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# Decision

of 19 October 2015

in the matter of

Investigation pursuant to article 27 of the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act [CartA]; SR 251)

## Online-Booking Platforms for Hotels

relating to unlawful agreements affecting competition within the meaning of art. 5 CartA and unlawful behavior within the meaning of art. 7 CartA

against

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## A. Facts

### A.1. Parties and Third Parties

1. *Booking.com B.V.* (hereinafter referred to as: Booking.com or Booking.com B.V.) is a private limited liability company, incorporated under the laws of the Netherlands, having its domicile in Amsterdam. Booking.com is a subsidiary of The Priceline Group which is a public company with its headquarters in Norwalk (Connecticut) in the United States. Booking.com in turn owns various subsidiaries worldwide including its Swiss subsidiary, Booking.com (Schweiz) AG, which is incorporated in Zurich. The main activity of Booking.com lies in operating an online-booking platform for hotels while The Priceline Group is also active in the distribution of flights, cruises and package holidays.

2. *HRS – HOTEL RESERVATION SERVICE Robert Ragge GmbH* (hereinafter referred to as: HRS) has its domicile in Cologne. The HRS-group has various subsidiaries in Europe and Asia and operates under the brands HRS, Tiscover (acquired in 2008), hotel.de (acquired in 2011, also active under the brand hotel.info) as well as with the opaque booking-portal<sup>1</sup> Surprise Hotels (founded in 2013) a variety of online-booking platforms. The HRS-group has no Swiss subsidiary.

3. *Expedia, Inc.* (hereinafter referred to as: Expedia), having its domicile in Bellevue (Washington) in the United States, has a subsidiary in Switzerland, Expedia Lodging Partner Services Sàrl in Geneva. The Swiss subsidiary provides as its main activity strategic services relating to hotel accommodations on behalf of the Expedia-group. The parent company of the Expedia-group is Expedia, Inc., a Delaware corporation, which does not perform any operational activities and instead merely constitutes a group holding corporation. The Expedia-group provides services in the field of travel distribution, which besides the distribution of hotels include the distribution of flights, package holidays, car rentals as well as services and activities at travel destinations (such as city tours). Expedia operates online-booking platforms for hotels under the brands Expedia, Hotels.com (acquired in 2003) and Venere (acquired in 2009).

4. The *Swiss Hotel Association* (hereinafter referred to as: SHV or hotelleriesuisse) is an association which is registered in the Swiss registry of commerce and has its domicile in Bern. The SHV is an industry association of Swiss hotels with more than 3171 members, including 2051 star-rated hotels. The SHV is admitted to the present investigation as a third party within the meaning of art. 43 para. 1(b) CartA<sup>2</sup>.

5. Due to various reasons the scope of the present investigation was not extended to associated partner-hotels of online-booking platforms as parties to the procedure. Considerations concerning procedural efficiency were one of the primary reasons for this decision. If it would have been extended, it would have been a challenge to impose a fine— if an unlawful agreement within the meaning of art. 5 para. 4 CartA would have been found. For the calculation of such a fine, as required by the principle of equal treatment, it would have been necessary to calculate the turnover on a specific online-booking platform for each specific hotels as well as

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<sup>1</sup> Such providers allow their customers to book hotel rooms at discounted prices whereby, in exchange, the identity of the hotel is only revealed after a non-refundable booking has been made. Before making a booking customers can only search according to a number of general criteria (location, category of the hotel etc.) without getting to know the names of the hotels which are available.

<sup>2</sup> Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act [CartA]; SR 251).

the length of time each specific hotel adhered to such agreements. Such a course of action would not only have led to significant delays of the present procedure but would also have resulted in prohibitive costs.<sup>3</sup>

6. Apart from these considerations above, it turned out that there appeared to be a significant asymmetry of interests between online-booking platforms and their partner-hotels with respect to parity clauses. This resulted in the fact that in the present procedure proceedings the behavior of the parties was also examined with respect to a possible abuse of a dominant position within the meaning of art. 7 CartA.<sup>4</sup> It was furthermore taken into account that parity clauses mainly have an anticompetitive effect on the level of online-booking platforms.<sup>5</sup>

## **A.2. Online-Booking Platforms**

7. As an introduction, a definition of online-booking platforms is provided, their business model is presented and it is shown how they organize their cooperation with their respective partner-hotels. Further explanations on the relevant facts are provided within the legal and economic considerations.

### **A.2.1. General Background**

8. The main activity of online-booking platforms consists – in a nutshell – of the intermediation of hotel bookings. In order to provide this service they serve two groups of users, namely hotels and end-users/guests.

9. Online-booking platforms offer end-users the possibility to search for and compare between different hotels and in a next step to make a hotel booking, which is immediately confirmed. Thereby a large number of hotels are on offer, i.e. hotels of different sizes and categories in different locations. The services with respect to end-users are mainly provided on the internet, either through an online-booking platform's own websites or through websites of distribution partner, so-called affiliates, such as airlines or railway companies<sup>6</sup> Additionally, end-user are given the possibility to make hotel bookings by phone, by e-mail or by using smartphone-apps. End-users do not have to bear any direct costs when using the services of online-booking platforms.

10. If an online-booking platform is successful in intermediation of a booking between a hotel and an end-user, the latter automatically receives an immediate booking confirmation. At the same time the respective information, including data concerning the end-user, is automatically transmitted to the hotel.

11. In turn, information regarding hotels are provided on online-booking platforms in order to facilitate bookings by end-users. This content is for example translated in various languages by online-booking platforms. Additionally, hotels occasionally receive personal support in order to increase the quality of such content, for example with regards to photographs. Furthermore, hotels are provided with the technical means required to transmit current prices, availability and conditions to the online-booking platforms.

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<sup>3</sup> See Law and Policy on Competition (hereafter: LPC) 2010/4, p. 699, paragraph 382 ff., *Hors Liste*.

<sup>4</sup> See paragraph 409 ff.

<sup>5</sup> See paragraph 266 ff.

<sup>6</sup> See paragraph 316 ff.



12. Hotels themselves put their respective information on prices, availabilities and conditions on the online-booking platforms. This can be performed on the extranet of the respective platform, i.e. manually on a password-protected part of the homepage of the respective online-booking platform, or using a so-called channel manager, which is a type of software which automatically synchronizes such information across various distribution channels. Additionally, there is the possibility to integrate the access to online-booking platforms using a central reservation system (CRS). Such software solution go beyond the mere channel management by supporting other aspects of hotel management such as maintaining customer data and analysis of business-related key figures.

13. The parties are by far the most important online-booking platforms in Switzerland. Other online-booking platforms are operated by STC Switzerland Travel Centre<sup>7</sup> (hereinafter referred to as: STC) and by ebookers.<sup>8</sup>

#### **A.2.2. Business Model**

14. The online-booking platforms operated by the parties, as well as by STC and ebookers currently apply an agency-model. Thereby an online-booking platform acts as a mere intermediary between end-users and hotels, which receives percentage of the turnover generated in the case of a successful booking as a commission.<sup>9</sup> Hotels do not incur any immediate costs for the registration and the presentation of respective content on the platform. The same applies to the previously presented other support services provided by platforms. In the meantime commissions have to be paid for each successful booking.

15. Online-booking platforms do not acquire any rooms in order to resell them. The sale of the hotel stay rather directly takes place between hotels themselves and their guests. Thereby the hotel itself sets the price paid by its guests. This price is presented on the online-booking platforms and is also the amount which determines the commission which is levied.<sup>10</sup> An overview on how such an agency-model works is presented in figure 1.

16. On the one hand, hotels only incur any immediate costs in the case of successfully intermediated bookings. On the other hand, they have no guarantees on the level of turnover as online-booking platforms do not acquire a fixed allotment of rooms for resale. From the point of view of online-booking platforms this business model is insofar attractive as they do not bear any inventory risk and there is no tied-up capital.

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<sup>7</sup> STC Switzerland Travel Centre specifically provides the hotel booking functionality on [myswitzerland.com](http://myswitzerland.com).

<sup>8</sup> See below, paragraph 323 ff.

<sup>9</sup> On the commission rates see below, paragraph 19 ff.

<sup>10</sup> Expedia [...] See paragraph 22.

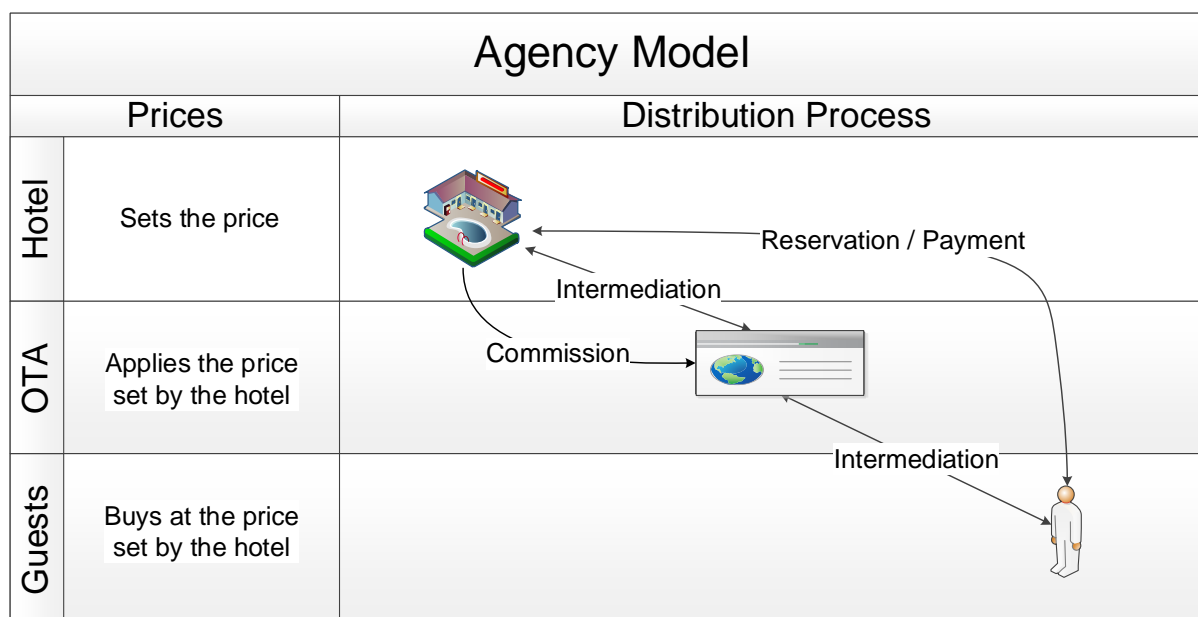


Figure 1: Functioning of the Agency-Model

17. The so-called merchant-model can be regarded as an alternative to the agency-model. In the case of a merchant-model a reseller acquires an allotment of rooms for a net price and resells these rooms at a mark-up, thereby setting the final price itself, to its customers. This model is for example frequently used in the context of package tours, whereby a tour operator bundles accommodation services with other travel services, such as flights, and sells this package to their customers. This model is also applied by wholesalers which acquire allotments of hotel rooms in order to resell them – after setting a mark-up – to tour operators, travel intermediaries or end-customers.<sup>11</sup>

### A.2.3. Cooperation between Online-Booking Platforms and Hotels

18. The cooperation between online-booking platforms and hotels is subject to so-called cooperation agreements. The parties thereby use standardized contracts with general delivery terms. These general delivery terms in turn include the clauses which are the subject of this investigation.<sup>12</sup> [...] [...] <sup>13</sup> [...]

### A.2.4. Commission Payments

19. Hotels pay a percentage of booking turnover generated by online-booking platform as a commission.

20. Booking.com sets the contractual commission rate annually and thereby differentiates between independent hotels and hotel -chains as well as between hotels with a regular commission rate and members of its Preferred Partner Program. The standard commission rate is [...] for independent hotels and [...] for hotel chains. Only [...] the commissions were increased

<sup>11</sup> See paragraph 203 ff.

<sup>12</sup> See paragraph 33 ff.

<sup>13</sup> Which play only a minor role in the Swiss hotel market. A majority of Swiss hotels are small, independent properties, see paragraph 319 ff.

for independent hotels in [...].<sup>14</sup> For Preferred Partners<sup>15</sup> the commission rate [...] for independent hotels ([...]) and [...] for hotel chains.

21. HRS applied [...].

22. Since [...] the commission rate of Expedia is in principle [...]<sup>16</sup> Apart from that partner-hotels of Expedia have the possibility [...] whereby the commission rate is [...]. In the case of [...] the commission rate is [...].

#### **A.2.5. Ranking**

23. Upon visiting the homepage of an online-booking platform, users are prompted to indicate a location, the desired time of a stay, the number of rooms required as well as the number of guests. Subsequently the online-booking platform suggests a number of hotels which are available at the desired location during the specified timeframe. The order in which these hotels are presented on the homepage is generally referred to as the ranking.

24. There are large regional differences in the importance of the ranking. In a region in which only a very small number of hotels make use of a specific online-booking platform the ranking plays only a minor role as all hotels are visible to end-users at first glance. In contrast, the ranking is very relevant in regions with a larger number of hotels as a majority of clients will only look at the very first hotels on the list provided and will book one of these.

25. The subsequent considerations are made with respect to the default-ranking which is normally presented to users as a result of a search. In the case of Booking.com this default-ranking is called 'Booking.com recommends'. In addition to this default ranking, users are given the possibility to sort this list according to other criteria, for example by price, location or based on user-generated reviews.

26. This default-ranking is automatically generated by online-booking platforms whereby various factors are taken into consideration. The algorithm which determine the ranking was not disclosed to the Secretariat by the parties because of its high complexity and confidentiality due to the critical importance to their business model. Nevertheless, based on explanations by Booking.com, it becomes clear that the so-called conversion rate, which puts the number of bookings at a specific hotel in relation to the number of site-visits (i.e. also called look-to-book ratio), plays an important role in determining the ranking. The conversion rate as well as other indicators determine which hotels are seen as being attractive for users of the respective online-booking platform. The more attractive a hotel is rated according to the algorithm by the online-booking platform, the higher it is positioned within the ranking. From the explanations by HRS and Expedia it can be seen [...].

27. Hotels themselves have various means to influence their ranking. [...]

28. In [...]

29. Booking.com additionally offers its partner-hotels the possibility, subject to certain requirements, to participate in its 'Preferred-Partner' Program. The participation in this program is on the one hand subject to a number of criteria (such as adherence to parity clauses<sup>17</sup>,

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<sup>14</sup> According to Booking.com this step [...].

<sup>15</sup> See paragraph 29.

<sup>16</sup> [...]

<sup>17</sup> See paragraph 31 ff.

favorable user-generated reviews, and low cancellation rates), on the other hand a higher commission-rate is required. Apart from being labeled as a Preferred Hotel the only real advantage of participating in the 'Preferred-Partner' Program consists of attaining a higher ranking.

30. [...] <sup>18</sup> In the case of Booking.com the adherence to price-parity clauses has only an indirect effect, as there is the possibility that the non-adherence to price-parity clauses possibly leads to a lower conversion rate. According to Booking.com, a hotel with constantly higher prices on a specific platform compared to other distribution channels, would as a consequence rather be booked on these other channels which in turn lowers its conversion rate and its ranking on this platform. [...]

### **A.3. Subject of this Investigation**

31. The subject of this investigation are primarily price-parity clauses which are included in the cooperation agreements between hotels and online-booking platforms. Additionally, availability-parity clauses as well as conditions-parity clauses, both of which relate to price-parity clauses, are also investigated. Subsequently a brief overview on these clauses, as well as their enforcement, is provided without anticipating any of the considerations on their lawfulness according to cartel law.

32. First of all it should be noted that towards the end of this investigation both Booking.com and Expedia have adapted their parity clauses with regards to partner-hotels in Switzerland. These parity clauses, which are called narrow parity clauses in the remainder of this decision, were introduced by 1 July 2015 (in the case of Booking.com) and by 1 August 2015 (in the case of Expedia). Nevertheless a brief overview on these narrow parity clauses is provided after the considerations with respect to wide parity clauses which are the subject of this investigation. Thereby it is specifically shown, why it would be premature to make a final judgement on the conformity to cartel law of narrow parity clauses at this point in time.

#### **A.3.1. Wide Parity Clauses**

33. Price-parity clauses are the focus of this investigation. With such clauses online-booking platforms prohibit their partner-hotels from offering lower prices for their rooms on other distribution channels, which are defined in these clauses. The subject of this investigation are so-called wide price-parity clauses. These clauses include all distribution channels of partner-hotels and especially do not allow to set lower prices on competing online-booking platforms.

34. At least before the recent adaptations by Booking.com and Expedia, an extension of the price-parity clauses stipulated by the party could be observed. Thus, HRS demanded until the year 2008 price-parity with other booking- or travel-platforms and a hotel's own homepage. In its current version of its general delivery terms HRS demands parity with all direct distribution channel. This clauses therefore also includes all direct offline-distribution channels such as telephone and walk-in. The clause currently applied by HRS is as follows:

„HRS erwartet von seinen Hotelpartnern grundsätzlich die günstigsten Zimmerpreise inklusive aller Steuern und Gebühren (sog. Endpreise) sowie eine höchst mögliche Verfügbarkeit. Das Hotel verpflichtet sich somit, dass (...) HRS immer die mindestens gleich günstigen Preise und Preisbedingungen (nachfolgend gemeinsam „Preis“ oder „Rate“) erhält, die das Hotel auf anderen Buchungs- und Reiseplattformen im Internet und den

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<sup>18</sup> See paragraph 31 ff.

eigenen Vertriebskanälen anbietet oder anbieten lässt (sog. parityrate). Das Hotel verpflichtet sich in diesem Zusammenhang auch, seine sonstigen Vertriebspartner (wie z.B. Reiseveranstalter) entsprechend zu verpflichten und dafür Sorge zu tragen, dass HRS für den Fall, dass das Hotel zu einem günstigeren Preis buchbar ist, diesen Preis ebenfalls erhält.“

35. Booking.com used the following version until before 1 July 2015:

„Die Unterkunft gewährt Booking.com Raten- und Verfügbarkeitsparität („Parität“). Ratenparität bezeichnet den gleichen oder einen besseren Preis für dieselbe Unterkunft, die gleiche Zimmerkategorie, das gleiche Datum, die gleiche Bettkategorie, die gleiche Anzahl an Gästen, die gleichen oder bessere Beschränkungen und Bestimmungen, darunter Frühstück, Buchungsänderungen und Stornierungsbedingungen, wie er auf den Webseiten, Apps oder in den Call-Centern (inklusive dem Kundenreservierungssystem) der Unterkunft oder direkt in der Unterkunft sowie bei einem Wettbewerber von Booking.com (darunter Online- und Offline-Reservierungs- oder Buchungsagenturen sowie Vermittler) und/oder bei einem anderen Dritten (online oder offline), der ein Geschäftspartner der Unterkunft ist oder auf irgendeine andere Weise mit der Unterkunft verbunden ist, angeboten wird.“

36. Expedia adapted its contracts in the aftermath of an procedure by the OFT<sup>19</sup> in February 2013 and used the following clause until before 1 August 2015:

[...]

37. The parties control the adherence to their respective price-parity clauses to a great extent. Thereby Expedia as well as HRS [...]. Booking.com [...]<sup>20</sup>

38. Best-price guarantees<sup>21</sup>, which are communicated to a platforms users, could also contribute to a detection of breaches against price-parity clauses as users discover a lower price on another channel and subsequently make a claim with this respect to the online-booking platform. According to declarations by Booking.com such claims would be relatively infrequent. Booking.com assumes that a respective user would rather simply cancel on Booking.com (if at all possible) and afterwards book on the cheaper channel.

39. Offline distribution-channels are harder to observe as this has to be made manually. HRS [...]. Some hotels have reported to foreign competition authorities that they were contacted by representatives of online-booking platforms (for example by phone) claiming to be a prospective customer and asking for special discounts which are only directly available at the hotel. During the course of this investigation no such cases were reported relating to hotels in Switzerland.

40. To supervise the adherence to price-parities [...]. Expedia [...] Also HRS verifies the adherence to price-parity clauses by using a proprietary software-solution which present the respective employees cases of possible breaches. If upon closer investigation actual problems are discovered, the respective hotels are contacted, subject to their importance, either by e-mail or by telephone.

41. If a breach against price-parity clauses by a hotel is discovered, it is occasionally contacted by the respective online-booking platform in order to make it aware of this breach and

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<sup>19</sup> See paragraph 139 ff.

<sup>20</sup> Other causes could for example be differences concerning the inclusion of possible fees (e.g. tourism taxes), differences in exchange rates, differences in the validity of an offer or technical problems in the transmission of prices.

<sup>21</sup> See paragraph 44ff.

to demand the future adherence to these clauses. The hotels are sometimes also supported in finding the reason for a breach which has been discovered.<sup>22</sup>

42. The cooperation agreements which are the subject of this investigation do include provisions whereby contracts with hotels, which breach price-parity clauses, can be terminated on this ground. [...], based on declarations by hotels there are indeed sanctions in cases of breaches against price-parity clauses by temporarily suspending the intermediation of rooms in the respective hotels or by lowering the ranking of the respective hotel in the ranking of a platform. The responses to the survey of hotels do not allow for making general conclusions with regards to the frequency of taking such measures by the platforms. In the meantime these isolated statements show that the online-booking platforms indeed apply restriction upon the discovery of breaches against price-parity clauses. Nevertheless there are no indications that hotels would be indefinitely suspended from an online-booking platform.<sup>23</sup>

43. Booking.com argued that a breach of price-parity clauses had no direct influence on the respective ranking. Contrary to this claim, the participation in the so-called 'Preferred Partner' program<sup>24</sup> by Booking.com is subject to the condition that price-parity clauses are continually adhered to. In the case of breaches against these clauses a hotel may lose its preferred-status which automatically results in a lower ranking. Nevertheless a non-adherence to price-parity clauses can ultimately lead to a lower ranking by possibly lowering the conversion rate.<sup>25</sup>

#### **A.3.1.1. Best-Price Guarantees by Online-Booking Platforms**

44. It is necessary to clearly distinguish between price-parity clauses by online-booking platforms and *best-price guarantees*, which are sometimes granted to users by online-booking platforms. By offering best-price guarantees online-booking platforms assure their users that for a given hotel at a given time no better rate is available elsewhere compared to the rate offered on its platform.

45. Best-price guarantees grant customers the right a refund in case a price-difference is found with respect to the prices on an online-booking platform. Rules regarding in which way or within which time frame such a claim has to be made vary between online-booking platforms. Equally, there are differences regarding the question whether the hotel or the platform has to bear the costs of such a refund.

46. Best-price guarantees are not the immediate subject of this procedure proceedings while nevertheless being relevant as the possibility to offer such guarantees can be supported by the use of price-parity clauses.<sup>26</sup> Apart from this, best-price guarantees might also play a role

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<sup>22</sup> Rooms which are offered through a wholesaler are frequently the cause of a breach of price-parity clauses. Wholesalers buy hotel rooms at net-prices which are finally resold to customers within package tours. If too many rooms have been bought these might be sold otherwise and third-parties might offer them for the net-rate (loss-minimization by the wholesaler). As the net-rate is typically significantly lower than the price set by hotels themselves this might lead to a breach of the price-parity clauses stipulated by the online-booking platforms. Such discrepancies have their cause in the contracts between the hotels and wholesalers. In particular Booking.com seems to put relatively comprehensive efforts into consulting their partner-hotels regarding changes to such contrast in order to avoid such problems.

<sup>23</sup> Also see paragraph 452.

<sup>24</sup> See paragraph 29.

<sup>25</sup> See paragraph 26 ff.

<sup>26</sup> It should be noted that HRS does continue to offer a best-price guarantee in Germany despite the facts that price-parity clauses are prohibited there, see

in monitoring the adherence to price-parity clauses as claims regarding best-price guarantees might contribute to the discovery of breaches by hotels against price-parity clauses.<sup>27</sup>

### A.3.2. Wide Availability-Parity Clauses

47. Another subject of this investigations are availability-parity clauses: According to such a clause, rooms which are available on other distributions channels, as specified in the contract, are to be always also offered on the respective platform. The subject of this investigation are particularly so-called wide availability-parity clauses, which particularly prohibit giving a higher number of rooms to a competing online-booking platform. If availability-parity clauses also include a hotel's direct distribution channels it is called a 'Last Room Availability'-clause.<sup>28</sup>

48. Such a Last Room Availability is only explicitly included in the partnership contracts of Expedia:

[...]

49. The respective clause of HRS, which is the subject of this investigation, could also be regarded as including a Last Room Availability as the wording 'other distribution' channels could also include direct distribution channels:

„(...) Das Hotel verpflichtet sich somit, dass

(...)

c. HRS in Bezug auf die Verfügbarkeit nicht schlechter behandelt wird als andere Vertriebskanäle, so dass auf anderen Vertriebskanälen noch verfügbare Zimmer immer auch See HRS verfügbar gemacht werden.“

50. Therefore the objection voiced by HRS during its interrogation, that the direct distribution channel is not included in its availability-parity clause, cannot be followed. In this regard HRS has also argued that hotels are free to restrict their distribution of rooms to their direct distribution channels for example during holidays.

51. The investigated clause by Booking.com, could also be seen to include direct distribution channels as its availability-parity clause includes all competitors of Booking.com:

„Die Unterkunft gewährt Booking.com Raten- und Verfügbarkeitsparität („Parität“). (...) Verfügbarkeitsparität bedeutet, dass die Unterkunft Booking.com Verfügbarkeiten (d.h. verfügbare Zimmer zur Buchung auf der Plattform) bietet, die mindestens genauso vorteilhaft sind wie die, die einem Wettbewerber von Booking.com (darunter Online- und Offline-Reservierungs- oder Buchungsagenturen sowie Vermittler) und/oder bei einem anderen Dritten (online oder offline), der ein Geschäftspartner der Unterkunft ist oder auf irgendeine andere Weise mit der Unterkunft verbunden ist, angeboten werden.“

52. Booking.com states that this clause does not include a Last Room Availability, but if it is observed that a hotel still makes rooms available on its own homepage during a certain time

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<<http://www.hrs.de/web3/showCmsPage.do?clientId=ZGVfX05FWFQ-&cid=45-1&pageId=standard-01869>> (6.2.2015).

<sup>27</sup> See above, paragraph 37.

<sup>28</sup> Availability parities are to be clearly distinguished from minimum or exclusive allotments. Such allotments are sometimes included in contracts with online-booking platforms and other indirect distribution channels but are not the subject of this investigation.

frame, it is contacted in order to ask whether it would be willing to make these room available on Booking.com. Accordingly, this objection by Booking.com is also to be rejected.

53. The adherence to availability-parity clauses is monitored, also with respect to the technologies used, in the same way as price-parity clauses. In the meantime there are differences in the extent of the supervision between the parties. While [...], Booking.com claims to only monitor absolute availabilities.

### **A.3.3. Wide Condition-Parity Clauses**

54. So-called condition-parity clauses are closely related to price-parity clauses. The combination of a specific price combined with specific conditions is called a room rate. Due to this combination these two parities together are sometimes called rate-parity. The online-booking platforms demand parity with respect to booking conditions, which are associated with specific hotel services, such as booking deadlines, cancellation rules, arrival times etc. [...].

55. So-called wide condition-parity clauses are the subject of this investigation. Such clauses specifically prohibit a hotel from offering more favorable conditions on a competing online-booking platform. In the contracts of Booking.com and Expedia, which are the subject of this investigation, the condition-parity is included in [...]. The clause by HRS, which is the subject of this investigation, is included in a separate heading:

„(...) Das Hotel verpflichtet sich somit, dass

(...)

d. HRS in Bezug auf die Buchungs- und Stornierungskonditionen für den Kunden nicht schlechter behandelt wird als andere Vertriebskanäle, so dass günstigere Konditionen, die das Hotel auf anderen Buchungs- und Reiseplattformen im Internet sowie den eigenen Vertriebskanälen online und offline anbietet oder anbieten lässt, auch See HRS gelten.“

56. The adherence to condition-parities [...]. Nevertheless, in cases of a possible breach of price-parity clauses, it is also verified whether this is the result of differences in booking conditions. Accordingly it is also determined if there is a possible breach against condition-parities. [...]

### **A.3.4. No Assessment of Narrow Parity Clauses**

57. In the context of procedures relating to competition law in Italy, France and Sweden, Booking.com has committed itself to the respective competition authorities to adapt its parity clauses in various aspects<sup>29</sup> and has unilaterally also extended these changes, effective from 1 July 2015, to partner-hotels in the whole EEA as well as in Switzerland. Afterwards, Expedia has also announced respective changes with respect to its partner-hotels in Europe, effective from 1 August 2015. HRS has only announced that it would be willing to make respective changes with regards to partner-hotels in Switzerland within an amicable settlement. Subsequently, the core-elements of the changes to parity clauses by Booking.com and Expedia are explained. It is also demonstrated that, due to a lack of practical experiences over a longer time period, currently no final judgement can be passed on whether or not the adapted parity clauses conform to the Swiss cartel law. The adapted parity clauses constitute so-called narrow parity clauses. The main difference of such clauses to wide parity clauses, which are the

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<sup>29</sup> See paragraph 143.



subject of this investigation, is the fact that they allow to treat diverse online-booking platforms differently with respect to prices, availabilities and conditions.

*a) Narrow Price-Parity Clauses*

58. The narrow price-parity clauses, as recently introduced by Booking.com and Expedia, still require partner-hotels to provide lower or equal prices on the respective online-booking platform compared to its online direct distribution channels. If this restriction is observed it is, in contrast to wide price-parity clauses, possible for partner-hotels to set different prices on different online-booking platforms.

59. Booking.com argues that narrow price-parity clauses would provide incentives to online-booking platforms to offer their partner-hotels lower commissions in exchange for lower prices. At the time being, though, it is unclear whether this prediction will become reality. Accordingly, the parties have argued in the hearings conducted by COMCO that respective developments currently cannot yet be observed in reality. Furthermore, there are certain restrictions to the adapted price-parity clauses: Specifically, it is still prohibited to offer lower prices compared to the own homepage of a hotel on online-booking platforms which are directly or indirectly controlled by hotels or hotel chains as well as for prices which are used to advertise hotels on meta-search engines.

60. In the meantime, this variety of price-parity clauses still prevents hotels from giving their customers a price-signal on the absolute amount of commissions raised by online-booking platforms by offering a respective discount on a hotel's own homepage. Furthermore, especially the SHV denies that hotels would be willing to offer lower prices on online-booking platforms compared to its own homepage as this would lead to a cannibalization of its direct distribution channel. On the contrary, results from a survey commissioned by Booking.com lead to the conclusion that hotels would in principle be willing to set different prices on different online-booking platforms. Meanwhile, Booking.com refrained from specifically asking whether partner-hotels would be willing to do so even if this would require to set lower prices compared to direct distribution channels.

*b) Narrow Availability-Parity Clauses*

61. The narrow availability-parity clauses, as recently introduced by Booking.com and Expedia, explicitly refrain from requiring partner-hotels to offer the same or a higher number of rooms on the respective online-booking platforms compared to other online-booking platforms or the hotel itself.

62. However, these changes to availability-parity clauses would allow online-booking platforms to continuously demand (upon availability) a relevant number of rooms. Therefore selectively closing a specific online-booking platform could also be prohibited according to the adapted availability-parity clauses. In contrast, Booking.com argues that these changes give hotels a wider range of possibilities to vary availabilities between online-booking platforms for example by giving preferential treatment to an online-booking platform with lower commission rates by giving it a higher number of rooms.

*c) Changes Regarding Exceptions to Parity Clauses*

63. The narrow availability-parity clauses, as recently introduced by Booking.com and Expedia, finally state that closed user-groups are exempted from price-parity clauses. Furthermore, offline booking-channels are explicitly exempted from the changed price-parity clauses.

64. By explicitly acknowledging the possibility of hotels to offer lower prices to members of its closed user-groups without breaching the narrow price-parity clauses, these changes constitute, at least formally, an improvement to the previous clauses. In the meantime at least Expedia has already offered such exemptions before. Furthermore, certain hotel chains have already operated their own closed user-groups before these changes. In the meantime, no final conclusion can be made at the moment regarding the question to which extent the concept of closed user-group might be relevant in practice particularly for independent hotels.

65. Also the fact that offline-bookings (such as walk-in guests and bookings by mail, e-mail, fax or phone) are exempted from price-parity clauses constitutes a formal improvement compared to previous parity clauses. It should be noted, though, that monitoring of the adherence to price-parity clauses on offline distribution-channels was, if performed at all, only very limited.<sup>30</sup>

66. The mentioned possibilities of partner-hotels to offer lower prices on their direct distribution-channel compared to online-booking platforms are subject to certain restrictions. As an example, any publication of specific prices with respect to such offers or a sufficient amount of details, which allows the calculation of specific prices, is prohibited.

#### *d) Conclusion*

67. At least formally, narrow parity clauses put less restrictions on partner-hotels compared to the previous wide parity clauses. As has been previously shown, there are for each element of these changes opposite arguments with regards to the practical effect of these changes. Due to a lack of experiences over a longer time frame it is currently unclear, what effect these adapted parity changes have in practice. Accordingly, at this moment in time, no final judgement can be passed on the question whether the adapted parity clauses lead to a relevant improvement of competition, for example with respect to the amount of commission rates, on the level of online-booking platforms. This opinion was ultimately also confirmed by the parties during the hearings held by COMCO.

68. Narrow parity clauses are formally less far-reaching compared to wide parity clauses which are deemed to be unlawful according to cartel law. In the meantime, it cannot be determined at this point in time whether narrow parity clauses lead, in practice, to a result which would make them clearly unobjectionable from the point of view of cartel law. It takes a certain amount of time to observe the actual consequences of narrow parity clauses. This is also reflected in the requirement by the competition authorities of France and Italy that Booking.com has to evaluate the effects of narrow parity clauses after one year. The CMA has also expressed the opinion that it is currently too early to pass a judgement on the effects of the changes by Booking.com and Expedia on the market.

69. As it is currently unclear, if narrow parity clauses do indeed lead to a removal of the restriction to competition which was the object of this investigation, there is also no possibility to close this investigation by an amicable settlement within the meaning of art. 29 CartA. As this investigation only makes a final judgement with regards to wide parity clauses by stating that they are unlawful, the question of whether or not narrow parity clauses are legal or not can be left open for the reasons set out above. The possibility to address this question within a new formal procedure, after an observation of market developments over a relevant time frame, is explicitly left open.

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<sup>30</sup> See paragraph 39.

70. In the view of this background, the following consideration are made with respect to wide parity clauses, as they were used with respect to partner-hotels in Switzerland by Booking.com before 1 July 2015, by Expedia before 1 August 2015 and by HRS until the date of this decision. For the sake of simplicity it is subsequently refrained from explicitly stating every time that these considerations are made with respect to wide parity clauses. In cases where considerations specific to the recently introduced narrow parity clauses are made, this is explicitly stated.

## **B. Proceedings**

### **B.1. Origins of the Procedure / Market Observation**

71. In April 2011 a hotel owner contacted the Secretariat by telephone in the matter of business practices of online-booking platforms. Subsequently this hotel owner, in a letter from 8 April 2011, explicitly points out price-parity clauses. On this very subject the SHV had requested a meeting with the Secretariat which was held the 28 June 2011.

72. In the course of the market observation various meetings and exchanges of letters with the respective hotel owner and the SHV took place during the year 2011 and in the beginning of the year 2012.

### **B.2. Preliminary Investigation**

73. By a letter dated 6 July 2012, the Secretariat sent Booking.com (Schweiz) AG a questionnaire and opened a preliminary investigation within the meaning of art. 26 CartA. The questionnaire was adapted by a letter dated 13 June 2012 and was responded to by Booking.com (Schweiz) AG within the deadline.

74. In the course of the preliminary investigation a second meeting with representatives of the SHV took place 15 October 2012.

### **B.3. Investigation**

75. On the 11 December 2012 the Secretariat opened this investigation pursuant to art. 27 CartA against Booking.com, Expedia and HRS. At the same time the competition authorities of Germany, the United States of America and the Netherlands were informed about this procedure. The opening of this investigation was published in the Swiss Official Gazette of Commerce the 28<sup>th</sup> of December 2012<sup>31</sup> as well as in the Federal Gazette<sup>32</sup>. Together with the opening letter questionnaires were sent to the parties which were responded to within the deadline. The parties which were not involved in the preliminary investigation were granted access to the file, in which business secrets have already been removed, up to this stage of the investigation.

76. The SHV claimed in a letter, dated 23 January 2013, its right to participate in this procedure as a third party within the meaning art. 43 CartA within the deadline. After the Secretariat denied the SHV a request by phone to be granted access to the file, the SHV requested on the 2<sup>nd</sup> of May 2012 to be admitted as a full party in the present investigation. By a letter dated 14 May 2013 the Secretariat refused this request as well. On 11 June 2013 the Secretariat issued, requested by the SHV, an intermediary injunction. The injunction was necessary in order to issue an appeal. The SHV appealed against this intermediary injunction on 12 July 2013 to the Federal Administrative Court. The Court dismissed the appeal on 1 July 2014. The SHV refrained from a further appeal to the Federal Court, therefore this decision by the Federal Administrative Court came into force.

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<sup>31</sup> See SHAB Nr. 252 of 28 December 2012, Nr. 6995854.

<sup>32</sup> See BBl 2012 9832.

### **B.3.1. Investigative Acts**

77. Apart from questioning the parties in writing, questionnaires were sent during the second and third quarter of the year 2013 to 220 Hotels which have been randomly chosen from the telephone directory. Furthermore, the trade associations SHV and GastroSuisse<sup>33</sup> were informed about this procedure. 175 out of these 220 hotels responded to the questionnaire with useful information for the proceedings. The other questionnaires were either undeliverable or the accommodations were unable to provide any useful information for various reasons: Some of the accommodations ceased to operate, provided only group accommodations, operated as health resorts, provide or only rented out rooms to long-term residents. Such accommodation providers therefore did not distribute their rooms in the same way as a typical hotel. 16 questionnaires were not responded at all. Nevertheless the Secretariat waived its right to issue an injunction for the non-responders for economic reasons.

78. On 20 February 2014 questionnaires were sent to various other companies, which operate as distributors of hotel rooms, namely ebookers, STC Switzerland Travel Centre, Kuoni, Hotelplan Travel, TUI Suisse, GHIX and Justbook. Justbook, which has its domicile in Germany and has lodged a complaint in this matter which set off the procedure by the Bundeskartellamt, did not respond to the questionnaire. The other questionnaires were all responded to within the set (sometimes extended) deadline.

79. In April 2014 the parties were separately questioned by the Secretariat. Before and after being questioned, the parties were requested to respond to additional questions in writing and responded within the set (and sometimes extended) deadlines.

80. [...]

81. [...]

82. [...]

83. [...]

84. [...]

### **B.3.2. Delivery of the Proposed Motion and Statements by the Parties and Third Party**

85. On 10 April 2015 the Secretariat sent the proposed motion to the parties together with electronic versions of the current directory of the files as well as the corresponding files. On the same day the proposed motion was sent to the SHV as a third party. 12 May 2015 was set as the deadline to comment on this proposed motion.

86. After the proposed motion was sent, Booking.com requested by letter on 4 June 2015 to receive additional information concerning a few elements of the proposed motion and regarding the content of some files. A statement by the Secretariat in this regard was sent to Booking.com on 8 June 2015. This statement was also sent to the other parties for their information.

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<sup>33</sup> GastroSuisse is an association for hotels and restaurants in Switzerland with altogether around 20'000 member (of which around 3'000 are hotels). See <<http://www.gastrosuisse.ch/de/gastrosuisse/verband/?>> (27.1.2015).

87. All parties as well as the SHV submitted comments concerning the proposed motion within the extended deadline. They requested that COMCO should conduct hearings pursuant to art. 30 para. 2 CartA.

88. In the following, the other core elements of the comments on the proposed motion are briefly explained, in order to provide an overview. These points are treated in a more detailed manner – if at all necessary – in the respective parts of this decision. In the meantime it needs to be pointed out that according to the settled case-law of the Federal Supreme Court, the right to be heard does indeed require that the arguments by the parties are heard, reviewed and considered in the decision-making process. From this, it does not follow that in a decision-process respectively in the written decision an intensive debate concerning all arguments by the parties has to take place or that it would be necessary to explicitly refute every single claim by the parties. Rather, decision-process respectively in the written decision can be limited – without violating the right to be heard – to the most important points.<sup>34</sup>

#### **B.3.2.1. Booking.com**

89. Booking.com confirms its position that parity clauses would not lead to any relevant restriction of competition according to cartel law. Furthermore, it is pointed out that in the meantime the competition authorities of France, Italy and Sweden have accepted the use of narrow parity clauses<sup>35</sup> and announced that it would unilaterally introduce these changes by 1 July 2015 with respect to its partner-hotels in Switzerland. Due to these developments, Booking.com argues that any of the concerns with respect to cartel law which have been expressed in the proposed motion should therefore be fully addressed. Accordingly this investigation should be closed without any consequences. Furthermore, it should be refrained from formally stating a dominant position by Booking.com, as was included in the proposed motion of the Secretariat.

90. As has been previously elaborated, the narrow parity clauses, introduced by Booking.com by 1 July 2015 with respect to partner-hotels in Switzerland, are not the subject to this investigation. A final judgement on these clauses and their practical effect cannot be made at that time.<sup>36</sup> Nevertheless, Booking.com applies basically the same arguments, which have been made with respect to wide parity clauses, to narrow parity clauses, especially concerning the potential existence of grounds of economic efficiency set out in art. 5 para. 2(a) CartA.

#### **B.3.2.2. HRS**

91. HRS essentially repeats its assessment that its behavior does not infringe cartel law, but nevertheless applies for an amicable settlement pursuant to art. 29 CartA which should include the introduction of narrow parity clauses as by Booking.com. Furthermore, HRS especially criticizes that this investigation does not include other, even smaller online-booking platforms (especially STC and ebookers), while HRS is a party to this procedure as the third largest online booking platform.

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<sup>34</sup> See on this subject: Judgement by the Federal Supreme Court 4A\_532/2011 of 31.1.2012, E. 3.1 with further remarks.

<sup>35</sup> See below, paragraph 143 ff.

<sup>36</sup> See paragraph 57ff.

#### **B.3.2.3. Expedia**

92. Also Expedia confirms its position in its comments to the proposed motion that parity clauses would not lead to any relevant restriction of competition according to cartel law and bases this claim mainly on already previously voiced arguments. Thus, the market definition in the proposed motion would be too narrow and the existence of grounds of economic efficiency would be wrongly denied. Furthermore, a contradiction would arise between the findings in the proposed motion that parity clauses do not lead to a significant restriction of competition on the level of hotels, while this would be the case on the level of online-booking platforms. Finally, a prohibition of parity clauses with no time limit would be disproportionate and lesser means to remove the restriction of competition, as described in the proposed motion, should be explored, such as the settlement proposal of Booking.com. Finally, Expedia argues that in any case it would be sufficient if only Booking.com would apply its settlement proposal in order to totally remove any possible restrictions of competition. At last, Expedia applies for a reduction of the fees it has to pay for this procedure to 1/9 of the total fees.

#### **B.3.2.4. SHV**

93. The SHV points out that the relevant processes and mechanisms are presented in a very concise manner. Accordingly it would not be necessary to make any further investigations regarding the facts of this case. However, it argues that, unlike stated in the proposed motion, Booking.com, HRS and Expedia would hold a collective dominant position and that a corresponding abusive behavior does exist. Nevertheless, the SHV would refrain from offering further remarks in this aspect, as to not further delay a decision. It was furthermore argued that the commitment proposal by Booking.com would in fact perpetuate the anticompetitive effect of parity clauses and would only contain superficial concessions. From its point of view, the decision of the French competition authorities is seen as being incomprehensible and would in any case not apply to the economic realities in Switzerland. Finally, the SHV demands that that a prohibition of parity clauses should come into force without delay even in the case of an appeal.

#### **B.3.3. Hearings Held by COMCO**

94. On 7 September 2015 COMCO held, on their request, hearings of all parties and of the SHV pursuant to art. 30 para. 2 CartA. Thereby the parties (Booking.com, Expedia and HRS) as well as the SHV, as a third party, were given the opportunity to make oral statements on the case. Afterwards, the President as well as the members of COMCO questioned the parties and the SHV. Written records of the hearings were made and afterwards signed by the parties and the SHV. In terms of the content, the parties and the SHV essentially presented the same arguments, which have already been submitted in the previously summarized written comments. If necessary, arguments submitted in the hearings will also be treated in the respective considerations.

## C. Legal and Economic Assessment

### C.1. Scope of the Cartel Act

#### C.1.1. Personal Scope

95. The personal scope of the Cartel Act includes private or public undertakings (art. 2 para. 1 CartA). According to the Cartel Act, undertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organizational form. (art. 2 para. 1<sup>bis</sup> CartA). In the determination of its personal scope, the Cartel Act therefore applies a functional definition of an undertaking. As a result, legally independent subsidiaries of a corporate group are not considered as undertakings within the meaning of art. 2 para. 1<sup>bis</sup> CartA because of a lack of economic independence. In such cases the corporate group as a whole institution is regarded as an undertaking.<sup>37</sup>

96. Booking.com, HRS and Expedia are parties to this investigation. All of them provide distribution services to hotels and offer their users the respective booking facilities.

97. HRS argues that it acts as a pure agent for hotels and that it would therefore not fall under the scope of the Cartel Act at all.<sup>38</sup> Contrary to competition law in the EU<sup>39</sup> there are no such provisions in Switzerland. Intermediaries are, just as other undertakings and distribution and distribution agreements, to be evaluated according to the Cartel Act.<sup>40</sup>

98. Based on para. 7 the Communication on Vertical Agreements<sup>41</sup>, which states that European rules should be analogously applied, the risk-approach as well as the approach in the EU's VBER could in principle, and taking into consideration the case-specific circumstances, be applied to this investigation. Thereby, also in Switzerland, it could be possible that certain distribution partners, which act on behalf of their principle in a certain agency relationship, would have to be treated differently compared to independently acting distributors.<sup>42</sup> Meanwhile, such circumstances are not given in the case under consideration.

99. In this regard it can be stated that in none of the European cases on this very subject the existence of a pure agency relationship within the meaning of art. 101 TFEU<sup>43</sup> was identified. Rather, the existence of such a relationship was in some cases explicitly denied, as the necessary prerequisites are not fulfilled in this situation.<sup>44</sup> This is due to the fact that operating an online-booking platform requires high market-specific investments, for example investments

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<sup>37</sup> JENS LEHNE, in: Basler Kommentar, Kartellgesetz, Amstutz/Reinert (Hrsg.), 2010, Art. 2 KG N 27; SAMUEL JOST, Die Parteien im verwaltungsrechtlichen Kartellverfahren in der Schweiz, Basel 2013, paragraph 335 und 341. See also Judgement by the Federal Supreme Court 2C\_484/2010 of 29.6.2012, LPC 2013/2, E. 3, *Publigroupe SA et al./WEKO*, and the judgement by the Federal Administrative Court, LPC 2010/2, 335 E. 4.1 *Publigroupe SA und Mitbeteiligte/WEKO*.

<sup>38</sup> Expedia also brought forward this argument in its comments on the proposed motion.

<sup>39</sup> See Guidelines on Vertical Restraints, Official Journal C 130, 19.05.2010, p. 1, paragraph 12 ff.

<sup>40</sup> See LPC 2013/4, 481 f. paragraph 32., *Costa Kreuzfahrten*.

<sup>41</sup> Bekanntmachung der WEKO of 28.6.2010 über die wettbewerbsrechtliche Behandlung vertikaler Abreden (Vertikalbekanntmachung, VertBek).

<sup>42</sup> See on the whole subject: LPC 2013/4, 481 f. paragraph 33 ff., *Costa Kreuzfahrten*.

<sup>43</sup> Consolidated version of the Treaty on the Functioning of the European Union of 13 December 2007, Official Journal C 115 of 9 May 2008 (TFEU).

<sup>44</sup> See specifically the decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, paragraph 8, *HRS*.



concerning marketing for the platform as well as for the respective distribution infrastructure (homepage, reservation systems, IT-infrastructure etc.). Additionally, the contract clauses, which are the subject of this investigation, are clearly at odds with the primacy of principal which is inherently tied to an agency relationship. Therefore the behavior of the online-booking platforms is to be measured according to the Cartel Act.

100. With respect to the personal scope of the CartA, the question on how the undertakings, against which this investigation was opened, are positioned within the respective corporate groups can be left open. Purely internal issues within a corporate group<sup>45</sup> are not under consideration. It is certain that all of these undertakings are legally independent undertakings which are active in commerce as consumers or suppliers of goods or services. Whether these undertakings are economically independent or not is inconsequential as they fall under the scope of the Cartel Act in any case: In the first case directly as an undertaking, in the second case due to being a member of the corporate group. It additionally needs to be noted that falling under the definition of an undertaking within the meaning of art. 2 para. 1<sup>bis</sup> CartA does not answer the question concerning the identification of the (material) addressee of the Decision.<sup>46</sup>

### **C.1.2. Material Scope**

101. The material scope of the Cartel Act includes parties to cartels and concluding other agreements affecting competition, the exercise of market power and the participation in concentrations of undertakings (art. 2 para. 1 CartA).

102. The term of an agreement affecting competition is defined in art. 4 para. 1 CartA. Whether the parties have concluded such agreements and whether unlawful agreements within the meaning of art. 5 CartA were concluded will subsequently be discussed in the consideration. Therefore, by referring to the later explanations, these arguments are not repeated presently.

103. A dominant position constitutes a qualified form of market power.<sup>47</sup> The questions of whether Booking.com on its own or all three parties together constitute dominant undertakings within the meaning of art. 4 abs. 2 CartA and whether there is an unlawful hindrance of competition according to art. 7 CartA will be treated in the respective considerations. If a dominant position is affirmed, the exertion of market power is therefore also stated. If the existence of a dominant position is denied, it is unnecessary to consider the question of market power, as in such a case a behavior which is in breach of art. 7 CartA cannot exist. Further explanations are provided in the respective considerations.<sup>48</sup>

### **C.1.3. Geographical Scope**

104. According to art. 2 para. 2 CartA this Act applies to practices that have an effect in Switzerland, even if they originate in another country (taking an effects-based approach). In other

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<sup>45</sup> See for example ROLAND VON BÜREN/EUGEN MARBACH/PATRIK DUCREY, *Immaterialgüter- und Wettbewerbsrecht*, 3. Aufl. 2008, paragraph 1245.

<sup>46</sup> LPC 2004/2, 419, paragraph 56, *Swisscom ADSL*, see specifically paragraph 106 ff.

<sup>47</sup> See LPC 2001/2, 268 paragraph 79; Botschaft vom 23. November 1994 zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen, BBl 1995 I 468, 547 f.; JÜRGEN BORER, *Kommentar zum schweizerischen Kartellgesetz*, Zürich 2005, Art. 2 N 14.

<sup>48</sup> See paragraph 412.

words, it is not relevant where the restriction of competition is initiated. Instead, it is relevant that there is an effect in the Swiss market.<sup>49</sup>

105. The investigated contract clauses are agreed upon by the parties and hotels in Switzerland and therefore have effects on the Swiss market. The Cartel Act is therefore applicable.

## C.2. Material Addressees of the Decision

### C.2.1. General Considerations

106. In cases in which a corporate group is qualified as an undertaking, it is difficult to determine the material addressee. The arising question is which of the subsidiaries the right addressee is, especially in this case where the existence of a corporate group is left open.<sup>50</sup> According to Swiss law a corporate group is no legal person, therefore being without legal entity. For legal reasons, the addressee of a decision is required to have a legal entity. Therefore a corporate group cannot be the addressee of a decision. Only individual subsidiaries of a corporate group can be addressees. Therefore they need to be identified for this specific investigation. Thereby a general distinction can be made between material and formal addressees of the decision.

107. *Material* addressees of a decision are those private or legal persons, which are directly affected in a legally binding way in their rights and duties concerning their actions, what they have to bear, and what they are prohibited.<sup>51</sup> As such they are parties to a procedure without the need for any further considerations.<sup>52</sup> In contrast, *formal* addressees of a decision are legal subjects, which are not directly affected in their rights and duties, but which are nevertheless affected in their interests (to a larger extent than the general public).<sup>53</sup> In other words: Formal addressees are those which have a right to appeal pursuant to art. 48 APA<sup>54</sup> without being material addressees of the decision.<sup>55</sup> Such third parties, which – as previously mentioned – are not directly affected in their rights and duties by the decision, can still be considered as parties to the procedure due to having a close relationship to the investigated subject.<sup>56</sup> Both material and formal addressees are therefore parties to the procedure and the rights which are derived from this qualification are in principle equivalent. The difference between material and formal addressees of a decision is therefore not aimed at making a distinction between persons with respect to their treatment as formal parties to a procedure (with this respect the term formal addressee of a decision could be misleading). It is rather aimed at making a differentiation with respect to whether the ruling of a decision the rights and duties of a party are affected (material addressee of a decision) or not (formal addressee of a decision, if it is nevertheless

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<sup>49</sup> BBI 1995 I 468, 535.

<sup>50</sup> See paragraph 100.

<sup>51</sup> LPC 2007/2, 200 paragraph 69, *Richtlinien des Verbandes Schweizerischer Werbegesellschaften VSW über die Kommissionierung von Berufsvermittlern*.

<sup>52</sup> See for example ISABELLE HÄNER, in: Kommentar zum Bundesgesetz über das Verwaltungsverfahren, Auer/Müller/Schindler (Hrsg.), 2008, Art. 6 VwVG N 5.

<sup>53</sup> Judgement by the Federal Administrative Court, LPC 2010/2, 336 f. E. 4.5, *Publigroupe SA und Mitbeteiligte/WEKO*.

<sup>54</sup> Federal Act on Administrative Procedure of 20 December 1968 (Administrative Procedure Act, APA; SR 172.021)

<sup>55</sup> See LPC 2012/1, 89 paragraph 78, *Vertrieb von Tickets im Hallenstadion Zürich*.

<sup>56</sup> See for example HÄNER (Fn 52), in: Kommentar VwVG, Art. 6 VwVG N 6 with further references.

directly and to a larger extent affected by the decision compared to the general public, irrespective of whether this interest is equal<sup>57</sup> or opposite<sup>58</sup> with respect the material addressees).<sup>59</sup>

### C.2.2. Material Addressees of a Decision within Corporate Groups

108. Determining the material addressee can be difficult in cases, in which the subsidiary carried out the relevant actions. When such a behavior within a corporate group was considered, COMCO has previously (including in recent cases) repeatedly addressed the decision only to the subsidiaries.<sup>60</sup> This approach, as taken in these cases, was never criticized, or even corrected *ex officio*, by the appeals courts. Rather they, at least implicitly, confirmed this approach.<sup>61</sup> Alternatively, COMCO has in specific cases regarded both, the subsidiary and the corporate group, as material addressees of the decision and holding them jointly liable for

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<sup>57</sup> As was the case in the judgement by the Federal Administrative Court, LPC 2010/2, 335 ff. E. 4, *Publigroupe SA und Mitbeteiligte/WEKO*.

<sup>58</sup> As was the case in LPC 2012/1, 88 ff., paragraph 77 ff., *Vertrieb von Tickets im Hallenstadion Zürich*.

<sup>59</sup> See to a more detailed extent and with several cases as examples JOST (Fn 37), paragraph 598 ff.

<sup>60</sup> See for example LPC 2010/4, 649 paragraph 2 and 655 paragraph 49, *Hors-Liste Medikamente: Preise von Cialis, Levitra und Viagra*: That the material addressees of the decision, Pfizer AG, Eli Lilly (Suisse) SA und Bayer (Schweiz) AG, are all subsidiaries is stated explicitly in Fn 2 of the decision. LPC 2010/4, 717 paragraph 3 f. and 773 Decision, *Baubeschläge für Fenster und Fenstertüren*: Roto Frank AG as well as Siegenia-Aubi AG are labeled as subsidiaries, nevertheless these companies and not their mother companies are treated as the material addressees. LPC 2009/3 197 paragraph 5 and 203 paragraph 37 f., *Elektroinstallationsbetriebe Bern*: In this decision for example Elektro Burkhalter AG is specifically identified as being part of the Burkhalter-Group while nevertheless being both regarded as the material addressee of the decision as well as being fined. LPC 2008/1, 87 paragraph 13 and 94 paragraph 68 ff., *Strassenbeläge Tessin*: In this decision Batigroup (Ticino) SA, later Implenia (Ticino) SA, is bound by the operative part of the decision despite the fact that company – as its name as well as the later change of its name imply – would probably constitute a part of a corporate group. LPC 2007/2, 250 paragraph 46, *Terminierung Mobilfunk*: In this decision Swisscom Mobile AG, which is a subsidiary, is imposed a fine and is therefore seen as the material addressee of the decision.

<sup>61</sup> A prime example is the Judgement by the Federal Administrative Court, LPC 2010/2, 377 f. E. 3, *Implenia (Ticino) SA/WEKO*, whereby Implenia (Ticino) SA is regarded as the material addressee of the decision, without giving any further consideration of its obvious status as a subsidiary. Judgement by the Federal Administrative Court, LPC 2010/2, 262 E. 3.1 and 307 E. 10.7.5, *Swisscom Schweiz AG/WEKO* and Judgement by the Federal Supreme Court 2C\_343/2010 of 11 April 2011, E. 2.3 and 3.1: Swisscom (Schweiz) AG, which was party to the procedure, is generally known to be a subsidiary of Swisscom AG. On this relationship within a corporate group and especially on the factual and possible effects of this relationship on its status as material addressee(s) of the decision neither the Federal Administrative Court nor the Federal Supreme Court make any considerations.

paying the sanction.<sup>62</sup> This approach can also be observed in the jurisprudence in the European Union.<sup>63</sup> Finally, there were cases in which only the corporate group was considered as the material addressee of the decision.<sup>64</sup>

109. The previous practice therefore allows for different approaches to solving problems relating the determination of the (material) addressee within a corporate group, all of which take case-specific circumstances into account.

110. The addressees of this specific decision are the companies which are named in Part A. HRS is the ultimate parent company within the HRS-Group. Expedia has with Expedia, Inc. (Delaware) a parent holding company. Booking.com is part of The Priceline Group. Expedia and Booking.com both have superior parent companies while also having – just as HRS – numerous subsidiaries.

111. Subject to these decision are the subsidiaries which are concretely acting with respect to the behavior under consideration. Thus, Expedia and HRS [...]. In the case of Booking.com the partnership contracts are concluded with Booking.com and not with its subsidiaries in the respective countries. The behavior which is considered according to the Cartel Act therefore is exerted by these companies, which are therefore closest to this subject. It is also those companies which are able to implement and ensure the measures which are mandated. Accordingly Expedia, HRS und Booking.com are seen as being the material addressees.

### C.3. Relationship to Other Statutory Provisions

112. Statutory provisions that do not allow for any competition in a market for certain goods or services take precedence over the provisions of the Cartel Act. Such statutory provisions include in particular: Provisions that establish an official market or price system and provisions that grant special rights to specific undertakings to enable them to fulfil public duties (art. 3 para. 1 CartA). Furthermore, the Cartel Act does not apply to effects on competition that result exclusively from the legislation governing intellectual property. However, import restrictions based on intellectual property rights shall be assessed under the Cartel Act (art. 3 para. 2 CartA).

113. In the markets under consideration there are no statutory provisions that do not allow for competition. The existence of statutory provisions within the meaning of art. 3 para. 1 and 2 CartA was furthermore not claimed by the parties.

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<sup>62</sup> LPC 2010/1, 120 paragraph 27, *Preispolitik Swisscom ADSL*; as previously LPC 2004/2, 421 paragraph 66 f., *Swisscom ADSL*.

<sup>63</sup> Judgement by the ECJ of 10.9.2009 C-97/08 P, *Kazoo Nobel et al./Kommission*, *Sl.2009 I-8237* paragraph 77; see also FRÉDÉRIQUE WENNER/BERTUS VAN BARLINGEN, in: *Competition Policy Newsletter*, 2010/1, European Court of Justice confirms Commission's approach on parental liability, 27: 'In view of the Court's ruling, parent companies should now systematically expect to be held jointly and severally liable for the anticompetitive infringement committed by their wholly owned subsidiaries.'; for other examples see the overview provided in in ANNA-ANTONINA SKOCZYLAS, *Verantwortlichkeit für kartellrechtliche Verstösse im Konzern*, 2011, 70 ff.

<sup>64</sup> As for example LPC 2011/1, 109 f. paragraph 95, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*.

## C.4. Unlawful Agreement Restricting Competition

114. Agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful. (art. 5 para. 1 CartA).

### C.4.1. Standard and Burden of Proof

115. The APA applies to investigation procedures unless the Cartel Act stipulates otherwise (see art. 39 CartA). Art. 12 APA prescribes that the authority shall establish the facts of the case ex officio. The inquisitorial principle<sup>65</sup>, which is thereby stipulated, also applies to cartel procedures. A breach against the Cartel Act is therefore in principle to be investigated by the authorities. As a result the Competition Authorities bear the responsibility to collect the information which is required to make a decision, to pursue all relevant facts and, by its own initiative, to investigate all relevant aspects.<sup>66</sup>

116. Due to the duty of the Competition Authorities to establish the legally relevant facts of the case in a correct and complete manner ex officio, the burden of proof in a cartel procedure lies with the Competition Authorities. It is its duty to prove the guilt of a respective undertaking, while the undertaking is not required to prove its innocence.<sup>67</sup> Meanwhile, this duty on the side of the Competition Authorities is supported by the duty of parties to cooperate in establishing the facts of the case pursuant to art. 13 APA.<sup>68</sup>

117. The standard of proof, which has to be fulfilled, can be summarized as follows: Both in ordinary administrative law as in cartel law, in principle, a full proof has to be provided. Accordingly, it needs to be demonstrated that the Competition Authorities are convinced of the realization of the facts based on objective considerations. The realization of the facts thereby does not have to be determined with absolute certainty (i.e. without any doubt). It is rather sufficient if eventual doubts appear to be inconsequential.<sup>69</sup>

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<sup>65</sup> PATRICK L. KRAUSKOPF/KATRIN EMMENEGGER, in: *Praxiskommentar zum Bundesgesetz über das Verwaltungsverfahren*, Waldmann/Weissenberger (Hrsg.), 2009, Art. 12 VwVG N 15 ff.

<sup>66</sup> Judgement by the Federal Administrative Court of 23.9.2014, E. 5.1.1, *Paul Koch AG/WEKO*; Judgement by the Federal Administrative Court B-8399/2010 of 23.9.2014, E. 4.1.1, *Siegenia-Aubi AG/WEKO*; Judgement by the Federal Administrative Court B-8404/2010 of 23.9.2014, E. 3.2.4, *SFS unimarket AG/WEKO*.

<sup>67</sup> Judgement by the Federal Administrative Court B-8430/2010 of 23.9.2014, E. 7.4.4, *Paul Koch AG/WEKO*; Judgement by the Federal Administrative Court B-8399/2010 of 23.9.2014, E. 6.4.4, *Siegenia-Aubi AG/WEKO*; Judgement by the Federal Administrative Court B-8404/2010 of 23.9.2014, E. 5.3.10.16, *SFS unimarket AG/WEKO*.

<sup>68</sup> BGE 129 II 18, 33 E. 7.1 (= LPC 2002/4, 743 E. 7.1), *Buchpreisbindung*; Judgement by the Federal Supreme Court 2A.430/2006 of 6.2.2007, LPC 2007/1, 133 E. 10.2, *Schweizerischer Buchhändler- und Verleger-Verband, Börsenverein des Deutschen Buchhandels e.V./WEKO, REKO/WEF*; Judgement by the Federal Administrative Court B-8430/2010 of 23.9.2014, E. 5.1.1, *Paul Koch AG/WEKO*; Judgement by the Federal Administrative Court B-8399/2010 of 23.9.2014, E. 4.1.1, *Siegenia-Aubi AG/WEKO*; Judgement by the Federal Administrative Court B-8404/2010 of 23.9.2014, E. 3.2.4, *SFS unimarket AG/WEKO*.

<sup>69</sup> Judgement by the Federal Administrative Court B-8430/2010 of 23.9.2014, E. 5.3.2 f., *Paul Koch AG/WEKO*; Judgement by the Federal Administrative Court B-8399/2010 of 23.9.2014, E. 4.3.2 f., *Siegenia-Aubi AG/WEKO*; see also Judgement by the Federal Supreme Court 2A.500/2002 of 24.3.2003, E. 3.5; LPC 2009/4, 341 paragraph 15, *Submission Betonsanierung am Hauptgebäude der Schweizerischen Landesbibliothek (SLB)*. On the whole subject, see for example MARC AMSTUTZ/STEFAN KELLER/MANI REINERT, „Si unus cum una...“: Vom Beweismass im Kartellrecht,

118. With respect to certain facts the standard of proof is lowered compared to the requirement of a full proof: The Federal Supreme Court stated in the *Publigroupe*-case, that it is evident that the analysis of market conditions is complex. Furthermore, the available data is often incomplete and collecting additional data can be difficult. For example the substitutability has to be considered for the marked definition from the point of view of the other side of the marked. It would hardly ever be possible to precisely determine the relevant goods and the degree of substitutability. Rather some economic assumptions would have to be made. The standard of proof regarding such interactions should be not overly demanding, especially on the background of the purpose of the Cartel Act to prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy. In this sense, providing a strict proof seems to be hardly possible with regards to this type of interactions. Meanwhile, to a certain degree, both the logic behind the economic analysis and the probability of its correctness must be deemed to be convincing and comprehensible.<sup>70</sup>

119. Also according to the case-law by the Federal Administrative Court the principle of full proof is both reduced and relativized in the context of complex economic interaction as examined under the cartel law. It is noted that the requirements regarding the level of proof should not be overbearing when it comes to complex questions in the context of competition law. Rather, the complexity of economic facts, especially the various and winding interdependencies inherent to economically relevant behavior, would exclude providing a strict proof.<sup>71</sup>

120. If a sanction pursuant to art. 49a CartA is under consideration, the Competition Authorities, due to the fact that such a measure is similar in character to a criminal sanction, have to provide the procedural guarantees stipulated by art. 6 and 7 ECHR<sup>72</sup> and art. 30 as well as 32 BV<sup>73, 74</sup>. If there are any uncertainties regarding the fact, due to the presumption of innocence pursuant to art. 6 para. 2 ECHR respectively art. 32 Abs. 1 BV, they should therefore be interpreted in favor of the parties which might face a sanction.<sup>75</sup>

121. The presumption of innocence respectively the principle *in dubio pro reo* means that the Competition Authorities must not claim to be convinced regarding facts which are unfavorable for the accused, if there are significant and insurmountable doubts, whether such facts are realized. If there are such doubts, the Competition Authorities must decide in favor of factual circumstances which are more advantageous for the accused party.<sup>76</sup> Merely abstract or theoretical doubts are insufficient, as such doubts are always possible and absolute certainty

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BR 2005, 114–121, 118 with further references.; KRAUSKOPF/EMMENEGGER (Fn 65), in: *Praxiskommentar VwVG*, Art. 12 VwVG N 214 with further references.

<sup>70</sup> BGE 139 I 72, 91 E. 8.3.2 (= LPC 2013/1, 126 f. E. 8.3.2), *Publigroupe SA et al./WEKO*; see also E. 9.2.3.4 of this judgement.

<sup>71</sup> Judgement by the Federal Administrative Court B-8430/2010 of 23.9.2014, E. 5.3.7, *Paul Koch AG/WEKO*; Judgement by the Federal Administrative Court B-8399/2010 of 23.9.2014, E. 4.3.7, *Siegenia-Aubi AG/WEKO*; each with further references.

<sup>72</sup> Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (ECHR; SR 0.101).

<sup>73</sup> Federal Constitution of the Swiss Confederation of 18 April 1999 (Federal Constitution, BV; SR 101).

<sup>74</sup> BGE 139 I 72, 78 E. 2.2.2 (= LPC 2013/1, 117 f. E. 2.2.2), *Publigroupe SA et al./WEKO*.

<sup>75</sup> BGE 139 I 72, 91 E. 8.3.1 (= LPC 2013/1, 126. E. 2.2.2), *Publigroupe SA et al./WEKO*.

<sup>76</sup> In favor of this view: art. 10 para. 3 Swiss Criminal Procedure Code of 5 October 2007 (Criminal Procedure Code, CrimPC; SR 312.0) as well as the Judgement by the Federal Administrative Court

cannot be required. The doubts have to be significant and insurmountable, i.e. the doubts must be based on the objective facts.<sup>77</sup>

122. The principle of free assessment of evidence also applies to cartel administrative procedures (Art. 39 CartA in conjunction with art. 19 APA and art. 40 BZP<sup>78</sup>). The Competition Authorities therefore assess the evidence according to its own opinion. They are not bound to any rules regarding the value of specific kinds of proof and there is no hierarchical ranking according to its value.<sup>79</sup> Nevertheless, the Competition Authorities are required to assess and rate available means of evidence for each specific case, considering the specific circumstances, to determine the respective evidential value.<sup>80</sup> It would be inadmissible to exclusively include those results of the collection of evidence in the appraisal of evidence which are supportive of the authority's own opinion.<sup>81</sup>

123. Unlike the burden of establishing proof and the level of proof, the distribution of the burden of proof concerns the question, who bears the consequences of the lack of proof with regards to a certain element of crime, i.e. who has to bear the consequences of a lack of proof: With regards to agreements within the meaning of art. 4 para. 1 in conjunction with art. 5 para. 1 CartA, the Competition Authorities bear not only the burden of proof but also the objective burden of proof. The same applies to the existence of a significant restriction of competition. Finally, if such a restriction is given, the parties bear the objective burden of proof regarding the existence of a justification on grounds of economic efficiency.<sup>82</sup>

#### **C.4.2. Across-Platforms Parity Agreements – General Considerations**

124. Price-parity clauses are considered to be so-called 'across-platforms parity agreements' (APPA). APPAs, occasionally also called retail price MFNs ('most-favored nation clauses') or platform MFNs, are agreements which can be observed in two-sided platform markets.<sup>83</sup> Thereby a firm, which sells a product to its customers through a platform, agrees to set a corresponding price on this platform, is for example not higher relative to the price the same firm sets on a competing platform. Such agreements are, as in the present case, especially prevalent in platforms that act as intermediaries between suppliers and customers, which are not involved in setting the price of the products presented on the platform.

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B-8430/2010 of 23.9.2014, E. 7.4.4, *Paul Koch AG/WEKO*; Judgement by the Federal Administrative Court B-8399/2010 of 23.9.2014, E. 6.4.4, *Siegenia-Aubi AG/WEKO*; Judgement by the Federal Administrative Court B-8404/2010 of 23.9.2014, E. 5.3.10.16, *SFS unimarket AG/WEKO*.

<sup>77</sup> See for example BGE 124 IV 86, E. 2a.

<sup>78</sup> Bundesgesetz vom 4. Dezember 1947 über den Bundeszivilprozess (BZP; SR 273).

<sup>79</sup> See CHRISTOPH AUER in: Kommentar zum Bundesgesetz über das Verwaltungsverfahren, Auer/Müller/Schindler (Hrsg.), 2008, Art. 12 VwVG N 17; BEAT ZIRLICK/CHRISTOPH TAGMANN, in: Basler Kommentar, Kartellgesetz, Amstutz/Reinert (Hrsg.), 2010, Art. 30 KG N 99.

<sup>80</sup> See for example BGE 133 I 33, E. 2.1.

<sup>81</sup> Judgement by the Federal Administrative Court B-8430/2010 of 23.9.2014, E. 7.3.46, *Paul Koch AG/WEKO*; Judgement by the Federal Administrative Court B-8399/2010 of 23.9.2014, E. 6.3.41, *Siegenia-Aubi AG/WEKO*.

<sup>82</sup> See additionally paragraph 368.

<sup>83</sup> See paragraph 178 ff.

125. Apart from price-parity clauses, which are agreed upon by online-booking platforms and hotels, Non-Discrimination rules between credit-card companies and merchants as well as similar agreements in the domain of e-books<sup>84</sup> can be qualified as APPAs.<sup>85</sup>

#### **C.4.2.1. Relation to Other Agreements Concerning Prices**

126. Due to the fact that platform parity agreements only concern relative prices, they particularly differ from resale price management agreements which concern absolute prices or price-elements.<sup>86</sup>

127. APPAs can also be distinguished from other types of so-called Price Relationship Agreements (PRA), which generally concern relative prices.<sup>87</sup> This distinction can mainly be based on two criteria: On the one hand a distinction can be made if an agreement has been made with market participant, who has to pay the price. On the other hand a distinction can be made to which other market participants a PRA refers to. These criteria are used to categorize PRAs as shown in Figure 2. The other categories of PRAs are briefly described in the following:

128. Across-sellers PRAs, also called meeting-competition clauses, promise the buyer of a product a price-match, if the buyer is offered a more favorable price by the competitor. Best-price guarantees to customers, such as the ones sometimes being offered by the parties to their customers,<sup>88</sup> are an example for such agreements.

129. In the case of across-customer PRAs, also called most-favored nation clauses (MFNs) or most-favored customer clauses, a seller promises a buyer that it receives conditions which are just as favorable as the ones of other buyers.<sup>89</sup>

130. Finally, pricing relativities agreements (which are hardly ever used in reality) are agreements by which a seller of a product is instructed to adapt the prices of a product in order to meet the price of a competing product.

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<sup>84</sup> See <<http://www.justice.gov/atr/cases/applebooks.html>> (16.3.2015); OJ 2013 C 378/14, *E-Books*; see also ANNA WOLF-POSCH, Bestpreisklauseln in Internetplattformmärkten im Visier der Wettbewerbsbehörden in: Österreichische Zeitschrift für Kartellrecht, S 138 f.

<sup>85</sup> See paragraph 137 ff. as well as STEVEN C. SALOP/FIONA SCOTT MORTON, Developing an Administrable MFN Enforcement Policy, Antitrust, Vol. 27, No. 2, 2013, 15 ff.

<sup>86</sup> See paragraph 166 ff.

<sup>87</sup> This categorization, as well as Figure 2, are both based on the explanations provided in in: Laboratorio di economia, antitrust, regolamentazione (LEAR), Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements, report prepared for the OFT by Lear, 2012 <[http://www.learlab.com/pdf/oft1438\\_1347291420.pdf](http://www.learlab.com/pdf/oft1438_1347291420.pdf)> (20.1.2015).

<sup>88</sup> See paragraph 44ff.

<sup>89</sup> For an economic assessment of meeting-competition clauses and most-favored nation clauses see MASSIMO MOTTA, Competition Policy, Theory and Practice, 2009, 157.



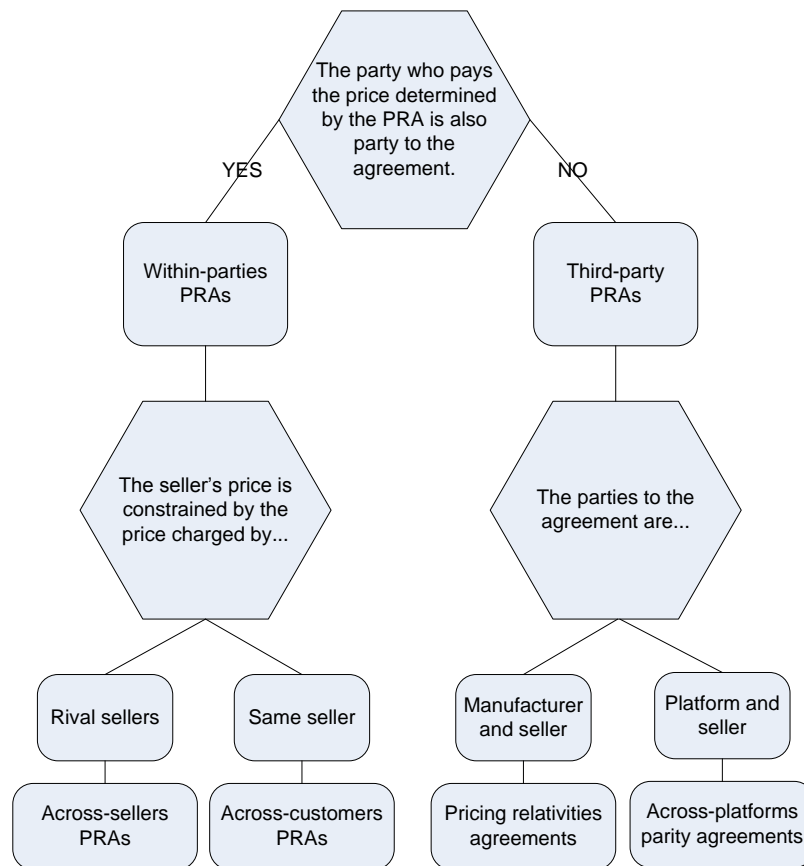


Figure 2: Classification of price relationship agreements. (Source: Lear-Report, see Fn 87)

#### C.4.2.2. Evaluation of Across-Platforms Parity Agreements – Literature

131. While the effects on competition of classical MFNs as well as best-price guarantees have been the long-time subject of theoretical considerations, the theoretical literature on APPAs is relatively recent. In general it is argued that in the presence of APPA platforms have an incentive to increase their fees extracted from buyers using such a platform due to the fact that an APPA prevents sellers from fully passing on such an increase to their customers. The possibility to deter entry into the market is seen as another possible effect of APPAs.<sup>90</sup>

132. An exhaustive explanation on possible effects on competition by APPAs can be found in LEAR.<sup>91</sup> In that report the following effects are identified:<sup>92</sup>

##### C.4.2.2.1. Reduction in Competition between Platforms

133. APPAs can lead to a reduction in competition between platforms due to the fact that such clauses prevent end-customers from receiving a direct price-signal regarding the costs of a specific platform. If customers are able to use multiple platforms, a platform has no immediate advantage from lowering its commission rates, as such an eventual decrease in prices has to

<sup>90</sup> ANDRE BOIK/KENNETH S. CORTS, The Effects of Platform MFNs on Competition and Entry, Working Paper, University of Toronto, 2013.

<sup>91</sup> See Fn 87.

<sup>92</sup> It is furthermore stated that, under a number of restrictive assumptions, an APPA could constitute a signal for the cost-structure of a platform.

be extended to other platforms as well. In the present investigation this mechanism is crucial when evaluating whether there is a qualitatively significant restriction of competition.<sup>93</sup>

#### **C.4.2.2.2. Deterring Entry into the Market**

134. There is the additional possibility that APPAs may potentially deter potentially competing platforms from entering into the market. This is due to the fact that a possible entrant might try to apply a strategy of offering sellers lower commission rates which in turn allows them to offer customers lower prices on the new platform. As a consequence this strategy would increase the number of customers using the new platform. In the presence of an APPA such a strategy would remain virtually ineffective. In the context of the present investigation this mechanism is particularly considered when discussing potential competitors.<sup>94</sup>

#### **C.4.2.2.3. Facilitating Collusion between Platforms**

135. In the potential case of collusive behavior between platforms, APPAs can have a stabilizing effect as a deviation from higher commission rates would not lead to a corresponding gain in customer numbers but rather to lower prices across all competing platforms. In the context of the present investigation this mechanism is particularly considered when discussing a possible collectively dominant position by the parties.<sup>95</sup>

#### **C.4.2.2.4. Protection of Investments by Platform Providers**

136. Finally, it is in principle conceivable that a platform which invests in providing high-quality services, thereby incurring high costs, might use APPAs to prevent free-riding behavior on behalf of competing low-cost/low-quality platforms. This could partially compensate the anti-competitive effects of APPAs especially if end-customers derive a corresponding benefit from the services provided by the platform. In the context of the present investigation this possibility is especially considered when analyzing possible justifications on grounds of economic efficiency.<sup>96</sup>

#### **C.4.2.3. Evaluation of Across-Platforms Parity Agreements – Previous Cases**

137. Across-Platforms Parity Agreements in the domain of online-booking platforms have been the subject of investigations by a range of competition authorities worldwide. Accordingly, a brief overview on some of the findings of these procedures is provided below.

##### **C.4.2.3.1. Bundeskartellamt**

138. The Bundeskartellamt has stated in its decision on 20 December 2013<sup>97</sup> that the best-price clause<sup>98</sup> by HRS, which was included in its general delivery terms, is in breach of the German cartel law and has prohibited HRS from continuing to use this clause with respect to

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<sup>93</sup> See paragraph 294 ff.

<sup>94</sup> See paragraph 333 ff.

<sup>95</sup> See paragraph 424 ff.

<sup>96</sup> See paragraph 365 ff.

<sup>97</sup> See Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, *HRS*.

<sup>98</sup> The term best-price clause as it is used by the Bundeskartellamt includes all kinds of parity clauses under consideration.

hotels in Germany. The Bundeskartellamt thereby considers the best-price clause by HRS as a vertical agreement which restricts competition. HRS has appealed to the Oberlandesgericht Düsseldorf against the decision by the Bundeskartellamt. On 9 January 2015 this appeal was fully rejected by the court.<sup>99</sup> After having terminated the procedure against HRS, the Bundeskartellamt opened corresponding procedures both against Booking.com and Expedia.<sup>100</sup> On 2 April 2015 the Bundeskartellamt sent Booking.com its statement of objections concerning their parity clauses.<sup>101</sup>

#### **C.4.2.3.2. Office of Fair Trading (OFT)**

139. The procedure of the OFT against Booking.com, Expedia, InterContinental Hotels Group plc and Hotel InterContinental London Limited was closed on 31 January 2014 by a settlement agreement, after the OFT has accepted the proposed commitments by the parties. No material decision was taken on whether or not the parties breached British or EU competition law.

140. The procedure of the OFT mainly focused on possibilities by online-booking platform and hotels to propose discounts to their respective customers. Accordingly the settlement agreement included giving the online-booking platforms as well as their partner-hotels the possibility to give members of so-called 'Closed User Groups'<sup>102</sup> access to discounts, the extent of which are not to be disclosed to the general public. According to the settlement agreement these discounted prices are not subject to price-parity clauses.

141. Skyscanner Limited, which operates a meta-search engine, appealed against the settlement agreement. They claimed that such non-public discounts would undermine its business model. According to Skyscanner, when accepting the settlement agreement, the OFT failed to properly take into account for its effects on companies which were not parties to these procedures. Based on this appeal, the Competition Appeal Tribunal, in its decision on 26 September 2014, quashed the settlement decision of the OFT.<sup>103</sup> In September 2015 the Competition and Markets Authority (CMA), the successor of the OFT, closed the procedure against Booking.com, Expedia and IHG. The CMA pointed out that the decision was taken solely on grounds of current administrative priorities while explicitly stating that no view is taken on whether or not a party acted illegally.<sup>104</sup>

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<sup>99</sup> The decision is available online under: <[http://www.justiz.nrw.de/nrwe/olgs/duessel-dorf/j2015/VI\\_Kart\\_1\\_14\\_V\\_Beschluss\\_20150109.html](http://www.justiz.nrw.de/nrwe/olgs/duessel-dorf/j2015/VI_Kart_1_14_V_Beschluss_20150109.html)> (6.2.2015).

<sup>100</sup> See the press release by the Bundeskartellamt of 20.12.2013: „Bestpreisklausel des Hotelportals HRS verstößt gegen das Kartellrecht – Verfahren gegen weitere Hotelportale eingeleitet“ <[http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2013/20\\_12\\_2013\\_HRS.html;jsessionid=28B8D3CB83680F5715434CD2732FBB67.1\\_cid362?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2013/20_12_2013_HRS.html;jsessionid=28B8D3CB83680F5715434CD2732FBB67.1_cid362?nn=3591568)> (20.1.2015).

<sup>101</sup> See the press release by the Bundeskartellamt of 2.4.2015: „Bundeskartellamt mahnt auch Bestpreisklauseln von Booking.com ab“ <[http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2015/02\\_04\\_2015\\_Booking.com.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2015/02_04_2015_Booking.com.html)> (28.9.2015).

<sup>102</sup> To join a 'Closed User Group' it is required that a customer has previously booked a stay for the full price on the respective online-booking.com platform.

<sup>103</sup> See the Judgement by the Competition Appeal Tribunal 1226/2/12/14 of 26.9.2014, *Skyscanner Limited v Competition and Markets Authority*.

<sup>104</sup> See information on the case CE/9320-10 of the Competition and Markets Authority <<https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation>> (16.10.2015).

#### C.4.2.3.3. Other Cases

142. A number of other European competition authorities, such as in Austria, the Czech Republic and Hungary, are currently running investigations concerning online-booking platforms. Outside of Europe a number of cases were also initiated: For example the competition authorities in Australia are looking into a range of behaviors by online-booking platforms. Furthermore, in the United States of America, a number of cases against online-booking platforms are pending at civil courts.

143. On 15 April 2015 the competition authorities of Italy, France and Sweden have accepted a settlement proposal by Booking.com, leading to the introduction of narrow parity clauses.<sup>105</sup> Expedia and HRS were not involved in these negotiations. After this settlement Booking.com has introduced on 1 July 2015 such narrow parity clauses in the whole EEA as well as in Switzerland. Expedia has made corresponding amendments to its contracts unilaterally on 1 August 2015.<sup>106</sup> The competition authorities of Greece explicitly closed its investigation against Booking.com and Expedia based on these changes.<sup>107</sup>

144. In contrast, price-parity clauses in specific contracts by Expedia were deemed to be illegal by a civil court in France. Furthermore, the French parliament has accepted a revision of the statute on 17 June 2015 which included (amongst others) a complete prohibition of price-parity clauses between online booking platforms and hotels. This law came into force in August 2015.<sup>108</sup> Thereby especially clauses, which prohibit hotels from offering lower prices on their direct distribution channel compared to online-booking platforms, are prohibited. Finally, in Italy one chamber of the parliament (Camera dei Deputati) has accepted a legal prohibition of parity clauses which are demanded by online-booking platforms from their accommodation providers on 7 October 2015 while the second chamber of the Italian parliament has still to vote on this subject.<sup>109</sup>

145. In their comments<sup>110</sup> on the Secretariat's proposed motion the parties argue that the complete prohibition of parity clauses by the Bundeskartellamt cannot be considered as a precedent to the present investigation. In the meantime, the parties propose that the findings from the competition authorities which agreed on the settlement proposal by Booking.com should be applied to the present investigation.

146. With respect to these arguments it should be noted that the decision by the Bundeskartellamt constitutes a comprehensive analysis of the relevant facts (including market definition, legal assessment of the facts and especially a discussions of possible justifications on grounds of economic efficiency) which has been confirmed by a court of appeal. In contrast, the decisions concerning settlement agreements contain, by the nature of such settlements, only to a very limited extent definitive findings concerning the facts and how they are appreci-

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<sup>105</sup> [...].

<sup>106</sup> See paragraph 57ff.

<sup>107</sup> See the press release regarding the closure of the procedure by the Hellenic Competition Commission [http://www.epant.gr/news\\_details.php?Lang=en&id=89&nid=794](http://www.epant.gr/news_details.php?Lang=en&id=89&nid=794) (25.9.2015).

<sup>108</sup> Art. 133, Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques (Loi Macron).

<sup>109</sup> See information of Camera dei Deputati for the relevant revision <[http://www.camera.it/leg17/522?tema=la\\_legge\\_annuale\\_sulla\\_concorenza\\_\\_a\\_c\\_\\_3012\\_e\\_abb\\_\\_](http://www.camera.it/leg17/522?tema=la_legge_annuale_sulla_concorenza__a_c__3012_e_abb__)> (16.10.2015).

<sup>110</sup> See paragraph 87 ff.

ated economically and legally. Finally it needs to be noted that due the different legal frameworks and the institutional independence by COMCO from foreign competition authorities requires COMCO to assess this matter on its own in an independent manner.

### **C.4.3. Agreements Affecting Competition**

147. Agreements affecting competition are binding or non-binding agreements and concerted practices between undertakings operating on the same or on different levels of production which have a restraint of competition as their object or effect (Article 4 (1) CartA, cf. also para. 1 and 8 of the Communication on Vertical Agreements).

148. Consequently, an agreement affecting competition within the meaning of art. 4 para. 1 CartA is defined by the following elements: a) a deliberate and volitional interaction between the undertakings involved in the agreement, b) the agreement has a restraint of competition as its object or effect and c) the undertakings involved in the agreement are active on the same or on different levels of production.

#### **C.4.3.1. Deliberate and Volitional Interaction**

149. A formal contractual basis for the deliberate and volitional interaction is not necessary, rather, concerted practices as well as binding agreements, regardless of their form, are relevant,<sup>111</sup> although agreements differ from concerted practices by the will of being bound, respectively, the lack thereof<sup>112</sup>. However, a deliberate and volitional interaction is more likely to be proven, if the agreement affecting competition is embodied in an explicit contractual agreement.<sup>113</sup>

150. The examined contract clauses relating to parity of price, availability and terms are all part of the affiliated contracts concluded between the parties of the procedure and their partner-hotels.<sup>114</sup> These contract elements are qualified as deliberate and volitional interaction between the online-booking platforms and their partner-hotels within the meaning of art. 4 para. 1 CartA.

151. This assessment is not to be questioned per se based on the fact, that the conclusion as well as the implementation of the alleged contract clauses are also seen under the aspect of an alleged abuse of a dominant position. A deliberate and volitional interaction would only then be excluded, if the conclusion of the contract would have been realized solely under pressure or coercion from a competitor.<sup>115</sup> This would be, however, an exceptional situation. In general, even weaker participants in the market are obliged to comply with the provisions of the legal system, even under pressure. However, as will be shown in the examination of art. 7 CartA, the pressure exercised by the online booking platforms *in casu* is not strong enough to assume

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<sup>111</sup> On this subject see for example LPC 2009/3, 204 paragraph 49, *Elektroinstallationsbetriebe Bern*; ferner THOMAS NYDEGGER/WERNER NADIG, in: Basler Kommentar, Kartellgesetz, Amstutz/Reinert (Hrsg.), 2010, Art. 4 Abs. 1 KG N 78 und 81.

<sup>112</sup> See BSK KG-NYDEGGER/NADIG (Fn 111), Art. 4 Abs. 1 KG N 100.

<sup>113</sup> See BSK KG-NYDEGGER/NADIG (Fn 111), Art. 4 Abs. 1 KG N 82.

<sup>114</sup> See above, paragraph 18 ff. regarding the cooperation between online-booking platforms and hotels.

<sup>115</sup> On this subject see: Judgement by the Federal Administrative Court B-8430/2010 of 23.9.2014, E. 6.3.1.16, *Paul Koch AG/WEKO*; Judgement by the Federal Administrative Court B-8399/2010 of 23.9.2014, E. 5.3.1.1.24, *Siegenia-Aubi AG/WEKO*; Judgement by the Federal Administrative Court B-8404/2010 of 23.9.2014, E. 5.3.7.4, *SFS unimarket AG/WEKO*.

such an exceptional situation.<sup>116</sup> The existence of a deliberate and volitional interaction between hotels and the online booking platforms can therefore be affirmed.

#### C.4.3.2. Restraint of Competition as Object or Effect

152. In addition to a deliberate and volitional interaction, the agreement must have 'a restraint of competition as their object or effect'. The conditions in art. 4 para. 1 CartA 'object' respectively 'effect' – as the word 'or' states in the provision – are understood as alternative and not cumulative elements.<sup>117</sup>

153. A 'restraint of competition' exists, if the single undertaking renounces from its entrepreneurial freedom and thus limits the free play of supply and demand.<sup>118</sup> The agreement concerning the restraint of competition has to refer to a parameter of competition (for example the price or terms of delivery).<sup>119</sup>

154. The effect of the agreement is a restraint of competition, if the parties of the agreement 'have targeted in their program the *elimination or* restraint of one or more parameters of competition'.<sup>120</sup> It is sufficient, if the content of the agreement is objectively likely to cause a restraint of competition by eliminating a competition parameter. The subjective view of the agreement's parties is insubstantial.<sup>121</sup>

155. The price-parity clauses by the online-booking platforms, according to the exact wording, prohibit<sup>122</sup> the affiliated partner-hotels to offer their rooms on other distribution channels at a more inexpensive price than on the online-booking platform. This already illustrates, based on the wording, that these clauses are objectively capable of restricting the liberty of setting the prices by the hotels – not in regards of the absolute, but at least regarding the relative prices. This leads to the conclusion that at least the price-parity clauses can result in a restraint of competition.

156. The significance of the affected competition parameters of the examined contract clauses<sup>123</sup> and the casual competition restriction, is not object of the question on the existence of an agreement within the meaning of art. 4 para. CartA, but is part of the material examination under art. 5 CartA hereinafter in paragraph 175 ff. It will be illustrated, that price-parity clauses limit, particularly, the ability of hotels to transmit price signals to end consumers regarding the amount of the commissions, i.e. the costs of distribution over an online-booking platform. Likewise, it is illustrated, to what extent hotels, due to the availability parities, are limited in their possibilities to react with situational limitations of availability on the amount of these costs.

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<sup>116</sup> See paragraph 450 ff.

<sup>117</sup> As one of many examples see: LPC 2012/3, 550 paragraph 97, *BMW*.

<sup>118</sup> BSK KG-NYDEGGER/NADIG (Fn 111), Art. 4 Abs. 1 KG N 42 and 51.

<sup>119</sup> BSK KG-NYDEGGER/NADIG (Fn 111), Art. 4 Abs. 1 KG N 63; Judgement by the Federal Administrative Court, LPC 2013/4, 756 f. E. 3.2.3, *Gaba/WEKO*; Judgement by the Federal Administrative Court, LPC 2013/4, 813 E. 3.2.6, *Gebro/WEKO*.

<sup>120</sup> BSK KG-NYDEGGER/NADIG (Fn 111), Art. 4 Abs. 1 KG N 69.

<sup>121</sup> BSK KG-NYDEGGER/NADIG (Fn 111), Art. 4 Abs. 1 KG N 71; Judgement by the Federal Administrative Court, LPC 2013/4, 756 f. E. 3.2.3, *Gaba/WEKO*; Judgement by the Federal Administrative Court, LPC 2013/4, 813 E. 3.2.6, *Gebro/WEKO*.

<sup>122</sup> See paragraph 34 ff.

<sup>123</sup> See paragraph 31 ff.

Ultimately, this results in a (substantial) restraint of competition between the online booking platforms.<sup>124</sup>

157. Thus, the question whether the present investigated contract clauses effect in a restraint of competition, can be affirmed.

#### **C.4.3.3. Agreement Between Undertakings on the Same or Different Levels of Distribution**

158. Vertical agreements affecting competition are agreements concluded between undertakings from different levels of distribution regarding terms and conditions, to which the parties acquire, sell or resell certain goods or services (para. 1 Communication on Vertical Agreements).

159. The present agreements are concluded between hotels that provide services of accommodation, requested from end consumers, and online-booking platforms that convey these services from hotels to the end consumers. Thus, it does not concern a classic distribution chain, in which a trader acquires products or services from a distributor and then re-sells. However, the undertakings that are parties to the agreement are still operating on different levels of distribution, as the hotel essentially offers the service of accommodation and the online-booking platform conveys a respective transaction between the hotels and the end consumers. Therefore, in the present case, vertical agreements affecting competition can be affirmed.

160. However, the examined contract clauses unfold their effects mainly on the horizontal level, namely in relation to other online-booking platforms as well as other distribution channels.<sup>125</sup> On the level of the hotels, such a horizontal effect cannot be established.<sup>126</sup>

#### **C.4.3.4. Interim Result**

161. By concluding price-parity, availability- and condition-parity clauses in the affiliated contracts between online-booking platforms and hotels, they deliberately and volitionally interact with hotels in the sense of an agreement affecting competition. While wide price-parity clauses themselves limit the liberty of hotels to set their prices, by practically making it impossible to differentiate between different distribution channels, and effecting in a probable restraint of competition, the total package of the clauses have actually effected, as shown hereinafter, in a (substantial) restraint of competition on the level of online-booking platforms. Despite their major impact on the horizontal level between the online-booking platforms, it is, in the present case, about agreements between companies on different levels of production, particularly between hotels and platforms. Thus, the present contract clauses can be qualified as vertical agreements affecting competition pursuant to art. 4 para. 1 CartA.

#### **C.4.4. Elimination of Effective Competition**

162. Pursuant to art. 5 para. 4 CartA, the elimination of effective competition is presumed in the case of agreements between companies at different levels of the production and distribu-

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<sup>124</sup> See paragraph 291 ff.

<sup>125</sup> See paragraph 291 ff.

<sup>126</sup> See paragraph 268 ff.

tion chain regarding fixed or minimum prices, and in the case of agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted.

163. For the purpose of a preliminary explanation to the following remarks to art. 5 para. 4 CartA, it should be noted that it corresponds to the legislation's intention, in the field of vertical agreements, to follow an analogous policy to that of the European Commission.<sup>127</sup> During the parliamentary debate regarding art. 5 para. 4 CartA it was clearly expressed, that in the future, vertical agreements concerning price or allocation of territory in Switzerland – after the example of the EU – should be treated more stringently.<sup>128</sup> Accordingly, the Communication on Vertical Agreements by COMCO<sup>129</sup> is modeled after the Vertical Block Exemption Regulation by the European Commission<sup>130</sup> and the corresponding vertical guidelines<sup>131</sup>, and the COMCO has declared the European rules as applicable by analogy.

164. In the context of the examined contract clauses solely the examination of the existence of an agreement regarding minimum or fixed prices seems relevant, as the parties do not allocate any territories as their object or effect. Should a vertical agreement concerning minimum or fixed prices be established (assumption basis), the elimination of effective competition is presumed, respectively, their unlawfulness, pursuant to art. 5 para. 4 CartA (assumption consequence).<sup>132</sup> Hereinafter it is to establish, whether an agreement concerning minimum or fixed prices can be affirmed and would therefore fall within the scope of the assumption basis of art. 5 para. 4 CartA. Not all examined contract elements concern the competition parameter of price, which is why the question of an agreement regarding minimum or fixed prices only concerns price-parity clauses of the parties. It should be noted that price-parity clauses only concern relative prices between the different distribution channels as object and they do not include agreements regarding absolute prices or elements of absolute prices. In an extreme example, a hotel can even comply with price-parity clauses if it offers services of accommodation free of charge.<sup>133</sup>

165. The agency model practiced by the online-booking platforms, in which the hotels set the amount of the prices themselves, is per se not problematic. In two-sided markets this kind of price decimation model is often applied, such as for auction platforms (where sellers and buyers set the prices) or for credit cards (where the seller defines the debited amount).

#### **C.4.4.1. Resale Price Maintenance?**

166. Usually a resale price maintenance (RPM) is assumed under an agreement concerning minimum or fixed prices pursuant to art 5 para. 4 CartA. In that case, the consumer and reseller

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<sup>127</sup> LPC 2009/2 151 paragraph 70, *Sécateurs et cisailles*, with a reference to DEISS, Amtliches Bulletin der Bundesversammlung (AB) 2002 N 1434 ff.

<sup>128</sup> LPC 2009/2 151 paragraph 70, *Sécateurs et cisailles*, with a reference to BÜHRER, AB 2002 N 1293.

<sup>129</sup> See above Fn 41.

<sup>130</sup> 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, Official Journal L 102 of 23 April 2010 p. 1 (VBER).

<sup>131</sup> VBER, paragraph 39.

<sup>132</sup> See PATRICK L. KRAUSKOPF/OLIVIER SCHALLER, in: Basler Kommentar, Kartellgesetz, Amstutz/Reinert (Hrsg.), 2010, Art. 5 N 475.

<sup>133</sup> To which extent price-setting possibilities by hotels are restricted by price-parity clauses is discussed in paragraph 273 ff.



obliges himself towards the supplier, to request from his own consumers an agreed upon absolute resale price. The existence of a resale price maintenance is to be affirmed in an agreement that concerns a resale price and a minimum or fixed price, whether this happens directly or indirectly.<sup>134</sup>

167. In this present case however, the constellation differs in several aspects from a resale price maintenance. First of all, it is not a distribution chain in the classical sense<sup>135</sup> that would usually build the frame for a resale price maintenance. Online-booking platforms do not act – particularly due to the agency model – as resellers of services ('hotel accommodation'). Their role is primarily one of an intermediary, who builds contacts between the provider or a service (hotel) and their customers.<sup>136</sup> Even if, for the sake of clarity, the hotels are equated with a supplier of a service (hotel accommodation) and the online-booking platforms are equated with a reseller within the classic distribution chain, the difference between wide price parity clauses and resale price maintenance is absolutely obvious. The price-parity clauses do not concern the compliance of absolute resale prices, but the obligation of the supplier not to offer certain services on other distribution channels at a more inexpensive price. Thus, there is no downstream-obligation from the dealer, but an upstream-obligation from the supplier.

168. As a result, the wide price parity clauses cannot be subsumed per se under art. 5 para. 4 CartA, as they are not a resale price maintenance. This raises the question, if the assumption basis can also be applied on another kinds of price relevant agreements.

#### **C.4.4.2. Application of Article 5 Paragraph 4 CartA on Price-Parity Clauses?**

169. In pertinent literature, agreements pursuant to art. 5 para. 4 CartA are generally described as binding the dealer by a provision by the supplier regarding the resale prices. BORER for instance states, that 'the assumption basis of art. 5 para. 4 CartA is applicable only for agreements concerning price or allocation of territories at the expense of the dealer'.<sup>137</sup> The same limitation can be found in AMSTUTZ/REINERT, who additionally exclude the application of MFN clauses.<sup>138</sup> In the Commentaire Romand the general direction of action of art. 5 para. 4 CartA is described as: 'L'art. 5 IV LCart concerne uniquement les restrictions de la liberté d'action du distributeur. Les limitations de la liberté du producteur ne sont pas concernées par l'art. 5 IV LCart'.<sup>139</sup> The MFN clauses are mentioned as an example of the clauses excluded by Art. 5 (4) CartA.<sup>140</sup> The ruling doctrine in Switzerland seems – as it appears – to coincide with the European understanding.<sup>141</sup>

170. The application of the assumption basis of art. 5 para. 4 CartA is not limited to the classic cases of resale price maintenance. In pertinent literature, the case of agreements on maximum

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<sup>134</sup> See BSK KG-KRAUSKOPF/SCHALLER (Fn 132), Art. 5 KG N 494 ff.

<sup>135</sup> See above, paragraph 158.

<sup>136</sup> See the considerations regarding market definition, paragraph 176 ff.

<sup>137</sup> JÜRIG BORER, Kartellgesetz, 3. Auflage 2011, Art. 5 KG N 32.

<sup>138</sup> See MARC AMSTUTZ/MANI REINERT, Vertikale Preis- und Gebietsabreden, eine kritische Analyse von Art. 5 Abs. 4 KG, in: Kartellgesetzrevision 2003, Stoffel/Zäch (Hrsg.), 2004, 86, 97.

<sup>139</sup> See MARC AMSTUTZ/BLAISE CARRON/MANI REINERT, in: Commentaire Romand, Droit de la concurrence, Tercier/Bovet (Hrsg.), 2013, Art. 5 KG N 557.

<sup>140</sup> See CR Concurrence-AMSTUTZ/CARRON/REINERT (Fn **Fehler! Textmarke nicht definiert.**), Art. 5 KG N 559.

<sup>141</sup> See REINHARD ELLGER, in: Wettbewerbsrecht, Immenga/Mestmäcker (Hrsg.), Wettbewerbsrecht, 2012, Art. 4 Vertikal-GVO paragraph 13; MINR MICHAEL BARON, in: Kartellrecht, Loewenheim/Messen/Riesenkampff (Hrsg.), 2009, Art. 4 Vertikal-GVO paragraph 149 ff., 155.

prices is mentioned, which could be regarded as an agreement on fixed prices (and therefore falling under the assumption) if its effect is equivalent to a price-fixing agreement.<sup>142</sup> The assumption basis could also be applicable in cases of indirect agreements on minimum or fixed prices, whereby: 'la fixation indirecte des prix ne concerne pas n'importe quels accords ayant quelconque influence sur le prix de revente (...) il est nécessaire que l'accord en question produise les mêmes effets que la fixation directe d'un prix minimum ou fixe.'<sup>143</sup>

171. Therefore it could be, in principle, thinkable that the investigated wide price-parity clauses could be qualified as agreements on prices pursuant to art. 5 para. 4 CartA if their effect would be equal to an agreement on minimum or fixed prices. Therefore it needs to be individually determined based on the specific facts of this case, whether or not price-parity clauses fall under the presumption basis of art. 5 para. 4 CartA.

172. Thereby the background of this presumption basis<sup>144</sup> needs to be particularly considered as price-fixing agreements directly lead to higher consumer-prices.<sup>145</sup> In the course of this investigation no indications for such an effect were found.<sup>146</sup> Additionally, the specifics of this case cannot be compared with the situation in the case of e-books<sup>147</sup> in which large publishing companies cooperated in order to force Amazon to apply an APPA within an agency model in order to facilitate higher prices for e-books. Such a coordinated behavior by hotels seems to be unthinkable, especially due to the large number of individual properties. It seems equally improbable to assume that the hotels' association, *hotelleriesuisse*, would have such intentions, as it had an important role in the initiation of this investigation, which was based on the fact that the price-parity clauses were clearly against the interests of hotels.

173. Furthermore, an agreement on minimum or fixed prices is in particular defined by the fact that such an agreement obliges the merchant (which sets the end-customer price) by direct or indirect means to apply a specific absolute level of end-customer prices. In the case of price-parity clauses, though, it is the hotels (which set the prices paid by their guests due to the agency model) which are not restricted at all in their possibilities with respect to setting the absolute level of prices or lowering their prices. As was shown in paragraphs 273 ff., a hotel has a range of possibilities to vary its prices. As a result it should be noted that the price-parity clauses by the parties do not restrict hotels in setting their absolute end-customer prices. Furthermore, intrabrand-competition between different types of services by hotels is not restricted to an extent which would allow the conclusion that price-parity clauses have an effect which is equal to agreement on fixed or minimum prices. Altogether, it becomes clear that wide parity clauses have an anti-competitive effect on the level of online-booking platforms but not in the level of hotels.

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<sup>142</sup> See BSK KG-KRAUSKOPF/SCHALLER (Fn 132), Art. 5 KG N 503 ff.

<sup>143</sup> CR Concurrence-AMSTUTZ/CARRON/REINERT (Fn 139), Art. 5 KG N 568.

<sup>144</sup> See MOTTA (Fn 89), 307 ff.

<sup>145</sup> See Botschaft vom 7. November 2001 über die Änderung des Kartellgesetzes, BBl 2002 2022, 2036 f. Ziff. 2.1.3; see Decision by COMCO of 20.8.2012 in the matter *Altimum*, paragraph 32 ff., available on <<http://www.weko.admin.ch/aktuell/00162/index.html?lang=de>> (3.12. 2014).

<sup>146</sup> See paragraph 268 ff.

<sup>147</sup> See <<http://www.justice.gov/atr/cases/applebooks.html>> (16.3.2015); OJ 2013 C 378/14, *E-Books*; also see ANNA WOLF-POSCH, Bestpreisklauseln in Internetplattformmärkten im Visier der Wettbewerbsbehörden in: Österreichische Zeitschrift für Kartellrecht, S 138 f.

#### **C.4.4.3. Conclusion: No Application of the Presumption Basis Pursuant to art. 5 para. 4 CartA**

174. Based on the observed effect of wide parity clauses no agreement on minimum or fixed prices can be demonstrated. The presumption basis pursuant to art. 5 para. 4 CartA therefore does not apply. As a result, it is to be shown to which extent competition is restricted pursuant to art. 5 para. 1 CartA in the relevant market.

#### **C.4.5. Significant Restriction of Competition**

175. Whether or not a restriction is significant in the sense of art. 5 para. 1 CartA needs to be determined by an overall assessment of a specific case whereby both quantitative and qualitative aspects are to be considered.<sup>148</sup> Concerning the qualitative element the significance of the parameter of competition which is affected by the agreement – namely in the specific market<sup>149</sup> – as well as the extent to which this parameter is affected<sup>150</sup> need to be analyzed. In the normal case, when analyzing the quantitative element it needs to be determined to which extent the relevant product market is affected by the agreement, in other words it needs to be considered which ‘weight’ the undertakings that are parties to the agreement, have in the corresponding market (number, market shares, turnover etc.).<sup>151</sup> A qualitatively severe restriction can be regarded as being significant despite quantitatively negligible effects. Vice versa a restriction with strong quantitative effects can be regarded as being significant despite having weak qualitative effects. (art. 12 para. 1 Communication on Vertical Agreements).

##### **C.4.5.1. The Relevant Market**

176. Before the conditions on the market can be examined, the relevant market needs to be defined both in terms of the product and in terms of its geographical scope. When defining the relevant markets it needs to be determined which goods or services are substitutes from the point of view of the other side of the market considering product characteristics, location or temporal circumstances.<sup>152</sup>

177. The relevant product market is defined from the point of view of the other side of the market: It is crucial if the goods or services compete with each other.<sup>153</sup> This depends on whether the demand-side consider them as substitutable regarding their characteristics as well as their planned use, therefore being exchangeable in terms of product characteristics, location and temporal circumstances<sup>154</sup> The crucial element is the functional substitutability (demand-

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<sup>148</sup> LPC 2000/2, 177 paragraph 50, *Des tarifs conseillés de l'Association fribourgeoise des écoles de circulation (AFEC)* with regards to horizontal agreements; additionally LPC 2009/2, 150 paragraph 64, *Sécaisseurs et cisailles*; LPC 2010/1, 103 paragraph 302, *Gaba* with regards to vertical agreements.

<sup>149</sup> BSK KG-KRAUSKOPF/SCHALLER (Fn 132), Art. 5 KG N 187; ROLF H. WEBER, in: Wettbewerbsrecht II Kommentar, Oesch/Weber/Zäch (Hrsg.), 2011, Ziff. 6 VertBek N 1.

<sup>150</sup> See LPC 2005/1, 241 paragraph 19, *Klimarappen*, with regards to an agreement on a cost-element.

<sup>151</sup> BSK KG-KRAUSKOPF/SCHALLER (Fn 132), Art. 5 KG N 230.

<sup>152</sup> BGE 139 I 72, 92 E. 9.1 with further references (= LPC 2013/1, 127 E. 9.1), *Publigroupe SA et al./WEKO*.

<sup>153</sup> BGE 139 I 72, 93 E. 9.2.3.1 (= LPC 2013/1, 127 E. 9.2.3.1), *Publigroupe SA et al./WEKO*.

<sup>154</sup> BGE 139 I 72, 93 E. 9.2.3.1 (= LPC 2013/1, 127 E. 9.2.3.1), *Publigroupe SA et al./WEKO*; BGE 129 II 18 E. 7.3.1 (= LPC 2002/4, 743 E 7.3.1), *Buchpreisbindung*.

side oriented market concept) of goods and services from the point of view of the other side of the market.<sup>155</sup> The specific subject of an investigation is the starting point of such an analysis.<sup>156</sup>

#### **C.4.5.1.1. The Other Side of the Market**

178. Starting from the subject of the procedure the other side of the market needs to be determined, as the definition of the relevant market needs to be determined from its point of view. The subject of this investigation is the questions whether or not price-, availability- and condition-parity clauses, which are a part of the contracts of the parties with their partner-hotels, are in breach with the Cartel Act. The services, which hotels demand and for which these contracts are signed can be generally characterized as distribution services.

179. Online-booking platforms intermediate a transaction between both hotels and their customers respectively their guests. Nevertheless, the following market definition is taken from the point of view of hotels as they are directly bound by the contractual obligations which are the subject of this investigation. The point of view of customers is indirectly taken into account as hotels need to consider the demand by customers in their choice of distribution channels. The distinction between these two groups is necessary as different distribution channels are often complementary from the point of view of hotels, while possibly being substitutable from the point of view of customers. The Bundeskartellamt has taken the same view in its decision concerning HRS.<sup>157</sup>

180. This is the first time that COMCO considers online-booking platforms and there are no previous cases in comparable two-sided transaction-markets in the travel industry such as Global Distribution Systems (GDS). Meanwhile, there is a large number of previous cases concerning credit cards which operate in a two-sided transaction-market. In those cases the market definition was also made from the point of view of merchants as the other side of the market, which sign contracts concerning the acceptance of credit cards and pay transaction fees levied by credit card companies. Meanwhile, the point of view of the other group of customers (customers) was also considered when defining the market.<sup>158</sup>

#### **C.4.5.1.2. Relevant Product Market**

181. The relevant product market encompasses all goods and services which are seen as substitutes from the point of view of the other side of the market concerning their characteristics and their planned use (art. 11 para. 3 (a) VKU<sup>159</sup>, analogue).

182. In the following the main characteristics of online-booking platforms are described. Then it is demonstrated which distribution channels a hotel can, in principle, use. Finally, the different

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<sup>155</sup> BGE 139 I 72, 93 E. 9.2.3.1 (= LPC 2013/1, 127 E. 9.2.3.1), *Publigroupe SA et al./WEKO*.

<sup>156</sup> BGE 139 I 72, 93 E. 9.2.3.1 (= LPC 2013/1, 127 E. 9.2.3.1), *Publigroupe SA et al./WEKO*.

<sup>157</sup> Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, paragraph 71, *HRS*: With respect to taking into consideration both groups of users the Bundeskartellamt refers to the case OJ 2007 L 314, paragraph 41 ff., *Travelport/Worldspan*, in which the European Commission also defined the 'GDS-Market' (for flights and other travel services) as a two-sided market taking into consideration the relevant sides of the market.

<sup>158</sup> See LPC 2003/1, 119, paragraph 73f., *Kreditkarten-Akzeptanzgeschäft*.

<sup>159</sup> Ordinance of 17. 6. 1996 on the Control of Concentrations of Undertakings (Merger Control Ordinance, MCO; SR 251.4).

channels are individually characterized and it is examined whether they can be seen as substitutes for online-booking platforms.

#### **C.4.5.1.3. Properties of Online-Booking Platforms**

183. The activities of online-booking platforms and their business model have been thoroughly explained in the facts of the case.<sup>160</sup> The parties thereby operate in a two-sided market in which they facilitate a direct transaction, the sale of hotel nights, between two user groups, namely hotels and their customers. Questions relating to two-sided markets have been previously treated by COMCO a number of times.<sup>161</sup>

184. Generally markets are defined as being two-sided, if they have a number of distinct user groups between which there are indirect network effects. The externalities which exist between these user groups are internalized by the firm operating the platform connecting these user groups.<sup>162</sup> The value-added of such a platform lies especially in the fact that it coordinates the demand by a large number of customers from both user groups, generating mutual positive network externalities.

185. Another property of two-sided markets is the ability of the platform provider to not only set the overall price level of its services (i.e. the total sum of the prices paid by the user groups) but also the price structure (i.e. the platform is typically able to determine the individual prices paid by each user group separately. This can lead to a situation in which the services of the platform are free of charge for one group of users while another user group has to pay for the services.<sup>163</sup>

186. Another factor determining the competitive structure of two-sided markets is whether the user group can simultaneously use several platforms (so-called 'multihoming') or if they are constrained to use only a single platform (so-called 'singlehoming').<sup>164</sup> Furthermore, a distinction can be made according to whether there is a measurable transaction between user groups (as in the case of credit-card payments) or not (as in the case of print advertisement in a free newspaper).<sup>165</sup>

187. In what follows it will be determined which of these properties apply to the online-booking platforms, which are the subject of this investigation.

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<sup>160</sup> See above, paragraph 7 ff.

<sup>161</sup> See LPC 2007/2, 283 ff., *Terminierung Mobilfunk*; LPC 2005/2, 312 ff., *Tamedia AG/Edipresse SA/Homegate AG*; LPC 2006/1, 65 ff., *Kreditkarten-Interchange Fee*; LPC 2011/1, 96 ff., *Six/Terminals mit Dynamic Currency Conversion (DCC)*.

<sup>162</sup> See DAVID S. EVANS, in: *Yale Journal on Regulation*, 20(2), *The Antitrust Economics of Two-Sided Markets*, 2003, 325-381; MARC RYSMAN, in: *Journal of Economic Perspectives*, 23(3), *The Economics of Two-Sided Markets*, 2009, 125-43; JEAN-CHARLES ROCHET/JEAN TIROLE, in: *Journal of the European Economic Association*, 1(4), *Platform Competition in Two-Sided Markets*, 2003, 990-1029.

<sup>163</sup> See ROCHET/TIROLE (Fn 162). Under certain circumstances and the price paid to the platform can, in a so-called 'pass-through', be passed on to the other (subsidized) group of users by including it in the price of the product offered on the platform.

<sup>164</sup> See MARK ARMSTRONG, in: *The RAND Journal of Economics*, 37, *Competition in two-sided markets*, 2006, 668-691.

<sup>165</sup> LAPO FILISTRUCCHI/DAMIEN GERADIN/ERIC VAN DAMME/PAULINE AFFELDT, *Market Definition in Two-Sided Markets, Theory and Practice*, TILEC Discussion Paper No. 2013-009, 2013.

### **(i) Indirect Network Effects**

188. In the case of online-booking platforms there are strong indirect network effects between the two user groups, hotels and customers, as they facilitate transactions between large numbers of users on each side of the market. From the point of view of customers, an online-booking platform is especially attractive if (for a given destination) it can offer a large choice of hotels. On the other hand, the larger the number of customers using an online-booking platform the more attractive it is from the point of view of hotels.

### **(ii) Groups of Users**

189. Due to indirect network effects it is crucial for a platform to reach a critical mass at least regarding one group of users. A merchant, for example, would supposedly only be willing to accept a credit card if it is used for payments by a sufficiently large number of customers. The other way round a credit card is only attractive for customers if it is accepted by a sufficient number of merchants. The same logic applies to the case of online-booking platforms: A platform is only attractive for a hotel if it can reach a large number of customers while an online-booking platform is more interesting for customers if it can provide a large choice of hotels. It is therefore crucial for the success of a platform to attract both sides of the market ('getting both sides aboard')<sup>166</sup> for which it is in turn necessary to reach a critical mass<sup>167</sup>

190. For a platform it can be worthwhile to extend a preferential treatment to a specific subset a group of users which is particularly attractive to the other group of users (so-called 'marquee buyers'<sup>168</sup>).<sup>169</sup> In the context of the subject of this investigation for example (international) hotel chains could constitute such a subset.<sup>170</sup>

### **(iii) Price Structure**

191. Another attribute of two-sided markets is the fact that a platform cannot only determine the total price of its services but can also simultaneously reduce the price for one group of users and increase the price for the other group of users to the same extent. This can have an impact on the volume of transaction and can therefore be a crucial factor in determining the success of a platform with regards to the two-user groups.<sup>171</sup> In many cases the willingness to pay differs between two user-groups connected by a platform. In such a situation it might be a sensible strategy for a platform to extract payments only from one group of users.<sup>172</sup> There are a number of examples in the domain of two-sided markets in which a platform applies such a strategy, which leads to a subsidization of one user group of users by another one: The software for reading pdf-files for example is provided free of charge to end-users while firms, which

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<sup>166</sup> See RYSMAN (Fn 162).

<sup>167</sup> Which is also called the 'chicken-or-egg problem': See GEOFFREY PARKER/MARSHALL W. VAN ALSTYNE, Two-Sided Network Effects, A Theory of Information Product Design, *Management Science*, 51(10), 2005, 1494–1504; ROCHET/TIROLE (Fn 162); as well as BERNARD CAILLAUD/BRUNO JULLIEN, in: *RAND Journal of Economics*, 34(2), Chicken & Egg, Competition Among Intermediation Service Providers, 2003, 309–328.

<sup>168</sup> See ROCHET/TIROLE (Fn 162).

<sup>169</sup> THOMAS EISENMANN/GEOFFREY PARKER/MARSHALL W. VAN ALSTYNE, in: *Harvard Business Review*, 84(10), Strategies for two-sided markets, 2006, 92.

<sup>170</sup> See paragraph 346.

<sup>171</sup> JEAN-CHARLES ROCHET/JEAN TIROLE, in: *RAND Journal of Economics*, 35(3), Two-Sided Markets, A Progress Report, 2006, 645-667.

<sup>172</sup> See CAILLAUD/JULLIEN (Fn 167).

typically provide such files, have to pay for software that is used to produce such files. A similar strategy can be observed in the case of credit cards, where merchants have to pay for any transactions while customers are in some cases given free credit cards.<sup>173</sup>

192. When analyzing two-sided markets in the context of competition law such interacting effects between user groups stemming from the price structure need to be considered. This is especially that case because the price-setting strategy with regards to only one group is analyzed in isolation on could for example come to the false conclusion that there exists a behavior which could for example amount to predatory pricing<sup>174</sup>

193. The parties to this investigation have chosen a price structure whereby hotels bear all the costs for the services provided by the platforms which in turn are free of charge for customers. Nevertheless hotels are able to pass on these costs to their customers through their room prices. In the meantime, wide price-parity clauses prevent hotels from specifically charging higher prices for bookings through a platform with higher commission rates.<sup>175</sup>

#### **(iv) Transaction- versus Non-Transaction-Markets**

194. In general, two-sided markets can be distinguished between transaction-markets and non-transaction markets. Two sided non-transaction markets are defined by the fact that no transaction takes place between the two user groups and even if a certain interaction takes place, it cannot be overserved in a way which would allow for levying a transaction fee, an interaction fee or a two-stage tariff. Such non-transaction markets exist primarily in the media industry. A newspaper, for instance, cannot levy a transaction fee from their advertisers each time a reader looks at a print advertisement. In the case of such non-transaction markets it might make sense to regard separate product markets according to each side of the market. Accordingly COMCO has in previous cases from the domain of print media treated markets for reader and markets for advertisements separately.<sup>176</sup>

195. In two-sided transaction markets, such as for example in the case of debit or credit cards there are observable transactions between the two user-groups. This allows a platform to not only potentially charge a membership fee but also to levy fees according to the actual extent of the usage of this platform, for example by applying a two-stage tariff.<sup>177</sup>

196. In the case of online-booking platforms the fact that there is a successful reservation constitutes a measurable transaction between hotels.

#### **(v) Singlehoming versus Multihoming**

197. If several platforms compete in a market, individuals from the user groups using these platforms can decide whether to use only one of these platforms (singlehoming) or several of

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<sup>173</sup> This as well as further examples can be found in EISENMANN/PARKER/VAN ALSTYNE (Fn Fehler! Textmarke nicht definiert.).

<sup>174</sup> See JULIAN WRIGHT, in: Review of Network Economics, 3(1), One-sided logic in two-sided markets, 2004, 44-64.

<sup>175</sup> See paragraph 294ff.

<sup>176</sup> See for example LPC 2009/3, 245 ff., *Tamedia/PPSR*.

<sup>177</sup> FILISTRUCCHI/GERADIN/VAN DAMME/AFFELDT (Fn 165).

them (multihoming). The possibility to multihome in turn can affect the competitive structure of two-sided markets, for example concerning the price structure.<sup>178</sup>

198. In the case of online-booking platform both hotels as well as customers have, in principle, the possibility to multihome. This is also due to the fact that the partner contract of the parties do not contain any exclusivity clauses while customers are free to use various platforms.

199. Nevertheless there is a number of restrictions limiting the extent of multihoming. From the point of view of hotels there is an increasing administrative burden when using a large number of online-booking platforms. While managing a single online-booking platform can be easily done by using its extranet, the parallel use of several indirect channels might result in the need to acquire specialized software solutions such as channel managers or central reservation systems (CRS). Under these circumstances it might not be worthwhile to a hotel to use an online-reservation platform which generates only small number of bookings.

200. From the point of view of customers it needs to be considered that the reservation of a hotel stay is (in contrast to for example credit card transaction) a relatively infrequent transaction which might lead to a preference for always using the same platform. Furthermore, online-booking platforms also have some possibilities to promote single-homing to a certain extent, for example by offering customer loyalty programs.

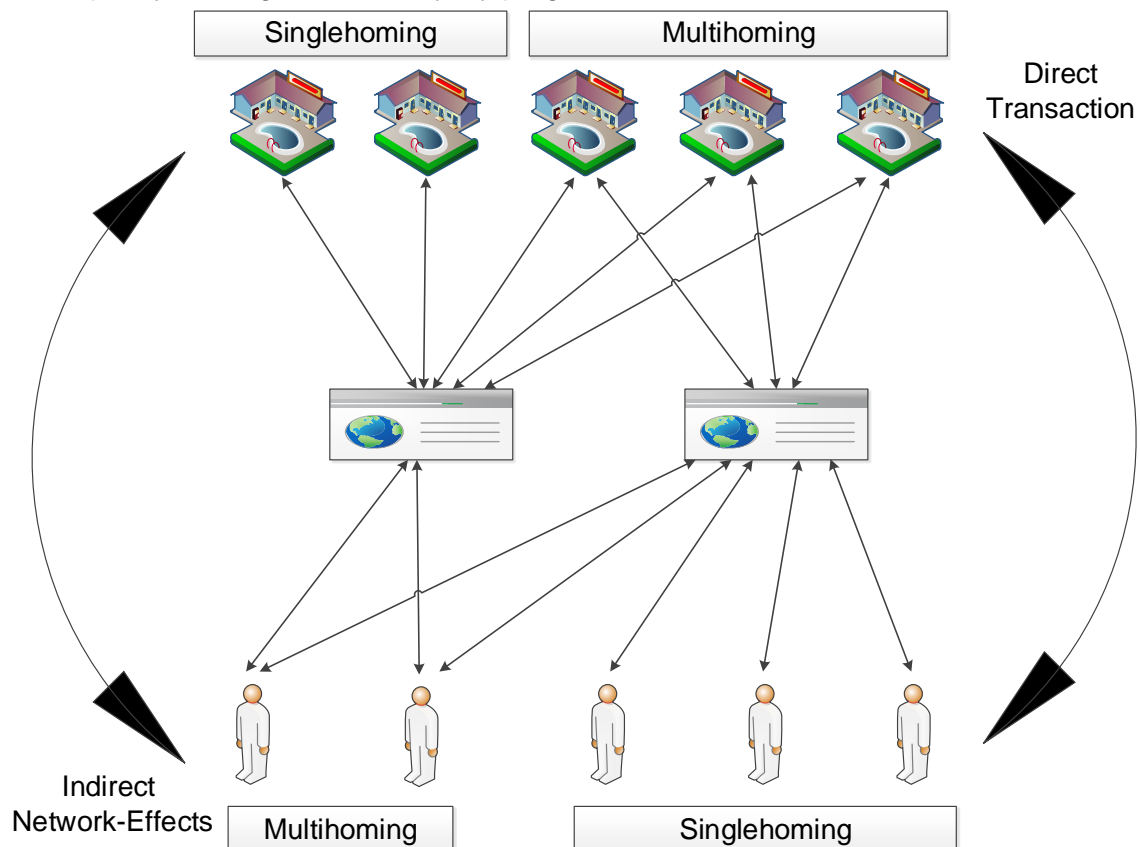


Figure 3: Online-booking platforms as two-sided markets

<sup>178</sup> EVANS (Fn 162).



(vi) **Summary**

201. To summarize, the way online-booking platforms operate bears the following characteristics:

- **User groups:** Online-booking platforms connect two user groups, namely customers and hotels.
- **Indirect network effects:** There are strong indirect network effects as an online-booking platform becomes more attractive to customers the more hotels it represents. Meanwhile, hotels have an interest to use a platform which is used by as many potential customers as possible.
- **Price structure:** Customers do not incur any (direct) costs for using online-booking platforms. Hotels bear the entirety of direct costs in the case of successfully generating a paying reservation.
- **Transaction:** The intermediation by online-booking platforms results in a measurable direct transaction between groups of users, namely the sale of a hotel stay to customers.
- **Multihoming:** In principle, multihoming is possible for both user groups.

202. Altogether online-booking platforms operate in a two-sided market. This conclusion is also shared in the arguments brought forward in this context by HRS and corresponds to the respective assessment by the Bundeskartellamt.<sup>179</sup>

#### **C.4.5.1.4. Alternatives to Online-Booking Platforms**

203. Apart from online-booking platforms there is a number of other distribution channels through which hotels can sell their services to customers. In a first step a distinction can be made between bookings of customers which contact a hotel directly (direct distribution) and bookings through third-party intermediaries (indirect distribution).

204. Table 1 contains an overview of distribution channels used by hotels. Furthermore, it is illustrated to which extent these channels are used in the distribution of hotel stays in Switzerland. Altogether roughly two-thirds of all room nights are booked directly at hotels, primarily through traditional communications channels (by telephone, fax and letter) and by walk-in guests. A similar proportion of room nights is due to bookings by e-mail and through online-forms on hotel-homepages which do not allow for an instant confirmation of the reservation. The proportion of room-night reserved by means of a real-time booking engine on hotel-homepages is relatively small.

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<sup>179</sup> See Decision by the Bundeskartellamt Bundeskartellamtes B 9 - 66/10 of 20.12.2013, paragraph 81, *HRS*. Typical examples for two-sided markets can be found in the fields of payment systems (e.g. credit- or debit-cards), media (e.g. newspapers, journal, TV) and computers (operating systems, game-consoles).

Table 1: Distribution channels of hotels in Switzerland (share of room nights)

Distribution Channel	2008 <sup>180</sup>	2013 <sup>181</sup>
Direct Distribution		
- Telephone / Fax / Brief	29 %	23 %
- Walk-In	8 %	6 %
- Contact form on website (no availability-check)	9 %	6 %
- E-Mail	26 %	21 %
- Real-time booking on website (with availability-check)	4 %	7 %
Online-booking platforms	6 %	19 %
Tour Operator / travel agents	7 %	5 %
Wholesalers	n/a	3 %
Global distribution systems (GDS)	2 %	3 %
Tourist offices	5 %	3 %
Event- and congress organizers	2 %	2 %
Hotel chains und hotel-cooperations with a central reservation system (CRS)	1 %	1 %
Social media channels	n/a	0 %
Other distribution channels	1 %	1 %

205. Apart from this, hotels in Switzerland use the services of a range of travel intermediaries. Of these indirect distribution channels, the majority of room nights is generated through online-booking platforms. Furthermore, indirect distribution includes, though to a significantly lesser extent, services provided by tour operators / travel agents, wholesalers<sup>182</sup>, Global Distributions Systems (GDS)<sup>183</sup>, as well as a range of other distribution channels<sup>184</sup> (such as tourist offices, as well as event- and congress organizers).

206. Over time, between the years 2008 and 2013, a massive increase in the proportion of room nights booked through online-booking platforms can be observed. As in the same time-frame the total number of room nights by hotels in Switzerland even decreased to a small extent, it can be noted, that this increase was mainly the result of a corresponding reduction of the direct distribution channel.<sup>185</sup> Nevertheless there are also other distribution channels which have seen a reduction of their relative importance, such as tour operators and travel agents.

<sup>180</sup> See ROLAND SCHEGG/THOMAS ALLEMANN, Schweizer Hotellerie und Internet 2008, Online Vertrieb gewinnt an Dynamik, Resultate einer online Umfrage bei Mitgliedern von hotelleriesuisse, HES-SO, 2009, 18 <[https://www.hotelleriesuisse.ch/files/pdf7/Schweizer\\_Hotellerie\\_und\\_Internet\\_20081.pdf](https://www.hotelleriesuisse.ch/files/pdf7/Schweizer_Hotellerie_und_Internet_20081.pdf)> (27. 1.2015).

<sup>181</sup> See ROLAND SCHEGG, 2014 European Hotel Distribution Study, The Rise of Online Intermediaries, Special focus Switzerland, HES-SO, 2014, 24 <[https://www.hotelleriesuisse.ch/files/pdf7/2014\\_European\\_Hotel\\_Distribution\\_Study\\_SUMMARY\\_Switzerland\\_Focus1.pdf](https://www.hotelleriesuisse.ch/files/pdf7/2014_European_Hotel_Distribution_Study_SUMMARY_Switzerland_Focus1.pdf)> (27.1.2015).

<sup>182</sup> See paragraph 221 ff.

<sup>183</sup> See paragraph 216 ff.

<sup>184</sup> See paragraph 228 ff..

<sup>185</sup> According to the Federal Office of Statistics in the year 2008 there were 37'333'769 overnight stays and in the year 2013 there were 35'623'883. See Federal Office of Statistics, Hotels und Kurbetriebe, Angebot und Nachfrage im Überblick <<http://www.bfs.admin.ch/bfs/portal/de/index/themen/10/03/blank/key/01/01.html>> ( 27.1.2015).

207. The parties bring forward that, apart from online-booking platforms, also all other named distribution channels are part of the relevant market which should also include advertisers (rating portals, meta-search engines and internet search engines). Subsequently it therefore needs to be determined, if those can be regarded as substitutes to online-booking platforms from the point of view of hotels.

**(i) Direct Distribution**

208. Direct distribution consists of all booking possibilities, whereby customers book directly at a hotel, i.e. without using the services of an intermediary. Customers can either book by using traditional means of communication (i.e. by telephone, letter or fax) or electronically (i.e. by e-mail or on a hotel-homepage either using a reservation form or a real-time booking engine). Finally there are also guests turning up at a hotel without a previous reservation, so-called walk-in guests.

209. Similarly to online-booking platforms, direct distribution is used to attract all kinds of customers. Contrary to online-booking platforms, direct distribution only offers the possibility to book a hotel without the possibility to search for a large variety of hotels and to compare between these options. In particular, this restriction results in the fact that cannot benefit from indirect network effects. In particular cases there can be limited network effects, especially in the context of hotels, which are members of an international hotel chain (for example Hilton, Sheraton etc.) or of a hotel affiliation program (for example The Leading Hotels of the World, Design Hotels). In Switzerland such network effects are hardly relevant due to the limited importance of hotel chains.<sup>186</sup>

210. Apart from the lack of network effects, direct distribution also lacks certain economies of scale: Accordingly an international presence of a single hotel is hard to achieve and a cooperation between hotels concerning marketing activities is difficult to achieve. Furthermore, a customer cannot book different independent hotels directly through the same homepage, as is the case with online-booking platforms.

211. Direct distribution is generally regarded as the cheapest distribution channel by hotels, especially compared to online-booking platforms. It is therefore evident that direct distribution is not seen as complete substitute to online-booking platforms: If this was the case, and accordingly there would be no value-added by online-booking platforms, there would hardly be any demand for such services, as well as for other (costly) distribution channels. In fact, it becomes clear from the hotel survey, that these hotels use online-booking platform complementary to direct distribution and that no hotel exclusively offers reservations through online-booking platforms without any possibility to contact the hotel directly. There is also no contradiction between the fact that some hotels refrain from using the services of online-booking platforms and such a complementary relationship.<sup>187</sup> As is the case with any goods and services, not all potential customers are also actual buyers in the market.

212. In previous cases concerning the travel industry COMCO has regularly stated that customers which book travel services without using the services of travel agency are not a part of

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<sup>186</sup> See paragraph 346 ff.

<sup>187</sup> In the hotel survey these were especially small properties, sometimes with a special target group, (such as mountain hostel, hotels geared towards long-term residents etc.).

the relevant product market.<sup>188</sup> Taking this fact into account the claim by Expedia that according to case concerning the distribution of concert tickets<sup>189</sup> in which the relevant market included both direct and third-party distribution of tickets<sup>190</sup> the same logic also applies to the current investigation is to be refuted. Apart from the fact that the case brought forward by Expedia concerned an entirely different product, it is obvious that in the case of tickets the possibility to compare the properties of different events is probably negligible which in turn reduces the potential for indirect network effects.

213. There are various other reasons why hotels with their direct distribution cannot be seen as competitors to the parties (and as such part of the relevant product market): From the point of view of customers the direct distribution channel of hotels offers only in very few cases a functionality which is comparable to online-booking platforms. This is particularly the case because only a small part of direct bookings on hotel-homepages can be made using real-time booking engines.<sup>191</sup> Even if there is, in fact, a real-time booking engine used on a hotel-homepage, a customer does not have the advantage to conveniently search for different hotels, compare between them and book on the very same homepage. Furthermore, hotels operate on a different level of the market compared to online-booking platforms as they mainly provide accommodation services instead of being specialized in distribution. Finally, it is hard to imagine that thousands of independently operating hotels could be seen as effective competitors to the parties.

214. Nevertheless, COMCO has acknowledged in previous cases concerning the travel industry that direct booking can in fact have a disciplining effect on intermediaries.<sup>192</sup> Therefore the question to which extent Hotels have a disciplining effect on online-booking engine is considered when discussing the position of the other side of the market.<sup>193</sup>

215. In summary it can be stated that direct distribution is, both in terms of properties as well as in terms of costs, clearly different from the services of online-booking platform and therefore no (perfect) substitute for those. On the contrary, the services of online-booking platforms, especially from the point of view of hotels, are used as a complement to direct distribution channels.

## **(ii) Global Distribution Systems**

216. Global Distribution Systems (GDS) are IT-systems which allow travel agencies to access information regarding travel services (especially flights, rental cars and hotels) and to reserve such services. GDS were originally developed by airlines to enable travel agencies to electronically reserve flights for their clients. Only later, the functionality of GDS was extended to other travel services such as car rental and hotel reservations, which are the subject of this investigation. Worldwide providers of GDS are Amadeus, Travelport and Sabre.

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<sup>188</sup> See LPC 2000/3, 399 ff., *TUI/Kuoni*; LPC 2004/1, 129 ff., *Hogg Robinson/Kuoni Business Travel*; LPC 2005/1, 41 ff., *Rassemblement des Agences de Voyage Indépendantes (RAVIS)/Swiss International Air Lines*; LPC 2006/4, 693 ff., *Hotelman/Travelhouse*.

<sup>189</sup> LPC 2012/1, 74 ff., *Vertrieb von Tickets im Hallenstadion Zürich*.

<sup>190</sup> LPC 2012/1, 104 f., paragraph 167 ff., *Vertrieb von Tickets im Hallenstadion Zürich*.

<sup>191</sup> See Table 1.

<sup>192</sup> See LPC 2000/3, 402, paragraph 19, *TUI/Kuoni*.

<sup>193</sup> See paragraph 345 ff.

217. Customers are practically excluded from directly accessing GDS. GDS are typically used by stationary (high-street) travel agencies serving private customers or corporate travel agencies. Accordingly the reach of GDS is limited as well as complementary compared to online-booking platforms. GDS as a distribution channel are therefore only attractive for hotels which are booked through such travel agencies. In the hotel survey these were especially major hotels cities and winter-sports resorts.

218. Furthermore, it can be stated that GDS are, as follows from the results of the hotel survey, used in addition to direct distribution channels and online-booking platforms. In Switzerland hotel distribution through GDS is only of a minor importance both with respect to the share of hotels using GDS and the overall number of room-night generated by this distribution channel.

219. So far COMCO did not treat any cases directly related to GDS. In the meantime the European Commission treated a number of merger cases in this context.<sup>194</sup> In all those procedures the European Commission stated that GDS are to be seen as separate product markets. This view was for example expressed in the case COMP/M.4523 Travelport/Worldspan.<sup>195</sup> Thereby it was explicitly examined whether the distribution of suppliers of travel services (such as hotels) through their own homepage (so-called 'suppliers.com') are a possible substitute to the distribution through GDS. This idea was ultimately rejected.<sup>196</sup>

220. To summarize, it can be stated that GDS cannot be regarded as substitutes for online-booking platforms and cannot be seen as a part of the relevant market.

### **(iii) Tour Operators and Wholesalers**

221. Tour operators are also involved in distributing hotel services. Tour operators<sup>197</sup> typically apply a merchant-model<sup>198</sup>, whereby hotels sell the tour operator a number of rooms for a net price. In many cases these rooms are then resold to customers as a package consisting of transportation, transfers and accommodation. Tour operators sell hotel-only services only to a limited extent. Examples for tour operators with activities in Switzerland are Kuoni, TUI and Hotelplan.

222. So-called Wholesalers operate on another level of the market compared to tour operators but with a similar business model as they also use a merchant-model and buy rooms for a net price. These rooms are then, instead of making them available to customers, resold to other intermediaries in the travel industry.<sup>199</sup> Examples for Wholesalers of services by hotels in Switzerland are Gulliver GTA (part of the Kuoni-group) und Hotelbeds (part of the TUI-group).

223. For hotels the advantage of distributing through tour operators and wholesalers lies in the fact that they buy a number of rooms thereby reducing their inventory risk. Measured by the discounts which are generally extended to wholesalers compared to the prices paid by

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<sup>194</sup> See OJ 2001 C 127/07, *Hilton/Accor/Forte Travel Services/JV*; OJ 2001 C 321/09, *Cendant/Galileo*; OJ 2002 C 135/07, *Amadeus/GGL/JV*; OJ 2007 L 314, *Travelport/Worldspan*; as well as OJ 2007 C 263/01, *Amadeus/Sabre/JV*.

<sup>195</sup> OJ 2007 L 314, 12, paragraph 58 f., *Travelport/Worldspan*.

<sup>196</sup> OJ 2007 L 314, 9-13, paragraph 39-57, *Travelport/Worldspan*.

<sup>197</sup> Which in turn are sold to customers either directly (through an own homepage or by phone) or through own or independent travel agents

<sup>198</sup> See above, paragraph 17.

<sup>199</sup> For example [...] acquires its hotel rooms through a wholesaler and therefore does not maintain direct contracts with hotels.

customers, the costs of using this distribution channel is significantly higher compared to the distribution through online-booking platforms..

224. Similar to the distribution through global distribution systems (GDS) the distribution through tour operators and wholesalers is only attractive for specific hotels. According to the hotel survey by the Secretariat these are again especially hotels in cities and winter-sports destinations. Again, these distribution channels are not used instead, but complementary to direct distribution and to online-booking platforms.

225. From a customer's point of view of tour operators as well as wholesalers cannot be seen as being equal to online-booking platforms. This is due to the fact that wholesalers operate on a level of the market which is inaccessible to customers. The offers of tour operators are sometimes severely limited both in terms of their products and concerning their target audience: As mentioned before, hotel stays are usually sold only as a part of a comprehensive package. Furthermore, booking hotel stays through a tour operator quite often incurs a reservation fee. Finally, tour operator usually have a specific target audience or rare primarily serving customers from a specific country therefore restricting the number of customers which may have access to their products. Examples for this, which were named in the hotel survey, are tour operators such as Čedok (Czech Republic) or JTB (Japan).

226. Even Booking.com argues that its activities differ from the ones of tour operators and that accordingly Booking.com should not be regarded as a tour operator.<sup>200</sup> Kuoni equally states that their tour operating business, as well as their activities as a wholesaler through GTA, cannot be compared to the services offered by online-booking platforms such as Booking.com, HRS and Expedia.

227. In summary, it can be stated that, from the point of view of hotels, tour operators and wholesaler do not constitute full alternatives to online-booking platforms and therefore cannot be regarded as being a part of the relevant market in the context of this investigation.

#### ***(iv) Other Distribution Channels***

228. While the previously mentioned distribution channels generate the vast majority of all bookings in Switzerland, there are a few other distribution channels which are quantitatively of minor importance, which already denies them from having the potential to count as a substitute to online-booking platforms. In addition, many of these specialized distribution channel have a narrow focus concerning target audiences or concerning the type or number of hotels on offer.

229. Event- or conference-organizers, social-media-channels and destination marketing organizations have such restrictions. The latter occasionally offer hotel distribution services while their core activities are providing information and performing marketing activities for their respective destinations. Destination marketing organizations can be categorized in local organizations (e.g. 'Arosa Tourismus'), regional organizations (e.g. 'Graubünden Tourismus') or national organizations ('Schweiz Tourismus', which also operates myswitzerland.com). In

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<sup>200</sup> Booking.com presents the following elements to support this assessment:

- Online-reservations of hotels is the only service provided, while it does not offer travel- or transportation services, package tours, tour guides, excursions, congresses, organized travels, meals and other (touristic) services.
- Booking.com is not involved in setting the prices paid by its user and the use of its services is free of charge for its customers and no booking fees are added.
- Booking.com does not act as a reseller of hotel rooms and does not operate as a merchant or wholesaler.

addition to the low booking volume generated by these distribution channels there is a tendency that they sometimes outsource their hotel booking functionalities to online-booking platforms which automatically precludes them from being direct competitors.<sup>201</sup> For example on the homepage of 'Lausanne Tourism'<sup>202</sup> when the link regarding hotel search is actually an affiliate link<sup>203</sup> leading to a corresponding site of Booking.com. In the meantime for example the destination marketing organization of St. Moritz as well as myswitzerland.com cooperate with STC.

230. There are also various providers of software solutions which are aimed at simplifying the distribution of hotel services. They do not constitute a distribution channel but may assist hotels on a technical level in offering certain booking possibilities to customers: Destination marketing organizations which do not cooperate with an online-booking platform, for instance, can manage prices and availabilities of hotels in their destination using so-called Destination Management Systems (DMS). Examples for DMS, with a certain relevance in Switzerland, are especially TOMAS and Feratel Deskline. Hotels themselves can manage prices and availabilities across different distribution channels by using Central Reservation Services (CRS) or Channel Managers, which might also allow to integrate a real-time booking facility within the hotel-homepage. Reonline and GHIX are important providers of CRS in Switzerland while hotel chains sometimes use proprietary solutions.

231. Other special-interest distribution channels include providers homepages offering limited discounted deals (such as Groupon or DeinDeal), auction platforms (such as eBay or Ricardo.ch), providers of packages (Weekend4Two was for example named in the hotel survey), providers specializing on specific categories of hotels (such as Bergfex, which specializes in leisure hotels in the mountains) and opaque-booking providers (Priceline.com, belonging to the same group as Booking.com and Hotwire, which is part of Expedia, Inc.).

#### **(v) Advertisers**

232. A number of firms offer information concerning hotels to their users which finance their services through advertising by providing paid links to distribution channels. Examples for companies using this business model are rating portals, meta-search engines and internet-search engines. The parties claim that such firms are to be seen as competitors to them and therefore part of the relevant product market.

233. It needs to be mentioned that payments to advertisers constitute a significant part of the operating costs of the parties. This fact is taken into consideration when discussing possible justifications on grounds of economic efficiency.<sup>204</sup>

### **1. Rating Portals**

234. Rating portals give customers the opportunity to write about and rate their personal experiences, for example concerning past hotel stay, in order to share these experiences with other users of a rating portal. Rating portals thereby offer their users the possibility to search for hotels and to compare these based on past user experiences. Examples for such rating portals are Tripadvisor, Zoover and HolidayCheck.

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<sup>201</sup> See the considerations on intrabrand-competition, paragraph 316 ff.

<sup>202</sup> <<http://www.lausanne-tourisme.ch>> (22.1.2015).

<sup>203</sup> <<http://www.booking.com/city/ch/lausanne.de.html?aid=33082de>> (22.1.2015).

<sup>204</sup> See paragraph 365 ff.

235. Users may access rating portals free of charge. They do not offer their own booking facilities but redirect users through an ad-supported link to firms which distribute hotel stays, such as online-booking platforms. The firms which handle the (potential) reservations pay a so-called pay-per-click fee for each user redirected through such a link to its homepage. The pay-per-click fee is levied irrespective of whether the user actually makes a paid booking or not.

## **2. Meta-Search Engines**

236. Meta-search engines are websites which are specialized on aggregating prices for specific travel services across different providers in order to facilitate price comparisons across these providers. Examples for meta-search engines are HotelsCombined, Skyscanner and Google Hotel Finder, which is embedded in the search functionality of Google. Certain meta-search engines are part of the groups corresponding the parties of this investigation: The meta-search engine Kayak belongs to Priceline.com (which is also the parent company of Booking.com) and Trivago has been acquired by Expedia, Inc. in the year 2013.

237. The business model of meta-search engines is mostly comparable to the one of rating portals: In order to make a reservation a user is forwarded to the respective provider through a link, for which the provider pays a pay-per-click fee.

## **3. Internet-Search Engines**

238. End-customers cannot only be guided towards online-booking platforms by specialized offers such as rating portal or meta-search engines, but also through internet-search engines such as Google or Bing.

239. Internet-search engines provide their services to their users also free of charge. If a user searches for hotels at a specific destination, for example by typing 'Hotels in Geneva' in the search field, this typically results in a list of organic search results. These organic search results include a list of links ideally ordered by relevance for the user by the internet-search engine. When a user ends up viewing a certain homepage through one of these organic links the owner of this homepage also incurs no cost for this intermediation. Accordingly, online-booking platforms and other providers (such as hotels themselves) may try to optimize the content of their homepage, that it is perceived as being more relevant by the internet-search engine. Such a behavior is called search engine optimization (SEO).

240. Internet-search engines generate revenues by selling paid search results. In the case of Google<sup>205</sup>, owners of a website are given the possibility to bid (within an auction-mechanism) for so-called Google AdWords, so that upon the input of certain search terms (as for example 'hotels in Geneva') a corresponding link to its homepage is presented to the user (for example leading to an online-booking platform). If an internet-user clicks on such an ad-supported link, this results in redirection to the online-booking platform and to the payment of a pay-per-click fee to Google. Additionally, Google might offer local search results, which includes an organic list of providers in a specific geographical location (for example hotels in the city of Geneva). Those local search results may in addition also feature link to booking facilities by advertising partners, which are also paid for by a pay-per-click fee.

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<sup>205</sup> In the case of Bing, the internet-search engine by Microsoft, the respective product is called Bing Ads.



241. Google AdWords can be used in an extremely flexible manner. No long-term contracts are required when buying Google AdWords as one can bid for them anytime and end a specific campaign on short notice. In addition there is a large number of parameters which can be freely determined such as requirements regarding at which time of the day or in which location a search takes place.

#### 4. Evaluation

242. As follows from the previous considerations, rating portals, meta-search engines and internet-search engines act as advertisers with especially online-booking platforms as their (paying) clients. Hotels themselves do not receive any bookings in a direct manner from these advertisers. While customers can use the services provided by these advertisers to search for hotels and to gather (various degrees of) information concerning these hotels, they are still compelled to use a hotel's existing distribution channels to book a stay.

243. A possible substitution of online-booking platforms through advertisers is already ruled out by the simple fact that advertisers themselves lack any own booking facilities. The services provided by advertisers have to be seen as inputs to the service provided by online-booking platforms: The advertising services are bought by online-booking platforms as a marketing tool for their own services. Attributing internet-search engines to the same product market as online-booking platform would lead to the contradictory conclusion that advertising expenditures by online-booking platforms themselves would also have to be counted as turnover of 'competing' advertisers. This would make even less sense in the case of meta-search engines belonging to the same group as an online-booking platform.<sup>206</sup>

244. The view that meta-search engines cannot be included in the relevant product market is also expressed by the Bundeskartellamt.<sup>207</sup> As a reason for this conclusion, it is stated that from the point of view of hotels meta-search engines cannot be regarded as substitutes because they, unlike online-booking platforms, do not offer all aspects of distribution.<sup>208</sup> Rather the Bundeskartellamt, based on experiences from merger procedures and on statements by online-booking platform, comes to the conclusion that meta-search engines operate on a different level of the market compared to online-booking platforms.<sup>209</sup>

245. Finally, the Bundeskartellamt points out that the European Commission came to similar conclusions in their assessment concerning Global Distribution Systems (GDS).<sup>210</sup> The European Commission noted that meta-search engines, due to the lack of a booking functionality, do not operate in the same product market as GDS. Rather, meta-search engines are primarily a tool channeling users to the travel distributor with the lowest prices.<sup>211</sup>

246. Even Booking.com, in its comment on the Secretariat's proposed motion, points out that only a very small number of hotels have direct contracts with meta-search engines: Out of [...] European hotels which were listed on the meta-search engine Kayak (being a part of the Price-line group) only [...] had direct contracts with Kayak.

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<sup>206</sup> See paragraph 236.

<sup>207</sup> The Bundeskartellamt also considers rating portals under this term. See Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, paragraph 98, *HRS*.

<sup>208</sup> See Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, paragraph 99, *HRS*.

<sup>209</sup> See Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, paragraph 100, *HRS*.

<sup>210</sup> See Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, paragraph 102, *HRS*.

<sup>211</sup> OJ 2007 L 314, *Travelport/Worldspan*.

247. In summary, rating portals, meta-search engines and internet-search engines cannot be regarded as substitutes to online-booking platforms. Advertisers rather offer possibilities to influence the choice by users between different distribution channels.

**(vi) Individual Online-Booking Platforms as Separate Product Markets?**

248. As has been previously illustrated, the parties have a certain scope to enact changes to the disadvantage of their partner-hotels, such as the possibility to increase their commission rates to a certain extent, even despite the presence of cheaper competitors: For instance, HRS increased its commission rate in the whole of Switzerland, [...]. Meanwhile STC (the largest online-booking platform apart from the parties) has been constantly charging lower commission rates. Furthermore, Expedia has the most far-reaching availability clauses of the parties while Expedia has been able to extend their parity clauses. STC only decided at a substantially later point in time to introduce certain, but less far-reaching, parity clauses.

249. Only viewed in isolation, the ability of certain market participants to increase prices or to worsen conditions cannot as such be seen as an indication for the existence of a separate product market. In reality it is quite normal to observe differences between different providers concerning prices and conditions.

250. In this context, the investigation 'ETA Preiserhöhung' is relevant, as the background of the investigation was a planned increase of mechanical watch movements by ETA by 1 January 2009 by up to 12 % while discontinuing a previously granted discount of 3 % in the case of payments within 10 days.<sup>212</sup> Nevertheless the previous view by COMCO that there is a product market for Swiss-made watch movements of all calibres and price-ranges was upheld<sup>213</sup> while stating that ETA holds a dominant position within this market.<sup>214</sup>

251. In the case of credit cards there is also a market structure in which Mastercard / Visa are in a number of respect vastly superior to smaller players such as Diners Club (for example concerning turnover or the number of merchants). Despite this situation, generally the view was taken, that there is a product market including all credit cards despite the fact that the disciplining effect by the smaller players might be negligible.

252. Taking into account COMCO's findings from these previous cases, it would also in the present investigation not be sensible to define separate product markets, each consisting of one of the large online-booking platforms, i.e. Booking.com, Expedia and HRS. The elements mentioned in this section are nevertheless considered when analyzing the market position of the parties, especially concerning the question of a possible (collective) market dominance by the parties.<sup>215</sup>

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<sup>212</sup> See LPC 2014/2, 396, paragraph 1, *ETA Preiserhöhung*.

<sup>213</sup> See LPC 2014/2, 398 ff., paragraph 44–59, *ETA Preiserhöhung*.

<sup>214</sup> See LPC 2014/2, 402, paragraph 75, *ETA Preiserhöhung*.

<sup>215</sup> See paragraph 424 ff. The claim by Expedia that there are indications that in the case of price-increases by Expedia a large number of partner-hotels would leave Expedia and that therefore a wider relevant market would exist, is also to be refuted. It is absolutely normal that, in the case of several undertakings operating in a relevant market, an undertaking [...] in the case of further price increases risks major declines in client numbers compared to an undertaking [...]. Nevertheless, respective considerations are taken into account when analyzing the questions of a potential collective dominant position by the parties.

## **(vii) Conclusions**

253. As follows from the previous consideration, a hotel cannot substitute the distribution through online-booking platforms by using other distribution channels. I was also shown that advertisers cannot act as substitutes to online-distribution channels. The relevant product market is therefore the intermediation of bookings by online-booking platforms between hotels and customers.

254. The definition of the product market is ultimately the same as the one by the Bundeskartellamt, despite the fact that it came to this conclusion using a different approach: In a first step, the Bundeskartellamt made a distinction between the distribution of hotels through the internet (especially online-booking platforms, real-time bookings a hotel-homepages, GDS) and offline distribution channel (especial direct booking by telephone, fax, e-mail and reservation forms on hotel-homepages and bookings through travel agencies / tour operators). In a second step the Bundeskartellamt considered whether there are any substitutes for online-booking platforms within internet distribution channels, which was ultimately denied.<sup>216</sup>

### **C.4.5.1.5. Geographic Market**

255. The geographic market comprises the area in which on the one hand consumers purchase and on the other hand suppliers sell the goods or services that constitute the product market. (art. 11 para. 3 b VKU, analogous).

#### **(i) Homogeneity of Market Conditions**

256. COMCO has repeatedly applied the criterion of the homogeneity of market conditions when defining the geographic market.<sup>217</sup> Specifically, regional differences in market shares were regarded as an indicator for the existence of corresponding separate geographic markets.<sup>218</sup>

257. STC represents an online-booking platform which is of a certain relevance exclusively in Switzerland. Furthermore, there exist, for example, online-booking platforms which are almost exclusively active in Germany, namely Unister and Justbook.<sup>219</sup> Even in the case of online-booking platforms operating in a variety of countries, there are sometimes significant differences between market shares in those countries.<sup>220</sup> Also from the point of view of customers there are national differences regarding how the products of the parties are geared towards them. Thus for example Expedia operates under Expedia.de a websites which mainly caters to users from Germany, while on Hotels.com and Venere.com users from Switzerland are shown prices in Swiss Francs and are given the possibility to contact the call-center using a Swiss telephone number.

258. While those country-specific differences can be seen as indicators for a national market, there are also certain indicators for a narrower geographic market: The fact that Booking.com [...] might lead to the conclusion that the market conditions there differ from those in the rest of Switzerland. Furthermore, hotels situated in cities are more likely to bear the additional costs

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<sup>216</sup> See Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, paragraph 65-107, *HRS*.

<sup>217</sup> See LPC 1997/3, 369 paragraph 26, *Migros/Globus* sowie LPC 2005/1, 118 paragraph 61 f., *Coca Cola*.

<sup>218</sup> See LPC 1998/2, 295 ff. paragraph 80 ff., *UBS/SBV*.

<sup>219</sup> Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, paragraph 116 ff., *HRS*.

<sup>220</sup> See SCHEGG (Fn 180); Akte 180, paragraph 4 ff.

incurred by joining Booking.com's preferred partner program, which might also be regarded as an indicator that those regions should be treated in a separate manner. In the meantime, Expedia [...]. It is furthermore possible that HRS is rather more important in the German-speaking part of Switzerland, as HRS has its origins in Germany and in its beginning mainly catered to Hotels in German-speaking territories. Ultimately defining narrower than national geographic market, as for example by regions or by languages, would hardly lead to a different assessment concerning differences between market participant and their market position.

## **(ii) Proximity to Customers**

259. Furthermore, the need for a certain proximity to customers when providing a service or the fact that there are national branches of firms can be seen as indications for national markets.<sup>221</sup>

260. As has been also repeatedly brought forward by the parties, proximity to hotels is especially important in the acquisition and support of partner-hotels. Booking.com for example states that subsidiaries such as Booking.com (Schweiz) AG are used due to practical and logistical reasons such as time zones, language barriers and travel times. Furthermore, those subsidiaries provide certain services for the hotels such as training and support of hotels concerning the use of its extranet and in order to provide account-management services for these hotels. Both Booking.com and Expedia have subsidiaries in Switzerland while STC is domiciled in Switzerland. The support is provided by [...], which are responsible for different regions or hotels in Switzerland and at times offer personal support to hotels and especially visit partner-hotels in person. Only HRS has no branch in Switzerland, [...].

## **(iii) Previous Cases Concerning the Travel Industry**

261. In previous cases in the domain of travel distributions, COMCO has in the vast majority of cases defined a national geographic market, as for example in the preliminary review of the merger project TUI/Kuoni.<sup>222</sup> In this decision it was specifically noted that a division of Switzerland into narrower regional markets cannot be justified based on the fact and that competitive conditions are roughly identical in the whole of Switzerland.<sup>223</sup> It was noted, though, that due to the increasing importance of the internet it cannot be included that in the future defining a wider geographic market might potentially be appropriate.<sup>224</sup> In Hogg Robinson/Kuoni Business Travel<sup>225</sup> a national market was proposed while hinting at the possibility that under certain circumstances an international market for the distribution of business travel arrangements might exist.<sup>226</sup> Ultimately the definition of the geographic market was left open.<sup>227</sup> In Hotelplan/Travelhouse a national market was defined.<sup>228</sup>

262. The views of the European Commission regarding the definition of the geographic markets concerning travel distribution services mostly corresponds to the assessment by

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<sup>221</sup> See LPC 2013/2, 185 paragraph 214, *Abrede im Speditionsbereich*.

<sup>222</sup> See LPC 2000/3, 403 paragraph 27, *TUI/Kuoni*.

<sup>223</sup> See LPC 2000/3, 403 paragraph 25, *TUI/Kuoni*.

<sup>224</sup> See LPC 2000/3, 403 paragraph 29, *TUI/Kuoni*.

<sup>225</sup> See LPC 2004/1, 129 ff., *Hogg Robinson/Kuoni Business Travel*.

<sup>226</sup> See LPC 2004/1, 129 ff. paragraph 21 f., *Hogg Robinson/Kuoni Business Travel*.

<sup>227</sup> See LPC 2004/1, 129 ff. paragraph 23, *Hogg Robinson/Kuoni Business Travel*.

<sup>228</sup> See LPC 2006/4, 693 ff. paragraph 23, *Hotelplan/Travelhouse*.

COMCO.<sup>229</sup> When assessing Global Distribution Systems (GDS) the European Commission also considered national markets.<sup>230</sup>

263. The Bundeskartellamt, in its decision concerning HRS of 20 December 2013, also defined a national market.<sup>231</sup>

#### **(iv) Summary**

264. To summarize, it can be stated that there is a national market for online-booking platforms. In the meantime, it can be taken into account that even in the hypothetical case of an international geographic market only the effects in Switzerland would determine the facts to be considered when applying the Swiss cartel law.<sup>232</sup>

#### **C.4.5.1.6. Conclusions**

265. Altogether, there is a national market for the intermediation of bookings by online-booking platforms between hotels and customers.

#### **C.4.5.2. Qualitative Restriction of Competition**

266. As in the present case the legal presumption set out in art. 5 para. 4 CartA does not apply due to the lack of an agreement on fixed or minimum prices and no other agreement pursuant to art. 12 para. 2 Communication on Vertical Agreements is involved, it cannot automatically be concluded that there is a severe qualitative restriction of competition. Accordingly, in what follows it needs to be shown which competitive parameters are affected by the agreements, to which extent they are restricted. Based on these findings, it can be analyzed whether these agreements lead to qualitatively severe restrictions of competition or if they merely have a minor impact.

267. First, the question will be treated if the contractual obligations by the parties affect competition on the level of hotels. Second, it is analyzed if there is a restriction of competition regarding a range of parameters on the level of online-booking platforms. As a starting point concerning possible restrictions to competition this analysis draws on the possible effects of Across-Platforms Parity Agreements proposed in the economic literature as elaborated in paragraph 134 ff.

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<sup>229</sup> See OJ 2007 C 137/6, paragraph 51, *Tui/First Choice*; OJ 2007 C 113/01, paragraph 38, *KarstadtQuelle/MyTravel*; COMP/M.6163, paragraph 29-32, *AXA/Permira/Opodo/GO Voyages/eDreams*.

<sup>230</sup> OJ 2007 L 314, *Travelport/Worldspan*.

<sup>231</sup> See Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, *HRS*. The Bundeskartellamt regards the following elements as indicators for a national market:

- The existence of an economic focus on the national level by providers of online-booking platforms (see Part 2.2.2 of the Decision),
- Local representatives by providers of online-booking platforms (see Part 2.2.3 of the Decision),
- Targeted offers provided on the portal (see Part 2.2.4 of the Decision),
- Targeted advertising activities (see Part 2.2.5 of the Decision),
- Development of the market (see Part 2.2.6 of the Decision).

<sup>232</sup> See LPC 2013/2, 185 paragraph 214, *Abrede im Speditionsbereich*.

#### **C.4.5.2.1. Restriction of Competition – Level of hotels**

268. The effects of Across-Platforms Parity Agreements expected in the economic literature focus on their effect on competition between platforms.<sup>233</sup> In this specific case parity clauses concern the relationship between hotels and online-booking platforms, which leads to the questions whether and to which extent such clauses might have an impact on competition between hotels. Thereby the specific question arises if parity clauses lead to a restriction of competition in relation to hotel services acquired by customers.

269. Price-, availability- und condition-parities by online-booking platforms affect the distribution of services provided by hotels. These services have a number of specific qualities, which in turn influence the way hotel rooms are distributed.<sup>234</sup> On the supply side the following elements are especially important:

- A hotel's room capacity is fixed and cannot be adapted in the short term.
- Hotel rooms are a perishable good: If a hotel room is left unsold in a night, this revenue potential is lost forever.
- The fixed costs of running a hotel are relatively high compared to variable operating costs.

270. On the demand side the following aspects are, amongst others, worth considering:

- Hotels typically face heterogeneous customers with a varying willingness to pay.
- Demand fluctuates over time.

271. From a business perspective a hotel faces the challenge that it has to maintain a high occupancy rate while maximizing the revenue generated by selling these rooms. To achieve this, as the main parameter of competition a hotel can set the price for a specific service. Furthermore, it needs to determine the number of rooms made available for this price and under which conditions these rooms are made available.

272. Against this background it will be explained which possibilities a hotel has in setting prices, availabilities and conditions and to which extent these possibilities are restricted by the contractual obligations by the parties. Furthermore, it needs to be determined if these restrictions have an impact on competition between Hotels.

#### **(i) Prices**

##### **1. Price-Differences between Products**

273. The basic possibility to differentiate the prices of hotel rooms is to vary prices according to the type of rooms, possibly taking into consideration how many guests sleep in this room. Accordingly different prices can be set for example for single rooms, double rooms or double room for single use. Especially in larger hotels there are frequently additional room categories,

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<sup>233</sup> See above, paragraph 133 ff.

<sup>234</sup> See for example STANISLAV IVANOV, Hotel Revenue Management, From Theory to Practice, Varna Zangandor, 2014, especially chapter 2; as well as PETER O'CONNOR/JAMIE MURPHY, Hotel yield management practices across multiple electronic distribution channels, Information Technology & Tourism, 10:2, 2008, 161-172.

as for example superior rooms, junior suites and suits or different categories according to the location of or the view from the room.

274. Another product-specific possibility to differentiate according to additional services offered together with the room, for example as a function of board services (for example breakfast, half-board or full-board).

## **2. Price-Differences According to the Time of the Stay**

275. Another possibility to price-differentiate is to set different prices as a function of the when the stay takes places. Therefore differences in demand over time can be accounted for when setting prices. This can result in different prices due to seasons, school holidays or during special events. Whether a guest stays during the week or during the weekend can also be considered.

## **3. Price-Differences between Distribution Channels**

276. Another possibility would be to set different prices for identical services across distribution channels according to the costs incurred by using these distribution channels. One possibility to do so would be for example to set prices with the goal that the net revenue, i.e. the price paid by the end-customer minus the commission paid, is identical across all bookings. By doing this, a hotel might also try to induce its customers to book using a lower-cost distribution channel.

## **4. Yield Management**

277. Once prices have been set according to the principles explained above, they can in principle be *dynamically adapted*, i.e. lowered or increased, according to changes in demand or characteristics of customers. By applying this so-called yield management or revenue management numerous factors such as the behavior of competitors, predicted occupancy of the hotel or cancellations of reservations can be considered to adapt prices.<sup>235</sup>

## **5. Restrictions due to Wide Parity Clauses?**

278. Wide parity clauses do not influence the majority of the price-setting parameters mentioned above. The platforms especially do not directly influence the absolute level of the prices charged by hotels to their customers.<sup>236</sup> Hotels are equally not restricted in their price-setting behavior concerning price-differences between specific products, according to the time of the stay or regarding their possibilities to use yield management. Therefore price-parity clauses do not lead to a restriction of interbrand-competition between hotels. In particular, hotels are not restricted in their possibilities to set higher or lower prices compared to other hotels or to lower their prices.

279. Nevertheless, price-parity clauses do lead to a certain restriction of intrabrand-competition concerning the services of a specific hotel. While a price-differentiation between products and price changes are possible without any restrictions, hotels have virtually no possibilities to differentiate prices for a specific product across different distribution channels. There is also

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<sup>235</sup> For economic consideration with this respect see: ALEX GERSHKOV/BENNY MOLDOVANU, Dynamic revenue maximization with heterogeneous objects, A mechanism design approach, *American Economic Journal: Microeconomics*, 1(2), 2009, 168-198.

<sup>236</sup> See above, paragraph 164 ff.

the theoretical possibility that price-parity clauses reduce a hotel's incentive to lower prices in individual negotiations, for example with walk-in guests. This might be the case because in such a situation a hotel would be obliged to lower prices to the same extent on the platforms. It needs to be noted, though, that hotels which want to refrain from a channel-specific price-differentiation (for example due to the fear of negative reactions from their customers) may do so without the need of agreeing to price-parity clauses as the platforms use an agency model.<sup>237</sup> Ultimately the restriction described before concerns only a small part of a hotel's pricing, namely prices at a specific moment in time for a specific room offered for specific conditions.

280. It can therefore be stated that price-parity clauses make it impossible to set different prices across different distribution channels. Meanwhile, price-parity clauses do not influence a hotel's choices regarding the absolute level of prices or its possibilities to lower or increase their prices. Price-parity clauses especially do not amount to a form of resale-price management, as has been previously elaborated.<sup>238</sup> Furthermore, price-parity clauses do not restrict hotels in their possibilities to set different absolute prices compared to competing hotels.

## **(ii) Conditions**

281. A hotel can set conditions under which a specific price is offered. Cheaper prices might for example be offered only for early-bookers, with restrictions regarding minimum stays or only upon prepayment of the full amount due.

282. As with price-parity clauses, there are also no indications that condition-parity clauses lead to worse booking conditions through a coordination facilitated by the platforms.

## **(iii) Availabilities**

283. The combination of a specific price with specific conditions can be described as a rate. A hotel can vary the availability of its services both across rates and across distribution channels.

### **1. Availability of Specific Rates**

284. As a principle, a hotel can restrict specific rates (i.e. combinations of a product, price and conditions) regarding the quantities made available or regarding the time-frame during which they are available. It might therefore be possible, that an especially cheap offer is restricted to a limited number of rooms or can only be booked within a certain time-window.

### **2. Availability according to Distribution Channels**

285. In principle, a hotel can also vary availabilities of rates across different distribution channels. In the case of distribution channels which operate using a fixed number of rooms (as in the case of wholesalers) this can simply be realized by selling the respective distributor only a limited number of rooms.

286. In the case of distribution channels, such as online-booking platforms, which are given access to available rooms on a non-exclusive basis, availabilities could be restricted by either restricting the number of rooms that can be booked simultaneously at a given moment in time or by restricting the total number of rooms given for a certain time-frame. Furthermore, a hotel

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<sup>237</sup> See below, paragraph 298.

<sup>238</sup> See above paragraph 166 ff.



could offer no availabilities at all on a platform for a specific rate or for certain times do not accept any bookings through a specific distribution channel, i.e. by closing this channel.

### **3. Restrictions due to Parity Clauses?**

287. Availability-parity clauses as stipulated by the parties restrict a hotel's possibilities reduce availabilities on online-distribution channels depending on the current situation. Thus, a hotel cannot offer rooms exclusively on its direct distribution channel, when its predictions concerning its occupancy rates are in favor of such a move, as for example during holidays or other events.<sup>239</sup>

288. A hotel is of course free to refrain from using any online-booking platform. There is also no restriction of the choice of the distribution channel from the point of view of hotel customers: A hotel can offer a room simultaneously on an online-booking platform and its direct distribution channel, therefore giving customers the choice between both of them. There also seems to be no way in which price-parity clauses could restrict the competition between hotels regarding availabilities.

289. In their comments on the Secretariat's proposed motion the parties Expedia, as well as (partly) Booking.com, brought forward that by stating that there is no restriction of competition on the level of hotels. It clearly follows that there cannot be a restriction of competition on the level of online-booking platforms. This argument is clearly misguided: In this part of the decision it is simply noted that price-parity clauses do not lead to a restriction of competition concerning the products offered by hotels (for example competition concerning stays in middle-class hotels at a specific destination). From this it cannot be followed that there is no restriction of competition regarding the distribution of such services. As a general rule, the competitive situation on the level of a product gives no indication on the competitive situation on the level of its distribution channel.

#### ***(iv) Summary Restriction of Competition on the Level of Hotels***

290. Altogether there are no signs that the contractual obligations which are the subject of this investigation could lead to qualitatively significant restriction of competition between hotels, especially concerning their competition on prices.

#### **C.4.5.2.2. Restriction of Competition – Level of Online-Booking Platforms**

291. In what follows it is to be shown whether and to which extent the contractual obligations which are the subject of this investigation lead to a restriction of competition on the level of online-booking platforms in a qualitative dimension.

292. As has been explained in the context of the general introduction on Across-Platforms Parity Agreements (APPA), the reduction of competition between platforms is considered as a possible effect of price-parity clauses in the economic literature.<sup>240</sup> Hereafter especially the question needs to be addressed, to which extent the price-structure resulting from price-parity clauses affects the competition between platforms concerning the level of commission rates. Furthermore, it is demonstrated to which extent availability-parity clauses as well as condition-parity clauses have an effect on the level of commission rates.

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<sup>239</sup> See below, paragraph 302 ff.

<sup>240</sup> See above, paragraph 133.

293. Due to the business model chosen by the platforms their commission corresponds to the costs of distribution incurred by using the platforms. In the absence of the clauses which are the subject to this investigation a hotel would mainly have two possibilities to react to differences in terms of costs between different distribution channels: On the one hand a hotel could set higher prices for rooms distributed through higher-cost channels. On the other hand hotels could restrict room availability on distribution higher-cost distribution channel. In principle both of these strategies can be used together.<sup>241</sup>

#### (i) Price-Parity Clauses

294. The first strategy, setting a higher price for an identical product on a more expensive distribution channel, results in what amounts to a channel-specific price differentiation. Due to the wide price-parity clauses stipulated by the parties such a behavior is virtually impossible: Hotels, which offer their services on several platform, which stipulate wide price-parity clauses, are ultimately not allowed to price-differentiate between these platforms.<sup>242</sup>

295. Thereby wide price-parity clauses prevent hotels from making *relative* differences with regards to commission rates between different platforms visible to their final customers: A hotel cannot offer its customers a discount on a specific service, if they book this service on a platform with a lower commission rate. On the contrary, wide price-parity clauses lead to a situation in which customers using a platform with lower commission rates actually cross-subsidize customers using a platform with higher commission rates.

296. Furthermore, wide (as well as narrow) price-parity clauses prevent hotels from making the *absolute amount* of the distribution costs resulting from the usage of platforms visible to their customers: A hotel cannot offer its customers a discount, which reflects these cost, when the customer books through the hotel's direct distribution channel. Contrary to situations in which an explicit booking fee is levied (as for example in the context of flight bookings), customers are not made aware of the true costs of booking through a platform despite the fact that these costs, which are not inconsequential, are ultimately included in the room rates paid by them.

297. Furthermore, due to wide price-parity clauses, a platform has no immediate advantage in the case it lowers its own commission rate, as their current partner-hotels cannot pass on this price advantage specifically to the customers using this platform. The competitive advantage of lowering prices, which normally result in being more attractive compared to competitors due to lower prices, does not apply to such a situation. On the contrary, a platform has no immediate disadvantage in the form of less attractive prices if it increases its commission rates:<sup>243</sup> Due to the price-parity clause a hotel cannot exclusively raise prices on this specific platform, but must either resort to increasing the prices on all distribution channels or has to face a reduction of its profit margin. Thus, in a presentation of Tobias Ragge, managing director of HRS, in the context of the increase of commission rates in the year 2012, this step is also

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<sup>241</sup> O'CONNOR/MURPHY (Fn 234).

<sup>242</sup> The Bundeskartellamt makes corresponding considerations regarding HRS's parity clauses and explicitly states that the economic effect of these clauses is comparable with a direct coordination of their behavior between platforms. Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, paragraph 156 f., *HRS*.

<sup>243</sup> As HRS has made for the whole of Switzerland and Booking.com [...].

motivated by the following statement: 'No advantages by hotels in exchange for lower commissions.'<sup>244</sup>

298. The parties bring forward that the introduction of price-parity clauses was originally the result of demands by hotels. It should be noted that from the point of view of hotels there might well exist arguments for maintaining a price structure without channel-specific price differences: In the hotel survey which was conducted, there was a small number of hotels which stated that they set identical prices on all distribution channels for reasons of simplicity, because it is considered to be fair (all guests are treated equally) or due to practical reasons. Also in a study on web-marketing by hotels, in which also *hotelleriesuisse* was involved, it is advised that the price offered to customers for an identical product must be identical on all online-distribution channels. According to this brochure, a customer, who discovers a price-difference would feel 'cheated'.<sup>245</sup>

299. Nevertheless, it is doubtful that hotels voluntarily act in full compliance with price-parity clauses. This thesis especially stands in contradiction to the fact that all parties actively monitor the compliance to price-parity clauses and take measure if a breach of contract is discovered.<sup>246</sup> Even if a non-negligible part of partner-hotels had a preference for a consistent price structure across different distribution channels, this would not automatically justify extending such a rule to all other hotels. Furthermore, it should be noted that due to the agency model by which all parties currently operate hotels are in any case given the possibility to set the absolute level of price on the platforms themselves. This gives the hotels the possibility to maintain such a price-structure without the need of such contractual obligations.

300. In their comments on the Secretariat's proposed motion the parties brought forward that based on the market definition a disciplining effect by other distribution channels, which are not part of the relevant market, cannot have a disciplining effect on the platforms. This question has been treaded in the considerations above. Furthermore, this argument ignores the fact, that neighboring markets can actually have a disciplining effect: This has for example been the background of the (previous) prohibition of the Non-Discrimination Rule (NDR).<sup>247</sup>

301. To summarize, wide price-parity clauses prevent hotels from conveying their customers any specific price signal regarding relative and absolute distribution costs of platforms. As a result, customers (which bear these distribution costs through the price of their rooms) have no monetary advantage if the either book through a platform with lower commission rates or through a hotels direct distribution channel. On the contrary, customers booking through lower-cost distribution channels partly cross-subsidize the costs generated by customers using higher-cost distribution channels. Wide price-parity clauses, which only lead to a limited restriction of intrabrand-competition by hotels regarding their services,<sup>248</sup> therefore lead to a significant restriction of interbrand-competition between platforms.

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<sup>244</sup> (in German: „Keine Vorteile durch Hotellerie für geringere Kommissionen“). Presentation by Tobias Ragge, VDR Frühjahrstagung, Berlin, 20.4.2012, HRS informiert zu aktuellen Entwicklungen, <[https://www.vdr-service.de/fileadmin/veranstaltungen/tagungen/20120419\\_berlin/2004\\_1215\\_HRS\\_Ragge.pdf](https://www.vdr-service.de/fileadmin/veranstaltungen/tagungen/20120419_berlin/2004_1215_HRS_Ragge.pdf)> (9.12.2014).

<sup>245</sup> „Der Gast aus dem Web – Reise- und Buchungsplattformen im Vergleich“; <[https://www.hotellerie-suisse.ch/files/pdf4/Hotel-Webmarketingstudie\\_einseitig\\_A4\\_mittel.pdf](https://www.hotellerie-suisse.ch/files/pdf4/Hotel-Webmarketingstudie_einseitig_A4_mittel.pdf)> (6.2.15), see especially 40 and 44.

<sup>246</sup> See paragraph 37 ff.

<sup>247</sup> See LPC 2003/1, 119, paragraph 255ff., *Kreditkarten-Akzeptanzgeschäft*.

<sup>248</sup> See paragraph 268 ff.

## **(ii) Availability Parity Clauses**

302. The second strategy, which hotels can in principle apply in reaction to different costs of various distribution channels is a temporary restriction of availabilities on higher-cost distribution channels. Due to availability-parity clauses it is virtually impossible to apply this strategy: A hotel has no possibility to temporarily refrain from using a relatively higher-cost platform while only using a lower-cost platform. Wide availability-parity clauses equally prevent hotels to offer their customers an especially cheap room category exclusively on a platform with lower commission rates.

303. If several platforms are used by a hotel apply availability-parity clauses, the most restrictive availability-parity clauses can indirectly also apply to platforms with less restrictive clauses: Booking.com and HRS claim, as elaborated before<sup>249</sup>, that their clauses do not include a Last Room Availability, i.e. that their availability-clauses do not extend to the direct distribution channel of their partner-hotels. But hotels, which apart from Booking.com or HRS also use Expedia, which applies a Last Room Availability, also have to make all rooms offered on their direct distribution channel available to Booking.com or HRS, because their availability-parity clauses include Expedia as a competing platform. In other words: As long as a hotel has available rooms, they have to be offered on Expedia. Such rooms offered on Expedia in turn have to be offered on the other platforms, such as Booking.com or HRS as well.

304. Especially in the case of an increase of the commission rate by platforms are prevented in a fundamentally important way. While buyers of goods and services can typically react to a price increase by an intentional reduction of their consumption, partner-hotels of the parties are only given the alternative to completely refrain from using the platform. This significantly limits the hotels' possibilities to react and their room for negotiation as they are effectively confronted with a 'take-it-or-leave-it'-situation: They can only choose to either accept the increase in commission rates completely or to terminate the contract with the respective platform. It is telling that the increase in commission rates by HRS was accompanied by an increase of the scope of the availability-parity clause.<sup>250</sup> While from there might be arguments from the point of view of hotels to have consistent prices across all distribution channels,<sup>251</sup> a channel-specific restriction of availabilities is widely accepted: In the same study, which recommends hotels to use a consistent price-structure across channels, hotels are urged to offer the highest number of rooms to the platforms with the most favorable conditions, while first closing the highest-cost online-distribution channel in times of increasing demand.<sup>252</sup> Altogether wide availability-parity clauses prevent hotels from temporarily restricting availabilities on a platform with relatively higher or even increasing commission rates.

## **(iii) Condition-Parity Clauses**

305. Due to condition-parity clauses another possibility is taken away from hotels to treat lower-cost platforms or distribution channels favorably by offering rooms with better conditions through them. For example in the case of wide condition parity clauses, a hotel cannot offer their customers booking on a lower-cost platform certain free amenities such as free internet-access. Condition-parity clauses therefore prevent hotels from using yet another strategy to treat a platform with low commission rates favorably. Therefore also their customers cannot

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<sup>249</sup> See above, paragraph 49 ff.

<sup>250</sup> See paragraph 21.

<sup>251</sup> See paragraph 298.

<sup>252</sup> See <[https://www.hotelleriesuisse.ch/files/pdf4/Hotel-Webmarketingstudie\\_einseitig\\_A4\\_mittel.pdf](https://www.hotelleriesuisse.ch/files/pdf4/Hotel-Webmarketingstudie_einseitig_A4_mittel.pdf)> (30.1.2015), especially pages 40 and 44.

receive a (non-monetary) benefit if they use a distribution channel, which is cheaper for the hotel.

#### **(iv) Importance of Commission Rate as a Parameter of Competition**

306. Booking.com brought forward that the commission rate is only a marginally important parameter of competition and that competition between platforms mainly takes place with regards to the quality of their services especially from the point of view of consumer using the platform. HRS has submitted a study in which also argues that competition between platforms regarding commission rates is only a parameter of competition of minor relevance.

307. This could effectively be the case, if (hotel) customers were not very price sensitive, as the Federal Supreme Court in its decision on fixed prices for books the relevance of non-price parameters of competition was (partly) based on a low price-sensitivity of customers.<sup>253</sup>

308. Meanwhile the mere existence of price-parity clauses and the reasons brought forward by the parties for their introduction demonstrate, that other parameters of competition only play a minor role in the relevant market. They explicitly state, that their customers would change to another provider in the case of price differences. On the contrary, if quality parameters as for example a simple booking process would play a central role, customers should be willing to pay a correspondingly higher price. The high price-sensitivity of customers is a clear argument against an importance of non-price parameters of competition which would be high enough to neglect a restriction of the competition regarding commission rates.<sup>254</sup>

309. The fact that also for hotels the level of commissions and the costs of distribution due to platforms are vitally important, is also plainly obvious. A trade association such as hoteller-iesuisse would certainly not give such an amount of attention to the contractual clauses which are subject to this investigation, if the costs of distribution using platforms were only of comparatively minor importance for their member-hotels. The mere fact that hotelleriesuisse applied for party status in this investigation prove the opposite.<sup>255</sup>

#### **(v) Summary Restriction of Competition on the Level of Online-Booking Platforms**

310. It has been demonstrated that competition with regards to the level of commission rates between online-booking platforms is significantly restricted in the qualitative dimension due to the contractual obligations which are the subject of this investigation.

#### **C.4.5.2.3. Conclusion**

311. It has been shown that the contractual obligations subject to this investigation have a negligible impact on competition between hotels, as they do not influence the setting of the absolute prices and a majority of price-setting parameters used by hotels.

312. Contrarily, competition between online-booking platforms is, in a qualitative dimension, severely restricted by the contractual obligation used by platforms. Due to these clauses hotels cannot convey a price signal regarding the level of commissions to their customers. Furthermore, hotels cannot respond to higher-cost platforms by temporary restricting availabilities or

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<sup>253</sup> See BGE 129 II 18, 33 E 9.4 (= LPC 2002/4, 743 E 9.4), *Buchpreisbindung*.

<sup>254</sup> See paragraph 308.

<sup>255</sup> See paragraph 76.

adapting conditions. This lead to a nearly complete elimination of competition with regards to commission rates between online-booking platforms.

#### **C.4.5.3. Quantitative Restriction of Competition**

313. In the case of vertical agreements the quantitative restriction of competition is examined by analyzing the degree of existing intrabrand and interbrand competition.<sup>256</sup> The starting point of this analysis is a situation, in which (hypothetically) there are no restraints to competition. Accordingly it will be shown to which extent the wide parity clauses, which are the subject of this investigation, have an effect on the relevant product market.

314. In doing so the following points need to be considered: In the classical case of resale price maintenance the agreement only has a direct effect on the prices set for the product which are the subject of such an agreement. In such cases the share of the respective products in the relevant market therefore also represents the quantitative restriction of competition. On the contrary, Across-Platforms Parity Agreements in general as well as the specific investigated clauses– as implied by the term ‘across-platform’ -- have disproportionate effects on the relevant product market and sometimes beyond that on neighboring markets. Therefore a simple analysis of the market shares of the parties to this investigation in the relevant product market would lead to an underestimation of the effects of their contractual obligations.

315. In order to be able to make a statement on the qualitative element of the significance of the investigated contractual obligations, it is first shown, which importance the parties have in the relevant product market as measured by the present intra- and interbrand competition. Second, in the context of the previous analysis, it will be determined to which extent the contractual obligations by the parties have a horizontal effect which goes beyond their market shares.

##### **C.4.5.3.1. Current Competition**

###### ***(i) Intrabrand Competition***

316. The parties offer their services in the relevant product market both directly as well as through distribution partners, so-called affiliates.<sup>257</sup> Accordingly many websites, which from the point of view of users might on first sight might seem to be alternative providers to established online-booking platforms, are in reality mere distribution partners of these players.<sup>258</sup>

317. It therefore needs to be determined to which extent such affiliates are able to promote intrabrand competition thereby having a disciplining effect on competition parameters relevant to users and hotels, as for example prices and conditions.

318. The online-booking platform by Booking.com is on the one hand available on its own website (www.booking.com) or through Booking.com’s mobile application. Additionally, the online-booking platform of Booking.com is available through websites of around [...] affiliates worldwide (e.g. [...]). If a booking is generated by an affiliate it accordingly receives a commission. Furthermore, Booking.com receives reservation through websites owned by its parent company (e.g. [...]), for which Booking.com also pays (internal) commissions. According to

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<sup>256</sup> See LPC 2005/2, 263 paragraph 73, *Swico/Sens*.

<sup>257</sup> See paragraph 13.

<sup>258</sup> Examples can be found in websites such as cheaptickets.ch, hotels-buchen.ch, opodo.de, swisshotels.com, hotelselection.ch.

estimates by Booking.com, in the year 2011, [...] % of all its bookings were generated by websites of affiliate partners.

319. Expedia operates, apart from brands Expedia and Hotels.com, a number of other websites such as eLong or Hotwire, but argues that the importance of these brands is negligible from the point of view of Hotels in Switzerland. Also in the case of Expedia its online-booking platform can be both accessed through Websites owned by Expedia (Expedia.com and corresponding country-specific websites such as Expedia.de; Hotels.com; Venere.com) and respective mobile applications. The affiliate program of Expedia is called 'Expedia Affiliate Network' (EAN) and offers for example so-called 'white label'-solutions, allowing affiliate partners to distribute hotel services on their website without disclosing this fact to their users. Also within the 'Expedia Affiliate Network' distribution partners receive a commission in the case of a successful booking.<sup>259</sup>

320. Finally, the online-booking platform of HRS is both available through corresponding websites (such as hrs.de, hotel.de, hotel.info, tiscover.com) and through corresponding mobile applications. HRS also runs an affiliate program which works in a similar manner compared to the affiliate programs of Booking.com and Expedia.<sup>260</sup>

321. The parties brought forward that such affiliate partners would have to be considered as their competitors. This claim is to be denied for the following reasons: From the point of view of Hotels a booking through affiliates bear the same commercial conditions as a booking through the parties' own online-booking platforms. When signing a contract with the parties, hotels also automatically agree to the distribution through affiliate partners. Accordingly bookings through affiliate partners are linked to the same conditions (such as the commission rate), therefore from the point of view of hotels no distinction can be made. Furthermore, Booking.com points out that an accommodation is unable to determine whether a reservation was generated by Booking.com or by one of its distribution partners. Besides it should be noted that hotels are unable to negotiate direct contracts with specific affiliates of the parties. On the contrary, they can only distribute their services through these affiliates by having a contract with the respective online-booking platform. This is also the case for users which book through affiliate partners of the parties. Also for users the same conditions apply irrespective whether they book through an affiliate or through the parties themselves.<sup>261</sup>

322. Altogether, there are no indications that intrabrand competition could have any disciplining effect on the parties.

## **(ii) Interbrand Competition**

323. To analyse the extent of competition between suppliers of online-booking platforms, first the current competition on the relevant product market is examined. The starting point of the analysis of current competition is the identification of the most important competitors in the market as well as their market share.

324. The only real competitors to the parties operating in Switzerland which could be identified are STC and ebookers. All other possible competitors which were considered turned out to be

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<sup>259</sup> See <<http://www.expediaaffiliate.com>> (26.3.2015)

<sup>260</sup> See <<http://www.hrs.de/web3/showCmsPage.do?pagelD=affiliatePartner>> (26.3.2015).

<sup>261</sup> See LPC 2010/3, 531f. paragraph 243-261, *France Télécom SA/Sunrise Communications AG*. In this decision it was stated that resellers could only exert competitive pressure if they are can set their prices independently.

either affiliates of the parties or STC or to be firms which source hotel rooms either through Global Distribution Systems or Wholesalers, tour operators or suppliers of software solutions.

325. In the following tables the market shares of Booking.com, Expedia, HRS and STC in Switzerland which were determined for the years 2007 to 2013 are presented:

Table 2: Market shares of online-booking platforms 2007-2013 according to booking turnover

	2007	2008	2009	2010	2011	2012	2013
Book- ing.com	[30-40 %]	[40-50 %]	[50-60 %]	[60-70 %]	[70-80 %]	[70-80 %]	[70-80 %]
HRS	[20-30 %]	[10-20 %]	[10-20 %]	[10-20 %]	[5-10 %]	[5-10 %]	[5-10 %]
Expedia	[20-30 %]	[10-20 %]	[10-20 %]	[10-20 %]	[10-20 %]	[10-20 %]	[10-20 %]
Tiscover	[0-5 %]	See HRS	See HRS	See HRS	See HRS	See HRS	See HRS
hotel.de	[5-10 %]	[5-10 %]	[5-10 %]	[0-5 %]	[0-5 %]	[0-5 %]	See HRS
STC	[0-5 %]	[5-10 %]	[5-10 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]
ebookers	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]

Source: Data collected by the Secretariat from providers of online-booking platforms. The numbers of Expedia include booking turnover by Venere and hotels.com.

Table 3: Market shares of online-booking platforms 2007-2013 according to number of room nights

	2007	2008	2009	2010	2011	2012	2013
Book- ing.com	[30-40 %]	[40-50 %]	[50-60 %]	[60-70 %]	[60-70 %]	[70-80 %]	[70-80 %]
HRS	[20-30 %]	[20-30 %]	[10-20 %]	[10-20 %]	[10-20 %]	[5-10 %]	[5-10 %]
Expedia	[10-20 %]	[10-20 %]	[10-20 %]	[10-20 %]	[10-20 %]	[10-20 %]	[10-20 %]
Tiscover	[0-5 %]	See HRS	See HRS	See HRS	See HRS	See HRS	See HRS
hotel.de	[5-10 %]	[5-10 %]	[5-10 %]	[0-5 %]	[0-5 %]	[0-5 %]	See HRS
STC	[5-10 %]	[5-10 %]	[5-10 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]
ebookers	k.A.	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]	[0-5 %]

Source: Data collected by the Secretariat from providers of online-booking. The numbers of Expedia include booking turnover by Venere and hotels.com.

326. Alternative surveys regarding market shares come to similar conclusions regarding the proportions of market shares: According to the 'Institut für Tourismus der Fachhochschule Westschweiz Wallis' (HES-SO Wallis) the market shares in the year 2013, as estimated based on a current survey, are at 69,7 % for Booking.com, at 9,8 % for HRS and 9,9 % for Expedia.<sup>262</sup>

<sup>262</sup> SCHEGG (Fn 180), 24 <[https://www.hotelleriesuisse.ch/files/pdf7/2014\\_European\\_Hotel\\_Distribution\\_Study\\_SUMMARY\\_Switzerland\\_Focus1.pdf](https://www.hotelleriesuisse.ch/files/pdf7/2014_European_Hotel_Distribution_Study_SUMMARY_Switzerland_Focus1.pdf)> (27.1.2015).



According to the survey of hotels conducted by the Secretariat the market shares in the year 2012, also based on room nights, are [60–70 %] for Booking.com, [10–20 %] for HRS and [10–20 %] for Expedia. It should be noted that in both of these surveys sometimes firms which operate in other product markets with respect to hotels, have also been counted towards the category of online-booking platforms.

327. The following table provides an overview on the changes in market share in the relevant market during the years 2007 to 2013. The development of market shares indicates, which firms have won market shares and which ones have lost market shares. Additionally, it becomes clear, that there are significant moment in the market. Large swings in market shares could be indicators for a dynamic markets as stable market structures are generally found in saturated (stagnant) markets.<sup>263</sup>

Table 4: Market shares of online-booking platforms 2007-2013 according to booking turnover (changes in percentage points)

	Veränderung 2007-2008	Veränderung 2008-2009	Veränderung 2009-2010	Veränderung 2010-2011	Veränderung 2011-2012	Veränderung 2012-2013
Booking.com	[...]	[...]	[...]	[...]	[...]	[...]
HRS	[...]	[...]	[...]	[...]	[...]	[...]
Expedia	[...]	[...]	[...]	[...]	[...]	[...]
Tiscover	[...]	See HRS	See HRS	See HRS	See HRS	See HRS
hotel.de	[...]	[...]	[...]	[...]	[...]	See HRS
STC	[...]	[...]	[...]	[...]	[...]	[...]
ebookers	[...]	[...]	[...]	[...]	[...]	[...]

Source: Data collected by the Secretariat from providers of online-booking platforms. The numbers of Expedia include booking turnover by Venere and hotels.com.

328. As can be seen in the tables, Booking.com has been the clear market leader in the market for online-booking platforms during the time considered. It is followed by a wide margin by Expedia and HRS. Finally, STC and ebookers only had marginal market shares during the time considered. It can also be observed that Booking.com was able to continuously increase its market share over time, while all the other suppliers have suffered from reductions in their market shares. In the meantime, as shown in the following tables, there has been an increase both in the number of partner accommodations as well as an increase in the overall market volume. Therefore the increases in market share by Booking.com was only partly the result of absolute losses by smaller competitors.

329. In its comments on the proposed motion by the Secretariat HRS brought up the question, why it is a party to this investigation, while other small market participants, namely STC and ebookers, are exempted. Regarding this point, it can be stated that the market shares of the latter are again significantly smaller than those of the parties. Furthermore, STC has signaled at an early stage of these proceedings that it swiftly enact respective changes in the potential case of a prohibition of parity clauses based on the cartel law. In the case of ebookers both

<sup>263</sup> See Decision by COMCO of 28.11.2011 paragraph 466, *Nikon AG*.

the number of partner-hotels as well as the market share are again significantly smaller than those of STC. It also needs to be pointed out that by now Expedia has been authorized to acquire Orbitz, which in turn owns ebookers.

Table 5: Number of properties

	2007	2008	2009	2010	2011	2012	2013
Book-ing.com	[...]	[...]	[...]	[...]	[...]	[...]	[...]
HRS	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Expedia	[...]	[...]	[...]	[...]	[...]	[...]	[...]
STC	[...]	[...]	[...]	[...]	[...]	[...]	[...]
ebookers	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Data collected by the Secretariat from providers of online-booking platforms. The numbers of Expedia include booking turnover by Venere and hotels.com.

Table 6: Development of turnover (booking turnover in million CHF)

	2007	2008	2009	2010	2011	2012	2013
Book-ing.com	[...]	[...]	[...]	[...]	[...]	[...]	[...]
HRS	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Expedia	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Tiscover	[...]	See HRS	See HRS	See HRS	See HRS	See HRS	See HRS
hotel.de	[...]	[...]	[...]	[...]	[...]	[...]	See HRS
STC	[...]	[...]	[...]	[...]	[...]	[...]	[...]
ebookers	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Data collected by the Secretariat from providers of online-booking platforms. The numbers of Expedia include booking turnover by Venere and hotels.com.

330. The strong growth of online-booking platforms is not the result of a general increase of the demand for hotel services in Switzerland but was largely at the expense of other distribution channels: Despite the significant increase in bookings through online-booking platforms the number of room nights per year in Switzerland in the years 2007 to 2013 was constantly between 22'600 and 24'000 with an average gross room occupancy rate between 44 % and 47 %.<sup>264</sup>

331. Altogether the relevant product market seems to be dynamic to a certain extent. While Booking.com is the undisputed market leader, a decline in market shares of smaller suppliers

<sup>264</sup> See Federal Office of Statistics, Hotellerie, Angebot und Nachfrage im Überblick, <<http://www.bfs.admin.ch/bfs/portal/de/index/themen/10/03/blank/key/01/01.html>> (3.2.2015).

can be observed. In return the market volume, measured by booking turnover, as well as market penetration, as measured by the number of partner-hotels, has been constantly increasing.

### **(iii) Summary**

332. The market for online-booking platforms is highly concentrated with the parties covering virtually the whole relevant product market. Thereby Booking.com is by far the strongest market participant followed by Expedia and HRS. Accordingly, no significant discipline effect on the parties can be expected from other market participants.

#### **C.4.5.3.2. Potential Competition**

333. Potential competition can only have a disciplining effect if there is a sufficient probability of market entries, these entries can take place relatively swiftly (i.e. within 2 or 3 years) and are sufficiently large in size. If market entries can only be expected in a number of years or if they only have a minor effect, they have no significant impact on the behavior of incumbents as the possibilities to circumvent them are only limited.<sup>265</sup>

### **(i) Barriers to Entry**

334. A crucial barrier to entry stems from the fact that online-booking platforms operate in a two-sided market which is therefore characterized by strong indirect network effects. To prevail in the market, an online-booking platform needs to be equally attractive to both sides of the market (i.e. hotels and users) to reach a critical mass. It will be shown that there exist substantial barriers to entry into this market concerning the need to attract both groups of users.

335. As was also brought forward by the parties, the acquiring partner-hotels requires an initial effort: Partner-hotels are acquired by and being supported by [...] which results in [...] costs. A supplier entering the market can hardly impose such initial investments on its partner-hotels due to the fact that the party do not levy a membership fee. Furthermore, a hotel, despite being in principle able to multi-home, has few incentives to maintain another online-booking platform as long as it generates only a small number of potential bookings.

336. Even if a new online-booking platform might succeed in acquiring a large number of partner-hotels it might be difficult to convince users to use its platform as can be seen in the case of STC: All member hotels of hotelleriesuisse (which partially owns STC) are presented on STC. Despite this substantial non-negligible advantage STC is unable to convince a substantial number of users to use its platform. While STC offers lower commission rates compared to the parties, due to wide parity clauses its partner-hotels cannot extend this difference by offering lower Prices on STC compared to other platforms. A new online-booking platform would therefore need a substantial marketing budget in order to use other means to attract new customers.

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<sup>265</sup> See Decision by COMCO of 21.10.2013, 38 paragraph 177, *Swatch Group Lieferstopp*, <<http://www.weko.admin.ch/aktuell/00162/index.html?lang=de>> (2.2.2015); LPC 2011/1, 96 ff., *SIX/Terminals mit Dynamic Currency Conversion (DCC)*; LPC 2010/1, 119 ff., *Preispolitik Swisscom ADSL*; LPC 2008/1, 228 paragraph 57, *TDC Switzerland AG vs. Swisscom Fixnet AG betreffend schneller Bitstromzugang*; LPC 2007/2, 262 paragraph 145, *Terminierung Mobilfunk*; LPC 2007/2, 214 paragraph 169, *Richtlinien des Verbandes schweizerischer Werbegesellschaften VSW über die Kommissionierung von Berufsvermittlern*.

337. Also in the case of Booking.com customer acquisition by using (online) advertising is a large cost factor. The respective expenditures by Booking.com in Switzerland alone for [...] has increased from [...] in the year 2008 to [...] in the year 2012.

338. Another possible barrier to entry are user-generated ratings. As is also stressed by the parties, these are a valuable source of information for its users. A firm which is a new entrant in the market of course still lacks such user-generated ratings which in turn makes the new entrant less attractive. Furthermore, from the point of view of hotels there is the additional difficulty, that they cannot transfer their reputation based on user-reviews on a platform when switching to another platform. This kind of barrier to entry has for example also been in the context of online-auction portals.<sup>266</sup>

339. Finally, profit margins of the parties on the relevant market can be an indicator of barriers to entry. Analysts came to the conclusion that in the case of Expedia hotel-bookings represent 73 % of its turnover while generating profit margins of 23 %. This margin is thereby substantially higher than in Expedia's other lines of business such as flight bookings (3 %) as well as both rental cars and cruises (9 % each).<sup>267</sup>

## **(ii) Market Entries**

340. Amongst the online-booking platforms operating in Switzerland between the years 2007 and 2013 there is no platform (with a non-negligible market share) which has been founded in this time-frame. On the contrary, there has been a certain tendency of an increasing market concentration due to takeovers: HRS acquired both Tiscover (in the year 2008) and hotel.de (in the year 2011) while Booking was previously bought by Priceline.com, Inc. (in the year 2005). Finally, Venere.com was acquired by Expedia, Inc. in the year 2008.

341. In the meantime Google has expanded its reach as an advertiser by introducing a meta-search functionality within its hotel finder. Nevertheless it seems very improbable that Google might ever decide to start operating an own online-booking platform as this would undermine its proven business model of selling pay-per-click advertisements.<sup>268</sup>

342. Other examples of market entries which have been brought forward by the parties are without exception either special-interest distributors, suppliers which only distribute private accommodation services or seemingly new suppliers of online-booking platforms which in fact rely on offers by the established online-booking platforms by way of an affiliate program.<sup>269</sup>

343. Especially Expedia argues that the significance of special-interest distributors as well as meta-search engines is possibly increasing. Concerning these players, the claim that they have a disciplining effect on established online-booking platforms can neither be currently be substantiated nor is it conceivable if, and to which extent, these might have such an effect in the future. Finally, it is to be noticed that in the case of a significant change in the legal or factual circumstances, pursuant to art. 30 para. 3 CartA, COMCO may in response to a motion

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<sup>266</sup> See for example CHRYSANTHOS DELLORCAS, in: Handbook of Economics and Information Systems, Terence Handershott (Hrsg.), Reputation Mechanisms, 2006, 629-660.

<sup>267</sup> See <<http://www.forbes.com/sites/greatspeculations/2013/01/04/whats-driving-expedias-stock/>> (3.5.2015).

<sup>268</sup> See paragraph 337.

<sup>269</sup> Of the examples provided by Booking.com, AirBnB offers private accommodations, while Swissshotels is a partner of STC Switzerland Travel Centre. Furthermore, Secret Escapes and Jet-setter are niche providers in the luxury segment. Expedia repeatedly mentioned AirBnB.

proposed by the Secretariat or at the request of the parties involved revoke or amend its decision.

**(iii) Summary**

344. Altogether there are no indications that potential market entries have any significant effect on the behavior of incumbent undertakings.

**C.4.5.3.3. Position of the Other Side of the Market**

345. Competitive pressure cannot only stem from current or potential competitors but also from the demand-side. If customers have a sufficiently high negotiating power even undertakings with high markets shares cannot to an appreciable extent behave independently from them.

**(i) Hotels**

346. HRS argues that the network effects which characterize the two-sided market lead to a high dependency of online-booking platforms from their partner-hotels, especially because it needs to acquire and maintain a large number of them using its platform as a distribution channel. As hotels are aware of this network effects, HRS does not have an unlimited scope to increase its prices. The argument that the market structure leads to a respective negotiating power by hotels is obviously wrong: For instance, in the year 2012 HRS was able to increase its commission rates while introducing more restrictive contrast without having to negotiate with their partner-hotels with regards to these steps. [...] was also possible without the need to give in to demands by hotels and without a significant number of cancellations of contracts. In general, alternative clauses compared to standard contracts [...] <sup>270</sup>

347. Only hotel chains receive some concessions, which are, though minor in scope. Thereby the room for negotiation is severely restricted even for international hotel chains. In the case of Booking.com the following hotel chains which operate within Switzerland have contracts differing the standard contracts: [...].

348. Therefore only [...] out of [...] accommodation partners had contractual obligations differing from standard contracts. However, Booking.com points out the with respect to their price- and availability-clauses no wide-ranging exemptions are made. A certain, while small, room for negotiation is granted mainly concerning elements of the contract which are of minor importance for Booking.com as for example concerning choice of law clauses.

349. Expedia has chain contracts with [...] hotel chains operating in Switzerland, representing in total [...] Hotels, especially [...]. In the meantime also these chain contracts do not allow for any substantial modifications with regards to the generally applied parity clauses.

350. In Switzerland, HRS maintains contracts with [...] hotel chains which altogether operate [...] hotels. The largest of which are [...]. In the meantime HRS states that for half of these hotel chains the standard general delivery terms apply while another fourth have a standard chain hotel contract which refers to these general delivery terms. Only the remaining fourth has differing contracts. As an example for differing contractual obligations, HRS [...]

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<sup>270</sup> See above, paragraph 18 f.

## **(ii) Hotel Associations**

351. With more than 3171 members, of which 2051 hotels, *hotelleriesuisse* represents, according to its own statements, 65 % of hotel beds in Switzerland as well as 75 % of room nights.<sup>271</sup> *GastroSuisse*, the association for hotels and restaurants, represents a large number of small hotels. *GastroSuisse* has more than 20'000 members, of which there are 3000 hotels.<sup>272</sup>

352. While therefore hotels in Switzerland are organized in two associations which represent a majority of all properties, these associations do not seem to have any negotiating power with respect to the parties. *Booking.com* states that they negotiate directly with hotels and not with their associations. The other parties also do not lead any negotiations with hotel associations. Therefore hotel associations do not have any disciplining effect on online-booking platforms.

## **(iii) Customers**

353. Customers using online-booking platforms have no direct influence on the contractual obligations between hotels and platforms. Nevertheless, COMCO has stated in its decision concerning *TUI/Kuoni* that in the travel market customers do in fact have a relatively strong position which specifically stems from the fact, that travelers often organize their trips themselves. Due to such direct booking the scope of action of tour operators is restricted. Price increases would result in a part of travelers organizing their trips by themselves.<sup>273</sup> It was also pointed out that customers in the travel market habitually compare prices between different suppliers.<sup>274</sup>

354. In the present case, though, customers receive no signal concerning the commission rate of online-booking platforms due to wide price-parity clauses. Under such circumstances customers cannot have a disciplining effect on online-booking platforms.

## **(iv) Summary**

355. Altogether it can be noted that neither hotels nor customers are able to exert any significant pressure on the parties concerning the contract clauses which are the subject of this investigation.

### **C.4.5.3.4. Horizontal Scope of the Restriction of Competition**

356. The previously established information concerning current competition, barriers to entry and the position of the other side of the market is especially useful in determining the market position of the parties with regards to hotels and customers. Meanwhile, these elements do not sufficiently reflect the actual quantitative effects of the investigated clauses as they do not only refer to the prices and availabilities on the respective platform but explicitly also include offers on other distribution channels.

357. In its decision concerning 'Vertrieb von Tickets im Hallenstadion Zürich'<sup>275</sup> COMCO noted that in order to assess the quantitative effect of a restriction of competition it is decisive

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<sup>271</sup> <<https://www.hotelleriesuisse.ch/de/pub/verband.cfm>> (3.2.2015).

<sup>272</sup> <<http://www.gastrouisse.ch/de/gastrouisse/verband/>> (3.2.2015).

<sup>273</sup> See LPC 2000/3, 408 f. paragraph 60, *TUI/Kuoni*.

<sup>274</sup> See LPC 2000/3, 408 f. paragraph 39 und 61, *TUI/Kuoni*.

<sup>275</sup> LPC 2012/1, 74 ff., *Vertrieb von Tickets im Hallenstadion Zürich*.

to which (quantitative) extent competition exists beside the agreement and does not hinge on the general market share, which is irrespective of the agreement, of an undertaking involved in such an agreement.<sup>276</sup>

358. As has been shown, wide parity clauses have a far-reaching scope and also cover all other distribution channel which a hotel uses apart from online-booking platform. They specifically include all direct distribution channels of a hotel as well as indirect channels which are operated by third parties. The various parity clauses are mostly followed in virtually all cases by hotels. This adherence is also monitored by the online-booking platform.<sup>277</sup> Therefore their partner-hotels are severely limited in their possibilities to extend a preferential treatment to distribution channels, which could potentially have a disciplining effect on the parties through customer behavior, by offering lower prices, better availabilities or more favorable conditions on such distribution channels.

359. Possibilities for variations remain in the field of indirect discounts offered within customer loyalty programs. Specifically large hotel chains offer such programs which offer loyalty points for customers booking through a hotel's direct distribution channel. An example for this is the loyalty program by Starwood hotels (Starwood Preferred Guest) which does not extend loyalty points to customers booking through an online-booking platform. Other hotel chains offer similar programs. Thereby no immediate rebates on a single booking are offered. Rather a customer can use collected loyalty point to receive future services such as free stays, upgrades etc.

360. In this regard, it should be noted that such loyalty programs are offered primarily by international hotel chains and therefore exhibit respective network effects. A loyalty program seems to be the more attractive to customers the more hotels are included in this program. Hotel chains, though, make up only a small proportion of properties in Switzerland.<sup>278</sup> Furthermore, it should be noted that such programs actually operate in contravention to availability- or condition-parity clauses, which means that the parties have to make respective exemptions.<sup>279</sup>

361. It seems, though, that some hotels, ultimately in contravention to availability and condition-parity clauses, offer their guest additional services if they book through specific channels. Such additional services could include services going beyond the mere accommodation, such as free parking, discounts on ski-passes, wellness-offers etc. While such offers constitute a breach of availability- and condition-parity clauses, there might sometimes also exist a problem from the side of the parties due to technical difficulties preventing them from offering such complex packages of services.

362. It should finally be noted that wide price-parity clauses also include the services of partner-hotels distributed to customers through wholesalers or rather their customers (such as tour operators). Especially in the case of these services, which are sold according to a merchant model, there is the possibility of a breach of the price-parity clause by the hotel despite the fact that the reseller sets the resale price independently. In this regard the parties state that in such cases they do not enforce their price-parity clauses but rather raise a hotel's awareness of

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<sup>276</sup> LPC 2012/1, 110 paragraph 197, *Vertrieb von Tickets im Hallenstadion Zürich*, with further references.

<sup>277</sup> See above, paragraph 37 ff., 56 und 53.

<sup>278</sup> See paragraph 319 ff.

<sup>279</sup> An exception for this is the fact that Expedia introduced the settlement with the OFT in the whole of Europe for all hotels. This allows hotels to offer so-called 'closed user groups', which are exempted from price-parity clauses.

such a situation in order to allow them to eventually adapt their contracts with their wholesalers.<sup>280</sup>

363. Therefore the partner-hotels of the parties have hardly any possibility to vary prices, availabilities or conditions on different distribution channels in a way which reflects relative differences in the costs of individual distribution channels. All the mentioned possibilities to vary prices or availabilities are exemptions or circumventions of the respective contractual obligations or at least constitute a grey area concerning the legal obligations stated in the contracts. Altogether, it follows that such effects are not limited to the relevant market but rather include all other distribution channels of a hotel as all of them cannot be treated in a better way compared to the online-booking platforms of the parties in terms of prices, availabilities and conditions.

#### **C.4.5.4. Conclusion**

364. From a quantitative point of view there is a comprehensive restriction of competition due to wide price-parity clauses and availability-parity clauses. On the one hand this is the result of the fact that in terms of market shares the parties cover a vast majority of the relevant product market. On the other hand there is the additional fact that the price-parity and availability-parity clauses by the parties have a horizontal effect which goes beyond the relevant product market and thereby also covers alternative distribution channels. Accordingly, the examination of qualitative as well as quantitative criteria leads to the conclusion that there is a practically complete elimination of competition on the level of online-booking platforms due to the parties' price- and availability-parity clauses.

#### **C.4.6. Justification on Grounds of Economic Efficiency**

365. If an agreement significantly restricts competition, it needs to be determined if there is any justification. This is the case if it increases economic efficiency within the meaning of art. 5 para. 2 CartA. The Competition Authorities cannot take into account any other non-economic grounds as an exceptional authorization of an unlawful agreement according to cartel law for compelling public interest reasons can, pursuant to Art. 8 CartA, only be awarded by the Federal Council.

366. According to art. 5 para 2 CartA agreements affecting competition are deemed to be justified on grounds of economic efficiency if:

- a) they are necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
- b) they will under no circumstances enable the parties involved to eliminate effective competition.

367. If an agreement affecting competition is not qualitatively significant and it does not have a cumulative effect on the market jointly with other agreements and significantly restricts competition, an agreement is normally regarded as being justified without further case-specific inquiries, if the undertaking (both as a supplier or a buyer) has a market share of less than 30 % in the relevant market of the respective goods or services and the share (see art. 16 para. 2 Communication on Vertical Agreements). In the present case there are several parallel

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<sup>280</sup> See Fn 22.



agreements which cover virtually the whole relevant market as well as other distribution channel. Accordingly the requirements for a justification without any further case-specific inquiries according to art. 16 para. 2 Communication on Vertical Agreements are not fulfilled. Therefore it needs to be examined, based on the specific fact of this case, whether there is justification on grounds of economic efficiency.

368. The Competition Authorities are required to investigate *ex officio* the relevant facts including elements which might lead to a justification. In the meantime, this does not require the Competition Authorities to prove the non-existence of grounds of economic efficiency. If the existence of such grounds of economic efficiency cannot be demonstrated – either be the Competition Authorities or the parties – it remains established that there is an agreement which significantly restricts competition and therefore in principle constitutes an unlawful agreement restricting competition. Insofar the lack of proof in this respect constitutes a disadvantage for the undertaking which the subject of an investigation, which consequently bears the objective burden of proof. This already follows from the wording of art. 5 para. 1 CartA, according to which a significant restriction of competition is only allowed if it is justified on grounds of economic efficiency instead of simply by not excluding such ground or by a somehow plausible existence of such grounds.<sup>281</sup>

369. Additionally, it should be noted that the existence of grounds of economic efficiency does not follow from the fact that the anticompetitive behavior makes sense from a mere business perspective of undertakings involved in such behavior. Rather an agreement must be efficient the point of view of the whole economy or from the point of view of the other side of the market.<sup>282</sup>

#### **C.4.6.1. Free-Riding Problem**

370. The parties bring forward that their business model involves a range of services and investments on behalf of their partner-hotels for that they are paid only in the case of effective bookings on their online-booking platform for which they receive commission. This specific feature of this business models leads to a situation in which they depend on generating as high a number of bookings through their platform as possible. In the case of bookings through the direct distribution channel a hotel benefits from the services of the online-booking platform but does not have to pay for these services. As a consequence, parity clauses are necessary to protect these services and investments.

371. This argument of the parties mostly corresponds to the Point-of-Sale-Services-Argument, which describe the problem of a horizontal externality on the level of merchants (i.e. merchants benefit from the customer and advisory services of their competitors). According to art. 16 para. 4(a) Communication on Vertical Agreements such adverse effects can be considered in the context of grounds of economic efficiency within the meaning of art. 5 para. 2 CartA. It is not necessary to further elaborate on the specific requirements for an application of the point-of-sales services argument as an extensive discussion of this question can be found in

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<sup>281</sup> Judgement by the Federal Supreme Court 2A.430/2006 of 6.2.2007 (= LPC 2007/1, 133 f.), E.10.3, *Schweizerischer Buchhändler- und Verleger-Verband, Börsenverein des Deutschen Buchhandels e.V./WEKO, REKO/WEF*.

<sup>282</sup> LPC 2012/2, 400 paragraph 1059, *Wettbewerbsabreden im Strassen- und Tiefbau im Kanton Aargau*.

the deliberations by COMCO about this subject in its decision of book-price fixing.<sup>283</sup> Furthermore, despite the fact that a free-rider problem might theoretically exist in the context of the services which are the subject of this investigation, it is already doubtful whether such a problem actually exists to the extent which is claimed by the parties. Furthermore, as shown in the following paragraphs, the parties do not succeed in demonstrating in what way their activities involve customer and advisory services or other investments which should be protected from such a problem.

372. It is also noted that COMCO, in its investigation on online-trading, looked into possible free-riding problems with regards to the distribution of household appliances. It was noted that that brick-and-mortar retailers, despite (to a certain extent) providing personal advice for customers and investing in exhibition units etc., are not subject to a free-riding problem which would be sufficient to justify a prohibition of online-distribution according to cartel law.

373. Finally, it can be noted, that most probably in all domains of (online-) distribution of services and goods, even if prices differ between intermediaries, these intermediaries invest in advertising as well as in improvements concerning their distribution services. Accordingly it seems, already from the outset, improbable that of all things in this domain, in which the undertakings do not even bear an inventory risk when providing their products and services a contractual protection against lower relative prices with respect to their competitors could be justified.

374. Booking.com has argued in its response to the proposed motion that the fact that a number of hotels interviewed on its behalf have stated that without any parity clauses they would set lower prices on their direct distribution channel relative to online-booking platforms. According to Booking.com this observation constitutes a proof for the existence of a free-riding problem. Regarding this argument it can be noted, that this line of reasoning directly contradicts with the parties' argument that parity clauses exist because they are in the interest of hotels. Apart from this argument, the result from the survey commissioned by Booking.com merely demonstrates that there are indeed individual incentives to deviate from price-parity clauses, as is the case in many kinds of price-related agreements.

375. Another argument brought forward by Booking.com, according to which a majority of users interviewed on its behalf have stated that lower prices would lead them to book on the direct distribution channel of a hotel instead of an online-booking platform merely reflect a normal market behavior. This result even illustrates that the direct distribution channel can indeed have a disciplining effect on online-booking platforms.

#### **C.4.6.1.1. Complexity of the Services Offered on the Platforms**

376. In principle, the services of hotels cannot be compared to technically complex durable goods for which the point-of-sales services is in many cases taken into consideration. Meanwhile, the services of hotels can be seen as being experience goods, which might make it difficult for users to make a judgement on its quality beforehand. Accordingly it is in principle conceivable that users might require some customer and advisory services when selecting a hotel.

377. In the meantime it can be noted that far from all users require advisory services when selecting a hotel.<sup>284</sup> Thus, numerous customers, such a repeat customers, have a level of

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<sup>283</sup> See LPC 2005/2, 286 paragraph 85 ff., *Sammelrevers 1993 für den Verkauf preisgebundener Verlagserzeugnisse in der Schweiz*.

<sup>284</sup> See also LPC 2011/3, 391 paragraph 149 ff., *Behinderung des Online-Handels*.

knowledge on the subject which goes beyond information available online. Especially walk-in guest have the possibility to determine the quality of a property without the need of third-party information.

#### **C.4.6.1.2. Billboard-Effect**

378. In order to demonstrate that a free-riding problem is prevalent in this line of business Expedia and HRS bring forward that the mere presence on an online-booking platform leads to a significant increase in the number of bookings on the direct distribution channel of a hotel. This presumed effect is introduced as the so-called 'billboard-Effect'. Based on a study which was supported by Expedia (hereafter: Cornell-Study vol. 9<sup>285</sup>) it is alleged that this increase lies between 7,5 % and 26 %.

379. It is doubtful to which extent the findings of the Cornell-Study vol. 9 can be applied to the situation in Switzerland, especially as the results of this study are mainly based on experiments involving hotels by InterContinental Hotel Group while such chain-hotels only play a minor role in Switzerland. That the findings of the Cornell-Study vol. 9 remain valid in a general setting is also doubted by ESTIS GREEN/LOMAN<sup>286</sup> as the respective hotels were consequently listed in the first position in the ranking by Expedia and due to the fact that the magnitude of increases in the direct distribution channel cannot be reconciled with general data on the number of room-night and occupancy rates. Furthermore, it is noted that the InterContinental Hotel Group (due to a dispute concerning contractual obligation) has refrained from using Expedia for a couple of months without an observable decrease in bookings on its direct distribution channel.

380. Already the aggregated development of hotel bookings shows that for hotels in Switzerland the hypothesis of a billboard-effect, which actually postulates a multiplier-effect due to the presence of a hotel on an online-booking platform, cannot be applied: While the number of partner-hotels as well as the number of bookings through online-booking platforms have steadily increased, a parallel increase in the booking volume through direct distribution channels cannot be observed. On the contrary, while the occupancy rate has been more or less constant, there has been a shift from direct bookings to bookings through online-booking platforms.<sup>287</sup>

381. Accordingly it cannot be demonstrated that the free-riding problem exists in the Swiss market in the extent brought forward by the parties. Nevertheless, in the following paragraphs it is considered whether the parties do at all provide investments or services which might require protection from a possible free-riding problem.

#### **C.4.6.1.3. Characteristics and Extent of Customer and Advisory Services**

382. Online-booking platforms do not offer their users personal advice which is comparable to such services for example in specialized retail stores. Due to the large number of available properties providing such a level of service would in any case hardly be possible. Rather they

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<sup>285</sup> CHRIS ANDERSON, in: Cornell Hospitality Report Vol. 9 No. 16, The Billboard Effect, Online Travel Agent Impact on Non-OTA Reservation, 2009. A follow-up study is also mentioned: CHRIS ANDERSON, in: Cornell Hospitality Report Vol. 11 No. 8, Search, OTAs and Online Booking, An Expanded Analysis of the Billboard Effect, 2011.

<sup>286</sup> These points can be found in CINDY ESTIS GREEN/MARK V. LOMAN, Distribution Channel Analysis, A Guide for Hotels, Hospitality Sales & Marketing Association International (HSMIA) Foundation, 2012, 131-135.

<sup>287</sup> See paragraph 330.

show their users after the input of their search criteria a corresponding list of hotels which is subject to the ranking criteria of the online-booking platform.<sup>288</sup> Such a ranking cannot be compared with individual, personalized advice especially as such a default ranking sometimes includes criteria of commercial interest of the platform which do not necessarily correspond to the interests of users.<sup>289</sup> In the case of alternative possibilities to rank the search results, this ranking is made according to strict quantitative criteria, such as the price of a hotel service. Furthermore, the extent of information provided by online-booking platforms is severely limited: Information on a specific hotel is provided on a single internet page which typically includes, besides prices and availabilities, a number of photographs of the hotels as well as a brief summary of the characteristics and the location of a hotel.

383. The possibility to rank search results according to user-generated reviews on online-booking platforms does not amount to the provision of active advisory services. Rather information mainly provided by third parties (either information provided by partner-hotels or reviews by users or third-party providers) are presented in an aggregated form. Furthermore, providing user-generated reviews directly increases the attractiveness of the respective online-booking platform. Additionally, all kinds of online-merchants provide such content. Therefore it seems probable that the provision of this kind of information does not hinge on the existence of parity clauses, but would rather take place in any case.

384. Altogether, online-booking platforms do not offer their users (costly) intensive personal advisory services provided by professional experts. Accordingly the marginal costs of providing customer and advisory services are most likely minor. Rather the provision of information on different hotels and the possibility to compare between such hotels are part of normal business activities of online-booking platforms.

385. The advisory services provided in favor of hotels is also of a low intensity. While they are educated and supported with respect to technical aspects concerning the management of the offers which they put on the respective online-booking platforms, as well as given some hints regarding the optimal presentation of their property, it is not evident that this would amount to intense advisory services which would justify the application of the point-of-sales services argument.

#### **C.4.6.1.4. Other Marketing Activities by Online-Booking Platforms**

386. The parties bring forward that they specifically invest in marketing activities on behalf of hotels. Furthermore, they claim that investments in the user-friendliness of their platforms should be considered as both hotels and user benefit from such steps. According to the parties, such investments should be protected from potential free-riders, which chose a hotel using an online-booking platform but book either through another platform or with the hotel directly.

387. Such investments mainly amount to advertising expenditures. When spending money on advertising for a specific product it is to be expected that some of these expenditures do not bear the desired results: It is normal that only a small percentage of potential clients which are exposed to a marketing activity ultimately buy the advertised product. Furthermore, there are no guarantees that the advertised product is bought at a competing merchant by certain clients. Furthermore, it is a general phenomenon that not every access to a homepage of for example

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<sup>288</sup> For general considerations regarding ranking see paragraph 23 ff.

<sup>289</sup> As an example, in the case of Booking.com hotels are able to positively influence their ranking by paying higher commissions, see paragraph 29.

an online-merchant lead to a transaction. It therefore cannot be shown, why advertising expenditures by online-booking platforms should be regarded as a special kind of investment which should be protected according to the point-of-sales services argument.

388. Finally, online-booking platforms do not exclusively advertise for a specific hotels but additionally always for their own platform. Such brand-building expenditures, as well as improvements in the user-friendliness of their platform, are directly to the benefit of the parties. Accordingly there are incentives to make such efforts irrespective of specific contractual agreements with partner-hotels.

#### **C.4.6.1.5. Interdependencies between Online-Booking Platforms and other Distribution Channels: Reverse Free-Riding**

389. Contrary to the arguments by the parties, if there is a free-riding problem at all, such a mechanism would not apply solely in the direction put forward by the platforms. Rather they also benefit from marketing activities of hotels and other distribution channels. If there are such bidirectional effects this is an argument against an efficiency-increasing effect of the competition agreement.<sup>290</sup>

390. There is a range of possibilities by which online-booking platforms benefit from the reputation of hotels: Especially in the context of pay-per-click advertising by means of Google AdWords online-booking platforms can ultimately benefit from the reputation of their partner-hotels, by for example bidding for AdWords containing a combination of the geographical location and the name of a hotel. Additionally, there are other examples whereby in other countries online-booking platforms attempted to generate bookings to the detriment of their partner-hotels. The Landgericht Frankfurt has for example stated that the provision direct links to HRS in an online phone directory constitute a deception of users as they are given the impression of directly booking at a hotel.<sup>291</sup> Furthermore, Expedia was condemned in France due to a deception of clients as it claimed on its website that certain hotels are fully occupied while there were in fact still rooms available on other distribution channels.<sup>292</sup>

391. Furthermore, there is a large number of indirect interdependencies between online-booking platforms and other distribution channels, especially with regards to the direct distribution channels. For example a study by the University of St. Gallen<sup>293</sup> on the behavior of Swiss travelers has found that three sources of information dominate others in the context of travel: Friends and relatives, sources from the internet and information provided by locals. Thereby the most important internet sites are search-engines such as Google. Equally important are internet sites of destinations followed by internet sites of accommodation providers. According to the authors of the study this result leads to the conclusion that the collection of information on travels begins with a general search on search-engines followed by a more detailed search on internet site of the destinations and finally hotel websites. In a similar study by Google on the travel behavior of inhabitants of Switzerland 41 % of the persons participating in the survey

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<sup>290</sup> See LPC 2011/3, 391 f. paragraph 153-159, *Behinderung des Online-Handels*.

<sup>291</sup> Judgement by the LG Frankfurt of 20.2.2013, 3-08 O 197/12, 9 ff, *Wettbewerbswidrigkeit der Verlinkung auf ein Hotelbuchungsportal*.

<sup>292</sup> Judgement by the Tribunal de Commerce de Paris, 15ème chambre of 4.10.2011, *Synhorcat et autres c/ Expedia et autres* <[http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=3242](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3242)> (2.2.2015).

<sup>293</sup> CHRISTIAN LAESSER/BARBARA RIEGLER, *Travel Market Switzerland, Basic Report and Database Specification*, Institute for Systemic Management and Public Governance, St. Gallen, 2012, 23.

have indicated that when deciding on an accommodation they consult the websites of accommodation providers such as homepages by hotels. According to this study these websites are the most important (online) source of information concerning accommodation followed by tourism homepages (with 18 %), search engines (with 15 %) as well as websites by travel agencies as well as travel portals (together 14 %).<sup>294</sup>

392. Even if a free-riding problem, as it is claimed by the parties, could indeed be demonstrated it would not be evident that this would exclusively be to the detriment of the parties. As it is probable that there could exist a reverse free-riding problem this would be another argument against an efficiency-increasing effect by the parity clauses used by the parties.

#### **C.4.6.1.6. Summary**

393. In summary it can be stated that on the one hand no free-riding problem to the extent claimed by the parties exists. On the other hand there is a lack of customer and advisory services provided by online-booking platforms as well as other marketing activities which could require protection from possible free-riding. As a result the parity clauses used by the parties cannot be justified using this argument.

#### **C.4.6.2. Hold-Up Problem**

394. Contract-specific investments which outside of this business relationship cannot be used or only be used by incurring a large loss (leading to a so-called hold-up problem) can be considered as a justification on grounds of economic efficiency within the meaning of art. 5 para. 2 CartA.<sup>295</sup>

395. In this specific case the parties, due to their business model, do not hold any inventory of hotel rooms and therefore do not bear any corresponding risk. Nevertheless the parties claim that they invest in advertising on behalf of specific hotels. As previously elaborated, advertising expenditures in general cannot be qualified as investments which afford a level of protection leading to a justification of parity clauses. A large percentage of advertising expenditures are used for pay-per-click advertising<sup>296</sup> which, due to its short-term nature and flexibility, is not suitable to justify the restraints to competition based on the argument of a protection of investments.

396. The only contract-specific investments on behalf of partner-hotels which do not simply involve short-term expenditures are the preparation of content for online-booking platforms as well as the translation of such content in different languages. With regards to the latter it can be noted that the translation to languages which are not featured on a hotel's own homepage is mainly to the benefit of the online-booking platform as clients which cannot understand any of the languages offered on a hotel's own homepage would probably prefer to book on the platform providing booking services and information in the user's native language. In any case,

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<sup>294</sup> See Google, Vertical Deep Dive Travel, Switzerland, May 2012  
<[https://ssl.gstatic.com/think/docs/analysis-of-travel-vertical-in-switzerland\\_research-studies.pdf](https://ssl.gstatic.com/think/docs/analysis-of-travel-vertical-in-switzerland_research-studies.pdf)>  
(3.2.2015).

<sup>295</sup> See LPC 2005/2, 280 paragraph 65 f., *Sammelrevers 1993 für den Verkauf preisgebundener Verlagserzeugnisse in der Schweiz*.

<sup>296</sup> See paragraph 240 f.

the absolute expenditures for such contract-specific services is probably small and therefore certainly cannot be used to justify an indefinite application of contractual restrictions.<sup>297</sup>

397. Due to the low contract-specific investments for including a new partner-hotel on an online-booking platform, as well as due to the relatively minor share of a single hotel in the context of the overall business of an online-booking platform the existence of a hold-up problem according the art. 16 para. 4(c) Communication on Vertical Agreements is not to be expected. If there was in fact a hold-up problem, hotels would have the possibility to renegotiate the terms after signing a contract with an online-booking platform. As previously elaborated<sup>298</sup> [...].

#### **C.4.6.3. Decrease in Search Costs and Increase in Interbrand-Competition between Hotels**

398. HRS and Booking.com bring forward that wide price-parity clauses lead to a price structure which leads to lower search costs incurred by users and thereby ultimately result in a higher degree of customer satisfaction. According to this argument user which are given best-price guarantees (which are in turn facilitated by wide price-parity clauses) can safely refrain from any further price-comparisons and therefore can fully focus on other elements when searching for a hotel.

399. These arguments are already at first sight obviously flawed as such by such a reasoning any kind of price-fixing agreement would have to be regarded as being welfare-increasing: This line of reasoning could for example also be brought forward as a justification for (clearly harmful) horizontal price-fixing agreements, as such an agreement would also lower search-costs due to leading to same prices everywhere.

400. Expedia and HRS furthermore claim that price-parity clauses lead to an increase in interbrand-competition on the level of hotels as the higher price-transparency, which they see as a result of these clause, would lead to a higher pressure on prices which would lead to lower prices for customers.

401. It is indeed the case that the internet is regarded to have procompetitive effect, especially as it facilitates an easier search for different products and prices.<sup>299</sup> Also on the subject of this investigation the internet makes it possible to easily search for information regarding different hotels including on their characteristics, prices and availabilities. Especially meta-search engines contribute to an easy comparison of prices between various distribution channels.

402. In order to justify the restriction on competition on the level of online-booking platforms due to parity clauses the efficiency-increasing effect which is claimed by the parties would have to go far beyond the mere existence of the possibility to perform comparisons on the internet. There are no signs that this is the case. Rather any additional decrease of search costs by users or any further increase of price-competition between hotels due to price-parity clauses is only of minor importance: Wide price-parity clauses rather lead to a situation in which users have no possibility to benefit from the increase in price-transparency made possible by the internet as prices are in any case always the same making price-comparisons redundant.

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<sup>297</sup> The Bundeskartellamt explains in its decision that such contract-specific initial investments are low enough that they can be recovered even if a contract with a hotel is cancelled after one year. See Decision by the Bundeskartellamt B 9 - 66/10 of 20.12.2013, *HRS*.

<sup>298</sup> See paragraph 345 ff.

<sup>299</sup> See LPC 2011/3, 374 paragraph 16 ff., *Behinderung des Online-Handels*.

403. It is therefore clearly obvious that a potential decrease in search costs or a potential increase of price-competition between hotels cannot be used as a basis for claiming a justification on grounds of economic efficiency within the meaning of art. 5 para. 2 CartA.

#### **C.4.6.4. Other Justification on Grounds of Economic Efficiency according to the Vertical Guidelines**

404. There are no indications for the existence of other justifications on grounds of economic efficiency which are listed in the Vertical Guidelines, namely regarding the consistency and quality of product<sup>300</sup>, the transfer of crucial know-how<sup>301</sup> as well as securing financial agreements<sup>302</sup>. This applies to both price- and availability-parity clauses. Such further grounds of economic efficiency were also not claimed by the parties.

#### **C.4.6.5. Conclusion**

405. Based on the reasoning above it is not necessary to further elaborate on the other requirements for the acceptance of justifications on grounds of economic efficiency. Altogether it can be stated that the parity clauses which are the subject of this investigation cannot be justified on grounds of economic efficiency within the meaning of art. 5 para. 2(a) CartA.

#### **C.4.7. Preservation of Industry Structure and Necessity of Parity Clauses**

406. Finally, HRS argues that a prohibition of price-parity clauses would lead to a development by which HRS would become a mere 'hotel search-engine' which could not generate any bookings and therefore would not receive any commission payments. On the one hand this a purely speculative claim, on the other hand such a dramatic development was also not set off in reality when price-parity clauses were suspended. Also Booking.com argues that if a price-comparison website shows that there are lower prices available on other distribution channel a user would refrain from making a reservation on Booking.com which in turn could potentially endanger its existence as an online-booking platform.

407. On these points it should be noted that the cartel law aims at protecting competition in general rather than protecting specific competitors. If there are compelling public policy reasons, as possibly policies regarding industry structure, which go beyond mere competitive consideration and this leads to a public interest reason for an exceptional authorization of unlawful agreements affecting competition a request for such an exception can be treated by the Federal Council pursuant to art. 8 CartA.

408. Finally, it needs to should be noted that even if there would be justifications on grounds of economic efficiency – which does not appear to be the case – it would be doubtful if parity clauses would indeed be necessary for providing the services of online-booking platform. As an example, HRS still operates despite the prohibition of parity clauses in Germany.

#### **C.4.8. Conclusions**

409. The price-, availability- and condition-parity clauses by the parties included in their contracts with their partner-hotels which are the subject of this investigation constitute unlawful

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<sup>300</sup> See art. 16 para. 4(b) Communication on Vertical Agreements.

<sup>301</sup> See art. 16 para. 4(f) Communication on Vertical Agreements.

<sup>302</sup> See art. 16 para. 4(g) Communication on Vertical Agreements.



agreements affecting competition within the meaning of art. 5 para. 1 CartA. The parties are therefore to be prohibited to use such clauses.

410. The adherence to parity clauses cannot only be enforced by means of a contractual obligation but also by other means. Such measures, such as for example a direct influence of the adherence to such clauses on the ranking<sup>303</sup>, threats of a contract termination in cases of non-adherence or similar measure, are to be regarded as being equal to a contractual agreement regarding parity clauses as such measures would result in a comparable restriction of competition. The parties are therefore additionally to be prohibited from taking measures by which the adherence to price-, availability- and condition-parities can be enforced.

411. As previously elaborated this assessment does not include the narrow parity clauses which have been introduced by Booking.com by 1 July 2015 and by Expedia by 1 August 2015. Applying such narrow parity clauses is therefore not prohibited. Nevertheless an assessment whether or not such clauses conform to cartel law is left open at this point of time as it would be too early to make a final assessment of their practical effects.<sup>304</sup>

## **C.5. Unlawful Practices by Dominant Undertakings**

412. As previously demonstrated wide parity clauses are to be regarded as unlawful agreements affecting competition within the meaning of art. 5 para. 1 CartA. Additionally, this investigation was opened with regards to a possible infringement against art. 7 para. 1 CarA. Therefore it needs to be examined if the application of such contractual agreements constitute unlawful practices by dominant undertakings. Art. 5 and art. 7 CartA can be applied in parallel concerning a certain behavior while a separate analysis is required in such a case.<sup>305</sup>

413. In this respect it is first determined if there is an individual dominant position by Booking.com or if there is a collective dominant position by all three parties together. Furthermore it needs to be examined whether the application of wide parity clauses in the contracts with partner-hotels or the enforcement of these clauses constitutes an imposition of unfair conditions of trade within the meaning of art. 7 para. 2(c) CartA. Finally, the question is addressed whether the application of these clauses constitutes an abuse by hindering other undertakings from starting or continuing to compete.

### **C.5.1. Dominant Position**

414. Dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market (art. 4 para. 2 CartA).

415. When declaring a dominant position of an undertaking it is insufficient to merely analyzing structural market data. Rather, concrete dependencies need to be examined.<sup>306</sup> Therefore a distinction is to be made between market dominance in the narrow sense ('classical market

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<sup>303</sup> [...]

<sup>304</sup> See paragraph 31ff.

<sup>305</sup> See EVELYNE CLERC, in: Commentaire Romand, Droit de la concurrence, Tercier/Bovet (Hrsg.), 2013, Art. 7 Abs. 1 KG N 6.

<sup>306</sup> BBI 2002 2045, 2.2.5.

dominance') and economic dependence of specific market participants on other market participants<sup>307</sup>. Whether such economic dependencies exist needs only to be examined in cases in which the existence of a 'classical' market dominance cannot be observed.

416. In order to examine whether a dominant position exists, the relevant product market and its geographical scope need to be determined in a first step. In this regard the previous analysis concerning the relevant market in the context of art. 5 para. 1 CartA can be equally applied.<sup>308</sup> Accordingly the following analysis is based on a national market for the intermediation of bookings by online-booking platforms between hotels and customers.<sup>309</sup>

#### **C.5.1.1. Individual Market Dominance by Booking.com**

417. Whether Booking.com is able to behave to an appreciable extent independently of competitors, suppliers and consumers pursuant to art. 4 para. 2 CartA needs to be determined based on the specific facts of this case. Booking.com cannot behave independently if it is exposed to sufficiently strong current or potential competitors.

##### **C.5.1.1.1. Current Competition**

418. An exhaustive description of current competition can be found in the considerations in the context of para. 5 CartA.<sup>310</sup> A main finding of these considerations is the fact that Booking.com is by far the largest market participant in the relevant market as it has been shown that Booking.com had a market share of [70-80 %] in the year 2013. Additionally, the number of competitors is very small as the only competitors with market shares of more than [0-5 %] are Expedia (with [10-20 %]) and HRS (with [5-10 %]).<sup>311</sup>

419. According to Swiss legal practice as well as academic contributions a high market share as such does not automatically point to a dominant position.<sup>312</sup> Nevertheless a market share of 50 % constitutes an indicator for a dominant position ('critical threshold').<sup>313</sup> Booking.com has at the latest reached a market share of 50 % in the year 2008 thereby passing this critical threshold. The fact that the market share has steadily increased in the following years is an indicator for a dominant position of Booking.com during this time frame. Especially the market share of [70-80 %] in the year 2013 point to a current dominant position of Booking.com.

420. In the meantime it is doubtful whether Booking.com already held a dominant position before the year 2008 as its market share was below 50 % in the year 2007. Additionally, the market shares of its main competitors were significantly higher at that point in time compared to today's situation (Expedia with [20-30 %] and HRS with [20-30 %]). Furthermore, there was the number of active competitors was higher at that point in time as the takeovers of Tiscover and hotel.de by HRS as well as the takeover of Venere by Expedia took place only after the year 2008.<sup>314</sup> Finally, the absolute importance of online-booking platforms as a distribution channels for hotels in Switzerland was significantly lower in the year 2007 compared to the

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<sup>307</sup> See LPC 2005/1, 161 paragraph 95 ff., *CoopForte*.

<sup>308</sup> See above, paragraph 176 ff.

<sup>309</sup> See paragraph 264.

<sup>310</sup> See paragraph 316 ff.

<sup>311</sup> See Table 2: Market shares of online-booking platforms 2007-2013 according to booking turnover.

<sup>312</sup> BGE 139 I 72, E 9.3.3.2, *Publigroupe SA et al./WEKO*, with further references.

<sup>313</sup> BGE 139 I 72, E 9.3.3.2, *Publigroupe SA et al./WEKO*, with further references.

<sup>314</sup> See above, paragraph 2 f.

situation in the year 2013. As an illustration the booking turnover generated by Booking.com in the year 2007 was approximately [...] lower than in the year 2013.<sup>315</sup>

#### **C.5.1.1.2. Potential Competition and Position of the Other Side of the Market**

421. Also with regards to potential competition as well as the position of the other side of the markets the analysis with respect to art. 5 CartA can be equally applied.<sup>316</sup> As stated in the respective consideration there potential competition does not exert any meaningful competitive pressure and there are no signs for a strong position of hotels or users.

422. Especially the SHV as well as individual hotels have repeatedly pointed out that there is an economic dependence especially from Booking.com. As in this specific context the existence of a 'classical' market dominance by Booking.com is of primary importance, the subsequent question of a possible economic dependence of partner-hotels on Booking.com does not need to be treated in addition.<sup>317</sup>

#### **C.5.1.1.3. Summary**

423. There are strong indications that Booking.com can behave to an appreciable extent independently from other market participants in the national market for the intermediation of bookings by online-booking platforms between hotels and customers. It therefore seems improbable that current and potential competition suffice to have a disciplining effect on Booking.com.

#### **C.5.1.2. Collective Dominant Position**

424. In the economic literature on Across-Platforms Parity Agreements (APPA) the possibility that such clauses might favor collusion is mentioned.<sup>318</sup> Accordingly the question arises whether Booking.com, HRS and Expedia together hold a collective dominant position on the relevant market. In order to examine this question the following criteria<sup>319</sup> are applied: The number of participating companies, their market share as well as the market concentration, symmetries, market transparency, homogeneity of their products, the position of the other side of the market, the stability of the market as well as existing multi-market relationships.

##### **C.5.1.2.1. Number of Participating Undertakings, Market Shares and Market Concentration**

425. As was demonstrated in the considerations concerning art. 5 CartA with regards to current competition<sup>320</sup> Booking.com is by far the largest market participant. It was shown that Booking.com had a market share of [70-80 %] in the year 2013. The number of competitors is very limited as the only competitors with market shares of more than [0-5 %] are Expedia (with [10-20 %]) and HRS (with [5-10 %]).<sup>321</sup> The number of participating undertakings, their market

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<sup>315</sup> See Table 6 Development of turnover (booking turnover in million CHF).

<sup>316</sup> See paragraph 333 ff. und paragraph 345 ff.

<sup>317</sup> The respective scheme of analysis regarding questions relating to individual dependence can be found in LPC 2005/1, 160 ff. paragraph 92 ff., *CoopForte*.

<sup>318</sup> See paragraph 135.

<sup>319</sup> See for example LPC 2008/4, 631 ff. paragraph 258 ff., *Coop/Carrefour*, with further references

<sup>320</sup> See paragraph 316 ff.

<sup>321</sup> Table 2: Market shares of online-booking platforms 2007-2013 according to booking turnover.

shares as well as the market concentration would favor the emergence of a collective dominant position by the parties.

#### **C.5.1.2.2. Symmetries**

426. The degree of symmetry between undertakings is regarded as a crucial indicator for a possible collective dominant position.<sup>322</sup> With respect to the services provided as well as the way these services are marketed Booking, Expedia and HRS can be regarded as being largely homogeneous. However, there are very large asymmetries between Booking.com, Expedia and HRS concerning market shares which in turn is a strong indicator against the existence of a collective dominant position.

#### **C.5.1.2.3. Market Transparency**

427. The market under consideration is characterized by a very high transparency as Booking.com, Expedia and HRS can easily gain information regarding the offerings by respective partner-hotels as well as regarding prices on competing platforms. Especially in the context of the surveillance regarding the adherence to parity clauses gathering such information takes place in practice. Additionally, there are third parties, such as meta-search engines as well as user (when making claims regarding best-price guarantees) which contribute to the market transparency. Furthermore, the media coverage on the behavior of online-booking platforms leads to a fact that general information concerning conditions of trade and commission rates are in many cases publicly available. A high degree of market transparency is generally regarded as being in favor of a collective dominant position.

#### **C.5.1.2.4. Position of the Other Side of the Market**

428. The question of the position of the other side of the market has also been exhaustively treaded within the consideration concerning art. 5 CartA.<sup>323</sup> Accordingly it can be presumed that partner-hotels of Booking.com, Expedia and HRS, as well as their users, would not be in the position to destabilize a possible collective dominant position by the parties.

#### **C.5.1.2.5. Stability of Market Conditions**

429. In the economic literature there is a broad agreement that stable market conditions increase the probability of the emergence of a collective dominant position.<sup>324</sup>

430. Due to the high barriers to entry in the market which is considered and the inexistence of potential competition following from these barriers there is improbable that there is an immediate threat to the market position of Booking.com, Expedia and HRS due to new entrants.

431. In the meantime, the relevant market remains highly dynamic as Booking.com was able to greatly increase its market share compared to Expedia and HRS. Especially in the case of HRS it could be observed that [...]. Another argument against stable market conditions is the fact that it seems probable that the market for the intermediation of hotel bookings by online-booking platforms is still not fully saturated, i.e. there seems to be a certain market potential which has not been exhausted yet. A main argument for this hypothesis is the fact that the

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<sup>322</sup> See for example LPC 2008/1, 187 paragraph 480, *Migros/Denner*, with further references.

<sup>323</sup> See paragraph 345 ff.

<sup>324</sup> See for example LPC 2008/1, 189 paragraph 498, *Migros/Denner*, with further references.

share of bookings through online-booking platforms compared to all hotel bookings is still below the European average and especially lower than in Germany, France and Italy.<sup>325</sup> Furthermore, the number of partner-hotels of the parties is still increasing. Altogether there seem to be instable market conditions. This fact constitutes a strong indication against a current collective dominant position by Booking.com, Expedia and HRS. Concerning a possible collective dominant position during the time before the 2008 in which Booking.com for the first time reached a market share of more than 50 % it should be noted that the market under consideration was at that time in an early market phase in which numerous other competitors apart from the parties were active in the market and in which the absolute importance of online-Booking platforms compared to other distribution channels was significantly lower.<sup>326</sup>

#### **C.5.1.2.6. Multi-Market Relationship**

432. Multi-market relationships of Booking.com, Expedia and HRS with regards to different product markets exist only to a limited extent as HRS is virtually only active in the intermediation of bookings between hotels and customers. In contrast, Booking.com is to a greater extent active in the intermediation of alternative accommodation providers (such as vacation rentals while Expedia (at least under the Expedia-brand) offers the widest range of travel services even including cruises and car rentals thereby offering a scope which is offered neither by Booking.com nor by HRS. Concerning geographical markets there are necessarily overlaps as all three undertakings are in principle globally active. In the meantime HRS focuses its activities on Germany while Expedia, concerning its European activities, has an especially strong position in Italy, which is partly due to its takeover of Venere. Altogether the fact that the parties are (apart from their activities in Switzerland) also competing in other geographic markets might in principle strengthen a possible collective dominant position of Booking.com, Expedia and HRS.

#### **C.5.1.2.7. Summary**

433. There are definitively a number of factors on the relevant product market considered which favor a collective dominant position by Booking.com, Expedia and HRS: There is a very high market concentration, a very high market transparency and a far-reaching homogeneity regarding their products. In the meantime there are strong indications that, despite a number of factors favoring collusion, these factors currently do not lead to a collective dominant position. This finding can be especially based on the fact that Booking.com has massively increased its market share compared to both Expedia and HRS. Apart from this lack of stability concerning market conditions, it also needs to be taken into account that the market as a whole is still growing which also counteracts tendencies toward a collective dominant position. Another factor to be taken into account is the significant asymmetry between Booking.com, Expedia and HRS concerning market shares. Altogether, it is currently not reasonable to assume the existence of a collective dominant position by Booking.com, HRS and Expedia within the meaning of art. 4 para. 2 CartA.

#### **C.5.1.3. Economic Dependence**

434. HRS and Expedia neither indecently hold a classical dominant position nor do they hold a collective dominant position jointly with Booking.com. The existence of an economic dependence of particular hotels on HRS and Expedia can also be denied. In order to be able to confirm

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<sup>325</sup> See SCHEGG (Fn 180).

<sup>326</sup> See paragraph 420.

such an economic dependence, amongst other factors, hotels would have to be required to invest in assets, which are specific to the use of these online-booking platforms.<sup>327</sup> There are no indications that this requirement is fulfilled in this specific case.

#### **C.5.1.4. Result**

435. There are strong indication that Booking.com hold a dominant position pursuant to art. 4 para. 2 CartA on the national market for the intermediation of bookings between hotels and customers while a collective dominant position jointly with Expedia and HRS can be regarded as being rather improbable. In the following, it is therefore to be determined whether the behavior of Booking.com with respect to its partner-hotels possibly constitutes an abuse of a dominant position pursuant to art. 7 CartA.

#### **C.5.2. Unlawful Behavior of Dominant Undertakings**

436. An unlawful behavior within the meaning of art. 7 CartA can only be associated with a dominant undertaking within the meaning of art. 4 para. 2 CartA. Accordingly solely the question whether the application of wide parity clauses by Booking.com constitutes such a behavior needs to be addressed.

##### **C.5.2.1. Introduction**

437. According to the sweeping clause of art. 7 para. 1 CartA dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners. Therefore a distinction can be made between so-called exclusionary abuses and so-called exploitative abuses. A clear-cut attribution is not possible in every case as business practices by dominant undertakings might at the same time be both exclusionary and exploitative.<sup>328</sup>

438. In the case of an *exploitative abuse* the other side of the market (i.e. suppliers or buyers of the dominant undertaking) are disadvantaged by the imposition of exploitative conditions of trade or prices. The imposition of prices and conditions of trade within the meaning of art. 7 para. 2(c) CartA therefore constitutes a typical exploitative abuse. An exploitative abuse is characterized by the fact that a dominant undertaking aims at achieving economic advantages by abusing its dominant position to the detriment of its trade partners and customers.<sup>329</sup>

439. An *exclusionary abuse* exists if other undertakings (typically current or potential competitors, but most basically also other market participants) are hindered from starting or continuing to compete. It is thereby insignificant whether the hindrance is exercise on the market of the dominant undertaking or on an upstream respectively on a downstream market. Exclusionary abuses therefore include all kinds of behavior by dominant undertakings which go beyond fair

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<sup>327</sup> According to LPC 2005/1, 161 f., paragraph 98 ff., *CoopForte*, such investments would be 'Buildings and facilities, possibly employees as well as research and development efforts of the supplier which are (partly) specialized in the production of goods and services sold to merchants and which cannot, at economically justifiable costs, be used otherwise or adapted for other uses.'

<sup>328</sup> LPC 2010/1, 166 paragraph 322, *Preispolitik Swisscom ADSL*; see also BGE 139 I 72, E. 10.1.1, *Publigroupe SA et al./WEKO*.

<sup>329</sup> BGE 139 I 72, E. 10.1.1., *Publigroupe SA et al./WEKO*, with further references.

competition based on performance which are directed against (current or potential) competitors or trade partners and which reduces their scope of action in the dominated or a neighboring market.<sup>330</sup>

440. Academic contributions acknowledge other criteria to address the question if there is an unlawful behavior or respectively an abuse, namely an intention of exclusion<sup>331</sup>, weakening the competitiveness, non-performance based competition or considerations of normative purposes.<sup>332</sup>

441. In art. 7 para. 2 CartA the legislators provided a non-exhaustive list of kinds of behavior which is aimed at illustrating or substantiate the prohibition within the meaning of art. 7 para. 1 CartA.<sup>333</sup> The elements of crime as stated in art. 7 para. 2 CartA as such do not automatically result in an unlawful behavior as the general requirements stated in the sweeping clause of art. 7 para. 1 CartA always need to be fulfilled in order to demonstrate the existence of an abuse.<sup>334</sup>

442. As the Federal Supreme Court has stated in the 'Publigroupe'-case<sup>335</sup> in each specific case two steps need to be performed in answering the question whether there exists an abuse or an unlawful behavior: In a first step it needs to be determined whether a specific behavior constitutes an exclusionary or exploitative conduct within the meaning of art. 7 para. 2 CartA. In a second step possible justifications, so-called legitimate business reasons, need to be examined.

#### **C.5.2.2. Exploitative Abuse**

443. For a start it is possible that the application of price-, availability- and condition-parity clauses by Booking.com in its contracts with hotels and/or the enforcement of these contracts constitutes an imposition of unfair conditions of trade within the meaning of art. 7 para. 2(c) CartA. Such a behavior is characterized by all of the following elements together: First, the behavior relates to conditions of trade (or prices), second, it is imposed and third, it is shown to be unfair.<sup>336</sup>

444. Without any doubt wide-parity clauses constitute conditions of trade. It therefore needs to be examined whether the existence of the element of an 'imposition' can be shown.

445. The Federal Supreme Court, in its decision concerning the termination fee by Swisscom<sup>337</sup>, has treated the element of crime as described in art. 7 para. 2(c) CartA in detail and has thereby presumed that the element of an 'imposition' has an independent relevance.

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<sup>330</sup> BGE 139 I 72, E. 10.1.1., *Publigroupe SA et al./WEKO*, m.w.H; see auch BBI 1995 468, 569.

<sup>331</sup> See BRUNO SCHMIDHAUSER, in: Kommentar zum schweizerischen Kartellgesetz, Homburger/Schmidhauser/Hoffet/Ducrey (Hrsg.), 1997, Art. 7 N 39; PETER REINERT, in: Stämpfli's Handkommentar zum Kartellgesetz, Baker & McKenzie (Hrsg.), 2007, Art. 7 KG N 6. See also Entscheidung der REKO/WEF, LPC 2004/3, 884 f. E. 4.5, *Unique (Flughafen Zürich AG)/Sprenger Autobahnhof AG, Alternative Parking AG, Wettbewerbskommission*.

<sup>332</sup> BGE 139 I 72, E. 10.1.2, *Publigroupe SA et al./WEKO*, with further references.

<sup>333</sup> See LPC 2012/3, 467 paragraph 71, *Erdgas Zentralschweiz AG*; BBI 1995 468, 570.

<sup>334</sup> See BBI 1995 I 468, 570; LPC 2004/2, 368 paragraph 57, *Produktbündel „Talk & Surf“*.

<sup>335</sup> BGE 139 I 72, *Publigroupe SA et al./WEKO*.

<sup>336</sup> See MARC AMSTUTZ/BLAISE CARRON, in: Basler Kommentar, Kartellgesetz, Amstutz/Reinert (Hrsg.), 2010, Art. 7 N 292.

<sup>337</sup> See BGE 137 II 199, *Terminierungsgebühr Swisscom*.

The Federal Supreme Court thereby requires for the existence of an abuse ‘that the other side of the market cannot oppose to or cannot avoid the economic pressure which is exerted based on the dominant position’.<sup>338</sup>

446. There has been widespread criticism on this decision by the Federal Supreme Court in academic contributions on this subject. It was pointed out that this interpretation concerning the element of imposition differs from what is practiced according to EU-law under which, despite a mostly identical wording, an abuse requires the implementation of unfair prices or other conditions of trade based on economic power.<sup>339</sup>

447. On closer examination, though, it becomes clear that in the case under consideration not even the minimal requirements with regards to this element of crime are fulfilled. Therefore the question regarding the importance of the element of the imposition can presently be left open.

448. In general, academic contributions on art. 7 CartA presume generally a causal relationship between a dominant position and the possibly abusive behavior is not required. It is simply required that there is a causal relationship between the abuse and the anticompetitive effect.<sup>340</sup> Concerning art. 7 para. 2(c) CartA (as well as in the decision by the Federal Supreme Court concerning the termination fee by Swisscom) an exemption to this general rule is postulated: The element of an ‘imposition’ would require a causal relationship between the dominant position and the abusive behavior as only this position would allow the dominant undertaking to apply prices and conditions of trade which would not be accepted in a normal competitive environment. ‘The imposition, which is stated within art. 7 para. 2(c) CartA is the causal link and this causal link constitutes the imposition.’<sup>341</sup> Art. 7 para. 2(c) CartA therefore requires, besides the general requirement of a causal relationship between the abuse and the anticompetitive effect also a causality between the dominant position the abusive behavior.<sup>342</sup>

449. That COMCO also shares this view regarding an exploitative abuse within the meaning of art. 7 para. 2(c) CartA can for example be seen in its response to the Federal Supreme Court on the subject of the termination fee by Swisscom, in which was quoted as follows: ‘[COMCO] raises the objection that the imposition of conditions set by an undertaking is not required. This element does not constitute a separate element of crime, but rather only sets the requirement that there is a causal relationship between the dominant position and the unfair prices and conditions of trade. Swisscom was able to set the amount of termination fees simply based the fact that it held a dominant position.’<sup>343</sup> The Federal Supreme Court agrees to this

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<sup>338</sup> BGE 137 II 199, E. 4.3.5., *Terminierungsgebühr Swisscom*; see also the Decisions by COMCO with respect to Art. 7 Abs. 2 Bst. c KG from that time on: LPC 2011/4, 525 f. paragraph 30 ff., *Terminierung Mobilfunk* und LPC 2014/2, 403 paragraph 81, *ETA Preiserhöhungen* sowie den Schlussbericht des Sekretariats: LPC 2012/4, 760 paragraph 94, *Maestro Fallback Interchange-Fee und Master Card Interchange-Fee*.

<sup>339</sup> See ANDREAS HEINEMANN, *Kartellrechtspraxis* 2013, 50 ff.

<sup>340</sup> For a detailed view on this subject: BSK KG-AMSTUTZ/CARRON (Fn 336), Art. 7 KG, N 19 ff. with further references.

<sup>341</sup> OLIVER VAHRENHOLT, in: SZW 2011, Das Tatbestandsmerkmal des „Erzwingens“ in EDV/Swisscom (Schweiz) AG, 497.

<sup>342</sup> Also see MARC AMSTUTZ, in: sic! 2011, 520, „Terminierungspreise im Mobilfunk“ Bundesgericht vom 11. April 2011 as well as BSK KG-AMSTUTZ/CARRON (Fn 336), Art. 7 KG, N 297 with further references.

<sup>343</sup> BGE 137 II 199, *Terminierungsgebühr Swisscom*, E. 4.2.



argument by stating that it is 'at least' correct that 'there must be a causality between the dominant position and the unfairness in the first place'.<sup>344</sup>

450. Booking.com applied wide parity clauses already in its contracts [...]. The existence of a dominant position by Booking.com before the year 2008 is in any case improbable.<sup>345</sup> At the time when Booking.com introduced these clauses there were a multitude of other undertakings which, besides the three parties, were active in the market. Apart from that online-booking platforms were, at that point in time, rather small players compared to other distribution channels. It furthermore needs to be considered that for example Expedia, which never held a dominant position, was even able to maintain more far-reaching parity clauses than Booking.com. Altogether it cannot be assumed that there is a causal relationship between the application of parity clauses by Booking.com and its possible dominant position.

451. Even if the current use of these clauses, in the sense of monitoring and enforcing these clauses by eventually threatening the use of sanctions, would be considered to constitute a possible abuse, it would be required to investigate the reasons for an adherence to these clauses by partner-hotels, possibly even for individual hotels, would have to be examined. As some of the responses of the hotel survey indicate, a certain number of partner-hotels of Booking.com would even without any parity clauses refrain for example from setting different prices across distribution channel. In the case of such hotels an imposition of parity clauses is quite implausible. Therefore investigation in order to determine the share of such hotels would have to be made.

452. Separate investigative measures with regards to an abuse with respect to specific hotels would, due to the large number of Booking.com's partner-hotels, would require very large efforts and therefore would only be taken under consideration if there were clear indications of such a potential abusive enforcement with respect to several hotels. [...] Finally it needs to be stated that up to this time Booking.com has never terminated a contract with one of its partner-hotels due to a breach of parity clauses.

### **C.5.2.3. Preliminary Result**

453. To summarize, it can be stated that there is no causal relationship between a possible dominant position by Booking.com and the parity clauses included in its contracts with its partner-hotels. The respective clauses were introduced at a time when a dominant position of Booking.com was improbable. It was furthermore demonstrated that even undertakings with a significantly weaker market position were able to apply equally (or sometimes even more) restrictive parity clauses. The application of price-, availability- and condition-parity clauses by Booking.com in its contracts with partner-hotels and/or the enforcement of such clauses therefore does not amount to an imposition of unfair conditions of trade within the meaning of art. 7 para. 2(c) CartA.

### **C.5.2.4. Exclusionary Abuse**

454. It remains to be determined whether Booking.com abused a possible dominant position in order to hinder other market participants in their activities and to force them out of business. In this regard it also needs to be determined if the behavior of Booking.com leads to barriers to entry which prevent potential competitors from entering the market as the existence of such anticompetitive effects is generally presumed in the economic literature on Across-Platforms

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<sup>344</sup> BGE 137 II 199, *Terminierungsgebühr Swisscom*, E. 4.3.4.

<sup>345</sup> See above, paragraph 423.

Parity Agreements (APPA).<sup>346</sup> Therefore it needs to be discussed whether there is an abusive behavior by a limitation of production, supply or technical demand within the meaning of art. 7 para. 2(e) CartA. The element of crime described in art. 7 para. 2(e) CartA in principle encompasses all kinds of tactics by a dominant undertaking to hinder or displace competitors thereby constituting a fallback-clause with regards to the other elements of crime listed in art. 7 para. 2 CartA.<sup>347</sup>

455. Especially types of behavior by a dominant company which have the aim to restrict the scope of marketing of competitors fall under the definition of a 'limitation of supply' within the meaning of art. 7 para. 2(e) CartA by artificially restricting market access in a way which is not the result of normal market developments or normal competition based on economic performance.<sup>348</sup> The term 'limitation' thereby only includes types of behavior which render products or services by competitors of the dominant undertaking less attractive or hinder their distribution. In the meantime this provision does not include types of behavior which aimed at improving the usability or availability of products or services of a dominant undertaking or the fact that competing undertakings are disadvantaged as a mere result of a better performance by the dominant undertaking, even if the wording of the law would also include such hindrances.<sup>349</sup>

456. Booking.com's parity clauses do not require hotels to offer lower prices, better availabilities or better conditions than compared to other distribution channels. It is only required to offer prices, availabilities and conditions which are at least as favorable as on other distribution channels. It therefore is not beyond any doubt that Booking.com behaves in a way which limits the supply of competitors, as there is especially no artificial limitation of supply as required by the element of crime stated in art. 7 para. 2(e) CartA. This is especially true for the availability-parity clause as rooms are only to be provided on a non-exclusive basis on Booking.com thereby allowing competitors to also distribute these rooms. The behavior of Booking.com can therefore rather be interpreted as having the goal to offer its services to its users at more attractive terms and with better availabilities without automatically leading to a hindrance of (current or potential) competitors or being aimed at leading to such a hindrance.

457. Beyond these facts there is a special situation in the market under consideration as all<sup>350</sup> competitors on the relevant market also use parity clauses. The parity clauses by Booking.com are in some cases even less far-reaching as the clauses by competitors. Specifically, Expedia uses Last-Room-Availability clauses which are not required by Booking.com.<sup>351</sup> Decreasing market shares by HRS and Expedia can therefore not be seen as being the result of Booking.com's parity clauses – and therefore a successful exclusionary strategy by Booking.com – but rather as being due to other factors such as superior services (such as support services for hotels etc.). Finally it can be stated that none of the competitors which have been consulted

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<sup>346</sup> See above, paragraph 134.

<sup>347</sup> See BSK KG-AMSTUTZ/CARRON (Fn 336), Art. 7 KG, paragraph 397 f.; EVELYNE CLERC/PRANVERA KËLLEZI, in: *Commentaire Romand, Droit de la concurrence*, Tercier/Bovet (Hrsg.), 2013, Art. 7 Abs. 2 KG N 234 f.

<sup>348</sup> See BSK KG-AMSTUTZ/CARRON (Fn 336), Art. 7 KG N 418 und 441; CR Concurrence-CLERC/KËLLEZI (Fn 347), Art. 7 Abs. 2 KG N 235; Decision by COMC on the subject of *Preispolitik und andere Verhaltensweisen der SDA* of 14. Juli 2014, not yet published, paragraph 130.

<sup>349</sup> See BSK KG-AMSTUTZ/CARRON (Fn 336), Art. 7 KG N 399 und 436 with further references

<sup>350</sup> STC has also included a price-parity clause in its contracts since the end of 2015. STC justifies this step by claiming that it is necessary to maintain price-parity as long as the most important players on the market, i.e. the parties to this procedure, have such clauses. STC would change its behavior immediately after the end of this procedure.

<sup>351</sup> See paragraph 33 ff.

have voiced the complaint that Booking.com's parity clauses lead to a hindrance of their own business activities.

#### **C.5.2.5. Preliminary Result**

458. Altogether there is no sufficient proof that Booking.com's parity clauses lead to a concrete limitation of supply by its competitors. The use of price-, availability- and condition-parity clauses by Booking.com therefore does not constitute a limitation of supply within the meaning of art. 7 para. 2(e) CartA.

#### **C.5.3. Conclusions**

459. Even in the case of a dominant position by Booking.com within the meaning of art. 4 para. 2 CartA, for which there are strong indications, the use of wide price-, availability and condition-parity clauses in its contracts and/or the enforcement of such clauses with respect to its partner-hotels would not constitute an unlawful behavior within the meaning of art. 7 para. 1 in conjunction with art. 7 para. 2(c and e) CartA. The question whether the clauses used by the parties would fulfil the definition of unfair conditions of trade within the meaning of art. 7 para. 2(c) CartA can therefore be left open. Altogether wide parity clauses can be qualified as unlawful agreements affecting competition within the meaning of art. 5 para. 1 CartA.

## D. Costs

460. Pursuant to art. 2 para. 1 Fee Regulation--CartA<sup>352</sup> those who caused an administrative procedure have to bear the respective costs. In an investigation pursuant to art. 27 ff. CartA if based on the assessment of facts of the case an unlawful restriction of competition is stated or if the parties comply voluntarily.<sup>353</sup> Therefore the parties the addressees of this decisions are obliged to bear the costs.

461. It was demonstrated that Booking.com, HRS and Expedia were parties to an unlawful agreement affecting competition pursuant to art. 5 para. 1 CartA. Therefore all three parties are jointly responsible for causing the respective administrative procedure. Accordingly the previous practice of the competition authorities, according to which – due to the lack of special circumstances, which would render such a result particularly unacceptable – the costs are levied on a per-capita-basis is applied. This takes primarily considerations of equality but also considerations concerning practicability into account.<sup>354</sup> As the division of the procedural costs should not depend on whether or not an undertaking, which is a party to an unlawful agreement affecting competition, is part of a corporate group, in this investigation each undertaking pursuant to art. . 2 para. 1 and 1<sup>bis</sup> CartA is to be regarded as an entity in the per-capita division of the costs, irrespective of the number of legal persons which are part of this undertaking. The costs are therefore to be imposed on the parties in equal parts and under joint guarantee (see art. 1a Fee Regulation-CartA together with art. 2 para. 2 General Fee Regulation<sup>355</sup>).

462. The duty to bear the costs does not apply to the points which are not confirmed and in which respect the procedure is therefore closed.<sup>356</sup> In this investigation this applies to art. 5 para. 4 and art. 7 CartA. In practice, it is impossible to exactly measure the exact expenses which relate to these specific points and to calculate a respective share of the costs. Meanwhile, it can be presumed that gathering the facts and the specific investigative and procedural steps relating to art. 5 para. 1 CartA caused altogether two thirds of the total procedural costs. The remaining third of the costs was therefore caused by specific steps relating to art. 5 para. 4 CartA as well as art. 7 CartA and is to covered the government's treasury.

463. Pursuant to art. 4 para. 2 Fee Regulation-CartA an hourly rate of CHF 100.– to 400.– is applied. The rate varies namely with the urgency of the procedure proceeding and the functional level of respective personnel. Expenses regarding postage fees, costs relating to telephone-calls and copies are included in these fees (art. 4 para. 4 Fee Regulation-CartA).

464. Based on the functional level of the members of staff working on this case an hourly fee of CHF 130.– to 290.– is applied. The amount of time spent on this investigation is altogether 1'862.90 hours. These hours are divided among the following hourly fees:

- 78.50 hours of CHF 130.– each, resulting in CHF 10'205.–

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<sup>352</sup> Verordnung vom 25. Februar 1998 über die Gebühren zum Kartellgesetz (Gebührenverordnung KG, GebV-KG; SR 251.2).

<sup>353</sup> BGE 128 II 247, 257 f. E. 6.1 (= LPC 2002/3, 546 f.), *BKW FMB Energie AG*; Art. 3 Abs. 2 Bst. b und c GebV-KG *e contrario*.

<sup>354</sup> LPC 2009/3, 221 paragraph 174, *Elektroinstallationsbetriebe Bern*.

<sup>355</sup> Allgemeine Gebührenverordnung vom 8. September 2004 (AllgGebV; SR 172.041.1).

<sup>356</sup> BGE 128 II 247, 257 f. E. 6.1 *e contrario* (= LPC 2002/3, 546 f.), *BKW FMB Energie AG*; Art. 3 Abs. 2 Bst. b und c GebV-KG; Judgement by the Federal Administrative Court, LPC 2013/4, 806 f. E. 16.1.3, *Gaba/WEKO*.

- 1'782.20 hours of CHF 200.– each, resulting in CHF 356'440.–
- 26.20 hours of CHF 290.– each, resulting in CHF 7'598.–

465. Therefore the costs of this procedure proceeding amount to CHF 374'243.–. As previously stated, one third of this amount is to be covered by the government's treasury.

466. Booking.com, HRS and Expedia are to bear the remaining costs in equal parts and under joint guarantee resulting in a fee of CHF 83'165.10 for each undertaking.

## E. Result

467. To summarize, COMCO comes, based on the above considerations, to the following result:

468. The application of wide parity clauses concerning prices, availabilities and conditions between Booking.com, HRS, Expedia and their respective partner-hotels constitute vertical agreements affecting competition within the meaning of art. 4 para. 1 CartA (see paragraph 147 ff.). The legal *presumption of an elimination of effective competition* of art. 5 para. 4 CartA does not apply (see paragraph 162 ff.). In the meantime, the vertical agreement on price-, availability- and condition-parity does *significantly restrict* competition within the meaning art. 5 para. 1 CartA. (see paragraph 175 ff.). There are no grounds of *economic efficiency* as laid out in art. 5 para. 2 CartA. (see paragraph 365 ff.). It therefore constitutes an unlawful agreement affecting competition within the meaning of art. 5 para. 1 CartA (see paragraph 409).

469. Based on this assessment the parties are prohibited from applying wide parity clauses. Therefore the application of narrow parity, as introduced by Booking.com by 1 July 2015 and by Expedia by 1 August 2015, is not prohibited. Nevertheless, question of whether or not these clauses conform to cartel law is currently left open as a final assessment on their practical impact cannot yet be made at the current time.<sup>357</sup>

470. There are strong indications that Booking.com holds a dominant position within the meaning art. 4 para. 2 CartA in the national market of the intermediation of bookings between hotels and customers (see paragraph 417 ff.). Meanwhile, an abuse of a possible dominant position cannot be demonstrated (see paragraph 436 ff.). There is furthermore no collective dominant positions of the undertaking mentioned in paragraph 468 together (see paragraph 424 ff.). Additionally, the existence of economic dependencies between hotels and online-booking platforms cannot be demonstrated (see paragraph 434). This investigation is therefore closed with respect to the allegation of an abuse of a dominant position (see paragraph 459).

471. The undertakings mentioned in paragraph 468 prohibited from applying the price-, availability- and conditions-parities under investigation to their partner-hotels by either contractual or other means (see paragraph 409 f.) and are informed about the legal consequences in case of a breach of this prohibition (art. 50 and 54 CartA).

472. Due to this result of the procedure the undertakings mentioned in paragraph 468 have to bear the costs of the procedure (see paragraphs 460 ff.).

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<sup>357</sup> See paragraph 57ff.

## F. Decision

Based on the facts and the previous considerations COMCO decides (pursuant to art. 30 para. 1 CartA):

1. Based on art. 5 para. 1 CartA Booking.com B.V. is prohibited from applying price- availability and condition-parities to partner-hotels in Switzerland such as they were included in contracts valid until 30 June 2015 by either contractual other means, insofar as these clauses commit hotels to treat online-booking platforms equally (wide parity clauses).
2. Based on art. 5 para. 1 CartA Expedia, Inc. is prohibited from applying price-, availability- and condition-parities to partner-hotels in Switzerland such as they were included in contracts valid until 31 July 2015 by either contractual other means, insofar as these clauses commit hotels to treat online-booking platforms equally (wide parity clauses).
3. Based on art. 5 para. 1 CartA HRS – Hotel Reservation Service, Robert Ragge GmbH – is prohibited from applying price-, availability- and condition-parities to partner-hotels in Switzerland such as they are included in contracts currently valid by either contractual other means, insofar as these clauses commit hotels to treat online-booking platforms equally (wide parity clauses).
4. HRS is obliged to inform its partner-hotels in writing at the latest one month after this decision enters into force about the changes pursuant to numeral 3 of the operative part of the decision.
5. Apart from that the proceedings [...] against Booking.com, HRS and Expedia are closed.
6. Two thirds of the cost of the procedure of CHF 374'243. – are imposed on the undertakings specified in numerals numeral 1 to 3 of the operative part of the decision in equal parts, i.e. CHF 83'165.10 each, and under joint guarantee.
7. This decision is addressed to:
  - Booking.com B.V., Herengracht 597, 1017 CE Amsterdam, The Netherlands represented by Dr. Franz Hoffet, Bettina Meyer und Martin Thomann, Homburger AG, Prime Tower, P.O. Box 314, 8037 Zurich
  - HRS – Hotel Reservation Service, Robert Ragge GmbH, Blaubach 32, 50676 Cologne, Germany represented by Dr. Jürg Borer, Schellenberg Wittmer AG, Löwenstrasse 19, P.O. Box 1876, 8021 Zurich
  - Expedia, Inc., 333 108th Ave NE, Bellevue, WA 98004, USA represented by Dr. Marcel Meinhardt, Lenz & Staehelin, Bleicherweg 58, 8027 Zurich
8. A copy of this decision is sent to:
  - Schweizer Hotelier-Verein, Monbijoustrasse 130, P.O. Box, 3001 Bern represented by FMP Fuhrer Marbach & Partner, Prof. Dr. Eugen Marbach, Konsumstrasse 16A, 3007 Bern

## **Competition Commission**

Prof. Dr. Vincent Martenet  
President

Dr. Rafael Corazza  
Director

Instructions on the right to appeal:

[...]