established violation.⁴⁵¹
- (338) In addition to the prohibition per se of performance of the existing best price clauses under section 32 (1) GWB, additional remedial actions under section 32 (2) GWB on valid ceasing of the established violation are necessary here and are also proportionate with respect to the established violation. The remedial action prescribed here consists of removing the agreed (narrow) best price clauses – visible to the contractual counterparties – from the contracts concerning Booking's hotel portal and/or from the general business terms and conditions underlying these contracts. This additional remedial action is appropriate and necessary to achieve the statutory objective of ceasing the violation. Only in the stated manner and not by a lesser means that does not burden Booking as much, can it be ensured that the text of the existing contracts and the general business terms and conditions underlying them no longer contain any clauses that – beyond their performance as prohibited under section 32 (1) GWB – could give the legal impression of their validity and enforceability based on their existence per se with respect to a contractual counterparty not fully or not currently informed. In effect, an unambiguously recognizable removal of the best price clauses from the existing contracts and general terms and conditions is needed in order to create clear conditions and legal certainty for all parties.
- (339) With respect to the reasonableness (proportionality in the narrower sense) of this remedial action under section 32 (2) GWB, the Bundeskartellamt considers two additional perspectives:
- (340) Because changing a number of contracts takes a certain amount of time, it seems necessary to give Booking time to fulfill its obligation to remove the best price clauses from the contracts and the general business terms and conditions to a reasonable extent. An objection deadline for the contractual counterparties for changes to the general business terms and conditions by Booking is not provided in the general business terms and conditions used by Booking. With respect to assessing the period in question, therefore – unlike in the HRS case where a corresponding objection deadline was contractually provided – a deadline of January 31, 2016 in effect is proportionate. Booking also changed wide best price clauses to narrow ones vis-à-vis the hotel companies within a few days in the summer of 2015 without observing an objection deadline. While the prohibition against executing the best price clauses under section 32 (1) GWB is effective immediately, Booking is given time until January 31, 2016 in its favor to remove the best price clauses from the text of the individual contracts and/or the general business terms and conditions.

⁴⁵¹ Bornkamm in Langen/Bunte, loc. cit., section 32 GWB, margin no. 12 et seq., with further references.

(341) The obligation to remove the best price clauses is satisfied with respect to the affected individual contracts also by timely notices of termination pending a change of contract at the next possible time even if they do not take effect until after January 31, 2016. With respect to the existing individual contracts that contain best price clauses, it is important to consider that Booking cannot readily and validly change them – unlike its general business terms and conditions – by unilateral action under civil law (at least to the extent that this is not objected to in the particular case), but rather that express approval from the respective contractual counterparty to continuing the contract under the amended terms is necessary. This approval can be obtained by Booking in many cases, but possibly not in all cases. Therefore, Booking cannot solely guarantee complete legally valid adjustment of the formed individual contracts and therefore is to be obligated only to the extent that it has the requisite civil law powers to modify contracts.

(342) As a result of the limitation of scope of the ordered remedial action (deletion of the best price clauses in question) to those cases that concern hotels located in Germany, the Bundeskartellamt limits the scope of the order to the established violation.

III. Disgorgement under section 34 GWB

(343) The Bundeskartellamt reserves the right to disgorge the benefits as announced with the hearing letter issued on March 30, 2015 to Booking⁴⁵² in the event that the present ruling becomes final and conclusive.

IV. Partial suspension

(344) The parts of the violation already ceased upon the change of the general business terms and conditions as of July 1, 2015, have been resolved on the merits; this is equivalent to a partial settlement of the original subject of the proceedings (see above). In this respect, the proceedings are therefore suspended for clarification reasons.

F. Immediate enforceability

(345) An appeal has no suspensive effect. Upon request, the appellate court can entirely or partially restore the suspensive effect of the appeal.

G. Costs

(346) The decision on costs is based on section 80 (1) sentence 2 (2) GWB. The amount of the costs is determined in accordance with section 80 (2) sentence 1 GWB according to the personnel and material expenses of the Cartel Office and the economic significance of the proceedings conducted against the party. The application of these principles to the facts as presented resulted in a fee of [...] euros (section 80 (2) sentence 2 no. 2 GWB). In this regard, the Decision Division considered in particular the economic significance of the proceedings.

⁴⁵² Letter from the Ruling Division of March 30, 2015, margin no. 84 et seqq.

(347) The debtor of this fee is the party according to section 80 (6) sentence 1 no. 2 GWB. The fee is due upon service of this decision and must be remitted within one month after service to the account:

Bundeskasse Trier at

Deutsche Bundesbank – Saarbrücken branch –

BIC: MARKDEF 1590

IBAN: DE 81 5900 0000 0059 0010 20

(348) As the reason for payment, please use the following payment number:

810600326371

(349) Please state the payment number and the date of the decision as the reason for payment; otherwise the payment cannot be processed.

(350) If payment has not been made in whole or in part by the expiry of one month after the date of service, default penalty charges of one percent of the outstanding amount may be charged for every month of default (section 80 (8) GWB, section 1 (1) of the Regulation on the Cost of the Cartel Authorities (KartKostVO) in conjunction with section 18 (1) of the Administrative Costs Act (VwKostG). For transfers from abroad, bank charges are generally incurred. In these cases, it must be ensured that the full fee is credited to the account of the Bundeskartellamt.

H. Explanation of appeal

(351) An appeal may be lodged against this decision. It must be filed in writing with the Bundeskartellamt, Kaiser-Friedrich-Strasse 16, 53113 Bonn, within a period of one month commencing with service of the decision. However, it is sufficient if it is received by the appellate court, the Düsseldorf Higher Regional Court, within this period.

(352) The appeal must be substantiated by a pleading to be filed with the Bundeskartellamt or the appellate court. The deadline for the grounds of appeal shall be two months. It begins with service of the contested decision and can be extended on request by the presiding judge of the appellate court. The grounds of appeal must include an explanation of the extent to which the decision is being contested and its amendment or repeal is being sought, and the – possibly also new – facts and evidence on which the appeal is based must be set forth.

(353) The notice of appeal and grounds of appeal must be signed by an attorney at law.

(354) The appeal has no suspensive effect. Upon request, the appellate court may order the suspensive effect of the appeal in whole or in part.

Silke Hossenfelder

Hans-Helmut Schneider

Dr. Christa Pfeil-Kammerer

You are notified that the decision – based on the operative provisions – will be published in the Federal Gazette (section 43 (2) no. 1 GWB) and – the complete text – online. You are therefore asked to communicate to the Ruling Division within 7 days after service of this ruling, if necessary, in writing as to whether the decision contains business secrets that are to be removed before publication. Please explain why the deletions that may be desired by you involve business secrets. If the competent Ruling Division does not receive notification from you within 7 days, the Bundeskartellamt will assume that this decision does not contain any business secrets, and will publish them.

Only the German version of the decision is authentic.

Table of contents

A. Summary	4
B. Statement of facts.....	6
I. Booking and other online sales channels	6
1. Booking's best price clauses.....	9
a) Best price clauses up until June 2015	9
b) Best price clauses from July 1, 2015, onward	11
2. Best price clauses of other hotel portals	13
II. Complaints from the hotel industry.....	14
1. HOTREC	14
2. IHG	15
3. Discussions between the Bundeskartellamt and representatives of the German hotel industry.....	16
a) Marketing channels used by the hotels.....	17
b) Wide best price clauses	17
c) Narrow best price clauses	18
d) Future development of hotel marketing.....	19
C. Proceedings	19
I. Proceedings against Booking before the Bundeskartellamt.....	19
II. Proceedings against Expedia at the Bundeskartellamt	24
III. Proceedings in other countries	24
D. Legal analysis	25
I. Granting of a fair hearing and fair proceedings	26
1. Pleadings of Booking	26
2. Analysis of the Bundeskartellamt.....	27
a) Grant of a fair hearing	27
b) Fair and impartial proceedings.....	29
II. Subject matter of the proceedings and partial conclusion	30
1. Booking's pleading	30
2. Analysis by the Bundeskartellamt	32
a) Inclusion of the "Preferred Partner" program in the decision.....	32
b) Initiation of new proceedings not necessary; partial conclusion.....	33
aa) Acceptance of commitments in France, Sweden and Italy	33
bb) Booking's amendment of the best price clauses as of July 1, 2015	35
c) Current subject matter of the proceedings is a "minus" not "aliud"	36
III. Ex officio duties to investigate were fulfilled.....	36

1. Booking's submission.....	36
2. Analysis by the Bundeskartellamt	38
IV. Relevant product market.....	39
1. Findings of the Düsseldorf Higher Regional Court.....	39
2. Booking's pleadings	40
3. Analysis by the Bundeskartellamt	41
a) No broad uniform booking market.....	41
aa) "Search, compare and book" bundle as the relevant package of hotel portals' primary and secondary services.....	42
bb) Indirect network effects.....	43
cc) Other sales channels are not part of the relevant market.....	43
dd) Decisions of other competition authorities confirm this market definition.....	44
b) No technical errors made while determining revenue.....	45
c) No contradiction to the market definition during the evaluation of exemption requirements	46
V. Relevant geographic market	46
1. Observations of the Düsseldorf Higher Regional Court.....	46
2. Booking's pleading	47
3. Assessment of the Bundeskartellamt.....	47
VI. Restrictions on competition pursuant to Section 1 of the GWB or Article 101 (1) of the TFEU.....	48
1. Narrow best price clauses as agreements between companies	48
2. Impedes interstate trade	49
3. Anti-competitive effects.....	49
a) Restrictions on competition on the hotel portal market.....	49
aa) Observations of the Düsseldorf Higher Regional Court	49
bb) Booking's pleading.....	50
cc) Assessment of the Bundeskartellamt.....	54
(1) Criterion for reviewing the question of a restraint of competition.....	54
(2) Scope of the investigations and usability of the investigation results.....	55
(3) Specific anti-competitive effects.....	57
(a) Limited incentives for hotel companies to differentiate prices at different hotel portals	58
(b) Limited incentives for the hotel portals to charge lower commissions or offer better terms	64
(c) Increased restraints on competition through clauses on minimum availability and best price guarantee	66

(d) Effects of market foreclosure.....	67
b) Restraints on competition on the market for hotel rooms	68
aa) Findings of the Düsseldorf Higher Regional Court	68
bb) Booking's arguments	69
cc) Legal analysis by the Bundeskartellamt.....	69
c) Amplification of the identified competition-restraining effects by the application of best price clauses by other hotel booking portals.....	72
4. Appreciability (<i>Spürbarkeit</i>)	73
VII. No exemption under section 2 (1) Vertical BER	74
1. Findings of the Düsseldorf Higher Regional Court	74
2. Argument by Booking.....	75
3. Analysis by the Bundeskartellamt	75
VIII. No individual exemption under Section 2 GWB or Article 101 (3) TFEU.....	76
1. Improving the generating or distributing of goods.....	76
a) Findings of the Düsseldorf Higher Regional Court.....	76
b) Argument by Booking	77
c) Analysis by the Bundeskartellamt	78
aa) General advantages that hotel portals bring to the hotel companies are not efficiency gains from the narrow best price clauses.....	78
bb) No sufficient proof of any relevant decline in sales as a result of deleting the narrow best price clauses.....	79
cc) No sufficient proof of efficiency gains by avoiding free riding	80
(1) No sufficient proof for relevant free riding	81
(2) No sufficient proof of reduced incentive to invest in the quality of the portal..	82
(3) No sufficient proof of negative consequences of any free riding on the advertising investments	83
dd) Reducing search costs for hotel customers with respect to room prices adjusted by best price clauses cannot be an efficiency gain	85
2. Reasonable consumer participation.....	85
a) Argument by Booking	85
b) Analysis by the Bundeskartellamt	85
3. Indispensability.....	86
a) Argument by Booking	86
b) Analysis by the Bundeskartellamt	87
aa) No sufficient proof of indispensability of the current business model.....	87
bb) No sufficient proof of the lower efficiency of all other business models	88

cc) Continuation of the commission model even without narrow best price clauses not excluded	89
dd) Only the effect of market forces can result in an efficient business model	90
4. Elimination of substantial competition.....	90
a) Booking's argument.....	90
b) Analysis by the Bundeskartellamt	90
IX. Unfair impediment pursuant to section 20 (1) in conjunction with section 19 (1, 2) no. 1 GWB.....	91
1. Findings of the Düsseldorf Higher Regional Court	91
2. Argument by Booking.....	91
3. Analysis by the Bundeskartellamt.....	92
a) Unfair impediment of the dependent hotels	92
aa) Applicability of the provisions.....	92
bb) Dependency of small and medium-sized hotel companies	92
cc) Unfair impediment	93
b) Market abuse.....	94
E. Actions pursuant to section 32 GWB.....	95
I. Cessation of the infringement under section 32 (1) GWB.....	95
1. Argument by Booking.....	95
2. Analysis by the Bundeskartellamt.....	96
a) Proportionality of the present order to cease	96
b) Admissibility of an order to cease with respect to the previous course of proceedings.....	97
c) No violation of duties to cooperate as part of the ECN	98
d) No compulsion to accept the commitments originally offered by Booking.....	99
II. Required additional remedial actions under section 32 (2) GWB	99
III. Disgorgement under section 34 GWB.....	101
IV. Partial suspension.....	101
F. Immediate enforceability	101
G. Costs	101
H. Explanation of appeal.....	102