



Bundeskartellamt

6th Decision Division

B 6 – 132/14-2

ADMINISTRATIVE PROCEEDINGS
Decision under Section 32(1) German Competition
Act (GWB)
- Public version -

Decision

In the administrative proceedings

1. CTS EVENTIM AG & Co. KGaA, Bremen,

- Party to the proceeding -

Authorised representative:

Law firm Allen & Overy LLP
Dr Ellen Braun
Kehrwieder 12
20457 Hamburg

2. [...]

- Third party admitted to the proceeding -

Authorised representative:

[...]

the 6th Decision Division of the Bundeskartellamt has decided on 4 December 2017:

1. The contract agreements nos. [...] up to [...] and nos. [...] up to [...] listed in Annexes 1 and 2, as well as the ticket quota bound to them under Annex 1 in combination with the terms of contract agreed according to Annex 2, are unlawful.
2. The party to the proceeding, including all affiliates within the meaning of Section 36(2) GWB, is obliged to end the agreements under no. 1 either by termination or amendment until 31 March 2018 at the latest.
3. The party to the proceeding, including all affiliates within the meaning of Section 36(2) GWB, is obliged forthwith,
 - 3.1. in future agreements on ticketing system services with event promoters, to allow the promoters at their own discretion to distribute at least 20% of the annual ticket volume for their events available for distribution via ticketing systems through a ticketing system other than EVENTIM.NET, either themselves or by influencing tour or local promoters, provided the term of the agreement is more than two years or unlimited,
 - 3.2. in future agreements on ticketing system services with booking offices that distribute tickets to end customers via points of sale, online, by telephone or in any other way, to allow these booking offices at their own discretion to use a ticketing system other than EVENTIM.NET for the distribution of at least 20% of the annual ticket volume they distribute via a ticketing system, provided the term of the agreement is more than two years or unlimited.
4. Agreements within the meaning of no. 3 whose terms are automatically extended upon the expiry of a certain period of time, are deemed unlimited.
5. The prohibition under no. 3 shall be valid until 31 December 2021.
6. The Bundeskartellamt reserves the right to revoke nos. 3 and 5 of this decision.
7. The administrative fee for the proceedings, including this decision, amounts to [...] and is payable by the party to the proceedings.

Reasons

A. STATEMENT OF FACTS

I. CTS Eventim AG & Co. KGaA, Bremen

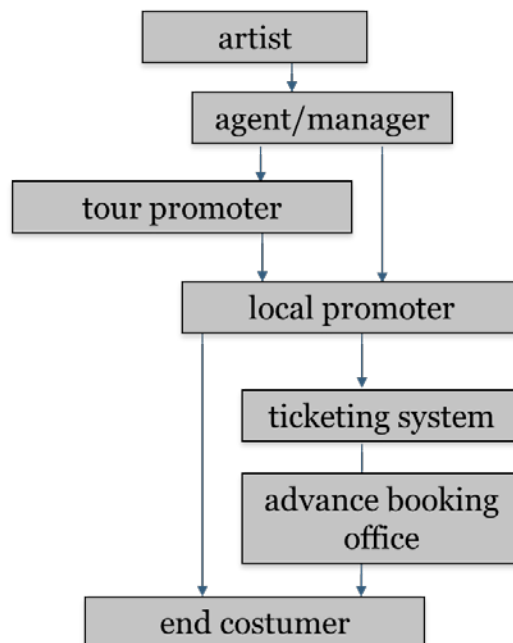
- (1) **CTS EVENTIM AG & Co. KGaA, Bremen**, (hereafter and including all affiliated companies within the meaning of Section 36(2) GWB: CTS) and its affiliates are both active in the area of live entertainment and ticketing. The company describes itself as Europe's leading ticketing and live entertainment company and operates in 25 countries.
- (2) In Germany, CTS operates especially through its affiliates FKP Scorpio Konzertproduktionen GmbH ("FKP Scorpio"), Marek Lieberberg Konzertagentur¹, Semmel Concerts Entertainment, Dirk Becker Entertainment, Peter Rieger Konzertagentur, Argo Konzerte and Promoters Group Munich in the planning, organisation and execution of festivals, tours and other events in the Live Entertainment business. Its emphasis is on the area of Rock/Pop with a special focus on tour events. In addition, CTS and its affiliates Marek Lieberberg Konzertagentur and FKP Scorpio organise popular rock/pop festivals such as "Rock am Ring", "Rock im Park" and "Hurricane".
- (3) In addition, CTS operates the Lanxess Arena in Cologne (18,000 seats), the Waldbühne in Berlin (22,000 seats), the Arena Berlin (9,000 seats) and the Tempodrom in Berlin (3,500 seats).
- (4) In the business area of ticketing, CTS acts as a ticketing system provider. For this purpose CTS operates a ticketing system consisting of a database with connected points of sale, online shops and call centres and offers promoters to sell tickets for any type of event through this system. Furthermore, CTS sells a variety of ticket software products to promoters. CTS also operates the online shop EVENTIM.DE and other in-house advance booking offices for tickets.
- (5) CTS attained global sales in the amount of 800-1000 million euros during the business year 2016.²

¹ Marek Lieberberg himself and his son left Marek Lieberberg Konzertagentur in early 2016 to join Live Nation GmbH. Marek Lieberberg Konzertagentur continues in business as an affiliate of CTS.

² [...]

II. Organisation and sales of live entertainment in Germany

- (6) The area of live entertainment events is characterised by a complex market structure. A variety of very different commercial and non-commercial events are offered in the areas of sports, culture and entertainment in Germany. A study by the market research company GfK describes a commercial “live entertainment“ sector that is divided into musical and non-musical events.³
- (7) Especially for musical events, the event organisation and execution regularly involve several steps and the contribution of various parties. Typically, a musical event essentially shows the following value chain: The manager of an artist represents his/her economic interests and instructs an agent to market the artist for live shows. For a single concert, the agent markets the artist to a promoter who will organise the concert on-site, or, for multiple performances, to a tour promoter, who will use the services of a local promoter to execute the individual tour concerts. For an event to take place, promoters require, among other things, a venue as well as a ticket sales provider.



³ GfK survey: Veranstaltungsmarkt 2013 (Event Market 2013), p. 4.

- (8) The agent or booking agency markets live performances of the artist to interested event promoters. In collaboration with the manager of the artist, who primarily acts as an advisor to the artist, the agent is mainly responsible for negotiating the artist's fees and contracts. In some cases the booking agency assumes further organisational and marketing tasks.
- (9) The work of a tour promoter includes the organisation, planning and execution of tours of individual artists or shows. On the basis of their special contacts, tour promoters acquire tour performances of artists and assume the financial risks of the tour on behalf of the artists. They pay the artists' fees, often organise ticket sales or decide about the type of ticket sales and determine the basic price for a ticket. Immediate buyers of the individual tour concerts are local promoters who generally assume the economic risk for the individual concert and are often the contractual partners of the end customers as well as of the ticketing systems. In some cases, the tour promoter also acts as local promoter and provides these services from within the company. A combination of agency and tour promoter is also possible, as the example of Four Artists shows.
- (10) Event promoters in the live entertainment sector use different services to sell tickets, with services of ticketing system providers being of particular economic relevance. Ticketing system providers operate event databases for event promoters who have been granted access to sell tickets via in-house points of sale, external points of sale and/or online ticket shops and, in some cases, call centres.

III. The CTS ticketing system EVENTIM.NET

- (11) With EVENTIM.NET, CTS operates the largest ticketing system in Germany. By its own account, it includes around 200,000 bookable events from all areas of live entertainment as well as sports events. Around 1,500-2,000 external brick-and-mortar advance booking offices, a variety of travel agencies of large travel agency chains, corporate call centres, corporate advance booking offices and corporate online shops, especially EVENTIM.DE, are connected to EVENTIM.NET. Other providers of ticketing systems in Germany are Reservix GmbH, Freiburg (hereafter: Reservix), AdTicket GmbH, Frankfurt a.M., which is associated with Reservix GmbH (hereafter: AdTicket), Ticketmaster GmbH, Berlin (an affiliate of the US company Live Nation Entertainment Inc., hereafter: Ticketmaster), as well as mainly regional ticketing providers, such as DERTICK-ETSERVICE.DE GmbH & Co. KG, Cologne (hereafter: DTS), München Ticket GmbH, Munich (hereafter: München Ticket), Frankfurt Ticket GmbH, Frankfurt a.M. (hereafter: FT) and in.Stuttgart Veranstaltungsgesellschaft mbH & Co. KG, Stuttgart, with a system called Easy Ticket Service (hereafter: easy ticket).

1. Service content of the ticketing systems

- (12) The core service provided by a ticketing system is the operation and technical connection to a database into which a diverse event portfolio can be entered. For this purpose, CTS concludes contracts with promoters which provide technical access to the system and facilitate the administration of events within the system by the promoters themselves. Furthermore, EVENTIM.NET contains all CTS-owned events. On the other market side a network of advance booking offices is connected that can access the system directly for the sale of tickets. For this purpose, CTS concludes contracts with advance booking offices which grant appropriate usage rights as well as other technical services. All external advance booking offices CTS has concluded such contracts with are brick-and-mortar offices. CTS also owns advance booking offices itself, especially online shops, such as EVENTIM.DE, which may also access the system.
- (13) Another core service provided by CTS for promoters is granting access to a sales network. The contracts with the promoters refer to in-house booking offices selling tickets to end customers. In addition, the ticketing system service also implies the connection of the promoter with a network of external advance booking offices.
- (14) Up until a few years ago, CTS used a so-called "brokering/ agency model", in which not only CTS, but also the advance booking offices connected to the CTS system acted as representatives for promoters on their behalf and on their accounts. Promoters can choose whether they want to use this contractual model CTS offers them either with or without having their own access to the system. In the first option, promoters enter the events into the system themselves, whereas the latter option represents a "full event service" by CTS, meaning that CTS enters the events into the system on behalf of the promoters.
- (15) For some time now, CTS has been using a commissionaire model in its contracts with event promoters. In this model, CTS acts as a commissionaire for the promoter, both in the ticket sales to end customers via its in-house online shop and in the sales of tickets via external advance booking offices. CTS sells the tickets itself under its own name, but on the account of the promoter.
- (16) CTS uses an agency model to connect advance booking offices to its ticketing system. The agency contract provides that if the commissionaire model is applied between CTS and the promoter, the advance booking offices sell tickets to the end customer on behalf and on the account of CTS. If, by contrast, an agency model is applied between CTS and a promoter, the booking offices sell the tickets on behalf and on the account of the promoter.

(17) In order to be connected to the CTS-System, CTS requests different fixed and variable fees from promoters and advance booking offices. A one-time installation fee for the connection to the system has to be paid by both sides, a monthly lump sum for the connection to the data processing centre and a rental fee for printing, and, in case of contract termination, a termination fee. In addition, the event promoters have to pay a "system fee" for each ticket booked and the advance booking offices a so-called "transaction fee" for every ticket sold in some cases.⁴

2. Exclusivity agreements used by CTS

(18) In many cases, CTS has agreed provisions with event promoters (see below a) and with advance booking offices (see below b) which provide obligations for the contractual partners to use the CTS system EVENTIM.NET either exclusively or to a considerable degree for the sale of their tickets via a ticketing system. In many cases, CTS grants a consideration to the event promoters and advance booking offices for using its system. (See in detail Annex 1 nos. [...] up to [...] (event promoters) and Annex 1 nos. [...] up to [...] (advance booking offices).

a) Exclusivity agreements with event promoters (nos. [...] up to [...])

(19) In 2015, CTS distributed tickets via the CTS-system for a total of 1000 - 2000⁵ event promoters.⁶ Currently, CTS has contracts with more than [...] event promoters on the use of EVENTIM.NET.⁷

(20) The decision division has determined that of these [...] include provisions about exclusive usage of the CTS ticketing system and cover more than 80% of the ticket volume sold through ticketing systems per year by the respective event promoter (agreements nos. [...] up to [...] in Annex 1, see aa). Contractual partners are sometimes obligated to enforce exclusivity agreements with third parties (especially local event promoters or tour promoters). All contracts are long-term contracts with different terms. Some exclusive contracts concern individual events (agreements nos. [...] up to [...]).⁸ Some of the submitted exclusive contracts with event promoters were still valid in 2016 but are currently no longer in force. (agreement nos. [...] up to [...], see bb).

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⁸ [...]

aa) Current agreements with event promoters (nos. [...] up to [...])

(1) Scope of exclusivity

- (21) The exclusivity clauses in the contracts nos. [...] up to [...] cover different ticket volumes:
- (22) Contracts [...] up to [...] each contain pure exclusivity clauses by which the promoter undertakes towards CTS to only use certain ticketing services. The respective agreements concern either the general distribution of tickets, the distribution via an electronic ticketing system or the use of a ticketing software. The agreements contain one of the following three phrasings (sometimes in a slightly different wording):
- "The partner shall sell tickets for his/her own events solely through the CTS service network. He/she will exclusively use the CTS service network for all of his/her events."*⁹
- "[...] the partner [shall] work exclusively with CTS EVENTIM for electronic ticketing."*¹⁰
- "The partner shall exclusively use CTS Eventim's ticketing software."*¹¹ (Bundeskartellamt unofficial translation)
- (23) Furthermore, several agreements (e.g. agreement nos. [...] up to [...]) contain the (identical) wording *"This agreement is exclusive. The promoter will solely instruct CTS to sell tickets in advance for the duration of this contract and according to this contract, unless otherwise explicitly stated in the contract."*¹² (Bundeskartellamt unofficial translation) Explicit exceptions are not evident in the respective contract agreements.
- (24) Instead of an exclusive use of the CTS system with possible exemptions, in the agreements Nos. [...] up to [...], the promoter undertakes to always sell a **quota of at least 80% or 90%** of the tickets available for an event via the CTS systems. For example, this wording is used in some contracts: *"In return, for the special conditions granted to the promoter by CTS in this agreement, the promoter is obligated to distribute at least 80% of the available ticket quota through the CTS system."*¹³ (Bundeskartellamt unofficial translation)
- (25) Agreements nos. [...] up to [...] contain **exclusivity clauses with an exemption for a certain ticket quota**. First, an unlimited obligation to exclusively use the CTS system is laid down with one of the above-mentioned wordings for pure exclusivity clauses. This obligation is then modified by allowing the event promoter to sell a certain quota of tickets from the overall amount of tickets

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¹⁰ [...]
¹¹ [...]
¹² [...]
¹³ [...]

via a distributor other than CTS. In most cases, the permissible quotas which, as an exception, may be sold without the participation of CTS, are set for individual events at a maximum percentage. In the [...] agreements concerned, this maximum limit is mostly no more than 30% of the overall ticket amount available for the particular event.¹⁴ The conditions under which a ticket quota may be allocated to a party other than CTS are described in detail in most agreements. Often, quota demands from venues in specific cities are deemed eligible.¹⁵ In many cases, quota exemptions are granted for third parties upon request of the tour organiser.¹⁶ Apart from that, artists¹⁷, agencies¹⁸, and presenters or sponsors¹⁹ qualify as eligible third parties to receive a certain number of tickets.

- (26) If a quota is requested by one of the mentioned parties, the promoter often has to submit written proof of this to CTS. Alternatively, the consent of CTS has to be obtained prior to allocating a quota to third parties.²⁰ Sometimes, the promoter is also obligated to work towards a withdrawal of quota requests by third parties and to ensure that the concerned companies solely use the CTS system.²¹ If, by way of exception, a ticket distribution through different ticketing systems is permitted, this is often restricted by, for example, having to block all advance booking offices which are connected to the CTS system for competing systems²² or by restricting the sales of tickets by a third party to that party's own points of sales.²³
- (27) Among the exclusivity agreements with quota exceptions is also the major contract no. [...] with [...] which has a term of [...] years. Apart from CTS and [...], Ticket Online Software GmbH, Hamburg (hereafter: Ticket Online) is also a contractual partner of the [...] contract. Ticket Online has been an affiliate of CTS since CTS acquired Ticket Online's sole shareholder, See Tickets Germany GmbH, Hamburg, in 2010. At the time, this acquisition was not subject to merger control.
- (28) In the agreement, [...] appoints Ticket Online to be the sole and exclusive ticketing service provider for sales and/or distribution of tickets to consumers, as well as for the B2B business.

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(29) The contracts Nos. [...] up to [...] contain **exclusivity clauses with general quota exceptions that are not clearly defined**. A proportional or otherwise quantifiable target to calculate the size of the quota permitted for third party distribution is missing in the contracts. For example, one of the agreements reads as follows: *"As a precondition for the terms and conditions outlined above, the contracting party undertakes to electronically distribute tickets solely through CTS Eventim and to offer all freely marketable tickets to the end customer through the distribution network of CTS Eventim. If the lessor of a venue insists on selling certain ticket quotas through the system of the respective venue, these quotas shall be exempt from the exclusivity agreement."*²⁴ (Bundeskartellamt unofficial translation) These exceptions apply where venues or tour organisers make corresponding provisions.²⁵ Tour organisers making such provisions are, according to some agreements, to be induced to solely use the CTS system.²⁶ Often it has to be proven in writing to CTS that the requirements for an exception are met.²⁷ Furthermore, in most of these agreements the advance booking offices connected to the CTS system have to be blocked for competing ticketing systems or third parties are restricted to their own points of sale for their ticket sales.²⁸

(2) Agreements on binding exclusivity for third parties

(30) Part of the agreements nos. [...] up to [...] described above do not (only) contain an explicit legal obligation for exclusivity, but also different versions of a contractual declaration of exclusivity.

(31) Provisions which obligate the promoter to not only use the CTS system himself, but to also influence other market participants to use it, can be found in some contracts between CTS and promoters. To that effect, some agreements with promoters contain the following sentence on influencing local promoters in this or a slightly altered version:

*"Furthermore, the promoter acting as tour organiser will influence the local promoters to exclusively use the CTS EVENTIM system for the distribution of tickets for his events."*²⁹ (Bundeskartellamt unofficial translation)

(32) Conversely, contracts with local promoters often contain clauses under which the local promoters are to induce tour organisers or other parties to solely use the CTS system. These clauses often appear in contracts also stipulating agreed exceptions to exclusivity through ticket quotas to establish, if possible, 100% exclusivity over time.

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- (33) *"In individual cases, the promoter is entitled to distribute a ticket quota not exceeding 20% of the tickets available per event through a different ticketing system, provided another distribution channel apart from the CTS network has explicitly been requested by a third-party event organiser. However, the promoter will try to convince the third-party promoter to solely sell the tickets through the CTS system."*³⁰ (Bundeskartellamt unofficial translation)

(3) Exclusivity agreements for individual events

- (34) Apart from that, CTS also has concluded supplemental agreements with promoters concerning the exclusive usage of the CTS system for individual events or event series. CTS has submitted agreements to this effect, to the extent that they were valid at any point in 2016 and concerned more than 10,000 tickets (contracts nos. [...] up to [...] and nos. [...] up to [...], for the latter see below under b). Of these, agreements nos. [...] up to [...] concern individual events in 2017 and agreements nos. [...] to [...] individual events that take place annually. The contracts contain this or similar wordings:

- (35) *"[...] In addition to or amendment of the above-mentioned commission contract and the currently valid price list, the following will be exclusively agreed upon for the aforementioned exhibition series [...]: The distribution of tickets may solely be made through the CTS system with regard to the sales of tickets for the above-mentioned exhibition series."* (Bundeskartellamt unofficial translation)

(4) Terms of agreements

- (36) Most ([...] agreements) of the currently valid exclusivity agreements nos. [...] up to [...] have a fixed term which in most cases ([...] agreements) is extended automatically. [...] agreements have been concluded with an indefinite term.³¹ A summary of the terms of the contracts is provided in the following table (for the exact wording of the term agreements see Annex 2):

³⁰ [...]
³¹ [...]
³² [...]

Terms of exclusivity agreements nos. [...] up to [...]:	Number of contracts:
Fixed (basic) term	[...]
- of these with automatic extension	[...]
- of these without automatic extension	[...]
Indefinite	[...]
Total	[...]

(37) The fixed (basic) terms of the agreements can be summarised as follows:

(38) Most ([...] agreements) of the [...] exclusivity agreements with fixed basic terms *and* automatic extension listed in the table have a fixed basic term of three years. [...] agreements have a fixed basic term of more than three years and [...] agreements have a fixed basic term of less than three years. In most cases, the automatic extension is for another year ([...] agreements) or for two years ([...] agreements) and in [...] cases for three months. Most of these [...] agreements may be terminated with three months' notice before the end of the particular contract term.

(39) The [...] exclusivity agreements with a fixed term without automatic extension listed in the table have a contract term of at least two years [...].

(40) Some of the exclusivity agreements nos. [...] up to [...] have been in force for just one year, others for more than ten years. The average contractual term is approx. four years.

bb) Terminated agreements with event organisers (nos. [...] up to [...])

(1) Exclusivity agreement with a major event organiser³² (no. [...])

(41) In June 2015, CTS and a tour and festival organiser concluded a cooperation agreement which contains an exclusivity clause (agreement no. [...]). The parties terminated the agreement in [...]. The terminated cooperation agreement contained the following clause in Section 2:

"Exclusive cooperation: (1) The partner undertakes to ensure that only the CTS system is used for the distribution of tickets for tours and events of acts/artists managed by him. (2) If the sale of tickets for the events is organised by the partner himself, the events will be entered directly [...] in the CTS system. (3) If third parties are involved in the organisation and/or execution of ticket sales, for example local promoters, the partner shall ensure that those tickets are also

only distributed via CTS Eventim systems. (4) Quotas of up to, but not exceeding, 30% of the tickets for an event which has to be allocated to [...] due to contractual obligations with the venues shall be exempted from the exclusivity. The partner will provide proof that such a requirement exists upon request by CTS Eventim. In any case, the partner ensures that at least an equivalent quota in regard to seat quality and selection of price range is offered in the CTS system. (5) Further exemptions from exclusivity are subject to consultation with and the written consent of CTS Eventim. Exemptions require consultation with and the written consent of CTS Eventim. The parties agree that these exceptions have to be absolutely justified, such as, for example, sales through [...].“ (Bundeskartellamt unofficial translation)

(2) Exclusivity agreements for individual events

(42) In the past, CTS concluded supplemental contracts with promoters concerning the exclusive utilisation of the CTS system for individual events or series of events. In this sense, the agreements nos. [...] to [...] refer to events which already took place in 2016 and are currently no longer valid.

b) (Current) Exclusive agreements with advance booking offices (nos. [...]. up to [...])

(43) CTS has concluded contracts with around 500-1500³³ companies about advance booking services.³⁴ Thereof, CTS has concluded contracts with [...] companies in which the advance booking offices are obligated to solely obtain tickets through the CTS system.³⁵ CTS has submitted the corresponding contracts with the [...] advance booking offices.³⁶

aa) Scope of exclusivity

(44) All contracts nos. [...] up to [...] stipulate that advance booking offices may solely obtain tickets from CTS. In some contracts, this is without exceptions (agreements nos.[...] up to [...]), the other agreements include specified exceptions (agreements nos. [...] up to [...]).

(45) Agreements nos. [...] to [...] allow for pure exclusivity clauses according to which the particular advance booking office solely works with CTS for ticketing. Agreements nos. [...] to [...] each contain the following clause, sometimes a slightly altered version³⁷:

(46) *In return, the advance booking offices assures CTS that it will not use any other electronic ticketing systems.*“ (Bundeskartellamt unofficial translation)

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³⁷ [...]

- (47) The advance booking office is not allowed to establish an interface with any other ticketing system similar to the interface agreed upon with CTS, in accordance with agreement no. [...].
- (48) Contract no. [...] contains the following wording: *[The advance booking office] and Eventim agree upon an exclusive cooperation in the areas of [...], internet offers and call centres.*“ (Bundeskartellamt unofficial translation)
- (49) An exclusive usage of CTS systems by the advance booking office is, in principle, intended, but different exceptions are permissible, pursuant to agreements nos. [...] to [...].
- (50) In contracts nos. [...] to [...], the advance booking offices first undertake that they may not “*use any computer-based distribution systems other than the CTS system.*” (Bundeskartellamt unofficial translation) Exceptions hereof are possible, especially with regard to tickets for regional events, unless they are available through the CTS system.³⁸ In these cases, the advance booking offices can use other systems. Exceptions are subject to the consent of or coordination with CTS in [...] contracts.³⁹ [...] stipulates a permissible exception of the exclusivity for “*En-Suite own events*“.⁴⁰
- (51) In agreements nos. [...] and [...] the contractual partners also undertake – with slightly altered wording – to exclusively use CTS systems. Other ticketing systems may be used as an exception and under the condition that the tickets for the event are no longer available in the CTS system in the category and/or for the number of seats requested, or not in the quality the customer intends to purchase.⁴¹
- (52) The following obligation exists according to [...]: “*[Advance booking office] will, in the segment of event tickets in the target market Germany (place of performance), exclusively work together with Eventim, which will be implemented from a technical point of view through the integration and communication of the distribution systems in a system interface (direct coupling). Such an integration may not be initiated with any other direct (operator or licence holder of a ticket distribution system) or indirect (operator or licence holder of secondary market platforms for the sale or mediation of tickets for events, if those are not operated by Eventim) competitor of Eventim. Furthermore, [advance booking office] may not distribute, sell, broker, etc. any other tickets except through a system interface (direct coupling), with the exception of tickets originating from the Eventim system, for the target market Germany (place of performance)*“ . (Bundeskartellamt un-

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official translation). Excluded are tickets for events which have been bundled with other services within a package. The advance booking office is also allowed to distribute vouchers for a closely limited portfolio of events by a specified promoter on its own account.

bb) Terms of agreements

- (53) All of the exclusive agreements nos.[...] to [...] between CTS and advance booking partners have a fixed basic term between two and seven years, with the majority of them having a basic term of three years ([...] agreements). When the basic term ends, [...] are automatically extended and [...] contracts end after a fixed term of three years. Of the contracts which are extended automatically, [...] contracts are extended for another year and [...] contracts for two years.⁴² Termination of these contracts is possible with three-months', six-months' [...] or 18 months' notice before the end of the contractual term.
- (54) The [...] exclusive contracts which have been submitted have mostly been in force for more than four years, in some cases much longer (e.g. 16 or 18 years for no.[...]). So far, the term is seven and a half years on average.

c) Exclusivity clauses in marketing cooperation

- (55) CTS has maintained regionally restricted cooperation relationships with regional ticketing companies⁴³ for some years now, which in principle serve the marketing of the CTS system to regional promoters. [...] One cooperation partner concluded at least [...] exclusive contracts with promoters.

3. Vertical integration with promoters and advance booking offices

- (56) Both external and CTS-owned promoters and advance booking offices are connected to the CTS system.
- (57) Multiple tour and festival promoters as well as regional promoters belong to the CTS group, most of which were purchased by CTS in the last few years. This includes the following promoters: FKP Scorpio Konzertproduktionen GmbH, Dirk Becker Entertainment GmbH, Marek Lieberberg Konzertagentur GmbH & Co. KG, Semmel Concerts Entertainment GmbH, Peter Rieger Konzertagentur GmbH & Co. KG, Argo Konzerte GmbH, Holiday on Ice Productions Germany GmbH PGM, Promotors Group Munich Konzertagentur GmbH, KPS Concertbüro GmbH, Arena Man

⁴² [...]
⁴³ [...]

agement GmbH, CRP Konzertagentur GmbH, Seekers Event GmbH, ESK Events & Promotion GmbH, Palazzo Produktionen GmbH, tour-house Veranstaltungs-, Konzert-, TV- und Media Consulting GmbH and Palazzo Produktionen Berlin GmbH.

- (58) CTS' own promoters process ticketing almost exclusively through the CTS system. In 2016, CTS promoters distributed [...] of their tickets through EVENTIM.NET.⁴⁴
- (59) CTS also takes part in the advance sales of tickets through in-house sales subsidiaries. The online shop EVENTIM.de is particularly relevant for ticket distribution in Germany. CTS' in-house advance booking offices solely offer tickets through the CTS system.

IV. Course of proceedings

- (60) Initially, the Bundeskartellamt initiated administrative proceedings against CTS and [...] in November 2014 to assess the exclusive contract concluded between the two companies in [...], in accordance with Article 101 TFEU (Treaty on the Functioning of the European Union), Section 1 GWB (Act against Restraints of Competition, German Competition Act). The subject of this proceeding was extended by the assessment of exclusivity agreements between CTS and other promoters and advance booking offices in 2015, in accordance with Article 102 TFEU and Section 19 GWB (B6-132/14-2).
- (61) The decision division notified the proceedings to the ECN by its notification dated 9 December 2014 ([...]). The consultation pursuant to Art. 11 of Regulation 1/2003 was concluded on 29 June 2017.
- (62) In its letter dated 14 June 2017, the Bundeskartellamt notified the contractual partners of current exclusivity agreements of CTS about the potential prohibition on the basis of Article 102 TFEU, Section 19 GWB and Article 101 TFEU, and Section 1 GWB, since these partners would be affected by the prohibition.⁴⁵ Only [...] exercised its right to file an application for admission to the proceedings. By decision of 14 July 2017, [...] was admitted to the proceedings.
- (63) In its letter of 10 July 2017 the decision division gave CTS the right to be heard with regard to the intended prohibition of exclusivity agreements after having granted the company access to file on 18 January 2017. In a letter dated 12 July 2017, the decision division informed CTS that it had been granted access to further sections of the file.

⁴⁴ Excluding FKP, Palazzo and Hol, which were only acquired in 2016.

⁴⁵ For details on the admission of third parties in cartel proceedings cf. German Federal Court of Justice WuW DER-1544, *Zeiss/Leica*; Bechtold, GWB, Section 54 GWB, para 13; MünchKomm-Ost, Europäisches und Deutsches Wettbewerbsrecht (Kartellrecht), vol.2, GWB, Section 54, para 33 f.

- (64) On 19 September 2017 [...] was given the opportunity to comment on the preliminary assessment notice of 10 July 2017. Access to file was granted to [...] in a letter dated 2 October 2017. [...] did not comment on the preliminary assessment notice of 10 July 2017.
- (65) CTS handed in a comment on the preliminary assessment notice of 10 July 2017 by its statement of 1 November 2017. CTS basically states that exclusivity agreements as described in the operative part are admissible market behaviour. This includes the [...] contract which CTS considers [...]. Additionally, objections to the violation of the right be heard and to have access to file are made. CTS submits, among other things, an economic expert opinion and a GfK study as Annexes to the statement of 1 November 2017.⁴⁶
- On 30 November 2017 CTS submitted another economic expert opinion on the review of exclusivity agreements based on the so-called “As efficient competitor” test.⁴⁷
- (66) CTS’s view basically is that from the perspective of promoters, the end customer level should be considered to a higher extent. Their view involves that in substance, a broader ticket distribution market comprising both third party distribution via ticketing systems and promoters’ direct sales solutions and online portals would have to be defined. CTS’s market share on the German national market amounted to a mere [...] %, which would already disprove the existence of a dominant market position. Additionally, the specific conditions set out in Section 18(3a) GWB regarding dominant positions on multi-sided markets were not fulfilled. CTS held that instead of indirect network effects with regard to the end customer level, which could not be detected, the parallel use of several services was observed.
- (67) While these proceedings were ongoing, the decision division also conducted merger proceedings involving CTS. On 29 March 2017, CTS notified the acquisition of sole control over Four Artists Events GmbH, Berlin, and Four Artists Booking Agentur, Berlin, which operate as a promoter and booking agency (hereafter: Four Artists, B6-35/17). The decision division prohibited the merger in its decision of 23 November 2017. The file on the merger is maintained as supplementary file to this proceeding.
- (68) [...]

⁴⁶ Economic expert opinion of [...] “B6-132/14-2 ticket distribution in Germany- - Eventim’s market definition and market position”, GfK study on the German event market (“Veranstaltungsmarkt Deutschland”) of 12 October 2017.

⁴⁷ Economic expert opinion of [...] “MEMORANDUM - AEC test in the CTS Eventim/BKartA case for exclusive distribution”.

B. LEGAL ASSESSMENT

- (69) The exclusivity agreements between CTS and promoters in the area of live entertainment violate, in their current state, not only the prohibition of abuse according to Article 102 TFEU, Section 19 GWB (see I.), but also the ban on cartels according to article 101 TFEU, Section 1 GWB (see II.), as the promoters are obligated to enter more than 80% of the available ticket volume for their events intended for distribution through ticketing systems into CTS's ticketing system EVEN-TIM.NET for a duration of two or more years. They either have to enter the ticket volume themselves or influence tour and local promoters to do so, as is stipulated in agreements nos. [...] to [...] (Annexes 1 and 2).
- (70) The same is true for exclusivity agreements between CTS and advance booking offices offering tickets to end customers either via stationary points of sale, online, over the phone or in any other way, insofar as they are obligated or bound by economic special conditions as is the case in agreements nos. [...] to [...] (Annexes 1 and 2), to exclusively or almost exclusively use the CTS system (again, see I. and II.) with the exception of some events.
- (71) The decision division intends to prohibit such agreements after due consideration, in accordance with Section 32 GWB (see III.).

I. Violation of the prohibition of abuse of a dominant position according to Article 102 TFEU, Section 19 GWB

- (72) The exclusivity clauses fulfil the elements of unfair hindrance under Article 102 TFEU and Section 19(2) no. 1 GWB.

1. CTS as norm addressee under Articles 102 TFEU, Section 19 GWB

- (73) Since CTS has a dominant position on both sides of the multi-sided German market for ticketing services according to the criteria of Section 18(1) and (3a) GWB, it is the addressee of the prohibition of abuse.

a) Markets concerned

- (74) The market concerned is the multi-sided national market for ticketing system services, in which CTS operates with EVENTIM.NET, and whose market sides (promoters and advance booking offices) form two separate markets.

aa) Ticketing systems as a multi-sided market (Section 18(3a) GWB)

(75) Based on the services they offer (see (1)), ticketing systems fulfil the elements of a multi-sided market (see (2)) as a transaction platform with distribution function). The sales function resulting from the agreed agency relationship does not make CTS a customer for the purposes of market power assessment, but requires a separate assessment of the agency relationship with the promoters from the advance booking offices' side of the market (see (3)).

(1) Services of ticketing systems

(76) Ticketing systems in Germany offer different service models. Providers of ticketing system services in particular include CTS with its EVENTIM.NET system, and Reservix with the associated AD Ticket system, as well as Ticketmaster and some regional providers.

(a) Technical services

(77) As illustrated above for CTS, the core of the services of all providers is primarily the operation and technical connection to a database into which the different events are entered. For this purpose, the providers of ticketing systems conclude contracts with the promoters which enable, in all cases, the technical aspects of connection to the system, and the promoters' own administration of their events. Some ticketing systems, e.g. EVENTIM.NET, offer the possibility of concluding a contract without the promoter having its own access to the system; these ticketing systems take on the tasks of entering and administrating the event data. Advance booking offices are connected to the other end of the system. Providers of ticketing systems like CTS own advance booking offices, especially online shops such as CTS's own EVENTIM.DE, which access the system to sell tickets to end customers. Additionally, a network of external (other) advance booking offices is connected to the system. Therefore, contracts are concluded between ticketing system providers and advance booking offices, which grant corresponding utilisation rights and other technical services.

(b) Provision of access to a distribution network

(78) Another core service provided by the system providers for promoters is granting access to a distribution network. For this purpose, all providers of ticketing systems conclude distribution contracts with promoters, involving their in-house advance booking offices. Their advance booking offices sell tickets to end customers on behalf of the promoters on the basis of this contract (as commissionaires, agents, instructed by the promoter, etc.). In addition, the ticketing system also connects promoters with a network of external advance booking offices. Contracts with promoters

contain different provisions as to the role of the ticketing systems in selling tickets to end customers via external advance booking offices and the relationship between advance booking offices and promoters.

- (79) Whereas CTS applies the commercial agent and commissionaire model described above, other ticketing systems act as agents for promoters, providing them with the external advance booking network. The advance booking offices receive access to events and tickets from the ticketing system and solely sell tickets on behalf and on the account of promoters. They receive power of representation, which is granted to them through the ticketing system on behalf of the promoter or through a delegated authority. This model exists with some variations of details on the market.

(c) Ticket generation and other services

- (80) Other booking-related services are also part of the range of services ticketing systems offer to promoters. Such services include for example the creation of seating plans whenever tickets are purchased for particular seats, presentation of events in the ticketing system's online shop, inclusion of the event in general or customer-specific newsletters or creation of a ticket layout to sell tickets to end customers as "fan tickets" or "collector tickets" in the design of the events.
- (81) Lastly, various additional services are available from ticketing system providers subject to additional costs. Such services range from technical services including system user trainings to optional advertising and marketing efforts, e.g. prominent representation of the event in the online shop or flyers to promote the event in advance booking offices.

(d) Price structure and cash flow

- (82) Most ticketing system providers have similar price structures. Firstly, all contracts stipulate that the admission fee of the events and the amount of the advance booking fee are defined and saved in the ticketing system by the promoter. The advance booking fee is normally between 7 and 12% of the basic ticket price. Almost all ticketing systems charge a transaction fee per ticket (often referred to as "system fee") which is 1€ per ticket on average and which may vary depending on the basic ticket price. Furthermore, some ticketing systems charge a fixed amount for the system connection of promoters and/or advance booking offices, like CTS.
- (83) The end customer pays to the advance booking office the final ticket price and the separately indicated advance booking fee. Transaction fees, which have to be paid by the promoters to the ticketing system, are usually included in the final ticket price. Online shops like EVENTIM.DE charge the end customer further fees, e.g. shipment fees, other processing fees or printing fees

for print@home.⁴⁸ Advance booking offices pay the basic ticket price to the promoter, and the promoter is often “refunded” a part of the advance booking fee. In some cases the payment process is handled directly between advance booking offices and promoters, but it may also be processed through the ticketing system. The ticketing system may charge the promoter separately for system fees or collect them directly from the advance booking offices.

(2) Transaction platform and agent model

- (84) As a matching platform including transactions (transaction platform), ticketing systems constitute a multi-sided market as defined in Section 18(3a) GWB. Besides the technical system connection as a transaction platform, the service package offered by the ticketing systems of CTS has a significant distribution function, which is especially expressed through the agreed position of CTS as commissionaire or commercial agent brokering tickets from the ticketing systems within the meaning of the German Commercial Code (HGB). The status as commercial agent does not mean that the characteristic of a multi-sided market within the meaning of Section 18(3a) GWB is generally eliminated. When defining the market, however, the market sides have to be considered separately.

(a) Structure of a multi-sided market

- (85) The underlying service of establishing a connection to the system shows the characteristics and effects typical of a so-called multi-sided market in the terms of Section 18(3a) GWB.
- (86) The terms multi-sided markets or “platform“ are used as synonyms in economic literature (hence, hereafter platform is also used). Definitions of the terms multi-sided market/platform found in literature often differ greatly in their approaches; however, they each emphasise the presence of indirect network effects.⁴⁹ The German legislator has not provided a legal definition in Section 18(3a) GWB. From the Bundeskartellamt’s point of view, the term “multi-sided market” has to be

⁴⁸ Consumer body Verbraucherzentrale NRW had issued a warning letter to CTS in 2015 regarding the print@home fee. In further proceedings, the appellate court, the Bremen Higher Regional Court, confirmed that CTS’s print@home fee was unlawful (decision of 15 June 2017, file: 5 U 16/16)..

⁴⁹ Cf. BKartA, Working paper on the market power of platforms and networks (“Arbeitspapier Marktmacht von Plattformen und Netzwerke”), June 2016 (hereafter: *working paper*), p. 8 ff. downloadable from www.bundeskartellamt.de; examples from relevant literature include: *Cailaud/Jullien*, “Chicken & egg: competition among intermediation service providers“ *RAND Journal of Economics*, 2003, 34(2), 309-328; *Armstrong*, “Competition in two-sided markets“, *RAND Journal of Economics*, 2006, 37(3), 668-691; *Rochet/Tirole*, “Two-sided markets: a progress report“, *RAND Journal of Economics*, 2006, 37(3), S. 645-667. *Hagiu/Wright*, “Multi-sided platforms“, Working Paper, 2015, Harvard Business School, http://www.hbs.edu/faculty/Publication%20Files/15-037_cb5afe51-6150-4be9-ace2-39c6a8ace6d4.pdf.

defined based on phenomena relevant to market power, particularly when looking at the connection between market power factors. In this context companies should be considered as multi-sided markets (platforms) if they function as intermediaries and facilitate direct interaction of two or more user sites between which indirect network effects exist.⁵⁰

(aa) User groups of ticketing systems

- (87) Direct users of ticketing systems are promoters on the one hand and advance booking offices on the other hand. These have contractual relations with and a technical connection to the ticketing systems. End customers, by contrast, are not considered users of the ticketing systems, but customers in downstream markets or on downstream market levels, e.g. of events or services provided by advance booking offices. They only take part in transactions brokered by ticketing systems through the database which is accessible for two sides. By visiting an event, end customers establish a direct transaction between themselves and the promoter.
- (88) The ticketing system offers a “matching process“ for the advance booking offices in which they use the platform for selecting events which may fulfil the very specific preferences of an end customer (“matching“) from relatively heterogeneous offers.⁵¹ A sufficient number of members of both user groups have to be connected to the system for the platform to effectively provide agency services as its product. This is because the system offers the promoters a network of advance booking offices (and their end customers) which is only possible if a sufficiently large network of advance booking offices has already been connected to it. While advance booking offices are offered access to tickets for individual events, these will only be available once the promoter enters a sufficiently large number of events into the system.⁵²
- (89) If CTS, as the notifying party, believes that, due to the fact that the end customers are the only party acquiring tickets, the ticketing system’s product (from the promoters’ point of view) is not about a “matching” process between the promoters and the advance booking offices, it fails to recognise the significance of the advance booking offices acting as intermediaries. According to their own statement, advance booking offices are a means to an end and their access to end customers makes them significant to the promoters.⁵³ However, this is the very purpose of transaction platforms, and they are upstream of the end customer level from the advance booking offices' point of view for precisely this reason (so-called Business-to-Business Platform (B2B)).

⁵⁰ Government reasoning to 9th amendment to the Act against Restraints of Competition, Bundestag printed paper 18/10207, p. 49 For a definition of platform in detail, refer to working paper p. 8 ff.;

⁵¹ For details on so-called matching platforms see. working paper, p. 23 ff.

⁵² For indirect network effects cf. working paper, p. 9 ff.

⁵³ [...]

Advance booking offices cannot be excluded from the analysis of the multi-sided market as they have access to the end customer. As can be assumed in the case of agency service markets including commercial agencies, the advance booking offices' point of view will reflect the end customers' perspective as well as their own business-related selection criteria.

- (90) CTS's point⁵⁴ that, from a customer's perspective, ticketing systems differ from "typical" matching platforms like real estate, dating and booking portals, is therefore correct to the extent that ticketing systems are B2B platforms rather than end customer portals and can thus be compared to travel or flight booking systems used by travel agencies.⁵⁵ In the context of multi-sided markets, "matching" is defined by the Bundeskartellamt as the core product imperatively requiring a critical mass on both sides of the market rather than as a mere "search-compare-book" process.

(bb) Indirect network effects

- (91) Mutually positive indirect network effects which are typical of so-called matching platforms exist between the user groups of the promoters and the advance booking offices. Indirect network effects exist where the benefit or gain of users in one group depends on the number of users from another group. Looking at the effects, it has to be differentiated between cases where the members of one user group benefit whenever the membership of the other group on the platform increases (positive network effects), and cases where they benefit whenever the other group's membership is smaller (negative network effects).⁵⁶
- (92) The higher the increase in connected advance booking offices, the more attractive a ticketing system becomes for the user group of promoters, because the possibility of sufficient ticket sales to end customers increases with a growing number of connected advance booking offices. The benefits advance booking offices derive from ticketing systems increase with the number of promoters and events entered into the system as they may offer a wider selection of tickets to end customers, which enhances the chances of bookings. The attractiveness of ticket offers is also relevant. Similar portfolio effects for a large and attractive selection exist in addition to network effects.
- (93) Again, the focus is not just possible indirect network effects between promoters and end customers, as held by CTS. The end customer level is downstream of the advance booking offices, which

⁵⁴ [...]

⁵⁵ cf. e.g. European Commission, decision of 21/08/2007, Ref. COMP/M.4523 – *Travelport/Worldspan* on the "Galileo" travel booking system.

⁵⁶ Cf. working paper, p. 9 f.

again represent the crucial user group. This is a direct consequence of the promoters' perspective that CTS considers decisive, too.⁵⁷ From the Bundeskartellamt's investigations of the promoters and from the services which have been outlined above and which are described in the contracts governing the connection to the system it has become clear that the promoters are particularly interested in the specific network of connected (external or system-owned) stationary and online box offices when purchasing ticketing system services. The larger and the more attractive the sales point network is, the higher the benefits of the ticketing system for the promoters. Advance booking offices rate a system's attractiveness by the number of attractive events it has to offer. Again, these facts have been proven by investigations and are not mere assumptions, as held by CTS.⁵⁸

- (94) Indirect network effects between promoters and end customers cannot be ruled out, but these will result from the advance booking offices' services. As a matter of fact the advance booking offices themselves could also have platform functions; however, these would take effect at the downstream level.⁵⁹ Nonetheless, ticketing system services will still be considered as a B2B platform.

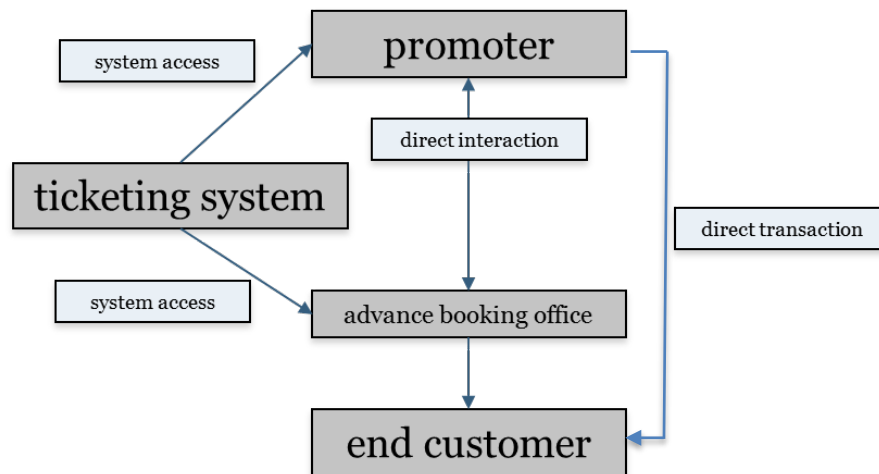
(cc) Direct transactions

- (95) From the Bundeskartellamt's point of view, another essential element of the definition of a multi-sided market is that its function is to facilitate direct interaction between user groups. The interaction may take many forms, especially – as is the case here – a direct transaction (so-called matching platform with transaction – transaction platforms).
- (96) The ticketing systems enable a direct transaction between promoters and end customers through the connected advance booking offices. At this point, end customers are involved in the platform as it is a means for them to request access to promoters with the aim to achieve direct interaction with them. By purchasing the ticket, the end customer obtains direct rights towards the promoter. CTS agrees with this view. At the same time, the advance booking office's direct access to the events as obtained through a booking process can also be considered a direct interaction with the promoters. Graphically, this may be simplified as follows:

⁵⁷ [...]

⁵⁸ [...]

⁵⁹ There are many practical examples of agents using a platform. Real estate platforms, for instance, are often used by real estate agents, who act on behalf of further third parties.

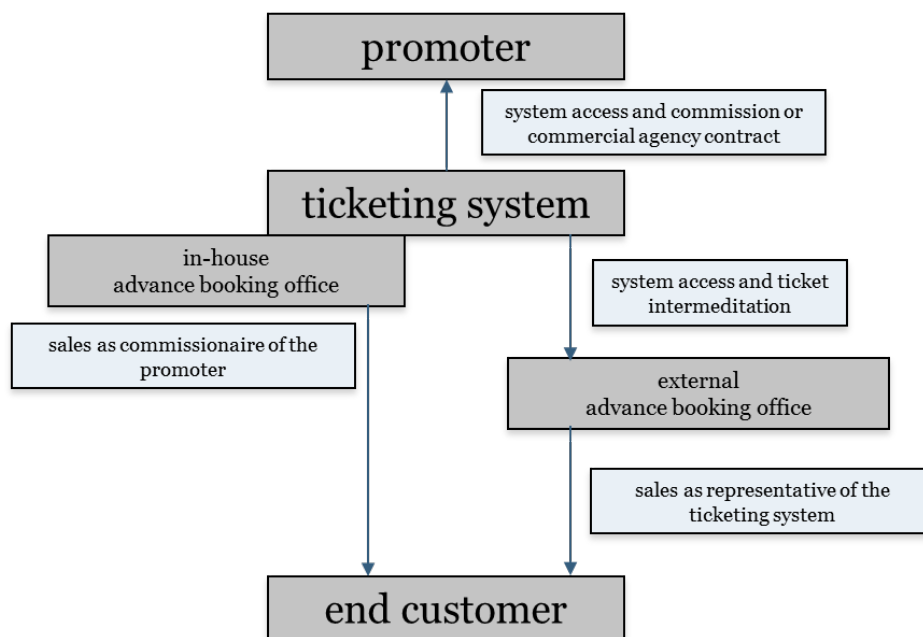


(b) Importance of the agent function

- (97) The agreement of a commercial agent or a commissionaire relationship pursuant to the German Commercial Code (HGB) between CTS and the promoters does not rule out the possibility that a multi-sided market exists.
- (98) However, the concept of multi-sided markets has to be differentiated from that of traditional wholesale and retail relationships, which also involve multiple market relations but which are considered to be upstream or downstream market levels. From the Bundeskartellamt's point of view, the element of direct interaction or transaction is useful for the differentiation between these and traditional wholesale and retail markets.⁶⁰
- (99) A reseller buys a product from a producer and then sells it to the consumer. There is no direct transaction between producer and consumer; instead, the reseller has the sole control over strategic transaction variables and has to cover the sales risk. The market concerns the commercial product, whereas the activities of the platform are limited to facilitating and brokering a direct transaction between the platform sites without the platform actually participating in the transaction.⁶¹ Whether the transaction is processed through a direct booking option on the platform or outside of the platform is not relevant in this regard.⁶²

⁶⁰ Working paper, p. 15 f.
⁶¹ Cf. Hagiu/Wright, loc.cit., p. 164
⁶² Working paper, p. 25 f.

- (100) Hence, the commercial activity differs substantially compared to multi-sided markets: According to its market function, the platform presents itself as a supplier of intermediation services to both sides, while the reseller as a buyer on the upstream market level procures the transaction product himself, and is thus a customer, and then offers the transaction product as a supplier on a downstream market level. This differentiation is relevant, particularly in the context of a market dominance test, as the assessment of buyer power, which is based on threat points and assumed to exist already at a relatively low market share⁶³, differs considerably from the phenomena and threats associated with supply power and the issue commonly referred to as “tipping problem”.
- (101) In case of ticketing system services for promoters, there is a significant overlap of platform and distribution activities. According to the above description of the ticketing systems’ scope of service, most ticketing system providers, particularly CTS, are more than just providers of system access to both sides of the market enabling them to establish contacts between end customers of the network of sales points and the promoters. Initially, all ticketing systems also fulfil a ticket distribution function on behalf of a promoter with their own connected online shops. As such, all ticketing system providers act as sellers for the promoters, which is also stipulated in all contracts with promoters. In addition to that, CTS in particular is charged with selling tickets via external advance booking offices and insofar acts as a commercial agent or commissionaire on the basis of the agreements with promoters. Please find a graphic illustration of CTS’s activities below:



⁶³ Cf. Commission decision of 3/2/1999, COMP IV/M.1221 - *REWE/Meinl*, para. 98ff, particularly 101; at 22% market share; Commission decision of 3/2/1999 COMP IV/M.1221 - “*Carre-four/Pro-modes*”; BKartA decision of 31/3/2015 - B2-96/14 - *Edeka/Tengelmann*, para. 639:

- (102) Classifying the contracts between CTS and promoters as commercial agent or commissionaire contracts does not rule out an evaluation as multi-sided market, in particular when it comes to assessing market dominance (pursuant to Section 18(3a) GWB).
- (103) However, commercial agents and commissionaires are part of the transaction insofar as they sell the transaction product to end customers in the interests of the principal. The typical (“genuine”) agent (or commissionaire), however, has no control over the essential transaction variables and bears no essential transaction risks. The services of an agent (or an equivalent agency relationship), in which the agent also acts as a provider in relation to the principal (the “agency service relationship”), thus show characteristics similar to a multi-sided market. While the agent may act on behalf of the principal and offer his agency and marketing services (for a fee), he is also in contact with the customer of the transaction, with whom he concludes the transaction agreement, either as a representative of the principal or legally as contractual partner, while acting on the account of the principal. The transaction is thus processed legally or economically (“on account of”) directly with the principal for each contractual type of agency relationship. While the agency relationship is not necessarily characterised by indirect network effects, the existence of such effects is not excluded. Thus, the agreement of an agency relationship and the distribution function of the platform do not exclude the existence of a multi-sided market for the purpose of an assessment of market power. However, the central element of indirect network effect exists and has to be taken into particular consideration when assessing market power.
- (104) The technical involvement in the transaction alone does not make any transaction platform facilitating a booking of the transaction an agent. It can only be assumed that a platform acts as an agent if its participation in the transaction can also be considered as “selling“ the product on behalf of its provider. The Bundeskartellamt holds that all circumstances of the case, including the purpose of the contractual agreements between the platforms and the provider of the transaction product, have to be considered. A commercial agent’s sales activities are marked by his negotiation and/or conclusion of the contracts.⁶⁴ His participation in the negotiation and conclusion of a transaction contract are, from the Bundeskartellamt’s point of view, significant for distinguishing (technical) platform activities from sales activities on behalf of one side of a platform.

⁶⁴ Cf. Article 1(2) of Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC): “For the purposes of this Directive, ‘commercial agent’ shall mean a self-employed intermediary who has continuing **authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the ‘principal’, or to negotiate and conclude such transactions** on behalf of and in the name of that principal.” (emphasis added), OJ 31/12/1986, L 382/17.

- (105) In this case, CTS can clearly be assessed as an “agent” or as a commissionaire in an equivalent position. Most of the services of the EVENTIM.NET ticketing system have the purpose of selling events in the form of tickets to the end customer via downstream in-house or external advance booking offices, acting as a commissionaire for the promoter. Despite the considerable fixed connection charges, the technical connection to the system, which is offered and charged together with the ticketing system services, is not the main aspect to consider, but rather constitutes the basis for sales activities.⁶⁵
- (106) The Bundeskartellamt holds that in the present case, the decisive element to be considered is the express agreement of a commissionaire relationship according to Section 383 or an agency relationship according to Section 84 of the German Commercial Code (HGB). While the designation of the contractual relationship is not decisive, such a relationship is intended by the parties, also under substantive terms, with regard to the legal consequences linked to the sales purpose of the ticketing system for the promoters.

(3) CTS is not considered a customer for the purposes of assessing market power

- (107) When assessing market power, the classification of CTS as an agent for promoters does not make the company a customer in this case and thus the principles of buyer power are not to be applied. As far as the assessment of market dominance is concerned, CTS remains, in the present case, in an agency service relationship with the principal, fulfilling the market function of a provider of agency services. This does not exclude that the ticketing system may legally be treated as a customer for the purpose of applying the VBER and for the competition restraints agreed upon with the principal at the expense of advance booking offices or end customers (Article 1(1 h) VBER).⁶⁶ Both the assessment of market power and the exclusivity agreed upon with the promoters refer to the agency service relationship only. CTS remains provider for the advance booking offices in any case. At this stage, it does not need to be assessed whether CTS is to be classified as a customer according to Article 1(1 h) VBER due to the distribution of risks and despite the far-reaching exclusion of liability described above.

⁶⁵ Cf. Article 1(1h) of the VBER: “Company **selling** goods or services on account of another company (emphasis added); Commission, Guidelines on Vertical Restraints, OJ of 19/5/2010, C130/1, para 12ff (hereinafter: **Vertical Guidelines**), on the definition of agency agreements within the scope of Article 101(3) TFEU.

⁶⁶ Cf. European Commission's Vertical Guidelines, para 21: An agency agreement may also fall within the scope of Article 101 TFEU if the commercial agent bears considerable risks. According to Article 1(1h) VBER a “customer” is also a company selling goods or services on the account of another company on the basis of Article 101(1) TFEU.

- (108) According to the prevailing opinion in the legal literature and to the European jurisdiction, two different markets have to be distinguished when assessing the activities of an agent: On the one hand, there is the market on which the agent offers his agency services to potential principals, and on the other hand, there is the market on which he offers the principal's goods or services to potential customers.⁶⁷ So whenever restrictions of the relationship with the principal are concerned, the agent remains a supplier of agency services according to all views represented. More particularly, it is not relevant in this regard whether the commercial agent is a "non-genuine" agent, because he assumes market or product-specific risks and thus has to be considered a customer when examining restraints of competition on the downstream market level.
- (109) Classifying ticketing system services in this case as an agency service for promoters leads to a market definition based on a user group of promoters on the one hand and on a user group of advance booking offices on the other hand.
- (110) Generally speaking, it is obvious, with a view to the system connection services offered by the ticketing systems and the positive indirect network effects, that the product of the ticketing system itself is only operational if both sides, including external advance booking offices, are sufficiently connected to the system. For such matching platforms, a uniform platform market can be assumed according to the Bundeskartellamt's practice.⁶⁸ However, the separate consideration of market sides is necessary for agency relationships with a view to separate consideration of the agency service relationship. Additionally, a uniform market definition would rule out the classification of the market sides as a vertical chain according to Article 1 (1) of the VBER.⁶⁹

⁶⁷ Indisputable, cf. ECJ of 11/9/2008 case C-279/06 para 41 - *CEPSA*; ECJ of 16/12/1975 case C-40/173 para 478-483 – *Suiker Unie*; ECJ of 1/10/1987 case 243/83 para 44f. – *Binon*; ECJ of 1/10/1987, case 311/85, para 20 – *Flemish Travel Agents*; opinions stated by Kokott of 13/6/2006, C-217/05, para 44, 46 - *CEPSA*; Commission, Vertical Guidelines, OJ. C 130/1 of 19/5/2010, para 19; Kirchhoff, in: Wiedemann, Handbuch Kartellrecht, 3rd edition 2016, Section 11 para 23, Emmerich, in: Immenga/Mestmäcker, EU-Wettbewerbsrecht, 5th edition 2012, Article 101, para 186; Schultze/Pautke/Wagener, Vertikal-GVO 2011, Section 1 section 1 h), para 274.

⁶⁸ Working paper, p. 31 f.

⁶⁹ Working paper, p. 31 f.

bb) Market for ticketing system services for promoters (agency service relationship)

(111) The agency service relationship between CTS and the promoters can be allocated to the national market for ticketing system services for promoters.

(1) Definition of the product market

(112) All actual alternative ticketing systems have to be included in the market of ticketing system services for promoters, even if they primarily offer a technical system connection rather than acting as commercial agents or commissionaires (see a). Services to enable direct selling as well as direct distribution services offered by web shops or stationary advance booking offices shall not be included (see b). Finally, the market for ticketing system services is not to be defined according to event genre as it comprises tickets for all types of events (see c).

(a) Consideration of alternative ticketing systems

(113) Despite the fact that there is sometimes a considerably clearer focus on technical services, alternative ticketing systems need to be considered from the customers' point of view with regard to their characteristics, designated usages and price structures.

(114) Whether, based on the circumstances and contract purposes, alternative ticketing systems are to be seen as distribution service providers or combined agents via in-house advance booking offices, technical platform work for promoters and other advance booking offices, can be left open as the specific requirements of the promoters do not define whether the ticketing system has to focus on technical services or sales support for the promoters. When using either constellation, the promoter intends to cover the major distribution channels through a service bundle having similar components and a similar pricing policy, which in this case is mostly transaction-based. Promoters consider it a key feature of ticketing systems that they provide access to the main distribution channels of both stationary advance booking offices and the internet. Like CTS, alternative ticketing systems offer (normally in-house) online shops and stationary advance booking offices as their main distribution channels. From the promoters' point of view, it does not make a considerable difference in terms of quality whether the ticketing system itself actively distributes tickets or whether they merely act as agents within the distribution network. Alternative ticketing systems consider themselves direct competitors of EVENTIM.NET, according to the investigations.

(b) No substitutability with direct selling solutions

- (115) From the promoters' point of view, direct selling solutions based on in-house software and offers by so-called white-label providers are no substitutes for ticketing system services.
- (116) Contrary to the view held by CTS, in-house software solutions are no substitute for ticketing system services based on their characteristics, purpose and price. The software licensing is, firstly, of purely technical nature and does not comprise sales or agency services.
- (117) Such software is especially relevant for promoters whose direct sales solution has to fulfil complex functions. This includes e.g. the creation of changing seating plans, the administration of subscriptions or the integration of other divisions such as accounting. The software thus mostly offers functions supporting the internal processes regarding ticket sales. Unlike ticketing systems, in-house solutions do not outsource ticket sales to ticketing companies or their network of advance booking offices, but rather enable promoters to sell the tickets themselves.
- (118) In-house online shops can be part of in-house software solutions, which can be included in the promoter's website. This offer overlaps with that of so-called white-label providers also offering promoters to set up an in-house online shop; however, they offer fewer functions on top. In-house software solutions or white-label shop solutions with ticket system services therefore cannot be considered a substitute for a ticketing system offering to sell tickets via different sales channels, in particular via stationary advance booking offices and a large sales network.
- (119) Promoters using ticketing systems for the selling of tickets require both a network of stationary advance booking offices and online shops of ticketing system providers which are generally used more often than direct selling solutions. Ticketing service providers need to attract as many potential ticket buyers as possible, as for commercial promoters the events need to be as highly frequented as possible to be profitable, some of them even have to be sold out. For less popular events, visibility is key for ticketing. It is decisive that the tickets be available in popular online shops such as EVENTIM.DE and stationary advance booking offices, in which the event may come to the attention of potential buyers. Only very well-known events or artists may potentially sell out their events successfully solely by distributing tickets through an in-house online shop, as enough customers may specifically search for tickets to this event.⁷⁰ However, this does not justify seeing in-house solutions as part of the ticketing system market.

⁷⁰ Cf. DZ Bank: Media& Entertainment, A research publication of the DZ BANK AG, 2015, p. 15.

- (120) The argument that stationary sales are losing ground to online sales channels would not disprove the preceding conclusion. The 2017 GfK study submitted by CTS does not give reason to expect that, from a promoter's point of view, online sales generated with direct sales solutions could replace ticketing systems in future, as there is no discernible tendency towards customers purchasing via online systems rather than stationary ticket agencies to an extent that would give rise to such expectations.⁷¹ Additionally, said study confirms that besides stationary sales via advance booking offices, which continue to be relevant, especially online distribution by ticketing systems via their online shops is of particular significance.
- (121) The 2017 GfK study handed in by CTS also shows that 30% of all tickets are sold via stationary advance booking offices, regardless of whether sales are effected through selling or third-party sales channels. Nevertheless, advance booking offices require a source of ticket supply. As advance booking offices mostly sell tickets from ticketing systems and rarely act directly on behalf of a promoter without using a ticketing system,⁷² approx. one in three tickets available on the overall event market can exclusively be sold via ticketing systems.
- (122) With regard to the ticketing system services market, which does not include direct selling, the percentage of sales attributed to stationary advance booking offices by far exceeds 30%, also according to the figures published in the GfK study.⁷³
- (123) Additionally, the recent GfK study shows that, while the relative percentage of online sales increased to approx. 40%, the absolute number of tickets sold online remained constant as the ticket volume slightly decreased. The ticketing systems' online shops benefit from this rather than direct online sales by promoters, whose significance has not increased in this period. The share of CTS's own online shops in the total online ticket sale alone has increased from [...] in 2013 to [...] % in 2016.⁷⁴ However, promoters can only access CTS's own online shop by using the CTS ticketing system. This is precisely because the shift in sales preferences towards online sales increases promoters' specific requirements regarding ticketing system services rather than leading to a limited scope of ticketing systems. Compared to direct sales solutions, ticketing systems can thus offer sales opportunities with a considerably wider range of coverage.

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⁷³ According to the 2017 GfK study, [...] % of 5 billion tickets (= [...] billion tickets) are sold via advance booking offices. Assuming that most of these tickets come from ticketing systems and considering the market for ticketing system services as a whole, a volume of [...] billion tickets and thus [...] % are sold via advance booking offices.

⁷⁴ According to the GfK study, it amounted to [...] billion euros in the period under observation from July 2016 to July 2017.

- (124) Similarly, the fact that in-house software products of CTS, eventim.inhouse and eventim.tixx have a technical interface with EVENTIM.NET and may configure optional tickets from the in-house software to the CTS ticketing system through simultaneous connection, may not lead to an integration of the solutions into the system market. The use of the ticketing system is subject to a separate contract and fees. Only those supplemental agreements may be categorised to the market of ticketing system services.
- (125) Contrary to CTS's view, there are no other significant common features between in-house software and the service bundle of ticketing system services that would support a uniform market definition.⁷⁵ In view of the different service scope, it is not essential that, ultimately, both direct and third-party sales solutions serve to sell tickets to end customers and are used for nearly all event genres. Promoters' parallel usage of direct and third-party sales solutions does not prove that the markets were to be summarised. On the contrary, a large share of direct sales, as encountered with some promoters, supplemented by third-party sales solutions indicates that it is not possible to sell out events without using ticketing systems. Promoters require complementary and thus separate ticketing system services due to their larger scope.
- (126) CTS's claim that there is no clear separation of direct and third-party sales and separate markets could not be clearly defined, is therefore not correct.⁷⁶ Instead, the scope of services stipulated in the contracts and the different cost structures are adequate definition criteria. During the proceedings CTS was able to give duly precise information about both sectors.
- (127) Another position which could not be upheld with regard to direct sales solutions was that the services provided by ticketing systems could be replaced by a package consisting of direct sales software, online marketing investments and scope generators for increased visibility of the events. By replacing a product by a bundle of services from various suppliers, the individual services do not become a uniform ticketing system services market. They could merely be considered as competition from substitutes. In the present case it cannot be assumed that online marketing and scope generators are equivalent in the market for the operators as far as the scope they generate compared to the connected booking offices of a ticketing system is concerned. This can also be seen in the [...] considerably lower costs of direct sales solutions, which shows a clearly reduced offered range of services.

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⁷⁶ [...]

- (128) Ticketing system services are, for the same reasons, no substitutes for operators' direct connection to pure online portals or individual advance booking offices. In both cases, the promoter does not have a sales network, or he would have to conclude individual contracts with each booking office he wants to do business with, which is only possible to a limited extent. As far as stationary advance booking offices are concerned, the scope which can be obtained by doing direct business with individual booking offices is nowhere near the scope obtained with ticketing systems. Neither are online portals offering sales opportunities beyond regional boundaries a possible substitute for ticketing systems as they do not offer the distribution channel of advance booking offices, which has to be involved for selling out most events. While online portals may increase the visibility to a certain extent, they cannot substitute the distribution channel of stationary advance booking offices due to the end customers' behaviour described above. Solely using an online portal and direct online sales as an alternative distribution channel can only be a viable option for very attractive events. If demand clearly exceeds ticket supply, customers for such events often actively look for tickets, so that selling tickets via an online shop only can be sufficient to sell out the event.
- (129) Direct ticket sales by promoters as such are not considered a market performance at the level of the ticketing systems. A "ticket sales market" defined according to these criteria, which CTS considers decisive, ignores the various market levels on which tickets are sold.
- (130) As has been shown, ticketing systems are an upstream distribution service to the advance booking service from the end customers' perspective. Direct sales of individual events are rather part of advance booking markets at end customer level.⁷⁷ The only aspect that could be considered in terms of direct sales opportunities towards ticketing system providers is buyer power, which also does not apply in this case. In relation to ticketing system providers, direct distribution rather fulfils a complementary function and may only replace a system in some exceptional cases.

(c) No segmentation by event genre

- (131) The ticketing system services market comprises tickets for all types of events rather than being segmented by event genres.
- (132) Essentially, as the system functions are the same in any case, the type of event is irrelevant for the provision of agency services. Ticketing system providers generally seek to offer a wide portfolio of different event genres. The portfolio effect may be seen as an advantage of ticketing systems which are used by a promoter on the one hand and advance booking offices on the other

⁷⁷ Cf. Federal Court of Justice decision of 26 Jan. 2016 – KVR 11/15 – para 30 f. – *Merck*, (juris).

hand. Advance booking offices offer a particularly wide range of events to end customers, which is what end customers expect when using either an advance booking office or an online shop. Ticketing systems are “diversified” only in terms of the region some providers specialise in.⁷⁸

- (133) Segmentation is not achieved by the fact that tickets to certain events are either not available in ticketing systems at all or only to a certain extent. Tickets to live entertainment events (rock/pop, classical music/opera/theatre, comedy shows, musicals, other live entertainment events) are by far the most frequently sold ticket type via ticketing systems, while sports and other events are less significant. The rock/pop segment is the most important live entertainment segment.⁷⁹ This, however, reflects the demand for a wide and extensive sales network, especially for the listed events. Nevertheless, the sales procedure via ticketing systems is the same for each genre; only the significance of events depends on the type of promoter.
- (134) Ticketing system services are only used in exceptional cases for low-price events (cinema etc.) as the costs for distribution of such tickets are too high. Event tickets not expected to sell out (e.g. zoo visits) are also rarely distributed through ticketing systems, as the end customer usually purchases the tickets upon entry. Ticketing systems are not particularly relevant for sports events (anymore), especially not for Bundesliga football events, as these tickets mostly sell via in-house online shops and individual stationary advance booking offices in the cities. Among other factors, this is because the clubs want a comprehensive Customer Relationship Management/CRM and their fans’ customer loyalty is an important economic factor for them. Most theatres sell their tickets as subscriptions using their own sales infrastructure or their box office and rarely use ticketing systems.
- (135) It can thus be assumed that there is a demand for a wide distribution range via the main sales channels internet and stationary advance booking offices for all events in ticketing systems which cannot be covered by other ticketing solutions.

(2) Definition of the geographic market

- (136) The geographic market for ticketing systems is to be defined as a Germany-wide market. Similar to the relevant product market definition, the geographic market is defined according to the customers’ options to switch in his geographic area.

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- (137) Although promoters normally want to use a sales network in the region where the event takes place, a Germany-wide market definition is appropriate. Events normally have a regional catchment area where most tickets are sold. Examples of this include the regional positioning of ticketing systems like München Ticket in Munich or easy ticket in Stuttgart. Often serving varying regions, promoters require ticketing systems which provide a nationwide sales network and have shifting regional requirements, for example when offering several concerts from a tour.
- (138) CTS and its most important competitors Reservix/AdTicket and Ticketmaster are active nationwide with their ticketing systems. The regional scope refers to stationary advance booking offices only. All ticket system providers operate their own online shop to offer tickets nationwide.
- (139) As it does not influence the competitive assessment, it can be left open whether ticketing systems with a regionally limited network of stationary advance booking offices have to be attributed to the nationwide market for ticketing system services for promoters or not.

cc) Ticketing system services market for advance booking offices

- (140) The affected market is the German ticketing system services market for advance booking offices, on which CTS operates with EVENTIM.NET. From the perspective of the advance booking offices, the definition of the ticketing services market is basically the same as for promoters in terms of products and geographic aspects.

(1) Definition of the product market

- (141) The service contents of ticketing system services for advance booking offices coincide in general with those for the promoter, according to the contractual agreement, especially in terms of the connection to the system. As far as the ticketing system's agency function between the promoter and the advance booking offices and their customers is concerned, it can be assumed that the advanced booking offices and the promoters have mostly the same requirements when connected to a ticketing system.
- (142) Advance booking offices obtain access to the CTS system through an agency contract stipulating that the advance booking office sells tickets to end customers on behalf and account of CTS so that the element of sales to promoters is passed on to the advance booking office. The market for ticketing system services for advance booking offices has to be considered separately as a downstream market.

- (143) The alternative ticketing systems are part of the relevant product market, also when it comes to their relationship to the advance booking offices. Alternative ticketing systems can be included in the market for ticketing system services for advance booking offices, even if they are merely granted the power of representation of promoters. The requirements of both advance booking offices and promoters are met regardless.
- (144) The Bundeskartellamt holds that ticketing systems not charging fees from the advance booking offices also have to be included in the market. The platform is designed in a way that ticketing system services on both sides of the platform can be considered market services according to Section 18 (2a) GWB, even if no fees are paid on one side of the platform. There is a close link between the user side of the advance booking offices, which is free of charge, and the user side of the promoters, which is subject to fees. The activities on both sides are, as described, closely linked through indirect network effects for a single profit-making purpose. The product of the ticketing system services as such is only achieved through the connection of both sides.⁸⁰
- (145) However, according to the investigations, it is possible that the CTS system is indispensable for the advance booking offices and thus forms a market of its own. While the investigations have shown that advance booking offices normally use several ticketing systems simultaneously, it is questionable whether this practice represents “multi-homing” on the same market. The advance booking offices normally primarily use CTS rather than using all the different systems to the same extent,⁸¹ with additional systems only being used if the expected remuneration exceeds the costs incurred. Multi-homing thus takes place sequentially, as the connection to the CTS system is required before further connections to other systems take place. Hence, other systems are not a substitute for the CTS system. This form of multi-homing can also define a separate market for the system, in this case CTS, which is primarily used, as the other ticketing systems merely serve rather complementary requirements.⁸² This question can be left open in view of CTS’s strong market position even when including alternative systems.
- (146) Individual direct contracts with promoters are not a substitute for the connection to a ticketing system from the perspective of the advance booking offices. While advance booking offices carry out such activities, the extent to which they do so is considerably lower compared to bookings via

⁸⁰ Cf. legislative intent of the 9th amendment to the GWB, Bundestag printed paper 18/10207, p. 47 f; working paper p. 40 f, loc. cit. Düsseldorf Higher Regional Court, decision of 9 January 2015, ref. VI Kart 1/14 (V), para 43 - HRS, available under http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2015/VI_Kart_1_14_V_Beschluss_20150109.html

⁸¹ [...]

⁸² See Working Paper, p. 70.

ticketing systems. From the advance booking offices' perspective, direct commissioning of promoters cannot substitute the ticketing systems' offer, as they are the ones who bring promoters and advance booking offices together and direct commissioning cannot lead to a comparable offer portfolio of bookable events. Advance booking offices have no other options to sell tickets as they only act as promoters in exceptional cases and only then are able to create bookable tickets themselves.

(2) Definition of the geographic market

- (147) The market for ticketing system services for both advance booking offices and promoters is to be defined as a Germany-wide market.
- (148) However, advance booking offices and promoters alike consider it essential that the ticketing system contain events from their region. It is important for advance booking offices to be connected to a nationwide system in view of promoters' alternating regional requirements. Major ticketing systems offer advance booking offices a connection to their nationwide system. It can be left open to what extent regionally limited systems have to be included in the national market.

b) Market dominance

- (149) CTS has a dominant position in the nationwide ticketing system services market, both on the market side of promoters and of advance booking offices.

aa) Promoters' market for ticketing system services

- (150) On the market for ticketing system services for promoters, CTS has a dominant market position within the meaning of Section 18(1) GWB and article 102 TFEU. For a multi-sided market, the criteria listed in Section 18 (3a) GWB are relevant besides market structure and the current competitors. As has been shown by the Commission's current practice, these criteria are also relevant when it comes to assessing market dominance according to article 102 TFEU.⁸³
- (151) In the present case, significant factors are indirect network effects, economies of scale on the side of CTS, the existing vertical integration, the superior access to data relevant for competition, the promoters' low level of preparedness to change, CTS's dominant position on the adjoining

⁸³ For abuse control by the Commission, decision of 24 March 2004, COMP/C-3/37.792 – *Microsoft*; for merger control Commission, decision of 7 October 2011, case COMP/M. 6281 – *Microsoft/Skype*, para 91, 92; confirmed by EGC, judgment of 11 March 2013, case T-79/12 – *Cisco/Commission*, para 79 ff.; Commission, decision of 21 August 2007, case COMP/M. 4523 – *Travelport/Worldspan*, para 19; Commission, decision of 11 March 2008, case COMP/M. 4731 – *Google/DoubleClick*, para 304 ff.; Commission, decision of 3 October 2014, case COMP/M.7217 – *Facebook/WhatsApp*, para 111.

market for in-house software, as well as the fact that the market power of CTS is neither limited through the possibility of direct sales nor through internet-driven product innovations.

(1) Market structure and competitors

- (152) According to the Bundeskartellamt's investigations, 17 companies operate ticketing systems in Germany. These companies are AD Ticket, which is affiliated with Reservix, Ticketmaster, DTS, München Ticket, FT, easy ticket and further smaller suppliers. Seven of them, however, only have a market share of less than one percent, irrespective of the chosen calculation basis.
- (153) On the basis of sales achieved with external promoters, CTS with its ticketing system EVEN-TIM.NET had a market share of 50-60% in 2016 and thus fulfils the statutory presumption of market dominance under Section 18(4) GWB. CTS's closest competitor is Reservix/AD Ticket with a market share of 10-20%. München Ticket and DTS each have 5-10%. All other competitors, including the international Live Nation group and its Ticketmaster system, have less than 5% of sales-based market share. The market volume is calculated on the bases of fixed and transaction-based fees promoters pay for using the ticketing system.
- (154) The systems being designed as trade and transaction platforms, their significance and success as an agency service compared to its competitors can be deduced from the value of its share in the transaction volume generated through it, just like turnover share. This indicator reflects the indirect network effects on a platform, as it does not only include the turnover generated with promoters, but also the agency services provided by advance booking offices. Contrary to CTS's view,⁸⁴ it seems justified to include CTS's internal sales generated with its own events and advance booking offices, as the in-house contents in the ticketing system and the in-house advance booking offices contribute significantly to indirect network effects. Applying this as the basis for calculation, CTS's market share is 60-70%. CTS's closest competitor Reservix/AdTicket reaches a share of 10-20%, while DTS and Ticketmaster have a market share of 5-10%. The basis for this calculation is the final ticket price including fees for advance booking and other fees determined by the promoter, but excluding fees for supplementary services like shipping.

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Company	Share of turnover with external promoter 2016	Share of transaction volume 2016
CTS	50 - 60%	60 - 70%
CTS + cooperation partners	55 - 75%	65 - 85%
Reservix/ AD Ticket	10 - 20%	10 - 20%
Ticketmaster	0 - 5%	5 - 10%
DTS	5 - 10%	5 - 10%
München Ticket	5 - 10%	0 - 5%
Frankfurt Ticket	0 - 5%	0 - 5%
Others	0 - 5%	0 - 5%
Market volume / Transaction volume	[...] million euros ⁸⁵	[...] billion euros ⁸⁶

- (155) In assessing the market shares it has to be taken into account that regional cooperation partners cannot be considered independent competitors of CTS due to their marketing function. The limitations stipulated in their contracts also indicate otherwise. They are rather competitors which depend on CTS and can thus be influenced. Adding these market shares to CTS, its market share with turnover and transaction-based calculation increases to 55-75% or to 65-85%, respectively.
- (156) It also has to be considered that besides CTS, only Reservix/ AD Ticket and Ticketmaster have a Germany-wide network of advance booking offices.⁸⁷ The remaining providers with their regional advance booking networks exert limited pressure on Germany-wide providers like CTS, as they can only offer to sell tickets outside their sales region via their online channels.
- (157) Reservix/AD Ticket is second to CTS in terms of market shares. However, the company's structure is different, in particular with regard to in-house promoters, and its overall turnover is considerably lower than that of CTS. Comparing the fees for promoters and advance booking offices and the average ticket price, it becomes clear that Reservix/ AD Ticket have positioned themselves in a lower price range than CTS. The average ticket price (including fees for the advance booking office and VAT) in 2016 was approx. [...] in the CTS system than in the Reservix/ AD

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⁸⁷ While one other company does have advance booking offices in all German federal states, their number is much lower and the company's market share is very low.

Ticket system.⁸⁸ The higher ticket price reflects the higher attractiveness of the events offered by CTS and the company's higher significance in the market that goes hand in hand with it. As the systems' online shops are used for selling a large part of the tickets, a higher ticket price leads to higher revenues due to the advanced booking fees which depend on the ticket price. The ticket price is therefore an indicator of the differences existing between the respective revenue opportunities of CTS and Reservix/ AD Ticket.

- (158) As the only other provider apart from CTS group, Ticketmaster has intra-group relationships with important promoters as a member of the international Live Nation Entertainment Inc group. In 2016 the average ticket price was [...], as for CTS. Ticketmaster has been operating in Germany since 2011. While it operates the leading ticketing system in Great Britain, the USA, and other places, its importance in Germany is still marginal. When the promoter Marek Lieberberg switched from CTS to the Live Nation subsidiary, Frankfurt-based Live Nation GmbH, which entered the German market late in 2015, this market position hardly changed at all.
- (159) It is not expected that the ticketing for Live Nation events completely moves from the CTS to the ticket master system in the forecast period. [...]. Almost all Live Nation events are currently also sold via the CTS system. A comparison of Live Nation's German website with EVENTIM.DE shows that 98% of the events of Live Nation remain bookable through EVENTIM.DE in Germany. Due to [...], Live Nation currently has little motivation to shift its ticket sales completely to its own Ticketmaster system.⁸⁹ Even if sales were completely shifted towards the Ticketmaster system, it would not change CTS's ticketing system market position significantly, as the total number of Live Nation events in Germany is not sufficient. In addition to that, there are considerable quality differences between the Ticketmaster and the CTS systems, and Ticketmaster clearly has less advance booking offices and online shop users.⁹⁰
- (160) CTS's market shares have been stable in the last few years with increasing market volumes. The market volume regarding turnover achieved with promoters increased by approx. 5% between 2014 and 2016, while the value of tickets sold increased by approx. 15% in the same period.

(2) Criteria pursuant to Section 18(3a) GWB

- (161) As was outlined above, ticketing system services form a multi-sided market within the meaning of Section 18(3a) GWB, and thus the additional criteria of Section 18(3a) GWB have to be examined when assessing market power. These factors set the focus on special characteristics of multi-

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sided markets. While generally irrelevant in unilateral markets, these characteristics constitute additional elements of market power and have to be considered when assessing market power in this case. They also specify the factors listed in Section 18(3) GWB, in particular with regard to market entry barriers. The factors listed also describe the threat of monopolisation through “tip-ping” which exists in multi-sided markets and networks in certain cases and was identified by the economists *Evans/Schmalensee*.⁹¹

(162) Taking this as a basis for its reasoning, the Bundeskartellamt holds that all circumstances which have been considered significant for multi-sided markets and networks have to be considered. Furthermore, an overall view of all relevant circumstances is required. While none of the mentioned criteria is in itself an indicator of market dominance, market dominance cannot be ruled out when one of the criteria is not met.⁹²

(a) Mutually positive indirect network effects, Section 18(3a), No. 1 GWB

(163) In the present case, an indication of market dominance could be the existing market share lead and the resulting indirect network effects between promoters connected to EVENTIM.NET, the advance booking offices which have access to their events and the end customers who use the advance booking offices. These indirect network effects have a significant lock-in effect on both user groups of the CTS system which clearly makes it more difficult to switch to competing platforms and constitutes a massive market entry barrier.

(164) Indirect network effects exist whenever benefit or gain of users in one group depends on the number of users in another group. Positive network effects exist when users of one group benefit from a large representation of another group on the platform, whereas negative network effects exist when they benefit from a small representation of the other group on the platform. Indirect network effects are mutual if members of group A directly or indirectly benefit from a larger representation of their group on the platform, and group B has an incentive to grow as a result.⁹³

(165) Mutually positive (indirect) network effects can result in self-reinforcing feedback loops as the growth of one user group can be an incentive for the other user group to grow, which then leads to further growth of the first user group. The number of products offered on the platform is signifi-

⁹¹ Legislative intent of the 9th amendment to the Act against Restraints of Competition, Bundestag printed paper 18/10207, p. 50., *Evans/Schmalensee* “The Industrial Organization of Markets with Two-sided Platforms”, *Competition Policy International*, 2007, Vol.3, p. 164, working paper p. 50, 54.

⁹² Cf. working paper p. 54ff.

⁹³ Cf. working paper p. 9 f.

cant for network effects of transaction platforms like in the present case. In extreme cases, self-reinforcing feedback effects can lead to what is referred to as “market tipping”, i.e. a monopolisation of the market.⁹⁴

- (166) Furthermore, mutual or bilateral indirect network effects as such form quite a significant market entry barrier, as the platform provider has to bring both sides on board at the same time and with a sufficiently large volume to be able to enter the market with a transaction product, which would otherwise not exist. The benefits of the platform for each side, however, depend on how many users or offers exist on the other side. There is a 'chicken or egg problem'.⁹⁵ Due to the indirect network effects, the leading platform can also provide superior benefits which competitors cannot make up for, so customers will be unwilling to change to a new platform.
- (167) As a transaction platform, a ticketing system typically shows two-sided positive indirect network effects. Promoters, as outlined above, aim at selling a maximum number of tickets, so they would like to see a growing number of connected advance booking offices allowing them to reach more potential customers. The benefits for advance booking offices of ticketing systems increase with the number of promoters and events entered into the system, as they may offer a wider selection of tickets to end customers which enhances the chances of bookings. The attractiveness of the ticket offers is also significant. Portfolio effects of a big and attractive choice of tickets therefore add to that.
- (168) It can be left open whether pronounced indirect network effects between end customers and promoters exist or not, as held by CTS,⁹⁶ because the advance booking offices, which are the only direct users, have access to the end customer. Contrary to CTS's view, the considerations of positive indirect network effects apply in a similar way to the group of end customers booking event tickets via the booking offices connected to the ticketing system. The question whether end customers definitely intend to buy tickets when visiting the online ticket shop or just use the search function is not relevant in this regard, as they visit the ticketing system's online shop, particularly EVENTIM.DE, expecting to find the tickets they are looking for. The wider its portfolio of offered events, the more likely a ticketing system is to meet customers' expectations. Contrary to CTS's view, such a portfolio effect has nothing to do with defining a portfolio market.⁹⁷ Instead, a com-

⁹⁴ For market tipping see working paper, p. 50 ff.

⁹⁵ Cf. working paper, p. 51; *Online-Dating-Plattformen*, B6-57/15 available (in German) on www.bund-deskartellamt.bund.de.

⁹⁶ [...]

⁹⁷ [...]

prehensive portfolio has to be examined as a factor of market power in the assessment of market dominance under Section 18(3), No. 3 GWB.⁹⁸ This characteristic is also relevant when looking at multi-sided markets combined with indirect network effects.

- (169) It can be left open whether market tipping is imminent or has started already due to mutual growth incentives. In any case, the indirect network effects existing in the present case are a massive barrier to entry and cause considerable lock-in effects for users on both sides. CTS as the largest ticketing system, which has many users on the different sides, is more attractive to the relevant customer groups than its competitors who have fewer users. Considering the sales platform function of a ticketing system, its portfolio (“content”) and attractiveness are significant, apart from the number of users.⁹⁹ EVENTIM.NET has a considerably larger number of attractive promoters in the upper price range than its competitors, particularly Reservix/AD Ticket, which can also be seen in the turnover-based transaction share of CTS. This is also reflected by the comparatively high average ticket price. Moreover, the promoters doing business with CTS are large compared to other ticketing systems, so that significantly more tickets are brokered per active customer each year than in other systems.¹⁰⁰
- (170) As a ticketing system provider, CTS is also vertically integrated to a considerable extent on the promoter side. The vertical integration of attractive events is a significant contributor to network effects, binding further considerable ticket quotas to the CTS system. The CTS group comprises several tour and festival organisers and local promoters which the company acquired in recent years (cf. A III.3 above).
- (171) The market position of CTS’s ticketing system is directly strengthened by the company’s own promoters. The ticket quotas brokered for these promoters thus ensure a minimum sales level of the CTS ticketing system and constitute a content basis which competitors cannot access. Approx. [...] million tickets were sold for concerts and festivals of CTS promoters in 2016. A large part of these tickets worth [...] million euros had been placed in the CTS system.¹⁰¹ These tickets are either sold by CTS subsidiaries acting as tour or festival organisers, which were sometimes placed in the CTS system by contracted local promoters from outside the CTS group, or tickets

⁹⁸ Cf. Bardong, in: Langen/Bunte, 12th ed. 2014 Section 18 para 112 mentioning the court of appeals of 7 November 1985, WuW/E Higher Regional Court 3759, 3761 – Pillsbury/Sonnen-Bassermann.

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by third parties which CTS placed in the system acting as a local promoter. The total value of tickets directly placed in the CTS network by the promoters of the CTS group is [...] million euros, which is equivalent to approx. 10-15 % of the overall value of the transaction volume in 2016.

- (172) Advance booking offices base their decision on whether to connect to a ticketing system on the available content. In-house promoters thus increase the system's attractiveness for other promoters due to indirect network effects. This is a significant contribution of internal promoters (and venues) to CTS's market position.
- (173) Approximately 1,500 - 2,000 advance booking office sites are connected to the CTS system, plus major travel agencies with up to [...] sites in Germany. CTS thus has the largest network of brick-and-mortar advance booking offices of all ticketing systems. While, from a regional perspective, the number of advance booking offices connected to the CTS system is more or less the same as for the company's regional competitors,¹⁰² this does not reduce the special significance of CTS's nationwide advance booking network. Besides the number of advance booking offices, their attractiveness also plays a significant role. Several regional daily newspapers, for instance, are connected to the CTS system as advance booking offices and offer promoters to advertise their events, a service which is brokered by CTS.¹⁰³ Another significant factor is that few ticketing system providers except CTS have a Germany-wide or at least cross-regional network of advance booking offices. These regional ticketing systems can only offer nationwide distribution via their online shops. New promoters and the contents they offer are attracted by the large network of advance booking offices and promoters which are already connected stay with the system because of them. As outlined above, the share of ticket sales achieved with brick-and-mortar advance booking offices, which can only be generated through ticketing systems, continues to be relevant.
- (174) Furthermore, CTS's online shop EVENTIM.DE is a significant element in its considerable level of vertical integration on the market side of advance booking offices. CTS's online shop EVENTIM.DE is a significant part of ticket distribution for promoters, which clearly increases the benefits of the EVENTIM.NET ticketing system. The online distribution channel accounts for at least 40 % of sales [...] of all events and is therefore very significant. Currently, [...] % of tickets in the CTS system are sold via CTS-owned online shops.¹⁰⁴

¹⁰² [...]

¹⁰³ [...]

¹⁰⁴ [...]

- (175) Only in the Ticketmaster system is the relative share of online sales in the total sales of the ticketing system comparable to the CTS system, which is considerably higher than in other systems. Selling via an in-house online shop is extremely lucrative for a ticketing system as the ticketing system does not only receive the commonly charged system fee, but also the net advance booking fee and other fees for supplementary services like shipping and processing fees.
- (176) Looking at online ticket sales via ticketing systems as a whole, the CTS-owned online shops have a very high share of [...] % based on the transaction value. EVENTIM.DE has a particularly large end customer base compared to its competitors and had [...] registered users as early as in 2014 and a high percentage of users who had registered for its “ticket alert”. Competing ticketing system providers, however, have considerably less registered customers and monthly visits in their own online shops. Their online shops are also significantly less frequently accessed directly.¹⁰⁵ The so-called affiliates also contribute to the success of CTS's online shops. Affiliates are online partners which place all or parts of CTS's products on their own websites (e.g. cities' tourism websites). Whenever end customer select an event on their websites, they are directed to CTS's own shop via a link. The booking and settlement with the promoters are effected via CTS's own shop.¹⁰⁶ Online affiliates thus primarily attract (potential) customers to CTS's own online shop.
- (177) Due to its significance, the online shop EVENTIM.DE has an enormous lock-in effect on promoters. When using a ticketing system, promoters attach particular importance to its covering all distribution channels, especially online sales. With its high share in online sales, the benefits of EVENTIM.DE over competing ticketing systems are paramount and cannot be compensated for by competitors. In 2016 [...] % of the value of the ticketing systems' transaction volume including sales via brick-and-mortar ticket agencies was achieved by EVENTIM.DE's online shop alone.
- (178) Contrary to CTS's view, it cannot be assumed that there is competition with regard to the traffic of [...] % registered for CTS's online shop. Competition is not proven to exist by the fact that online traffic [...]. Instead, CTS's own account, which claims that more than [...] % of customers accessed CTS's site directly, is a testament to the high significance of the EVENTIM.DE online shop. The fact that more than [...] % of the customers were directed to the shop via search engines and more than [...] % via other websites does not prove that CTS's competitors could easily redirect [...] % of the traffic achieved with EVENTIM.DE to their own shops. It is rather another indication of customers preferring to click the top search results and select the best known and largest online

¹⁰⁵ [...]
¹⁰⁶ [...]

shop EVENTIM.DE. The visitor figures of CTS's online shop, which CTS presented, are more than [...] higher than that of Ticketmaster and Reservix,¹⁰⁷ and thus another testament to the fact that there is no such level of competition in online traffic.

(179) Customers show little willingness to switch to platforms with lower user numbers, less attractive contents and a limited number of advance booking offices.¹⁰⁸ According to the investigations, many promoters which are customers of CTS fear that if their business relationship were terminated, they would see a decrease in booking numbers which cannot be compensated for by other ticketing systems.¹⁰⁹ Two thirds of the tour organisers questioned in the current survey considered CTS's system indispensable.¹¹⁰ They stated as a reason for this that CTS's system has a scope which is unparalleled by other systems. This group of promoters who are CTS's customers therefore show a low susceptibility to switch supplier. The reliance of advance booking offices on the CTS system increases with an increasing number of promoters relying on the distribution system with its wide scope, as they can only book most of the relevant events via this system.

(b) Limited Multi-homing, Section 18(3a) no. 2 GWB

(180) The massive barrier to market entry and expansion which originates from the indirect network effects is not sufficiently reduced by the opportunity to use several services simultaneously ("multi-homing", Section 18 (3a) no. 2 GWB). Due to the lock-in effect caused by a low willingness of CTS's customers/promoters to switch supplier, competing ticketing systems and systems entering the market only have limited options to win over customers already using the leading system.

(181) In a multi-sided market with two-sided positive indirect network effects, multi-homing is crucial for competition as it considerably reduces the barriers to market entry and thus represents a counterbalance for a market tipping process which could result from two-sided indirect network effects. Where multi-homing prevails, there is a demand for more than one platform on the market. A company entering the market is able to establish a platform without having to convince customers to leave the existing platforms. Furthermore, the growth of some of the platforms does not necessarily lead to other providers losing customers, so they keep their users and have a chance to grow themselves with a view to indirect network effects. Real multi-homing limits concentration on the market.¹¹¹

¹⁰⁷ [...]

¹⁰⁸ [...]

¹⁰⁹ [...]

¹¹⁰ [...]

¹¹¹ Working paper, p. 64.

- (182) In order to reduce market concentration it is imperative, particularly for transaction platforms, that multi-homing takes place on both sides, as agency products like ticketing systems require both sides to be on the same platform (matching platform). If single-homing (i.e. sourcing predominantly via one platform) only takes place on one of the market sides required, it cannot be assumed that market entry barriers are reduced to a relevant extent nor that sufficient countermeasures against tipping are in place.¹¹² Although, generally speaking, each market side represents a separate market, market entry barriers cannot be solely considered for one side. A parallel use of several platforms which effectively limits market power exists where both sides mostly use several platforms simultaneously in order to fulfil their requirements. In the case of transaction platforms, the providers of transaction products offer these on several platforms simultaneously and consistently, while consumers or resellers search several platforms for transaction products. Typically, however, there are various forms of platform use, which all have to be assessed differently when it comes to their effect on market entry barriers.
- (183) In the present case, the promoters' multi-homing activities are limited as there is a lower priority on using competing systems. Advance booking offices merely use so-called sequential multi-homing. These degrees of multi-homing do not adequately reduce the market entry barriers.
- (184) Ticketing systems limit multi-homing opportunities from the outset as the systems lack interoperability so that only pre-defined ticket quotas can be distributed among the different systems. As the number of seats is normally limited in the venues, events cannot be placed in several systems with all available tickets because total ticket sales must be under control. A technical solution to ensure that different ticketing systems can continuously access a promoter's ticket stock in a way that would make quotas obsolete has not been developed yet, and ticketing systems do not seek to develop such a solution. The Bundeskartallamt considers that multi-homing effectively restricting market power in this market could only be assumed to exist if most promoters allocated similar ticket quotas to each ticketing system they use. However, this would be a very complex approach on the market under review, as sales via different platforms would have to be monitored permanently. Asymmetric sales would have to lead to a shift of ticket quotas to other platforms, in particular to CTS's ticketing system, which has the largest number of users.
- (185) The Bundeskartellamt conducted a survey about the use of ticketing systems among a random sample of approx. 200 promoters of various genres¹¹³ taken from the customer lists of ten ticketing systems. Additionally, the lists of customers and events were compared at two reference dates¹¹⁴.

¹¹² Working paper, p. 71f.

¹¹³ [...]

¹¹⁴ [...]

Various matching procedures were used to ensure, among other things, that promoters were clearly and unambiguously identified, even if their name was spelled differently in different systems.

- (186) Insights into user behaviour were gained by this analysis of overlaps in the behaviour of approx. 6,000 promoters. The survey showed that only approx. 10% of the promoters had in fact commissioned more than one ticketing system provider in 2015. The ticket quota issue detailed above is the reason for this “single-homing” form of usage. Commissioning more than one system, and possibly readjusting ticket quotas in the course of the sales process, is considered as too complex by many promoters, particularly by the smaller ones. Larger promoters are more likely to consider quotas, which can also be deduced from the fact that approx. 50% of the ticket volume offered via ticketing systems were accounted for by approx. 10% of customers applying multi-homing.
- (187) There is doubt, however, as to whether 50% of the ticket volume as such can be assessed as “predominant multi-homing”, even if the quotas were evenly distributed among the ticketing systems. It also has to be assumed that promoters who are CTS customers, and who also use systems other than CTS, offer significantly lower ticket quotas in these alternative systems, which can be deduced both from the survey among randomly selected customers and the inquiry with rock/pop tour organisers, which was carried out separately as part of the merger proceedings.
- (188) While promoters of all event genres (including sports and culture associations, theatres, etc.) sold on average approx. 50% of the tickets brokered via ticketing systems through the CTS system, that figure was even higher (approx. 75%) among the tour organisers. The average quotas distributed across competing ticketing systems can thus only be considerably smaller than those allocated to the CTS system. This applies across all genres, but especially to the area of rock/pop tours, which is particularly relevant for ticketing systems.
- (189) The surveys also confirmed the result of the comparison of customer lists according to which the majority of all promoters (across all genres) rarely offered tickets through more than one ticketing system, whereas rock/pop tour promoters mostly used more than one ticketing system per event, which was shown by the investigations in the CTS/FKP Scorpio merger case (B6-53/16).¹¹⁵ However, the CTS system generally has a higher significance for these promoters than for the other groups of promoters and is considered indispensable by most of them, which is shown by the share of tickets sold via the system.¹¹⁶ The type of multi-homing the tour organisers engage in can therefore rather be classified as “sequential multi-homing”, as the system they mainly use is

¹¹⁵ [...]

¹¹⁶ [...]

CTS, merely complemented by other systems. The Bundeskartellamt holds that such a limited form of multi-homing is to be treated like single-homing and that it has no relevant effect of reducing the dominant company's market power.¹¹⁷

- (190) It has not been determined which quotas the promoters allocated to which ticketing systems and how they readjusted them in the sales process, as this would have entailed a considerably higher workload for the respondents. In addition to that, the question of how the quotas are actually allocated is not decisive. CTS's market share, which remained constantly high over a prolonged period, and the evolution of market shares show that the limited multi-homing option, at least in this case, is not sufficient to reduce concentration in the market, and thus does not change CTS's dominant position.
- (191) CTS also restricts promoters' multi-homing options with its practice of concluding exclusivity agreements, which, as was outlined above, are intended to prevent the use of other systems. Apart from these exclusivity agreements, which account for at least 80% of a promoter's annual ticket volume, there are other quota agreements with promoters which ensure that a large part of the total ticket volume is distributed via the CTS system, thus further restricting the promoters' multi-homing options.
- (192) Additionally, the use of multi-homing by advance booking offices can only be described as limited at best. While some advance booking offices simultaneously use several systems,¹¹⁸ it is doubtful that this user behaviour can be considered as multi-homing on the same market, as the investigations have shown that the CTS system is used predominantly and that the advance booking offices depend on their connection to that system.¹¹⁹ Using other platforms to meet other demands on separate markets cannot be classified as multi-homing reducing entry barriers to a relevant extent on this side of the market. This applies in particular if alternative platforms are merely used to complement the main platform. Sequential multi-homing, i.e. the predominant use of the CTS system, also does not constitute a relevant reduction of market entry barriers.
- (193) Additionally, user behaviour directly depends on the behaviour of users on the other side of the market. With many promoters using the CTS system exclusively due to contractual obligations or because they are part of the CTS group, or de facto exclusively due to widespread single-homing, advance booking offices cannot offer end customers a large part of the total event portfolio unless they are connected to the CTS system. The advance booking offices confirmed that CTS offers

¹¹⁷ Cf. Bundeskartellamt, Case summary of 20 April 2015, ref. B6-39/15– *Immowelt/Immonet*, B6-39/15 available under www.bundeskartellamt.de.

¹¹⁸ [...]

¹¹⁹ Cf. Working paper, p. 72.

the largest and most attractive portfolio of events.¹²⁰ Further ticketing systems are therefore rather used to complement CTS and it is very likely that they are only used because the costs of connection to competing systems are either considerably lower or the connection is free of charge.¹²¹

(c) Economies of scale, Section 18(3a) no. 3 GWB

(194) In connection with the indirect network effects it is furthermore to be expected that economies of scale of the CTS system hinder the market entry and the expansion of already existing suppliers in the market. A platform such as a ticketing system regularly shows a cost structure with a comparatively high share of fixed costs and (in many cases rather small) constant variable costs, so that unit costs decrease with increasing output quantity and economies of scale may be realised.¹²² On the one hand, ticketing system services constitute a software product the development of which causes high fixed costs, whereas the costs of providing software to users are relatively low. On the other hand, high fixed costs are to be expected for the build-up of a database, whereas additional transactions within the database hardly cause additional costs. Also, additional users of the system will only cause minor connection costs. The realisation of economies of scale may also be seen as a consequence of indirect network effects. Furthermore, in the present case the combination with exclusivity agreements has to be taken into account, so that market entry of others, possibly even more efficient providers, is made difficult.¹²³ Cost advantages thus further reduce the possibility to catch up with the leading platform CTS. If CTS points out that its own cost structure has [...], no conclusions can be drawn from this as to the cost structure of competitors, in particular newcomers.¹²⁴

(d) Access to competition-related data, § 18(3a) no. 4 GWB

(195) In comparison to its competitors, CTS has a substantial lead in terms of data. This is especially based on the ticket mediation through their own, highly frequented online shop, which allows for substantial data collection. In case of booking, by default the usual customer data is collected (email address, street, house number, postal code, location, country, date of birth (optional), tel-

¹²⁰ [...]

¹²¹ Cf. Bundeskartellamt, Case summary of 20 April 2015, ref. B6-39/15 - *Imowelt/Immonet*, available under www.bundeskartellamt.de.

¹²² See also the research publication of DZ Bank which refers to substantial cost depression effects in the online distribution of ticketing systems (p. 17). This assessment of the cost situation of ticketing systems remains valid even when external stationary advance booking offices are taken into account.

¹²³ Cf. working paper, p. 61 f.

¹²⁴ [...]

ephone, payment details), which are subsequently linked and may be used for marketing purposes and market analysis. CTS uses the data to personally address customers in newsletters and mailings which refer to the same or similar events.¹²⁵ Furthermore, customers may register for a "ticket alert" in order to be informed when tickets for a particular event or artist become available.

- (196) In the case of sales through stationary advance booking offices which are connected to the CTS system, sales data are also collected through the ticketing system. As a general rule, no customer data are collected in this process, but insights may be gained as to the regional and temporal distribution of the demand for particular events.
- (197) On the one hand, the value of the data collected by CTS¹²⁶ is created by the possibility of a targeted customer approach which leads to more ticket bookings. Also with regard to an internal study by CTS [...].¹²⁷ In comparison to other ticketing systems, CTS thus has an essential competitive advantage as promoter customers can be offered a better marketing of their events. Personalised approach of customers by other systems is far less differentiated.
- (198) Apart from improved marketing and customer loyalty, such data may generally also be used for better exploitation of customers' willingness to pay.¹²⁸ In the past, CTS occasionally charged excessive shipment fees for particularly attractive events or charged a print@home fee. It was issued a warning notice by the consumer association North Rhine Westphalia (Verbraucherzentrale NRW) in both instances.¹²⁹
- (199) The obtained data may also be used to the advantage of in-house promoters as the demand for certain events may be better predicted. CTS can thus use the obtained data not only for the purpose of improving its approach to customers or for charging fees to enhance profits, but in general also for the planning and acquisition of events through in-house promoters. The support of in-house promoters does not only constitute a transfer of market power from the system market to the event markets, but also secures the market position on the system markets achieved

¹²⁵ Cf. CTS Eventim's data protection declaration of 2.11.2017: "The information obtained in connection with the purchase of the ticket(s) will also be used to (1) send the user the EVENTIM Newsletter, (2) inform the user about the same or similar future events as those for which the user purchased a ticket..." (Bundeskartellamt unofficial translation) http://www.eventim.de/obj/media/DE-eventim/pdf/datenschutz_eventim_02_11_2017_DE.pdf (last accessed on 30.11.2017).

¹²⁶ For an assessment of user data within the context of market power assessment, cf. also: Working paper, p. 91 ff.

¹²⁷ [...]

¹²⁸ Cf. Working Paper, p. 95.

The appellate court, the Bremen Higher Regional Court, confirmed that the print@home fee as well as an excessively high "premium shipping" rate were unlawful (decision of 15.6.2017, file: 5 U 16/16).

through hedging of in-house content. If CTS rejects this option for using data in view of restrictions imposed by data protection rules,¹³⁰ this does not cover the anonymised use of sales data which are not personal data, but can be used for the purpose mentioned above.

(200) Contrary to the view held by CTS, competing ticketing systems cannot duplicate the data. As their online shops are far less frequented and used they have considerably less customer data which may be used for the purposes described. Also, promoters cannot make data relating to their own events available to competing ticketing systems. In general, CTS only makes booking data for the events of external promoters available to them in aggregated form, so that they are at least not able to build their own customer base. If CTS refers to restrictions imposed by data protection rules, these are based on CTS's own data protection declaration which, for example, readily grants Facebook direct access to a substantial part of its user data, including personal IP addresses, through the implementation of social plug-ins ("Like" and "Share").¹³¹ In contrast to CTS, competing ticketing systems provide promoters with a comprehensive insight into the customer and booking data of their events, as covered by their data protection declarations. It is also possible to migrate an existing customer database into these systems. However, CTS customers who wish to switch to a competitor have no possible way of obtaining their customer data from the CTS system. The fact that other large online platforms such as Google, YouTube, Facebook, Amazon, Spotify and Songkick collect huge amounts of data¹³² does not minimise CTS's lead in terms of data as these companies are not active in the ticketing systems market. Furthermore, there are no sufficient indications that these companies are becoming active in the ticketing systems market.

(e) No innovation-driven competitive pressure, Section 18(3a) no. 5 GWB

(201) Under Section 18(3a) no. 5 GWB innovation-driven competitive pressure must also be considered in the assessment of market power, in particular in the case of multi-sided markets. However, in the case of ticketing systems, no such innovation pressure can be observed which would be able to considerably weaken the binding effect involved in indirect network effects and to challenge CTS's market position.

¹³⁰ [...]

¹³¹ Data protection declaration [in German] available at <http://www.eventim.de/?doc=info/dataProtection>

¹³² [...]

- (202) The provision for innovation-driven competitive pressure in Section 18 (3a) no. 5 GWB specifically addresses digital markets which are faced with the special dynamics of the internet.¹³³ The internet is often highly dynamic and characterised by a large number of innovations on all internet-based markets. Innovative products and services can quickly create and establish new internet markets. At the same time, internet services can also quickly lose their significance due to the internet dynamics. The internet's characterising factors of worldwide connection and direct accessibility of end customers as well as the innovation speed play a central role.
- (203) In the view of the Bundeskartellamt, market dominance of online platforms and networks with substantial or even monopolistic market positions cannot be denied simply on account of the fact that these positions can be challenged by the innovative power of the internet and its potential for disruptive changes. Rather, the internet's potential for innovation has to be assessed for each case individually. Concrete indications for such a dynamic or disruptive process during the underlying forecast period are required.¹³⁴ Such indications are not evident in the present case, neither in the short term nor during the merger forecast period.
- (204) These special dynamics are not likely to be found to the same extent in ticketing systems which are not part of the open internet and hence are not online platforms. As a software product and database application, this is a digital platform market which, however, offers primarily a technical basis for the special distribution functions. It is therefore a market which offers technical innovation possibilities with regard to software functionality. It is not evident that a special innovation pressure is present on the market for ticketing system services.
- (205) With regard to online distribution, an integral part of a ticketing system, a special internet dynamic which may generate innovative online business models for ticket distribution, is generally imaginable, but also unlikely to be determined with a sufficient degree of probability. Neither the possibility of online distribution nor the existence of internet-based product innovations restrict the established market power of CTS to such an extent that this would oppose the finding of market dominance.
- (206) Apart from the already described possibility of operating online direct sales or using a ticketing system, promoters can also use purely online portals as an alternative. In contrast to a promoter's own online shop, such online portals also offer a distribution service and could theoretically offer an attractive portfolio for end customers through the acquisition of different promoters. The few

¹³³ Legislative intent of the 9th Amendment to the Act against Restraints of Competition, Bundestag printed paper 18/10207, p. 51

¹³⁴ Working Paper, p. 84f.; *Online Dating Platforms*, B6-57/15 available at www.bundeskartellamt.bund.de.

existing portals, however, have not been found to have the same scope and ticket volumes as the online shops of the ticketing systems. The portal myticket.de operated by DEAG Deutsche Entertainment Aktiengesellschaft has to be mentioned in this regard, which, although it also distributes in-house events, has only achieved little market significance. Other providers are the portals tickets.de, metaltix.com, krasserstoff.com and others, which all offer a rather limited ticket portfolio and are restricted to certain music genres in some instances.

- (207) The examples of internet companies CTS has referred to, in particular Amazon and Facebook, may not be seen as potential innovation-driven online competition which would be able to refute the forecast of CTS's market dominance. It is unlikely that any of these companies will enter the market with an online shop anytime soon and that, within the forecast period, they could be expected to succeed in the market in such a way as to threaten CTS's market position. This also applies to Amazon, the only one of these companies which is already active in the ticketing sector, but so far only in the UK. It is an open question if, when and to what extent Amazon can be expected to enter the market and which business model the company would use. The fact that Amazon has a huge reach is not sufficient to support the assumption that it would be able to enter this market successfully.
- (208) Cooperations between ticketing system providers and social media platforms such as Facebook or streaming providers such as Spotify are possible and could become even more significant in the future. It is unlikely, however, that this potential development would reduce the importance of ticketing systems per se because such cooperations must always include a partner in charge of ticket distribution.
- (209) Due to the above-described necessity to always ensure adequate stationary distribution as part of a ticket distribution system, purely online distribution products may only have a limited effect on competition, if any, within the forecast period. Even though the share of online distribution amounts to approx. 40% and is thus comparatively higher than in other markets, about 35% of the tickets are still sold via stationary advance booking offices or ordered by telephone. An innovative internet product would thus have to be capable of generating substantial stationary sales volume and convincing its customers to purchase tickets online. However, especially in view of the very strong market position of CTS in online distribution, such a dynamic cannot be expected to emerge.
- (210) Additionally, the disruption in many internet-based markets due to the rapid spread of smartphones and their applications has had no effect on CTS's market position among ticketing systems. The innovations realised in this context during the past years, such as mobile ticketing,

are offered by CTS itself within the scope of its ticketing system services. In view of the strong position of CTS's own products in the online segment, the company is able in most cases to fend off competition from innovative internet-based products.

(3) Other factors of market power

(211) There are also other factors of market power that indicate market dominance. These include in particular the access to customers via the neighbouring market of in-house software solutions and the lack of buying power due to the promoters' change to direct sales.

(a) Access to customers via in-house software

(212) Apart from its provision of ticketing system services, CTS is also an important provider of software for direct sales of tickets (in-house software) which has an optional interface to EVENTIM.NET. Due to the lack of compatibility of this software with other ticketing systems and the great amount of time and effort involved in manual allocation, it is not an attractive option for promoters who use the CTS in-house software to simultaneously or exclusively use the services of other ticketing systems. Those customers can hardly be won over by competing ticketing systems. Altogether this affects [...] percent of the value-based share of tickets which are mediated through EVENTIM.NET.

(213) CTS licenses the products eventim.tixx, eventim.inhouse and eventim.light as in-house software. Eventim.inhouse is a ticket management software which is primarily used in the area of classical music and the cultural sector. Typical customers are opera houses and theatres. The individual modules of the product include functions for subscription management, seating plan booking, an in-house web shop which may be integrated into one's own homepage, statistical evaluations and automatic customer mailings. In order to use the interface ("connect online") to EVENTIM.NET, it is necessary to conclude an individual contract.

(214) eventim.tixx is a product for the area of sports, comparable to the product eventim.inhouse. Customers are German Bundesliga football teams and also ice hockey, handball, basketball clubs etc. The product features are adjusted to the particular needs of this customer group (functions for season tickets, creation of stadium plans with different price categories, restriction on quantity etc.). Access to EVENTIM.NET is also optionally possible through an interface. Eventim.light is intended for small promoters and includes altogether less functionalities, but the possibility of optional distribution through EVENTIM.NET via interface.

(215) Altogether, up to [...] percent of the value-based share of the tickets mediated through EVEN-TIM.NET are accounted for by customers who simultaneously also use CTS's in-house software. These customers can hardly be won over by competing ticketing systems, due to the described issue of compatibility or rather quota allocation, thus further securing the market dominating position of CTS on the market for ticketing system services. Here, the already weak competition from substitutes which originates from in-house solutions for ticketing systems, has even less market power restricting effects, due to the strong position of CTS in this area.

(b) No buyer power through the possibility of direct ticket sales

(216) The market power of CTS is also not effectively restricted by the possibility of direct ticket sales. As described above, the direct sales option would only be relevant for the assessment of market dominance as countervailing buyer power (through vertical integration). However, such buyer power cannot be assumed to exist in this case. This is already indicated by the fact that the opposite market side consisting of the event promoters is highly fragmented. More than [...] event promoters¹³⁵ have concluded a contract with CTS on the use of its system. None of these promoters are of such economic importance that a possible loss of a customer cannot be compensated for in the short term by the acquisition of other customers.¹³⁶ The fact that 84% of all tickets are accounted for by only 10% of the event promoters does not contradict this.¹³⁷ There would still be at least [...] individual event promoters who would continue to represent a fragmented opposite market side. No individual promoter on its own could claim to have a threat point.

(217) Furthermore, direct sales and sales via the CTS system are not equal in terms of quality. In general, promoters can sell tickets through their own points of sale, especially their own websites, and can also use the support of special providers (white label providers) which offer the creation of direct sales online shops and, in this context, also other services such as payment processing etc. However, this alternative still has little significance compared to ticketing systems in general and CTS in particular. This is indicated first of all by the fact that volumes traded through ticketing systems have increased constantly in the past years. The number of tickets traded through them increased altogether by about 25% between 2013 and 2016. The value of tickets even increased by about 33%.

¹³⁵ [...]

¹³⁶ Cf. Bundeskartellamt guidance document on merger control, para. 80.

¹³⁷ [...]

- (218) Online in-house solutions may be considered for high demand events, especially for strong “brands”, such as popular festivals. However, events less in demand are dependent on their presentation in highly frequented online shops, in particular EVENTIM.DE, as well as stationary advance booking offices. The share of direct sales varies, depending on the particular event type, but is only significant enough to replace the utilisation of ticketing systems for few event categories. The majority of promoter customers relevant for ticketing systems, such as rock/pop event promoters, only use online direct sales to a limited extent and only in addition to the distribution through ticketing systems.¹³⁸ This distribution alternative therefore [...] ¹³⁹ does not effectively restrict [...] CTS's market power.¹⁴⁰
- (219) Especially in regard to the presence and visibility of events on the internet, CTS has an immense advantage, also vis-à-vis the promoters' own websites, and it has a rather strong position in the online trade of tickets for live entertainment. Volumes traded over CTS' own online shops have increased significantly during the past years. The number of tickets traded through these shops increased by [...] % between 2013 and 2016, while the value of traded tickets increased by [...] %.¹⁴¹ Even if there is a trend towards online distribution, at least for certain music genres,¹⁴² this does not weaken the market position of CTS by means of enhanced direct sales of promoters. CTS is able to continuously extend the online trade sector that is extremely lucrative, also according to its own opinion.¹⁴³
- (220) Hence, the market importance of white label providers remains rather low. Providers operating in Germany include in particular White Label eCommerce GmbH, Paylogic Deutschland GmbH and ticketscript GmbH. Their competition from substitutes for ticketing systems is not strong enough to effectively limit the market power of CTS. White label solutions were only occasionally named as an alternative to ticketing systems by the promoter side.¹⁴⁴
- (221) For these reasons the threat to establish such an alternative through vertical integration is not credible and cannot have any disciplinary effects. It is unlikely that direct ticket sales would be able to adequately cover the promoters' requirements.

138 [...]]

139 [...]]

140 [...]]

141 [...]]

142 Cf. *ibid.* Media& Entertainment, A research publication of the DZ BANK AG, 2015, p. 15.

143 Cf. CTS Annual Report 2016; available at http://www.eventim.de/obj/media/DE-eventim/relations/financialReportDownload/2016/Geschaeftsbericht_2016.pdf, p. 3. []

144 [...]]

bb) Market for ticketing system services for advance booking offices

- (222) The market position of CTS on the market side of advance booking offices corresponds to the market position on the side of promoters. Pursuant to Section 18 (1) in conjunction with (3a) GWB, CTS has to be considered as market dominant on the nationwide market for ticketing system services for advance booking offices, predominantly for the same reasons.
- (223) The total turnover volume achieved on the market side of the advance booking offices is considerably lower than the turnover volume achieved on the promoters' side of the market. The market volume of this calculation consists of fees, which are charged by the ticketing system to the advance booking offices for the utilisation of the system. The 2016 market volume only reached 5-10 million euros. CTS achieves a market share of 60-70%, or 70-80% if cooperation partners are included in the calculation.
- (224) There is a particularly large gap to the next closest competitors, all of which are regional ticketing systems that only reach market shares of less than 10% each. The second-largest ticketing system operating throughout Germany, Reservix/AD Ticket, does not charge any fees to advance booking offices, so that a turnover-based calculation would result in a market share of 0%. Ticketmaster, the other supplier operating Germany-wide, only achieves a turnover-based market share of 0-5%.¹⁴⁵
- (225) In order to assess the market power of the suppliers, it is still relevant to consider the shares in the value-based transaction volume, also on the advance booking offices' side of the market. Here CTS achieves a share of 60-70%, as described above.
- (226) As the advance booking offices represent an essential side of the market for the product supplied by ticketing systems, the overall consideration of market power elements on multilateral markets indicates the existence of market dominance on this side – just as on the promoters' side described above - pursuant to § 18 (3a) GWB. On this side of the market, the mutual positive indirect network effects also lead to a high binding effect on the stationary advance booking offices as the connection to the CTS system is essential for their business considering the number of attractive events, including in-house ones, in EVENTIM.NET.¹⁴⁶ The market entry barriers for competitors are also high on the market side of advance booking offices, as multi-homing is used only to a limited extent by promoters and advance booking offices as shown above. It needs to be considered – as indicated- that market access to advance booking offices is also restricted if the other market side is not sufficiently accessible for competitors, and vice versa. Even if the market sides

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are, in general, separate markets, the market entry barriers may not be considered separately, especially if a transaction platform is involved – as is the case here - in which the agency service represents the product (matching platform). Scale and data advantages, as well as the lack of innovation-driven competitive pressure indicate a dominant position on the market for ticketing system services of advance booking offices.

(227) Another expression of the market dominant position of CTS vis-a-vis advance booking offices is the imposition of comparatively high fees. In accordance with standard contracts, advance booking offices pay the same high fee levels as promoters. Other large ticketing system providers connect advance booking offices to their system free of charge. Apart from CTS, only some regional providers charge advance booking offices notable connection fees. CTS may also enforce other contractual obligations, which may be adverse for the advance booking offices. Apart from sales restrictions, advance booking offices are also often not included in the presale of attractive events, which CTS executes exclusively through their own online shop. This restricts the income opportunities for advance booking offices noticeably.

2. Abuse of a dominant position pursuant to Article 102 TFEU and Section 19 (2) no. 1 GWB

(228) The current exclusivity agreements concluded by CTS with promoters and advance booking offices and similar future exclusivity agreements falling under the description in the operative part, violate the prohibition of abuse in accordance with Article 102 lit. b) TFEU, Section 19 (2) no. 1 GWB.

a) Significant impediment/restriction

(229) CTS impedes the competitive opportunities of competing ticketing systems, bound promoters and advance booking offices on the two-sided market for ticketing system services in a substantial way through the agreement of exclusivity. Many of the long-term exclusivity obligations include the total ticket quota of promoters and the total sales operation of some advance booking offices, and, with at least 80% of ticket quota also a considerable part thereof (see aa), which results in the foreclosure of the markets for ticketing system providers at the expense of competing ticketing systems (see bb). According to the established case-law of the ECJ and national courts, long-

term exclusivity agreements regarding all or substantial parts of the requirements fulfil the elements of exclusionary conduct pursuant to Article 102 lit. b) TFEU and Section 19 (2) no. 1 GWB.¹⁴⁷ A foreclosure effect exists irrespective of this.

aa) Considerable extent and duration of exclusivity

(230) The challenged agreements affect all requirements or a considerable part thereof (see below (1)). A sufficient binding effect is also evident in the provisions which target local or tour operators (see below (2)). Furthermore, the term of most provisions is practically unlimited (see below (3)).

(1) All or substantial parts of the required ticket volume

(231) Pure exclusivity clauses contained in the **agreements nos. [...] to [...]** by which promoters are obliged to solely use the CTS ticketing system, affect the whole demand of promoters for ticketing system services. The same applies to **agreements nos. [...] to [...]**, by which the respective advance booking office partners are obliged to use exclusively the CTS ticketing system.

(232) Apart from that, agreements with promoters, which bind more than 80% of ticket quota per year for their events exclusively to the CTS system, constitute a significant share, and have, as such, a foreclosure effect. This corresponds to the case-law which has clearly stated that a share of at least 80% of the requirements constitutes a significant share.¹⁴⁸ The remaining agreements to be prohibited cover at least 80% of the ticket quantity sold by the particular promoter through the ticketing system per year (see agreements nos. [...] to [...]).

(233) According to the **agreements nos. [...] to [...]** promoters are obliged to exclusively cooperate with CTS for the advance booking of their tickets, unless the contract explicitly states otherwise. As such exemption rules are not evident in the contracts concerned, the agreements result in a 100% binding effect for the respective promoters.

¹⁴⁷ ECJ decision of 13.2.1979, case C-85/76 para. 89 – *Hoffmann-La Roche*; ECJ decision of 3.7.1991, case C-62/86 para. 149 – *AKZO*; EGC decision of 12.6.2014, case T-286/09 para. 72, 85 – *Intel*; Düsseldorf Higher Regional Court decision of 6.4.2016, VI-Kart 9/15 (V) para. 116 - *Postdienstleistung*; Düsseldorf Higher Regional Court decision of 20.6.2006 VI-2 Kar 1/06 (V), S. 40 – *E.ON Ruhrgas*; Fuchs/Möschel, in: Immenga/Mestmäcker, 5th edition 2012, Art. 102 para. 219.

¹⁴⁸ ECJ decision of 13.2.1979, case C-85/76 paras. 83, 109 – *Hoffmann-La Roche*; ECJ decision of 12.6.2014 case T-286/09 para. 79 – *Intel*; Düsseldorf Higher Regional Court decision of 20.06.2006, VI-2 Kart 1/06 (V), p. 40 – *E.ON Ruhrgas*.

- (234) The **agreements nos. [...] to [...]** also bind more than 80% of the annual ticket volume per promoter to CTS. According to the agreements, the promoter has to distribute either at least 80% or at least 90% of the quota *per event* through the CTS system. As a result, mathematically at least 80% of the overall quota per year have to be distributed through the CTS system.
- (235) The exclusivity clauses that include quota exemptions in the **agreements nos. [...] to [...]** also relate to at least 80% of the ticket quantity distributed annually through the ticketing system of the respective promoter. Generally all of these agreements lay down the unrestricted obligation for promoters to solely distribute tickets through the CTS system. In exceptional cases and relating to individual events, promoters may be allowed to distribute a certain percentage of the particular ticket quota through other ticketing systems, subject to further requirements. Ultimately, however, such agreements have to be categorised as clauses which cover all of the requirements (100%). Any deviation of the promoters from the assured exclusivity becomes an exceptional case which requires justification. Under civil law, the presence of such an exceptional case has to be demonstrated and proven by the promoter. This is also applicable to clauses in some contracts, pursuant to which the promoter may need to prove (in writing) to CTS that an exceptional case exists, or sometimes may need the consent of CTS prior to any deviation from the agreed exclusivity.
- (236) Even if, in view of possible quota exemptions, the agreements nos. [...] to [...] may not be categorised as total demand coverage clauses, they oblige promoters to distribute at least 80% of their annual ticket quantity through the CTS system. Insofar, the quota in the **agreements nos. [...] to [...]** which may be allocated to other ticketing systems under exceptional circumstances, amounts to a maximum of 20% per event, so that at least 80% of the annual ticket volume would go into the CTS system – even if hypothetically the exemption rules were exhausted for all of the events organised by the respective promoter in the respective year.¹⁴⁹
- (237) Even with the **exclusivity agreements nos. [...] to [...]** which provide for larger quota exemptions of [...]%, and in [...] cases up to [...]% of the ticket quantity per event, CTS maintains control over at least 80% of the ticket quantity for the whole year.¹⁵⁰ CTS cannot argue that some of these agreements only cover quotas between [...]% and [...]%¹⁵¹ as the relevant exclusivity agreements oblige the promoters to use *exclusively* the CTS system for their *entire* ticket volume. According to these agreements limited ticket quota can be passed on to other ticketing systems in exceptional cases, but only for individual events and subject to further preconditions. The requirements

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under which the promoter is allowed to allocate ticket quota to another system are narrowly defined, so that they can only apply to very few events. Most requirements concern venues or exemptions with regional focus (e.g. **agreements nos. [...] to [...]**).¹⁵² Additionally, the allocation of quota to third parties is complicated in many cases by the fact that they are dependent on written proof of the promoter to CTS, or even the consent of CTS (**agreements nos. [...] to [...]**).¹⁵³ In this way, CTS keeps control over the handling of the exemption provision and can restrict it or – if consent is necessary- cancel an exemption. Contrary to the view held by CTS¹⁵⁴ these requirements represent a practical barrier for promoters wishing to make use of the quota exemptions.

(238) If the requirements for a quota allocation to another ticketing system exist in an exceptional case, various supplementary agreements are in place to ensure that CTS loses as few tickets as possible to competing ticketing systems. In particular the requirement for promoters to bar advance booking offices which are connected to the CTS system *and* to the ticketing system which profits from the quota exemption, from the latter system for particular events, defeats the effectiveness of the exemption provision significantly in favour of CTS (**agreements nos. [...]**).¹⁵⁵ As a result, third party ticketing systems may receive a ticket quota, but their sales opportunities are diminished through the blocking of points of sale. The same applies if, under the exemption rule, ticket quota may be given to ticketing systems of venues, which can, however, only be used by the venue operators themselves at their own locations and may not be linked with any other points of sale (**agreements nos. [...]**). The exemption rule in the [...] has a similar effect as ticket quota may only be allocated „B2B“ to companies which do not operate ticketing systems and which commit themselves not to pass on any tickets to ticketing systems (**agreement no. [...]**).

(239) It has to be emphasised that even the **exclusivity agreements nos. [...] to [...]**, which in some cases allow a higher quota exception of up to [...] % per event in favour of third party systems, either include narrowly defined requirements (agreements nos. [...])¹⁵⁶ or make the use of the exemption dependent on the prior consent of CTS (agreement no. [...]).¹⁵⁷ Due to this, those promoters also provide CTS with at least 80% of their annual ticket volume under the agreements described herein.

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- (240) Random checks have confirmed that the possible quota exemptions under the agreements nos. [...] to [...] play a minor role in practice and that the relevant promoters enter at least 80% of their ticket volume sold through ticketing systems into the CTS system. [...] of these promoters indicated that they distributed between 85% and 100% of their tickets through CTS in 2016.¹⁵⁸ It has to be emphasised that this also includes [...] promoters which were granted a more substantial quota exemption of up to [...]%.
- (241) **Agreements nos. [...] to [...]** are in principle also designed as exclusivity agreements with quota exemptions. However, contrary to the agreements nos. [...] to [...], the exceptionally admissible quota for third-party systems is not defined in terms of quantity. As in all other respects these [...] agreements have the same design as the above-mentioned group of agreements and, in particular, lay down narrowly defined regional exceptions (e.g. with regard to venues) and require promoters to provide written evidence/documentation to CTS; they also result in at least 80% of the annual ticket volume being secured for CTS.
- (242) The same assessment applies to the extent of the binding effect achieved by the exclusivity agreements concluded between CTS and the advance booking offices (agreements no. [...] to [...]). If these agreements do not provide for any exemptions from the exclusivity agreed upon, the CTS system is at the core of the entire ticketing process (**agreements nos. [...] to [...]**). If the agreements with advance booking offices provide for exemptions from the exclusivity, these are set at such a low level that the volume of tickets bound to CTS again amounts to at least 80% (**agreements nos. [...] to [...]**). In view of the type of applicable rules these exclusivity contracts may also be categorised as total demand coverage clauses as they include the unrestricted exclusivity obligation (see above). However, the requirements for the exceptional booking of tickets through “other systems“ are so narrowly defined in all agreements that the advance booking offices obtain at least 80% of the respective ticket quantity from the CTS system. In the agreements nos. [...] to [...], the admissible exceptions are furthermore restricted to cases in which tickets for the particular event are not available in the CTS system. The scope of application of this exception is restricted from the start as CTS has concluded many promoter contracts with high ticket volumes. Additionally, the use of this exception by the advance booking partner is made even more difficult in the case of [...] of these agreements as they require the approval and agreement of

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[...]

CTS.¹⁵⁹ Also, the permitted exceptions in the agreement no. [...] do not result in advance booking offices obtaining less than 80% of the tickets they purchase from ticketing systems from CTS. Permitted exceptions either relate to services which do not belong to the event markets or the exceptions are strongly restricted.

(2) Binding effect of the agreements

(243) The agreements also have a sufficient binding effect in all presented options.

(244) This also applies to the agreements on exclusivity agreements with local promoters or with tour promoters, as the agreements also intend a 100% exclusivity for the particular event if the CTS system is used. According to the case-law of the ECJ, the focus of exclusivity agreements on the impediment of competitors is an essential aspect in the assessment of abuse of a dominant position.¹⁶⁰ The respective promoters are also contractually obliged to exert influence on the tour promoters or the local promoters which means that provisions for or negotiations with third parties become necessary in order to fulfil the contract.

(3) Term of exclusivity clause

(245) According to European case-law, the abusive nature of exclusivity agreements not only depends on the bound quantity but also on the term during which the market dominant company imposes the exclusivity requirements on a customer or supplier.¹⁶¹ It is irrelevant whether short-term options for terminating contracts are available during the overall term of the exclusivity agreement (in the present case: 30 day period of notice) or whether the long overall term of the exclusivity agreement arises from a series of successive contracts with short terms.¹⁶² In general, the ECJ has already considered an exclusivity term of two years as a violation against Article 102 TFEU.¹⁶³ The ECJ held that relevant terms existed in different cases of exclusivity requirements which were implemented for periods of varying lengths between one and five years. Exclusivity obligations of such durations are generally likely to result in the restriction of competition.¹⁶⁴ In the practice of the Bundeskartellamt, exclusivity requirements for a contractual term of two years or more were already presumed to constitute an abuse of dominance.¹⁶⁵ Exclusive agreements imposed by

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¹⁶⁰ ECJ judgment of 13.2.1979, case C-85/76, para. 90 – *Hoffmann-La Roche*.

¹⁶¹ EGC judgment of 12.6.2014, case T-286/09 para. 111, 195 – *Intel*.

¹⁶² EGC judgment of 12.6.2014, case T-286/09 para. 111, 195 – *Intel*.

¹⁶³ ECJ judgment of 13.2.1979, case 85/76 para. 120 – *Hoffmann-La Roche*; Markert, in: Im-menga/Mestmäcker, 5th edition 2014, § 19 para.196.

¹⁶⁴ EGC judgment of 12.6.2014, case T-286/09 para. 195 – *Intel*.

¹⁶⁵ Cf. in particular Bundeskartellamt decision B8-113/03-1 – *Langfristige Gaslieferung* (long-term gas supply).

market dominant companies for an indefinite term are all the more to be categorised as anti-competitive. In this sense, Article 5 (1) a) VBER already considers purchasing commitments of non-dominant companies with market shares below 30 % with indefinite duration to be non-exempt restrictions of competition.

(246) The exclusivity agreements concluded by CTS and referred to in the operative part exceed the term of two years continuously or are concluded with an indefinite term. Insofar as fixed terms (without automatic extensions) were agreed upon in the agreements [...] to [...], they have terms of at least two years and, in most cases, three to five years. Some agreements have been concluded for an indefinite period from the start. The majority of the contracts can be automatically extended after the end of a fixed term of at least two years and hence also have an indefinite term.¹⁶⁶ According to Article 5 (1) subpara. 2 VBER, the tacit extension of contracts is equivalent to concluding contracts for an indefinite term. This assessment accurately takes account of the fact that, in the case of contracts that can be extended automatically, contractual partners are inclined to stay passive and to simply “proceed with the contracts“. Hence, there are fewer cases of re-negotiation or even change of contractual partner. In this way, disadvantageous competition structures are solidified significantly through clauses with tacit contractual extension – especially in connection with exclusivity agreements. Due to this effect resulting from automatic extension clauses - and contrary to the view of CTS¹⁶⁷ - all exclusivity agreements with automatic extension contribute to market foreclosure, even if the contracts are extended for a period shorter than two years.

(247) The agreements with the advance booking offices nos. [...] to [...] also have long terms. The fixed basic term for all of these agreements exceeds three years. Furthermore, most of these agreements are automatically extended and, hence, have to be considered as concluded for an indefinite term. The significant temporal dimension of the exclusivity agreements referred to here is reflected by the fact that the agreements nos. [...] to [...] have already been in force for an average of approx. four years, and the agreements nos. [...] to [...] even for an average of approx. seven years.

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bb) Foreclosure effect

(248) The exclusivity agreements concluded by CTS with promoters (such as in nos. [...] to [...]), and also the exclusivity agreements concluded by CTS with advance booking offices (such as in nos. [...] to [...]) are to be categorised per se as abusive conduct and are as such prohibited (see (1)). Independent from this, an actual foreclosure effect is existent (see (2)).

(1) Per se prohibition

(249) According to the case-law of the ECJ, long-term exclusivity agreements of a market dominant company concerning the overall requirements of the opposite market side or a significant part thereof are not based on an economic performance of the binding company, but have, on the one hand, a focus targeted on the obstruction of competitors and, on the other hand, make the customers' choice between several suppliers impossible or more difficult.¹⁶⁸ Competition, already significantly weakened by the market dominant position of one party, is further threatened by exclusivity agreements of the market dominant party.

(250) The recent ECJ judgment in the Intel case has not modified or abandoned the European case-law on the per se prohibition of exclusivity agreements concluded by a dominant company.¹⁶⁹ To the extent that the ECJ has clarified the requirements of proof to be observed by the competition authorities, the court exclusively referred to the rebates offered by the dominant company, not to contractual exclusivity clauses. In para. 137 of the Intel judgment the ECJ first of all emphasises the general differentiation between contractual exclusivity agreements on the one hand and exclusivity rebates on the other. The provision of details on the previous case-law in paras. 138f. exclusively refers to the second category of rebates. This follows from the statement that, apart from the "conditions and arrangements for granting the rebates in question" and "their duration and their amount", the Commission was also required to assess the possible existence of a strategy aiming to exclude equally efficient competitors from the market. A so-called „as-efficient competitor test“, referred to by CTS in this context¹⁷⁰ is not decisive here under the law; in particular under the German law, i.e. Section 19 GWB, it is irrelevant. It is doubtful whether and to what extent the test submitted by CTS in an expert opinion can demonstrate that the exclusivity agreements do not actually result in foreclosure. However, this question can be left open here.

¹⁶⁸ ECJ judgment of 13.2.1979, case C-85/76, para. 90 – *Hoffmann-La Roche*.

¹⁶⁹ ECJ judgment of 6.9.2017, case C-413/14 P - *Intel*, [...].

¹⁷⁰ [...]

- (251) In view of the different modes of operation of the two instruments, it appears obvious that different levels of proof are required for market foreclosure through exclusivity agreements and foreclosure through exclusivity rebates. In the case of exclusivity agreements a fixed part of demand or supply on the market is permanently foreclosed to competition whereas in the case of exclusivity rebates the decision is up to the recipient of the rebate, which means that the degree of market foreclosure varies. That is why exclusivity obligations involve a higher potential for market foreclosure, in contrast to exclusivity rebates which are therefore subject to higher levels of proof of abusive conduct. Within the framework of competition law, the assessment that binding agreements involve a higher abstract risk than unilateral conduct is also expressed by the fact that the prohibition of cartels under Article 101 TFEU, Section 1 GWB provides for a lower intervention threshold for anti-competitive agreements, including exclusivity agreements, than the definition of abusive conduct.
- (252) CTS's objection stating that the company did not pursue any strategy to exclude competitors from the market¹⁷¹ is irrelevant in view of the examination standard described above. The expert opinion submitted by CTS carries out an as efficient competitor test (AEC test) on the basis of a price-cost comparison. According to the opinion, a foreclosure effect to the detriment of as-efficient competitors was unlikely as they could still undercut CTS's prices even if a limited contestable quantity was assumed.
- (253) CTS's argument is not conceptually sustainable as the proceeding is not about the amount of CTS's effective prices or the amount of potential rebates for exclusivity, but about the existence of exclusivity as such. In a market characterised by network effects, comprehensive exclusivity agreements reinforce these effects, which makes it even more difficult for competitors to gain market shares to the detriment of the dominant company. Due to the network effects it has to be assumed that promoters or advance booking offices will not consider identical offers with identical prices submitted by CTS and a smaller supplier on the market as equivalent. CTS's offer will rather be seen as superior. Also in this respect, CTS's effective price is not an adequate standard for the examination whether as-efficient competitors can be excluded from the market. The extent to which CTS's exclusivity agreements have been applied so far even make it impossible for CTS's competitors to have their offer seen by promoters or advance booking offices as equivalent in terms of quality.

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- (254) In accordance with the per se prohibition of exclusivity agreements concluded by the dominant company, which is therefore still applicable, the competition authority does not have to establish the foreclosure effect.¹⁷² The Düsseldorf Higher Regional Court has also held that proof of an actually occurring foreclosure effect is not required.¹⁷³ According to the court, proof of an actual serious risk for the competitive process is sufficient.¹⁷⁴ Hence, a competition authority fulfils its obligation of producing evidence if it proves the existence of the formal exclusivity obligation,¹⁷⁵ which is the case here.
- (255) This evaluation must also, and all the more, be applied to exclusivity agreements of a dominant platform. This applies in particular if exclusivity is agreed upon on both market sides, as is the case here. In order to enter or stay on the market, competitive platforms must gain access to both market sides. If this access is restricted significantly through exclusivity agreements, even just on one side, the restriction will inevitably also affect the other market side in view of the indirect network effects. The market entry barriers originating from network effects are artificially increased further through the exclusivity agreements, as they practically exclude almost completely the possible parallel utilisation of platforms (multi-homing) with significant ticket quota, in particular by larger promoters. Single-homing is secured through exclusivity and any option of change is eliminated for platform users which so far only used CTS. Competitors do not have the option to make attractive offers to convince users of multi-homing or even to switch to their system. The focus of platform users on only one platform increases the indispensability of this platform, also for users on the other side of the platform. Hence there is a significant risk that competing platforms withdraw from the market over the medium-term and that the (remaining) competition is a competition for the market.¹⁷⁶
- (256) The theory of harm of the per se prohibition, originally developed for exclusivity in vertical relations either in form of customer foreclosure or input foreclosure (as distribution or purchasing commitment) is transferable with regard to the risks discussed above, irrespective of which of the two foreclosure forms are evident in a platform constellation. Even if the ticketing systems also assume a distribution function and the organisation of ticketing may be essentially presented as a vertical chain in the present case, as presented above, both sides of the platform promoters and

¹⁷² EGC judgment of 12.6.2014, case T-286/09 para. 103, 177 – Intel.

¹⁷³ Cf. Düsseldorf Higher Regional Court, decision of 20.6.2006, VI-2 Kart 1/06 (V), p. 40 - *E.ON Ruhrgas*.

¹⁷⁴ Nothdurft, in: Langen/Bunte, Deutsches Kartellrecht, 12th edition 2014 § 19 para. 197.

¹⁷⁵ ECJ decision of 3.7.1991, case C-62/86 para. 149 – *AKZO*.

¹⁷⁶ For incentive and effect of exclusivity agreements for single homing, see Working Paper, p. 62, 63ff.

advance booking offices (including end consumers), ultimately remain customers of ticketing system services. Both sides have to make a payment for the utilisation of the platform. Customer foreclosure is thus more obvious. In the case of platforms, what should be added to this theory of harm are the problems of market tipping, in view of existing reciprocal indirect positive network effects, as well as single-homing which, due to exclusivity, is focused on one platform. This could also justify positioning the necessary “significant part” of the demand below the thresholds so far stipulated by the ECJ. However, this also results in the fact that exclusivity agreements of a dominant platform, to the described extent, must all the more be subject to a per se prohibition.

(2) Actual market foreclosure

- (257) An actual market foreclosure effect on the two-sided market for ticketing system services can be attributed to the exclusivity agreements between CTS and promoters or advance booking offices. This market is for the most part foreclosed for competing ticketing systems due to the exclusivity agreements, taking into account all circumstances, including the vertical integration and further exclusivity agreements to be attributed to CTS.
- (258) The exclusivity agreements considerably hinder promoters and advance booking offices from using competing systems, especially by means of multi-homing. This considerably restricts the competitive options of competitors on the market for ticketing system services and strengthens the dominant position of CTS.

(a) Bound market volume

- (259) The exclusivity agreements concluded by CTS cover a significant part of the market for ticketing system services. CTS, with multiple partners, has created a system with different exclusionary options, which have to be acknowledged altogether in their interaction.
- (260) The exclusivity agreements altogether available to CTS on the market for ticketing system services cover at least 40% of the market volume (value-based) on the promoters' and advance booking offices' sides.¹⁷⁷ The Decision Division considers as market volume the transaction volume achieved by the promoters as well as the advance booking offices on the market for ticketing system services. This covers all tickets mediated through ticketing systems, both in terms of value and quantity. On platform markets, the Bundeskartellamt considers the value-based transaction

¹⁷⁷ When applying Article 101 TFEU, the 30% threshold referred to by CTS, which can be found in para. 10 of the De Minimis Notice (OJ C 291/1 of 30.8.2014), applies to cumulative foreclosure by several companies and is therefore not relevant for the present assessment of abuse of a dominant position pursuant to Article 102 TFEU, Section 19 GWB. As a matter of fact, the 30% threshold in para. 10 of the De Minimis Notice would have been exceeded in this case [...].

volume in particular as a significant indicator of the market position on this market. As presented above, the transaction volume also takes into account the indirect network effects, which must also be considered in assessing market foreclosure.

(261) Included in the calculation are also ticket volumes which are distributed through the system by affiliated companies of the ticketing system provider who are active on one of the two market sides as promoters or advance booking offices. A deduction of the ticket quantity distributed by these companies – as it is usual for vertical upstream or downstream markets - would not appropriately reflect the market relations on the affected platform market. This procedure is also advisable in order to reflect the indirect network effects present in the market. Corporate promoters and advance booking offices, especially the very important online shop EVENTIM.DE, significantly contribute to the indirect network effects. Access to the remaining non-affiliated platform users thus gains greater importance. Section 38 (1) sentence 2 GWB, which CTS uses as an argument against this view and which stipulates that the turnover of non-affiliated companies shall not be taken into account in the calculation of turnover, is not relevant in the analysis of market conditions carried out here on the basis of the transaction volume.¹⁷⁸

(aa) Bound transaction volume for promoters

(262) The following picture of foreclosure arises on the promoters' market side in 2016:

2016	
Promoters exclusively bound to CTS	Ticket value
combined:	[...] billion €
	100%
Exclusivity agreements no. [...] to [...]:	20-25%
Exclusive individual events 2016:	< 5%
Via cooperation partners:	< 5%
In-house promoters:	10-15%
TOTAL: ¹⁷⁹	35- 45%

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[...]

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Without taking into account agreements on binding third parties, for details on this see text below.

- (263) Not only the exclusive agreements nos. [...] - [...] have to be included in the effects analysis, but also the exclusive individual events, the corporate event promoters and the exclusivity agreements concluded between a cooperation partner and promoters.¹⁸⁰ The provisions included in the cooperation agreements lead to competing systems being deprived of promoters, which has a strengthening effect on the market position of CTS.
- (264) Contrary to the view held by CTS¹⁸¹ and as already described above, the cooperation partner cannot be considered as an independent competitor of CTS. In view of the agreed exclusive marketing of the CTS system through this company, its exclusivity agreements also lead to a situation where competing systems are deprived of promoters and advance booking offices, which has a strengthening effect on the market position of CTS. It is justified to include this in the analysis as the specific purpose of the cooperation is to market the CTS system through the cooperation partner and CTS considerably benefits from this cooperation based on special provisions of the cooperation agreement.¹⁸² The exclusivity agreements concluded between the cooperation partner and promoters in the interests of the CTS system are therefore to be included in the assessment of the market conditions at least as an element of fact.

The cooperation partner has concluded exclusivity agreements with a total number of at least [...] customers in which these commit themselves to make available to the cooperation partner ticket quotas amounting to at least 80% of their annual ticket quantities.¹⁸³ In this way, a maximum of 5% of the 2016 transaction volume reached the CTS system.¹⁸⁴

- (265) As far as promoters are concerned, the investigated 2016 market volume exclusively bound to CTS is considerably underestimated. The actual share of the market which is controlled by CTS through the exclusivity agreements is, in fact, considerably higher than the indicated value, but cannot be estimated exactly. Only those tickets are included which were directly entered into the CTS system by a CTS contractual partner itself. However, not included are those tickets which were entered into the CTS system by third parties in accordance with requirements set by promoters exclusively bound to CTS. According to the findings of the Bundeskartellamt, it is to be assumed that almost all of these requirements actually take effect. This is illustrated by the example of the exclusivity agreement no [...] where only a small share of the ticket volume is integrated into the CTS system by the promoter itself. However, a much larger share of tickets for

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tour concerts was ultimately passed on to the CTS system. In a sample, around 80% of the tickets controlled by the promoter were entered into the CTS system, but only around 10% of these tickets were entered into the system by the promoter itself.

- (266) CTS has agreed to such binding of third parties with at least [...] other tour operators.¹⁸⁵ These are for the most part relatively large promoters who have already entered high ticket volumes into the CTS system themselves which are included in the above calculation. It is to be expected that the ticket quantity influenced by them, which is directed into the CTS system by third parties - similar to Four Artists - is significantly higher. The effectiveness of passing on ticket volumes through third parties may also be observed in the case of the corporate promoters of CTS. In 2016, [...] of the tickets of third parties were entered into the CTS system.¹⁸⁶
- (267) Not least, all promoters who have undertaken to solely use the CTS system could feel obliged to have their cooperation partners solely use the CTS system as well. An exclusivity wording such as *„From the date of signature of this agreement, the promoter undertakes to distribute all events solely through the CTS system“* (Bundeskartellamt unofficial translation) could also be interpreted in this way.¹⁸⁷ The Bundeskartellamt has not investigated and categorised in detail the ticket quota entered into the CTS system for individual events, tour operators and local events as this would have involved a considerable amount of time and effort and is not a relevant factor in the evaluation of the exclusivity agreements.
- (268) Tickets which were mediated by CTS through promoters exclusively bound to a cooperation partner were not taken into account. The investigation of this data would have required the disclosure of the exclusive partners to CTS. Furthermore, exclusivity agreements concluded by CTS or cooperation partners with smaller promoters with less than 10,000 tickets were excluded for reasons of procedural economy. Exclusivity agreements concluded between CTS and promoters since 1.2.2017 have not been considered either.¹⁸⁸ The same applies for (exclusivity) contracts concluded between CTS and venues, agencies, artists and other market participants.¹⁸⁹

185 [...]
186 [...]
187 [...]
188 [...]
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- (269) The market foreclosure effect of the large market share bound to CTS arises from the indefinite term of most exclusivity agreements. The longer the purchasing obligations, the stronger the market foreclosure effect.¹⁹⁰ As already detailed above, the majority of exclusivity agreements concluded by CTS are automatically extendable or concluded for an indefinite term. The other contracts run for at least two years. The agreements nos. [...] to [...], as a whole, have significant foreclosure potential. Market access to promoters and their tickets is largely impossible for competitors due to the long-term nature of the agreements.
- (270) In contrast to CTS's statements,¹⁹¹ the level of market growth is not strong enough to be able to counteract the described foreclosure effects of the exclusivity agreements. While, according to the GfK studies submitted, the volume of the overall event market has increased from approx. four billion euros to five billion euros since 2013, the market volume based on the number of tickets has decreased from approx. 121 million to approx. 114 million tickets during the same period. Competing ticketing systems can thus only have access to a reduced ticket volume, and, as compared to 2013, actually cannot benefit from any greater demand from promoters. It is not clear from [...] of CTS why the exclusivity agreements nos. [...] to [...] ¹⁹² should not result in a foreclosure effect. On the contrary, they illustrate a secure dominant position in a foreclosed market.

(bb) Advance booking offices

- (271) The following image of foreclosure arises for advance booking offices:

2016	
Promoters exclusively bound to CTS	Ticket value
overall:	[...] billion euros
	100%
Exclusivity agreements nos. [...] to [...]:	1-5%
via cooperation partners:	<5%
CTS online shop:	35-45%
CTS call centre:	2%
CTS stationary advance booking offices:	<2%
TOTAL:	40-50%

¹⁹⁰ OJ C 45/7 of 24.2.2009: Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para.36.

¹⁹¹ [...]

¹⁹² [...]

(272) The exclusivity contracts nos. [...] to [...] concluded by CTS with advance booking partners altogether represent 1-5% of the transaction volume. Tickets which were bought through cooperation partners are also to be included.¹⁹³ Contrary to the view of CTS,¹⁹⁴ the sales of tickets from the CTS system by cooperation partners cannot be seen as autonomous competitive behaviour, but as a distribution activity attributable to CTS.¹⁹⁵ A major role is played by CTS's own online shop through which 35-45% of the value-based market volume is sold and which represents a total of [...] % of tickets sold through the internet in Germany. CTS's in-house call centre and in-house advance booking offices, however, have little significance compared to this. As the transaction volume must be considered in this context, it is essential to include all the in-house advance booking offices of CTS in the assessment.¹⁹⁶

(b) Importance of the contractual partners

(273) The exclusivity agreements concluded by CTS cover a significant part of the market for ticketing system services, not only in terms of quantity. Also in terms of quality they affect particularly attractive promoter contracts, particularly efficient promoters as well as strategically important advance booking offices.

(aa) Promoters

(274) Most of the investigated exclusive agreements nos. [...] to [...] concluded between CTS and promoters target higher-priced tickets whose ticket value is far above market average in some cases. The average ticket price in the case of CTS's exclusivity agreements is almost [...] market average.¹⁹⁷ In particular the [...] tickets, which account for a large share¹⁹⁸ of the quantity or value of tickets bound to CTS through the exclusivity agreements nos. [...] to [...], contribute to this. For a large share of the tickets covered by the exclusivity agreements the ticket price is above the average market price. From the point of view of competing ticketing systems, at least a large share of these are particularly attractive tickets as more expensive tickets result in a higher fee income achieved by the ticketing systems. Furthermore, the comparably high ticket price, particularly in the case of the [...] events, indicates that these are tickets for very attractive events which may be sold easier and which guarantee a faster and complete sale.

193 [...]

194 [...]

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197 Division of the value-based transaction volume by the volume-based transaction volume (2016).

198 [...]

- (275) The average number of tickets affected by the exclusivity agreements concluded by CTS with promoters also illustrates the particular market significance of these promoters as customers of ticketing systems. While an average promoter sells around 7,000 tickets via ticketing systems per year,¹⁹⁹ the exclusivity agreements concluded by CTS cover a multiple thereof.²⁰⁰ The facts that the Bundeskartellamt, for reasons of procedural economy, only investigated agreements covering volumes of more than 10,000 tickets, and that CTS has possibly also concluded a large number of other exclusivity agreements with smaller promoters, do not reduce the competitive role played by the large-volume exclusivity agreements to the benefit of CTS.²⁰¹
- (276) In addition, the exclusivity agreements concluded by CTS primarily target large promoters which, due to their large ticket volumes and in contrast to the view held by CTS,²⁰² are far more efficient contract partners than smaller promoters. CTS thus binds primarily those promoters to its own system which are important for market entry or expansion of competition. This further increases market foreclosure which is already anti-competitive due to the dimension of the market volume bound,²⁰³ as the competitors of CTS can no longer use alternative, sufficiently efficient sources any longer.²⁰⁴
- (277) The major part of the ticket volume available on the market is offered by a small number of promoters of big events. Insofar, only around 10% of the promoters covered by the customer overlap analysis can offer more than 10,000 tickets.²⁰⁵ However, in the customer overlap analysis, 84% of the ticket quantity altogether available on the market could be attributed to those few promoters with more than 10,000 tickets. CTS purchases a major share of its tickets from such large promoters.²⁰⁶
- (278) Furthermore, it has to be considered that CTS has several in-house promoters which match the above-mentioned characteristics of promoters bound by exclusivity agreement to an even greater extent: The average ticket price of promoters belonging to the CTS group – just as in the exclusivity agreements - is almost [...] market average.²⁰⁷ Furthermore, the promoters linked to CTS

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203 OJ C 45/7 of 24.2.2009: Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para.20.

204 OJ C 45/7 of 24.2.2009: Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para.32 fn. 4.

205 [...]

206 [...]

207 [...]

are all promoters of larger events with more than 10,000 tickets; in most cases the ticket number is even above 100,000 tickets.²⁰⁸ The average number of tickets available from CTS's own promoters is thus far above market average.

(bb) Advance booking offices

- (279) The exclusivity agreements nos. [...] to [...] on the advance booking side of the market also affect advance booking offices which are particularly interesting in terms of quality. For example, CTS has concluded exclusive cooperations with [...]. CTS has thus acquired access to [...] advance booking offices with a single contract.²⁰⁹ Furthermore, some [...] concluded exclusive agreements with CTS.²¹⁰ The advertising possibilities presented through this have further advantages for CTS. The same applies for the important customer network of an advance booking partner with which CTS has also concluded an exclusivity contract.
- (280) Especially CTS's own online shop is of significant importance on the advance booking side of the market, which was confirmed in a market survey.²¹¹ In many cases it would not be possible to ensure that tickets are sold or completely sold out without a connection to the CTS online shop. By controlling this distribution channel on its own, CTS has a qualitative competitive advantage, which competitors can hardly make up for. A fact that is intensified even more through exclusivity agreements with the remaining advance booking offices.

(c) Impediment to the promoters' options to switch supplier

- (281) The exclusivity agreements actually impede the possibility for promoters to switch supplier. The parallel use of several ticketing systems for marketing events by means of ticket quotas is made difficult or even impossible (see above, multi-homing), in particular in the case of large promoters.
- (282) As described above, multi-homing is a significant factor for competition in a multi-sided market. This strategy presents a countermeasure for higher market entry barriers, which originate from mutual indirect network effects, and for the self-reinforcing feedback loop effect, as it creates an equal demand for several platforms in the market. This results in lower market entry barriers. A newly entering company can thus establish a platform without having to persuade customers to exclusively use the new and unknown platform and leave competing platforms.²¹²

²⁰⁸ [...]

²⁰⁹ [...]

²¹⁰ [...]

²¹¹ Cf. above section B.I. "Market dominance".

²¹² Working paper p. 63ff.; Bundeskartellamt, case summary of 20.4.2015, B6-39/15 – *Immowelt/Immonet*, B6-39/15 available at www.bundeskartellamt.de.; *Online-Dating-Plattformen*, B6-57/15 available at www.bundeskartellamt.bund.de.

If multi-homing is possible and of strategic interest to users, exclusivity agreements lead to a significant artificial increase in existing market entry barriers which represent an abusive foreclosure strategy.

- (283) Exclusivity agreements represent a significant competitive barrier, also or especially if single-homing is predominant, as it completely eliminates any possibility of switching to another platform (which is already limited due to market dominance) and increases the risk of a market tipping process.
- (284) In the present case, CTS concludes exclusivity agreements especially with promoters of bigger events, which would be able to sell their high ticket volumes through a ticket quota by means of multi-homing and could in general have competitors of CTS take part in the marketing of their tickets with significant quota, at least partially. In general, according to the investigation and as described above, some promoters, in particular larger companies, pursue multi-homing strategies in the marketing of tickets.
- (285) The Bundeskartellamt has conducted a customer analysis in this context on the basis of a representative customer list and investigated the occurrence of multi-homing and single-homing in the systems as well as the importance of customers and events. While, in 2015, promoters/CTS customers who only used single homing merely sold 4,062 tickets on average, promoters/CTS customers who used multi homing at least to a limited extent, sold an average of 30,000 tickets.²¹³ Around 50% of the tickets available on the market may be allocated to those big customers.²¹⁴ At the event level it became apparent that multi-homing is generally used for larger events and that the share in ticket sales is thus disproportionately high.²¹⁵ This shows that multi-homing is generally a sensible strategy for those major customers, and that this is in fact impeded by the exclusivity agreements.
- (286) However, the switching options of single-homing promoters exclusively bound to CTS are also impeded as competing systems may only win over those customers if they completely withdraw from CTS. Single-homing promoters are thus closely bound to CTS by the exclusivity agreements, even if the agreements only relate to a share of the ticket quota. It cannot be argued that those companies depended on CTS in any case and that switching was therefore generally not an option. In the assessment of abuse of a dominant position, the objective of the prohibition has to be considered which, in view of the already existing market dominance and considerably weakened competition, focuses in particular on keeping the markets open. In general, switching to another

²¹³ [...]

²¹⁴ [...]

²¹⁵ [...]

ticketing system could be considered by any promoter, if sufficiently competitive alternatives were available. Not only the development of alternatives, but also the switching options available to promoters are impeded by exclusivity contracts.

b) No objective justification

(287) An objective justification of the exclusivity agreements concluded by CTS and the resulting market foreclosure is not evident. Promoters and advance booking offices which have concluded exclusivity agreements with CTS may not be categorised as privileged agents of CTS, which is why the prohibition of abuse of a dominant position is applicable with regard to their relationship with CTS (for more details on this see aa) below). Also, the fact that promoters and advance booking offices concluded the exclusivity agreements voluntarily and that, in some cases, they are granted a consideration from CTS, cannot objectively justify the exclusivity agreements (for more details on this see bb) below). The exclusivity agreement in the [...] contract no. [...] is not objectively justified either (for more details see cc) below).

aa) No agency privilege

(288) The qualification of the exclusivity obligations concluded between CTS and promoters or advance booking offices as abusive is not called into question by the competition law concept of “agency privilege”, even though the obligations form part of agency agreements.

(1) No privileged treatment of exclusive agency clause to the detriment of promoters

(289) The agreement of a commissionaire relationship or commercial agent relationship pursuant to Section 383 or Section 84 of the German Commercial Code (HGB) for the marketing of all tickets from the system through CTS’s own and other advance booking offices does not result in a privileged treatment of exclusivity agreements with regard to CTS’s relationship with promoters. In its capacity as commissionaire/commercial agent, CTS does not act as a mere auxiliary organ of the promoters. With regard to its relationship with promoters CTS is to be treated as an independent economic operator whose conduct towards the principals, including so-called exclusive agency clauses, is solely governed by Articles 101 and 102 TFEU.

- (290) Two markets, the market for agency services and the market for products of the principal, have to be distinguished in assessing the admissibility of distribution agreements and price and condition fixing provisions in agency agreements with regard to agency privilege (as described above for the definition of the market).²¹⁶ In the case practice of the Commission and the case-law of the ECJ, the question as to the applicability of the agent privilege or the independence of an agent from the principal arises only insofar as the agreed restriction affects the market for products of the principal, particularly in view of the risk distribution for sales of the products.²¹⁷
- (291) However, as explained, the exclusivity agreements with promoters solely relate to the agency relationship, as their subject is the exclusive marketing by CTS (exclusive agency clause). Even if, in individual cases, the allocation of a restriction to one of the markets can be difficult, there is consensus that exclusivity agreements in the form of exclusive agency provisions are to be seen as belonging to the agency market.²¹⁸
- (292) If the restriction concerns the agency relationship between agent and principal, it is generally accepted that agent and principal are in general independent operators, irrespective of the risk distribution, and that Article 102 and Article 101 TFEU are therefore applicable.²¹⁹

²¹⁶ Undisputed, cf. ECJ decision of 11.9.2008 case C-279/06 para. 41 - *CEPSA*; ECJ decision of 16.12.1975 case C-40/173 para. 478-483 – *Suiker Unie*; ECJ decision of 1.10.1987 case 243/83 para. 44f. – *Binon*; ECJ decision of 1.10.1987, case 311/85, para. 20 – *Flemish Travel Agents*; conclusions stated by Kokott of 13.6.2006, C-217/05, para. 44, 46 - *CEPSA*; Commission, Guidelines on Vertical Restraints, OJ C 130/1 of 19.5.2010, para. 19; Kirchhoff, in: Wiedemann, Handbuch Kartellrecht, 3rd edition 2016, § 11, para. 23; Emmerich, in: Immenga/Mestmäcker, EU-Wettbewerbsrecht, 5th edition 2012, Art. 101, para. 186; Schultze/Pautke/Wagener, Vertikal-GVO, 2011, § 1(1) lit. h, para. 274.

²¹⁷ Cf. Commission, Guidelines on Vertical Restraints, OJ C 130/1 of 19.5.2010, para. 13ff; ECJ decision of 14.12.2006 case C-217/05, para. 43 – *CEES*; ECJ decision of 24.10.1995 case C-266/93, para. 19 – *Bundeskartellamt/Volkswagen*.

²¹⁸ Cf. Commission, Guidelines on Vertical Restraints, OJ C 130/1 of 19.5.2010, para.19, Nolte, in: Langen/Bunte, Europäisches Kartellrecht, 12th edition, 2014, Art. 101 para. 644.

²¹⁹ Cf. Commission, Guidelines on Vertical Restraints, OJ C 130/1 of 19.5.2010, para. 19, Kirchhoff in: Wiedemann, Handbuch Kartellrecht, 3rd edition, 2016, § 11, para. 23, Schultze/Pautke/Wagener, Vertikal-GVO, 2011, § 1(1) lit. h, para. 275.

(2) Non-compete obligation to the detriment of advance booking offices not covered by privileged treatment

- (293) The exclusivity agreements to the detriment of advance booking offices do not fall under the agency privilege. Article 102 TFEU thus remains applicable in this context as well.
- (294) The “advance booking partner contract” used by CTS states that the advance booking office is to “broker the sale of tickets for events”.²²⁰ If CTS itself acts as an agent for the promoter, the purchase contract concerning the ticket brokered by the advance booking office is concluded directly between the promoter and the ticket buyer.²²¹ In this scenario, the advance booking offices are direct agents of the promoters while CTS and the advance booking offices only conclude a contract for connection to the system in conjunction with a sub-authorisation for the advance booking offices.
- (295) Irrespective of the question if and under which contract constellation the advance booking offices act directly or indirectly as agents for CTS, the agency privilege is not effective because the exclusivity agreements in these contracts - as so-called single branding obligation²²² - affect the agency market on which the advance booking offices face CTS as independent economic operators.
- (296) The restrictions imposed on advance booking offices by CTS may not be seen as transactions carried out by CTS for the promoters. The exclusivity agreements concluded between the advance booking offices and CTS do not result from contracts between CTS and the promoters, but are specified by CTS for the advance booking offices and thus represent an autonomous decision. Hence, these restrictions do not represent a business policy of the promoter as the principal, which is merely passed on by CTS to its own contractual partners.

²²⁰ [...]

²²¹ [...]

²²² Cf. Commission, Guidelines on Vertical Restraints, OJ C 130/1 of 19.5.2010, para. 19.

bb) Voluntary basis and consideration for promoters/advance booking offices are irrelevant aspects

- (297) In establishing whether exclusivity agreements constitute an abuse of a dominant position, it is irrelevant whether the agreements were concluded under pressure or voluntarily.²²³ Even exclusivity agreements concluded by a dominant company upon request by the bound company can be unfair.²²⁴ In this respect, the general interest in undistorted competition is predominant.
- (298) Conditions which the dominant company creates by granting economic advantages (e.g. price reductions), can also constitute an abusive practice.²²⁵ According to the guideline ruling of the ECJ in the *Hoffmann-La Roche* case, a consideration (e.g. a discount) received by the bound company is irrelevant for the assessment of whether an exclusivity agreement constitutes an abusive practice.²²⁶
- (299) Hence, it is also irrelevant for the exclusivity agreements in question that in some cases [...] have been provided by CTS in return for the granting of exclusivity.

cc) No justification for exclusivity agreements in the [...] contract

- (300) Contrary to the view held by CTS,²²⁷ the exclusivity clause included in the [...] contract (no. [...]) is not justified either. [...].

(1) [...]

- (301) [...]
- (302) [...]
- (303) [...]
- (304) [...]

(2) [...]

- (305) [...]
- (306) [...]

²²³ ECJ of 13.2.1979, case 85/76, para. 120 – *Hoffmann-La Roche/Commission*; Eilmannsberger/Bien, in: Münchener Kommentar, 2nd edition 2015, Art. 102 para. 433; Brand, in: Frankfurter Kommentar, 80. Lfg. May 2014 para. 219.

²²⁴ Düsseldorf Higher Regional Court, decision of 20.6.2006, VI-2 Kart 1/06 (V), p. 40 – *E.ON Ruhrgas*.

²²⁵ Eilmannsberger/Bien, in: Münchener Kommentar, 2nd edition 2015, Art. 102 para. 434.

²²⁶ ECJ decision of 13.2.1979, para. 85/76, para. 89 – *Hoffmann-La Roche*.

²²⁷ [...]

(3) [...]

(307) [...]

(308) [...]

c) Appreciable effect on trade between Member States

(309) The exclusive agreements concluded between promoters and advance booking offices are likely to appreciably affect trade between Member States within the meaning of Article 102 TFEU. They affect the Germany-wide market for ticketing system services provided for promoters and advance booking offices. Due to the dominant position held by CTS on this market, this effect is appreciable.

II. Violation of Article 101 TFEU, Section 1 GWB

(310) Furthermore, the exclusivity agreements fall under the prohibition of cartels pursuant to 101 TFEU, Section 1 GWB.

1. Anti-competitive agreement

(311) As explained, the conclusion and application of exclusive agreements with promoters and advance booking offices aims at restricting competition and thus has an appreciable (anti-competitive) foreclosure effect (see above). The agency privilege does not preclude this as CTS is not a privileged agent in its relationship with promoters, nor are advance booking offices privileged agents in their relationship with CTS (see above).²²⁸ Also, as described above, [...] be considered [...].

(312) According to the ECJ's case law, in the assessment of whether the restriction of competition is appreciable, the exclusivity agreements concluded by CTS with promoters and advance booking offices have to be considered cumulatively in their foreclosure effect.²²⁹ On this basis, and taking into account the dominant position held by CTS, an appreciable effect is to be assumed as market

²²⁸ The statements made by CTS [...] according to which the exclusivity agreements with promoters and advance booking offices were admissible for an indefinite term or at least for a duration of 5 years, subject to the 30% market share threshold of the VBER and taking into account the rules on non-compete obligations in Article 1 and Article 5 of the VBER, are meaningless/irrelevant as the 30% threshold is actually exceeded in this case.

²²⁹ Cf. ECJ decision of 28.2.1991, case C-234/89 para. 27 – *Delimitis*.

access is not easy for competitors wishing to enter the market or to extend their market share.²³⁰ Moreover, as explained above, CTS has foreclosed at least 40% of the market for competitors through the exclusivity agreements and through in-house promoters and advance booking offices.

- (313) In view of this market share, the requirements concerning proof of appreciable effect set out by the Commission's De Minimis Notice are also fulfilled. In contrast to the view held by CTS,²³¹ the relevant provision in this case is not para. 10, but para. 8.b) of the De Minimis Notice which states that in the case of non-horizontal agreements at least one of the parties to the agreement must hold a market share exceeding 15%.²³² In view of the overall economic and legal context, the position of the parties on the relevant market and the term of the agreements concerned, they contribute significantly to the foreclosure effect.²³³

2. No exemptions

- (314) The requirements for an exemption of the agreements are not met, neither on the basis of Article 101(3) TFEU, nor on the basis of Section 2 GWB.
- (315) A block exemption of the exclusive agreements in accordance with Article 2(1) VBER cannot be considered, as the market share threshold under Article 3(1) VBER is exceeded.
- (316) There is also no indication that an individual exemption in accordance with article 101(3) TFEU, Section 2 GWB can be considered. Efficiency gains cannot be expected to result from the exclusivity agreements, nor are these considered indispensable. In fact, anti-competitive agreements involving the dominant undertaking bear the risk of eliminating substantial competition. Moreover, CTS would have to prove that the requirements for an individual exemption are met.

III. Decision

1. Operative part

- (317) In paragraphs 1 and 2 of the operative part, the Bundeskartellamt obliges CTS to remedy the infringements against Article 102 TFEU, Section 19 GWB and Article 101 TFEU, Section 1 GWB by adjusting or terminating the agreements nos. [...] to [...] and nos. [...] to [...] on the basis of Section 32 (1) GWB. These termination measures must be ordered.

²³⁰ Cf. ECJ decision of 28.2.1991, case C-234/89 para. 27 – *Delimitis*.

²³¹ [...]

²³² Cf. OJ C 291/01 of 30.8.2014.

²³³ Cf. ECJ decision of 28.2.1991, case C-234/89 para. 27 - *Delimitis*.

- (318) Merely prohibiting the continuation of the exclusivity agreements under review would not be sufficient to terminate the infringement, as, on the one hand, the existing contracts could remain unchanged and the lawfulness and enforceability of the exclusivity agreements would not be sufficiently discernible for CTS's partners, and on the other hand, the exclusivity agreements are often closely connected to other clauses of the contract and have been set up individually for each case. If the agreements were merely prohibited, the validity under civil law of all contractual clauses which do not refer to exclusivity (and which are void anyway according to Section 134 of the German Civil Code (BGB)) would remain unclear. In order to establish a clear legal situation and to protect its partners, CTS will therefore have to explicitly renegotiate or delete the contract clauses in question, ensuring that paragraphs 3 and 4 of the operative part of the order are observed. The Bundeskartellamt grants CTS a four-months transition period for implementing the measures to eliminate the infringement.²³⁴
- (319) In accordance with Section 32 (1) GWB, paragraph 3 of the operative part contains the obligation for CTS to grant its partners the right to explicitly and at their own discretion broker at least 20% of their annual ticket volume via or from systems *other than* CTS in all ticketing system service agreements of a duration of at least two years or of unlimited duration. Without this requirement, CTS could conclude agreements of the same type as those specified in paragraphs 1 and 2 of the operative part again upon receipt of the order and thus perpetuate the foreclosure which was supposed to be eliminated.²³⁵ The order of restrictions on the design of contracts is justified in view of existing market structures and the information available on CTS's future sales policy²³⁶ which give sufficient reason to believe that such behaviour could occur. The restrictions on the design of future contracts in paragraph 3 of the operative part are intended to prevent future foreclosure effects of all types of agreements investigated in this context. Paragraph 3 of the operative part contains requirements to adjust or renew agreements according to paragraphs 1 and 2 of the operative part. It also contains requirements regarding future agreements with other promoters or advance booking offices.
- (320) The Bundeskartellamt's requirements for future contracts by CTS under paragraph 3 of the operative part are based both on relevant case-law and existing market practice. The requirements set forth in paragraph 3 of the operative part are not met unless CTS's contracted promoters and advance booking offices can act "at their discretion" and hence completely independent of CTS

²³⁴ [...]

²³⁵ Cf. Federal Court of Justice decision of 10 February 2009, KVR 67/07 para 34 – gas supply contracts

²³⁶ [...]

and without the obligation to contact CTS when using third-party ticketing systems. If these requirements are to be met, interactions of partners must neither be reported to CTS nor documented for CTS and must not be subject to CTS's consent. Agreements stipulating that partners are obligated to use CTS's systems exclusively, i.e. 100%, with the quota of at least 20% only being attained in exceptional cases,²³⁷ will also be rejected. Such agreements entail the reversal of the burden of demonstration and proof under civil law when quota are allocated to competing ticketing systems, which counteracts the objective of the order.

- (321) When calculating the relevant annual ticket volume, the ticket *quantity* rather than the ticket *value* is the relevant criterion. While the informative value of the latter is higher when it comes to assessing the potential for foreclosure, it is normally not used to determine quota in contracts between ticketing systems and promoters or advance booking offices, and it would hardly be feasible to do so in practice.
- (322) Contrary to the opinion of CTS,²³⁸ it is the current and not the previous calendar year that is taken as a basis for calculating the annual ticket volume. This is common practice on the market and seems more manageable in view of the promoters' fluctuating ticket volumes. While Article 1 sentence 1d) of the VBER references the previous calendar year, the VBER is not applicable in this case. The exclusivity agreements concluded by CTS rather show that it is uncommon to set ticket quota on the basis of the previous calendar year and that it is easier to reference the current calendar year in practice. Some agreements explicitly focus on the total ticket quantity "per year" when setting quotas, without referring to the previous year, i.e. their wording points to the current year.²³⁹ A large number of further exclusivity agreements has been set up to control the agreed ticket quota for the current calendar year by referencing the ticket quantity per event.²⁴⁰ Referencing the current calendar year and/or individual events would thus be appropriate when future quota for CTS are defined. A pro rata approach to agreements starting during the course of a year is dispensable from the outset when the latter procedure applies.²⁴¹
- (323) According to paragraph 4 of the operative part, agreements with tacit renewal clauses are considered concluded for an unlimited period as they have a similar effect. This provision serves for clarification.

²³⁷ Contracts [...] are an example of this type of agreement.

²³⁸ [...]

²³⁹ [...]

²⁴⁰ [...]

²⁴¹ [...]

- (324) Paragraph 5 of the operative part stipulates that paragraph 3 of this order shall be limited to four years, which is deemed appropriate for reasons of proportionality. However, there is no need to decree provisions of degression for that period.²⁴² According to a supreme court decision, granting the addressees of a prohibition a limited transitional period is sufficient when ordering them to implement certain contractual requirements in future.²⁴³ In the case to be decided on, the Federal Court of Justice also confirmed that a time limit of four years for the order was proportionate.²⁴⁴ Any contracts concluded with promoters and advance booking offices by CTS in the four-year period which exceed 80% of the respective ticket volume will therefore be disputable by competing ticketing systems on at least two dates in view of the maximum permissible duration of two years.
- (325) Paragraph 6 of the operative part contains a reservation of revocation relating to paragraphs 3 and 5, which enables the Bundeskartellamt to amend the order in the event that the circumstances change, especially if the order fails to effectively bring the infringement to an end due to factual or temporal aspects. This applies in particular with regard to the restriction of the order to certain contracts, which is outlined in the following.

2. Discretion

- (326) The Bundeskartellamt exercises its discretionary powers according to Section 32 (1) GWB for the issuance of this order.
- (327) Considering the high economic significance of the affected market and the wide-ranging effects of competition restraints in view of the large number of contracts with promoters and advance booking offices, the competition authority's intervention is in the public interest.
- (328) In exercising its discretionary powers, the Bundeskartellamt focuses on exclusivity agreements concluded by CTS with promoters and advance booking offices which affect at least 80% of the annual ticket volume and either have a fixed duration of at least two years, or have been concluded without time limit or are subject to tacit renewal. The order thus does not refer to agreements in which promoters, advance booking offices or other market participants undertake towards CTS to sell on its behalf an annual ticket volume below 80%, although the Bundeskartellamt has information suggesting that CTS uses such agreements to secure further significant ticket

²⁴² [...]

²⁴³ Cf. Federal Court of Justice decision of 10 February 2009, KVR 67/07 para 34 – gas supply contracts

²⁴⁴ Cf. Federal Court of Justice decision of 10 February 2009, KVR 67/07 para 54 – gas supply contracts

volumes for its business.²⁴⁵ The Bundeskartellamt considers that these measures will sufficiently open the market for competition. In this context, it has to be made clear that the prohibition of exclusivity agreements as described in the operative part does not allow the conclusion that any agreement between CTS and promoters or advance booking offices regarding less than 80% of the annual ticket volume and having a duration of more than two years are admissible under competition law.²⁴⁶ The same applies to agreements concerning at least 80% of the annual ticket volume and having a duration of less than two years.

- (329) In paragraphs 1 and 2 of the operative part and in its investigations into possible exclusivity agreements of CTS, the Bundeskartellamt focused on agreements with promoters for 10,000 tickets or more per year in the interest of procedural economy. The Bundeskartellamt is aware of further potentially problematic contracts CTS has concluded with organisers for a volume of less than 10,000 tickets per year.²⁴⁷ The same applies to further exclusivity agreements CTS has concluded with promoters after 1 February 2017.²⁴⁸ In an effort not to delay the conclusion of the proceedings any further, the Bundeskartellamt did not make the question of lawfulness of past agreements which had already been concluded a subject of the proceedings.
- (330) This is based on the expectation that the market can only open successively in view of CTS's strong market position and the limited options for promoters and advance booking offices to switch to alternative suppliers. In exercising its discretionary powers, the Bundeskartellamt considered it sufficient to enforce the adjustment or termination of any contracts falling under the conditions set forth in paragraphs 1 and 2 of the operative part and thus to make the market shares linked to them contestable for CTS's competitors. However, CTS could undermine the market opening effect after the order's release if it were to negotiate new exclusivity agreements with promoters and advance booking offices which are not covered in paragraphs 1 and 2 of the operative part.
- (331) As described above, such agreements were indeed concluded while the proceedings were ongoing, which shows that CTS continues to have a strong interest in concluding such exclusivity agreements, and that there is a risk that the order's market-opening effect could be foiled by CTS setting up new contractual commitments for third parties. For this reason, the wording of paragraph 3 of the operative part has been chosen to include agreements of the kind described in paragraph 3 of the operative part with third parties rather than only including the participants in the agreements covered by paragraphs 1 and 2.

²⁴⁵ [...]

²⁴⁶ [...]

²⁴⁷ [...]

²⁴⁸ [...]

C. FEES

[...]

D. INSTRUCTION ON RIGHTS OF APPEAL

This decision is subject to appeal. The appeal should be submitted in writing to the Bundeskartellamt, Kaiser-Friedrich-Straße 16, 53113 Bonn within one month upon service of the decision. Receipt of the appeal by the appellate court, the Düsseldorf Higher Regional Court, within this time limit is, however, also sufficient.

The reasons for the appeal should be presented in a written statement and submitted to the Bundeskartellamt or the appellate court. The time limit for filing the statement of appeal is two months. It shall begin upon receipt of the decision under appeal and may, upon application, be extended by the presiding judge of the appellate court. The statement of appeal must state the extent to which the decision is being appealed and its modification or revocation sought and indicate the facts and evidence (if applicable, also new facts) on which the appeal is based.

The notice of appeal and the statement of the reasons of appeal must be signed by a lawyer.

The appeal has no suspensive effect. The appellate court may, upon application, entirely or partly restore the suspensive effect of the appeal.

Appellants should note that the operative part of the decision will be published in the Federal Gazette (Section 62(1) GWB) and online in full text version. Appellants are asked to inform the competent decision division within seven days upon receipt of the decision in writing whether the decision contains business secrets which are to be deleted prior to publication. Please give reasons substantiating why the passages you wish to see deleted contain business secrets. Unless the decision division receives your notice within seven days, the Bundeskartellamt will assume that the decision does not contain any business secrets and publish it without any deletions.

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