



B 9 - 66/10

**DECREE IN ACCORDANCE WITH
SECTION 32 (1) OF THE ACT AGAINST
RESTRAINTS OF COMPETITION,
PUBLIC VERSION**

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Decision

In the administrative proceedings

1. HRS-Hotel Reservation Service

Robert Ragge GmbH

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50676 Köln

party concerned,

represented by:

Hengeler Mueller

Dr. Christoph Stadler

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40213 Düsseldorf

2. Hotelverband Deutschland (IHA) e.V.

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10117 Berlin

third party admitted to the proceedings (no. 1),

represented by:

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for examination of a violation of section 1 of the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen (GWB)*)/Art. 101 (1) TFEU and section 20 (1) in conjunction with section 19 (1) and (2) No. 1 GWB, the 9th Decision Division ruled as follows on 20 December 2013 in accordance with section 32 (1) GWB:

I.

1. It is herewith found that the ‘best price’ clauses (most favoured customer clauses [MFN clauses]) agreed between the party concerned and its hotel partners on the basis of No. 5 a) to d) and No. 18 (i) of the general terms and conditions which have been applicable since 1 March 2012, or in individual contracts with corresponding content, are in infringement of competition law as far as they affect hotels in Germany.

2. The party concerned is herewith prohibited from continuing to implement such clauses as far as they affect hotels in Germany.
3. The party concerned is herewith ordered to delete the MFN clauses from the contracts, and from the general terms and conditions underlying these contracts, by 1 March 2014, as far as they affect hotels in Germany.
4. The requirement in No. 3 shall also be satisfied in the case of individual contracts by timely changes in the contracts at the next possible date, even if these do not become effective until the deadline has expired.

II.

The fee for the present decision is herewith set at

€[...]

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

Statement of reasons:

A. Summary

- 1 HRS-Hotel Reservation Service Robert Ragge GmbH, Cologne, (hereafter: "HRS") is infringing valid competition law by means of the MFN (most favoured customer) clause which it has agreed with its hotel partners. The relevant product market is the market for the sale of hotel rooms via hotel portals (hotel portal market), which in geographic terms should be defined to cover all of Germany. The MFN clauses contained in the general terms and conditions of HRS and in corresponding individual contracts constitute a significant restraint of competition¹ on this market between the hotel portals and between the hotels; it can therefore be considered irrelevant whether this restraint is a restraint by object. In view of the fact that HRS has had a market share of more than 30% in the past four years, the MFN clauses are not exempted in accordance with the Vertical Restraints

¹ section 1 GWB/Art. 101 (1) TFEU

Block Exemption Regulation.² It can thus be left open whether the MFN clauses are a non-exemptible hardcore restriction.³ The MFN clauses also do not satisfy the requirements for an individual exemption.⁴ Additionally, the application of the MFN clauses by HRS constitutes an unfair hindrance⁵ of the small and medium-sized hotels which are dependent on HRS.

- 2 The service agreements concluded between hotels and HRS provide for the hotels to be included in the HRS hotel reservation system. HRS does not buy room contingents, but sells (the German term used in this context is “vermitteln”) single hotel rooms and receives a standard commission from the hotel for each booking that is made, currently amounting to 15% of the final hotel room price.
- 3 There is also a contractual relationship between hotel customers and HRS: via the HRS reservation system, the hotel customer can make direct bookings at the current hotel prices which are displayed on the portal. HRS does not charge the hotel customers any direct costs for the service, and the customers only pay the displayed room price to the hotel. The displayed hotel price as a rule includes the commission which the hotel is to pay to HRS.
- 4 The MFN clauses are contained in contracts between HRS (including its subsidiaries Tiscover and Hotel.de) and the hotels and in the general terms and conditions underlying these contracts. The general terms and conditions were most recently agreed in the version of 1 March 2012. HRS has agreed MFN clauses with its hotel partners in various countries since 2006. The wording of the MFN clauses is largely identical. HRS has continued to systematically monitor compliance with the MFN clauses until October 2013, and, most recently only in isolated cases, has threatened the hotels with sanctions should they fail to comply. HRS has enforced sanctions, in particular in form of booking deactivation and contract termination.
- 5 The product market for the sale of hotel rooms via hotel portals (hotel portal market) is not a substitute for offline sales, for instance via travel agencies or sales at the hotel reception

² section 2 (1) GWB/Art. 101 (3) TFEU in conjunction with Art. 2 of the Block Exemption Regulation (Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements, OJ L 102/1).

³ Art. 4 a) of the Block Exemption Regulation

⁴ section 2 (1) GWB/Art. 101 (3) TFEU

⁵ section 20 (1) in conjunction with section 19 (1) and (2) No. 1 GWB

desk. Because hotel portals offer hotel customers the functions “search, comparison and booking” in a bundle of services which customers find convenient, the own website of the hotel and specialised portals, like e.g. city portals, do not belong to the hotel portal market. Online travel agencies and tour operator portals as a rule do not have any direct contractual ties with the hotels, and hence operate at another level of the distribution chain. This also applies to meta search engines, which regularly only offer a price comparison function and establish contact between the connected hotel portals (and in some cases major hotels and hotel chains) and the hotel customers.

- 6 By contrast, the corporate customer business of HRS is just as much part of the relevant product market as is private customer business. At best, travel management, which consists of a comprehensive bundle of services for corporate customers going beyond the sale of hotel rooms should be treated as being separate from private customer business. HRS, however, does not offer this service.
- 7 In geographic terms, one may assume a market for hotel portals which covers the whole of Germany. The hotel portals are Internet platforms which are technically accessible to customers from anywhere in the world. Nonetheless, the hotel portal market is neither a worldwide market nor a European market because the hotel portals operating on it have a regional focus, especially as to the local presence of the staff and as to the services offered on the portal (e.g. concerning destinations and advertising).
- 8 The MFN agreements between HRS and its hotel partners are likely to affect trade between Member States within the European Union. The agreements are within the scope of both the German and of the European bans on anti-competitive agreements⁶. This is neither contradicted by the status of HRS, which HRS considers to be that of a “genuine agent”, nor are the MFN clauses mere ancillary agreements implementing contracts which are neutral in terms of competition law. The MFN clauses bring about a restraint of competition, in particular they are a competitive restraint between the hotel portals and between the hotels; it can be left open whether competition is restrained by object, as well.
- 9 There are significant restraints of competition by effect. The MFN clauses remove the economic incentives for the hotel portals to offer lower commissions to the hotels or to face up to competition by adopting new sales strategies. Market entries by new

⁶ section 1 GWB/Art. 101 (1) TFEU

competitors are made more difficult and opportunities open to hotels are considerably restricted. Hotels cannot use different hotel portals and other sales channels in order to make offers at different prices and conditions. Moreover, the MFN clauses of the two other major hotel portals operating in Germany, namely Booking and Expedia, strengthen the restraints of competition which are brought about by the MFN clauses of HRS.

- 10 The MFN clauses are not exempt from the application of the ban on anti-competitive agreements⁷. The MFN clauses are vertical restraints, which as a matter of principle may fall under the exemption of the Vertical Restraints Block Exemption Regulation⁸; this, however, does not apply in the present case. The market share of HRS was above 30%, not only in the past year 2012, but for at least four years.⁹ It can thus be left open whether the MFN clauses are hardcore restrictions within the meaning of the Vertical Restraints Block Exemption Regulation.¹⁰
- 11 An individual exemption¹¹ of the MFN clauses is not possible in the present case because the possible positive effects of the MFN clauses do not outweigh the anti-competitive effects. The potential efficiency impact of the MFN clauses solving a free riding problem, if there is such a problem at all, is slight at best; the restraint of competition which is brought about as a result of the MFN clauses is not indispensable, and it does not allow consumers a fair share of the benefit. It is hence left open whether the MFN clauses lead to the elimination of competition in respect to a “substantial part of the products”, even though there is much to suggest that they do.
- 12 The implementation of the MFN clauses constitutes an unfair hindrance¹² of the small and medium-sized hotel partners which are dependent on HRS.
- 13 The Decision Division decided that the infringement that has been identified is to be brought to an end¹³. As a further measure¹⁴, HRS is instructed to remove the MFN clauses from the contracts and from the general terms and conditions by 1 March 2014.

⁷ section 2 GWB/Art. 101 (3) TFEU in conjunction with Art.2 (1) of the Vertical Restraints Block Exemption Regulation

⁸ Art. 2 (1) of the Block Exemption Regulation

⁹ cf. Art. 3 (1) of the Block Exemption Regulation

¹⁰ Art. 4 of the Block Exemption Regulation

¹¹ section 2 (1) GWB/Art. 101 (3) TFEU

¹² section 20 (1) in conjunction with section 19 (1) and (2) No. 1 GWB

¹³ section 32 (1) GWB

- 14 By contrast, the Decision Division does not consider the time-limited commitments¹⁵ recently offered by HRS, as adequate alternative. Time-limited commitments would not permanently eliminate the serious concerns of the Decision Division with regard to the MFN clauses. Moreover, a precedence effect for other cases only emanates from an explicit finding of the infringement. The prohibition order at hand is an effective and enforceable remedy for removing the MFN clauses in the interest of creating legal certainty for all contracting partners of HRS.
- 15 The withdrawal of the benefit¹⁶ of the relevant block exemption, which the Decision Division initially considered, cannot be carried out because of the current results of the investigation in this case. The market share of HRS remains above 30% according to the current findings of the Decision Division. Therefore HRS, at least currently, does not enjoy the benefit of the Vertical Restraints Block Exemption Regulation.

B. Statement of facts

1. HRS and other hotel portals

- 16 HRS operates a worldwide electronic hotel portal¹⁷ for business and private travellers on the basis of a database of more than 250,000 hotels in all price categories in Germany, Europe and worldwide.¹⁸ HRS is one of the leading hotel portals in Germany.
- 17 The sole shareholder of HRS is Robert Ragge, Cologne. The enterprise has its registered office in Cologne; it has branch offices in Paris, London, Rome, Warsaw, Moscow, Istanbul, Shanghai, Singapore and Beijing. In 2008, HRS took over Tiscover GmbH (below: "Tiscover"), which operates in Austria with the hotel portal tiscover.com. In

¹⁴ section 32 (2) GWB

¹⁵ section 32 b GWB

¹⁶ section 32 d GWB

¹⁷ The definition of "hotel portal" used here includes online portals which act as an intermediary on the basis of direct contracts with hotels both with regard to individual accommodation in hotels and where appropriate other travel services (cf. for details of this Section D.1.2.2).

¹⁸ cf. www.hrs.de (at: 18 December 2013).

October 2011, HRS took over a majority share in the Hotel.de AG hotel portal (below: "Hotel.de"); Hotel.de was completely taken over in 2013.¹⁹

- 18 HRS provides services both for its hotel partners and for their customers who book hotel rooms via the portal:
- 19 According to the contracts between HRS and the hotels HRS receives a standard commission of currently 15% of the accommodation price for each individual booking that is made; the commission is billed on a monthly basis. Furthermore, the contracts regulate questions on the quality and on the prices for the accommodation as well as the data maintenance of the hotels and the booking and cancellation conditions. The ranking of the hotels on the HRS portal depends on categories and criteria individually selected by the customers, such as the most favourable price, "HRS recommends!", discounts, evaluations and "HRS stars".²⁰
- 20 According to the "General Terms and Conditions for Reservations", which apply in the relationship between HRS and the hotel customers, customers are not billed for the portal service of HRS; they only pay the displayed room price to the selected hotel. Further clauses of the general terms and conditions refer to bookings and cancellation, as well as to the various prices that are offered by the hotels (e.g. daily, last minute, seasonal or weekend prices).
- 21 The HRS system allows direct bookings to be made at the current prices. For users with German IP addresses, the bookings are made via the hotel portals hrs.de and hrs.com, and can also be made on mobile devices.
- 22 HRS offers booking information in more than 30 languages, and hence also targets hotel customers abroad. The hotel selection is made easier by a large number of filters, on deals and offers, theme hotels, business travel and groups, as well as by providing detailed hotel descriptions, hotel videos and roughly 2.5 million evaluations by hotel guests. For many years HRS operated the only well-known hotel portal, Hrs.de, in Germany, until two hotel portals, which are to some degree better known abroad, also gained a clearly visible presence on the German hotel market after the turn of the

¹⁹ cf. also www.ahgz.de of 3 September 2013.

²⁰ as per: 4 March 2013. In the category "HRS recommends", hotels are suggested to customers which HRS considers to best satisfy a large number of criteria (e.g. with regard to booking conditions, high level of customer satisfaction and value for money).

millennium. These are, firstly, Booking.com (below: "Booking"), the Dutch leading hotel portal in Europe, and Expedia.com, which belongs to the US online travel agency Expedia, Inc. (below: "Expedia"), which concentrates its operations on the U.S.A. and on Canada.

- 23 The worldwide turnover of HRS from commissions and, to a small extent, from advertising was approx. [...] € in 2012, of which approx. [...] € in Europe and approx. [...] € in Germany. Of the more than [...] million hotel guests in Europe who booked hotels via HRS, [the lion's share] came from Germany.
- 24 Booking, which belongs to the US Priceline Group, is the only enterprise which, on a scale comparable to HRS, concentrates exclusively on the sale of hotel rooms in Germany as well as in other EU Member States. The sale takes place via the booking.com portal and the domains which redirect to booking.com, such as booking.de. Other hotel and travel sites operated by the Priceline Group focus their services on the U.S.A. (priceline.com for hotel accommodation, flights, hire cars, package tours and cruises) and on Asia (agoda.com for hotel accommodation).
- 25 Expedia, the portal which currently has the third-largest turnover in Germany, sells single hotel rooms (also referred to below as "hotel-only") and travel products via its portals expedia.com and hotwire.com (discount), as well as hotel rooms only via the hotels.com portal, which is owned by its UK subsidiary Hotels.com, L.P. and via the venere.com portal, which is owned by its Italian subsidiary Venere Net S.p.A. (hereinafter: "Venere").
- 26 In addition to the service offered by HRS, Booking and Expedia, there are other portals which as a rule sell hotel rooms in Germany as well as travel products, flights, hire cars and other items, but have not yet become as significant for German hotels as HRS, Booking and Expedia. Other competitors, worth mentioning, are the German Unister Holding GmbH (hereinafter: "Unister") with the ab-in-den-urlaub.de travel portal and the hotelreservierung.de hotel portal, as well as ehotel AG (hereinafter: "ehotel") with the hotel portal ehotel.com. The German company lastminute.com GmbH (hereinafter: "lastminute"), which belongs to the UK lastminute.com Group, with the lastminute.de portal, and the UK ebookers Ltd., which belongs to the US Orbitz Group (hereinafter: "ebookers") with the ebookers.com portal, also sell hotel rooms in Germany, but generate more turnover here from the sale of flights and package tours. Furthermore, various

companies, in particular foreign ones, sell hotel rooms in Germany, but only on a small scale overall (e.g. Late Rooms, Quick Rooms or Superbreak).²¹

27 Hotel rooms in Germany have also been sold via mobile hotel portals in form of Apps²² on smartphones or tablet PCs since 2012 at the latest.²³ In addition to the HRS “Hotels Now” App, these include “JustBook”²⁴ and “BookitNow!”, as well as Booking’s “Tonight” App, the US “Hotel Tonight”²⁵ and the “BlinkBooking” App.²⁶

2. The MFN clauses of HRS

28 MFN clauses²⁷ have been a part of the contracts between HRS and its hotel partners worldwide since 2006.²⁸ The scope of the MFN clauses which have been applied since 1 March 2010 was expanded with effect as per 1 March 2012. The proceedings pending in the present case were initiated by a complaint against HRS in January 2010. The 2010 MFN clauses, the transition to the 2012 MFN clauses and the most recent clauses, which

²¹ In the overview for 2011 contained in the 2013 Sectoral Study on the Hotel Market in Germany (*Branchenstudie Hotelmarkt Deutschland*), p. 213, the share of the other electronic channels not named there is more than 5%. The list however also includes classical travel portals, hotels’ own websites, platforms of conference and event organisers and tourism organisations, as well as meta search engines specialising in hotels and travel, cf. information provided by e-mail by the *Hotelverband Deutschland (IHA) e.V.* (German Hotel Association) (hereinafter: “German Hotel Association”) of 17 August 2012, pp. 2207 et seqq. and 2210 (only page number quoted below for the case files). The information contained in the sectoral study published by the German Hotel Association, which appears annually, is based on surveys among hotels in Germany. A total of 686 individual hotels and 28 hotel chains with roughly 400 hotels took part in the latest study, which was carried out in December 2011 and January 2012, so that it was possible to evaluate the responses for more than 1,000 hotels for Germany (cf. 2013 Sectoral Study on the Hotel Market in Germany, p. 209). The sectoral study is the only study which comprehensively analyses the situation in the hotel sector in Germany on an annual basis.

²² App is the abbreviation for “application software”. This is a program used in order to process or support a specific function, e.g. text processing, financial accounting, outgoing goods, etc. The application software is used for mobile devices as well as for desktop PCs.

²³ cf. Sectoral Study on the Hotel Market in Germany 2013, p. 223 et seqq., on mobile portals, and for additional Internet information on the mobile hotel portals which are currently active, pp. 2576 et seqq. and 2674 et seqq. of the case file.

²⁴ JustBook has also been operating the “justbook.com” Internet portal since 2013, via which it sells hotel rooms, cf. fwv of 13 March 2013, pp. 46 et seq. (pp. 2694 et seq.).

²⁵ The “Hotel Tonight” App was launched on the US market back in 2010, and is now trying to enlarge its share of the market for the last minute sales of hotels in Europe, cf. fwv of 1 February 2013, pp. 50 et seq.

²⁶ cf. www.hotel-newsroom.de, “Neue Lastminute App - Bis zu 70% Rabatt bei BlinkBooking” on the “BlinkBooking” app, 20 September 2012.

²⁷ The term “MFN clauses” used here and below refers to all booking and cancellation conditions, as well as to room availability.

²⁸ cf. statement of HRS of 30 June 2012, p. 61 (pp. 1532 et seqq. and 1592) (hereinafter “statement of HRS” with no reference to the file page), as well as the answers of HRS in the questionnaire “Competitors questionnaire 2010” (“*Fragebogen Wettbewerber 2010*”) file, p. 1244.

are currently still applicable, are therefore described below. HRS has continued the practice of enforcing the MFN clauses by applying pressure, as was the case prior to the amendment of the MFN clauses.

2.1 MFN Clauses 2010

29 The 2010 MFN clauses of HRS are contained in Nos. 4 and 5 sentence 1 and No. 21 (h) of the general terms and conditions which have been applicable between HRS and its hotel partners since 1 March 2010, and read as follows.²⁹

30 “4. Best-price and availability guarantee

a) In principle, HRS expects its partner hotels to offer HRS the lowest room rates available including all taxes and other fees (so-called end prices). The hotel guarantees that the HRS price is at least as low as the cheapest rate offered by or for the hotel on other booking and travel platforms on the Internet or on offers on the hotel's own Web pages (the so-called parity rate). In this respect, the hotel also pledges to hold its other sales partners (e.g. tour operators) to this guarantee or to ensure that, if it is bookable at a cheaper rate elsewhere on the Internet, this price will definitely be available to HRS customers.

b) Furthermore, the hotel guarantees not to treat HRS unfairly vis-à-vis other online sales channels with regard to availability. Therefore, if rooms are available on other online sales channels, they must also be made available on HRS.

c) The hotel guarantees not to treat HRS unfairly vis-à-vis other online sales channels with regard to the booking and cancellation conditions for customers. Therefore, better conditions that the hotel offers online on other booking and travel platforms must also apply on HRS.”

31 It also says in No. 5 sentence 1 of the general terms and conditions: “The hotel is obliged to notify HRS without delay about all current temporary price reductions and to make these bookable through HRS.”

32 According to No. 21 (h) of the Contractual Terms and Conditions 2010, “HRS may bar the hotel immediately or temporarily prevent it from receiving further bookings” in case of

²⁹ Text of the contractual terms 2010, pp. 114 et seqq.

“uncooperative behaviour, e.g. quoting unfair market prices or entering higher prices on the HRS system than those charged to persons “walking in” as well as breaches of the best-price guarantee or parity with availability or booking conditions as per Section 4”³⁰.

33 Prior to the amendment of its general terms and conditions, HRS explained the new conditions to its hotel partners in writing. The Bundeskartellamt has at its disposal a letter from HRS to its hotel partners of 4 September 2009³¹ and a letter of 13 January 2010.³²

34 Referring to the MFN clauses existing at that time, the letter of September 2009 states the following as the reason for the transition: “[...]. HRS has developed a system which monitors the rates offered on our site and compares them on a daily basis with those of our competitors and of the hotels’ own websites. [...] This routine monitoring has revealed rates in various online portals which were originally meant for tour operators to put together package tours. Some of these rates were far below the HRS guaranteed best prices, and also below those being offered on the hotels’ own websites. [...] Against this background, we have called on all of you, our hotel partners [...] to provide HRS with [...] parity rates. [...]” All in all, this concerned roughly 100 hotels from various hotel chains and other hotels. The majority of the hotels in question reacted directly, and immediately restored rate parity. Where our demand was, however, not met, we have removed the hotels from sales until the prices are adjusted. This meant that roughly 40 hotels could no longer be booked via our site for a certain time. We are now able to state that, with the exception of two hotels, all partner hotels can now be booked via HRS once more, since the appropriate corrections have been carried out. [...]

35 In an intensive discussion that was provoked by HRS, a sectoral solution [was] developed which [...] ensures that operator rates can no longer [...] be passed into the portal world. Rate parity has thus been restored, and we can keep the promise which we make to our customers, and we can guarantee to offer them the best price.”

36 HRS explained the content of the new general terms and conditions in the letter of 13 January 2010 as follows:

³⁰ Referred to in this text as “No. 4”.

³¹ cf. letter, page 318.

³² cf. letter, page 4.

37 “As is the customary practice in cooperation between hotels and online sales channels, we will be expanding the existing, generally recognised best price guarantee to include availability and booking conditions. [...] If you therefore also sell a room on other online portals, we would like to be able to continue to offer your hotel. [...] As one of your strongest and most advantageous sales channels, we presume that, where you still have free capacities which are offered via other portals, you can also be booked via HRS. Moreover, HRS is also not to be placed at a disadvantage over other Internet sales channels with regard to the reservation and cancellation conditions. [...] Should you object to the changes [...], this is deemed as cancellation of your HRS contract with effect as per 1 March 2010, so that it will no longer be possible to book your hotel via HRS from that time onwards.”

2.2 MFN Clauses 2012

38 By letter of 17 January 2012³³, HRS informed its hotel partners of a change in its contractual terms and conditions from 1 March 2012³⁴ and pointed out that the opposition of a hotel to the changes would be regarded as constituting termination of the contract with effect from the date of the changes. Major changes relate to the tightening up of the MFN clauses (expansion of price and condition parity to cover all sales channels) as well as the increased commission, inter alia for individual bookings from a previous level of 13 to 15%.³⁵

39 The general terms and conditions in the version of 1 March 2012 now apply exclusively between HRS (including its subsidiaries Tiscover and Hotel.de) and its hotel partners.³⁶

40 No. 5 of the general terms and conditions reads as follows:

“Best price guarantee and availability guarantee

In principle, HRS expects its hotel partners to offer the lowest room rates available including all taxes and other fees (so-called end prices) and the maximum possible availability. The hotel is therefore obliged to

³³ cf. “Separate Citizens’ Inquiries” (*Separate Bürgeranfragen*) file, pp. 162 et seqq.

³⁴ Text of the contractual terms, cf. “Separate Citizens’ Inquiries” file, pp. 164 et seqq.

³⁵ Simultaneous increase in the commission for group bookings from 10% to 13%, as well as any surcharges otherwise agreed (No. 14).

³⁶ cf. e-mail from HRS of 27 March 2013, p. 2819.

- a) guarantee that HRS always receives a price (hereinafter referred to jointly as "price" or "rate") at least as low as the cheapest rate offered by or for the hotel on other booking and travel platforms on the Internet or on offers through the hotel's own sales channels (so-called parity rate). The hotel is obliged in this context to also hold its other sales partners (e.g. tour operators) to this guarantee or to ensure that, if it is bookable at a cheaper rate elsewhere, this price will definitely be available to HRS customers.
- b) A successful claim by a HRS customer resulting from the breach of the best price guarantee must be settled when invoicing the guest. In addition, the Hotel will modify the HRS price accordingly without delay.
- c) Furthermore, the Hotel guarantees not to treat HRS unfairly vis-à-vis other distribution channels with regard to availability. Therefore, if rooms are available on other sales channels, they must also be made available on HRS.³⁷
- d) The Hotel guarantees not to treat HRS unfairly vis-à-vis other distribution channels with regard to the booking and cancellation conditions for customers. Therefore, better conditions that the hotel or a third party acting on behalf of the hotel offers online or offline on other booking and travel platforms must also apply on HRS."

41 In accordance with No. 18 (i) of the new contractual terms and conditions, an "infringement against the best price guarantee or parity for availability or booking terms" authorises HRS to "directly and temporarily block the hotel from receiving any additional bookings".

42 HRS has supported the impact of these clauses by means of a price guarantee which applies to the customers of its hotel partners.³⁸ The price guarantee reads as follows:

43 "With the HRS best price guarantee, you can be certain that you will always receive the best offer for your hotel reservation from HRS. If a hotel offers its rooms more cheaply via a different Internet service with the same booking conditions, HRS will also only charge

³⁷ HRS and Hotel.de stated the following in letters to their hotel partners regarding the amendment to the terms and conditions in 2012: First of all, we would like to stress once more with regard to No. 5 c) ("availability guarantee") that this does not refer to the hotels' own websites. They are therefore free to make rooms available only via sales on their own websites, via telephone sales or at the reception. The provision only refers to the fact that HRS/Hotel.de is not to be treated unfairly vis-à-vis the other sales channels (cf. pp. 1092 and 1142).

³⁸ HRS best price guarantee, Internet text, p. 1934 h.

you the lower price. We guarantee this! [...] Within best the price guarantee, after we have checked the alternative offer, we will send you a new booking confirmation with the cheaper room price.”

44 HRS continued until September 2013 the practice which it had already exercised in the past, namely of routinely monitoring rates and threatening to impose sanctions (in particular booking deactivations and issuing contract terminations) in the event of non-compliance with rate parity.³⁹

45 HRS also agreed clauses in individual contracts with its hotel partners the content of which, according to its own information, is similar with the MFN clauses in No. 5 of the currently applicable terms and conditions.⁴⁰

2.3 “Top Quality Hotel” seal

46 By letter of 1 October 2012, HRS informed the Decision Division of the introduction of the “Top Quality Hotel” seal from November 2012 onwards.⁴¹ Since then, it has been possible for HRS hotel partners to conclude an additional agreement⁴² with HRS containing the conditions for the award of the seal. These conditions include a high level of customer satisfaction, flexible booking conditions and “objectively advantageous prices”. [...] The seal is withdrawn if the hotel that was awarded the “Top Quality Hotel” seal no longer meets the requirements of the quality seal (No. 2 of the additional agreement). The participating hotel appears on the HRS portal with the “Top Quality Hotel” seal [...].⁴³ HRS informed the Decision Division by e-mail of 9 December 2013 that the Top Quality Hotel is

³⁹ This practice was described in detail in letters from the German Hotel Association of 12 and 18 September 2013 and documented by excerpts from the e-mail correspondence between HRS and individual hotels (pp. 3579 et seqq. and 3597 et seqq.). In 2013, the German Hotel Association requested hoteliers in Germany to inform it of written warnings received from HRS; the Decision Division has the e-mail correspondence in question (enclosed with the e-mail of the German Hotel Association of 9 September 2013, pp. 3443 et seqq.). cf. also letter from the Hotel Association of 13 August 2013, in which the Association proposes to proceed against contract terminations by HRS related to the enforcement of the MFN clauses via an interim measure in accordance with section 32 GWB (pp. 3394 et seqq.)

⁴⁰ cf. e.g. information from a major hotel chain of 18 January 2011, p. 49 of the “Request for information from major hotels/hotels receiving termination notices” (“*Auskunftsersuchen große Hotels/gekündigte Hotels*”) file and letter from HRS of 29 November 2013, pp. 4014 and 4019, in which HRS refers to “parity obligations comparable” to the MFN clause in contracts between HRS and its hotel partners.

⁴¹ cf. letter of HRS of 1 October 2012 containing the specimen text of the additional agreement, pp. 2411 et seqq.

⁴² Text of the additional agreement, cf. pp. 2413 et seqq.

⁴³ cf. in this respect letter of HRS of 1 October 2012, pp. 2411 and 2412.

now shown with [...] hotels in Germany.⁴⁴ Hence, fewer than [...] of the approx. [...] hotel partners of HRS⁴⁵ in Germany have currently been awarded the seal.

47 The Decision Division decided not to make the HRS “Top Quality Hotel” seal part of its prohibition order in these proceedings. Nonetheless, the Decision Division will continue to precisely observe whether the use of the seal by HRS results in an impact on the market which is similar to the impact of the MFN clauses contained in the terms and conditions and in individual contracts. Looking at the impact on competition it is crucial whether HRS combines the “Top Quality Hotel” seal with further services for hotels, e.g. in form of better ranking or lower commissions, and to what degree hotels use the seal.

3. MFN clauses of other portals

48 Just like HRS, the other major portals in Germany, such as Booking and Expedia, introduced MFN clauses some years ago.

49 The MFN clauses of Booking and Expedia provide in detail for the following:

50 In accordance with number 2.2. of the general term and conditions which apply in the relationship between Booking and its hotel partners⁴⁶, the hotel is obliged to grant to Booking a rate and availability guarantee with regard to the websites and Apps, in the call centres of the accommodation or directly in the accommodation, as well as with a competitor of Booking.com (including online and offline reservation or booking agencies and intermediaries) and/or with another third party (online or offline) which is a business partner of the accommodation or affiliated with the accommodation in any other way. Rate parity also relates to the other booking and cancellation conditions. In the event of an effective claim being made by a guest on the basis of the best price guarantee, the accommodation is to immediately adjust the prices on the Booking.com portal so that the lower price is available for other bookings. Once the guest has left, the accommodation offers the rooms at the lower price and pays the difference vis-à-vis the booked price (No. 2.5.6). Booking is entitled to cease providing its services to the accommodation without delay if the accommodation invoices a price which is “too high” to a guest or

⁴⁴ cf. e-mail of HRS of 9 December 2013, p. 4101.

⁴⁵ HRS states that it had contracts with almost [...] partner hotels in Germany in 2012 (cf. “Questionnaire among competitors 2012” [“Fragebogen Wettbewerber 2012”] file, p. 851).

⁴⁶ The text of the contractual terms and conditions which currently apply can be found in the “Questionnaire among competitors 2012” file, pp. 218 et seqq.

several guests (No. 7.4 v).

- 51 In accordance with the terms and conditions which are applicable between Expedia and its hotel partners⁴⁷, the MFN clauses of Expedia refer to rates and availabilities, as well as to other booking and cancellation conditions on the hotels' own or third-party sales or booking channels. The hotel is obliged to refund to Expedia the price difference claimed by a guest between the best price and the booked price. The general regulations apply, such as the possibility open to the portal to suspend provision of the booking service should the hotel act in breach of contract, without any particular reference being made to the MFN clauses.
- 52 The smaller hotel portals such as lastminute, Unister or ehotel apply MFN clauses, too.

C. Course of proceedings

1. Proceedings against HRS at the Bundeskartellamt

1.1 Pending proceedings

- 53 The proceedings pending here were initiated in January 2010 by the complaint of a hotel against the MFN clauses of HRS.
- 54 By letter of 17 June 2010, the Decision Division requested HRS to make a statement on the MFN clauses agreed between HRS and its hotel partners.⁴⁸ In its statement of objections of 9 February 2012, the Decision Division informed HRS that the MFN clauses might, in the view of the Decision Division, be in breach of section 1 GWB/Art. 101 TFEU, section 20 (1) in conjunction with subsection (2) GWB and section 21 (2) GWB^{49, 50}.
- 55 JustBook Mobile GmbH ("JustBook") was admitted to the proceedings by order of the Bundeskartellamt of 29 February 2012, the German Hotel Association (IHA) e.V.

⁴⁷ The Bundeskartellamt has the text of the contractual terms which currently apply ("Questionnaire among competitors 2012" file, pp. 311 et seqq.), but Expedia considers it to be confidential in its entirety (cf. letter from Expedia of 28 May 2013, pp. 2895 et seq.). For this reason, the text of the contract is only indirectly quoted from here.

⁴⁸ cf. pp. 72 et seqq.

⁴⁹ The section number relates to the version of the GWB applicable at that time.

⁵⁰ Statement of objections, cf. pp. 472 et seqq.

(“German Hotel Association”) was admitted by decision of 1 March 2012, and Unister was admitted by decision of 7 March 2012.

- 56 HRS made a statement on the Decision Division’s statement of objections of 9 February 2012 by letter of 27 April 2012,⁵¹ by detailed letter of 30 June 2012⁵² and by letters of 11 March⁵³ and 10 May 2013⁵⁴. The German Hotel Association reacted to the June statement of HRS by letter of 28 August 2012⁵⁵, and JustBook did so by letter of 27 September 2012.⁵⁶
- 57 By letter of 27 April 2012,⁵⁷ HRS undertook vis-à-vis the Decision Division not to enforce the MFN clauses contained in its terms and conditions in relations with its hotel partners during the entire administrative proceedings.
- 58 With regard to the question of the implementation and the impact of the MFN clauses on competition, and in particular to the question of the standardisation of conditions, in 2011 the Decision Division surveyed large, medium-sized and small hotels which have their rooms booked via HRS, as well as other hotels whose contracts HRS has cancelled.⁵⁸ Furthermore, in 2011 the Decision Division carried out a survey among competitors which sell a large number of hotel rooms in Germany.⁵⁹ The questionnaire related to the definition of the relevant market, the market structure, as well as to the application and the

⁵¹ letter of HRS of 27 April 2012 (pp. 1019 et seqq.).

⁵² statement of HRS of 30 June 2012, loc. cit. (pp. 1532 et seqq.).

⁵³ letter of HRS of 11 March 2013 (pp. 2625 et seqq.).

⁵⁴ letter of HRS of 10 May 2013 (pp. 2828 et seqq.).

⁵⁵ letter from the German Hotel Association of 28 August 2012 (pp. 2228 et seqq.).

⁵⁶ letter from JustBook of 27 September 2012 (pp. 2430 et seqq.).

⁵⁷ letter of HRS, pp. 1103 et seq., letter of HRS to hotel partners, pp. 1108 et seq., confirmation letter of the Bundeskartellamt, pp. 1136 et seq.; cf. also the corresponding information letter from Hotel.de to its hotel partners, p. 1142.

⁵⁸ The questionnaire covered ten hotels with more than 100 rooms, ten hotels with 20-100 rooms and ten hotels with fewer than 20 rooms. Four hotels told the Decision Division that they had received a termination letter from HRS. The Bundeskartellamt’s questionnaires were answered by all hotels. cf. on the questionnaires and the answers the “Information request to small and medium-sized hotels” (“*Auskunftsersuchen kleine und mittlere Hotels*”) file and the “Request for information from major hotels/hotels receiving termination notices” file, as well as the overview of responses, pp. 226 et seqq. of the case file.

⁵⁹ Of the approx. twenty companies surveyed, twelve answered the questionnaire, including all the major portals focussing on booking for hotels in Germany (incl. Booking, Expedia, Hotel.de, ehotel). cf. files “Questionnaire among competitors 2010” 1-3, “Questionnaire among competitors 2010” 4-9, “Questionnaire among competitors 2010” (“Fragebogen Wettbewerber 2010”) 10-17 and “Questionnaire among competitors 2010” 18-31 (overviews of the responses, pp. 125 et seqq. and 418 et seqq.) on the questionnaire and the responses

effects on competition of MFN clauses. In September 2012, giving consideration to the HRS statement of 27 April 2012 and to the HRS more detailed statement of 30 June 2012, as well as to an expert report by Professor Inderst (hereinafter: "Inderst report") enclosed with this statement,⁶⁰ the Decision Division carried out a further survey regarding the market data of hotel and tour operator portals.⁶¹

59 By letter of 24 July 2013, the Decision Division forwarded to HRS a further statement of objections in which it informed HRS that, after a more detailed investigation, it was holding to its view that the MFN clauses were in violation of section 1 GWB/Art. 101 TFEU and of section 20 (1) GWB⁶², and that therefore it intended to issue a prohibition order in accordance with section 32 (1) GWB or to withdraw, in accordance with section 32 d GWB, the exemption regulated by Art. 2 (1) of the Vertical Restraints Block Exemption Regulation, if the market share of HRS was to be lower than 30% in 2012. The Decision Division calculated the market data for 2012 on the basis of the results of the questionnaire of 19 September 2013.⁶³

60 By letter of 13 August 2013, the German Hotel Association informed the Decision Division that cases had repeatedly been brought to the Association's attention since the end of July 2013 in which HRS had threatened to terminate contractual relations with hotels and hotel chains after examining rate parity, and that it had indeed cancelled contracts in the event of non-compliance with rate parity.⁶⁴ HRS continued this practice at least until October 2013.⁶⁵

⁶⁰ "Ökonomische Analyse der Bestpreisklausel im Markt für Online-Hotelbuchungsportale" (Economic analysis of the MFN clause in the market for online hotel booking portals), expert report commissioned by HRS Hotel Reservation Service Robert Ragge GmbH, Cologne, drafted by Prof. Dr. Roman Inderst (commissioned by RCS Research & Consulting Services GmbH, Goethe University Frankfurt, June 2012 (pp. 1636 et seqq.). Hereinafter referred to as "Inderst report" (without stating file page no.).

⁶¹ Six hotel and travel portals and the tour operator portals belonging to REWE, Thomas Cook and TUI were surveyed. cf. files "Questionnaire among competitors 2012" ("*Fragebogen Wettbewerber 2012*"), Vols. 1 and 2 (overviews of answers pp. 45 et seqq.), as well as "Questionnaire among tour operator portals" ("*Fragebogen Reiseveranstalterportale*") file regarding the questionnaires and the answers.

⁶² cf. pp. 3050 et seqq.

⁶³ The questionnaire and the results of the investigations can be found in the "Questionnaire among competitors 2013" file.

⁶⁴ Letter of the Hotel Association with the corresponding information mails and termination letters from HRS, cf. pp. 3394 et seqq.

⁶⁵ The practice carried out in order to enforce the MFN clauses is described in detail in letters of the German Hotel Association of 12 and 18 September 2013 and documented by excerpts from the e-mail correspondence of HRS with individual hotels (pp. 3579 et seqq. and 3597 et seqq.). In 2013, the German Hotel Association called on hoteliers in Germany to provide it with information on written warnings from HRS; the Decision Division also has the corresponding e-mail correspondence (attached to the e-mail of the German Hotel Association of 9 September 2013, pp. 3443 et seqq.). A final meeting took place between HRS and the Decision Division on 15 October 2013, cf. note of 22 October 2013 (pp. 3813 et seqq.).

- 61 HRS did not make a detailed statement on the statement of objections of the Decision Division of 24 July 2013,⁶⁶ but made the Decision Division an offer to enter into a commitment by letter of 25 October 2013. HRS mainly offered to delete the MFN clauses agreed in its general terms and conditions and in bilateral agreements with its hotel partners for a period of two years and not to agree these or similar clauses during this period.⁶⁷ The German Hotel Association made a statement on the HRS offer to enter into a commitment by letter of 5 November 2013⁶⁸, as did JustBook by letter of 6 November 2013.⁶⁹ No statement has been received from Unister. The Decision Division informed HRS by letter of 21 November 2013,⁷⁰ considering the statements of the parties to the proceedings, that it was making use of the discretion which it had in accordance with section 32 b GWB and that it was rejecting the HRS offer to enter into a commitment. At the same time, the Decision Division provided information in its letter on the results of the investigations regarding the market data for 2012. Since the market share of HRS remains above 30%, and hence no decision can be taken in accordance with section 32 d GWB, the Decision Division announced that it would issue a prohibition order in accordance with section 32 (1) GWB.
- 62 On 4 December 2013 the Decision Division rejected the HRS offer of 29 November 2013 to enter into a commitment,⁷¹ in which HRS extended its original offer to a period of five years.⁷² The parties to the proceedings which had been informed of this expanded offer⁷³ did not make any statement on this offer.
- 63 The Decision Division informed the European Commission in accordance with Art. 11 (3) of Regulation (EC) No 1/2003 of the commencement of the proceedings (letter received by the European Commission on 1 February 2012)⁷⁴ and informed it in accordance with

⁶⁶ cf. letter of 18 September 2013, pp. 3709 et seqq.

⁶⁷ cf. pp. 3830 et seqq.

⁶⁸ cf. pp. 3923 et seqq.

⁶⁹ cf. pp. 3913 et seqq.

⁷⁰ cf. pp. 3940 et seqq.

⁷¹ cf. pp. 4014 et seqq.

⁷² cf. on this note of 4 December 2013 on a telephone conversation with HRS on the same day (p. 4097).

⁷³ Letter by the Decision Division, of 29 November 2013, to the German Hotel Association (pp. 3999 et seqq.) and letter of the same date from JustBook (pp. 4002 et seqq.), as well as letter to Unister on 2 December 2013 (pp. 4066 et seqq.).

⁷⁴ cf. p. 505.

Art. 11 (4) of Regulation (EC) No 1/2003 that it intended to adopt this decision (letter received by the European Commission on 31 July 2013).⁷⁵

64 By letter of 19 December 2013, the Decision Division informed Booking⁷⁶ and Expedia⁷⁷ that it had initiated proceedings in order to examine the permissibility under competition law of the parity clauses used by the hotels in contracts with hotel partners for their hotels in Germany.

1.2 Complaint by BookitNow!

65 By letter of 12 December 2012, BookitNow! Services GmbH (hereinafter “BookitNow!”) lodged a complaint with the Bundeskartellamt against HRS because it considered that it had been hindered in launching its mobile hotelApp of the same name on the market by the MFN clauses of HRS.⁷⁸ According to information from BookitNow!, hotels had given as reasons for terminating with BookitNow! that HRS had called on them to always use the “Hotels Now” App operated by HRS if they wished to use the BookitNow! App and the JustBook App, and to grant the same discounts to HRS. If the hotels did not use the HRS mobile service, they had to expect to be deactivated for booking on the HRS Internet portal. In its statement, HRS informed the Bundeskartellamt that the conduct complained of had consisted of misunderstandings and that these had now been clarified.⁷⁹ The Decision Division has not received a reaction from JustBook. The Bundeskartellamt has not received any further complaints in this matter.

2. Proceedings before Düsseldorf Higher Regional Court

66 Both JustBook and the German Hotel Association have applied in court for interim measures against the MFN clauses of HRS⁸⁰, and the German Hotel Association has also

⁷⁵ cf. p. 4125.

⁷⁶ BKartA B9-121/13.

⁷⁷ BKartA B9-120/13.

⁷⁸ BKartA B9-155/12 letter of complaint (excerpt from file, pp. 2568 et seqq.) and statement of HRS of 10 January 2013 (pp. 2591 et seqq.).

⁷⁹ BKartA B9-155/12, excerpt from file, pp. 2591 et seqq.

⁸⁰ cf. Düsseldorf Higher Regional Court VI-W (Kart) 1/12 of 15 February 2012 “JustBook/HRS” (pp. 2425 et seqq.) and Düsseldorf Higher Regional Court VI-W (Kart) 4/12 of 22 May 2012 “German Hotel Association/HRS” (pp. 2935 et seqq.).

applied for interim measures against the MFN clauses of Hotel.de⁸¹ and of Booking.⁸² In the case of JustBook, the hotels had withdrawn their offers or increased the room prices to the HRS price level after HRS had threatened to deactivate bookings and to cancel contracts with its hotel partners, referring to its MFN clauses. The Düsseldorf Higher Regional Court handed down an injunction in the “JustBook/HRS” proceedings on 15 February 2012 prohibiting HRS from applying parity clauses vis-à-vis its hotel partners, a regulatory fine being imposable in the case of an infringement, alternatively confinement for contempt of court, until a ruling were to be handed down in the main case. Just as in the cases of “German Hotel Association/HRS” and “German Hotel Association/Hotel.de”, the Düsseldorf Higher Regional Court put forward its legal view that the MFN agreements concerned practically eliminate competition between the sales partners of the hotels which are bound by the agreements.⁸³

3. Proceedings against hotel portals in other countries

67 Competition authorities inter alia in the United Kingdom, Austria, Switzerland, Sweden, Ireland, Australia, and recently also in France⁸⁴, as well as courts in the U.S.A., are dealing with complaints against the use of MFN clauses and other anti-competitive practices of hotels and portals. On 31 July 2012, the UK Office of Fair Trading sent a statement of objections addressed to Expedia, Priceline/Booking and the Inter-Continental hotel group.⁸⁵

D. Legal assessment

68 HRS is in infringement of applicable competition law by virtue of the MFN clauses agreed with its hotel partners. These clauses certainly bring about a significant restraint of

⁸¹ Düsseldorf Higher Regional Court - VI – W (Kart) 5/12 of 22 May 2012 “Hotel Association/Hotel.de” (pp. 1209 et seqq.).

⁸² Düsseldorf Higher Regional Court VI – W (Kart) 6/12 of 9 May 2012 “Hotel Association/Booking” (pp. 1227 et seqq.).

⁸³ In the proceedings initiated by the German Hotel Association against HRS, Hotel.de and Booking, the Düsseldorf Higher Regional Court rejected the plaintiff’s immediate appeals against the rulings of Cologne Regional Court refusing to grant an interim injunction for lack of urgency. Substantive statements on the MFN clause can nonetheless be found in the rulings of the Düsseldorf Higher Regional Court “Hotel Association/HRS” and “Hotel Association/Hotel.de”.

⁸⁴ French competition authority investigating as requested by the Umih Hotel Association since 2 July 2013, cf. Internet information of Le Figaro (www.lefigaro.fr of 1 July 2013), pp. 3012 et seqq. and the Le Monde newspaper (www.lemonde.fr of 2 July 2013), pp. 3018 et seqq.

⁸⁵ OFT press release of 31 July 2012, p. 1998.

competition between the hotel portals and between the hotels within the meaning of section 1 GWB/Art. 101 (1) TFEU (cf. on this section D.3) on the relevant market for the sale of hotel rooms via hotel portals (cf. on this section D.1), which, in geographic terms, is to be defined to cover all parts of Germany (cf. on this section D.2). The criteria for an exemption in accordance with section 2 (1) GWB/Art. 101 (3) TFEU in conjunction with Art. 2 of the Vertical Restraints Block Exemption Regulation would not be satisfied if the MFN clauses of HRS were a hardcore restriction within the meaning of Art. 4 a) of the Vertical Restraints Block Exemption Regulation. Whether this is the case may, however, remain open since the HRS market share was above 30%, at least from 2009 to 2012 (cf. on this section D.4.3). The criteria for an individual exemption in accordance with section 2 (1) GWB/Art. 101 (3) TFEU are not satisfied (cf. on this section D.5); an exemption in accordance with section 3 GWB cannot be considered in the present case (cf. on this section D.6). By applying the MFN clauses, HRS has acted in violation of section 20 (1) in conjunction with section 19 (1) and (2) No. 1 GWB (cf. on this section D.7).

1. The relevant product market

69 The relevant product market is the market for the sale of hotel rooms via hotel portals (hereinafter referred to as “hotel portal market”). The relevant product market encompasses all goods or services which have a substitute function in the view of the customer as to their characteristics, economic purpose and prices. The purpose of market definition is to identify and define the area with regard to a specific set of proceedings in which companies compete with one another, i.e. the purpose is to identify competitors that are capable of constraining the behaviour of companies and of preventing them from behaving independently of effective competitive pressure⁸⁶.

1.1 The pleading of HRS

70 HRS submits that hotel portals belong to a broad product market which, in addition to the providers of the typical bundle of services of a hotel portal (“search, comparison and booking”), also includes all providers of services possibly leading to a booking. It was hence not necessary to distinguish between online and offline services. Since the

⁸⁶ cf. Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9 December 1997, No. 2.

companies operating in these fields acted as intermediaries between hotels and hotel customers, it would seem logical to regard both two sides of the market separately. HRS essentially takes into consideration the view of hotel customers and is of the opinion that Google, online travel agencies, meta search engines, offline travel agencies, tour operators and hotel portals are certainly to be included in the same market. All channels were used by hotel customers in order to be able to book hotel accommodation at the end of the search. Since hotel customers in any case consulted several providers, it was said to be irrelevant whether they received the search, comparison and booking function from one or several providers. They were all suited to meet customers' needs – where appropriate in combination –, and would hence be substitutes from the point of view of hotel customers. The typical customer was said to consult several providers; the providers of the combined functions were merely providers with an additional service which did not dispense with the need to consult other providers. It was, however, said to be necessary to distinguish between corporate customers (“managed travel”) and private customers (“non-managed travel”).⁸⁷ From the perspective of the hotels, all sales channels served to improve hotel occupancy and hence increased their income. It was therefore artificial to define markets on the basis of the various channels. All channels were said to offer their services at similar prices; the convenience of the customer was irrelevant to the choice of channel mix by hotels.⁸⁸

1.2 The market definition of the Decision Division

- 71 The Decision Division does not share the view held by HRS according to which hotel portals belong to a broad product market including both providers of the typical bundle of services of a hotel portal (“search, comparison and booking”), and all providers of single services. The present case relates to the market for the sale of hotel rooms via hotel portals. In particular, there is a need to distinguish between the various sales channels and the sales-relevant services specified by HRS since there are considerable differences here. Relevant points are, in particular, whether services are offered as a bundle or individually and whether the service is offered at the same level of the distribution chain. Furthermore, the orientation and the range of services offered by the channels need to be considered. The Decision Division, like HRS, looks at both sides of the market but focuses on the view of the hotels. The meaning and purpose of the market definition under

⁸⁷ cf. statement of HRS, loc. cit., pp. 30 et seqq.

⁸⁸ cf. statement of HRS, loc. cit., pp. 47 et seqq.

competition law is to include competition relationships between market players whose relationships are the focus of the investigation in a specific case. This case relates to the MFN clauses that are agreed by contract between HRS and the hotels. It is vital for the hotels to define who provides the service and subject to what contractually-agreed conditions.⁸⁹ In the view of the hotels only those channels are substitutes, and hence to be included in the same market, via which substitute services are provided. This is not the case for the providers and services mentioned by HRS from Google to offline travel agencies and to offline sales by the hotels.

72 The Decision Division has also investigated the perspective of the hotel customer in the market definition.⁹⁰ It should be taken into account that, even where hotel customers consider a certain degree of substitution to exist between the various channels, hotels might have a different perspective. From their point of view specific channels may not be substitutes, but complement one another.

73 According to the investigation, the online sales of hotel rooms complement offline sales, and do hence not substitute offline sales (cf. on this section 1.2.1). A further distinction needs to be made when it comes to online sales (cf. on this section 1.2.2). Hotel portals establish a direct contact between hotels and hotel customers (cf. on this section 1.2.2.1). On the basis of direct contractual ties with the hotels, they primarily provide hotel rooms or also further travel services such as package tours, flights and hire cars. Hotel portals offer to hotel customers the functions “search, comparison and booking” in a bundle of services which customers find convenient. Hotels’ own websites (cf. on this section 1.2.2.2) and specialised portals (cf. on this section 1.2.2.3), which as a rule do not offer the same comprehensive bundle of services to the hotels and their customers, and whose range is narrower, are hence not part of the hotel portal market. Online travel agencies (cf. on this section 1.2.2.4) and tour operator portals (cf. on this section 1.2.2.5), as a rule, do not have direct contractual ties with hotels, and hence operate on another level of the distribution chain than hotel portals do. Unlike hotel portals, meta search engines essentially only offer price comparison and also operate on another level of the distribution chain, since they only connect the hotel portals which they list (and in some cases large hotels and hotel chains) with the customers, but as a rule they do not have

⁸⁹ cf. also the information provided by the Hotel Association of 17 August 2012, p. 2207.

⁹⁰ In the case of Comp/M. 4523 “Travelport/Worldspan”, Nos. 41 et seq., the European Commission also defines a two-sided market with the “GDS market” (for flights and other travel services), and in so doing takes account of the sides of the market that are relevant in each case.

any direct contractual ties with individual hotels (cf. on this section 1.2.2.6). By contrast, the corporate customer business managed by HRS is just as much a part of the relevant market as is private customer business. At most, “travel management” would have to be regarded as being separate from private customer business, which goes beyond selling hotel rooms and incorporates a comprehensive bundle of services for corporate customers, but which HRS does not offer (cf. on this section 1.2.2.7).

1.2.1 Online and offline sales

- 74 Online sales of hotel rooms complement offline sales, and are hence not a substitute for offline sales. This is made clear in particular by the unilateral substitution of offline sales by online sales. Whilst offline sales are waning, Internet bookings of travel services, primarily hotel bookings, have been growing continually in the last years.⁹¹ There are no adequate indications of a uniform market on which the online and offline sales channels only constitute segments of a more comprehensive market.
- 75 The Internet-based sales channels for hotel rooms include the Internet booking platforms, hotels’ own websites with real-time booking facilities, the Global Distribution System (“GDS”) used by online travel agencies, the respective central reservation system (“CRS”) of the hotel chains and hotel cooperations⁹², and social media, such as Facebook or Twitter.⁹³ The offline sales channels include in particular sales of hotel rooms by telephone and e-mails, reservation forms on the hotels’ own websites and sales via offline travel agencies and tourism organisations.

⁹¹ cf. 2013 Sectoral Study on the Hotel Market in Germany, pp. 206 et seqq.

⁹² GDS are sales channels which were used by travel agencies before the Internet came to be used. At that time, GDS were the main electronic sales channels used by hotels. Hotels chains are connected to the GDS via their own central reservation systems (CRS). Examples of GDS providers are Amadeus, Travelport and Sabre. cf. information from the Institut de Tourisme, HES-SO Wallis, of 17 September 2012, pp. 2220 and 2221. cf. also Inderst report, loc. cit., pp. 40 et seqq. for a description of electronic sales channels,

⁹³ More detailed description of Sectoral Study on the Hotel Market in Germany 2013, pp. 227 et seqq.

76 Depending on the respective location and the emerging developments of customer preferences, hotels use a different “sales mix”. An overview of the sales channels used by the hotels in Germany and their significance in the market is provided in the table below.⁹⁴ According to these data, roughly one-third of all hotel room bookings are carried out online:

Table 1: Distribution of hotel room bookings among sales channels

Internet reservation platform	19.50%
Real-time booking website	5.90%
GDS ⁹⁵	2.70%
Hotel chains and cooperations with CRS ⁹⁶	1.80%
Social media	0.20%
Online reservation channels total	30.10%
Telephone	25%
e-mail	17.10%
Reservation form (website)	6.20%
Tour operator/travel agency	5.90%
Walk-in trade	5.30%
Letter/fax	4.90%
Tourism organisation	2.80%
Event/conference organiser	1.90%
Total offline reservation channels	69.10%
Other channels ⁹⁷	0.80%

⁹⁴ The table is taken from the Sectoral Study on the Hotel Market in Germany 2012, p. 171. It was based on a survey by the German Hotel Association, the Austrian Hotel Association and the Institut de Tourisme of the Wallis Western Switzerland University of Applied Sciences, HES-SO Wallis, on the distribution and sales situation in the German-speaking area of Europe (*“Die Macht der Buchungsportale”* [The power of the reservation portals] by Roland Schegg & Michael Fux, March 2012, copy pp. 2126 et seqq., *hereinafter: “HES-SO Study 2012”*). A total of 686 individual hotels and 28 hotel chains in Germany with roughly 400 hotels took part in the survey for 2011, so that the answers of more than 1,000 hotels were evaluated for Germany (cf. German Hotel Association sectoral study 2012, pp. 168 et seq.). p. 209 of the Sectoral Study on the Hotel Market in Germany 2013, which is now available, also refers to the survey for 2011. No more recent figures are yet available on this.

⁹⁵ GDS are listed separately because the first surveys on the distribution channels in the German-speaking area of Europe were launched in 2002, when the GDS was more significant for the hotel industry, cf. information from the Institut de Tourisme of 17 September 2012, pp. 2220 and 2221.

⁹⁶ CRS are listed separately since the first surveys on the distribution channels in the German-speaking area of Europe were launched in 2002, when the CRS were more significant for the hotel industry, cf. information from the Institut de Tourisme of 17 September 2012, pp. 2220 and 2221.

⁹⁷ “Other channels” include sales channels which could not be attributed elsewhere, such as online sales via tour operators which hotels could not separately list (cf. information from the German Hotel Association of 17 August 2012, pp. 2207 and 2208).

- 77 Small and medium-sized hotels in particular, which are less well known among potential customers, rely on the Internet as a supplementary sales channel in order to fill their hotel rooms.⁹⁸ Where they sell their rooms via travel agencies, they frequently do not restrict the sales to either offline or online sales, but use both sales channels in conjunction since the channels meet different hotel customer needs. Where a hotel customer uses the service of an offline travel agency, this might be the result of the quality and extent of the personal and expert advice for the travel service required.⁹⁹
- 78 Just as hotels, hotel customers are making increased use of the Internet in addition to the classical offline sales channels. Only the Internet offers customers a rapid, targeted search for the desired service independently of place and time, made easier by meta search engines.¹⁰⁰ Since online services are translated into a large number of languages as a rule or are at least offered in the global language English, language barriers are minor, unlike in offline sales.
- 79 The approach taken by some hotel customers, as described by HRS, namely “looking on the Web, sorting out questions in a travel agency and then booking”¹⁰¹, may well apply to complex travel services comprising accommodation, flights, hire cars, travel insurance and tourist attractions, but hardly to individual hotel stays. General experience suggests that a change from online to offline sales in any case does not take place with a simple hotel room search. According to a market survey of the European Commission travel customers who do not get the information from one online provider typically continue their search with another online provider, but they do not continue their search offline.¹⁰²

⁹⁸ This is also confirmed by the Bundeskartellamt's market survey, cf. on this the summary notes of 14 February 2011, pp. 226 and 228 et seq.

⁹⁹ cf. also Decision of the European Commission of 6 January 2011, Comp/M. 5996 “Thomas Cook/Travel Business”, Nos. 24 et seqq. Comparable considerations were also supposed by the Federal Court of Justice and the European Commission in presuming distinct product markets to exist for stationary and distance sales, which are structurally comparable with the Internet (Federal Court of Justice, judgment of 4 November 2003 “*Depotkosmetik im Internet*”, WuW/E DE-R 1203-1205 and Decision of the European Commission of 16 December 1991, Case IV/33.242 “Yves Saint Laurent Parfums”).

¹⁰⁰ A comparable view is held by the European Commission, which in Comp/M. 4731 “Google/DoubleClick”, No. 45 et seqq. presumes different markets to exist for online advertising and offline advertising.

¹⁰¹ cf. statement of HRS of 30 June 2012, loc. cit., p. 17.

¹⁰² Case of Comp/M. 6163, Nos. 27 et seq.

1.2.2 Differentiation within online sales

80 A further distinction should be made within online sales. In terms of their services and prices, hotel portals are in a close competition relationship in the view of the hotels, whilst other online sales channels do not constitute adequate substitutes, but tend more to complement online sales.¹⁰³ Where online providers only connect other upstream and downstream sides of the market, they operate on a different level of the distribution chain. This leads to differing contractual obligations and means of payment between these online providers and their customers. The services of online providers which are on another level of the distribution chain are hence not a substitute for hotel portals, in particular in the view of the hotels which have to pay.¹⁰⁴

1.2.2.1 Hotel portals

81 The relevant product market includes the services of all portals which relate to the sale of hotel rooms (“hotel-only”), this also being the case if the portals additionally offer other travel services. Hotel portals either display the information provided by the hotels via the respective central booking system of the hotel chains (CRS) or a technical interface (e.g. Pegasus), or they process and complete the information provided by hotels by including photographs and videos, editing and translating the descriptions and evaluating the hotels, and they finally post this information on their websites (in the case of HRS via the so-called extranet).¹⁰⁵ The hotel portal market is a two-sided market. The customers that hotel portals connect are the hotels on one side and the hotel customers on the other side. A typical feature of two-sided markets is the network effect: the more intensive use of a portal by one side of the market triggers greater use of the portal by the other side. The larger the network, the more comprehensive the services can be. In some cases hotel portals charge standard commissions for their services, in other cases for different reasons, they impose highly differentiated commissions (e.g. higher commissions in large cities). The hotels are, however, left to shoulder the room occupancy risk.

¹⁰³ For a market definition in case of differentiated goods or services cf. also Schwalbe/Zimmer, *Kartellrecht und Ökonomie*, 2nd ed., pp. 88 et seqq.

¹⁰⁴ The European Commission also distinguishes Internet platforms by the various sides of the market which connect the respective platforms together. In the case of Comp/M. 4523 “Travelport/Wordspan”, the European Commission for instance distinguishes a separate “GDS only market”, and in doing so takes into consideration that GDS platforms connect travel agencies and not end-consumers (cf. Nos. 58 et seq.).

¹⁰⁵ cf. Inderst report, loc. cit., pp. 46.

- 82 From the point of view of the hotels, hotel portals largely procure bookings during the week (Monday to Friday), for which there is generally greater demand. The hotels determine the hotel room price and pay a commission to the hotel portals. The standard commission is as a rule between approx. 10 and 15% of the end price of the hotel room, often including other services, such as breakfast.¹⁰⁶ Hotel portals offer the possibility for hotel customers to find the specific hotel service which they require quickly and book it on the same website free of charge, independently and regardless of time (“search, comparison and booking”). The hotel search is made easier by filtered selection boxes, detailed hotel descriptions, including location descriptions and hotel videos, as well as evaluations by hotel guests. The target groups of the hotel portals are business travellers and individual travellers who primarily wish to book hotel rooms on the hotel portal and look for further services, such as flights and hire cars, on other portals. Hotel portals also sell rooms for business travellers with typical business facilities such as the Internet and fax services. As a rule hotel portals also offer bonus programmes in cooperation with the hotels.¹⁰⁷
- 83 The portals in Germany which have concentrated on the sale of hotel rooms on the basis of direct contracts with the hotels include HRS, Booking and ehotel.¹⁰⁸ Other portals, such as Expedia, lastminute, Unister and ebookers, offer both hotel rooms as well as travel services, e.g. package tours, flights and hire cars.
- 84 The closest competitors are HRS and Booking since both portals only offer hotel accommodation via their portals but not other travel service. A service that is similar to that of HRS and Booking can be found with Expedia, which offers individual hotel accommodation via its venere.com and hotels.com portals, but also sells travel products via its expedia.com portal. The hotel partners of Expedia can post their hotel rooms on

¹⁰⁶ cf. “Questionnaire among competitors 2012” file, p. 47.

¹⁰⁷ Where hotel portals offer bonus programmes in cooperation with the hotels in question, the hotel foregoes a part of its income. If a hotel portal offers a bonus programme alone, it foregoes a part of its commission. The latter variant includes the current voucher codes of Hotel.de (information from the German Hotel Association of 14 December 2013, cf. p. 4126).

¹⁰⁸ Some hotel portals also take hotel content from other reservation systems (e.g. from a GDS such as Amadeus, Travelport or Sabre) or from other hotel portals. In these cases, there are no direct contracts between the portal and the hotel; the hotel portal and the intermediary share the booking fee paid by the hotel to the intermediary.

one or several portals operated by Expedia. Expedia receives a commission for its sale services or a pro rata deduction within the “merchant model”.¹⁰⁹

85 From the point of view of hotels, Unister is a substitute for HRS, Booking and Expedia only to a limited extent since, whilst hotel rooms can also be individually sold via the portals which Unister operates (the hotelreservierung.de hotel portal and the ab-in-den-urlaub.de travel portal) (“hotel-only” service), Unister obtains a large share of the hotel-only content not directly from the hotels, but from tour operators or wholesalers.¹¹⁰ This also applies to lastminute and ebookers, which just as HRS, Booking and Expedia provide hotel rooms in Germany on the basis of direct contractual ties with the hotels,¹¹¹ but also display flights and package tours on their portals. Just as HRS, Booking and Expedia, Ehotel sells rooms of hotels in Germany; the company has, however, only assumed minor significance on the German market.¹¹²

86 An indication of the special status, in particular of the major hotel portals, such as HRS, is the reaction of the German hotels to HRS increasing its commission from 13% to 15% (from 12% to 15% for the Hotel.de hotel portal which belongs to HRS) and to the tightening up of the MFN clauses in March 2012. General experience suggests that, were sales via HRS actually a substitute for all other online sales channels, the cumulative price increase by more than 15% at HRS and by more than 25% at Hotel.de, as well as the additional tightening up of the MFN clauses, should have led to large numbers of cancellations and to the hotels changing to other channels which compete with HRS.¹¹³ The action of HRS did lead to vociferous public protest in the German hotel market,¹¹⁴ but there were few cancellations. HRS confirmed that with only fifty cancellations from hotels only a very low resonance to the tightening up of the conditions had been recorded.¹¹⁵ The

¹⁰⁹ The hotel customer pays the portal, which in turn passes on the net price (gross price minus deduction) to the hotel. The hotels only provide to Expedia their hotel rooms for re-selling. Counter to the impression made by the designation “merchant model”, Expedia does not buy in any room contingents, and also does not re-sell them. Just as with the commission models of HRS and Booking, the hotel price is set by the hotel (cf. file “questionnaire competitors” 2012, pp. 306 et seq.).

¹¹⁰ information from Unister, “Questionnaire among competitors 2012” file, pp. 504 et seq.

¹¹¹ Lastminute for instance also obtains access to hotel rooms via tour operators, cf. information from lastminute, “Questionnaire among competitors 2012” file, pp. 585 et seqq.

¹¹² cf. on this section D.4.3.

¹¹³ cf. Schwalbe/Zimmer, loc. cit., pp. 77 et seqq., on the market definition using “Monopoltest” (no change of supplier despite worsening of service)

¹¹⁴ cf. press release of HRS at www.HRS.de, copy pp. 1116 et seq.

¹¹⁵ cf. www.ahgz.de/unternehmen/tobias-ragge-hrs-kuendigungen-sind-geringe-resonanz. 200012 192 891.html

lack of competitive pressure on the part of the providers of other sales channels¹¹⁶ is a clear indication that HRS and other hotel portals, such as Booking and Expedia, constitute a separate product market. This is also made clear by the fact that the major portals are managing to use MFN clauses, which influence price setting for hotel rooms on the other sales channels.

- 87 The view expressed by HRS according to which the joint designation of hotel portals, tour operator portals, online travel agencies and travel evaluation portals (e.g. holidaycheck.de) in some studies¹¹⁷, and in the self-evaluation of some of the companies surveyed by the Decision Division, as “competitors” already proves that these companies are actually operating on one and the same product market, does not hold true.¹¹⁸ The designation of other companies as “competitors” depends on what service a study is investigating or on the designation that is offered by the companies surveyed.¹¹⁹ The designation as “competitors” does not answer the question of whether the functions offered in each case are substitutes from the point of view of the customers. The term “competitors” is, rather, used in a non-technical manner in such studies. The providers which only offer single functions of the hotel portals or other product bundles exert very little or no competitive pressure on the hotel portals.¹²⁰

¹¹⁶ Given that hotels have not switched from the HRS portal to other hotel portals, it should be taken into account that many hotels use several portals simultaneously and that competition between the hotel portals is restrained by the MFN clause (cf. on this section D.3.4.1).

¹¹⁷ Portals which only offer hotel accommodation or offer other travel services in addition to hotel accommodation also are referred to as “travel portals” without distinction in some cases, and in English as “Online Travel Agents” (“OTA”), e.g. in the study “Phocus Wright’s European Online Travel Overview”, 7th ed. 2011. These designations do not distinguish according to the individual services offered, and are hence already not suited to provide the market definition needed here.

¹¹⁸ cf. statement of HRS of 30 June 2012, , loc. cit., pp. 28 et seq. with further references

¹¹⁹ The Phocus Wright’s “European Travel Overview” market study, 7th ed. (2011) (*hereinafter*: “*Phocus Wright Market Study*”) and Expedia, which offers hotel rooms and travel products, observe travel portals and hotel portals which exclusively specialise in room sales together, and specifically investigate the countries France, Germany, Italy, Scandinavia, Spain and the United Kingdom.

¹²⁰ cf. in this regard sections D.1.2.2.3 to D.1.2.2.7 below

1.2.2.2 Hotels' own websites

- 88 The websites of the hotels offering real-time booking are not part of the same product market as hotel portals. They are not substitutes for hotel portals because they do not offer the same bundle of services for hotel customers that hotel portals do. They only offer customers the possibility of booking a room in a specific hotel or hotel chain.
- 89 Because of the technical effort involved, it is frequently only major hotels which have their own websites and offer real-time booking. Websites offering real-time booking are less well suited, by contrast, for the large number of small and medium-sized hotels in Germany¹²¹ because they do not have well-known brand names, and because hotel customers cannot find the websites without using meta search engines. The use of Google Adwords and Google Finder to make it easier to find hotels' own websites¹²², which is put forward by HRS in favour of the inclusion of hotels' own websites in a more broadly-defined market, is not widely used by small and medium-sized hotels. Rather, many of these hotels use their own websites primarily as general advertising sites, and less as an additional sales channel.¹²³ The share of bookings via hotels' own websites is hence small, accounting for somewhat more than 5% of all hotel bookings in Germany.¹²⁴ Hotel customers can neither look for hotel rooms of other hotels on the hotels' own websites, nor can they compare hotel rooms of other hotels and accordingly obtain information via customer evaluations. The search and comparison functions on hotels' own websites is therefore limited in comparison to that of hotel portals.
- 90 The sale of hotel rooms via hotels' own websites cannot be compared with the sale channels for flights via the own websites of airlines. The European Commission¹²⁵ did affirm that travel websites (offering fly-only) are substitutes for airlines' own websites, because the websites contained identical information with regard to the destination, and the major airline websites were just as easy to find and were used by customers with a frequency similar to that of the travel portals.¹²⁶ Unlike in the case of travel by air, hotels,

¹²¹ As is shown by the overview in the Sectoral Study on the Hotel Market in Germany 2013, p. 39, almost two-thirds of the lodging establishments in Germany have fewer than 20 rooms.

¹²² cf. Inderst report, loc. cit., pp. 43 et seqq.

¹²³ cf. note on the survey of hotels of 14 February 2011, pp. 226 and 229.

¹²⁴ cf. Sectoral Study on the Hotel Market in Germany 2013, p. 210.

¹²⁵ statement of HRS of 30 June 2012, loc. cit., pp. 29 et seq.

¹²⁶ cf. Case Comp/M. 6163, Nos. 25 et seqq.

however, do not have a very small number of well-known providers whose brand names are known to every customer and by means of which it is very easy to obtain a market overview. Rather, customers find at their travel destination large numbers of chain and non-chain hotels, which, as a matter of principle, can be shortlisted. An appropriate overview is offered only by hotel portals, and not by the hotels' own websites.

1.2.2.3 Specialised portals

91 Specialised portals, such as city portals or ebay, are not part of the same relevant product market as hotel portals. Specialised portals do not concentrate on the sale of hotel rooms and they display a much narrower range of hotels on the website. Where specialised portals only redirect hotel customers to other portals – and not directly to the websites of the hotels –, they operate on another level of the distribution chain than hotel portals do, and for this reason they belong to another market.

92 City portals are orientated towards services that cities offer to tourists and business travellers. Since they only offer an additional sales channel for hotels in and near that city, they do not have the same range of services as hotel portals which show hotels all over Germany and beyond on their websites. City portals furthermore frequently do not permit hotel customers to book hotel rooms directly, but in turn only redirect customers to hotel portals. Other portals with a specific content, such as hiking trails or trade fairs, mention a few selected hotels, but they do not offer a complete overview, they do not facilitate direct searching for a specific hotel and they also do not always permit direct booking (e.g. fernwege.de, messen.de or twenga.de). The “bargain” website ebay does not sell hotels and is not a full-blown alternative to the hotel portals. The service of ebay is restricted to “Buy it now” or auctions of specific hotel travel services and to selling individual hotel vouchers.

1.2.2.4 Online travel agencies

93 Online travel agencies do not belong to the same product market as hotel portals. They target a different category of customers, overlapping only slightly with that of the hotel portals, and hence operate on another level of the distribution chain. With its comprehensive range of services, including lastminute travel products, package tours and holiday apartments as well as flights, railway tickets and hire cars, the service offered by

online travel agencies, such as Opodo,¹²⁷ primarily addresses holiday travellers but not individuals who initially only wish to book a hotel room. Unlike hotel portals, they do not have contractual ties with a large number of hotels, but sell hotel rooms of other portals or of wholesalers. Accordingly, online travel agencies do not receive a fee for the sale of hotel rooms from the hotels, but from other portals and wholesalers.¹²⁸ Online travel agencies are less a “sales channel of the hotels” than a sales channel for other portals and for wholesalers. According to information from Hotel.de, for instance, some of the bookings made on Opodo were carried out via its Hotel.de portal.¹²⁹

1.2.2.5 Tour operator portals

- 94 Tour operator portals differ from the hotel portals in terms of the service which they offer and the target group, and operate on another level of the distribution chain than hotel portals do; they do therefore not belong to the same market.
- 95 The core business of tour operators such as DERTOUR,¹³⁰ TUI and Thomas Cook¹³¹ is the sale of their own and third-party travel products via offline travel agencies. Additionally, travel products are offered online. The primary target of tour operator portals are groups and persons who wish to book individual or group package tours or individually-assembled package tours for specific holiday destinations. The prices of the package tour hotels depend on the price of the total holiday offered (including travel, hire cars, tourist services, etc.), and form an integral part of this offer; the hotel prices only cannot be seen by the customer.
- 96 Where online tour operators also offer hotel accommodation separately (hotel-only offer), there is a certain overlap with the services offered by the hotel portals. But tour operator portals as a rule do allow direct contractual ties between the hotels and the hotel customers and hence operate on another level of the distribution chain than hotel portals

¹²⁷ Opodo has been part of the OdigeO Group since 2011.

¹²⁸ A percentage share of the fee is paid which hotels pay to wholesalers or to other portals with which they have contractual ties..

¹²⁹ cf. file “Questionnaire among competitors 2010”, p. 68.

¹³⁰ DERTOUR acts as an operator (dertour.de) and as an intermediary (DERhotel.com). DERhotel.com has however specialised not in private end-consumers, but in B2B business (cf. information from DERTOUR, “Travel Portals Questionnaire” file, pp. 13 and 84).

¹³¹ cf. “Travel Portals Questionnaire” file, pp. 22, 110 and 213 on the business models of DERTOUR, Thomas Cook and TUI.

do.¹³² The contracting partner of the portal is not the hotel, but the operator, which only pays a fee to the portal.¹³³ The operator, and not the hotel, sets the hotel room price which is shown on the portal. The hotel in turn pays a fee to the tour operator. This fee is frequently higher than the commission payable to a hotel portal since tour operators reduce the cancellation risk for the hotel by imposing more stringent cancellation conditions and taking on the risk of debt collection.¹³⁴ Tour operator portals have a weaker network effect for hotels since the hotel-only service only accounts for a small share of the overall range on offer.

1.2.2.6 Meta search engines

- 97 Meta search engines¹³⁵ do not belong to the hotel portal market. As a rule they do not have direct contractual ties with individual hotels, the flows of payment are hence different, and above all they do not offer to hotel customers the comprehensive services of “searching, comparing and booking”.
- 98 Meta search engines, which are specialised on travel and hotel services (e.g. Holidaycheck, TripAdvisor, Kayak, trivago, travelzoo, Check24 and Hotel-Vergleich) only allow for a summarised (price) comparison, and re-direct users who express an interest to websites via which they can book the desired services. The booking websites connected are travel and hotel portals¹³⁶, or in specific cases individual hotels or hotel chains which

¹³² Even if one were to include tour operator portals in the relevant market, this would not be decisive for the competitive assessment in these proceedings. According to the investigations of the Sectoral Study on the Hotel Market in Germany, the share of bookings via the hotel-only offer of the online tour operators is well below 1% of bookings for hotel rooms in Germany (cf. Sectoral Study on the Hotel Market in Germany 2013, p. 210 and e.g. for DERTOUR, information provided on 10 August 2011, “Travel Portals Questionnaire” file, p. 960). According to information provided by the German Hotel Association, the hotel-only offer of tour operators is included in “other channels” (cf. note of 17 August 2012, pp. 2207 et seqq.).

¹³³ cf. on this response of DERTOUR, “Travel Portals Questionnaire” file pp. 29 and 84, the response of Thomas Cook, “Travel Portals Questionnaire” file, pp. 110 and 165 and of TUI, “Travel Portals Questionnaire” file, pp. 212 et seq.

¹³⁴ cf. e.g. information provided by DERTOUR of 29 October 2012, “Travel Portals Questionnaire” file, pp. 67 et seq.

¹³⁵ A detailed description of meta search engines can be found in the Sectoral Study on the Hotel Market in Germany 2013, pp. 219 et seqq.

¹³⁶ The meta hotel comparison of for instance CHECK24 includes the services of the major hotel portals such as HRS, Hotel.de and booking.com, and hence more than 400,000 hotels in more than 80,000 towns and cities (cf. <http://www.news4press.com>). Hotel-Vergleich compares offers from the portals Booking.com, HRS, Hotel.de, hotelopia, hotels.com, accorhotels.com, DERhotel.com, ehotel, TUI hotels & Resorts, CenterParcs, Hotel & More and easyres.com (cf. <http://www.hotel.comparison.net>).

are well known on the market.¹³⁷ At a higher level of information comparison one finds the general meta search engines such as Google, Yahoo or Bing, which in turn refer to their own specialised search engines (e.g. Google's "hotel Finder")¹³⁸ or to third-party search engines.

99 From the viewpoint of the hotels, meta search engines are not a substitute for hotel portals because they do not provide the comprehensive service expected of a hotel portal by hotels (search, comparison and booking). The vast majority of hotels therefore do not have contracts of their own with the meta search engine providers. Whilst the owners of the connected websites (hotel portals in most cases) pay the meta search engines via the "cost per click" procedure, hotels continue to only pay a booking fee to the hotel portals.

100 There are so far no adequate indications that the various functions of the meta search engines and the connected portals are growing together to form a new service on a market which is characterized by the bundled services of "searching, comparing and booking" of hotel rooms. Not lastly in recent merger control proceedings¹³⁹, the Decision Division has learned that, firstly, hotel and travel portals and, secondly, the meta search engines that specialise in hotels and travel products are operating at different levels of the distribution chain.¹⁴⁰ Meta search engines can stay in the market only if they offer a simple, neutral (price) comparison¹⁴¹ and in this way advertise the websites which are connected to them.¹⁴² The primary goal of the connected hotel and travel portals remains, by contrast, to directly motivate the customer to book on the same website by providing comprehensive hotel and travel information.

101 Hotel portals and meta search engines are also not substitutes from the point of view of the hotel customers. In particular, one cannot conclude from the step-by-step approach taken by some hotel customers when looking for hotels that all sales-relevant services

¹³⁷ HRS points out in its statement of 11 March 2013, loc. cit., p. 15, that trivago only concludes direct contracts with companies which operate more than 30 hotels.

¹³⁸ According to online information from HRS of 20 August 2012, Google Finder is "another point of access to potential bookers [of HRS]", cf. www.ahgz.de/unternehmen/hotefinder-unter-der-lupe, copy p. 2202.

¹³⁹ B 9-11/13 "Expedia/trivago" and B9-15/13 "Priceline/Kajak".

¹⁴⁰ cf. Expedia/trivago registration, copy pp. 2557 and 2563 et seqq.

¹⁴¹ cf. on this also booking.com interview, fvw 9/13, pp. 23 and 27.

¹⁴² HRS describes the cost per click payments which it makes to meta search engines as advertising expenditure for its portal and for the small and medium-sized hotels listed on its portal (cf. statement of HRS of 11 March 2013, loc. cit., p. 15).

ultimately leading to a hotel room booking belong to the same market.¹⁴³ It is not essential for the market definition under competition law whether the services in question complement one another, but whether they have substitute functions from the point of view of the customer. This is particularly not the case for websites which (like meta search engines) only offer restricted functions, and those which (like hotel portals) offer comprehensive functions. The difference between meta search engines and hotel portals is emphasized by Google's search function. More than 80% of hotel customers start their hotel search on Google,¹⁴⁴ but are redirected from there to specialised search engines and also to hotel portals.¹⁴⁵

- 102 The European Commission has developed a similar view.¹⁴⁶ The European Commission thus presumed a separate market to exist for electronic travel sales services in form of the GDS¹⁴⁷. The GDS contains offers of travel services from all over the world (in particular flights and hotels) and enables travel agencies to select, compare and book travel services depending on the wishes of the travel agency customers. The European Commission found that the GDS created an added value, in particular in terms of efficiency and reduced time effort, by enabling travel service-providers to gain access to an extensive network of travel agencies and the travel agencies to search centrally and to make comparisons as well as to reserve and book travel services.¹⁴⁸ Websites which only offer single functions were said not to be an alternative for travel agencies: For instance, such portals did not offer an opportunity for [direct] booking and direct comparison with individual travel service-providers.¹⁴⁹
- 103 The existence of a hotel portal market with bundled services (search, comparison and booking) is also not contradicted by the sometimes low conversion rate ("look to book") on

¹⁴³ cf. statement of HRS of 30 June 2012, loc. cit., pp. 21 and 28.

¹⁴⁴ Inderst report, loc. cit., pp. 21 et seq., referring to Stiftung Warentest (2012): *Hotelbuchung im Internet: Meerblick per Mausclick*, Vol. 5, pp. 77 et seq.; also the study by the Center for Hospitality Research (Cornell University) "Search, OTA's, and Online Booking: An Expanded Analysis of the Billboard Effect" 2011, p. 8 (pp. 2644 and 2651), made available by HRS in the enclosure with its letter of 11 March 2013, loc. cit.

¹⁴⁵ In the Case Comp/M. 5727 "Microsoft/Yahoo! Search Business", Nos. 30 et seqq., the European Commission distinguishes between Internet searches in general, vertical Internet searches for specific content, and website searches. HRS offers the facility for website search.

¹⁴⁶ Decision of the European Commission of 21 August 2007 "Travelport/Worldspan". Case Comp/M. 4523

¹⁴⁷ GDS=General Distribution System.

¹⁴⁸ Case Comp/M. 4523 Nos. 11 et seqq.

¹⁴⁹ Case Comp/M. 4523, Nos. 24 et seqq. and 34 et seqq.

hotel portals.¹⁵⁰ Not every Internet search ends with the purchase of goods or services. This is a general phenomenon when searching on the Internet, but is not peculiar to the searching for hotel rooms.

1.2.2.7 Travel management

104 The Decision Division does not share the view of HRS that the services which HRS provides both for corporate customers and for private customers are to be defined as separate markets.¹⁵¹ Rather, the investigations carried out by the Decision Division¹⁵² have not revealed that there is a difference between selling rooms for corporate customers and room sales for private customers which would justify the definition of two separate markets. Whilst Booking, Lastminute and ebookers do not show any particularities at all with regard to the sale of hotel rooms for corporate customers, Unister and ehotel only refer to the possibility of special rates for corporate customers. Only Expedia states that it operates comprehensive travel management for companies which it has outsourced to its subsidiary “Egencia”. HRS refers to hotel room sales carried out for corporate customers as “Managed Travel”. This is, however, not comprehensive travel management outside of the hotel portal market.

105 According to information from the VDR¹⁵³ and from the companies that were surveyed by the Decision Division,¹⁵⁴ travel management encompasses a comprehensive travel management service put together according to the wishes of the corporate customer, including hotels, flights and hire cars and travel cost invoicing, event management, mobile communication, car pool management, relocation services and business travel insurance. The companies pay for these services through a monthly or annual fee as a rule independently of bookings specifically made. A major element of travel management is

¹⁵⁰ According to information from Prof. Inderst, the usual conversion rate for instance for the search term “hotel Berlin” is [...] % ([...] % of clicks do not lead to a booking), cf. Inderst report, loc. cit., p. 50.

¹⁵¹ cf. statement of HRS of 30 June 2012, loc. cit., pp. 18 et seqq.

¹⁵² cf. Responses to Question G of the 2012 Competitors Questionnaire, files “Questionnaire among competitors 2012”, Vols. 1 and 2.

¹⁵³ With its more than 480 companies which are members of the German “*Verband Deutsches Reisemanagement e.V.*” (VDR) the travel management association represents a business travel volume of roughly nine billion Euros per year. The *VDR-Geschäftsreisenanalyse*, which has been appearing on an annual basis since 2003 (copy: pp. 2296 et seqq.), provides figures on the business travel market in Germany and an insight into the organisation of business travel in companies and in the public sector.

¹⁵⁴ Amongst others, the providers Carlson Wagonlit Travel, BCD Travel Germany and STA Travel were surveyed, as well as on the demand side large companies such as Siemens, Karstadt and Metro, and the Federal Office of Administration (cf. pp. 2247 et seqq.).

the provision of advice to corporate customers via “key account managers” or “blanket” via travel agencies, as well as negotiations on rates with hotels when customers so desire. HRS, by contrast, only provides its corporate customers with an interface to the intranet of the company and thus provides corporate customers with easier access to the hotels represented on the HRS portal. In this case the content of the HRS portal is, albeit in an arrangement that is tailored to the company, the usual content that is put together for all portal customers. [...] As to hotel room bookings, as a matter of principle the same contractual conditions apply to corporate customers as to all other customers of the HRS hotel portal.¹⁵⁵ HRS does not offer services typical of travel management beyond hotel room bookings, in particular not fully-fledged travel management.¹⁵⁶

106 It makes no difference that HRS [...]. The service offered by HRS remains restricted to hotels and hotel programmes.¹⁵⁷ From the point of view of hotels, there is no major difference between the corporate customer and the private customer business of HRS: The room prices continue to be set by the hotels, and the usual commission rate for hotels which are contracting partners of HRS is the same. For the connected firms it is relevant that HRS only charges commissions from its hotel partners for the sale of rooms, and not for additional services. Neither the Federal Government nor the majority of the companies that were surveyed by the Decision Division have concluded contracts with HRS on making available services of a special “company portal”.¹⁵⁸

107 Accordingly, the Decision Division takes account of all commission income from the hotel sales business when calculating the total market volume and the market share of HRS.

2. Relevant geographic market

108 In geographic terms, the hotel portal market is a national market. It covers the selling of rooms in hotels in Germany (hereinafter: German hotel portal market). The relevant

¹⁵⁵ cf. questionnaire information from HRS, “Questionnaire among competitors 2012” file, pp. 855 et seq. and information provided by the Federal Office of Administration, Metro, Karstadt, telephone notes, pp. 2248 et seqq. There is a derogation only to the extent that HRS may give discounts to individual firms (cf. HRS website at www.hrs.de – retrieved on 18 December 2013).

¹⁵⁶ Where HRS refers in its statement of 11 March 2013, loc. cit., p. 6, to typical characteristics of travel management (e.g. to the special remuneration model in form of fixed fees for specific services), HRS does not relate this to its own company.

¹⁵⁷ This also applies to the calls for tenders of the federal administration, which for business travel uses both the services of HRS and those of other portals, such as the DB portal for booking rail travel. With regard to its services, HRS also refers to “hotel programmes” (cf. fw of 6 July 2012, p. 53, p. 2327).

¹⁵⁸ cf. Note of the Decision Division of 28 June 2012, pp. 2248 et seqq.

geographic market comprises the area in which the companies concerned are involved in the supply and demand of relevant goods or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring geographic areas with significantly different conditions of competition.¹⁵⁹ Relevant are the geographic alternatives available from the point of view of the customer. In the hotel portal market these are the alternatives open to the hotels and their customers. The actual observations of the customers and the alternatives which they actually take up have to be considered.¹⁶⁰ As evidence which is relevant to the definition of a geographic market, the European Commission also mentions price differences, national preferences for domestic brands, languages, culture and lifestyle, as well as the need for a local presence and the purchase pattern.¹⁶¹

2.1 Pleading by HRS

109 In the view of HRS, the relevant market, in which HRS de facto includes all channels of hotel room selling, should be defined Europe-wide in geographic terms. As essential reasons for this, HRS names uniform conditions of competition, the lack of obstacles to cross-border trade, providers operating Europe-wide and products that are standardized Europe-wide, and the uniform terms and conditions which are applicable between the hotel portal and the hotel customers.¹⁶²

2.2 Market definition of the Decision Division

110 Unlike HRS, the Decision Division considers the definition of a separate German hotel portal market to be appropriate in the present case. The hotel portals which have much business with German hotels all have a special focus on Germany in terms of the economic focus, local presence, content of the portal and advertising. These portals are relevant for German hotels because they target the customers of these hotels. The main demand for hotel beds in Germany comes from domestic customers (and to a lesser

¹⁵⁹ No. 8 of the Commission Notice on definition of the relevant market of 9 December 1997 in OJ C372/5; also No. 88 of the European Commission's Guidelines on Vertical Restraints of 19 May 2010 in OJ C 130/1.

¹⁶⁰ cf. B10 – 124/01 – Trienekens/AWISTA, Decision of 17 June 2002; No. 33, accessible at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion03/B10_124_01.pdf. cf. also Federal Court of Justice, Decision of 16 January 2008, KVR 26/07, "Kreiskrankenhaus Bad Neustadt", quoted by Juris, juris No. 65.

¹⁶¹ cf. Notice on definition of the relevant market, Nos. 44 et seqq.

¹⁶² cf. statement of HRS of 30 June 2012, loc. cit., pp. 30 et seqq.

degree from customers from abroad). Portals which offer as wide a selection of hotels and rooms as possible for destinations in Germany are particularly interesting for German customers. For the hotels, a portal is all the more relevant the more their closest competitors are represented on the portal. For German hotels, this function is mainly performed by the hotel portals HRS, Booking and Expedia, which are major players in the German market and which have branch offices and employees in Germany.

- 111 Whilst the hotel portals are Internet platforms which in technical terms are accessible to customers worldwide, the hotel portal market is nonetheless neither a worldwide market nor a European market (cf. on this section 2.2.1). The Decision Division, rather, presumes that there is a German market in particular with a view to the sales activities of the hotel portals for hotels in Germany. Within Europe, the economic focus of the hotel portals which are major market players in Germany varies (cf. on this section 2.2.2). This corresponds to a special focus of these hotel portals on a separate German market (and possibly further regional markets). The Decision Division has considered a number of criteria in this context; these include the local presence of the portals (cf. on this section 2.2.3), the services provided by the portals (cf. on this section 2.2.4) and the focus of their advertising (cf. on this section 2.2.5). The market developments also show that one should presume a separate German hotel portal market in the present case (cf. on this section 2.2.6).

2.2.1 Internet platforms

- 112 Hotel portals offer hotel services on the Internet, and hence, in purely technical terms, worldwide. Internet users in Germany can book hotels in Germany or abroad, and Internet users abroad can book hotels in Germany or abroad. For instance, HRS accesses one single database for its worldwide activities. Nonetheless, the market should be more narrowly defined than worldwide.¹⁶³
- 113 The uniform business model of HRS, the uniform terms and conditions of the contracts, uniform standard commissions, and the lack of major obstacles to cross-border demand do not per se suggest the existence of a worldwide hotel portal market. These criteria are in fact indications of the worldwide spread of offers via the “world wide web”, and hence are hardly suited to define a specific Internet market in geographic terms. If no deliberate

¹⁶³ Even Professor Inderst occasionally refers in his report drafted for HRS to a “German online booking market”. cf. e.g. Inderst report, loc. cit., p. 41.

technical hindrances have been established, any Internet offer can be accessed worldwide via the Internet, and can hence be supplied and purchased worldwide.

- 114 It is ultimately not significant for the geographic definition of the hotel portal market that there are as a rule no obstacles to meeting cross-border demand from hotel customers. The hotel portal does not obtain a fee from the hotel customer who is in Germany or abroad at the time of the booking, but from the hotel.¹⁶⁴ For the hotel it is relevant that the hotel portal attracts customers regardless of whether they come from home or abroad. The hotel itself is stationary, and is selected by customers according to its location. Customers look for a hotel where its closest competitors are present. Hotel portals are relevant for the hotels when they present the closest on-the-spot competitors. Accordingly, only a national market definition, and even a territorial definition that is smaller still, can be considered for the service offered by hotel portals. The European Commission presumes that the market for hotel accommodation is certainly smaller than national; only with regard to hotel chains for which there are similar competition conditions at national level did the European Commission undertake a national market definition.¹⁶⁵ Accordingly, the content of the hotel portals and the presentation of hotels on the portals have a local focus, too.
- 115 The criteria below that were investigated by the Decision Division also show that the hotel portals are operating on a separate German market.

2.2.2 Economic focus of the hotel portals

- 116 The existence of a separate German hotel portal market is suggested first and foremost by the fact that the strong-selling hotel portals in Germany, namely HRS, Booking, Expedia, lastminute, ehotel, Unister and ebookers, all have an economic focus in Germany or, when headquartered abroad, such as lastminute, have another national focus. The Decision Division has investigated in which EU countries the hotel portals generate the biggest share of their provisions/margins and for which countries they

¹⁶⁴ This also applies in the case of the “merchant” business model used by Expedia. Expedia only passes on the hotel price to the booked hotel minus its margin.

¹⁶⁵ cf. Case Comp/M. 3858 “Lehmann Brothers/SGG/Starwood/Le Meridien”, Nos. 18 et seq. In a comparable sense, the European Commission also defines the travel agency market regionally, and at most nationally, taking account of customer habits, cf. Case of Comp/M. 4600 “Tui/First Choice”, Nos. 49 et seqq.

receive the biggest number of bookings. The investigations of the Decision Division cover both 2011 and 2012.¹⁶⁶

- 117 The investigations show that the portals surveyed focus activities on the German market. The focus on a national market has become even stronger vis-à-vis 2011. In 2012 HRS received a [...] larger share of its bookings for hotel rooms in Germany ([60-90]%), and still more hotel beds in Germany were booked via the HRS portal ([50-80]%). The position of the UK lastminute Group on the German hotel market has not changed ([less than 10]% of commissions/margins and turnover from bookings), but the focus on the UK market has become stronger still ([60-80]% of commissions/margins and turnover from bookings). Additionally, the hotel portals sell hotel rooms in countries which customers regard as holiday destination.¹⁶⁷
- 118 Just as HRS, Unister and ehotel primarily operate on the German hotel market. Unister received [60-80]% of its bookings for hotels in Germany and ehotel received [50-70]% of its commissions from hotels in Germany. In addition to Germany, the classical holiday countries for German hotel customers, namely France and Italy, and in the case of Unister also Spain, remain important for these portals. Booking is strong in Germany, Italy, France and Spain.
- 119 Expedia received a much smaller share of its commissions and margins in Germany than HRS and Booking. In terms of turnover, Expedia is nonetheless the third-largest hotel portal in Germany, after HRS and Booking.¹⁶⁸
- 120 lastminute, which sell relatively few hotel rooms in Germany, has a clear focus on the United Kingdom; France and Germany follow far behind as holiday destinations for UK hotel customers (fewer than 10% of commissions/margins, bookings and hotel rooms). The German ebookers made roughly one-third of its commission income in Germany, but much less in the United Kingdom and in Spain. Correspondingly, the position of ebookers in Germany is much stronger than in the United Kingdom and in Spain looking at bookings, turnover from bookings and the number of hotel rooms sold.

¹⁶⁶ cf. files "Questionnaire among competitors 2012", Vols. 1 and 2, with the overview of the investigation results, p. 45a of these files, as well as "Questionnaire among competitors 2013" file with the overview of the results of the investigation, p. 20 of this file.

¹⁶⁷ e.g. customers from Germany visiting the German-language website of the portal of HRS or Booking and who search for hotels in Spain or Italy (cf. on this also section 2.2.4. below).

¹⁶⁸ cf. section D.4.3.

2.2.3 Local presence of the hotel portals

- 121 The local presence of the major hotel portals in Germany also suggests that there is a separate German market. The economic focus is reflected in the local presence in Germany or in another country. Hotel portals with an economic focus on Germany have a particularly strong local presence in Germany. Hotel portals must make intensive efforts to recruit hotels, and must maintain their business relationships with the hotels on the spot in order to offer a good market environment to them and to their customers. Portals which have no branch offices in Germany tend to sell hotel rooms only in big German cities which are attractive to their customers.¹⁶⁹
- 122 HRS has a strong economic focus on Germany. It has had a registered office in Germany for many years and employs several hundred staff in Germany alone¹⁷⁰ for recruiting hotels and maintaining business relationships. Whilst HRS only provides customer-specific services, such as text editing and the provision of photos or videos, for roughly [...] % of its hotel partners Europe-wide (including Germany), HRS provides these services for [the lion's share of] hotel partners in Germany.¹⁷¹ It is easier for German hotels to assert their rights vis-à-vis HRS because German law applies to the contracts they concluded with HRS.¹⁷² HRS regards itself as a portal which "invests intensively in customer loyalty".¹⁷³
- 123 Depending on the economic focus of their activities, Booking, Expedia, lastminute and ebookers have subsidiaries in Germany and in other European countries, as well as one or several separate branch offices per country. The branch offices take care of hotels and customers locally and in the local language, with consideration being given to regional particularities, and are also responsible for maintaining the "local websites" (e.g. hrs.de, expedia.de) and for local advertising.¹⁷⁴ Booking has several branch offices in

¹⁶⁹ LateRooms, Quickrooms and Superbreak, which do not have German branch offices, primarily sell hotels in for instance Berlin and Munich, cf. overview p. 2966.

¹⁷⁰ cf. also www.hoppenstedt-firmendatenbank.de (p. 2993) on the development of the staff numbers of HRS in Germany. HRS states on its homepage that it has approx. 400 staff in Germany (as per: 18 December 2013).

¹⁷¹ According to the statement of HRS, loc. cit., p. 10, approx. [...] % of the German hotels sold by HRS take up the special services offered by HRS.

¹⁷² cf. No. 24 of the terms and conditions of HRS of 2012.

¹⁷³ cf. statement of HRS of 30 June 2012, loc. cit., p. 54.

¹⁷⁴ cf. e.g. information from Expedia, ehotel and ebookers ("Questionnaire among competitors 2012" file, pp. 245, 717, 740 and 825).

Germany¹⁷⁵, and now has several hundred staff.¹⁷⁶ Expedia has one branch office in Germany.¹⁷⁷ The branch offices of ebookers in Germany, Austria and in Switzerland each maintain a variety of local websites in the German-speaking area alone.¹⁷⁸

2.2.4 Focus of the services provided by the hotel portals

- 124 The focus of the services provided by the major portals in Germany suggests that there is a separate German hotel portal market. These hotel portals offer services which are tailored to hotels in Germany and to their customers, inter alia through local websites with country-specific content and domain names and through the country-specific selection of their cooperation partners. Portals which are headquartered abroad and which have their economic focus outside Germany also have a country-specific focus.
- 125 German hotels largely accept bookings from portals which focus on hotels in Germany and specifically on the wishes of German customers: from the point of view of the German hotels that were surveyed¹⁷⁹, the ranking of hotel portals (including where several are mentioned) is as follows: 84% of the hotels use the services of Booking; hrs.de (82%), Hotel.de (77%), expedia.de (25%), venere.com (22%) and hotels.com (18%). At least outside of the major cities, more than 80% of the bookings in Germany are made by German customers.¹⁸⁰
- 126 Accordingly, the HRS portal focuses on German hotel customers. HRS sells hotel rooms in Germany on the domains hrs.de and hrs.com.¹⁸¹ Among the seven top European hotels presented on the first page, five are currently hotels in Germany (Dresden, Berlin, Hamburg, Frankfurt am Main and Leipzig), and the hotels in Dresden are prominent with

¹⁷⁵ cf. "Questionnaire among competitors 2012" file, pp. 93 et seq. The German branch offices are located in Berlin, Düsseldorf and Munich (cf. fvw 9/13, pp. 22 and pp. 2802 et seqq.).

¹⁷⁶ cf. "Questionnaire among competitors 2012" file, p. 178. Booking has more than 100 branch offices worldwide and a total of approx. 4,750 staff (cf. fvw of 26 April 13, pp. 22 et seqq.) The number of staff in Germany has increased more than tenfold since 2008, cf. www.hoppenstedt-firmendatenbank.de, excerpt of 24 June 2013, p. 2996.

¹⁷⁷ cf. letter from Expedia of 18 June 2013, pp. 3008 and 3009.

¹⁷⁸ cf. "Questionnaire among competitors 2012" file, p. 825.

¹⁷⁹ cf. Business Target Group "*Buchungsmedien& -portale 2011*", p. 31. Almost 200 hotel companies in Germany were surveyed in a random sample.

¹⁸⁰ cf. Sectoral Study on the Hotel Market in Germany 2013, p. 64, according to which the share of foreign bookings for German hotels averaged only 20% of all bookings.

¹⁸¹ other portals are e.g. www.hrs.fr for France and www.hrs.pol for Poland.

four eye-catching photographs.¹⁸² HRS itself points out that its website, which is translated into more than 30 languages, always presents hotels in the country of the website user on the first page.¹⁸³ The Austrian hotel portal Tiscover, which belongs to HRS, sells hotel rooms for the Austrian clientele interested in hotels in Austria via an “Alp portal” pointing to “holidays in the Alps”.¹⁸⁴

127 Counter to the view of HRS, there has not been a “far advanced Europeanisation of online hotel sales”¹⁸⁵. HRS is a good example. As is shown by the surveys of the Decision Division for 2011 and for the following year 2012 only [fewer than 20]% of bookings in the EU via the HRS portal are made by customers outside Germany, and only [fewer than 30]% of the hotel rooms booked are hotel rooms of hotels outside Germany.¹⁸⁶ [70-90]% of the European bookings made via the HRS portal Hotel.de come from customers in Germany and [60-80]% of the bookings are made for hotel rooms in Germany.¹⁸⁷

128 Expedia has “local language” websites in 30 countries and more than 75 “local country sites” of its portal hotels.com.¹⁸⁸ The expedia.de website lists the “Top travel destinations in Germany” with 15 destinations, and expedia.co.uk lists “Domestic hotels” in the United Kingdom.¹⁸⁹ Whilst expedia.de advertises rooms in Berlin, Hamburg, Munich and Cologne on the German-language website under the slogan “Travel in Germany [...] from Hamburg to Munich, from Dresden to Cologne”, the English-language website lastminute.co.uk lists hotels in London, Edinburgh, York, Blackpool and Bath, and visitors to the website are informed about a large selection of hotels in the UK and in Ireland under the banner: “if you’re planning on staying closer to home”.

¹⁸² as per: 5 January 2013. On the first page of the website of HRS furthermore hotels in Vienna and Prague are presented which are also interesting for customers from Germany. The selection of the big German cities on the first page of the HRS website occasionally changes (previously for instance Cologne, Berlin, Hamburg, Frankfurt a.M. and Munich).

¹⁸³ cf. p. 35 of statement of HRS of 30 June 2012, loc. cit.

¹⁸⁴ Marketing via Google, as per 19 June 2013. Also HRS on its own website of 18 December 2013: “The Alp portal tiscover.com [...] is a specialist for “Your bed in the Alps.””

¹⁸⁵ cf. statement of HRS of 30 June 2012, loc. cit., pp. 33 et seqq.

¹⁸⁶ Calculation by the Decision Division on the basis of the responses of HRS to the questionnaire, “Questionnaire among competitors 2012” file, pp. 834 et seqq. and “Questionnaire among competitors 2013” file, pp. 241 et seqq.

¹⁸⁷ Calculation by the Decision Division on the basis of the responses of HRS to the questionnaire, “Questionnaire among competitors 2012” file, pp. 834 et seqq. and on the basis of the responses of HRS to the questionnaire, “Questionnaire among competitors 2013” file, pp. 241 et seqq.

¹⁸⁸ cf. www.expedia.de of 7 September 2012, copy in “Questionnaire among competitors 2012” file, pp. 262 et seq.

¹⁸⁹ cf. www.expedia.de and www.expedia.co.uk (as per 20 June 2013), copy pp. 2967 et seqq.

- 129 HRS, Booking and Expedia have many country domains, for Germany with the extension “.de”, which is familiar to German users.¹⁹⁰ The country-specific additions make it easier for users to gain access to the portal from their respective home countries. Even if users enter an address ending with “.com”, they can be redirected to a portal with the corresponding country domain extension.¹⁹¹ This ensures that users receive the hotel room information in the language of that country and other country-specific information.¹⁹²
- 130 Hotel portals can adapt to the needs of the hotels and their hotel customers in a specific country by selecting cooperation partners to whose websites they are connected. HRS and Booking have selected cooperation partners in Germany which are particularly well known in Germany.¹⁹³ Anyone booking a ticket on the portal of Deutsche Bundesbahn can easily book a hotel room via a link with the HRS website. A similar arrangement applies to Booking and TuiFly. Anyone booking a flight via TuiFly can also look for a hotel room there and is linked directly to the Booking website.

2.2.5 Focus of advertising by the hotel portals

- 131 The focus of advertising by the hotel portals in Germany is further evidence for a separate German hotel portal market. The portals use local advertising tailored to hotels in Germany and to their customers. Hotel portals having an economic focus outside Germany focus their advertising on customers outside Germany, as well.
- 132 Offline advertising, like posters at railway stations and airports and on the television, is important for attracting local customers. HRS, whose economic focus is in Germany, places nearly all offline advertising in Germany.¹⁹⁴ It spends roughly [...] of the advertising budget on offline advertising, despite a considerable increase in expenditure on online

¹⁹⁰ The domain hotels.com alone has for instance more than twenty derived domains, and the domain expedia.com and the domain venere.com have more than five derived domains with country-specific domain extensions (cf. Expedia’s letter of 18 June 2013, pp. 3008 and 3009).

¹⁹¹ Targeted redirection to another domain can for instance take place via the IP address of the computer or via the language setting of the computer. (cf. information provided by ebookers, “Questionnaire among competitors 2012” file, p. 740).

¹⁹² cf. e.g. for ebookers, “Questionnaire among competitors 2012” file, p. 740.

¹⁹³ For Booking cf. “Questionnaire among competitors 2012” file, p. 194.

¹⁹⁴ The Inderst report, loc. cit., p. 47, referring to the PhoCusWright study 2011, stresses offline advertising as a “powerful instrument” which increases the recognition value and brand awareness and gives consumers a feeling of safety.

advertising.¹⁹⁵ Additionally, HRS spends money on online advertising which also focuses on customers in specific countries, e.g. via the country-specific accounts of Google Adwords or via the country- and language-specific versions of other meta search engines¹⁹⁶.

- 133 Booking and Expedia focus on online advertising for customers which they would like to attract, and spread the advertising in the language which they use for their local websites.¹⁹⁷ Expedia stresses the significance of a “local marketing presence”¹⁹⁸, and has placed a special emphasis within the EU on offline advertising in Germany.¹⁹⁹ ebookers, which has subsidiaries in several German-speaking countries (Germany, Austria and Switzerland), states that each of its subsidiaries operates its own country-specific commercial policy and places special advertising on the local websites.

2.2.6 Market development

- 134 The market development shows that there is a need to distinguish between a German market and other regional markets in Europe.
- 135 There is the strong market position of HRS in the sale of hotel rooms in Germany and the take-over of Hotel.de, the growth of Booking particularly in Germany and in France and Italy,²⁰⁰ the concentration of Expedia’s Italian subsidiary Venere on the online sale of hotel rooms in Italy²⁰¹, and the focus of a number of portals on the sale of hotel rooms in the United Kingdom as compared to little activity in Germany (including Late Rooms, Quick Rooms and Hotelguide). As is shown by the reaction of customers, the acquisition of the Austrian hotel portal Tiscover by HRS has not led to a Europeanisation of the service offered. Whilst on the HRS portal [fewer than 10]% of the European bookings were made

¹⁹⁵ Calculation by the Decision Division from the response of HRS to the questionnaire, cf. “Questionnaire among competitors 2013” file, pp. 241 et seqq.

¹⁹⁶ cf. the response of HRS to the questionnaire, “Questionnaire among competitors 2012” file, p. 857. As is shown by the responses to the Questionnaire among competitors 2013 re Question E.3, “geo-targeting” by means of Google Adwords is also used by other portals.

¹⁹⁷ For Booking cf. e.g. “Questionnaire among competitors 2012” file, p. 194.

¹⁹⁸ cf., <https://joinexpedia.com> of 7 September 2012, “Questionnaire among competitors 2012” file, p. 245.

¹⁹⁹ cf. letter from Expedia of 18 June 2013, pp. 3008 and 3009 et seq. This information is also supported by the amount of expenditures stated in the questionnaire competitors (“Questionnaire among competitors 2013” file, pp. 53 et seqq.).

²⁰⁰ cf. on this also section D.2.2.2.

²⁰¹ cf. on this “Questionnaire among competitors 2012” file, p. 238.

for hotel rooms in Austria, [more than two-thirds] of the European bookings on the Tiscover portal were made for hotels rooms in Austria.²⁰² This applies to 2011 and the subsequent year 2012.²⁰³

136 New hotel portals concentrating on the sale of hotel rooms in Germany have virtually been unable to enter the German market in recent years.²⁰⁴ HRS only mentions Unister in this context.²⁰⁵ Unister does not, however, achieve the lion's share of its turnover with the online sale of hotel rooms, but is primarily active in the sale of travel products.²⁰⁶ The new mobile hotelApps which have entered the German market are technical novelties, the market development remains to be seen.²⁰⁷

3. Violation of section 1 GWB/Art. 101 (1) TFEU

137 The MFN clauses implemented by HRS violate section 1 GWB/Art. 101 (1) TFEU. This provision prohibits agreements between companies which prevent or restrict competition, either by object or by effect.

Even though it is arguable whether the MFN agreements between HRS and its hotel partners bring about significant restraints of competition by object, they certainly do so by effect. The economic incentive for hotel portals to offer lower commissions to the hotels or the incentive to face up to competition by adopting new sales strategies is taken away; it is made more difficult for new competitors to enter the market. The possibilities open to the hotels to submit offers on various hotel portals and other sales channels at different prices and conditions are considerably restricted. The restraints of competition caused by the MFN clauses of HRS are strengthened by the MFN clauses of the two other major portals in Germany, namely Booking and Expedia.

²⁰² Calculation by the Decision Division on the basis of the response of HRS to the questionnaire, "Questionnaire among competitors 2012" file, pp. 834 et seqq.

²⁰³ Calculation by the Decision Division on the basis of the response of HRS to the questionnaire, "Questionnaire among competitors 2013" file, pp. 241 et seqq.

²⁰⁴ In the responses to Question F.2. of the Bundeskartellamt's market survey, HRS named Unister as the only new market player in Germany since 2006, cf. files "Questionnaire among competitors 2010", p. 1243. Other new portals offer hotel rooms in the EU, but hardly any in Germany (e.g. Travel Republic, Late Rooms and dhr.com).

²⁰⁵ cf. the response of HRS to the questionnaire in "Questionnaire among competitors" file, p. 1243.

²⁰⁶ According to information provided by Unister itself and documented using percentages, e-mail of 11 September 2012, its turnover in the hotel sector only constitutes a small part of its total turnover, cf. "Questionnaire among competitors 2012" file, p. 480.

²⁰⁷ cf. on this also section B.1. above

138 The MFN agreements between HRS and its hotel partners are agreements between companies (cf. on this section 3.1 below) which can impact trade between Member States of the European Union (cf. on this section 3.2). The agreements fall within the scope of section 1 GWB/Art. 101 (1) TFEU (cf. on this section 3.3). The MFN clauses restrain competition (cf. on this section 3.4). The restraints of competition are significant (cf. on this section 3.5).

3.1 Agreements within the meaning of section 1 GWB/Art. 101 (1) TFEU

139 The MFN clauses used by HRS are agreements within the meaning of section 1 GWB/Art. 101 (1) TFEU. Agreements are reached by congruent statements of intent of the parties to engage in a certain market conduct.²⁰⁸ Agreements also cover expressions of will which provide for or authorise a company to adopt unilateral conduct which is binding on the other company.²⁰⁹ The agreements here in question fall within this definition.

140 The clauses which are to be examined by the standard of section 1 GWB/Art. 101 (1) TFEU include clauses in which a company legally undertakes not to grant better conditions to any other company than to the contracting partner and/or to always grant to the contracting partner the best prices or conditions which they grant (MFN clauses).²¹⁰ If there are a large number of similar contracts, in accordance with the bundle theory, not each individual contract, but the entire contract system is to be taken into account.²¹¹

141 The general terms and conditions which apply in the relationship between HRS and its hotel partners include the MFN clauses described, in the expanded version applicable from 1 March 2012. The MFN clauses permit HRS to require its hotel partners to behave in a specific way. By accepting the general terms and conditions of HRS, the hotel partners of HRS have undertaken to grant to HRS the respectively best conditions in comparison to other platforms on the Internet with regard to hotel price, room availability

²⁰⁸ cf. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C11/1 of 14 January 2011 (hereinafter: "Horizontal Guidelines"), No. 32.

²⁰⁹ cf. Guidelines on Vertical Restraints, No. 25.

²¹⁰ Immenga/Mestmäcker, loc. cit., Nos. 399 et seqq., on section 1 of the Act Against Restraints of Competition.

²¹¹ On the bundle theory cf. Langen/Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, 11th ed., 2011 (hereinafter: "Langen/Bunte"), No. 252 on section 1 GWB with further references

as well as to booking and cancellation conditions. The examination under competition law relates to all MFN agreements currently existing between HRS and its hotel partners.

3.2 Interstate clause

142 Art. 101 (1) TFEU is applicable in addition to section 1 GWB since the restraints of competition may affect trade between Member States. The effect on trade is to be interpreted broadly. It is already satisfied if restraints of competition can exert an influence on the cross-border economic activities of the companies in question.²¹²

143 As a result of the MFN clause, the hotel partners have undertaken to grant to HRS the best respective conditions vis-à-vis the other hotel portals. The MFN clause hence affects competition between HRS and domestic and foreign hotel portals which have cross-border activities.

3.3 Scope of section 1 GWB/Art. 101 (1) TFEU

144 The MFN clause of HRS falls within the scope of section 1 GWB/Art. 101 TFEU. HRS is neither a genuine agent who might be permitted to agree such a clause (cf. on this section 3.3.1), nor are the MFN clauses only ancillary agreements in contracts which are otherwise neutral in terms of competition law (cf. on this section 3.3.2).²¹³

3.3.1 Agent

145 With regard to the sale of hotel rooms, HRS does not operate as a genuine, and hence dependent agent within the meaning of competition law. Competition law therefore applies.²¹⁴

146 Where agents do not bear any economic risk of their own with regard to their contract services, and are therefore largely dependent on the instructions of the principal, the ban on anti-competitive agreements only applies to a limited degree to legal relations between

²¹² cf. Langen/Bunte, loc. cit., No. 123 b) on section GWB.

²¹³ cf. also statement of HRS of 30 June 2012, loc. cit., pp. 5 et seqq.

²¹⁴ The case-law with regard to categorisation as an agent under (national) competition law is not decisive (in Germany sections 84 et seqq. of the Commercial Code [*HBG*]); rather, competition law has created a definition of its own here; cf. in this regard Zimmer in Immenga/Mestmäcker, No. 360 re section 1 of the Act Against Restraints of Competition; Guidelines on Vertical Restraints No. 13.

the principal and the genuine agent.²¹⁵ Restraints of competition committed by the principal vis-à-vis the agent are only allowed if the principal takes the risks and determines the commercial strategy, such as restrictions as to the sales area, the customers or the prices and conditions at which the agent must buy or re-sell the goods or services.²¹⁶

147 HRS does not act as a genuine agent with regard to the sale of hotel rooms. HRS cannot qualify as a genuine agent because the MFN clauses do not bring about any restraints of competition which emerge from a principal - in this case the hotel partners -, but from the agent HRS. As described in section B.2, HRS has amended the general terms and conditions which apply between HRS and its hotel partners. It is HRS which has unilaterally decided to amend the general terms and conditions. The hotel partners do not exert influence on the activities of HRS: They do not make demands on HRS either relating to the sales area or to the customers, nor do they influence further activities of HRS. The activities of HRS do not depend on the hotel partners of HRS. The MFN clauses do not restrict the conduct of the alleged agent, but rather that of the alleged principal.

148 HRS is not a dependent agent since HRS bears its own financial and economic risk. HRS does not dispute its extensive commercial activities and the economic risks.²¹⁷ Examples are the HRS investment in advertising the HRS “brand”,²¹⁸ the establishment of a contractual network with a large number of hotels²¹⁹ and cooperation partners (e.g. major travel companies, such as DB AG, AirBerlin, Germanwings and public clients, such as the Bundeswehr), as well as the establishment and ongoing technical refinement and

²¹⁵ cf. Zimmer in Immenga/Mestmäcker, loc. cit., Nos. 55 and 358 et seqq. re section 1 of the Act Against Restraints of Competition.

²¹⁶ cf. Guidelines on Vertical Restraints, No. 18.

²¹⁷ cf. statement of HRS, loc. cit., pp. 7 et seqq. and pp. 53 et seqq. HRS merely assesses its commercial activities differently, namely as not suited to question the status which HRS claims to have as a genuine agent.

²¹⁸ According to its own information, HRS spent an amount totalling more than [...] € on online advertising in 2012, and an amount of more than [...] € on offline advertising (response to questionnaire in “Questionnaire among competitors 2013” file, pp. 241 et seqq.).

²¹⁹ HRS mentions almost [...] partner hotels in Germany for 2012, as well as more than [...] partner hotels worldwide with which it has contracts (cf. “Questionnaire among competitors 2012” file, p. 851).

development of the content of the HRS website,²²⁰ and cooperation with major Internet providers, such as Amadeus,²²¹ Google, Facebook, Twitter and TravelTainment.

- 149 The European Court of Justice has ruled that the ban on anti-competitive agreements is to be applied to travel agents which sell tourist services, including hotel rooms.²²² Accordingly, travel agents are not genuine (dependent) agents, but are to be regarded as independent providers of services for a large number of tour operators. The activities of HRS are similar. HRS does not act in the interest of a single principal. Rather, HRS sells hotel rooms for more than 250,000 different hotels worldwide. It is ultimately not relevant for HRS which hotels are booked.

3.3.2 Ancillary agreement

- 150 The MFN clauses are not ancillary agreements which are required to safeguard the main purpose of a contract which does not violate competition law. The clauses are therefore not exempt from the scope of the ban on anti-competitive agreements.²²³
- 151 In particular, the MFN clauses are not required for avoiding free riding on the information and advertising services provided by HRS (more detail on this in section 5.2.1).²²⁴

The MFN clauses are not necessary because a large number of competitors in the market apply them.²²⁵ Where MFN clauses of other market players constitute a restraint of

²²⁰ cf. pp. 54 et seq. of statement of HRS of 30 June 2012, loc. cit.

²²¹ According to information from HRS, its hotel partners are to be bookable in future via all travel agencies which use the Amadeus system (more than 91,000 travel agencies worldwide and over 65,000 airline sales offices).

²²² ECJ, judgment of 1 October 1987, RS C-311/85.

²²³ On the "*Immanenztheorie*" (Translator's note: a kind of rule of reason), cf. Zimmer in Immenga/Mestmäcker, loc. cit., No. 175 on section 1 of the Act Against Restraints of Competition, referring inter alia to Federal Court of Justice 14 January 1997, WuW/E Federal Court of Justice 3121, 3126 "*Bedside-Testkarten*" and Federal Court of Justice 12 May 1998, WuW/E DE-R 131 "*Eintritt in Gebäudereinigungsvertrag*"= NJW-RR 1998,1508. cf. very recently also Düsseldorf Higher Regional Court, order of 11 November 2013 "Merck", ref. VI-Kart 5/09 (V), p. 16.

²²⁴ On the problem of free riding from the point of view of a functionally-necessary ancillary agreement, cf. Zimmer in Immenga/Mestmäcker, loc. cit., No. 382 on section 1 of the Act Against Restraints of Competition. On the problem of free riding from the point of view of possible gains in efficiency in accordance with section 2 (1) of the Act Against Restraints of Competition/Art. 101 (3) TFEU, cf. in section D.5.2.1. In line with Community practice, the Decision Division tackles the subject of free riding (cf. Guidelines on Vertical Restraints, Nos. 107 and 225 on Art. 101 (3) TFEU) with regard to the question of possible efficiency gains.

²²⁵ cf. on this statement of HRS of 30 June 2012, loc. cit., pp. 53.

competition, the HRS MFN clauses contribute to further strengthening the restraints of competition already existing on the German market.²²⁶

3.4 Restraint of competition by object and by effect

152 Even though it may be arguable that the MFN clauses of HRS do not bring about restraints of competition by object, they do at least bring them about by effect. The restriction of freedom to compete is regarded to be intentional if it is objectively suited to do so, if it is part of the contractual obligations of the parties in question and if the fulfilment of the contractual obligations is indeed enforced.²²⁷ When examining whether an agreement contains a restraint of competition “by object”, the ECJ also looks at the goals pursued by the agreement and the economic and legal context.²²⁸

153 The HRS MFN clauses are objectively suited to directly restrict the freedom of price setting of the hotel partners of HRS on the other sales channels, since the hotel partners may not offer their hotel rooms at lower prices and better conditions via the other sales channels. The hotel partners of HRS can freely set the price for the hotel rooms on the portal of HRS,²²⁹ but they may not have a different price on other portals. Because of the transparency which is inherent to online sales, HRS can effectively monitor compliance with the MFN clauses and impose sanctions. HRS further expanded the area of application of its previous MFN clauses with effect as per 1 March 2012 (concerning parity of availability and conditions to include all sales channels), and enforces these clauses by an automatic price monitoring system and by threatening and implementing booking deactivations and by the termination of contracts.²³⁰ The MFN clauses are suited and indeed intended to restrain competition between the hotel portals and to make it difficult to enter the market (cf. on this in detail section 3.4.1); they also restrain competition between the hotels (cf. on this section 3.4.2).

154 Whether the HRS clauses are genuine or typical MFN clauses (in the sense of direct pricing) is ultimately not relevant. The effect of the MFN clauses is anti-competitive even

²²⁶ For more details on this cf. at section D.6.2 “Cumulative competition impacts”.

²²⁷ cf. Horizontal Guidelines, Nos. 24 et seq., as well as rooms in Immenga/Mestmäcker, loc. cit., Nos. 156 et seq. on section 1 of the Act Against Restraints of Competition.

²²⁸ cf. recently ECJ Case C-32/11 of 14 March 2013 “Allianz Hungaria”, No. 36 with further references

²²⁹ cf. statement of HRS of 30 June 2012, loc. cit., pp. 56 et seq.

²³⁰ HRS was already enforcing its “MFN clause 2010” applicable at that time in 2009 by these means, and certainly continued this practice until September 2013 (cf. section B.2 above with further references).

taking account the problem of free riding and the possible reduction of the search costs for hotel customers.

3.4.1 Restraint of competition between the hotel portals

155 The restraint of competition between the hotel portals relates to competition for the lowest booking commissions (cf. on this section 3.4.1.1), aggressive competition for the best conditions (cf. on this section 3.4.1.2) and the market entry of new competitors (cf. on this section 3.4.1.3). Anti-competitive effects of the MFN clauses are strengthened by the application of MFN clauses by the other major portals in Germany Booking and Expedia (cf. on this section 3.4.1.4).

3.4.1.1 Booking Fees

156 The MFN clauses of HRS remove the economic incentive for hotel portals to offer lower commissions to the hotel partners of HRS in order to have in turn rooms provided at lower prices and at more favourable conditions. The MFN clauses thus restrain intra-brand competition when selling hotel rooms and hence also restrain inter-brand-competition between the hotels.²³¹ The significance attached by hotel portals, and by HRS in particular, to low room prices and to favourable booking and cancellation conditions is proven by the application of MFN clauses: They are to ensure that no other hotel portal offers better conditions.

157 The economic effect of the MFN clauses is similar to direct collusion between the hotel portals, namely concerted behaviour regarding the sale of a specific hotel room at a specific minimum price. Hotel portals which provide the same or at least similar hotel rooms as HRS²³² are prevented from selling hotel rooms at lower prices or at more favourable conditions than HRS. In turn, HRS can increase its commissions without having to fear that its hotel partners will pass on the increase in the commission to hotel customers. The room price on the HRS portal is a central competition factor.²³³ Therefore the MFN clauses have strong anti-competitive effects and HRS profits from them.

²³¹ For instance also Düsseldorf Higher Regional Court VI-W (Kart) 4/12 "Hotel Association/Hotel.de", pp. 5 et seqq.

²³² The best price guarantee of HRS which is applicable to hotel customers covers rooms which are comparable (in qualitative terms), e.g. as to arrival and departure dates, room category, additional services (such as breakfast), method of payment and the like; cf. HRS best price guarantee (p. 1934 h).

²³³ This is also the view held by HRS, cf. statement of HRS of 30 June 2012, loc. cit., p. 57.

3.4.1.2 Competitive advances

158 The MFN clauses also prevent competitive advances by other portals. New sales strategies are negatively affected. HRS confirmed that it removed forty of its partner hotels from the HRS reservation system because these hotel partners had permitted that hotel rooms which had originally been offered by tour operators within package tours were offered in various other portals at prices that were lower than those of HRS.²³⁴

159 HRS also barred the “deal of the day” offered by Unister in 2011.²³⁵ In each “deal”, a discount is granted against the nominal amount of the voucher. HRS invoked its MFN clauses to exclude hotel partners from the HRS booking system in cases where the hotel partners did not offer the “deal of the day” to HRS. Thus special offers from hotel portals which could have intensified competition and increased price pressure did not succeed.

3.4.1.3 Market entry

160 The MFN clauses furthermore impede the market access of new competitors.²³⁶ If a hotel portal is prevented from gaining access to cheaper rooms by charging lower commissions²³⁷ or through a new sales strategy, market access will be difficult.

161 There is less economic incentive for HRS hotel partners to take up the services of another hotel portal if they cannot pass on the lower commissions of this portal to their hotel customers or use new sales strategies to the advantage of their customers.²³⁸ Ultimately, the use of MFN clauses by HRS is particularly damaging for competition, because it protects an established enterprise against innovative offers from newcomers. A specific example is the market introduction of mobile hotel portals, such as JustBook and BookitNow!.²³⁹ Hotels had to grant to the portals discounts of 30% or more on the daily

²³⁴ cf. at section B.2.1 above

²³⁵ cf. file “Questionnaire among competitors 2010”, pp. 232 et seq.

²³⁶ HRS estimates the financial expenditure on the Internet presence, hardware, access technology (e.g. GDS and IBE) to be approx. [...] € and the time spent to correspond to [...], so that certainly no high financial and technical market access barriers exist.

²³⁷ e.g. thanks to favourable cost structures and a different range of services

²³⁸ cf. also the fvw article of 16 April 2010, pp.17 et seqq.

²³⁹ cf. on this in section B.1. and B.2. above

rate for last minute offers.²⁴⁰ Both JustBook and BookitNow! have initiated proceedings²⁴¹ targeting the MFN clauses of HRS.

162 MFN clauses even prevent market access by competitors if the latter are particularly efficient.²⁴² A new hotel portal can only achieve a prominent status among the hotel customers if the hotels presented on the portal can satisfy the demand of the customers. The hotels approached by JustBook referred to the MFN clauses of HRS and refused to offer hotel rooms to JustBook. A new competitor who is de facto refused access to the market cannot demonstrate that he is an efficient competitor.

3.4.1.4 Strengthening of the anti-competitive effect through the application of MFN clauses by other hotel portals

163 The anti-competitive effects of the MFN clauses of HRS on competition between the hotel portals are strengthened by the application of MFN clauses by other portals. Looking at commissions earned, Booking has a larger market share than HRS ([40-50]% of the total volume).²⁴³ Booking has, agreed MFN clauses with its hotel partners, and it is in a position to enforce the clauses. Expedia, the third-largest market player with a value-based market share of [10-20]%,²⁴⁴ obliges hotels to implement parity of room rates and room availabilities, as well as parity of booking and cancellation conditions.²⁴⁵ HRS, Booking and Expedia together reached a market share of roughly 90% on the German hotel portal market.²⁴⁶ The MFN agreements of HRS, Booking and Expedia cover almost the entire market. Hotel portals cannot compete by using different booking commissions on the portals or different sales strategies. Market entry by new competitors is not impossible but much more difficult.

²⁴⁰ Discounts of up to 30%, for JustBook discounts of up 50% and for Blink Hotels discounts of up 70% are quoted on the Internet for Hotels Now.

²⁴¹ cf. on this sections C.1 and C.2. above with further references

²⁴² cf. in this respect statement of HRS of 30 June 2012, loc. cit., pp. 71 et seqq. and once more statement of HRS of 11 March 2013, loc. cit., p. 13.

²⁴³ cf. in detail at section D.4.3 below on the spread of the market shares on the German hotel portal market

²⁴⁴ cf. in detail at section D.4.3 below on the spread of the market shares on the German hotel portal market

²⁴⁵ cf. on this in detail in section B.3 above

²⁴⁶ cf. in detail at section D.4.3 below on the spread of the market shares on the German hotel portal market

3.4.2 Restraint of competition between the hotels

164 The MFN clauses have negative effects on competition between the hotel partners of HRS and other hotels. Competition between the hotels for the best prices of rooms is particularly affected (cf. on this section 3.4.2.1). Competition is restrained for all channels which the hotels use for selling hotel rooms (cf. on this section 3.4.2.2). Anti-competitive effects of the MFN clauses on competition between the hotels are strengthened by MFN clauses which other major portals in Germany, like Booking and Expedia, apply (cf. on this section 3.4.2.3).

3.4.2.1 Hotel room prices

165 The MFN clauses of HRS prevent hotels from directly passing on lower commissions to their customers. Thus the hotels may attract a smaller number of customers. If the hotels cannot charge differential prices, they cannot effectively cover their costs. The hotels are prevented from adapting to specific market situations (“yield management”).

166 The hotel partners of HRS are not free to set prices when it comes to pricing special offers (e.g. accommodation with or without breakfast). Since the MFN clauses do not only include booking and cancellation conditions, but also “prices and price conditions”,²⁴⁷ hotels have to apply the MFN clauses, when they make special offers. In this case, the hotels must put HRS in a position to post the new offer on its portal, as well. Competition between the hotels for the best room offer (“inter-brand” competition) is thus restricted.²⁴⁸

167 It is irrelevant whether, in the interest of “branding”, major brand hotels might prefer one and the same hotel room price in any case, or whether smaller hotels might do so in order to achieve a simpler (price) management.²⁴⁹ Freedom of price setting can only strengthen competition if the price setting is not restricted. Hotels are prevented from granting discounts on other hotel portals by the MFN clauses of HRS since these clauses cover

²⁴⁷ No. 5 sentence 1 of the MFN clause 2010 reads as follows: “The Hotel is obliged to notify HRS without delay about all current temporary price reductions and to make these bookable through HRS”, and according to No. 5 sentence 1 of the 2012 MFN clause, it covers price or rate.

²⁴⁸ cf. also Düsseldorf Higher Regional Court in the Case “Hotel Association/Hotel.de” (Düsseldorf Higher Regional Court VI-W (Kart) 4/12, pp. 5 et seqq.

²⁴⁹ cf. however HRS in its statement of 30 June 2012, loc. cit., pp. 61 et seqq.

“prices and price conditions”, and hence discounts, too.²⁵⁰ Price setting should always be decided by the hotels since they bear the sales risk. The hotels may therefore not be obliged by means of the MFN clauses to offer the same price on different sales channels.

168 There has been little price differentiation by hotels across the various sales channels in the past few years.²⁵¹ This shows how emphatically the hotel portals enforce rate parity. According to the information that is available to the Bundeskartellamt, HRS automatically checks 80% of all hotels in the system for breaches of rate parity.²⁵² Just like the other hotel portals, HRS uses “crawlers” which search the Internet several times a day for rates.²⁵³ HRS staff approaches hotels orally and in writing in order to enforce rate parity²⁵⁴ and threatens to expel hotels from the HRS portal, at least this was the case until October of this year.²⁵⁵

3.4.2.2 The sales channels concerned

169 The MFN clauses restrain competition between the hotels on the various Internet sales channels, but also outside the Internet. HRS has extended parity requirements for the booking and cancellation conditions in accordance with No 5 d) of its general terms and conditions to include offline sales channels.

170 From the point of view of major hotels, which largely sell their rooms via their own websites, the MFN clauses particularly restrict the opportunity to design these websites and to offer accommodation at more favourable conditions for specific periods. Since hotels do not pay commissions if bookings are made via their own websites, they could as a matter of principle sell rooms here at a lower price than via third-party channels. The accommodation services posted on the hotels’ own websites are theoretically allowed to

²⁵⁰ The inclusion of discounts is also favoured by the fact that HRS also prevented the “Deal of the day” offered by Unister in 2011 by invoking its MFN clause. cf. section D.3.4.1.2. above on the “Deal of the day”

²⁵¹ cf. also Sectoral Study on the Hotel Market in Germany 2013, p. 211: Whilst in 2003 more than two-thirds of the hotels which took part in the survey of the German Hotel Association used the different sales channels to differentiate on price, this share had fallen to one-fifth by 2009, and to 16% according to a survey by the Institut de Tourisme, Wallis Western Switzerland University of Applied Sciences from 2012.

²⁵² cf. www.hospitalityinside.de – Newsletter of 20 January 2012: “Die Dämme brechen”.

²⁵³ cf. letter of HRS of 4 September 2009, p. 318.

²⁵⁴ cf. e.g. information provided by the Hotel Association, e-mail of 9 November 2012, pp. 2473 et seqq.

²⁵⁵ cf. section B.2.2 above with further references on claiming the rate parity by HRS.

differ from those on the HRS portal, if they cannot be presented on the HRS portal. The Decision Division is, however, not aware of any practical examples.

- 171 Because the MFN clauses cover the availability of rooms, the hotels cannot offer the remaining contingents on portals which have more visitors. HRS submits that it does not demand “last room availability” from its hotel partners.²⁵⁶ This is, however, not explicitly incorporated in the contractual terms applicable between HRS and its hotel partners; rather, in No. 5 c) the MFN clauses extend the availability parity for the hotel rooms to all “other sales channels”, and hence at least in terms of the wording, to the own websites of the hotels.
- 172 The MFN clauses restrict the price setting on hotel rooms across the entire Internet, even when third parties sell the hotel rooms without the influence of the hotels.²⁵⁷ According to No. 5 (a) of the general terms and conditions which are applicable between HRS and its hotel partners the MFN clauses relate to prices and price conditions which customers can find on other platforms. They oblige hotel partners to ensure that the same price is available to HRS even if the price on the other channels was set by the sales partner (e.g. a tour operator) and not by the hotels.
- 173 HRS brings about a further restriction of competition between the hotels by extending the application of the MFN clauses to bookings over the counter.²⁵⁸ Hotels can no longer sell off remaining rooms at particularly good conditions at the hotel reception desk.

3.4.2.3 Strengthening of the anti-competitive effect through the application of MFN clauses by other hotel portals

- 174 The anti-competitive effect of the MFN clauses between the hotels is strengthened by the application of MFN clauses by the other major portals like Booking and Expedia. German hotels are frequently hotel partners of all three major hotel portals or partners of at least one of these portals.²⁵⁹ Thus the German hotel portal market is nearly completely covered

²⁵⁶ cf. on this the explanation by HRS (section B.2.2), according to which availability parity is not to cover the hotels' own websites, telephone sales and the hotels' reception.

²⁵⁷ e.g. of another travel portal to Unister. re Unister cf. section D.1.2.2. A commission splitting takes place in this case between the portals concerned.

²⁵⁸ No. 5 (a) of the terms and conditions of HRS extends price parity to the entire Internet and to “own sales channels” of the hotels.

²⁵⁹ cf. on this in section D.2.2.4.

by MFN clauses and the vast majority of the hotels in Germany are obliged to apply MFN clauses. There is practically no way for hotels to use the services of a hotel portal which does not apply MFN clauses. Competition between the hotel partners of the various hotel portals is significantly restricted.

3.5 Significance of the restriction

175 An agreement restrains competition significantly if it affects the possibility for the companies involved to exert influence on the market conditions. The case-law decides on the question of significance of the restraint by looking at the number of market players and their market shares.²⁶⁰

176 As stated above, the relevant market is the German market for hotel portals. Only a small number of large market players are operating on this market, like HRS, Booking and Expedia; the market share of other market players which sell hotel rooms in Germany on any larger scale is [0-5]% each. HRS is one of the leading hotel portals, with a market share of more than 30% (2012).²⁶¹ HRS enforces the MFN clauses by continually checking on its hotel partners and in case of a breach of the clause deactivating them for further bookings or permanently removing the hotels from the HRS portal. The anti-competitive impact of the MFN clauses is strengthened by the application of MFN clauses by Booking and Expedia. Since HRS, Booking and Expedia together achieve a market share of roughly 90%, the restraints of competition are significant.

4. No exemption in accordance with section 2 (2) GWB/Art. 101 (3) TFEU in conjunction with the Vertical Restraints Block Exemption Regulation

177 The MFN clauses are not exempt from the application of section 1 GWB/Art. 101 (1) TFEU in accordance with section 2 (2) GWB/Art. 101 (3) TFEU in conjunction with Art. 2 (1) of the Vertical Restraints Block Exemption Regulation. In accordance with Art. 2 (1) of the Vertical Restraints Block Exemption Regulation, the ban on anti-competitive agreements contained in Art. 101 (1) TFEU does not apply to the vertical restrictions

²⁶⁰ Immenga/Mestmäcker, loc. cit., No. 168 re section 1 of the Act Against Restraints of Competition, referring to Federal Court of Justice 23 February 1988 WuW/Federal Court of Justice 2469, 2470 “*Brillenfassungen*” and Federal Court of Justice 14 January 1960 WuW/E Federal Court of Justice 369, 373 “*Kohlenplatzhandel*”. For a restraint by object, also applicable here within the meaning of Art. 101 TFEU, it is always affirmed that it is appreciable (cf. ECJ, judgment of 13 December 2012, C-226/11 – “*Expedia*”, No. 37).

²⁶¹ cf. at section D.4.3 re the market shares (after commissions as well as margins, and accommodation)

contained in vertical agreements, but this exemption only applies if the share of the provider and of the purchaser on the relevant market is not more than 30% each (Art. 3 (1) of the Vertical Restraints Block Exemption Regulation). The exemption does not apply to agreements containing hardcore restrictions (Art. 4 of the Vertical Restraints Block Exemption Regulation).

178 Contractual agreements between HRS and the hotel partners are vertical agreements within the meaning of the Vertical Restraints Block Exemption Regulation (cf. on this section 4.1). Whether the MFN clauses are hardcore restrictions can remain open (cf. on this section 4.2). At least in 2012, HRS exceeds the upper limit of 30% market share prescribed for an exemption (cf. on this section 4.3).

4.1 Vertical agreements within the meaning of the Vertical Restraints Block Exemption Regulation

179 In accordance with Art. 1 (1) (a) of the Vertical Restraints Block Exemption Regulation, “vertical agreements” are agreements entered into between companies which operate, for the purposes of the implementation of the agreement, at a different level of the distribution chain, and relating to the conditions under which the parties may purchase or sell certain goods or services.

180 HRS and its hotel partners operate at different levels of the distribution chain. Whilst each hotel only offers accommodation (and to a large extent also sells them on its own website), HRS operates an Internet portal where a large number of hotels sell rooms to hotel customers. The general terms and conditions designated in section B.2 apply to HRS and its hotel partners. These terms and conditions include the MFN clauses by means of which HRS imposes vertical restraints on its hotel partners.

4.2 Hardcore restriction

181 Whether the MFN clauses are hardcore restrictions can remain open.

182 In accordance with Art. 4 sentence 1 of the Vertical Restraints Block Exemption Regulation, the exemption provided for in Article 2 (1) of the Vertical Restraints Block Exemption Regulation does not apply to the hardcore restrictions set out in Article 4. The hardcore restriction in accordance with Art. 4 (a) of the Vertical Restraints Block Exemption Regulation relates to agreements which directly or indirectly relate to fixed or

minimum prices.²⁶² Art. 1 (h) of the Vertical Restraints Block Exemption Regulation also defines as buyers companies which sell goods or services on behalf of another company.

183 If the wording is interpreted strictly, the conditions of Art. 4 (a) of the Vertical Restraints Block Exemption Regulation are not fulfilled. If one regards the hotels as “suppliers” of hotel services, hotel portals, such as HRS, could still be regarded as “buyers” of these services within the meaning of the Art. 1 (h) of the Vertical Restraints Block Exemption Regulation. However, it is then not the buyers whose freedom of price setting is directly restrained by the MFN clauses, but it is the suppliers (hotels). If, conversely, one regards the hotel portals as “suppliers” of the portal services, the hotels are “buyers” of these services; they do not, however, re-sell the services of the portal.

184 The competitive impact of the MFN clauses is, however, similar to that of a hardcore restriction in accordance with Art. 4 (a) of the Vertical Restraints Block Exemption Regulation. Art. 4 (a) of the Vertical Restraints Block Exemption Regulation is to protect the freedom of price setting by the “buyer”. The freedom of price setting does not only include end prices, but also all price components and other pricing factors.²⁶³

185 The MFN clauses oblige hotel partners to adjust the prices of their hotel rooms in other portals to the HRS level, and prevent the hotel partners from passing on lower commissions of other portals to the hotel customers. Hence, the MFN clauses do not set a fixed price level. However, the MFN clauses have the de facto effect of minimum prices, considering the market position of HRS, the system of price monitoring which HRS operates, and the sanctions imposed by HRS in case of breaches of the MFN clauses.²⁶⁴

186 The impact of MFN clauses on restricting price setting has been shown in the case of “JustBook/HRS”, in which the Düsseldorf Higher Regional Court issued an injunction.²⁶⁵ Although JustBook offered more favourable conditions to hotels than HRS, the hotels referred to the MFN clauses and the sanctions linked to a violation and thus refused to have their hotel rooms being offered at lower prices on the JustBook portal. The freedom of price setting of the hotels and that of the hotel portals is equally negatively affected:

²⁶² cf. on this European Commission, Guidelines on Vertical Restraints, No. 48.

²⁶³ cf. Schultze/Pautke/Wagener, *Vertikal-GVO*, 3rd ed., No. 529 re Art. 4 (a) with further references

²⁶⁴ cf. No. 48 of the Guidelines on Vertical Restraints. The European Commission names a number of measures strengthening the effect of price maintenance, such as in particular price monitoring systems.

²⁶⁵ cf. on this section C.2 above

The MFN clauses prevent the hotels from offering rooms at lower prices, and for the hotels there is no economic incentive for charging lower commissions.

187 Finally, the question of the existence of a hardcore restriction within the meaning of Art. 4 (a) of the Vertical Restraints Block Exemption Regulation can remain open, since at least the other criteria for an exemption of the MFN clauses from a ban on anti-competitive agreements are not fulfilled.

4.3 Exceeding the 30% threshold

188 The MFN agreements are, at least currently, not exempt from the application of the ban on anti-competitive agreements in accordance with Art. 2 (1) in conjunction with Art. 3 (1) of the Vertical Restraints Block Exemption Regulation. An exemption for the MFN agreements is not possible if the share on the relevant market is more than 30%. HRS did not have a market share of less than 30% at any time in recent history (at least not since 2009), and its market share is currently not below 30%.

189 If the share of a provider or buyer on the relevant market is below 30%, the competition authority of a Member State can, in accordance with Art. 29 (2) of Regulation No. 1/2003,²⁶⁶ withdraw the benefit of the block exemption regulation in question, here the exemption in accordance with Art. 2 (1) of the Vertical Restraints Block Exemption Regulation, if the agreements to which the block exemption regulation applies nonetheless have effects which are incompatible with Art. 101 (3) TFEU²⁶⁷ and occur in the territory of a Member State which has all the characteristics of a separate geographic market. The market share of HRS, however, remains higher than 30%. The market shares that are relevant to the application of Art. 3 (1) of the Vertical Restraints Block Exemption Regulation are calculated in accordance with Art. 7 (b) of the Vertical Restraints Block Exemption Regulation and they relate to the previous calendar year. For the Decision

²⁶⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1 of 4 January 2003.

²⁶⁷ Art. 101 (3) TFEU corresponds to the previous Art. 81 (3) EC, to which Art. 29 of the Block Exemption Regulation No. 1/2003 refers.

190 Division the relevant point of reference is the time of its decision in 2013.²⁶⁸ The calculation of the market shares is based on value.²⁶⁹

191 The Decision Division has calculated the market shares (and the bookings via hotel portals) for 2012.²⁷⁰ The market share of HRS on the German hotel portal market was greater than 30% in 2012.²⁷¹ The Decision Division has been observing the prior market development on the German hotel portal market since 2009.²⁷²

192 The figures which are contained in the tables below are based on the information provided by the hotel portals. Where the Decision Division had no information from the hotel portals, the Decision Division carried out an estimate.²⁷³ A safety margin of 5% on the market volume was allowed in favour of HRS in order to take into account portals that might not have been considered. In the view of the Decision Division, the figures on the tables are nonetheless sufficiently authoritative since they solely serve the purpose of identifying the area of application of the Vertical Restraints Block Exemption Regulation.²⁷⁴ The market shares calculated on the basis of commission and margin income²⁷⁵ are contained in the table below (in percent):

²⁶⁸ With regard to the substantive result, it is ultimately irrelevant whether the Decision Division used as a point of reference for the calculation of the market shares the time of the conclusion of the contract (see for instance Düsseldorf Higher Regional Court VI-Kart 5/09 (V) "Merck", pp. 20 et seq. referring to the grace period arrangements contained in Art. 7 (d) and (e) of the Block Exemption Regulation) or the time of the cartel office's order in that year (2013) (regarding the latter time cf. No. 44 of the Guidelines on the application of Article 81(3) of the Treaty [now Art. 101 (3) TFEU] (OJ 2004/C 101/97), according to which the assessment of restrictive agreements is made within the actual context in which they occur and on the basis of the facts existing at any given point in time; also No. 145 of the Horizontal Guidelines). In the former case, the relevant reference year would be 2011 as a matter of principle since this year is prior to the introduction of the anti-competitive clause presently applicable, which took place on 1 March

2012; it would only be different for newly-concluded sales contracts in 2013. The market shares of HRS/Hotel.de together were more than 30% in 2011, and the individual exemption criteria of section 2 of the Act Against Restraints of Competition/Art. 101 (3) TFEU were not met. In the second case, the relevant reference year would be 2012. The market shares of HRS were also above 30% in 2012 (with the then consolidated turnover of the subsidiary Hotel.de).

²⁶⁹ cf. Art. 7 (a) of the Block Exemption Regulation and No. 93 of the Guidelines on Vertical Restraints.

²⁷⁰ The responses to the questionnaire for 2012, as well as a corresponding overview, can be found in the "Questionnaire among competitors 2013" file, p. 21.

²⁷¹ cf. on this Table 2 below.

²⁷² The hotel portals' responses to the questionnaire for 2009 can be found in the files "Questionnaire among competitors 2010", Vols. 1 to 4, and for 2011 in the files "Questionnaire among competitors 2012", Vols. 1 and 2; for an overview cf. "Questionnaire among competitors 2012" file, pp. 46 and 46 a.

²⁷³ The estimates are labelled in the footnotes below.

²⁷⁴ cf. in this respect also Art. 7 (a) sentence 2 of the Block Exemption Regulation, which also permits estimates for the investigation of the market shares that are relevant in accordance with Art. 3 of the Block Exemption Regulation.

²⁷⁵ Only Expedia had margin income in the "merchant model", cf. on this at section D.1.2.2.1

Table 2: Market shares by commission and margin income

Hotel portals	Market shares 2009²⁷⁶	Market shares 2010	Market shares 2011	Market shares 2012
Booking	[20-30]% ²⁷⁷	[30-40]%	[40-50]%	[40-50]%
HRS ²⁷⁸	[30-40]%	[30-40]%	[20-30]%	[30-40]%
Hotel.de	[10-20]%	[0-10]%	[0-10]%	
<i>HRS and Hotel.de</i>	<i>[40-50] %</i>	<i>[40-50]%</i>	<i>[30-40]%</i>	
Expedia	[10-20]%	[10-20]%	[10-20]%	[10-20]%
lastminute	[0-5]%	[0-5]%	[0-5]%	[0-5]%
ehotel	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Unister	[0-5]%	[0-5]%	[0-5]%	[0-5]% ²⁷⁹
ebookers ²⁸⁰	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Others ²⁸¹	approx. 5 %	approx. 5 %	approx. 5 %	approx. 5 %
Total	170-190 million €	190-210 million €	260-280 million €	340-360 million €

²⁷⁶ Since the Decision Division does not have consistent information on commissions and margins for 2009 for Expedia, lastminute, Unister and ebookers, the Decision Division estimated the commissions/margins. In view of the only slight (positive) changes from 2010 to 2011, the figures for 2010 were taken as a basis. The presumptions for 2009 might therefore be slightly exaggerated. This however ultimately does not influence the illustration of the market structure.

²⁷⁷ The market share ranges stated in this table are worked out on the basis of the precisely-calculated market volumes (including a “safety margin” for any hotel portals which have not been included and which only sell hotel rooms in Germany on a limited scale).

²⁷⁸ HRS took over a majority holding in Hotel.de in October 2011. For this reason, the information for HRS and Hotel.de is no longer listed separately for 2012.

²⁷⁹ The Decision Division has no information on the commission proceeds of Unister from hotel-only sales in 2012. The market share stated was estimated on the basis of the market development to date.

²⁸⁰ The Decision Division has the information from ebookers.com Deutschland GmbH in this regard (cf. already “Questionnaire among competitors 2012” file, p. 744).

²⁸¹ “Safety margin” for any hotel portals which have not been included and which only sell hotel rooms in Germany on a limited scale (cf. section B.1 for more information).

193 The table below shows the bednights booked via hotel portals in percentage.²⁸²

Table 3: Market shares by bednights

Hotel portals	Accommodation 2010	Accommodation 2011	Accommodation 2012
HRS ²⁸³	[40-50]% ²⁸⁴	[30-40]%	[40-50]%
Hotel.de	[10-20]%	[10-20]%	
<i>HRS and Hotel.de</i>	<i>[50-60]%</i>	<i>[50-60]%</i>	
Booking	[20-30]%	[30-40]%	[30-40]%
Expedia	[0-10]%	[0-10]%	[0-10]%
lastminute	[0-5]%	[0-5]%	[0-5]%
ehotel	[0-5]%	[0-5]%	[0-5]%
Unister	[0-5]%	[0-5]%	[0-5]%
ebookers ²⁸⁵	[0-5]%	[0-5]%	[0-5]%
others ²⁸⁶	approx. 5 %	approx. 5 %	approx. 5 %
Total	15-25 million	20-30 million	25-35 million

194 Both the developments in value-based market volume and in the abovementioned bednight volume show that the German hotel portal market is still growing. Booking has, however, benefitted from the growing volume more than HRS and Expedia; the shares of the small providers, by contrast, remain at the same low level. The market share of HRS was above 30% in 2009 and 2010. In 2011 the market share was above 30% for HRS and Hotel.de together; Hotel.de was taken over by HRS in October 2011.²⁸⁷ In 2012 the HRS market share remained above 30%. HRS (together with Hotel.de) has no longer had the largest market share in terms of commission income since 2011, but HRS still accounted

²⁸² The Decision Division only has information from the hotel portals on the “bednights” for the years 2010 and 2011; cf. “Questionnaire among competitors 2012”, Vols. 1 and 2; for an overview cf. “Questionnaire among competitors 2012” file, p. 48.

²⁸³ HRS took over a majority holding in Hotel.de in October 2011. For this reason, the information for HRS and Hotel.de for 2012 is no longer listed separately.

²⁸⁴ The ranges stated in this table for the shares in the sale of hotel accommodation are calculated on the basis of the precisely-calculated market volumes (including “Sicherheitszuschlag” for any hotel portals not included and which sell hotel accommodation in Germany only on a small scale).

²⁸⁵ The Decision Division has the information from ebookers.com Deutschland GmbH in this regard (cf. already “Questionnaire among competitors 2012” file, p. 744).

²⁸⁶ “Sicherheitszuschlag” for any hotel portals not included which only sell hotel accommodation in Germany on a small scale (cf. section B.1 for more details).

²⁸⁷ Such attribution of the turnover of Hotel.de is indicated despite being acquired intra year since the turnover of HRS and Hotel.de together represents the market position of HRS in the following year 2012 (with the then consolidated turnover of the subsidiary Hotel.de).

for almost half of the beds in German hotels that were booked on hotel portals in 2012.²⁸⁸ The value-based market share of Booking was already larger than that of HRS in 2010, and continued to exceed the HRS share after HRS had taken over Hotel.de in October 2011. Looking at the booking of hotel beds the gap between Booking and HRS/Hotel.de has nearly been bridged in 2012.

195 It can be left open whether marginal competition from Internet providers other than hotel portals had an impact on the overall market position of HRS in 2012. The 30% threshold provided for in the Vertical Restraints Block Exemption Regulation is to serve the purpose of simplifying the exemption criteria contained in the rules of the Block Exemption Regulation.²⁸⁹ Even if the market share threshold is exceeded, there is no presumption that the MFN clauses violate competition law.²⁹⁰

5. No individual exemption in accordance with section 2 (1) GWB/Art. 101 (3) TFEU

196 The MFN clauses are not exempted in accordance with section 2 (1) GWB/Art. 101 (3) TFEU. Vertical agreements are only exempt from the prohibition contained in section 1 GWB/Art. 101 (1) TFEU if the positive competition effects outweigh the anti-competitive effects.²⁹¹ In accordance with section 2 (1) GWB/Art. 101 (3) TFEU, this is the case if the agreements allow consumers a fair share of the resulting benefit and contribute to improving the production or distribution of goods or to promoting technical or economic progress; restrictions being imposed on the companies may not be indispensable to the attainment of these objectives or eliminate competition in respect to a “substantial part of the products”.

197 The MFN clauses restrict price and quality competition between the hotel portals and between the hotels. The first three criteria for an individual exemption from a ban on anti-

²⁸⁸ The results of the Bundeskartellamt's investigation are supported by the market questionnaire of the German Hotel Association. According to the survey carried out by the Hotel Association for 2011, HRS remains the market leader among hotel portals in Germany with 34.4 % of accommodation booked, and is around 50% if one includes the accommodation booked via Hotel.de. According to the German Hotel Association, the shares of the competitors are 30% for Booking, less than 10% for Expedia and 1% for lastminute, ehotel and Unister (cf. Sectoral Study on the Hotel Market in Germany 2013, p. 213, Figure 94). The question referred to the accommodation generated via the booking portals.

²⁸⁹ cf. Schultze/Pautke/Wagener, *Vertikal-GVO*, loc. cit., No. 490 re Art. 3 and Klotz in Schröter/Jakob/Mederer, *Kommentar zum Europäischen Wettbewerbsrecht*, 1st ed., 2003, No. 62 re Article 81 of the EC Treaty

²⁹⁰ For instance explicitly the European Commission in its Guidelines on Vertical Restraints, No. 23.

²⁹¹ cf. Nos. 5 and 122 of the Guidelines on Vertical Restraints.

competitive agreements in accordance with section 2 GWB/Art. 101 (3) TFEU are not fulfilled. Where, as the market continues to grow, the remaining competition has nonetheless led to shifts in the market share between the two largest hotel portals, it is not clear whether the fourth criterion for exemption contained in section 2 GWB/Art. 101 (3) TFEU, namely no possibility of “eliminating competition in respect of a substantial part of the products”, is fulfilled. This question can remain open since at least the other criteria for exemption are not fulfilled.

198 The potential positive efficiency impact of the MFN clauses, namely avoiding free riding, is at best very small (cf. on this section 5.1), and the restraints of competition brought about by the MFN clauses are at least not indispensable for the achievement of such efficiency (cf. on this section 5.2). Consumers are not granted a fair share of the resulting benefit with regard to efficiencies of the MFN clauses (cf. on this section 5.3). Whether the last criterion for exemption contained in section 2 (1) GWB/Art. 101 (3) TFEU, namely that there be no possibility of “eliminating competition in respect of a substantial part of the products” is fulfilled is ultimately not relevant (cf. on this section 5.4).

5.1 Efficiency gains

199 HRS claims that the efficiency gains brought about by the MFN clauses include the elimination of free riding, a positive impact on the quality of the services provided by the portals and intense competition on quality between portals.²⁹² There could be a free riding problem in this context (cf. on this section 5.1.1). However, since quality competition plays an important role in the hotel portal market (cf. on this section 5.1.2), the efficiency gains of the MFN clauses in terms of better quality of the service offered by the portals are at best limited (cf. on this section 5.1.3).

5.1.1 Occurrence and scope of the free riding problem

200 In the present case, there are hardly adequate indications that any free riding problem exists at all.

²⁹² cf. statement of HRS of 30 June 2012, loc. cit., pp. 77 et seqq.

- 201 The essence of the free riding problem in the present case is the danger that differences in the room prices might have a negative effect on the incentives for investments made by hotel portals and thus on the quality of their services they provide, as well as on the competition on quality between the portals. This is the case when investments in the quality of the portal can only be recovered to an unsatisfactory degree as a result of the lower room prices on lower-quality hotel portals (or via other sales channels).²⁹³ The investments would not be compensated for by adequate booking commissions, and hence by adequate commission earnings.²⁹⁴
- 202 There is a danger of reducing incentives for investments in the quality of the service offered by portals when the investments of the portal are contract-specific and long term so that they cannot be recovered in the short term.²⁹⁵ In the present case, investments are to be regarded as contract-specific if they arise on the basis of the contractual relationship between the hotel portals and a specific hotel and if they cannot be used for the service offered to other hotels.
- 203 As a matter of principle, the free riding problem could also have a negative impact on the incentive of hotel portals for carrying out investments on the overall quality of the services offered to all hotel partners (e.g. investments in improving the functionalities and in the content of the platform).²⁹⁶ Thus, because of the competitive pressure from other portals (and possibly from other sales channels) which might only make limited investment in the quality of their services, the overall incentive to carry out investments could be reduced. Without restricting price competition by means of MFN clauses the customer could ultimately receive a worse price/quality ratio.

²⁹³ Since the end-consumer may find a hotel room booking via a variety of channels, the free riding problem may occur across sales channels; this should be distinguished from the product market definition that is carried out in a specific case which may regard the various sales channels as belonging to separate markets (for the present case cf. on this in particular section D.1.2.).

²⁹⁴ In accordance with No. 107 of the Guidelines on Vertical Restraints, a free riding problem exists when a retailer benefits from of the sales efforts of another retailer.

²⁹⁵ cf. No. 107 (d) of the Guidelines on Vertical Restraints.

²⁹⁶ No. 106 of the Guidelines on Vertical Restraints takes up this aspect under the title "Positive effects of vertical restraints". cf. accordingly statement of HRS, loc. cit., pp. 57 et seqq.

- 204 The investments of HRS in the quality of its website are largely not contract-specific. HRS states a total amount of approx. [...] € for online-advertising in 2012 and an amount of approx. [...] € for offline-advertising, almost all of which was carried out in Germany.²⁹⁷ The total advertising expenditure of HRS was hence almost [...] % of its worldwide turnover²⁹⁸ and almost [...] of its turnover in Germany.²⁹⁹ This adds to the contractually-agreed, and thus contract-specific, investments carried out by HRS for hotel partners that are connected via the extranet (photographs, text editing, etc.). Taking as a basis the expenditure stated by HRS³⁰⁰ for the approx. [...] hotels in Germany that are connected via the extranet ([...]), this results in a total amount of almost [...] €. If one relates the expenditure for each single hotel (almost [...] € during the first year) to the average annual commission income that HRS earns with German hotels which are connected via the extranet (almost [...] €), the contract-specific investments of HRS are small. They are less than [...] % of the average annual commission income per hotel.³⁰¹ Contract-specific investments can be recovered after one year.
- 205 When HRS carries out non-contract-specific investments in the quality of its portal, these serve to improve the general image of the portal, and are therefore not lost as a result of free riding.³⁰² Against the background of the structure of the German hotel market, there is a small probability that the hotels listed on a portal will exploit the advertising effect of the portal on a large scale in order to directly attract the booking to their own (commission-free) websites by means of lower prices (so called “billboard effect”).³⁰³ In supporting its argument, HRS exclusively relies on studies that mostly relate to the U.S. market, which in turn is primarily characterized by large branded hotels.³⁰⁴ Unlike in the U.S. in Germany

²⁹⁷ the response of HRS to the questionnaire in the “Questionnaire among competitors 2013” file, pp. 241 et seqq..

²⁹⁸ Related to the worldwide commission revenue of HRS, advertising expenditure was in 2012 almost [...].

²⁹⁹ calculation for the year 2011, cf. also note of the Bundeskartellamt of 31 May 2013, p. 10 (pp. 2919 and 2928). This reveals comparably high advertising expenditure.

³⁰⁰ With regard to contract-specific advertising investment of HRS, the Decision Division only has the figures for 2011.

³⁰¹ cf. the statement of HRS pp. 10 et seq. detailed calculation in, cf. note BkartA of 31 May 2013, pp. 9 et seq. (pp. 2919 and 2927 et seq.)

³⁰² In accordance with No. 107 d) of the Guidelines on Vertical Restraints, the danger of an investment not being recovered is only real and significant if the investment cannot be used elsewhere, outside of a specific contract.

³⁰³ cf. statement of HRS of 30 June 2012, loc. cit., p. 54.

³⁰⁴ HRS refers to the study by Anderson, The Billboard Effect, 2009 and 2011 (summary retrievable at www.hotelschool.cornell.edu/research/chr/pubs/reports/abstract-15540.html). According to www.ahgz.de/jobs-and-mehr/investoren-wollen-marken, 200012183226.html, the share of brand hotels in the U.S.A. is likely to be 70%.

there are far more independent small and medium-sized hotels³⁰⁵ which use their own website as pure and simple information pages. They have a reservation form on the website but do not offer continually-updated prices and the possibility of real-time bookings.³⁰⁶ Bookings without real-time confirmation are, however, not as convenient for the customer. Since the customer does usually not incur in any directly-invoiced costs when booking via a hotel portal, there is no good reason why he should give up the convenience of real-time bookings provided by the hotel portal and book via reservation forms. When it comes to branded hotel chains, it should be taken into account that they are well known and customers frequently have direct access to rooms presented on the websites of these hotels.

5.1.2 The significance of quality competition in comparison to price competition

206 The quality of a hotel portal is very important to its position on the market. The MFN clauses cover major qualitative aspects of the service offered by hotels and portals, and thus restrain quality competition.

207 The weight the customer attaches to “price” and “quality” must be assessed in order to determine to what extent, the restriction of price competition between competing hotel portals (and any alternative sales channel) may positively impact the range of services and the intensity of quality competition by means of MFN clauses. If the criterion “quality” is anyways highly important to customers, the potentially positive impact of a restriction of price competition on product quality and on the intensity of quality competition will be limited. The scope for competing hotel portals (and any other sales channel) to compensate for low investment in the quality of the service by means of lower prices would be limited. Because of the relevance of the parameter “quality” for portals competition between portals is sufficient to guarantee a high level of quality to the benefit of the customers without restricting price competition.

³⁰⁵ According to the Sectoral Study on the Hotel Market in Germany 2013, p. 198, with roughly 3,800 out of a total of roughly 35,000 lodging establishments brand hotels had a share of only just over 11% in Germany in 2012.

³⁰⁶ As is shown by the market survey carried out by the German Hotel Association, more than half of the bookings in Germany are still made on the own websites of hotels using reservation forms, cf. the overview entitled “Sales channels of hotels in Germany 2011” in the Sectoral Study on the Hotel Market in Germany 2013, p. 210.

208 Vertical restraints in the hotel portal market do not have particularly strong effects on quality because, in any case, only prices and quantity are agreed between suppliers and buyers.³⁰⁷ The success of a portal depends on the range of services available on the portal, the booking and cancellation conditions and the presentation and the ranking of hotels on the portal, as well as on the technical equipment and popularity of the portal. Price parity is less important. HRS stresses that the genuine services provided by a portal (search, comparison and booking) are essential for attracting customers.³⁰⁸ Currently, HRS installs new filters and thus tries to improve the quality of its portal.³⁰⁹ The MFN clauses do not only cover prices, but also the other conditions on offers (e.g. “deal of the day”)³¹⁰, as well as booking and cancellation conditions. Hence they contribute to standardize major quality aspects of the services offered by the portals and thus even restrict quality competition.

5.1.3 Specific connection identified between the restriction of price competition and the scope of quality competition

209 The MFN clauses are not needed to achieve greater booking volume for HRS, and to make its investment in the quality of the portal pay off. The connection between the restriction of price competition brought about by the MFN clauses and the quality of the service is at best weak.

210 In order to underpin its argument, HRS has investigated the relationship between MFN clauses and the conversion rate (“look to book ratio”).³¹¹ For the analysis³¹² HRS

³⁰⁷ cf. No. 106 of the Guidelines on Vertical Restraints.

³⁰⁸ cf. statement of HRS of 11 March 2013, loc. cit., pp. 12 et seq. HRS also refers in this context to the investigation carried out by Stiftung Warentest, which, when evaluating the portals, only weights the information posted there with 40% (consisting of 20% evaluations of the hotels and 20% information on the hotels), cf. statement of HRS of 30 June 2012, loc. cit., pp. 54 et seq., referring to “Stiftung Warentest” 5/2012, pp. 77 et seq. (pp. 3044 et seqq.).

³⁰⁹ Newer filters on the HRS portal are for instance “HRS recommends”, discounts, Evaluations and “HRS stars” (as per: 4 March 2013).

³¹⁰ cf. on this section D.3.4.1.2 above

³¹¹ The conversion rate records how frequently a customer who has clicked on a specific hotel in the hitlist of the HRS hotel portal actually books it at the end of the process. Cases in which a customer first looks via HRS, but then closes the website and opens it again later and then books are not included (cf. letter of HRS of 10 May 2013, pp. 2828 and 2831 et seq.).

³¹² cf. on this in detail letter of HRS of 11 March 2013, loc. cit., pp. 8 et seqq. and letter of HRS of 10 May 2013 (pp. 2828 et seqq.). The Bundeskartellamt has examined the analysis of HRS of the conversion rate as well as the [...] raw data underlying this analysis and summarised the economic evaluation in a note, cf. note of the Bundeskartellamt of 31 May 2013, pp. 2919 et seqq.

compared for the period of [...] ³¹³ weekly prices of approx. [...] hotels on the HRS portal with the prices on three other major hotel portals (booking.com, expedia.com and venere.com) ³¹⁴. HRS estimated that the abolition of the MFN clauses would cause a reduction of its total turnover by approx. [...]%. ³¹⁵

211 The Bundeskartellamt has examined and evaluated the analysis on the conversion rate as well as the raw data underlying the analysis. ³¹⁶ The results of the analysis show that the conversion rate for HRS may be higher if hotel rooms that are offered on the HRS portal are not more expensive than similar rooms presented on other portals. Price deviations have a statistically significant impact on the conversion rate. ³¹⁷ The analysis, however, shows that the price deviations alone do not explain all the variance in the conversion rate. Other variables, in particular destination and the hotel category, have a stronger effect on the conversion rate. The analysis shows that customers both in the low-price segment and in the high-price segment (“1 star” and “5 star” hotels) tend to book immediately on HRS ³¹⁸, and that the MFN clause is unlikely to have a significant influence on these customers. ³¹⁹ These results make clear that price sensitive customers attach considerable importance to the factors quality and service. The incentive of portals to invest in the quality of its services is high, even without a restriction of price competition. The MFN clause has a small efficiency effect, if at all.

³¹³ HRS was moreover obliged not to enforce the MFN clauses vis-à-vis its hotel partners in the lion's share of this period because of the order of Düsseldorf Higher Regional Court by means of an interim order of 15 February 2012 and on the basis of the written commitment vis-a-sis the Decision Division of 27 April 2012.

³¹⁴ The platforms expedia.com and venere.com both belong to Expedia.

³¹⁵ HRS calculated the [...] % decline in its total booking turnover for the case that the average conversion rate for the hotels with less than [...] % higher prices on the portal of HRS dropped to the average conversion rate for hotels with accordingly more than [...] % higher prices.

³¹⁶ cf. note of the Bundeskartellamt of 31 May 2013 (pp. 2919 et seqq.).

³¹⁷ cf. note of the Bundeskartellamt of 31 May 2013, pp. 4 (pp. 2922).

³¹⁸ cf. note of the Bundeskartellamt of 31 May 2013, pp. 5 et seq. (pp. 2923 et seq.).

³¹⁹ In another analysis of 16 September 2013 (enclosed with the letter of HRS of 18 September 2013) and of 9 October 2013 (annexed to the e-mail of HRS of 10 October 2013), Prof. Inderst extended the period under report by several months [...]. These recent observations change nothing as to the fact that other variables than the deviation of prices go further towards explaining the conversion rates (cf. in detail control report of 8 November 2013, Vol. 10 of the case file).

5.2 The indispensability of the restraints of competition

- 212 The restraints of competition imposed on the hotel partners of HRS are at least not indispensable.
- 213 Restraints of competition are indispensable if they are necessary for obtaining the efficiency gains. Ultimately, greater efficiency gains must be achieved with the restraint of competition than without it.³²⁰ Restraints of competition are indispensable if alternatives which are less restrictive would be significantly less efficient.³²¹
- 214 In the case of the MFN clauses of HRS, at best low efficiency gains can be identified (cf. on this section 5.2.1). Alternative business models without MFN clauses exist and HRS would not (necessarily) have to suffer considerable efficiency losses by applying them (cf. on this section 5.2.2).

5.2.1 The question of greater efficiency gains

- 215 The Decision Division did not find evidence that the current commission model of HRS, including the MFN clauses, is able to achieve higher efficiencies than other models which do not have MFN clauses. In the present case, it is already not certain whether any worthwhile efficiency gains, such as avoiding free riding or increasing non-price competition, are given at all. The potential efficiency gains in terms of solving the free riding problem are at best limited.
- 216 Moreover, the MFN clauses may cause inefficiencies by restricting pricing strategies of the hotels. The MFN clauses prevent the hotels from engaging in efficiency-boosting price differentiation tailored to customer demand.³²² In the current business model of HRS the burden of paying the commission is only borne by those hotels whose rooms are booked, whilst the other hotels, which nonetheless benefit from the HRS marketing services, do not pay.

³²⁰ cf. Langen/Bunte, loc. cit., No. 46 re section 2 of the Act Against Restraints of Competition.

³²¹ cf. No. 125 of the Guidelines on Vertical Restraints.

³²² cf. also section D.3.4.2.1. above on "yield management"

5.2.2 Alternative business models

- 217 Alternative business models that do not use MFN clauses³²³ are possible and they do not necessarily lead to considerable efficiency losses.
- 218 The success of the models mentioned by HRS in form of a service fee payable by the hotel customer or a cost-per-click payment or a listing fee payable by the hotel partner depend on the amount of payment demanded. Ultimately, the willingness of the hotels and of the customers to pay is crucial. The results of a customer survey submitted by HRS on the willingness of customers to pay a fixed service fee of [0-10] Euro, whereby the fee was rejected by [90-100]% of the customers surveyed,³²⁴ are not convincing. In its survey, HRS neither asked whether people would be willing to pay a fee at all and in what amount, nor did HRS take sociographic data of the customers (e.g. age, sex, place of residence) into account for the sampling. In particular, customers were asked just after they had booked free of charge with HRS. This distorts the result of the survey. Customers are likely to have simply confirmed their wish to continue to use the HRS service for free and have voted accordingly.³²⁵
- 219 The alternative model of a fixed monthly fee payable by the hotels for the services of the portal is not likely to fail because the hotels would not receive at least a given number of bookings.³²⁶ In any case, the hotels listed on the HRS portal would benefit by the advertising effect which the HRS portal offers, even if the hotels do not receive bookings via the portal. Since the HRS contract-specific investment is small and in any case is only incurred once for one hotel, a fixed fee would not need to be particularly high. Moreover, HRS could differentiate the amount of the fixed fee depending on the amount of services actually purchased and provided.³²⁷ In a payment model in form of a combination of a

³²³ cf. on this statement of HRS of 11 March 2013, loc. cit., pp. 14 et seqq.

³²⁴ HRS surveyed customers from [approx. one month in the first quarter of 2013] [1000-2000] who had booked via HRS, cf. letter of HRS of 10 May 2013, pp. 6 et seq. (pp. 2833 et seq.).

³²⁵ Detailed economic evaluation of the survey of HRS, cf. note of the Bundeskartellamt of 31 May 2013, pp. 11 et seq. (pp. 2929 et seq.).

³²⁶ cf. statement of HRS of 11 March 2013, loc. cit., p. 17.

³²⁷ cf. on this also note of the Bundeskartellamt of 31 May 2013, pp. 12 et seq. (pp. 2930 et seq.).

fixed fee with a variable fee per booking (two-part-tarif) the willingness of each hotel to pay and to take risks could be taken into consideration in each case individually.³²⁸

- 220 There is no need for a more detailed assessment of the alternative models mentioned by HRS. Firstly, other payment models, such as listing or commission fees depending e.g. on the conversion rate, are conceivable. Secondly, one could imagine that a commission model could be continued even without MFN clauses. This would be the case, for instance, of commission models which are more closely linked to discounting campaigns, deals and add-on services, or which are financed to a greater extent through advertising. Without MFN clauses, HRS could also give up the robot price comparison by means of crawlers,³²⁹ and thus save costs.
- 221 The Decision Division has no indications that HRS, which agreed in April 2012 to stop enforcing the MFN clauses,³³⁰ has become a free “hotel search engine”. At least since HRS waived in writing the enforcement of the MFN clauses, an average of [fewer than half] of the German hotels complied with the MFN clauses.³³¹ Nonetheless, according to the information given by HRS, HRS made an average commission turnover per hotel of roughly [...] €³³², and, along with Booking, is still the leading German hotel portal.³³³ This development clearly speaks against the indispensability of the MFN clauses.
- 222 Should hotel customers increasingly use of the booking portals solely to gain an overview of offers and prices, the hotel portals should adapt to this market situation and offer an added value to customers who book hotel rooms. The best solution for all parties concerned can only emerge through market forces when the restraints of competition caused by the MFN clauses have been eliminated.

³²⁸ cf. statement of HRS of 11 March 2013, p. 18. HRS claims not to have carried out a more detailed analysis of this business model.

³²⁹ cf. on this letter of HRS of September 2009 (cf. on this section B.2.1).

³³⁰ cf. letter of HRS of 27 April 2012 (pp. 2430 et seqq.). cf. also sections C.1 and C.2 above

³³¹ cf. note of the Bundeskartellamt of 31 May 2013, p. 8 (p. 2926), referring to the conversion rate analysis carried out by HRS in the period [2012/13]. Moreover, because of the interim order of Düsseldorf Higher Regional Court of 15 February 2012, and because of the written commitment vis-à-vis the Decision Division of 27 April 2012, HRS was obliged to cease enforcing the MFN clauses vis-a-vis its hotel partners.

³³² cf.. statement of HRS, loc. cit., p. 10.

³³³ HRS was the leading German hotel portal prior to 2006, when HRS was operating its commission model without MFN clauses entrenched in its terms and conditions.

5.3 Allowing consumers a fair share of the resulting benefit

223 The Decision Division cannot find any fair share of the resulting benefit for consumers with regard to the efficiency gains brought about by the MFN clauses. The MFN clauses are not suited to further stimulate quality competition between the hotel portals since. Quality competition is already strong. The HRS commission model which includes the MFN clauses is neither a particularly low-risk and low-cost business model (cf. on this section 5.3.1), nor do the MFN clauses increase market transparency (cf. on this section 5.3.2) or reduce search costs for hotel customers (cf. on this section 5.3.3).

5.3.1 Low-risk and low-cost business model

224 The commission model currently used by HRS with MFN clauses does not allow consumers a fair share of the resulting benefit only because this model involves low risks and low costs for consumers in comparison with other models which do not make use of MFN clauses.³³⁴

225 Within the business model currently operated by HRS, the commission costs are only incurred for hotels if the customer makes a booking.³³⁵ Hotels which do not receive a booking do not contribute to the costs, but nonetheless benefit from the advertising services of HRS. If HRS wished to avoid unilaterally burdening hotels whose rooms are booked other business models would make more sense than those which exclusively rely upon booking fees as a source of income.

226 The standard commissions charged by HRS on the basis of its current business model are not lower than the standard commissions charged by other hotel portals.³³⁶ In fact, HRS increased its commissions in March 2012 from 13% to 15% for individual bookings and from 10% to 13% for group bookings. The MFN clauses do not lead to lower prices for hotel customers, either.³³⁷ In the view of the extensive application of MFN clauses in

³³⁴ cf. statement of HRS of 30 June 2012, loc. cit., pp. 77 et seqq.

³³⁵ HRS states that this is an advantage of its business model, cf. statement of HRS, p. 78.

³³⁶ According to the market survey of the Bundeskartellamt among competitors (2012), the standard commissions of the portals of Booking, Expedia Unister and ehotel were all between 10% and 15% of the gross price of the rooms booked in 2011 – or corresponded to an equivalent margin (Expedia) (cf. overview p. 2789). The commissions can be even higher in some cases (Booking, Expedia, lastminute, ebookers). The percentage demanded by HRS was 13%, or 10% for groups, in 2011, and was increased to 15% from 1 March 2012 for individual bookings and to 13 % for group bookings.

³³⁷ thus however HRS in its statement of 30 June 2012, loc. cit., pp. 55 and 78.

the German hotel portal market, hotel portals have no incentive to reduce their commissions, and the hotel partners of HRS have no incentive to offer their hotel rooms at lower prices on the other portals.³³⁸

5.3.2 Market transparency

227 The MFN clauses and the possibility of a more efficient hotel search do not allow consumers a share of the resulting benefits in form of improved market transparency. Hotel customers who rely on the MFN clauses are less likely to compare identical or similar offers on other portals, and will hence not compare various hotel rooms, because they believe that, in any case, they have been presented with the “best offer” on the HRS portal.³³⁹ The price guarantee offered by HRS³⁴⁰ may influence the behaviour of the hotel customers in the sense that they would not bother comparing offers on other hotel portals. Only in a small number of cases, hotel customers have complained about hotels not keeping the best price promise of HRS.³⁴¹ If customers do not look for hotel rooms in other hotel portals than HRS, they do not take up other offers which might be better adapted to their specific needs. Thus, not only “intra-brand” competition, that is competition between the hotel portals when selling the same or similar rooms of the same hotel, but also “inter-brand competition”, that is competition between the different hotels, is restrained.³⁴² Hotel customers are offered an illusion of transparency.

³³⁸ The managing director of HRS, Tobias Ragge, has himself publicly expressed his view that repealing price parity would set off a downward price spiral, cf. [http://www.hhc-brunowolf.com/files/HRS “Das Preismodell bleibt, Hospitality Inside”](http://www.hhc-brunowolf.com/files/HRS_Das_Preismodell_bleibt_Hospitality_Inside) 120217.pdf.

³³⁹ This is also confirmed by Prof. Inderst in his expert statement of 16 September 2013, p. 5 (annexed to the letter of HRS of 18 September 2013, pp. 3717 et seqq.)

³⁴⁰ Refund of the difference in accordance with No. 5 (b) of the terms and conditions of HRS (cf. also section B.2.2 above).

³⁴¹ According to the information given by HRS, there were only approx. [...] customer complaints regarding the best price guarantee in 2009, whilst there were more than [...] bookings (cf. p. 91).

³⁴² The case mentioned in No. 102 of the Guidelines on Vertical Restraints in which a reduction of competition between the distributors in the sales of the same brand (“intra-brand competition”) does not have a negative effect on consumers if at least the manufacturers compete fiercely through different brands (“inter-brand competition”) is not relevant here. cf. also section D.3.4.2.1 on restraints of inter-brand competition between hotels.

5.3.3 Search costs

228 Consumers will not be allowed a fair share of the resulting benefit in form of lower search costs.³⁴³ In any case, it is not the hotel customers but the hotels which pay for the search of hotel rooms on the Internet. Customers do not incur costs in form of financial expenditure. Meta search engines which are available on the Internet, such as Google, and meta search engines which specialise in travel products and hotel rooms, such as trivago and Kayak, help reduce the time needed for search.³⁴⁴ Additionally, hotel portals are present on meta search engines (e.g. HRS and Booking on trivago), and they profit themselves from the transparency that meta search engines offer.

5.4 Elimination of competition

229 In accordance with No. 127 of the Guidelines on Vertical Restraints, vertical restraints eliminate competition if the actual competition (cf. on this section 5.4.1) or the potential competition (cf. on this section 5.4.2) is foreclosed.

5.4.1 Actual competition

230 The MFN clauses of HRS eliminate actual competition since they substantially restrict price and quality competition between the hotel portals as well as price competition between the hotels. It can be left open whether this is to be regarded as “eliminating competition in respect of a substantial part of the products” within the meaning of section 2 (1) GWB/Art. 101 (3) TFEU.

231 All actual impacts of the competition restraints must to be taken into consideration when assessing the elimination of competition. In the context of this overall evaluation, relevant criteria are the market share of the companies concerned, the market structure and the market conduct, in particular the ability of competitors to react and restore competition and the existing incentives for reaction of the competitors.³⁴⁵

³⁴³ cf. statement of HRS of 30 June 2012, loc. cit., pp. 58 et seqq.

³⁴⁴ HRS points out that developments such as the trend towards meta searches are making the comparison increasingly transparent and simpler (statement of HRS of 11 March 2013, loc. cit., p. 8). Also OECD, *The economic and social role of internet intermediaries*, 2010, p. 4, quoted by HRS in its statement, loc. cit., p. 78.

³⁴⁵ cf. Langen/Bunte, loc. cit., No. 53 re section 2 of the Act Against Restraints of Competition with further references

- 232 A hotel customer who has selected a specific hotel is certainly likely to carry out the hotel room booking via the portal which offers the best price (and the best conditions). If a hotel portal which enforces the MFN clauses offers the hotel room with the best price, there can be no price (and condition) competition between this hotel portal and other hotel portals. The MFN clauses, which primarily are to prevent a difference arising between the portals in terms of price (and conditions), hence have the economic effect of setting a minimum price for hotel rooms.³⁴⁶
- 233 The specific conditions of the relevant market, and in particular the sustained growth on this market,³⁴⁷ nonetheless lead to certain fluctuations in the market shares of the market players. The German hotel portal market has been characterised by the three major providers HRS, Booking and Expedia for a number of years; the rest of the market is shared by a large number of providers, each of which having marginal market shares. The value-based market shares of the small providers stagnated at [0-5]%, or indeed fell. Of the largest three competitors, only Booking was able to expand its market share.
- 234 The shift in market shares in favour of Booking³⁴⁸ does, however, not prove that the MFN clauses of HRS are not anti-competitive. Just like HRS, Booking agrees MFN clauses with its hotel partners, and can indeed enforce them because of its position in the market. As the third-largest market player, Expedia obliges hotels to agree to MFN clauses, too. In view of the joint market share of HRS, Booking and Expedia of roughly 90%, the anti-competitive effects that have been described occur on the largest part of the relevant market. One of the reasons for the shift in market shares between the two largest hotel portals might lie in the commission structure of Booking, which is different from that of HRS.³⁴⁹ Booking was the market leader in 2012 with regard to the commission revenue, but still was not ahead when it came to the hotel accommodation booked.³⁵⁰ It cannot be

³⁴⁶ The hotels surveyed by the Decision Division also stress the dampening in price competition (cf. note of 14 February 2011, pp. 226 and 231).

³⁴⁷ cf. section D.4.3 on developments in the German hotel portal market since 2009.

³⁴⁸ cf. statement of HRS of 30 June 2012, loc. cit., pp. 83.

³⁴⁹ In addition to the comparatively low standard commission, Booking also has individual commission agreements with the hotel partners or further criteria which may lead to a derogation, e.g. depending on the location of the hotel (town/country) (cf. "Questionnaire among competitors 2012", p. 196). Hotels which meet specific quality criteria can also take part in a "Preferred Model" and can bid there (cf. booking.com Interview, fvw 9/13, pp. 23 and 25).

³⁵⁰ cf. on this section D.4.3.

ruled out that the competition on quality which exists between the portals and advertising on the Internet³⁵¹ may impact the share of Booking in market growth.

5.4.2 Potential competition

235 The MFN clauses largely eliminate potential competition. Smaller hotel portals cannot effectively attack the leading market position of HRS by means of fierce competition. This is clearly shown by the example of the hotel portals Hotel.de, JustBook and BookitNow!. Hotel.de was able to remain on the market for a certain period of time³⁵² but was taken over by HRS in October 2011. The newcomers JustBook and BookitNow!, which offer hotel rooms at particularly attractive conditions, regard their access to the market as being hindered by MFN clause of HRS.³⁵³ The market-foreclosing effect of the MFN clauses is strengthened by the fact that the lion's share of the German hotel portal market is covered by MFN clauses.

6. Violation of section 20 (1) in conjunction with section 19 (1) and (2) No. 1 GWB

236 By applying the MFN clauses, HRS is unfairly hindering the small and medium-sized hotel partners which are dependent on it, and therefore violates section 20 (1) in conjunction with section 19 (1) and (2) No. 1 GWB.³⁵⁴

³⁵¹ According to information contained in the Sectoral Study on the Hotel Market in Germany 2013, p. 215, the budget available for search engine marketing is vital to the visibility of the hotel and travel portals on the Internet. According to the results of an analysis by Xamine GmbH (2012) shown there, Booking's average daily budget is more than 40,000 € and the corresponding budget of HRS is roughly 30,000 €.

³⁵² The use of a MFN clause by Hotel.de was not considered objectionable at the outset since the small portal was thus to obtain the same low hotel prices as the market leader HRS. As MFN clauses increasingly spread, however, the disadvantage of the MFN clause in terms of competition also became clear: aggressive competition of Hotel.de was practically no longer possible (cf. telephone note regarding discussion with HSMA of 11 August 2011; p. 355).

³⁵³ cf. on this in section C.1 above and C.2 as well as D.3.4.1.3.

³⁵⁴ Art. 3 (2) sentence 1 of Regulation (EC) No 1/2003 and section 22 (2) sentence 1 GWB do not disfavour the application of section 20 (1) in conjunction with section 19 (1) and (2) No. 1 GWB. In accordance with the former provisions, the application of German competition law may not lead to the prohibition of agreements which are unobjectionable in accordance with Art. 101 (1) TFEU or are exempt from a block exemption regulation in accordance with Art. 101 (3) TFEU. The MFN agreements of HRS concerned here however violate Art. 101 (1) TFEU, and are not exempt in accordance with the Block Exemption Regulation or in accordance with Art. 101 (3) TFEU.

6.1 Addressee of the provision

- 237 HRS is addressee within the meaning of section 20 (1) and 19 GWB since its small and medium-sized hotel partners are dependent in the sense that there are no adequate, acceptable possibilities of changing to other hotel portals. Small and medium-sized hotels are particularly dependent on marketing their rooms via hotel portals since they are less well known to hotel customers than the large hotels and they cannot reach a good ranking on the search engines when competing with the hotel portals and the large hotels.³⁵⁵ HRS, which does much advertising, whose name is well-known on the market and which is at the top of the ranking of the meta search engine Google, can offer direct access to a large number of hotel customers to the small and medium-sized hotels.³⁵⁶ Small and medium-sized hotels sell their rooms via several hotel portals, but HRS, along with Booking and Expedia, continues to assume a special position despite its decline in market shares, and it is not dispensable for the occupancy of the hotels.³⁵⁷ According to a survey by the CHD Expert (Germany) among more than 250 hotels, approx. 90% of hotels received bookings via HRS in 2009.³⁵⁸ According to the Decision Division's market survey, HRS was also the hotel portal which received the most bookings in Germany in 2012.³⁵⁹
- 238 Small and medium-sized hotels can be dependent on HRS even if it is not the largest and not the only enterprise on the relevant market.³⁶⁰ On the German hotel portal market, which is characterised by the three large companies, HRS, Booking and Expedia, small and medium-sized hotels could depend on all three portals. As a rule hotels are present on several portals in order to increase their range. HRS pretends that its business model

³⁵⁵ According to the sectoral study of the hotel market Germany 2013, pp. 215, a daily search engine marketing budget of approx. 15,000 € is currently needed to reach the TOP 10 of advertisers in the tourism sector. The study mentioned there by Xamine GmbH (2012) estimates a daily budget of approx. 30,000 € for HRS and a daily budget of more than 40,000 € for Booking.

³⁵⁶ According to a survey carried out by the German Hotel Association, almost one hotel booking in three is now generated via online channels, cf. Sectoral Study on the Hotel Market in Germany 2013, p. 209. This does not take account of the fact that the initial contact with the hotel frequently takes place via an electronic booking, followed by telephone and other bookings. cf. recently also kn-online.de of 21 November 2013, p. 1.

³⁵⁷ According to the assessment by the specialist travel periodical fvw, according to which HRS is indispensable in commercial business and on the German hotel market, fvw of 16 April 2010, pp. 17 et seqq. This view is also likely to be still valid today since HRS continues to belong among the "big three" on the German hotel portal market and hotels frequently use these channels conjunctly. cf. recently also "*Der Tagesspiegel*" of 23 November 2013, p. 9 on the indispensability of the major portals for hotels.

³⁵⁸ cf. the Internet information of CHD Expert (Germany) GmbH at www.chd-expert.de.

³⁵⁹ cf. "Questionnaire among competitors 2013" file, pp. 241 et seqq.

³⁶⁰ cf. in this regard Bechthold, of GWB, loc. cit., section 20 No. 80.

is particularly SME friendly. According to the information provided by HRS, the ranking of hotels on its portal does not depend on the amount of fees paid to HRS.³⁶¹

- 239 Alternatives for small and medium-sized hotels are not available through the online tour operators (via which customers, regularly book package deals and longer stays in hotels), the own website of the hotel (which does not offer the functions of comparing and real-time booking),³⁶² meta search engines specialised in hotel comparison (which as a rule only connect hotel portals or major hotels or hotel chains) or a high ranking on Google (the algorithm of which does not focus on small and medium-sized hotels). Small and medium-sized hotels need HRS in order to obtain a high ranking on Google.
- 240 There is no mutual dependence of hotels on HRS and vice versa because of the “network effect”.³⁶³ Whereas HRS is able to buy up hotel content at any time (e.g. via one of the large GDS) and offers hotel portal services for more than 250,000 hotels worldwide, German hotels rely on hotel portals which are well known in Germany. The setting of the commission price by HRS is not restricted by the network effect: HRS was able to increase its standard commission in March 2012 from 13% to 15%.³⁶⁴
- 241 HRS was able to restrict sales of hotel rooms via other portals. Of the roughly 100 hotels which HRS had called on to restore rate parity in 2009, [the vast majority of the] hotels restored rate parity.³⁶⁵ [Only a small number of] the hotels could afford to be no longer bookable via HRS. HRS continued this practice of demanding rate parity until October of this year at least.³⁶⁶ Since the Hotel.de hotel portal was taken over by HRS, small and medium-sized hotels depend on HRS even stronger. The HRS partnership with Amadeus, which means that hotel rooms of HRS hotel partners are bookable worldwide via all travel agencies which use the Amadeus GDS system, increase the dependency of small and medium-sized hotels, as well.

³⁶¹ cf. statement of HRS of 30 June 2012, loc. cit., p. 87.

³⁶² The counter example quoted by HRS relates to a luxury class hotel which deliberately offers its hotel rooms more expensively on its own website for marketing reasons, and hence does not object to the MFN clauses of HRS (cf. pp. 206 and 214 of the “Information request to small and medium-sized hotels” file).

³⁶³ cf. statement of HRS of 30 June 2012, loc. cit., p. 85.

³⁶⁴ Overview of developments in standard commissions on the German hotel portal market 2010-2012 cf. overview in “Questionnaire among competitors 2013” file, p. 23.

³⁶⁵ According to information which the Bundeskartellamt has received, this even includes major chains such as [...].

³⁶⁶ cf. on this section B.2.2 above with further references

242 In the run-up to its commission increase as per 1 March 2012, HRS described its prominent market position in Germany in a letter of 17 January 2012 to its hotel partners. It stresses the following points in particular:

- range for hotel sales increased by 30% in 2011,
- strong sales partners, such as Air Berlin, China Eastern, Deutsche Bahn and the Italian railway company Trenitalia,
- 20% increase in the number of corporate customers in 2011, reaching more than 30,000 companies; world market leader for hotel room bookings by companies,
- the new version of HRS' iPhoneApp is among the Top 10 in 89 countries,
- HRS is one of the TOP 5 hotel portals worldwide after taking over the Hotel.de portal,
- because of the new strategic partnership between HRS and the Amadeus IT Group hotels were said to be bookable with no additional fees worldwide via more than 91,000 travel agencies and more than 65,000 airline sales offices.

243 All of the points which HRS mentioned also benefit small and medium-sized hotels in Germany and make HRS indispensable for them.

6.2 Unfair hindrance of small and medium-sized hotels

244 By means of the MFN clauses, HRS unfairly hinders small and medium-sized hotels within the meaning of section 20 (1) in conjunction with section 19 (1) and (2) No. 1 GWB. This covers any conduct which directly or indirectly harms the freedom to act of another company.

245 The MFN clauses of HRS do not only restrain competition between the hotel portals, but also competition between the small and medium-sized hotels, which are hotel partners of HRS, and other hotels.³⁶⁷ For the hotel partners of HRS, the primary interest is to use the different online sales channels and to differentiate in terms of price and conditions and to sell hotel rooms via new channels with new business models. In weighing the freedom of competition against the interest of HRS in sheltering itself from competition by means of MFN clauses, the freedom of competition must prevail.

246 The hotels have publicly disclosed their interest by means of a position paper. In May 2011, at the initiative of the hotel associations in Germany, the Netherlands, Austria and Switzerland, the European umbrella association HOTREC, Hospitality Europe, published

³⁶⁷ cf. sections D.3.4.1 and D.3.4.2.

a position paper with 20 “*Eckpunkte fairen Verhaltens von Hotel-Buchungsportalen*” (20 key points on fair conduct by hotel portals).³⁶⁸ The key points, which were updated in April 2012,³⁶⁹ include the request to leave the control over rates, sales and product to the hotels, in particular the hotel association requested: no obligatory rate parity, no obligatory availability parity or availability of the last room, no minimum availability and no obligatory access to all hotel offers (no “full content”). The market survey of the Decision Division³⁷⁰ confirmed that hotels consider their competition to be hindered by the MFN clauses and by the strict enforcement of the clauses, such as “threatening letters” from HRS³⁷¹ and the ongoing examination of compliance with the MFN clauses by using crawler technology and by telephoning the hotels³⁷².

247 The administrative proceedings in the present case were initiated by a small hotel. Hotels are now less willing to make use of price differentiation on the various sales channels. This may, however, be the consequence of the broad enforcement of MFN clauses.³⁷³ An example of hindrance of a small and medium-sized hotel is the case “JustBook”. The MFN clauses prevented the hotel partners of HRS from placing their hotel rooms on the JustBook portal at more favourable conditions than on the HRS portal.³⁷⁴

248 HRS argues that MFN clauses give special protection to smaller hotels.³⁷⁵ This argument is not convincing. At least large hotels like [...] have not agreed MFN clauses with HRS [...]³⁷⁶ [...]³⁷⁷..

249 The MFN clauses were introduced in 2010 and extended on 1 March 2012 by the expansion of their scope. Moreover, the development of the German hotel portal market is hindering small and medium-sized hotels.³⁷⁸ There has been an increasing consolidation

³⁶⁸ cf. German Hotel Association sectoral study 2012, pp. 175 et seqq.

³⁶⁹ cf. German Hotel Association sectoral study 2013, pp. 216 et seqq.

³⁷⁰ cf. overview note of 14 February 2011, pp. 226 et seqq.

³⁷¹ cf. on this in section C.1.1.

³⁷² cf. on this in section D.3.4.2.1.

³⁷³ cf. already sectoral study of the German Hotel Association 2011, p. 160.

³⁷⁴ cf. on this in section C.2 above

³⁷⁵ cf. statement of HRS of 30 June 2012, loc. cit., p. 89.

³⁷⁶ cf. pp. 49 and 86 of the “Request for information from major hotels/hotels receiving termination notices” file.

³⁷⁷ cf. p. 116 of the “Request for information from major hotels/hotels receiving termination notices” file.

³⁷⁸ In this vein also the estimation of the Hotel Association, cf. sectoral report by the German Hotel Association 2012, p. 175; cf. also Sectoral Study on the Hotel Market in Germany p. 216.

of the market in recent years (most recently through the takeover of Hotel.de by HRS). Almost two-thirds of accommodation in Germany is still provided by hotels which have fewer than 20 rooms.³⁷⁹

E. Measures in accordance with section 32 (1) GWB

250 HRS is obliged to terminate the infringement that has been identified and to enact appropriate remedies (cf. on this section E.1). The commitments recently offered by HRS in accordance with section 32 b GWB cannot be accepted (cf. on this section E.2). The Decision Division initially considered the withdrawal of the benefit of the relevant block exemption regulation in accordance with section 32 d GWB. However, on the basis of the investigation results in the present case the Decision Division cannot consider a withdrawal in the foreseeable future (cf. on this section E.3).

1. Termination of the infringement and measures to bring the infringement to an end in accordance with section 32 GWB

251 The Decision Division has ruled to oblige HRS to terminate the infringement identified in accordance with section 32 (1) GWB, and to prescribe HRS corresponding measures to bring the infringement to an end in accordance with section 32 (2) GWB.

1.1 Termination of the infringement in accordance with section 32 (1) GWB

252 In accordance with section 32 (1) GWB, HRS is herewith obliged to terminate the infringement by means of the prohibition of the further implementation of the MFN clauses which were agreed between HRS and its hotel partners on the basis of No. 5 (a) to (d) and No. 18 (i) of the general terms and conditions that have been applicable since 1 March 2012 or in individual contracts where they relate to hotels in Germany.

253 The Decision Division can oblige companies in accordance with section 32 (1) GWB to terminate an infringement of a provision of the GWB or of Art. 101 and 102 TFEU that has been identified. The cartel authority must prohibit specific conduct in an order for

³⁷⁹ As shown in the overview in the Sectoral Study on the Hotel Market in Germany 2013, p. 39, almost two-thirds of accommodation facilities in Germany (hotels, bed and breakfast hotels and guest houses) had fewer than 20 rooms.

termination in accordance with section 32 (1) GWB.³⁸⁰ If the violation that has been identified consists of the implementation of contract clauses which infringe competition law the implementation of these clauses is to be prohibited.³⁸¹

254 The termination that has been ordered constitutes a measure that is proportionate in view of the infringement of competition law. The implementation of the MFN clauses agreed between HRS and its hotel partners infringes section 1 GWB and Art. 101 (1) TFEU and sections 19 and 20 GWB. The prohibition of the implementation of these clauses is a measure that is suited to achieve the statutory objective of effectively terminating this infringement within the meaning of section 32 (1) GWB. No other equally well suited measure, and in particular no less incisive, less burdensome measure, can be considered to achieve the same goal as an effective termination. The prohibition of the implementation of the MFN clauses is therefore necessary. Additionally, the prohibition of the implementation of the MFN clauses does not impose an inappropriate burden on HRS, given that it is restricted to compliance with the prohibition of anti-competitive agreements and abuses.

255 By restricting the scope of the order to prohibiting the implementation of the MFN clauses for those cases which relate to hotels in Germany, the Decision Division is restricting the scope of the order to the violation that has been identified.

1.2 Necessary further measures to bring the infringement to an end in accordance with section 32 (2) GWB

256 HRS is herewith instructed to remove the MFN clauses agreed with its hotel partners from the contracts by 1 March 2014 and from the general terms and conditions underlying these contracts where they relate to hotels in Germany. This order shall be deemed to be complied with in individual contracts by termination in good time with the option of altered conditions at the next time possible, even if they do become effective after expiry of the deadline.

257 In accordance with section 32 (2) GWB, the cartel authority may prescribe to an enterprise which is in breach of a provision of the GWB or of Art. 101 or 102 TFEU all measures of a conduct-orientated or structural nature necessary to bring the infringement to an end and

³⁸⁰ cf. Federal Court of Justice, 10 February 2009, KVR 67/07.

³⁸¹ cf. Bornkamm in Langen/Bunte, loc. cit., section 32 GWB, No. 27 et seq. with further references

which are needed for the effective termination of the infringement that has been identified and which are proportionate to the violation that has been ascertained.³⁸²

258 In addition to merely prohibiting the implementation of the existing MFN clauses in accordance with section 32 (1) GWB, further measures to bring the infringement to an end are necessary here in accordance with section 32 (2) GWB for effective termination of the infringement and these are proportionate with regard to the violation that has been ascertained. The measure to bring the infringement to an end prescribed here consists in removing the agreed MFN clauses from the contracts and from the general terms and conditions underlying these contracts in a way that is visible to the contracting partners. This additional measure is suitable and necessary to achieve the statutory goal of the termination of the infringement. Only by these means, and not by less incisive means which are less burdensome for HRS, is it possible to ensure that the text of the existing contracts and the general terms and conditions underlying them no longer contains any clauses which may through their mere existence give the legal appearance to contracting partners that the clauses apply and that they can be enforced. Consequently, there is a need to delete the MFN clauses from the existing contracts and general terms and conditions in order to create a clear picture and ensure legal certainty for all parties concerned.

³⁸² cf. Bornkamm in Langen/Bunte, loc. cit., section 32 GWB, No. 12 et seq. with further references

259 With regard to the suitability of this measure to bring the infringement to an end in accordance with section 32 (2) GWB, the Decision Division takes two further aspects into account:

260 Since the amendment of a large number of contracts takes a certain time, it appears to be necessary to grant HRS a certain amount of time to comply with its obligation to delete the MFN clauses from the contracts and from the general terms and conditions; a six-week objection period for the contracting partners has to be initially awaited in accordance with the general terms and conditions. When assessing the period in question it is therefore proportionate to take 1 March 2014 as a deadline. Whilst the prohibition of the implementation of the MFN clauses in accordance with section 32 (1) GWB applies with immediate effect, HRS is granted time until 1 March 2014 for the removal of the MFN clauses from the text of the individual contracts and the general terms and conditions.

261 The obligation to remove the MFN clauses is also fulfilled in good time in the individual contracts if the conditions in these contracts are changed at the next time possible and even if the new conditions do not become effective until after 1 March 2014. With regard to the existing individual contracts which contain MFN clauses, it should be taken into account that HRS cannot necessarily change them unilaterally but that the express consent of the contracting partner to the continuation of the contract under the amended conditions is needed. HRS can obtain this consent in many cases, but possibly not in all. HRS can consequently not unilaterally guarantee a complete legally-valid adjustment of individual contracts that have been concluded. The Decision Division therefore decided to oblige HRS only to the extent that it is able to exercise the necessary entitlement under civil law.

262 By restricting the application of the measure to cases relating to hotels in Germany the Decision Division is restricting the scope of the order to the violation that has been ascertained.

2. No acceptance of commitments in accordance with section 32 b GWB

263 The Decision Division does not consider accepting the commitments recently offered by HRS by declaring them to be binding in accordance with section 32 b GWB.

264 If, within proceedings in accordance with section 32 GWB, companies offer to enter into commitments which are suited to remove the concerns of the cartel authority, the cartel authority can declare the commitments to be binding by means of an order in accordance

with section 32 b (1) GWB. This particularly takes place at an early stage of the proceedings.³⁸³ The content of the order is that the cartel authority, subject to section 32 b (2) GWB, will not avail itself of its powers in accordance with section 32 GWB and that it may be time-limited. In this context there is no finding of the infringement by the cartel authority.

265 The Decision Division rejects the time-limited commitments recently offered by HRS because they are not suited to conclude the proceedings with findings of the violation and with the effective termination of the infringement within the meaning of section 32 (1) and (2) GWB. The time-limited commitments offered by HRS would not remove the sincere concerns of the Decision Division. It is not even decisive here that, in the context of the ongoing administrative proceedings, HRS has not completely complied with the commitments that it made to forego the enforcement of the MFN clauses and that this gives rise to doubt as to reliability of HRS with regard to the commitments offered. Rather, the explicit finding of the infringement and the effective prohibition of the implementation of the MFN clauses are necessary in order to effectively enforce competition on the hotel portal market. Furthermore, only a prohibition order can ensure that the MFN clauses are deleted and guaranty legal certainty for all contracting partners of HRS. The time-limited commitments offered by HRS would constitute a deficiency that is not acceptable.

266 The commitments offered by HRS do not need to be accepted because other market players, in particular Booking and Expedia, apply parity clauses. The parity clauses of other market players might violate competition law, as well. The Decision Division is currently examining the parity clauses of Booking and Expedia in two sets of recently-initiated administrative proceedings, which are directed towards a possible prohibition in accordance with section 32 GWB. It is therefore important that the present case against HRS can be used as a precedent.

267 From the point of view of HRS the acceptance of the commitments, that it has offered in accordance with section 32 b GWB, might be the less incisive measure. However, this measure would not at all be suited to achieve the goal that has been set, namely that of a finding of an infringement, and it would much less be suited to achieve the goal of effectively terminating the infringement. Therefore, the decision of the Decision Division to hand down a prohibition order in accordance with section 32 GWB and to reject, in

³⁸³ Similarly, also Bornkamm in Langen/Bunte, loc. cit., section 32 b GWB, No. 5 with further references

accordance with section 32 b GWB, the time-limited commitments offered by HRS is within the scope of the discretion to which the Decision Division is entitled.

3. No withdrawal of the exemption in accordance with section 32 d GWB

268 As a result of the initial lack of clarity regarding the market situation in 2012, the Decision Division has considered the withdrawal of the benefit of the relevant block exemption regulation in accordance with section 32 d GWB for a certain time period during the ongoing proceedings. However, on the basis of the current investigation results, the Decision Division rejected the withdrawal until further notice.

269 If agreements which fall under a block exemption regulation have effects which are incompatible with section 2 (1) GWB/Art. 101 (3) TFEU and which occur in a territory in Germany which has all characteristics of a separate geographic market, the cartel authority can withdraw the benefit of the block exemption regulation in accordance with section 32 d GWB/Art. 29 (2) of Regulation 1/03 in this territory.³⁸⁴

270 Within the ongoing administrative proceedings the Decision Division continued to survey the market developments. In 2013 it was temporarily not possible to rule out that the market share of HRS was below 30% in the preceding year 2012. A conceivable consequence of this development would have been that, in accordance with Art. 2 (1) of the Vertical Restraints Block Exemption Regulation, the MFN clauses of HRS would have been exempt from the application of Art. 101 (1) TFEU. At that time the Decision Division heard HRS on the question of whether and to what degree the requirements of section 32 d GWB for the withdrawal of the exemption according to the Block Exemption Regulation would be fulfilled in the present case. The Decision Division made clear that it could take a decision on withdrawal in accordance with section 32 d GWB, if the market share of HRS fell below 30% at a later date. However, after the Decision Division had ascertained the initially unclear market shares for 2012, it became clear that a decision in accordance with section 32 d GWB could not be considered until further notice since the market share of HRS was still above 30%.

³⁸⁴ cf. also Bornkamm in Langen/Bunte, loc. cit., section 32d GWB, No. 3.

F. Immediate enforceability

- 271 The appeal has no suspensive effect. The court of appeal can completely or partly restore the suspensive effect of the appeal on request.

G. Costs

- 272 The ruling on fees is based on section 80 (1) sentence 2 No. 2 GWB. The amount of the fees is determined in accordance with section 80 (2) sentence 1 GWB according to the staff and material expenses of the competition authority and the economic significance of the proceedings. The application of these principles to the facts as described led to a fee of [...] Euro, which is below the maximum fee of 25,000 Euro (section 80 (2) sentence 2 No. 2 GWB). The Decision Division has taken into consideration the expenditure caused by the total of five market surveys, two statements of objections and several statements on economic expert opinions required, as well as the comprehensive, long-term enforcement of the MFN clauses by the parties concerned.
- 273 In accordance with section 80 (6) sentence 1 No. 2 GWB, the debtor of this fee is the party concerned. The fee is due on the service of this Decision and should be transferred to the following account within one month of service

**Bundeskasse Trier at
Deutsche Bundesbank - Filiale Saarbrücken -
BIC: MARKDEF 1590
IBAN: DE 81 5900 0000 0059 0010 20**

Please quote the following **transaction number** as the **reference**:

[...]

Please state as the reference the transaction number and the **date of the Decision**; otherwise the payment cannot be processed.

- 274 If no payment or incomplete payment has been effected by the expiry of one month after the date of service, charges for late payment of one percent of the amount in arrears can be charged for each commenced month of arrears (section 80 (8) GWB, section 1 (1) of the Ordinance on the Costs of the Cartel Authorities [*KartKostVO*] in conjunction with

section 18 (1) of the Administrative Costs Act [*VwKostG*]). Where transfers are effected from abroad, bank fees are generally incurred. It should be ensured in such cases that the account of the Bundeskartellamt is credited with the full fee.

Information on appeals

An appeal is admissible against this Decision. It must be submitted in writing to the Bundeskartellamt, Kaiser-Friedrich-Straße 16, 53113 Bonn, within a period of one month starting with the service of the Decision. It is however sufficient if it is received by the court of appeal, Düsseldorf Higher Regional Court, during this period.

The appeal must be justified by a written statement submitted to the Bundeskartellamt or to the court of appeal. The period for the submission of the statement of grounds for the appeal is two months. It starts on service of the contested decision, and may be extended by the presiding judge of the court of appeal on request. The statement of grounds for the appeal must contain a declaration of the degree to which the Decision is contested and its amendment or reversal is requested, and must state the facts and items of evidence – where appropriate also new ones – on which the appeal is based.

The written appeal and the statement of the grounds for the appeal must be signed by a lawyer.

Hossenfelder

H.-H. Schneider

Dr. Pfeil-Kammerer

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