Corrected by the decision
of 8 July 2021
Barth
Registrar
of the court
registry

FEDERAL COURT OF JUSTICE

DECISION

KVR 54/20

Pronounced on:
18 May 2021
Barth
Registrar
of the court
registry

in the cartel administrative proceedings

Case law reports: yes
BGHZ (*Collection of decisions of the Federal Court of Justice in civil matters*): yes
BGHR (*Collection of rulings of the Federal Court of Justice*): yes

Booking.com

Article 101(1) and (3) TFEU

a) A “narrow price parity clause” used by an online hotel platform which allows hotels to offer lower prices on other online hotel platforms or, provided that such offers are not advertised or published online, also “offline”, but prevents hotels from offering their rooms on their own website at lower prices or better conditions than on the platform does not constitute an ancillary restraint exempted from the application of Article 101(1) TFEU.

b) The “narrow price parity clause” used by Booking.com does not satisfy the conditions for exemption set out in Article 101(3) TFEU since any advantages associated with combating free riding do not, by any means, balance out its anti-competitive effects in the form of a significant impediment to the hotels’ own online distribution alongside the platform; these anti-competitive effects are caused by the fact that the hotels have to price their online offers outside the platform as if they were subject to the costs associated with selling rooms on the platform.

BGH (*German Federal Court of Justice*), decision of 18 May 2021 – KVR 54/20 – OLG Düsseldorf (*Düsseldorf Higher Regional Court*)
ECLI:DE:BGH:2021:180521BKVR54.20.0

On the basis of the oral hearing of 18 May 2021 the Cartel Panel of the Federal Court of Justice, represented by the presiding judge Prof. Dr Meier-Beck and the judges Prof. Dr Kirchhoff, Dr Roloff, Dr Tolkmitt and Dr Rombach,

decided as follows:

Following the appeal on points of law lodged by the Bundeskartellamt, the decision rendered by the First Antitrust Division of the Düsseldorf Higher Regional Court on 4 July 2019 is repealed.

The complaint lodged by the parties under 1 and 2 against the Bundeskartellamt's decision of 22 December 2015 is rejected.

The parties concerned will bear the costs of the appeal proceedings, including the reimbursement of any necessary expenses incurred by the Bundeskartellamt in duly pursuing the matter.

The value in dispute in the appeal proceedings is set at EUR 5,000,000.

Reasons:

1 I. The parties concerned (in the following: Booking.com) operate an online hotel platform (booking.com) at "www.booking.com" which allows hotel customers to make direct bookings; booking.com is a leading online hotel platform in Germany and Europe. Booking.com receives a performance-related commission from the hotels for its intermediary service. Booking.com's general terms and conditions included a "narrow price parity clause" under 2.2. According to this clause, hotels were not allowed to offer their rooms on their own website at lower prices or better conditions than on Booking.com's platform. It was, however, permitted to offer the hotel rooms at lower prices on other online hotel platforms or, provided that the offers were not advertised or published online, also

“offline”. A violation of these price and booking conditions parity clauses on the part of a hotel gave Booking.com the right to terminate the contract concluded with the hotel without notice.

2 In its decision of 22 December 2015, the Bundeskartellamt established that the price and booking conditions parity clauses violated competition law and consequently the authority prohibited their further use as from 1 February 2016. Since then, Booking.com has no longer used the narrow price parity clause.

3 Following a complaint lodged by Booking.com, the appellate court (Düsseldorf Higher Regional Court, WuW 2019, 386) reversed the authority’s decision. The Bundeskartellamt appeals the court’s decision on points of law. The appeal on points of law has been admitted by the Cartel Panel of the German Federal Court of Justice. Booking.com opposes the appeal.

4 II. The appellate court held that the narrow price parity clause did not violate Article 101(1) TFEU or Section 1 of the German Competition Act (*GWB*), nor did it constitute an abuse of market power pursuant to Section 20(1), Section 19(1), Section 19(2) no.1 GWB.

5 The appellate court acknowledged that the clause restricted competition within the meaning of Article 101(1) TFEU and Section 1 GWB both on the market for online hotel platforms and on the market for hotel rooms. However, the court held that such a clause was exempted from the prohibition of anti-competitive agreements under Article 101(1) TFEU and Section 1 GWB since it was an ancillary restraint to the platform service which in itself was neutral in terms of competition law. In the appellate court’s opinion, the narrow price parity clause ensured a fair and balanced business relation between Booking.com as the platform operator and the contractually bound hotels as recipients of the intermediary service provided, and, what is more, in terms of time, territory and purpose the clause did not go beyond what was necessary for achieving this objective. Since Booking.com only received a commission if the hotel room found on the platform was indeed booked via booking.com, the court held that the balanced business relation between the parties to the platform contract would be

seriously disrupted if the hotels could redirect customers to their own booking facilities by offering lower room prices or better booking conditions before customers made a booking on booking.com. In the court's view, this was a real and serious risk likely to emerge without the narrow price parity clause since, in that case, the hotels would not have to pay the commission for the intermediary service and could strengthen their customer ties. The appellate court held that the very possibility of the hotels to redirect bookings to their own booking facilities was enough to justify Booking.com preventing its contractual partners from engaging in such "free-riding activities". In the court's view, it was irrelevant whether or not Booking.com could tackle this free-rider problem by agreeing on other forms of compensation (e.g. a listing fee or pay per click).

6 The appellate court also held that the narrow price parity clause did not violate the prohibition of abuse of a dominant or powerful position either (Section 19(1) and (2), Section 20(1) GWB). The question as to whether or not Booking.com was subject to these provisions was, in the court's view, irrelevant in this context since in any case no abusive conduct existed.

7 III. These considerations do not stand up to legal review. Booking.com's narrow price parity clause does not constitute an ancillary restraint to the platform's service exempted from the application of Article 101(1) TFEU.

8 1. Article 101(1) TFEU prohibits all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

9 2. The narrow price parity clause is an agreement between undertakings. It is part of the contracts concluded between Booking.com and the hotels.

10 3. The appellate court rightly assumed that the narrow price parity clause restricts competition in the distribution of hotel rooms. It can therefore be

left open whether or not the clause also restricts competition between hotel platforms.

11 a) No hotel subject to this price parity clause may offer better room prices and booking conditions on its own online distribution channels than on booking.com. In particular, this deprives the hotels of the obvious opportunity to take into account the average commission of 10% to 15% of the room price not incurred on their own distribution channels when setting their prices, and to use these savings to offer lower prices in order to gain customers.

12 This restriction of intra-brand competition in the provision of a hotel's rooms between the hotel's own online distribution channels and the platform booking.com at the same time also restricts inter-brand price competition between hotels since the hotels that are subject to this clause are not able to offer the current or potential customers of other hotels better prices on their own online distribution channels than on booking.com. This makes it particularly difficult for hotels to directly market remaining capacities at reduced prices online in order to manage capacities. It is true that hotels are free to offer such deals if they also reduce their price on booking.com accordingly. However, they then have to pay the usual commission on the lower price when rooms are booked on booking.com, so that their scope for price reductions, and thus the chance of successfully marketing their rooms at the last minute, is reduced accordingly. Since rooms that have not been booked remain unused, such last-minute offers are of particular economic importance in this market.

13 Furthermore, the appellate court rightly assumed that the narrow price parity clause also restricted competition in the offline distribution of hotel rooms. The contractually bound hotels are allowed to offer better room prices and booking conditions on their offline distribution channels than on booking.com. They are, however, prohibited from advertising such offers online. This limits the hotels' offline customer reach.

14 b) According to the appellate court's findings based on the Bundeskartellamt's further investigations, these restrictions of competition

associated with the narrow price parity clause are of great importance in practice. In fact, since the wide price parity clause is no longer in use, 72% of the hotels that provide real-time online booking facilities offer better prices or booking conditions on these sites than on booking.com. This percentage is still 47% for hotels that do not provide such booking facilities but have their own website.

15 c) The restraint of competition in the distribution of hotel rooms is not offset by the fact that the hotels are free to offer their rooms on any other booking platform at lower prices than on booking.com.

16 aa) The appeal for hotels to offer better prices on another platform, for example because this platform charges a lower commission than Booking.com, is limited by the fact that in this case the hotels would have to expect this to have adverse effects on their own online distribution. The price parity clause agreed with Booking.com would prevent them from adjusting the prices offered on their own distribution channels to the lower prices offered on other platforms. Since every other platform will also charge a commission for its intermediary service, which may be lower at best, a customer lost on the hotel's commission-free direct distribution channel outweighs a customer won on another platform due to a lower price. In addition, the appreciation for the hotel's own online offer is affected by the fact that in such a case it becomes clear to customers comparing the offers that the price charged on the hotel's own distribution channel, which is thus not subject to any commission, may even be higher than the price which can be researched, compared and booked on an online hotel platform and which thus even includes an additional service for the customer.

17 bb) It is irrelevant that offering different prices on different online hotel platforms can nevertheless be profitable for a hotel despite the narrow price parity clause agreed with Booking.com on the grounds that a lower price offered on another platform can attract more new customers due to the hotel's extended customer reach than a corresponding offer on the hotel's own website (see Mörsdorf/Schäfer, NZKart 2019, 659, 663).

18 The extent to which the narrow price parity clause affects competition in the distribution of the individual hotel's rooms thus depends on the individual case. Based on the study carried out by RBB Economics and referenced by Booking.com, approx. 40% of all hotels subject to the narrow price parity clause are assumed to have offered prices that differed from those on booking.com on at least one online hotel platform; it is, however, not clearly specified whether the prices referred to were higher or lower prices, the latter being the only relevant factor in this matter. In any case, the restrictive effect on competition of the narrow price parity clause cannot be denied if it affects the online direct distribution channels of all contractually bound hotels, but the possibility for price differentiation between platforms afforded by this provision is not used by 60% of those contractually bound hotels.

19 d) Even if the hotels are free to determine the room price offered on booking.com, any contractual obligation not to offer other prices elsewhere, be it in general or in individual cases only, restricts their freedom to set prices. This obligation forces the hotels to take into account the commission charged by Booking.com (which generally has to be covered by the accommodation price) when setting their prices even if no commission has to be paid. The competitive effect of the narrow price parity clause can thus generally be compared to imposing minimum sales prices (for specific goods or services) which under Article 4(a) of the Vertical Block Exemption Regulation (VBER) qualifies as a hardcore restriction; however, this provision is not directly applicable in this case since the hotels are not buyers of Booking.com's intermediary services and do not resell the intermediary service to their customers, but merely indirectly charge for this service as part of the accommodation price. The reason why price competition is restricted is irrelevant under Article 101(1) TFEU. In order to establish that a restraint of competition exists, it is irrelevant whether the purpose of the restriction is merely or primarily to retain platform users or avoid free-riding activities and whether this purpose may possibly constitute a legitimate objective under competition law in the specific case; based on the structure of Article 101

TFEU, the purpose of the restriction does not become relevant until the conditions for exemption under Article 101(3) TFEU are assessed.

20 e) The restriction of competition caused by Booking.com's narrow price parity clause is appreciable. Booking.com operates a leading online hotel platform in Germany and Europe. Based on the Bundeskartellamt's findings referenced by the appellate court, 64.5% of the hotels consider their presence on booking.com to be practically indispensable in economic terms for the distribution of their hotel rooms and another 29.4% consider this presence to be important. Approximately two thirds of the hotel customers who were not familiar with their accommodation before booking the room found their accommodation on booking.com.

21 In addition, the authority's further investigations referenced by Booking.com have shown that since the narrow price parity clause is no longer used by Booking.com, the vast majority of hotels offer significantly better (i.e. five to ten percent cheaper) prices and/or booking conditions on their own website than on booking.com. Hotels that have not yet adjusted their prices have stated that they intend to do so in the future.

22 4. The appreciable effect of Booking.com's narrow price parity clause on trade between Member States already results from the fact that it prevents hotels throughout Germany, which is an essential part of the common market, from offering guests from other Member States lower room prices on their own websites than on booking.com. If Booking.com also uses narrow price parity clauses in relation to hotels in other Member States of the Union, then the criterion of affecting trade between Member States is all the more shown to have been met. In addition, two of the three large providers, Booking.com and the third party under 2, Expedia Inc., are internationally active companies based outside Germany. Taking into account Booking.com's market significance, there is thus no doubt that the narrow price parity clause can appreciably affect service transactions between Member States (see only European Court of Justice, decision of 30 June 1966 – case no. 56/65, report 1966, 281, 303 –

Maschinenbau Ulm; decision of 24 September 2009 – C-125/07 among others, WuW/E EU-R 1633 para. 36 – Lombardclub).

23 5. If thus all the criteria under Article 101(1) TFEU are fulfilled, it is, contrary to the appellate court's view, not possible to rule out the application of this provision on the ground that the narrow price parity clause is an ancillary restraint to a non-restrictive exchange agreement and necessary to ensure a fair and balanced business relation between Booking.com as the platform operator and the contractually bound hotels as recipients of the intermediary service, and on the ground that in terms of time, territory and purpose the clause does not go beyond what is necessary for achieving this objective.

24 a) If a specific activity is not covered by the general prohibition of Article 101(1) TFEU due to its neutrality or its positive effect on competition, a restriction of the commercial autonomy of one or more parties involved in this activity is, according to the case law of the Court of Justice of the European Union, not subject to this prohibition either, provided that the restriction is objectively necessary for implementing this activity and is proportionate to the objectives pursued by the activity. If it is not possible to separate such a restriction from the main activity without jeopardising the objectives pursued by such activity, the restriction's compliance with Article 101 TFEU has to be examined together with the main activity; this is also the case even if at first glance the restriction as such seems to fall under Article 101(1) TFEU.

25 aa) Only restrictions that are objectively necessary and indispensable for implementing the main activity are exempted from the prohibition under Article 101(1) TFEU as restraints ancillary to a main activity. The fact that the implementation of the main activity would only be more difficult or less profitable without the ancillary restraint is not a sufficient reason for an exemption (see in detail European Court of Justice, decision of 11 September 2014 – C-382/12 P, NZKart 2015, 44 paras. 89-91 – MasterCard/Commission; decision of 23 January 2018 – C-179/16, NZKart 2018, 84 paras. 69-71 – Hoffman-La Roche/Autorità Garante della Concorrenza e del Mercato; European Court of

Justice, decision of 18 September 2001 – T-112/99, WuW/E EU-R 469 paras. 103-114 – Métropole télévision/Commission; Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101 p. 97, para. 29). The assessment of a restriction's objective necessity for the main activity must be based on more abstract criteria, such as the ones also applied by the appellate court, since the weighing of the pro-competitive and anti-competitive effects of a restriction can only be carried out within the scope of Article 101(3) TFEU (EGC, WuW/E EU-R 469 paras. 107-109 – Métropole télévision/Commission). This ruling of the Union courts corresponds with the ruling handed down by the German Federal Court of Justice (see only Federal Court of Justice, decision of 10 December 2008 – KZR 54/08, WuW/E DE-R 2554 para. 15 – Subunternehmervertrag II).

26 bb) Contrary to the appellate court's view, the suitability or also necessity of a contractual provision for securing a fair and balanced business relation in the bilateral relationship between contractual partners is not sufficient to exempt an ancillary restraint from the prohibition under Article 101(1) TFEU.

27 (1) A broad understanding of objective necessity which to a large extent already excludes restraints of competition from satisfying the prohibition criteria under Article 101(1) TFEU for the mere reason that the objective pursued with such restraints seems reasonable in the bilateral relationship between the contractual partners, is incompatible with the structure of Article 101 TFEU. The pro-competitive aspects narrow price parity clauses are claimed to have, such as securing adequate remuneration for a platform's service by solving the free-rider problem or providing increased market transparency for consumers, must be carefully weighed against their anti-competitive aspects (see paras. 11 to 14, 19 above). Based on the structure of Article 101 TFEU, this weighing can be carried out only as part of the assessment under Article 101(3) TFEU; by applying too broad an interpretation of the concept of ancillary restraints the assessment would, however, not go beyond Article 101(1) TFEU (see EGC, WuW/E EU-R 469 paras. 107 f. – Métropole télévision/Commission, Commission, Guidelines on the application of Article 81(3) of the Treaty loc. cit., para. 30).

28 The Bundeskartellamt rightly claims that merely the assessment pursuant to Article 101(3) TFEU provides room for the necessary balanced consideration based on the market parameters particularly relevant to the evaluation of narrow price parity clauses such as

- the market position of the booking platform and the level of fragmentation of the opposite market side, that is the hotels,
- a possible enhancement of indirect network effects to the benefit of the market leader with the possible consequence of market tipping,
- the extent of the restraint of competition and its relation to prices,
- the actual significance of the free-rider problem,
- the effects of the narrow price parity clause on consumers and competitors of the platform using such a clause and
- the public interest in undistorted price competition.

29 These market parameters can, in the individual case, be more or less distinct and more or less important so that the competitive effect of narrow price parity clauses does not have to be assessed uniformly but can depend in particular on the market power of the party using such clauses. Especially when it comes to platform markets, the assessment of all aspects relevant to competition requires a level of flexibility which is only offered by an examination of the conditions for exemption under Article 101(3) TFEU but not by a broad interpretation of the concept of ancillary restraints which results in a reduction of the scope of application of Article 101(1) TFEU and inevitably excludes all narrow price parity clauses from the prohibition (see, for example, Nolte in Langen/Bunte, EU-Kartellrecht, 13th ed., following Article 101 TFEU paras. 827 f.; MünchKomm.EU WettbR/Zöttl, 3rd ed. Article 4 Vertical BER para. 55; MünchKomm.EU WettbR/Wolf loc. cit., Article 101 TFEU para. 498; regarding the weighing of the competitive effects of price parity clauses also see the study

Crémer/de Montjoye/Schweitzer, Competition policy for the digital era, 2019, pp. 5, 55 ff. commissioned by the European Commission).

30 (2) The decision under appeal also shows that the practical significance of the free-rider problem highlighted by Booking.com only becomes apparent after extensive analyses which differentiate, *inter alia*, between first and follow-up bookings and distribution channels (hotels' own distribution channels, other platforms). In this regard, the appellate court often referenced the Bundeskartellamt's evaluation note on the further investigations requested by the court in the appeal proceedings. In doing so, however, the appellate court departed from the scope of the assessment under Article 101(1) TFEU and moved to the level of weighing the effects reserved for Article 101(3) TFEU.

31 b) Based on these principles, the narrow price parity clause used by Booking.com does not constitute an ancillary restraint exempted from the application of Article 101(1) TFEU (similarly, Augenhofer, NZKart 2019, 415, 417; Bernhard NZKart 2019, 577, 580 f.; Birk, GRURPrax 2019, 452; Mörsdorf/Schäfer, NZKart 2019, 659, 664 to 666; Kühling/Ceni-Hule/Engelbracht, NZKait 2021, 76, 79; with a different view, Santos Goncalves/Karsten, WuW 2019, 454, 457). The narrow price parity clause is not an ancillary restraint necessary for the implementation of the contract relating to the provision of online intermediary services for distributing hotel rooms.

32 aa) It has not been established, or shown to have been brought forward in determining the facts of the case, that without this clause Booking.com could incur sales losses which would jeopardise the functioning and profitability of the business model on which an online hotel platform financed by commissions is based.

33 (1) In this context, the appellate court erred in law by failing to attach importance to the Bundeskartellamt's investigation results. It is true that the assessment of a restraint's objective necessity for the main activity has to be carried out in a relatively abstract way because the weighing of its pro-competitive and anti-competitive effects can only be carried out in the context of Article 101(3)

TFEU (see para. 27 above). This does not, however, mean that relevant findings regarding the market conditions can be ignored when assessing the objective necessity. In fact, all market data that are available at the time of the relevant assessment and which do not require the weighing of the pro-competitive and anti-competitive effects must be taken into consideration.

34 In the present case, this particularly includes the results of the Bundeskartellamt's further investigations carried out due to the appellate court's decision of 17 March 2017 and outlined in the evaluation note of 21 January 2019, to the extent that no significant objections were raised as to the validity of the results. The appellate court has often referenced the evaluation note in the reasons for its decision which is now under appeal; it has, however, left open the question as to whether or not the Bundeskartellamt's further investigations have produced results that are absolutely reliable. In reserving its opinion, the appellate court has taken into account the methodological criticism of the authority's further investigations expressed by Booking.com. However, this criticism was essentially directed against the investigation results obtained by the Bundeskartellamt based on a consumer survey and only to a much lesser extent against those results obtained based on a survey of the hotels. Booking.com did not, however, attack the investigation results which the Bundeskartellamt obtained from online hotel platforms, including Booking.com itself, based on an official request for information pursuant to Section 59(1) GWB subject to fines pursuant to Section 81(2) no. 6, Section 59(2) GWB. In the absence of differing findings established by the appellate court and in the absence of any submissions to the contrary provided by Booking.com, the findings regarding the market structure outlined on pages 1 to 15 and in tables 1 to 15 of the non-confidential version of the Bundeskartellamt's evaluation note can thus be taken into consideration in the appeal on points of law.

35 (2) The fact that, according to the authority's investigations, Booking.com was not only able to maintain but even consolidate its market position in the almost 1.5 years between abandoning the clause on 1 February 2016 and the end of the survey period on 30 June 2017 already

suggests that the narrow price parity clause is not objectively necessary. No arguments have been brought forward and there are no other indications suggesting that this period is not sufficient to provide reliable information on the transaction-intensive market of online hotel platforms on which a great many rooms offered by a large number of hotels are constantly booked in a short amount of time. The Bundeskartellamt's further investigations have shown that based on all relevant parameters such as turnover, market share, booking volumes, number of hotel partners and number of hotel locations, Booking.com's market position in Germany was strengthened and not weakened; this is not disputed by Booking.com.

36 bb) This result is confirmed when comparing the matter at hand with the very limited number of exceptional cases in which ancillary restraints have been previously exempted from the prohibition under Article 101(1) TFEU. The narrow price parity clause is intended to combat a free-rider problem by means of a provision which, to a significant extent, regulates the most important competition parameter, that is the price. Based on this alone, the quality of this clause is not comparable to any of the examples of ancillary restraints brought forward by the appellate court.

37 (1) Agreements with sales agents that with regard to the sale of the relevant contractual goods form an economic unit with the principal do certainly not qualify as ancillary restraints. In this respect, the sales agent and the principal are not independent economic operators (see European Court of Justice, decision of 11 September 2008 – C-279/06, WuW/E EU-R 1475 paras. 35 f. – CEPSA). If the principal and not the sales agent bears the financial and commercial risks associated with selling the goods to third parties, then the instructions and specifications given to the sales agent with regard to selling the goods do not constitute an agreement between undertakings within the meaning of competition law. Since Article 101(1) TFEU is already inapplicable due to the absence of an agreement between undertakings, which is a criterion under this provision, this is not a suitable example of an exemption based on the concept of ancillary restraints.

38 (2) The selective distribution based on qualitative criteria does not raise any concerns under competition law due to the fact alone that it does not constitute a restraint of competition as defined under Article 101(1) TFEU (see only European Court of Justice, decision of 25 October 1983 – case no. 107/82, para. 331 – AEG-Telefunken). As a consequence, there is no need to draw on the concept of ancillary restraints which applies only after it has been determined that a restraint of competition is shown to exist.

39 (3) Furthermore, the protection against competition under lease agreements referenced by the appellate court does not constitute an example where the scope of application of Article 101(1) TFEU is reduced due to the concept of ancillary restraints.

40 In terms of commercial property leases, the lessor's main duty to grant the lessee unhindered use of the leased property (Section 535 German Civil Code (*BGB*)) generally also includes protection against competition afforded under the lease. Based on this, the lessor is generally obliged not to rent space in the lessee's vicinity to competitors or to compete with the lessee himself. However, the lessor is not required to keep any appreciable or unwelcome competition away from the lessee. It rather has to be evaluated in the individual case to what extent the lessor is required in good faith and taking into account the parties' interests to keep away competition (Federal Court of Justice, decision of 26 February 2020 – XII ZR 51/19, BGHZ 224, 370 para. 37; decision of 8 December 2020 – KZR 124/18, NZKart 2021, 302 paras. 36 f. – Konkurrenzschutz für Schilderpräger II).

41 This protection against competition afforded under a lease does not constitute a restraint of competition as long as there is sufficient suitable commercial space available to the lessee's competitors within the relevant geographic market for the goods or services in question. If this is not the case after taking into account similar clauses on protection against competition in other lease agreements relevant in the specific case, the agreed protection against competition has a foreclosing effect on the market. In this case, the clauses on

protection against competition in lease agreements result in restraints of competition which contribute significantly to foreclosing the market (see European Court of Justice, decision of 26 November 2015 – C-345/14, WuW 2016, 74 paras. 24, 27-29 – Maxima Latvija, with reference to European Court of Justice, decision of 28 February 1991 – C-234/89, WuW/E EWG/MUV 911 paras. 20-26 – Delimitis). If, based on the above, competition is shown to be restricted, protection against competition can only be effectively agreed in the lease if the conditions for exemption under Article 101(3) TFEU are satisfied.

42 (4) The restrictions on the franchisee excluded from Article 101(1) TFEU as ancillary restraints are, unlike the narrow price parity clause, an indispensable part of the main contract, i.e. the franchise agreement, that is neutral in terms of competition law. This applies primarily to the measures and specifications for protecting the franchisor's brand and the system's image, such as advertising, the product range, the design and furnishing of the business premises or the service. The franchisee's exclusive purchase obligations are exempted from Article 101(1) TFEU only if and to the extent that they are necessary to ensure the product's quality standards in cases where objective quality standards are not possible or impracticable. Agreements, however, which prevent franchisees from competing in terms of prices – as is the case with the narrow price parity clause which prevents price competition in the hotels' online direct distribution – fall under the prohibition of Article 101(1) TFEU (European Court of Justice, decision of 28 January 1986 – case no. 161/84, WuW/E EWG/MUV 693 paras. 15-23 – Pronuptia).

43 (5) Furthermore, the effects on competition of non-competition clauses in company purchase agreements or of the non-compete obligation applicable to shareholders under company law which significantly affect the company are not comparable to narrow price parity clauses either (see European Court of Justice, decision of 11 July 1985 – case no. 42/84, GRUR Int. 1986, 55 para. 19 – Remia; decision of 15 December 1994 – C-250/92, 1994, I-5641, paras. 33-35 – Gottrup-Klim, Federal Court of Justice, decision of 23 June 2009 – KZR 58/07, WuW/E DE-R 2742 paras. 16-20 – Gratiszeitung Hallo).

44 In both of these examples relating to non-competition obligations the scope of application of Article 101(1) TFEU is reduced due to the concept of permissible ancillary restraints in order to safeguard the substance of a company as an asset protected under property rights afforded by the legal system. The narrow price parity clause, in contrast, merely aims to avoid the impairment of business opportunities, meaning the mere loss of possible future earnings, caused by the free-rider problem. Mere business opportunities, however, are in principle not legally protected against such impairments resulting from the permissible conduct of market players such as the platform's users.

45 (6) According to the case law of the Federal Court of Justice, a non-competition clause in subcontracts – as well as in other exchange agreements – is compatible with Section 1 GWB if the clause is necessary for the subject matter of the agreement and is limited in terms of time, territory and purpose to what is necessary to achieve the purpose pursued in the exchange agreement (Federal Court of Justice, WuW/E DE-R para. 15 Subunternehmervertrag II). This view is in line with the case law of the Court of Justice of the European Union regarding Article 101(1) TFEU (see Federal Court of Justice, WuW/E DE-R 2554 para. 17 – Subunternehmervertrag II).

46 (a) The purpose of subcontracts is the collaborative execution of certain works; in this regard, the main contractor acquires the customers and the subcontractor is to carry out the (partial) orders assigned to him using his own staff and equipment. In this context, the court stated that the balanced business relation could be seriously disrupted if the subcontractor, who inevitably comes into contact with the main contractor's customers in executing the subcontract, were to enter into contractual relationships directly with these customers; however, this was stated because in the relationship between the main contractor and the subcontractor the non-competition clause in question (i.e. the customer base protection clause) counters the likely risk of undermining the main contractor's contractual relationships with his customers in a manner which is comparable to the con-competition obligation under company law (Federal Court of Justice, WuW/E DE-R 2554 para. 19 – Subunternehmervertrag II, with

reference to the decision of 12 May 1998 – KZR 18/97, WuW/E DE-R 131, 133 [juris para. 19] – Subunternehmervertrag I). Such customer base protection clauses are recognised as ancillary restraints excluded from the criteria of Article 101(1) TFEU and of Section 1 GWB because the current customer base is of considerable importance for a company's value and is therefore deemed just as worthy of protection as the entire company value when selling the company and the shareholders' joint business.

47 (b) Contrary to the view held by Booking.com, the narrow price parity clause does not constitute a milder form of such a customer base protection clause.

48 An online hotel platform combines the functions of a sector-specific search engine which allows users to search for and compare a range of accommodation facilities based on pre-set criteria or criteria selected by the users themselves from an existing catalogue, with the service of a sales agent or an intermediary service which, based on the results of the search for and comparison of goods or services, allows users to immediately conclude a contract with their preferred provider with little effort – ideally in only a few "clicks". Anyone who books an overnight stay at a hotel through such a platform is therefore – just as with booking the room with the hotel itself – a customer of the hotel. They are only customers of the platform with regard to the use of the intermediary service for which they do not pay the selected sales agent directly but indirectly via the commission fee included in the accommodation price. Therefore, when it comes to hotel guests who use the platform only to search for available hotels which fit their criteria and to compare the offers found on booking.com but who do not book their rooms there but directly with the hotels found on the platform, Booking.com cannot claim that it has to protect its customer base against the hotels. The price parity clause is therefore not a customer base protection clause but a commission protection clause; it is intended to make users book their accommodation on the platform so that Booking.com receives the corresponding commission from the hotels. Lastly, contrary to the narrow price parity clause, the

customer base protection clauses recognised as ancillary restraints neutral in terms of competition law do not constitute price-related restrictions.

49 IV. Booking.com's narrow price parity clause is neither covered by the block exemption nor by an individual exemption.

50 1. The narrow price parity clause used by Booking.com is not exempted from the prohibition under Article 101(1) TFEU pursuant to Article 2(1) of the VBER as the company's market share on the relevant market for online hotel platforms in Germany is more than 30%.

51 a) In line with the authority's decision (paras. 130 to 147), the appellate court based its analysis on the "hotel platform market" as the relevant product market, that is the market on which the online hotel platforms offer their intermediary services to hotels (see Düsseldorf Higher Regional Court, WuW/E DE-R 4572, juris paras. 30 to 59). Booking.com neither objects to this definition nor to the authority's geographic market definition limited to Germany (see the authority's decision, paras. 152 to 158; Düsseldorf Higher Regional Court, WuW/E DE-R 4572, juris paras. 60 f.) in the appeal proceedings; no legal errors are discernible. In addition, Booking.com has not argued that the company's narrow price parity clause is covered by the block exemption.

52 b) In any case, according to the results of the Bundeskartellamt's further investigations which were not disputed by Booking.com, the company holds a market share of more than 30% on the relevant hotel platform market in Germany.

53 Accordingly, the online hotel platform market is highly concentrated. Compared to the large platform operators Booking.com, Expedia and HRS and the websites they offer, the smaller platform operators holding a total market share of no more than 5% in the years 2013 to 2017 do not carry any weight. Tables 4 and 6 of the evaluation note show that, taking into account a turnover-based (commission revenues) and quantity-based (bookings/overnight stays)

safety margin, Booking.com's market share ranged between 45% and 65% in the years 2013 to 2017. Booking.com's very large market significance is confirmed by the fact that in the years 2015 and 2017 this company arranged at least twice the number of bookings for hotel partners compared to its large competitors HRS and Expedia (table 11 of the evaluation note). The same applies to the number of hotel bookings arranged in Germany from 2014 onwards (table 12 of the evaluation note). Consequently, there is no doubt that Booking.com's market share is in any case above 30%.

54 2. The applicability of Article 101(1) TFEU to the narrow price parity clause is not excluded due to an individual exemption under subsection 3 of this provision.

55 a) Pursuant to Article 1(2) of Council Regulation (EC) No. 1/2003, agreements within the meaning of Article 101(1) TFEU which satisfy the conditions of Article 101(3) TFEU are not prohibited, no prior decision to that effect being required (legal exemption). The exemption pursuant to Article 101(3) TFEU requires that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, without (a) imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or (b) affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

56 b) Based on the appellate court's findings, such an individual exemption is ruled out since not even the first condition for exemption is satisfied.

57 aa) According to the first condition for exemption, the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. This refers to efficiency gains created by the anti-competitive agreement (see Commission, Guidelines on the application of Article 81(3) of the Treaty, paras. 48 ff.).

58 bb) There is no doubt that the operation of an online hotel platform results in significant efficiency gains both for consumers and the hotels connected to the platform. With its search, compare and booking functions the online hotel platform offers consumers a convenient and attractive bundle of services which, in this form, is not available elsewhere. For a specific location, consumers are provided with a large, extensively described and easily comparable selection of hotels that they would otherwise not be able to access, or only with great effort, and for which they do not have to pay a fee, at least not directly. Due to the comprehensive comparison possibilities, consumers can in particular achieve considerable savings with regard to the costs they have to pay for accommodation. In addition, they also have access to the experiences of previous hotel guests, which provide further information consumers can use to decide between the offers found on the platform. Lastly, booking a selected offer is made much easier by the instant booking option available on the online hotel platform. All in all, online hotel platforms thus create considerable transparency gains, lower accommodation costs and reduced transaction efforts on the part of consumers. For the hotels the booking platforms offer the advantage of a significantly extended customer reach.

59 cc) The Bundeskartellamt expressly acknowledges these efficiency gains resulting from online hotel platforms. However, the authority rightly denies the causality between the narrow price parity clause and these efficiency gains since these gains do not exclusively arise from the price parity clause and the permanent and economically successful operation of the platform is possible even without agreeing on a narrow price parity clause.

60 (1) For the application of Article 101(3) TFEU it is, however, not decisive whether a company’s existence is threatened without the anti-competitive clause. On the other hand, it is also irrelevant whether, if the undertaking were to abandon the clause in question, the company would have less investment capital available that could be used to maintain and continuously improve its range of services offered. The only decisive factor is whether concrete

efficiency gains are not achievable without the restraint of competition (see Commission, guidelines on Article 81(3) loc. cit. paras. 53 f.).

61 (2) No indications have been identified or brought forward by Booking.com that abandoning the narrow price parity clause will cause a deterioration in the provision of the search, compare and booking functions for end consumers or in the expansion of the customer reach of the hotels connected to the platform with implications for competition.

62 (a) In this respect, the present case is in the view of both parties characterised by the fact that the narrow price parity clause has not been used by Booking.com since February 2016 and that as a result the market conditions that are to be assessed are no longer fictitious conditions, but conditions that have actually existed since early 2016.

63 In its further investigations, the Bundeskartellamt collected data on the developments in the market for online hotel platforms from 2013 until the end of June 2017. This survey period covers the period from 1 February 2016 to 30 June 2017 and thus the first 17 months after Booking.com abandoned the narrow price parity clause. In view of the fact that the hotel booking market is characterised by a very large number of transactions made in a short period of time and a demand that fluctuates seasonally or due to special, often regular events such as trade fairs, this period generally seems long enough for assessing the effects of abandoning the narrow price parity clause. In particular, this period covers a full, regular tourism year. Booking.com raises no objections to the use of the market development data and assumes itself that the competition conditions as they have existed since February 2016 accurately reflect the market conditions without the clause in question.

64 (b) According to the Bundeskartellamt’s investigations, Booking.com was able to increase its commission turnover by at least 20% annually from 2014 to 2017 (table 3 of the evaluation note). A month-by-month analysis of the booking volumes on booking.com for accommodations located in Germany or the EU (tables 7 to 9 of the evaluation note) shows a monthly positive difference of

at least 10% in the entire period from January 2016 to June 2017 compared to the previous year; in most of the months, this difference ranged between at least 20% and 30%. As at 30 June 2017, Booking.com also arranged twice the number of bookings for hotel partners in Germany at twice the number of hotel locations in Germany compared to the year 2015, the last year in which the narrow price parity clause was used (tables 11 and 12 of the evaluation note).

65 This is also not called into question by Booking.com; its objections to the informative value of these turnover and business developments are without foundation.

66 Even if the company's market success might have been facilitated or even caused by the strong growth of the online travel market and high investments by Booking.com, it is in any case not discernible that Booking.com's business development has suffered due to abandoning the narrow price parity clause. Similarly, when assessing the matter under Article 101(3) TFEU it cannot be decisive whether Booking.com would have grown even more if the clause had still been used. In this context it is also irrelevant that in terms of booking accommodations online, new and strong competitors such as Airbnb, Google Hotels or also Amazon and Facebook have entered or may potentially enter the market. However, where Booking.com refers to self-reinforcing network effects (the more hotels offered on the platform, the more customers are attracted) in order to explain its market success achieved without the narrow price parity clause, this especially demonstrates Booking.com's existing market power. Due to this market power, Booking.com is able to provide the range of services desired and intensively used by consumers and hotels even without the narrow price parity clause. The fact that an expanded range of services offered on the platform is met by consistently growing booking volumes and commission revenues does not provide any grounds for the assumption that Booking.com's services for hotel customers and hotels have deteriorated as a result of abandoning the price parity clause.

67 (3) The statement of reply to the appeal on points of law correctly points out that without the narrow price parity clause, hotel customers can no longer trust that a room found on booking.com is not offered at a lower price directly on the hotel's own website. However, this loss of price transparency incurred on the part of the consumers is at least balanced out by the possibility of being able to find the room they intend to book at a cheaper price on the hotel's own online direct distribution channels.

68 The theory outlined in the reply to the appeal on points of law that abandoning the narrow price parity clause will at the same time minimise the price pressure between accommodations and as a consequence will result in higher prices is not plausible. Even without the narrow price parity clause the hotels still have to endeavour to attract the customers' attention on the hotel platform due to Booking.com's high market share. Their prices offered on the platform thus still have to be attractive compared to the prices offered by their competitors. They have no reason to increase their prices on the platform in order to gain financial leeway to offer lower prices on their online direct distribution channels. Moreover, the hotels already have such financial leeway due to the fact that the quite significant commission of 10% to 15% otherwise payable to Booking.com does not have to be paid when using their direct distribution channels. They can easily pass on some of their savings to the hotel customers in order to directly market their rooms online at a lower price.

69 dd) It is true that based on the findings it cannot be ruled out that abandoning the narrow price parity clause may result in a "free rider problem" for Booking.com (for more details see (1) below). In the present case, eliminating or mitigating this problem by using this clause does not, however, constitute an efficiency gain recognisable under Article 101(3) TFEU (for more details see (2) below).

70 (1) For the assessment of the appeal on points of law it is to be assumed that due to the hotels being able to offer differing prices based on the contractual arrangement without the narrow price parity clause, Booking.com is

missing out on a considerable amount of commissions because customers who have searched for and compared hotels on the platform can book the selected room at a lower price using the hotel's direct distribution channels online.

71 (a) The Bundeskartellamt holds that the free-rider problem expected to emerge for Booking.com when abandoning the narrow price parity clause is only marginal. According to the result of the consumer survey carried out on the authority's behalf, 99% of the consumers who first find an accommodation on booking.com also book the accommodation via the platform. Even in the case of follow-up bookings, that is cases in which the consumers were already familiar with the hotel, 44.35% of the bookings were made with Booking.com, which is still more than the 37.6% of bookings made directly with the hotel. These 37.6% of direct bookings can, in the Bundeskartellamt's view, not be regarded as free riding since such follow-up bookings are only made if the services offered by the hotel have convinced the customers after their first-time booking.

72 (b) The appellate court did not deal with the objections raised by Booking.com in the appeal proceedings against the validity of the survey results according to which 99% of the consumers surveyed who first found their accommodation on booking.com also used the platform to book their accommodation. In the appeal on points of law it is not possible to carry out the assessment of the facts which the competent court failed to do. In fact, in terms of the rules governing appeals on points of law it has to be taken into consideration for the benefit of Booking.com that the authority's further investigations have at least shown that there are indications of hotel customers engaging in certain free-riding activities on booking.com.

73 According to table 32, 88% of accommodations using online real-time booking facilities offer lower prices on their online direct distribution channels than on booking.com; 60% of those hotels do so most of the time or always, 12% often and 16% sometimes. The Bundeskarellamt's investigation results have also shown that 71% [corrected to 81% by decision of 8 July 2021] of the hotels that merely have websites without online real-time booking facilities offer lower prices

on their websites than on booking.com; 43% of these hotels do so most of the time or always, 17% often and 21% sometimes. According to paragraph 53 of the evaluation note, 61.3% of the hotels that use booking.com have online real-time booking facilities. It therefore follows that 53.42% of all the hotels that use booking.com most of the time or always undercut the prices offered there on their online direct distribution channels (61.3% x 60% + 38.7% x 43% = 53.42%).

74 Roughly one third of the consumers who found their accommodation on booking.com stated that they had compared prices before making the booking (table 56); 85% of those consumers had included the hotels' websites in their comparison. Approximately half of those consumers, that is at least 14% of the customers who found their accommodation on booking.com, were then able to find out about the lower prices offered on the hotel's website. This finding is confirmed by the fact that approximately one third of the customers made their booking online using the hotel's direct distribution channels after having compared prices (table 55 of the evaluation note); more than half of those customers also used booking.com to compare prices (table 60 of the evaluation note). It is therefore possible that approximately 17% of all customers surveyed found a lower price offered on the hotel's direct distribution channels after visiting booking.com and then also booked their accommodation directly with the hotel.

75 (2) Based on these findings, in the appeal on points of law the "free-rider problem" is to be assumed to exist at least to a certain extent; however, solving or limiting this problem by using a narrow price parity clause does, in the present case, not constitute an efficiency gain pursuant to Article 101(3) TFEU.

76 (a) Contractual fairness as such is from the outset not an efficiency gain within the meaning of Article 101(3) TFEU (see Commission, Guidelines on the application of Article 81(3) of the Treaty loc. cit., para. 47). Likewise, agreements which merely allow the companies involved to increase or maintain their profits without producing any pro-competitive effects do not create any objective advantages that may be deemed efficiency gains pursuant to Article 101(1) TFEU (see loc. cit., para. 49).

77 (b) Contrary to the view outlined in the reply to the appeal on points of law, the Court of Justice of the European Union did in no way assume that combating free-riding activities in any case always justifies a restriction of competition. In fact, it merely confirmed in a specific case the view held by the General Court of the European Union in connection with statements regarding the notion of a restriction of competition by object that in the CB system, which was intended to ensure the interoperability of the payment and withdrawal systems with its members' bank cards, combating the free-riding activities, which threatened the reliability of the generally pro-competitive CB system, was deemed a legitimate objective (European Court of Justice, decision of 11 September 2014 – C-67/13 P, NZKart 2014, 399 para. 75 – Groupment des cartes bancaires).

78 However, even after the Bundeskartellamt's further investigations, there is, as outlined above, no reason to believe that Booking.com would not be able to maintain its services without the narrow price parity clause.

79 (c) Solving the free-rider problem has been primarily regarded as a legitimate objective under competition law if a supplier wishes to motivate the distributors to provide special sales services, such as customer advisory services or a shopping experience for customers. In such a case it may be necessary to protect the official distributors against the possibility of other distributors offering the contractual goods at lower prices while not providing these distribution services so that there is the real risk of the official distributors no longer providing the services that promote distribution and competition if they are not able to conclude an agreement with the supplier that restricts competition from other distributors. Depending on the circumstances, selective distribution agreements, exclusive distribution agreements or non-competition obligations are possible solutions to the free-rider problem. In each of these cases, it was possible to assume that the anti-competitive agreement objectively had a pro-competitive effect that went beyond solving the free-rider problem. As outlined above (see paras. 75 to 77), this is not the case with regard to the narrow price parity clause.

80 (d) Depending on the circumstances of the individual case, it could be regarded as an efficiency gain to use the activities to combat free riding to restructure a business model which due to a structural deficit does not include effort or performance-based remuneration to the effect that it ensures performance-based remuneration. In order to meet the first condition for exemption under Article 101(3), any efficiency gains associated with such a restructuring would, however, have to balance out its anti-competitive effects (see European Court of Justice, decision of 13 July 1966 – case no. 56/64, 58/64, report 1966, 325, 396 f. – Grundig und Consten/Commission; decision of 6 October 2009 – C-501/06 P among others, WuW/E EU-R 1641 para. 92 – GlaxoSmithKline/Commission; Commission, Guidelines on vertical restraints, OJ 2010 C130, p. 1, para. 122, and Guidelines on the application of Article 81(3) of the Treaty, loc. cit., para. 50). This is not the case with regard to the use of the narrow price parity clause for Booking.com's online hotel platform.

81 (aa) In this regard, the business model pursued by Booking.com in the form of an online hotel platform is of vital importance.

82 By combining the platform's search and comparison function with direct booking facilities, the platform operator can, via the commission the hotels undertake to pay, finance not only the intermediary service as such but also the platform functions that precede the arranging of a contract for an individually requested accommodation. These platform functions provide the platform operator with numerous benefits, especially due to the indirect network effects that usually occur with online platforms, but also due to the customer loyalty the platform operator can achieve based on the structure of the platform services (which as such can be used by consumers free of charge). In particular, these services include presenting and sorting the search results based on criteria selected by the consumer, but which can also be influenced by the platform operator through default settings and a limited catalogue of possible criteria to choose from, and the structure of the booking process, which is not hotel-specific but platform-specific and includes information on the cancellation policy and on other contractual terms. In addition, the platform offers consumers the possibility

to create a platform user profile and view their individual booking history and it grants rebates and other discounts linked to the use of the platform. This package of services allows the platform operator to at least potentially establish its own customer ties which are not linked to the ties the individual hotel can establish with its customers based on its services offered; this is facilitated by the fact that customers do not see the price they pay for Booking.com's services because although they choose the platform they use, the commission is, according to the business model, not owed by the users but by the hotel alone.

83 Taking these circumstances into account, the fact that consumers – probably without being aware of this – are able to "deprive" the platform operator of the "earned" commission by making a direct booking with the hotel cannot be regarded in the same way as failing to pay a regular intermediary that has provided the agreed intermediary service; the appellate court's view developed in connection with the assumption that an ancillary restraint necessary for the contract was shown to exist fails to take this into account.

84 Even if the business model underlying the online hotel platform does not provide for every acquisition service to be paid for in the form of a booking commission, it is nevertheless possible to earn commissions for only minor or no acquisition services rendered. According to the Bundeskartellamt's investigations, almost 30% of the bookings made on booking.com concern hotels with which users were already familiar prior to the booking (follow-up bookings). In the cases in which users were already familiar with the hotel due to a previous stay, these follow-up bookings are usually made primarily due to the service provided by the hotel during this stay; if this service had not been to the guest's satisfaction, the guest would probably not book the same hotel again. It is true that, depending on the circumstances, Booking.com may to a greater or a lesser extent also contribute to the follow-up booking and this contribution may even become more important if a user routinely books accommodations on booking.com and, prior to making the booking, possibly also uses the opportunity to find out whether a hotel other than the one the user is already familiar with offers a particularly low price. However, Booking.com "contributes" to arranging

the follow-up booking precisely because it has its own platform-specific possibilities to establish customer ties so that the actual intermediary service constitutes only one of several aspects of the benefits enjoyed by consumers. Irrespective of Booking.com's specific contribution to concluding the follow-up booking, due to the nature of the system the company always receives the full commission for every follow-up booking of the hotel. This illustrates that a performance-based remuneration without exception for precisely (and only) every intermediary service rendered by the platform operator is not a functional feature of the business model underlying an online hotel platform.

85 (bb) A perspective focusing on the individual service transaction also fails to reflect the functioning of a platform market because preventing "free-riding activities" – not, as held by the appellate court, in the form of the hotel "redirecting" a customer, but in the form of consumers using the services provided by the platform but booking their accommodation on the hotel's own website instead of on the platform because of the lower price offered there – by using a narrow price parity clause significantly impedes the hotels' efficient and platform-independent marketing of accommodations.

86 It prevents hotels from using lower prices than on booking.com to win customers directly via search engine advertising (such as "GoogleAdwords"), targeted advertising on travel service websites or via other online media, which is all the more serious since it can be expected that for hotels online bookings will continue to gain importance over telephone and personal bookings in the future. Even if Booking.com's services are not used, any hotel service also offered on booking.com must, as a result of the narrow price parity clause, nevertheless be priced as if such services had been used. This, at the same time, reduces the competitive pressure on the commission rate, which can at least potentially be exerted by another distribution channel; the reason for this is that the profits hotels can achieve by using the platform's services cannot be directly compared with those profits that can be achieved on the hotel's own distribution channels without the platform's services by taking advantage of the efficiency gains achievable there. This is all the more important as the indirect network effects

already reduce the competitive pressure on powerful companies exerted by smaller competitors charging lower commission fees on the platform market. At the same time, this increases the hotels' dependence on the already very strong platform booking.com, which further strengthens the anti-competitive effect of the narrow price parity clause for hotels. This effect is a direct and intended consequence of reducing the attractiveness of direct distribution, which is supposed to render free-riding activities useless, and not only a negligible side effect of the narrow price parity clause.

87 (cc) The overall assessment of these effects caused by Booking.com's narrow price parity clause does not suggest that the efficiency gains potentially associated with this clause in terms of containing free-riding activities at any rate balance out its manifestly anti-competitive effects; neither are such indications demonstrated by Booking.com. On the contrary, the anti-competitive clause results in significant efficiency losses which cannot be justified by the mere opportunity for Booking.com to use increased profits to improve the services it offers.

88 (3) Lastly, the reply to the appeal on points of law claims in vain that due to future changes in the conduct of the hotels and their customers, the free-rider problem could worsen to such an extent that Booking.com would no longer be able to maintain its full range of services. However, concrete indications substantiating the risk of such a development are not provided.

89 The responses provided by the three large platform operators on which the information on the market development outlined in the evaluation note is based refer to the period ended 30 June 2017. Prior to the oral hearing before the appellate court on 29 May 2019, Booking.com had the chance to update the data regarding the market development, i.e. to a period of three years and almost three months after abandoning the narrow price parity clause on 1 February 2016. However, before the appellate court Booking.com did not refer to any market development figures more recent than those gained by the Bundeskartellamt's

further investigations which could prove that the company had suffered disadvantages as a consequence of abandoning the clause.

90 ee) If not even the first condition for exemption is satisfied, the other conditions for exemption, and thus particularly the question as to whether the narrow price parity clause may be indispensable within the meaning of the third condition for exemption to solve the free-rider problem, are no longer relevant.

91 V. Consequently, the appealed decision is to be repealed. Since it is not necessary to reach further findings, the court may decide itself on the merits of the case (Section 80(4) no 1 GWB) and reject the complaint. Since Booking.com's narrow price parity clause constitutes an appreciable restraint of competition within the meaning of Article 101(1) TFEU that is not exempted, the Bundeskartellamt legitimately prohibited its use.

92 1. Booking.com pleads in vain that the Bundeskartellamt violated its right to a fair proceeding. The Bundeskartellamt's statements contested by Booking.com, including the authority's press release of 2 April 2015 and paras. 82, 85, 89, 94 of the prohibition decision, cannot be criticised. They are in line with the authority's responsibilities, which particularly also include an obligation to engage in public relation work.

93 2. Booking.com also pleads in vain that the Bundeskartellamt violated its obligation to cooperate pursuant to Article 11 Council Regulation (EC) No. 1/2003 by acting alone on a national level when prohibiting the narrow price parity clause and in this way failing to take into account the view of other national competition authorities in the European Union and also failing to sufficiently discuss the matter within the European Competition Network (ECN). Irrespective of the fact that the Bundeskartellamt's submissions demonstrate that the authority considered the views of the competition authorities of other Member States and discussed within the ECN how to deal with price parity clauses for online hotel platforms, the obligations to cooperate existing among the competition authorities of the European Union or between the competition authorities and the Commission do not at any rate establish individual rights for private companies.

94 VI. It is not necessary to bring the matter before the Court of Justice of the European Union pursuant to Article 267(3) TFEU (see European Court of Justice, decision of 6 October 1982 – case no. 283/81, report 1982, 3415 para. 21 – Cilfit and others; decision of 1 October 2015 – C-452/14, GRUR Int. 2015, 1152 para. 43 – Doc Generici, with further references). In the case under dispute, no question on the interpretation of Union law that is relevant to the decision arises which has not already been clarified by the case law handed down by the Court of Justice or cannot be answered with certainty. This applies in particular to the concept of restriction of competition under Union law, which is based on the principle of autonomy according to which entrepreneurs must especially determine for themselves which pricing policy they wish to pursue on the market (see only European Court of Justice, decision of 4 June 2009 – C-8/08, WuW/E EU-R 1589 paras. 32 f. – T-Mobile Netherlands), and to the requirements for a restraint ancillary to a contract that does not raise any concerns under competition law (see only European Court of Justice, NZKart 2015, 44 paras. 89-91 – MasterCard/Commission; NZKart 2018, 84 paras. 69-71 – Hoffmann-La Roche/Autorità Garante della Concorrenza e del Mercato).

95 Furthermore, the court's decision is not based on a legal principle which deviates from Union law as interpreted by the Commission or courts of other Member States. In particular, the court does not question the Commission's view that narrow price parity clauses can be exempted under the currently applicable VBER. In the decision of the Swedish patent and appellate court Svea Hovrätt referred to in the reply to the appeal on points of law, the civil action against Booking.com's use of the narrow price parity clause was dismissed not because of a different interpretation of Article 101 TFEU, but because the claimant failed to prove that competition was harmed as a result of prohibiting the hotels from independently setting their own prices irrespective of the prices offered on the platform (critical view Mackenrodt, IIC 2019, 1131, 1136 f., 1139). This court, on the other hand, must base its decision on the facts established by the appellate court according to which prices are actually set independently; this is made possible by the prohibition of the price parity clause.

96 In the cases in which competition authorities in France, Italy, Ireland and Sweden have accepted narrow price parity clauses as a commitment offered by Booking.com to remedy any concerns, no assessment under competition law can be found in the relevant agreements, so that considerations of expediency may have prevailed in this respect. The informative value of these commitments is further reduced by the fact that they were not reviewed in private antitrust proceedings in France and Italy since in these states – just like in Austria – price parity clauses have in the meantime been generally prohibited by law.

97 VII. The ruling on costs is based on Section 71 sentences 1 and 3 GWB, Section 91(1) German Code of Civil Procedure (*ZPO*).

Meier-Beck Kirchhoff Roloff

Tolkmitt Rombach

Court of lower instance:
Düsseldorf Higher Regional Court, decision of 4 June 2019 – VI-Kart 2/16[V] –

FEDERAL COURT OF JUSTICE

DECISION

KVR 54/20

of

8 July 2021

in the cartel administrative proceedings

ECLI:DE:BGH:2021:080721BKVR54.20.0

On 8 July 2021 the Cartel Panel of the Federal Court of Justice, represented by the presiding judge Prof. Dr Meier-Beck and the judges Prof. Dr Kirchhoff, Dr Roloff, Dr Picker and Dr Rombach,

decided as follows:

> The decision of the Cartel Panel of 18 May 2021 is corrected *ex officio* on account of an arithmetical error to the effect that in the reasons for the decision in para. 73 the number 71% is replaced by the number 81%.

Meier-Beck Kirchhoff Roloff

Picker Rombach

Court of lower instance:

Düsseldorf Higher Regional Court, decision of 4 June 2019 – VI-Kart 2/16[V]