JUDGMENT OF THE COURT (Second Chamber)

19 September 2024 (*)

(Reference for a preliminary ruling – Competition – Article 101 TFEU – Agreements between undertakings – Contracts concluded between an online reservation platform and hoteliers – Price parity clauses – Ancillary restraint – Block exemption – Vertical agreements – Regulation (EU) No 330/2010 – Article 3(1) – Definition of the relevant market)

In Case C-264/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), made by decision of 22 February 2023, received at the Court on 24 April 2023, in the proceedings

Booking.com BV,

Booking.com (Deutschland) GmbH

v

25hours Hotel Company Berlin GmbH,

Aletto Kudamm GmbH,

Air-Hotel Wartburg Tagungs- & Sporthotel GmbH,

Andel's Berlin Hotelbetriebs GmbH,

Angleterre Hotel GmbH & Co. KG,

Atrium Hotelgesellschaft mbH,

Azimut Hotelbetrieb Köln GmbH & Co. KG,

Barcelo Cologne GmbH,

Business Hotels GmbH,

Cocoon München GmbH,

DJC Operations GmbH,

Dorint GmbH,

Eleazar Novum GmbH,

Empire Riverside Hotel GmbH & Co. KG,

Explorer Hotel Fischen GmbH & Co. KG,

Explorer Hotel Nesselwang GmbH & Co. KG,

Explorer Hotel Schönau GmbH & Co. KG,

Fleming's Hotel Management und Servicegesellschaft mbH & Co. KG,

G. Stürzer GmbH Hotelbetriebe,

Hotel Bellevue Dresden Betriebs GmbH,

Hotel Europäischer Hof W.A.L. Berk GmbH & Co. KG,

Hotel Hafen Hamburg. Wilhelm Bartels GmbH & Co. KG,

Hotel John F GmbH,

Hotel Obermühle GmbH,

Hotel Onyx GmbH,

Hotel Rubin GmbH,

Hotel Victoria Betriebs- und Verwaltungs GmbH,

Hotel Wallis GmbH,

i31 Hotel GmbH,

IntercityHotel GmbH,

ISA Group GmbH,

Kur-Cafe Hotel Allgäu GmbH,

Lindner Hotels AG,

M Privathotels GmbH & Co. KG,

Maritim Hotelgesellschaft mbH,

MEININGER Shared Services GmbH,

Oranien Hotelbetriebs GmbH,

Platzl Hotel Inselkammer KG,

prize Deutschland GmbH,

Relexa Hotel GmbH,

SANA BERLIN HOTEL GmbH,

SavFra Hotelbesitz GmbH,

Scandic Hotels Deutschland GmbH,

Schlossgarten Hotelgesellschaft mbH,

Seaside Hotels GmbH & Co. KG,

SHK Hotel Betriebsgesellschaft mbH,

Steigenberger Hotels GmbH,

Sunflower Management GmbH & Co. KG,

The Mandala Hotel GmbH,

The Mandala Suites GmbH,

THR Hotel am Alexanderplatz Berlin Betriebs- und Management GmbH,

THR III Berlin Prager-Platz Hotelbetriebs- und Beteiligungsgesellschaft mbH,

THR München Konferenz und Event Hotelbetriebs- und Management GmbH,

THR Rhein/Main Hotelbetriebs- und Beteiligungs-GmbH,

THR XI Berlin Hotelbetriebs- und Beteiligungsgesellschaft mbH,

THR XXX Hotelbetriebs- und Beteiligungs-GmbH,

Upstalsboom Hotel + Freizeit GmbH & Co. KG,

VI VADI HOTEL Betriebsgesellschaft mbH & Co. KG,

Weissbach Hotelbetriebsgesellschaft mbH,

Wickenhäuser & Egger AG,

Wikingerhof GmbH & Co. KG,

Hans-Hermann Geiling (Hotel Präsident),

Karl Herfurtner, **Hotel Stadt München e.K.,**

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, F. Biltgen, N. Wahl (Rapporteur), J. Passer and M.L. Arastey Sahún, Judges,

Advocate General: A.M. Collins,

Registrar: A. Lamote, Administrator,

having regard to the written procedure and further to the hearing on 29 February 2024,

after considering the observations submitted on behalf of:

– Booking.com BV and Booking.com (Deutschland) GmbH, by J.K. de Pree, H. Gornall, P.W. Post and K.J. Saarloos, advocaten,

– 25hours Hotel Company Berlin GmbH and Others, by R. Buchmann and V. Soyez, Rechtsanwälte, H.C.E.P.J. Janssen and A.P. van Oosten, advocaten,

– the German Government, by J. Möller and P.-L. Krüger, acting as Agents,

– the Greek Government, by K. Boskovits and C. Kokkosi, acting as Agents,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

– the Austrian Government, by J. Schmoll and E. Samoilova, acting as Agents,

– the European Commission, by S. Baches Opi, G. Meessen and C. Zois, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 June 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU and of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1).

2 The request has been made in the context of a dispute between Booking.com BV and Booking.com (Deutschland) GmbH (together, 'Booking.com'), on the one hand, and 25hours Hotel Company Berlin GmbH and 62 other hotel establishments in Germany, on the other, concerning the validity, in the light of Article 101 TFEU, of the price parity clauses used by Booking.com in the contracts concluded with those establishments.

Legal context

Regulation (EC) No 1/2003

3 Article 11 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), entitled 'Cooperation between the [European] Commission and the competition authorities of the Member States', provides:

'1. The Commission and the competition authorities of the Member States shall apply the [EU] competition rules in close cooperation.

...

5. The competition authorities of the Member States may consult the Commission on any case involving the application of [EU] law.

...'

Regulation No 330/2010

4 In accordance with the second paragraph of Article 10 thereof, Regulation No 330/2010 expired on 31 May 2022.

5 Recitals 5 and 9 of that regulation stated:

'(5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) [TFEU].

…

(9) Above the market share threshold of 30%, there can be no presumption that vertical agreements falling within the scope of Article 101(1) [TFEU] will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition. At the same time, there is no presumption that those vertical agreements are either caught by Article 101(1) [TFEU] or that they fail to satisfy the conditions of Article 101(3) [TFEU].'

6 Under Article 1(1)(a) of that regulation:

'For the purposes of this Regulation, the following definitions shall apply:

(a) "vertical agreement" means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'.

7 Article 2 of the same regulation provided:

'1. Pursuant to Article 101(3) [TFEU] and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) [TFEU] shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.

…'

8 Article 3(1) of Regulation No 330/2010 was thus worded:

'The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.'

Directive 2014/104/EU

9 Article 1 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1), entitled 'Subject matter and scope', provides:

'1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the [European] Union for anyone who has suffered such harm.

2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.'

10 Under Article 9 of that directive, entitled 'Effect of national decisions':

'1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the

purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Booking.com BV, a company incorporated under Netherlands law with its registered office in Amsterdam (Netherlands), was established in 1996 and offers a worldwide intermediation service for reserving accommodation through the operation of its online platform Booking.com. It is supported in its activities by subsidiaries established in other Member States, including in Germany by Booking.com (Deutschland).

12 Booking.com is neither a supplier nor a purchaser of accommodation services. Nor does it determine the accommodations and the corresponding prices offered on its platform, those elements being defined by accommodation establishments. Thus, Booking.com merely connects establishments and travellers on its platform.

13 The services offered by the platform operated by Booking.com are free of charge for travellers. Hotel establishments pay a commission to Booking.com if a customer makes a reservation through that platform without cancelling it. Independently of that platform, those establishments may use alternative sales channels.

14 When it entered the German market in 2006, Booking.com, like other hotel reservation platforms referred to also as 'online travel agencies' ('OTAs'), inserted, into the general terms and conditions of the agreements concluded with accommodation providers, a clause known as a 'wide parity' clause. Pursuant to that clause, those service providers were prohibited from offering, through their own sales channels or through sales channels operated by third parties – including competing OTAs – rooms at prices lower than those offered on Booking.com.

15 By decision of 20 December 2013, the Bundeskartellamt (Federal Cartel Office, Germany) concluded, in essence, that the wide parity clause used by Hotel Reservation Service Robert Ragge GmbH ('HRS'), one of the OTAs operating on the German market, was contrary to the prohibition of cartels in EU and German law and ordered that it no longer be used.

16 In 2013, that authority also opened an investigation concerning the wide parity clause used by Booking.com, which was similar to the one that had been used by HRS.

17 By a judgment of 9 January 2015, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) dismissed the appeal brought by HRS against the decision of that authority of 20 December 2013. That judgment, which was not subject to an appeal, became final.

18 With effect from 1 July 2015, Booking.com undertook, in consultation with the French, Italian and Swedish competition authorities, to remove the wide parity clause from its general terms and conditions and replace it with a 'narrow parity' clause, under which the prohibition on accommodation providers offering their rooms at better prices than those offered on Booking.com applied only to offers made through their own sales channels.

19 By a decision of 22 December 2015, taken after consulting the Commission pursuant to Article 11(5) of Regulation No 1/2003, the Federal Cartel Office found that a narrow parity clause such as that one was also contrary to the prohibition of agreements, decisions and concerted practices in EU and German law and ordered Booking.com to cease using it. That authority considered, in essence, that such clauses restricted competition both on the market for the provision of accommodation services and on the market for the provision of online intermediation services by platforms to accommodation providers. That authority also took the view, first, that, because of Booking.com's large share of the relevant market, those clauses could not be exempted by virtue of Regulation No 330/2010 and, second, that the conditions for the application of an individual exemption under Article 101(3) TFEU were not fulfilled, either.

20 By a judgment of 4 June 2019, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) upheld, in part, the appeal brought by Booking.com against that decision of 22 December 2015. That court inter alia found that the narrow parity clause did restrict competition, but could nevertheless, as an ancillary restraint, be deemed necessary to enable Booking.com to receive fair remuneration for its provision of services. It was therefore unfair that accommodation establishments could register on Booking.com's reservation platform, but then encourage customers to reserve directly with them by offering better rates on their own site. According to that court, the possibility for accommodation establishments to transfer reservations to their own reservation systems was sufficient justification for Booking.com to prevent those establishments contractually from engaging in 'free-riding' activities. Thus, that clause could not, according to that same court, be regarded as contrary to the prohibition of agreements, decisions and concerted practices laid down in national law and in Article 101(1) TFEU.

21 In 2020, Hotelverband Deutschland e.V., an association representing more than 2 600 hotels, lodged an action for damages against Booking.com before the Landgericht Berlin (Regional Court, Berlin, Germany) seeking compensation for the damage which the members of that association claim to have suffered as a result of the price parity clauses.

22 By a decision of 18 May 2021, the Bundesgerichtshof (Federal Court of Justice, Germany), hearing an appeal brought by the Federal Cartel Office, annulled the decision of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) of 4 June 2019. It held that the narrow parity clause significantly restricted competition on the market for online hotel reservation platforms and on the market for hotel accommodation. Such a clause could not be classified as an 'ancillary restraint', since it had not been established that, in its absence, Booking.com's profitability would be compromised. Nor could that clause benefit from an exemption under Regulation No 330/2010 or from any other exemption from the prohibition of agreements, decisions and concerted practices in EU and German law.

23 On 23 October 2020, Booking.com brought an action before the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), which is the referring court in the present case, seeking a declaration, first, that the parity clauses that it employs did not infringe Article 101 TFEU and, second, that the defendants in the main proceedings had not suffered any loss as a result of those clauses. Those defendants, by way of counterclaim, requested that court, first, to declare that Booking.com had infringed Article 101 TFEU and, second, to order it to pay damages for infringing Article 101 TFEU.

24 According to the referring court, which found itself to have jurisdiction to hear the case by an interlocutory judgment of 26 October 2022, the question arises, in the first place, whether the price parity clauses – both wide and narrow – that are inserted into the contracts concluded between OTAs and affiliated accommodation providers must, for the purposes of the application of Article 101(1) TFEU, be classified as 'ancillary restraints'.

25 The referring court notes that the Court has not yet ruled on the question whether such clauses, by virtue of which an online reservation platform prevents accommodation providers affiliated to that platform from charging lower prices – depending on the case on all sales channels or on certain other sales channels – than those offered on that platform, are liable, as ancillary restraints, to fall outside the scope of the prohibition of agreements, decisions and concerted practices laid down in

Article 101(1) TFEU. That question gives rise, in that court's view, to differing analyses, which could lead to the adoption of contradictory decisions.

26 In that regard, the referring court queries whether Booking.com should not be able to protect itself against the risks of free-riding. According to that court, it is apparent inter alia from the case-law relied on by the applicants in the main proceedings that it is not necessary to show that the breach of a contractual limitation jeopardises the viability of the undertaking, but that it is sufficient that the undertaking's viability be 'compromised'. It should also be noted that, in the meantime, both the narrow parity clause and the wide parity clause have been prohibited by law in Belgium, France, Italy and Austria and that the proceedings currently pending before the Landgericht Berlin (Regional Court, Berlin) concern the same question as that at issue in the present proceedings.

27 In the second place, should it be found that the parity clauses at issue cannot be classified as 'ancillary restraints', the question then arises, according to the referring court, as to whether those clauses may be exempted. For the purposes of applying Regulation No 330/2010, however, it would be necessary to know how to define the relevant product market. In the case at hand, the referring court considers that the manner of defining the relevant market, which is 'multi-sided', lacks clarity.

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

'1. Do wide and narrow parity clauses constitute an ancillary restr[aint] in the context of [the application of] Article 101(1) TFEU?

2. If Regulation … No 330/2010 applies, how should the relevant market be defined when transactions are mediated by an [OTA] on which accommodation establishments can offer rooms and get in touch with travellers who can book a room through the platform?'

Admissibility of the request for a preliminary ruling

29 The admissibility of the request for a preliminary ruling has been challenged on three grounds.

30 In the first place, according to the defendants in the main proceedings, the request does not meet the requirements laid down in Article 94 of the Rules of Procedure of the Court, the referring court having failed to describe precisely and comprehensively the factual context in which the questions are asked.

31 In that regard, it is clear from a reading of the request for a preliminary ruling as a whole that the referring court has adequately defined the factual and legal framework within which it has made its request for an interpretation so as to enable both the interested persons to submit their observations, in accordance with Article 23 of the Statute of the Court of Justice of the European, and the Court to provide a useful reply to that request. In particular, that court clearly referred to the decisions taken both by the Federal Cartel Office and by the German courts in the context of disputes between OTAs and hotel establishments in Germany.

32 The first ground of inadmissibility raised by the defendants in the main proceedings must therefore be rejected.

33 In the second place, both the defendants in the main proceedings and the German Government submit that the request for a preliminary ruling concerns purely hypothetical questions which have no bearing on the main proceedings. They submit that the issue underlying the questions referred for a preliminary ruling has already been addressed by the Federal Cartel Office, in its decisions of 20 December 2013 and 22 December 2015, with regard to wide parity clauses and narrow parity clauses respectively, decisions which were ultimately confirmed by the decision of 9 January 2015 of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) and that of 18 May 2021 of the

Bundesgerichtshof (Federal Court of Justice). To the extent, inter alia, that the referring court should, by virtue of Article 9 of Directive 2014/104, take into account those decisions and those judgments, however, it is appropriate to question the necessity of referring those questions.

34 In that regard, it should be recalled that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgments of 9 July 2020, *Santen*, C-673/18, EU:C:2020:531, paragraph 26 and the case-law cited, and of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 27).

35 It follows that, since questions concerning EU law enjoy a presumption of relevance, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 9 July 2020, *Santen*, C-673/18, EU:C:2020:531, paragraph 27 and the case-law cited, and of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 28).

36 That is not the situation here. The Court's answer to the questions referred will clearly determine the outcome of the dispute in the main proceedings.

37 In that regard, it is apparent from the documents in the file before the Court that the main proceedings appear to fall, in part, within the scope of Directive 2014/104, as defined in Article 1 thereof. Subject to the verifications which it is for the referring court to carry out, the main claims and counterclaims lodged with it concern not only the question whether the parity clauses at issue infringe Article 101 TFEU, but also the question whether the applicants in the main proceedings may be held liable for the damage allegedly suffered by the defendants in the main proceedings as a result of such clauses.

38 Article 9(2) of Directive 2014/104 provides that, where an action for damages for an infringement of competition law is brought before the courts of a Member State, Member States are to ensure that final decisions of a national competition authority or of a review court of another Member State may be presented as prima facie evidence of an infringement of competition law.

39 It follows that, even assuming that the referring court is in fact seised of an action for damages falling within the scope of that directive, which it is for it to determine, that court is not necessarily bound by the findings relating to price parity clauses in the decisions of the Federal Cartel Office or in subsequent decisions of the German courts. The fact that those decisions may constitute prima facie evidence of the existence of an infringement does not therefore render the present request for a preliminary ruling inadmissible.

40 So far as concerns the question whether and to what extent final decisions adopted in Germany are liable to have an impact on the assessment that the national court will have to make as to the conformity of the parity clauses at issue, it should be recalled that Article 9(3) of Directive 2014/104 clearly states that the provisions of paragraphs 1 and 2 of that article are 'without prejudice to the rights and obligations of national courts under Article 267 TFEU'.

41 Moreover, there is no indication that the preliminary ruling procedure has, as is stated in paragraph 29 of the judgment of 16 December 1981, *Foglia* (244/80, EU:C:1981:302), been diverted by the parties from the purposes for which it was laid down. Even assuming that the bringing of the action before the referring court by the applicants in the main proceedings had the ultimate objective of counteracting the final decisions taken in Germany by which those clauses were found to be contrary

to Article 101 TFEU, it is only in exceptional circumstances that the Court can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction.

42 It is therefore not obvious that the interpretation of the provisions referred to in the questions referred bears no relation to the actual facts of the main action or its purpose, or that the problem is hypothetical.

43 The second ground of inadmissibility must therefore also be rejected.

44 In the third place, the defendants in the main proceedings and the German Government take the view that the request for a preliminary ruling does not relate to the 'interpretation' of the Treaties and secondary legislation, within the meaning of Article 267 TFEU, but in fact concerns the 'application' of provisions of EU law. The question whether price parity clauses constitute ancillary restraints, falling outside the scope of Article 101(1) TFEU, cannot be answered in the abstract and independently of the factual, legal and economic context in which they apply. The definition of a relevant product market is not a legal concept, but rather requires a factual assessment.

45 In that regard, it must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to give a ruling on the interpretation of the Treaties and on acts adopted by the EU institutions, bodies and agencies. It is therefore not for the Court either to establish the facts which have given rise to the dispute in the main proceedings and to draw any inferences therefrom for the decision which the referring court is required to deliver, or to interpret the relevant national laws or regulations (judgment of 14 May 2020, *Bouygues travaux publics and Others*, C-17/19, EU:C:2020:379, paragraphs 51 and 52).

46 That being so, the Court may, in the framework of the judicial cooperation provided for by that article and on the basis of the material in the case file, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 133 and the case-law cited).

47 Seised, more specifically, of requests for the conduct of an undertaking to be classified in the light of the provisions of EU competition law, in particular Article 101 TFEU, the Court has held that, while it is for the referring court to determine in the end whether, taking account of all of the information relevant to the situation in the main proceedings and the economic and legal context of which it forms a part, the agreement at issue has as its object the restriction of competition, it may, however, on the basis of the information available to it, provide clarification designed to give the national court guidance in its interpretation in order to enable it to decide the case before it (see, inter alia, judgments of 18 November 2021, *Visma Enterprise*, C-306/20, EU:C:2021:935, paragraphs 51 and 52 and the case-law cited, and of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraphs 28 and 29).

48 It follows that the third ground of inadmissibility cannot be upheld, either.

49 In the light of all the foregoing considerations, the request for a preliminary ruling is admissible.

Consideration of the questions referred

The first question

50 By its first question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that parity clauses, both wide and narrow, inserted into the agreements concluded between online hotel reservation platforms and providers of accommodation services fall outside the scope of that provision on the ground that they are ancillary to those agreements.

51 According to settled case-law, if a given operation or activity is not covered by the prohibition rule laid down in Article 101(1) TFEU owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives pursued by one or the other (see, to that effect, judgments of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89; of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 69; and of 26 October 2023, *EDP–Energias de Portugal and Others*, C-331/21, EU:C:2023:812, paragraph 88).

52 Accordingly, where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising the existence and aim of that operation or activity, it is necessary to examine the compatibility of that restriction with Article 101 TFEU in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 101(1) TFEU (see, to that effect, judgments of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 90; of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 70; and of 26 October 2023, *EDP–Energias de Portugal and Others*, C-331/21, EU:C:2023:812, paragraph 89).

53 In order for a restriction to be classified as 'ancillary', it is necessary to establish, first, whether the implementation of the main operation, which is not anti-competitive in nature, would be impossible in the absence of the restriction in question. The fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as 'ancillary'. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 101(1) TFEU (see, to that effect, judgments of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91; of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 71; and of 26 October 2023, *EDP–Energias de Portugal and Others*, C-331/21, EU:C:2023:812, paragraph 90).

54 Second, it is necessary, where appropriate, to examine the proportionality of the restriction at issue to the objectives underlying the operation in question. Thus, in order to refute the ancillary nature of a restriction, the Commission and the national competition authorities may examine whether there are realistic alternatives which are less restrictive of competition than the restriction at issue. Those alternatives are not limited to the situation that would arise in the absence of the restriction in question but may also extend to other counterfactual hypotheses based, inter alia, on realistic situations that might arise in the absence of that restriction (see, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraphs 107 to 111).

55 It is important to specify that a distinction must be made between the concept of 'ancillary restraints' as it is examined in the context of Article 101(1) TFEU and the exemption based on Article 101(3) TFEU. Unlike the latter, the condition relating to objective necessity, in order to classify a restraint as 'ancillary' for the purposes of the application of Article 101(1) TFEU, does not require a balancing of the procompetitive and anticompetitive effects of an agreement. It is only in the context of Article 101(3) TFEU that that balancing may take place (see, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 93).

56 In the case at hand, it is in principle for the referring court alone, taking into account all the facts that are put before it, to determine whether the conditions for establishing the existence of an ancillary restraint have been met. It may, in particular, take into account, in accordance with Article 9(2) of Directive 2014/104, when it is hearing an action falling within the scope of that directive, as defined in Article 1(2) thereof, final decisions taken by a national competition authority or by a review court.

57 The Court is nevertheless entitled to provide the referring court with indications to guide it in its examination of the objective necessity of a restriction in relation to the main operation.

58 Such an examination, unlike that required in the context of the balancing of the procompetitive and anticompetitive effects of an agreement for the purposes of the application of Article 101(3) TFEU, is relatively general and abstract in nature and does not require a purely factual assessment.

59 In the first place, it appears that the main operation at issue in the present case, namely the provision of online hotel reservation services by platforms such as Booking.com, has had a neutral, or even positive, effect on competition. Those services lead to significant efficiency gains by enabling, on the one hand, consumers to have access to a wide range of accommodation offers and to compare those offers simply and quickly according to various criteria and, on the other hand, accommodation providers to acquire greater visibility and thereby increase the number of potential customers.

60 In the second place, it has not been established, by contrast, that price parity clauses, first, are objectively necessary for the implementation of that main operation and, second, are proportionate to the objective pursued by it.

61 In that regard, so far as concerns wide parity clauses, which prohibit partner hoteliers referenced on the reservation platform from offering, on their own sales channels or on sales channels operated by third parties, rooms at a lower price than that offered on that platform, they do not appear to be objectively necessary for the main operation of providing online hotel reservation services or proportionate to the objective pursued by it.

62 After all, there is no intrinsic link between the continued existence of the main activity of the hotel reservation platform and the imposition of such clauses, which clearly produce appreciable restrictive effects. In addition to the fact that such clauses are liable to reduce competition between the various hotel reservation platforms, they carry the risk of ousting small platforms and new entrants.

63 The same is true, in the circumstances of the case in the main proceedings, of narrow parity clauses which prohibit only partner accommodation providers from offering to the public on their own online channels overnight stays at a rate lower than that offered on the hotel reservation platform. Although the latter clauses give rise, prima facie, to a less restrictive effect on competition and are intended to address the risk of free-riding referred to, in particular, by Booking.com in the case in the main proceedings, they do not appear to be objectively necessary to ensure the economic viability of the hotel reservation platform.

64 It is true that, in the context of the main proceedings, it has been argued that the parity clauses are intended to prevent, on the one hand, accommodation providers from making unfair use, without consideration, of the services and visibility offered by the hotel reservation platform and, on the other hand, the investments made in the development of the search and comparison functions of that platform from being amortised.

65 As is apparent from the case-law recalled in paragraph 55 of the present judgment, however, the application of the concept of 'ancillary restraint', which determines whether a restriction may escape the prohibition laid down in Article 101(1) TFEU, must not lead to the creation of an amalgamation of, on the one hand, the conditions set by the case-law for classifying, for the purposes of the application of Article 101(1) TFEU, a restriction as 'ancillary' and, on the other hand, the indispensability test required under Article 101(3) TFEU for a prohibited restriction to qualify for an exemption.

66 It is apparent from the case-law cited in paragraphs 51 to 55 of the present judgment that, during the examination of the objective necessity of a restriction in relation to the main operation, it is not a question of analysing whether, having regard to the competitive situation on the relevant market, such a restriction is required to ensure the commercial success of the main operation, but of determining

whether, in the particular context of that operation, the restriction in question is indispensable to the implementation of the operation.

67 Classifying a restriction as 'ancillary' – and escaping the prohibition laid down in Article 101(1) TFEU – has been envisaged by the Court only in situations where the implementation of the main operation was necessarily compromised in the absence of such a restriction. Thus, only restrictions which were inherently necessary for the main operation to be able, in any event, to be implemented have been able to be classified as 'ancillary restraints'.

68 That was the situation in the case which gave rise to the judgment of 11 July 1985, *Remia and Others* v *Commission* (42/84, EU:C:1985:327, paragraphs 19 and 20), in which the Court held that a non-competition clause was objectively necessary for a successful transfer of undertakings, in so far as, without such a clause, and should the seller and the buyer remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. It was found that the vendor, with his particularly detailed knowledge of the transferred undertaking, was still in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business.

69 That was also the situation in respect of certain restrictions referred to in the case which gave rise to the judgment of 28 January 1986, *Pronuptia de Paris* (161/84, EU:C:1986:41). In that judgment, the Court held that the clauses of franchise agreements which are essential in order for the franchise system to work did not constitute restrictions of competition. That was the case as regards clauses which prevented the know-how and assistance provided by the franchisor from benefitting competitors. Likewise, clauses established the means of control necessary for maintaining the identity and reputation of the franchise network bearing the franchisor's business name or symbol (paragraphs 16 and 17 of the said judgment).

70 The Court also held, in the judgment of 19 April 1988, *Erauw-Jacquery* (27/87, EU:C:1988:183, paragraph 11), that a provision of an agreement concerning the propagation and sale of seed, in respect of which one of the parties was the holder or the agent of the holder of certain plant breeders' rights, which prohibited the licensee from selling and exporting the basic seed was compatible with Article 85(1) of the EC Treaty (now Article 101(1) TFEU) in so far as it was necessary in order to enable the breeder to select the growers who were to be licensees.

71 The Court further considered, in the judgments of 15 December 1994, *DLG* (C-250/92, EU:C:1994:413, paragraph 45), and of 12 December 1995, *Oude Luttikhuis and Others* (C-399/93, EU:C:1995:434, paragraph 20), that certain restrictions imposed on the members of a purchasing cooperative or of an agricultural cooperative society, such as those forbidding them from participating in other forms of organised cooperation which is in direct competition with it or those providing for a withdrawal fee scheme, did not fall within the scope of the prohibition then laid down in Article 101(1) TFEU, since, in particular, the provisions of the statutes at issue were limited to what was necessary to ensure the proper functioning of the cooperative in question and to maintain its contractual power in relation to producers.

72 In the case at hand, the fact that the absence of price parity clauses imposed by the hotel reservation platform might possibly have negative consequences for the profitability of the services offered by that platform does not, in itself, mean that those clauses must be regarded as being objectively necessary. Such a circumstance, were it established, appears to relate to the business model followed by the online reservation platform, which inter alia opted to limit the level of commissions payable by affiliated accommodation providers in order to increase the volume of offers submitted on that platform and to reinforce the indirect network effects that this generates.

73 Thus, the fact, assuming it were established, that price parity clauses tend to combat possible free-riding phenomena and are indispensable in guaranteeing efficiency gains or in ensuring the commercial success of the main operation does not make it possible to classify them as 'ancillary

restraints' for the purposes of Article 101(1) TFEU. That fact can be taken into account only in the context of the application of Article 101(3) TFEU.

74 Although it is relatively abstract, the examination of the objective necessity of a restriction in relation to the main operation may, in particular, be based on a counterfactual analysis making it possible to examine how the online intermediation services would have functioned in the absence of the parity clause (see, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 164). It is apparent from the documents before the Court, however, that, although both wide and narrow parity clauses have been prohibited in several Member States, Booking.com's provision of services has not been compromised.

75 In the light of all the foregoing considerations, the answer to the first question is that Article 101(1) TFEU must be interpreted as meaning that parity clauses, both wide and narrow, inserted into the agreements concluded between online hotel reservation platforms and providers of accommodation services do not fall outside the scope of that provision on the ground that they are ancillary to those agreements.

The second question

76 By its second question, the referring court asks, in essence, how should, for the purposes of the application of Article 3(1) of Regulation No 330/2010, the relevant product market be defined in a situation in which a hotel reservation platform acts as intermediary in transactions concluded between providers of accommodation services and consumers.

77 Pursuant to Article 3(1) of Regulation No 330/2010, the exemption provided for in Article 2 is to apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

78 The market share threshold provided for in that provision is intended, as recital 5 of that regulation confirms, to limit the benefit of the block exemption established by that regulation to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) TFEU. As recital 9 of the same regulation states, above the market share threshold of 30%, there can be no presumption that vertical agreements falling within the scope of Article 101(1) TFEU will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.

79 In that regard, the referring court started from the premiss that the restrictions of competition brought about by the price parity clauses at issue form part of a 'vertical agreement', which, under Article 1(1)(a) of Regulation No 330/2010, is defined as 'an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'.

80 The Court is therefore asked only to provide guidance as to the elements of interpretation to be taken into account for the purposes of the definition of the relevant market where, as in the case in the main proceedings, online intermediation services are at issue, it being specified that such a definition, which requires the conditions of competition and the structure of supply and demand on the market concerned to be taken into consideration, is largely dependent on an in-depth factual examination which only the referring court can carry out. This is all the more so since that court has provided the Court with little information and, consequently, the Court is not in a position to carry out a rigorous definition of the relevant product market.

81 As is stated both in paragraph 2 of the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5) and in paragraph 6 of the Commission's

revised 2024 Notice on the definition of relevant market for the purposes of Union competition law (OJ 2024 C 1645, p. 1), the definition of the market makes it possible to identify and define the boundaries of competition between the undertakings concerned.

82 As regards the product market, which is the only point at issue in this question, it is apparent from the Court's case-law that the concept of 'relevant market' implies that there can be effective competition between the products or services which form part of it, and this presupposes that there is a sufficient degree of interchangeability between all the products or services forming part of the same market in so far as a specific use of such products or services is concerned. That interchangeability or substitutability is not assessed solely in relation to the objective characteristics of the products and services at issue. There must also be taken into consideration the conditions of competition and the structure of supply and demand on the market (judgments of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 51 and the case-law cited, and of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 129).

83 In the case at hand, the referring court ultimately seeks to ascertain whether, as was decided in the proceedings instituted in Germany, the relevant product market for the purposes of the application of the market share threshold provided for in Regulation No 330/2010 was the 'market for hotel platforms', defined as the market on which online hotel platforms offer intermediation services to accommodation providers, or whether the relevant market is broader than that for hotel reservation portals.

84 In that regard, as is indicated in paragraph 95 of the revised notice cited in paragraph 81 of the present judgment, in the presence of multi-sided platforms, it is possible to define a relevant product market for the products offered by a platform as a whole, in a way that encompasses all (or multiple) user groups, or indeed separate (although interrelated) relevant product markets for the products offered on each side of the platform. Depending on the facts of the case, it may be more appropriate to define separate markets where there are significant differences in the substitution possibilities on the different sides of the platform. To assess whether such differences exist, account may be taken of factors such as whether the undertakings offering substitutable products for each user group differ, the degree of product differentiation on each side (or each user group's perception thereof), behavioural factors such as the accommodation decisions of each user group and the nature of the platform.

85 In order to determine the market share held by Booking.com as a provider of online intermediation services to accommodation providers for the purposes of the application of Article 3(1) of Regulation No 330/2010, it is therefore necessary to examine whether other types of intermediation services and other sales channels are substitutable for the intermediation services from the point of view of demand, on the one hand, from accommodation providers for those intermediation services and, on the other hand, from end customers.

86 The referring court must therefore, in order to determine the relevant market, verify whether there is actual substitutability between online intermediation services and other sales channels, irrespective of the fact that those channels have different characteristics and do not offer the same functionalities for searching for and comparing the offers of hotel services.

87 In that context, it is for the referring court to take account of all the information that has been submitted to it.

88 In the case at hand, it should be noted that, in the proceedings instituted in Germany, which gave rise to the present case, the Bundesgerichtshof (Federal Court of Justice), in its decision of 18 May 2021, confirmed the assessments made both by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) and by the Federal Cartel Office for the purposes of the definition of the relevant market. It thus confirmed the conclusion that the relevant product market for the purposes of the application of the market share threshold of Regulation No 330/2010 was the market for hotel platforms, defined

as the market on which online hotel platforms offer intermediation services to accommodation providers.

89 Although the findings of the Federal Cartel Office and the review bodies in Germany on the definition of the relevant product market for the purposes of the application of Regulation No 330/2010 do not relate *stricto sensu* to final decisions establishing an infringement of competition law which, in accordance with Article 9(2) of Directive 2014/104, may be presented before national courts at least as prima facie evidence of an infringement, the fact remains that those findings, where they relate to the same geographic market, are among the particularly relevant contextual factors.

90 It is, however, for the referring court to determine whether such a market definition, which takes account of the particular characteristics of the 'contract services' offered by the OTA both from the point of view of accommodation providers and from the point of view of end customers, is vitiated by any error of analysis or is based on erroneous findings.

91 In the light of all the foregoing considerations, the answer to the second question is that Article 3(1) of Regulation No 330/2010 must be interpreted as meaning that, in a situation in which an online hotel reservation platform acts as intermediary in transactions concluded between accommodation establishments and consumers, the definition of the relevant market for the purposes of the application of the market share thresholds provided for in that provision requires a concrete examination of the substitutability, from a supply and demand point of view, between online intermediation services and other sales channels.

Costs

92 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 101(1) TFEU**

   must be interpreted as meaning that parity clauses, both wide and narrow, inserted into the agreements concluded between online hotel reservation platforms and providers of accommodation services do not fall outside the scope of that provision on the ground that they are ancillary to those agreements.

2. **Article 3(1) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices**

   must be interpreted as meaning that in a situation in which an online hotel reservation platform acts as intermediary in transactions concluded between accommodation establishments and consumers, the definition of the relevant market for the purposes of the application of the market share thresholds provided for in that provision requires a concrete examination of the substitutability, from a supply and demand point of view, between online intermediation services and other sales channels.

[Signatures]