



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
COLLINS

delivered on 6 June 2024<sup>1</sup>

**Case C-264/23**

**Booking.com BV,  
Booking.com (Deutschland) GmbH**

**v**

**25hours Hotel Company Berlin GmbH,  
Aletto Kudamm GmbH,  
Air-Hotel Wartburg Tagungs- & Sporthotel GmbH,  
Andel's Berlin Hotelbetriebs GmbH,  
Angleterre Hotel GmbH & Co. KG,  
Atrium Hotelgesellschaft mbH,  
Azimut Hotelbetrieb Köln GmbH & Co. KG,  
Barcelo Cologne GmbH,  
Business Hotels GmbH,  
Cocoon München GmbH,  
DJC Operations GmbH,  
Dorint GmbH,  
Eleazar Novum GmbH,  
Empire Riverside Hotel GmbH & Co. KG,  
Explorer Hotel Fischen GmbH & Co. KG,  
Explorer Hotel Nesselwang GmbH & Co. KG,  
Explorer Hotel Schönaa GmbH & Co. KG,  
Fleming's Hotel Management und Servicegesellschaft mbH & Co. KG,  
G. Stürzer GmbH Hotelbetriebe,  
Hotel Bellevue Dresden Betriebs GmbH,  
Hotel Europäischer Hof W.A.L. Berk GmbH & Co KG,  
Hotel Hafen Hamburg. Wilhelm Bartels GmbH & Co. KG,  
Hotel John F GmbH,  
Hotel Obermühle GmbH,  
Hotel Onyx GmbH,  
Hotel Rubin GmbH,  
Hotel Victoria Betriebs- und Verwaltungs GmbH,  
Hotel Wallis GmbH,**

<sup>1</sup> Original language: English.

**i31 Hotel GmbH,  
IntercityHotel GmbH,  
ISA Group GmbH,  
Kur-Cafe Hotel Allgäu GmbH,  
Lindner Hotels AG,  
M Privathotels GmbH & Co. KG,  
Maritim Hotelgesellschaft mbH,  
MEININGER Shared Services GmbH,  
Oranien Hotelbetriebs GmbH,  
Platzl Hotel Inselkammer KG,  
prize Deutschland GmbH,  
Relexa Hotel GmbH,  
SANA BERLIN HOTEL GmbH,  
SavFra Hotelbesitz GmbH,  
Scandic Hotels Deutschland GmbH,  
Schlossgarten Hotelgesellschaft mbH,  
Seaside Hotels GmbH & Co. KG,  
SHK Hotel Betriebsgesellschaft mbH,  
Steigenberger Hotels GmbH,  
Sunflower Management GmbH & Co. KG,  
The Mandala Hotel GmbH,  
The Mandala Suites GmbH,  
THR Hotel am Alexanderplatz Berlin Betriebs- und Management GmbH,  
THR III Berlin Prager-Platz Hotelbetriebs- und Beteiligungsgesellschaft mbH,  
THR München Konferenz und Event Hotelbetriebs- und Management GmbH,  
THR Rhein/Main Hotelbetriebs- und Beteiligungs-GmbH,  
THR XI Berlin Hotelbetriebs- und Beteiligungsgesellschaft mbH,  
THR XXX Hotelbetriebs- und Beteiligungs-GmbH,  
Upstalsboom Hotel + Freizeit GmbH & Co. KG,  
VI VADI HOTEL Betriebsgesellschaft mbH & Co. KG,  
Weissbach Hotelbetriebsgesellschaft mbH,  
Wickenhäuser & Egger AG,  
Wikingerhof GmbH & Co. KG,  
Hans-Hermann Geiling, Hotel Präsident,  
Karl Herfurtner, Hotel Stadt München eK**

(Request for a preliminary ruling from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands))

(Reference for a preliminary ruling – Competition – Agreements between undertakings – Contracts between an online hotel booking platform and hotels – Price parity clauses – Article 101 TFEU – Ancillary restraints – Block exemption – Vertical agreements – Regulation (EU) No 330/2010 – Market definition)

## **I. Introduction**

1. The present case requires the Court of Justice to answer two novel and important questions that arise in the application of competition law to digital markets. Are wide and narrow price parity clauses ancillary restraints for the purposes of Article 101(1) TFEU? In the context of two-sided digital platforms such as Booking.com, what legal principles apply to the definition of the relevant product market?

## **II. The dispute in the main proceedings, the request for a preliminary ruling and the procedure before the Court**

2. Booking.com BV, an undertaking incorporated in 1996 in the Netherlands, operates an online hotel booking platform<sup>2</sup> under the same name. Booking.com acts as an intermediary between hotel service providers and end customers. It does not set the price at which hotel rooms are offered through its platform. End customers do not pay a fee to use Booking.com. When an end customer makes a reservation through Booking.com, hotels pay a commission to that platform. End customers may book hotel rooms directly with hotels (by phone, email or through hotel websites) or via a ‘bricks-and-mortar’ travel agency. Through its platform, Booking.com offers hotel rooms in more than 1.2 million hotels around the world.

3. When Booking.com entered the German market in 2006, online hotel booking was uncommon and most hotel rooms were booked directly with hotels. Other OTAs, including Hotel Reservation Service Robert Ragge GmbH (‘HRS’) and Expedia Inc., operated in Germany. Those OTAs included wide price parity clauses in their contracts with hotels. Such clauses prevented hotels from offering rooms at a lower price through their own direct sales channels and any other sales channels, including competing OTAs.

4. In 2010, the Bundeskartellamt (Federal Competition Authority, Germany) opened an investigation into HRS concerning its use of wide price parity clauses. On 20 December 2013, it adopted a decision finding that the wide price parity clauses included in contracts between HRS and hotels infringed Article 101 TFEU and the equivalent provision of German law (‘the HRS decision’). In 2013, the Federal Competition Authority also opened an investigation into Booking.com concerning the wide price parity clauses it included in its contracts.

5. By judgment of 9 January 2015, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) rejected an action for annulment lodged against the HRS decision (‘the HRS judgment’). HRS did not appeal against that ruling, which became final.

6. In July 2015, in consultation with the French, Italian and Swedish competition authorities, Booking.com terminated the wide price parity clauses that it had until then included in all of its contracts. It replaced those clauses with narrow price parity clauses. The latter prevent hotels from offering rooms at a lower price through their direct sales channels.

7. On 22 December 2015, the Federal Competition Authority found that narrow price parity clauses were contrary to Article 101 TFEU and the equivalent provision of German law (‘the Booking.com decision’). It held that such clauses restricted competition on the market for the provision of hotel accommodation services and, in practice, on the market for the provision of

<sup>2</sup> Online hotel booking platforms are often known as ‘online travel agents’ (‘OTAs’) and will be so described throughout the present Opinion.

online intermediation services by platforms to hotels.<sup>3</sup> Due to Booking.com's large share of the relevant market those clauses were not exempt by virtue of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices<sup>4</sup> ('the old VABER'). Nor were the conditions for the application of an individual exemption under Article 101(3) TFEU fulfilled.

8. By judgment of 4 June 2019, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) found that narrow price parity clauses constituted a restriction of competition but were necessary to avoid free-riding. Those clauses prevented hotels from using Booking.com to reach customers and thereafter inciting them to book directly with the hotels. The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) concluded that such clauses were ancillary restraints which did not infringe Article 101(1) TFEU. It thus annulled the Booking.com decision.

9. On 18 May 2021, the Bundesgerichtshof (Federal Court of Justice, Germany) overturned that judgment and upheld the Booking.com decision. It held that narrow price parity clauses restricted competition on the market for the provision of hotel accommodation services. Those clauses were neither exempt under the old VABER, nor were they ancillary restraints. The balancing exercise between the pro- and anticompetitive effects of narrow price parity clauses is to be carried out in the context of an individual analysis under Article 101(3) TFEU. The Bundesgerichtshof (Federal Court of Justice) concluded that such clauses were not objectively necessary to implement a main operation since it had not been established that, in their absence, Booking.com's profitability would be compromised.

10. In 2020, Hotelverband Deutschland (IHA) eV, an association representing more than 2 600 hotels, lodged an action for damages against Booking.com before the Landgericht Berlin (Regional Court, Berlin, Germany).

11. On 23 October 2020, Booking.com initiated proceedings before the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) seeking a declaration that its price parity clauses did not infringe Article 101 TFEU. In the context of that action, 62 German hotels lodged a counterclaim seeking damages from Booking.com for breach of Article 101 TFEU ('the counterclaiming hotels'). Two main legal issues are in dispute before that court.

12. First, do the price parity clauses constitute an ancillary restraint for the purposes of Article 101(1) TFEU? Booking.com argues that wide and narrow price parity clauses are ancillary restraints because they prevent hotels from using its services without paying for them and thus avoid free-riding. The counterclaiming hotels argue that the elimination of the clauses in 2016 had no appreciable negative effects on Booking.com's activities, thereby demonstrating the limited risk of free-riding.

<sup>3</sup> According to the Federal Competition Authority, hotels had little incentive to offer rooms at lower prices through other OTAs. The narrow price parity clauses imposed by Booking.com operated in such a way that those rooms would have to be offered at a higher price through the hotels' direct sales channels in order to match the price offered on Booking.com.

<sup>4</sup> OJ 2010 L 102, p. 1. Article 2(1) of the old VABER declared that, pursuant to Article 101(3) TFEU and the provisions of that regulation, Article 101(1) TFEU did not apply to vertical agreements, to the extent that such agreements contained vertical restraints. That exemption applied on condition that the market share held by a supplier did not exceed 30% of the relevant market on which it sold the contract goods or services and the market share held by the buyer did not exceed 30% of the relevant market on which it purchased those goods or services (Article 3(1) of the old VABER). Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2022 L 134, p. 4; 'the new VABER') replaced the old VABER.

13. The Rechtbank Amsterdam (District Court, Amsterdam) further observes that there are conflicting views as to the treatment of price parity clauses, as demonstrated by the different positions taken by the Federal Competition Authority and the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf). It adds that national legislation in Belgium, France, Italy and Austria prohibits recourse to wide and narrow price parity clauses.

14. Second, the Rechtbank Amsterdam (District Court, Amsterdam) observes that, if the price parity clauses are not ancillary restraints, it is necessary to define the relevant product market in order to examine whether the old VABER applies. It observes that, according to the old Commission Notice on the definition of relevant market for the purposes of Community competition law<sup>5</sup>, in order to define a relevant product market it is necessary to examine demand-side and supply-side substitutability.<sup>6</sup>

15. Booking.com submits that the relevant product market is the market for the distribution and booking of hotel accommodation, which is a two-sided market. The various distribution channels, online and offline, are substitutable for hotels and end customers and thus belong to the same relevant product market. According to an economic report commissioned by Booking.com, 62% of German end customers used between two and four websites to search for hotel accommodation in 2014. Of the end customers who used OTAs to search for hotel accommodation, 46% also used metasearch engines. In 2015, 60% of hotel bookings were made offline.

16. The counterclaiming hotels argue, in contrast, that the OTAs are active on a separate product market, since they offer search, comparison and booking services. The offline distribution of hotel services and the hotels' direct sales channels are therefore not part of the same relevant product market.

17. The Rechtbank Amsterdam (District Court, Amsterdam) suggests that there appears to be a contradiction between the argument that the hotels' direct sales channels constitute a separate product market and the claim that narrow price parity clauses restrict competition between OTAs, such as Booking.com, and hotels' direct sales channels. It also observes that Commission Decision C(2011) 3913 final of 30 May 2011 (Case No COMP/M.6163 – AXA/PERMIRA/OPODO/GO VOYAGES/EDREAMS), which found that the relevant product market included the online distribution of airplane tickets through OTAs and airlines' websites, appears to support Booking.com's position.

18. According to the Summary of the stakeholder consultation to the Evaluation of the Market Definition Notice of 18 December 2020 ('Summary of the stakeholder consultation'),<sup>7</sup> there is no consensus in the economic literature or in the competition authorities' decision-making practice as to how multi-sided markets are to be defined. There is a debate as to whether they ought to be defined as multiple relevant markets (one for each side of the platform) or as a single market (to encompass all sides of the platform).<sup>8</sup>

<sup>5</sup> OJ 1997 C 372, p. 5.

<sup>6</sup> Replaced by the new Commission Notice on the definition of the relevant market for the purposes of Union competition law (OJ C C/2024/1645; 'the new Notice on the definition of the relevant market').

<sup>7</sup> Ares(2020)7730543.

<sup>8</sup> Summary of the stakeholder consultation, p. 8. Although the Rechtbank Amsterdam (District Court, Amsterdam) refers to the Commission Staff Working Document entitled 'Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 (SWD(2021) 199 final) of 12 July 2021; 'the Commission Staff Working Document', which makes a similar finding (see p. 54), the exact quote can be found in the Summary of the stakeholder consultation.

19. In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings before it and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Do wide and narrow parity clauses constitute an ancillary restriction in the context of Article 101(1) TFEU?
- (2) If Regulation [No 330/2010] applies, how should the relevant market be defined when transactions are mediated by an online travel agency platform (OTA) on which accommodation establishments can offer rooms and get in touch with travellers who can book a room through the platform?’

20. Booking.com, the counterclaiming hotels, the German, Greek, Spanish and Austrian Governments and the European Commission submitted written observations. At the hearing on 29 February 2024, Booking.com, the counterclaiming hotels, the German and Spanish Governments and the Commission presented oral argument and answered questions put by the Court.

### **III. Assessment**

#### ***A. Admissibility***

21. The counterclaiming hotels and the German Government dispute the admissibility of the reference for a preliminary ruling.

22. First, they submit that the request for a preliminary ruling is inadmissible because it fails to comply with the requirements of Article 94 of the Rules of Procedure of the Court of Justice. The reference does not contain all the relevant facts, namely that the Booking.com decision and the HRS decision addressed both of the questions raised by the referring court. The German courts upheld those decisions and they have become final. While the counterclaiming hotels consider that the referring court is bound by the findings set out in those decisions, the German Government argues that those decisions constitute at least *prima facie* evidence of the existence of an infringement.

23. Second, the counterclaiming hotels contend that the questions are purely hypothetical, since the referring court is bound by the rulings of the German courts. In a similar vein, the German Government considers that the questions are unnecessary, since the Booking.com decision and the HRS decision, upheld by the German courts, dispel any doubts as to the interpretation of EU law.

24. Third, the questions are inadmissible in so far as they do not concern the interpretation of EU law but rather its application. It is impossible to answer the question as to whether wide and narrow price parity clauses are ancillary restraints in the abstract, divorced from the factual, legal and economic context in which they apply. The definition of a relevant product market is not a legal concept but rather requires a factual assessment.

25. In accordance with settled case-law, the Article 267 TFEU procedure is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with the interpretation of such EU law as is necessary for them to give

judgment in cases which they are called upon to adjudicate. In the context of that cooperation, it is solely for the national court hearing the case, which must assume responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions it refers to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is bound, in principle, to give a ruling.<sup>9</sup>

26. It follows that questions on the interpretation of EU law that a national court refers in a factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.<sup>10</sup>

27. As far as the first objection to the admissibility of the request for a preliminary ruling is concerned, the order for reference provides sufficient factual, legal and procedural information to enable the Court to reply to the questions raised. It contains, in particular, details of the HRS decision, the Booking.com decision, and the subsequent rulings of the German courts on those decisions.

28. As regards the relevance of these decisions and the subsequent rulings of the German courts to the case before the referring court, the material scope of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union<sup>11</sup> is limited to actions for damages caused by infringements of the competition rules. It does not apply to other types of actions alleging infringements of competition law,<sup>12</sup> such as actions for a declaration that an infringement did not occur, where such actions exist under national law. It appears from the Court's file that while Booking.com seeks a declaration from the referring court that its price parity clauses did not infringe the competition rules, the counterclaiming hotels lodged an action for damages against Booking.com before that court. That counterclaim brings the case before the referring court within the material scope of Directive 2014/104.

29. Under Article 9(1) of Directive 2014/104, an infringement of competition law established by a decision of a national competition authority or a review court is deemed to be irrefutably established for the purposes of an action for damages brought before that Member State's courts.<sup>13</sup> Article 9(2) of Directive 2014/104 governs the situation that arises in the context of the present case. Where an action for damages caused by a breach of competition law is brought before the courts of a Member State, those courts are required to take into account final decisions adopted in another Member State as *prima facie* evidence that an infringement of competition law has occurred, without prejudice to the possibility of adducing evidence to the

<sup>9</sup> Judgment of 8 December 2016, *Eurosanemamientos and Others* (C-532/15 and C-538/15, EU:C:2016:932, paragraphs 26 and 27 and the case-law cited).

<sup>10</sup> *Ibid.*, paragraph 28.

<sup>11</sup> OJ 2014 L 349, p. 1.

<sup>12</sup> Judgment of 20 April 2023, *Repsol Comercial de Productos Petrolíferos* (C-25/21, EU:C:2023:298, paragraph 31).

<sup>13</sup> *Ibid.*, paragraphs 38 and 43.

contrary.<sup>14</sup> The referring court is, therefore, not bound by the findings made in the Booking.com decision, the HRS decision or the subsequent rulings of the German courts. That those decisions may constitute *prima facie* evidence of the fact that an infringement has occurred does not make the reference for a preliminary ruling inadmissible.

30. The second objection as to the admissibility of the reference may be rejected for similar reasons. The referring court's questions are not hypothetical, since the abovementioned decisions are not binding on it. Nor does the existence of those decisions imply that it is unnecessary for the Court to answer the questions referred, since the Court is the ultimate interpreter of EU law.<sup>15</sup>

31. Finally, in the context of the Article 267 TFEU procedure, the Court is not empowered to apply rules of EU law to the facts of a particular case, which is a matter for the referring court. The Court may, however, on the basis of the material presented to it, provide the national court with an interpretation of EU law that may be useful for the latter's assessment of the effects of one or another of its provisions.<sup>16</sup>

32. In the present case, the questions the referring court raises concern the interpretation of EU law, namely the concept of ancillary restraints and the legal principles guiding the definition of relevant product markets in which OTAs in the hotel sector are active.

33. For these reasons, I advise the Court to dismiss the various objections to the admissibility of the request for a preliminary ruling.

## **B. Substance**

### *1. The first question*

#### *– The parties' observations*

34. As far as wide price parity clauses are concerned, the Commission considers that the HRS decision and the HRS judgment constitute indications that such clauses are, in principle, contrary to Article 101(1) TFEU, since they restrict competition both as between OTAs and as between hotels. That is so even though Booking.com was not a party to those proceedings and therefore Article 9(2) of Directive 2014/104 does not apply.

35. As regards narrow price parity clauses, the Commission contends that the Booking.com decision and the subsequent ruling of the Bundesgerichtshof (Federal Court of Justice), which concluded that such clauses restrict competition between hotels and OTAs, constitute *prima facie* evidence by virtue of Article 9(2) of Directive 2014/104 that an infringement of competition law has occurred. In the Commission's view, there is no indication that the German authorities' findings with regard to wide and narrow price parity clauses are vitiated by an incorrect legal analysis or that they distorted the evidence.

<sup>14</sup> See, to that effect, Opinion of Advocate General Pitruzzella in *Repsol Comercial de Productos Petrolíferos* (C-25/21, EU:C:2022:659, point 107).

<sup>15</sup> See, to that effect, Opinion of Advocate General Bot in Opinion 1/17 (*EU-Canada CET Agreement*) (EU:C:2019:72, paragraph 116).

<sup>16</sup> Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 132).

36. According to the Commission, a restriction is to be regarded as ancillary where two conditions are met. First, the restriction is objectively necessary for the implementation of a main operation, which would be impossible without the ancillary restriction. That main operation must have positive effects or at least be neutral from the viewpoint of competition. Second, the ancillary restriction must be proportionate to the aims pursued by the main operation. The Commission's observations concentrate on the first of those conditions. It takes the view that the main activity in the present case, namely the provision of online intermediation services by OTAs to hotels, has positive effects. It increases competition among hotels and allows end customers to search for, and to compare, competing offers of hotel services. The Commission further submits that the German authorities appear to have applied the correct legal test by seeking to establish whether the price parity clauses are objectively necessary. Although it is not for the Commission to substitute its own assessment for that of national competition authorities and national courts in the context of references for preliminary rulings, there appears to be no indication that, in the absence of price parity clauses, Booking.com's economic survival would be at risk. Even though narrow price parity clauses may be useful to prevent free-riding, that analysis falls to be conducted in the context of the application of Article 101(3) TFEU to individual circumstances.<sup>17</sup>

37. According to the counterclaiming hotels, the German, Greek and Austrian Governments, the price parity clauses could be regarded as ancillary restraints only if they are indispensable for ensuring Booking.com's viability. It is insufficient to show that Booking.com's activities may be less profitable. They take the view that the price parity clauses are not ancillary restraints because they are not objectively necessary. First, Booking.com introduced price parity clauses a few years after its successful entry into the German market. Second, Booking.com continued to strengthen its market position in Germany after it had ceased to have recourse to such clauses.<sup>18</sup> Third, Booking.com claims that although many hotels did not respect the price parity clauses, it did not seek to enforce them.

38. The counterclaiming hotels and the Greek Government further submit that the price parity clauses are disproportionate, since Booking.com could protect its legitimate commercial interests by different means. It could, for example, charge hotels a listing fee or require end customers to pay-per-click.

39. The German and Greek Governments consider that wide price parity clauses are excluded restrictions under Article 5(1)(d) of the new VABER. That provision demonstrates that such clauses are not ancillary restraints and that their compatibility with competition law requires an individual assessment under Article 101(3) TFEU. Narrow price parity clauses may, however, come within the scope of the new VABER, as long as market share thresholds and other applicable conditions are respected.

40. The Spanish Government proposes a different assessment of wide and narrow price parity clauses. Since wide price parity clauses have particularly harmful effects upon competition, they constitute restrictions of competition by object, which should lead to their treatment as hardcore restrictions within the meaning of Article 4 of the new VABER. In contrast, the new VABER may exempt narrow price parity clauses where the undertakings concerned do not exceed the 30% market share thresholds. Where those market share thresholds are exceeded, it will be necessary to carry out an individual examination of the compatibility of narrow price parity clauses. The

<sup>17</sup> The Greek Government also submits that the concept of ancillary restraints, which relates to the application of Article 101(1) TFEU, is not to be confused with the grant of an exemption under Article 101(3) TFEU.

<sup>18</sup> The Austrian Government adds that despite the prohibition on the use of price parity clauses on its territory as an unfair practice since 2017, OTAs continued to increase their market shares in Austria.

Spanish Government does not exclude that, in that hypothesis, such clauses may be regarded as ancillary restraints in so far as they are necessary to prevent free-riding, as long as there are no alternative, less restrictive, means to achieve that goal.

41. Booking.com provides two reasons why wide and narrow price parity clauses are ancillary restraints. First, the price parity clauses were directly linked to the implementation of the main contracts between Booking.com and the hotels, which have had a positive impact on competition and have provided benefits to hotels and to end customers. Thanks to Booking.com's platform, hotels have obtained greater visibility and have managed to reach a larger number of end customers around the world. End customers obtain access to a wider offer of hotels and are able to compare and book accommodation in a simple and efficient manner. Booking.com's platform has increased competition among hotels, which has led to lower prices for end customers.

42. Second, due to its significant investments in the creation, development and promotion of its platform, price parity clauses were an objective necessity in order to protect Booking.com's business model. Hotels do not pay a fee to offer their rooms on Booking.com's platform. They pay only once a customer books a room through Booking.com and does not cancel. End customers use Booking.com's services free of charge. The price parity clauses were indispensable in order to prevent hotels from engaging in free-riding by advertising their rooms on Booking.com's platform, while at the same time trying to avoid paying the booking fee by offering the same rooms at a lower price through other sales channels. Booking.com submits that the price parity clauses (i) constituted an appropriate measure to ensure the success of its business model, (ii) pursued a legitimate objective, and (iii) constituted the least restrictive measure to combat free-riding.<sup>19</sup>

– *Analysis*

43. By the first question, the referring court asks whether wide and narrow price parity clauses that an OTA seeks to impose on hotels as part of its terms of business should be regarded as ancillary restraints for the purposes of Article 101(1) TFEU.

44. As a consequence of Article 9(2) of Directive 2014/104, the referring court is required to treat the Booking.com decision and the subsequent rulings of the German courts as at least *prima facie* evidence that Booking.com's narrow price parity clauses infringed competition law. The referring court may also treat the HRS decision, which was not addressed to Booking.com, and the subsequent ruling of the German courts thereon, as 'any other evidence', if adduced by the parties, to establish whether Booking.com's wide price parity clauses infringed competition law. The referring court is not bound by final decisions adopted in another Member State where it appears that those decisions are vitiated by an error of law or a manifest error of assessment, which is a matter for the referring court to determine.

45. It is apparent from the case-law of the Court that if an operation or activity is not covered by the prohibition laid down in Article 101(1) TFEU, owing to its neutrality or its positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the

<sup>19</sup> Booking.com refrained from imposing exclusivity obligations on the hotels for that purpose, which would have been a more restrictive measure.

participants in that operation or activity is not covered by that prohibition if that restriction is objectively necessary to implement that operation or activity and proportionate to the objectives of either of them.<sup>20</sup>

46. Where it is a matter of determining whether an anticompetitive restriction can escape the prohibition laid down in Article 101(1) TFEU because it is ancillary to a main operation which is not anticompetitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of that restriction. The fact that an operation is more difficult to implement or even less profitable without recourse to a restriction is insufficient to give that restriction the requisite ‘objective necessity’ for it to be classified as ancillary. Were it otherwise, the content of ancillary restraints would include restrictions that are not strictly indispensable for the implementation of the main operation. If accepted, that outcome would undermine the effectiveness of the prohibition laid down in Article 101(1) TFEU.<sup>21</sup> The objective necessity test concerns the question whether, in the absence of a restriction of commercial autonomy, a main operation or activity not caught by the prohibition laid down in Article 101(1) TFEU and to which that restriction is secondary, is likely not to be implemented or not to proceed.<sup>22</sup>

47. In order to avoid an amalgamation of the conditions laid down by the case-law for the classification of a restriction as ancillary for the purposes of Article 101(1) TFEU and the criterion of the indispensability that Article 101(3) TFEU requires in order to exempt a restriction, the examination of the objective necessity for a restriction is conducted at a relatively abstract level. While the balancing of the pro- and anticompetitive effects of an agreement takes place within the framework of Article 101(3) TFEU, only those restrictions that are necessary in order for the main operation to function under any circumstances<sup>23</sup> may be regarded as falling within the scope of ancillary restraints.<sup>24</sup>

48. In the present case, it is clear that the provision of online booking accommodation services by OTAs such as Booking.com has had positive effects for competition in so far as that activity increases competition among hotels and allows end customers to search for and to compare competing offers of accommodation services. The real question is whether wide and/or narrow price parity clauses are objectively necessary and proportionate to carrying out the main activity under scrutiny before the referring court. As most of the parties to the present proceedings submit, wide and narrow price parity clauses do not appear to be indispensable. There seems to be no inherent link between the OTAs’ main activity and the imposition of price parity clauses. Nor do they appear objectively necessary in order to secure the economic viability of OTAs. The Court’s file suggests that OTAs continue to provide their services and even thrive in several Member States after they have been prohibited from having recourse to price parity clauses. As several parties to the proceedings before the Court have argued, other alternative and less

<sup>20</sup> Judgments of 11 September 2014, *MasterCard and Others v Commission* (C-382/12 P, EU:C:2014:2201, paragraph 89); of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25, paragraph 69); and of 26 October 2023, *EDP – Energias de Portugal and Others* (C-331/21, EU:C:2023:812, paragraph 88).

<sup>21</sup> Judgments of 11 September 2014, *MasterCard and Others v Commission* (C-382/12 P, EU:C:2014:2201, paragraph 91); of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25, paragraph 71); and of 26 October 2023, *EDP – Energias de Portugal and Others* (C-331/21, EU:C:2023:812, paragraph 90).

<sup>22</sup> Judgment of 11 September 2014, *MasterCard and Others v Commission* (C-382/12 P, EU:C:2014:2201, paragraph 93).

<sup>23</sup> Considerations relating to the competitive situation on the relevant market are, accordingly, not part of the analysis of the ancillary nature of the restriction and are rather to be taken into account in the application of Article 101(3) TFEU.

<sup>24</sup> See, to that effect, judgments of 18 September 2001, *M6 and Others v Commission* (T-112/99, EU:T:2001:215, paragraphs 107 and 109), and of 24 May 2012, *MasterCard and Others v Commission* (T-111/08, EU:T:2012:260, paragraph 89).

restrictive means may be envisaged to achieve the legitimate goal of preventing free-riding, for instance, charging hotels a listing fee. It is therefore questionable if wide and narrow price parity clauses fulfil the proportionality criterion that ancillary restraints must satisfy.

49. The foregoing considerations are without prejudice to the balancing exercise of the pro- and anticompetitive effects of such restrictions in the context of an individual examination under Article 101(3) TFEU. Avoiding free-riding is a legitimate goal capable of justifying restrictions of competition where the conditions for the application of Article 101(3) TFEU are met.<sup>25</sup> It follows that OTAs may put forward such arguments in the context of the framework provided by Article 101(3) TFEU rather than in ascertaining the existence of ancillary restraints.<sup>26</sup>

50. Since the issue was aired at the hearing, I would add that wide and narrow price parity clauses are not hardcore restrictions within the meaning of Article 4 of the old VABER. The old VABER does not refer to wide or narrow price parity clauses. The hardcore restriction in Article 4(a) of the old VABER<sup>27</sup> concerns ‘resale price maintenance’, that is agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price. The concept of resale price maintenance refers to a restriction of the buyer’s ability to determine its resale price.<sup>28</sup> Wide and narrow price parity clauses operate in a quite different manner. First, OTAs provide intermediation services to hotels. They do not provide accommodation services that hotels resell to end customers. The concept of resale price maintenance does not fit easily into that contractual matrix. Second, even if an analogy were to be drawn between resale price maintenance and an OTA’s imposition of a fixed or minimum sale price for the transactions it intermediates,<sup>29</sup> wide and narrow price parity clauses do not prevent hotels lowering the sale price of the transactions carried out through that OTA.<sup>30</sup>

51. The proposition that price parity clauses are not hardcore restrictions for the purposes of the old VABER is supported by two additional considerations drawn from the new VABER and the new Vertical Guidelines.<sup>31</sup> First, Article 5(1)(d) of the new VABER expressly provides that wide price parity clauses are ‘excluded restrictions’,<sup>32</sup> rather than hardcore restrictions under Article 4 of the new VABER.<sup>33</sup> That appears to imply that the new VABER exempts narrow price parity

<sup>25</sup> See, to that effect, Opinion of Advocate General Mazák in *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:113, points 39 and 40), and Opinion of Advocate General Wahl in *CB v Commission* (C-67/13 P, EU:C:2014:1958, point 123).

<sup>26</sup> Paragraphs 372 to 375 of the new Commission Guidelines on vertical restraints (OJ 2022 C 248, p. 1; ‘the new Vertical Guidelines’) provide guidance as to the assessment of price parity obligations under Article 101(3) TFEU in order to address the free-rider problem.

<sup>27</sup> Article 4(a) of the new VABER is expressed in identical terms.

<sup>28</sup> See paragraph 48 of the old Commission Guidelines on Vertical Restraints (OJ 2010 C 130, p. 1) and paragraph 185 of the new Vertical Guidelines. An example of resale price maintenance is where a supplier sets the price at which a distributor must resell the products that it supplies.

<sup>29</sup> See, to that effect, point (c) of paragraph 67 and paragraph 194 of the new Vertical Guidelines.

<sup>30</sup> A narrow price parity clause does not prevent hotel X from lowering the price of room Y through Booking.com. It simply requires that if hotel X lowers the price of room Y through its direct sales channel (for instance, on its website), it is also required to lower the price of that room on Booking.com. Similarly, a wide price parity clause does not prevent hotel X from lowering the price of room Y through Booking.com either. It means that if hotel X lowers the price of room Y on another OTA’s platform, it is required to lower the price of that room also on Booking.com.

<sup>31</sup> For the avoidance of doubt, the definition of the hardcore restriction included in Article 4(a) of the old VABER is identical to that contained in Article 4(a) of the new VABER.

<sup>32</sup> Article 5(1) of the new VABER excludes the application of that block exemption regulation to any direct or indirect obligation that causes a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services.

<sup>33</sup> Point (d) of paragraph 67 and paragraph 253 of the new Vertical Guidelines confirm that proposition expressly.

clauses, which are less restrictive of competition.<sup>34</sup> Second, the new Vertical Guidelines expressly confirm that narrow price parity clauses can benefit from the exemption provided by the new VABER.<sup>35</sup>

52. Since the old VABER does not contain a provision similar to Article 5(1)(d) of the new VABER and price parity clauses are not hardcore restrictions, nothing in principle appears to prevent the old VABER from applying to both wide and narrow price parity clauses, provided that the other conditions that that regulation establishes are met.

53. I therefore invite the Court to answer the first question to the effect that wide and narrow price parity clauses that an OTA seeks to impose on hotels as part of its terms of business are not ancillary restraints for the purposes of Article 101(1) TFEU, unless they are indispensable and proportionate to ensuring the OTA's economic viability, which is for the referring court to determine without prejudice to its analysis under Article 101(3) TFEU.

## *2. The second question*

### *– The parties' observations*

54. The Commission observes that, according to the Booking.com decision, which has become final, the relevant product market was that for the provision of online intermediation services by platforms to hotels. The hotels' direct sales channels and metasearch engines were not part of that relevant product market. The Commission, supported by the German Government, submits there is no indication that those findings are vitiated by a manifest error of assessment.<sup>36</sup> That decision should, accordingly, constitute at least prima facie evidence for the referring court's definition of the relevant market.

55. The Commission points out that the market share threshold in Article 3(1) of the old VABER relates to the relevant market on which the supplier sells the contract goods or services. The Commission and the German Government refer by analogy to paragraph 67 of the new Vertical Guidelines.

56. The counterclaiming hotels appear to call into question the vertical nature of the relationship between Booking.com and hotels by reference to Booking.com's argument that the hotels' direct sales channels compete with its platform. On the basis of that argument, the old VABER would not apply. In any event, the counterclaiming hotels, supported by the Greek, Spanish and Austrian Governments, submit that metasearch engines are not part of the relevant product market because users cannot make a booking through them. The hotels' direct sales channels are not part of the relevant product market because they do not provide search and comparison functionalities.

57. Booking.com submits that the relevant product market must include the competitive pressure exercised directly and indirectly by offline and online sales channels, including hotel websites. The fact that customers engage in multi-homing, in that they book hotel accommodation through offline and online sales channels, including OTAs, metasearch engines and the hotels' direct sales

<sup>34</sup> See, to that effect, paragraphs 360 and 374 of the new Vertical Guidelines.

<sup>35</sup> See point (a) of paragraph 254 and paragraph 359 of the Vertical Guidelines.

<sup>36</sup> The Commission further observes that the French, Italian and Swedish competition authorities have defined the relevant product market in similar terms.

channels, supports that proposition. Irrespective of the sales channel, the service offered to end customers is the same, namely a hotel room. If there were no risk that customers might book hotel rooms through other sales channels, the price parity clauses would be unnecessary from a commercial viewpoint.

– *Analysis*

58. By the second question, the referring court asks how the relevant product market should be defined in relation to the activities of an OTA which intermediates between hotels and end customers for the purposes of the application of Article 3(1) of the old VABER.

59. By way of preliminary observation, I note that the argument put forward by the counterclaiming hotels, to the effect that the relationship between hotels and Booking.com is not vertical and that the old VABER does not apply to that type of situation, appears to be based on a misconception.

60. Article 1(1)(a) of the old VABER defines ‘vertical agreement’ as an agreement or concerted practice entered into between two or more undertakings, each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, which relates to the conditions under which the parties may purchase, sell or resell certain goods or services.<sup>37</sup> An undertaking, such as Booking.com, that provides intermediation services to hotels in order to reach end customers who seek hotel accommodation services clearly falls within that definition, since, for the purposes of that agreement, Booking.com and the hotels operate at different levels of the production and distribution chains.

61. A different legal issue is whether or not the old VABER is applicable because Booking.com’s platform competes with the hotels’ direct sales channels. Under Article 2(4) of the old VABER, the exemption in Article 2(1) thereof is not to apply to vertical agreements entered into between competing undertakings. There is an exception to that provision: the block exemption is to apply where competing undertakings enter into a non-reciprocal vertical agreement and the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and it is not a competing undertaking at the level of trade where it purchases the contract services.<sup>38</sup> That exception covers situations of ‘dual distribution’, that is, where a supplier not only sells its services through independent distributors but also sells them directly to end customers in competition with its independent distributors.<sup>39</sup> It follows that, even on the assumption that Booking.com’s platform and the hotels’ direct sales channels were to be considered actual or potential competitors on the same relevant product market,<sup>40</sup> the situation whereby hotels sell their rooms through OTAs as well as through their own websites falls within Article 2(4) of the old VABER. Contrary to the argument put forward by the counterclaiming hotels, the old VABER thus applies.

62. That conclusion becomes even clearer when examined in the context of the new VABER and the new Vertical Guidelines. Article (1)(e)(ii) of the new VABER defines ‘online intermediation services’ as information society services which allow undertakings to offer goods or services to

<sup>37</sup> Article 1(1)(a) of the new VABER is in identical terms.

<sup>38</sup> Article 2(4)(b) of the old VABER.

<sup>39</sup> See, to that effect, paragraph 28 of the old Vertical Guidelines.

<sup>40</sup> It is for the referring court to make that assessment in view of the considerations set out in points 64 to 74 of the present Opinion.

final consumers, with a view to facilitating the initiation of direct transactions between those undertakings and final consumers. Article 2(4)(b) of the new VABER, which concerns dual distribution, is expressed in identical terms to Article 2(4)(b) of the old VABER. The new VABER includes, however, a new Article 2(6), which establishes that the exceptions set out in Article 2(4) of the new VABER are not to apply to vertical agreements relating to the provision of online intermediation services where the provider of those services is a competing undertaking on the relevant market for the sale of the intermediated goods or services.<sup>41</sup>

63. Paragraphs 104 to 106 of the new Vertical Guidelines make it clear that the purpose of Article 2(6) of the new VABER is to narrow the scope of the safe harbour as regards platforms that have a ‘hybrid’ function.<sup>42</sup> That may arise where sellers of foodstuffs offer their products for sale on an online marketplace whilst the online marketplace operator simultaneously offers its own products in competition with those sellers. The rationale of that exclusion is that in such circumstances online intermediation service providers may have an incentive to favour their own sales and the ability to influence the outcome of competition. It follows that the new VABER continues to provide an exemption to online intermediation service providers that do not have a hybrid function, such as an OTA which does not offer its own hotel rooms via its platform.

64. Turning to the second question, I observe that market definition is a tool to identify and define the boundaries of competition between undertakings. Its chief purpose is to identify in a systematic way the effective and immediate competitive constraints that undertakings face when they sell specific products.<sup>43</sup>

65. According to the case-law, the relevant product market comprises all those products and/or services which the consumer regards as interchangeable or substitutable, on account of their characteristics, their prices and their intended use. The concept of the relevant market implies that there can be effective competition between the products or services which form part of it. This presupposes that there is a sufficient degree of interchangeability between all of the products or the services that form part of the same market, in so far as a specific use of such products or services is concerned. Interchangeability or substitutability is not assessed solely in relation to the objective characteristics of the products and services at issue. Consideration must also be given to the competitive conditions and the structure of supply and demand on the market.<sup>44</sup> The interchangeability or substitutability of products is dynamic and the definition of the relevant market may evolve over time.<sup>45</sup>

66. Two-sided markets are those where an economic operator, often an online platform, connects two different user groups. In such circumstances, demand from one group of users has an influence on demand from the other group, giving rise to indirect network effects.<sup>46</sup> Examples of

<sup>41</sup> The exception to the exception means that, in those situations, the new VABER does not apply.

<sup>42</sup> To that effect, see the Commission’s Explanatory note on the new VABER and Vertical Guidelines, available on its website: [https://competition-policy.ec.europa.eu/system/files/2022-05/explanatory\\_note\\_VBER\\_and\\_Guidelines\\_2022.pdf](https://competition-policy.ec.europa.eu/system/files/2022-05/explanatory_note_VBER_and_Guidelines_2022.pdf). See also point (e) of paragraph 67 of the new Vertical Guidelines.

<sup>43</sup> See paragraph 6 of the new Notice on the definition of the relevant market.

<sup>44</sup> Judgments of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25, paragraphs 50 and 51), and of 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, paragraph 129).

<sup>45</sup> See, to that effect, judgment of 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, paragraph 130).

<sup>46</sup> See, to that effect, paragraph 94 of the new Notice on the definition of the relevant market.

such two-sided markets include an online marketplace where a platform brings together sellers of products and buyers of a product and a professional social network which connects end users and potential employers.<sup>47</sup>

67. According to the new Notice on the definition of the relevant market, in the presence of multi-sided platforms it may be appropriate to define a relevant product market for the products offered by the platform as a whole, in a way that encompasses all user groups. It may be appropriate to define separate, though interrelated, relevant product markets for the products offered on each side of the platform.<sup>48</sup> A number of factors have an impact upon that determination, including whether it is a transaction platform or a non-transaction platform.<sup>49</sup>

68. In that context, as the Commission and the German Government correctly submit, the Booking.com decision and the subsequent rulings of the German courts constitute at least *prima facie* evidence for the referring court to define the relevant market under Article 9(2) of Directive 2014/104, in line with the considerations set out in point 29 of the present Opinion. National courts are not, however, bound by decisions adopted in another Member State, in particular where it appears that they are vitiated by an error of law or a manifest error of assessment, which is a matter for the referring court to decide.

69. It is undisputed that, in the present case, Booking.com operates on a two-sided market as a provider of online intermediation services both to hotels and to end customers.<sup>50</sup> While it is for the referring court to establish whether it is appropriate to define a single relevant product market encompassing users on both sides of the platform or two separate relevant product markets, one on each side of the platform, the new Vertical Guidelines state that, for the purposes of the market share thresholds in Article 3(1) of the new VABER,<sup>51</sup> a provider of online intermediation services such as Booking.com is categorised as a supplier of those services and an undertaking that offers or sells goods or services via an online intermediation service provider, such as a hotel, is categorised as a buyer in respect of online intermediation services.<sup>52</sup> As a consequence, the market share of the undertaking that provides the online intermediation services is calculated by reference to the relevant market for the supply of those services to the undertakings categorised as buyers.<sup>53</sup> The new Vertical Guidelines further state that the scope of the relevant product market will depend on the degree of substitutability between online and offline intermediation services, between intermediation services used for different categories of goods and services and between intermediation services and direct sales channels.<sup>54</sup>

<sup>47</sup> The phenomenon of indirect network effects results from the fact that the more sellers offer their products via the online marketplace, the more buyers will be interested in that online marketplace, and vice versa.

<sup>48</sup> See paragraph 95 of the new Notice on the definition of the relevant market.

<sup>49</sup> *Ibid.* I observe that the new Notice on the definition of the relevant market has not endorsed the theory defended by some scholars that, as a general principle, a single relevant market encompassing all user groups should be defined in the case of transaction platforms (for instance, an online marketplace) and separate relevant markets should be defined on each side of the platform in the case of non-transaction platforms (such as a social network). According to the new Notice on the definition of the relevant market, that is only one among several factors to take into account. The reason for that approach appears to be a want of consensus in the academic literature and in the practice of competition authorities. See, to that effect, the Commission Staff Working Document, p. 54. For more details on the theory, see Filistrucchi, L., Geradin, D., van Damme, E., Affeldt, P., ‘Market Definition in Two-sided Markets: Theory and Practice’, *Journal of Competition Law & Economics*, 2014, Vol. 10(2), pp. 293 to 339.

<sup>50</sup> From the perspective of end customers, those intermediation services consist of the possibility of searching for and comparing hotel offers and ultimately making a booking.

<sup>51</sup> Article 3(1) of the new VABER is expressed in identical terms to Article 3(1) of the old VABER.

<sup>52</sup> Paragraph 67 of the new Vertical Guidelines.

<sup>53</sup> Point (b) of paragraph 67 of the new Vertical Guidelines.

<sup>54</sup> *Ibid.*

70. In order to apply Article 3(1) of the old VABER to the present case, it will be necessary to calculate Booking.com's market share as a provider of online intermediation services to hotels. In that context, it may be appropriate to consider whether other types of intermediation services and other sales channels are substitutable for intermediation services from the point of view of hotels (on the demand-side of those intermediation services) and end customers (present on the other side of that two-sided platform).<sup>55</sup> It may thus be appropriate to consider the substitutability of offline travel agency services, hotels' direct sales channels and even other online services such as those provided by metasearch engines. In that regard, I observe that all of the parties to the proceedings before the referring court, except Booking.com, take the view that there is no substitutability between online intermediation services and the abovementioned sales channels, in essence, because they do not provide the same search and comparison functionalities together with the possibility of making a booking.<sup>56</sup>

71. It is for the referring court to define the relevant product market in the light of the foregoing considerations, taking into account the Booking.com decision and the subsequent rulings of the German courts as *prima facie* evidence, together with any other relevant evidence. I would add that, according to the judgment of the Bundesgerichtshof (Federal Court of Justice) on the Booking.com decision, Booking.com did not, in the course of that litigation, object to the definition of the relevant market.

72. The referring court may also seek guidance from precedents from other competition authorities, such as Commission Decision C(2023) 6376 final of 25 September 2023 declaring a concentration to be incompatible with the internal market and the functioning of the Agreement on the European Economic Area (EEA) (Case M.10615 – Booking Holdings/eTraveli Group), discussed at the hearing. Although Booking.com has brought an action for the annulment of that decision before the General Court,<sup>57</sup> in response to questions from the Court of Justice, its representatives replied that, notwithstanding certain reservations, it had not specifically challenged the market definition adopted in that decision.

73. Finally, as the Commission correctly submits, there is no contradiction between the argument that hotels' direct sales channels constitute a separate product market and the claim that narrow price parity clauses restrict competition between OTAs such as Booking.com and hotels' direct sales channels. While the definition of the relevant product market seeks to identify the most direct competitive pressure felt by the undertakings concerned, the competition assessment may also take into account forms of less direct competitive pressure, such as out-of-market competitive constraints.

74. I thus invite the Court to answer the second question to the effect that, for the purposes of the application of Article 3(1) of the old VABER, it is necessary to define the relevant product market in relation to the activities of an OTA that intermediates between hotels and end customers by

<sup>55</sup> As indicated above, even when separate relevant product markets are defined on each side of the market, both sides are nevertheless interrelated and their characteristics must be reciprocally taken into account to define the relevant market. See Filistrucchi, L., Geradin, D., van Damme, E., Affeldt, P., 'Market Definition in Two-sided Markets: Theory and Practice', *Journal of Competition Law & Economics*, 2014, Vol. 10(2), pp. 293 to 339.

<sup>56</sup> It seems clear that offline travel agency services provided by bricks-and-mortar operators present very different characteristics and functionalities. For their part, hotels' direct sales channels do not allow customers the possibility of searching and comparing offers from different providers. Metasearch engines also appear to have different characteristics and functionality in that they find offers by OTAs and hotel service providers and, when the customer clicks on the results, he or she is redirected to the website of the OTA or hotel in question to make a booking.

<sup>57</sup> Case T-1139/23, *Booking Holdings v Commission* (pending).

assessing whether other sales channels are substitutable from the point of view of hotels and end customers, in order to calculate an OTA's market share as a supplier of online intermediation services to hotels.

#### IV. Conclusion

75. I propose that the Court answer the questions referred for a preliminary ruling by the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) as follows:

(1) Article 101(1) TFEU is to be interpreted as meaning that

wide and narrow price parity clauses that an online travel agent (OTA) seeks to impose on hotels as part of its terms of business are not ancillary restraints, unless they are indispensable and proportionate to ensuring the OTA's economic viability, which is for the referring court to determine without prejudice to its analysis under Article 101(3) TFEU;

(2) Article 3(1) of Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices is to be interpreted as meaning that

it is necessary to define the relevant product market in relation to the activities of an OTA that intermediates between hotels and end customers by assessing whether other sales channels are substitutable from the point of view of hotels and end customers, in order to calculate an OTA's market share as a supplier of online intermediation services to hotels.