EUROPEAN COMMISSION
Competition DG

CASE AT. 40528 - Melia (Holiday Pricing)

(Only the English text is authentic)

ANTITRUST PROCEDURE
Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 21/02/2020

EUROPEAN
COMMISSION

Brussels, 21.2.2020
C(2020) 893 final

SENSITIVE[*]**:** *COMP Operations*

COMMISSION DECISION

of 21.2.2020

relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

Case AT. 40528 - Melia (Holiday Pricing)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,[1] and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 2 February 2017[2] to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty,[3]

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

1. INTRODUCTION

(1) This Decision is addressed to Meliá Hotels International, S.A. The addressee is referred to in this Decision as "Meliá".

(2) The Commission finds that Meliá participated in a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union

[1] OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

[2] Commission decision of 2 February 2017 under the previous case number AT.40308 – Holiday Pricing.

[3] OJ L 123, 27.4.2004, p. 18.

("TFEU") and Article 53 of the Agreement on the European Economic Area ("the EEA Agreement"), spanning the period from 1 January 2014 to 31 December 2015 ("the relevant period"). The infringement concerns vertical contracts concluded by Meliá which restricted active and passive sales of hotel accommodation. In particular, Meliá's standard terms and conditions for contracts with tour operators contained a clause according to which those contracts were valid only for reservations of consumers who were resident in specified country/countries. Such behaviour constitutes conduct which has as its object the restriction of competition within the meaning of Article 101(1) TFEU and Article 53(1) of the EEA Agreement.

2. THE PARTY CONCERNED

(3) Meliá has its registered office at c/ Gremio Toneleros 24, 07009 Palma de Mallorca, Spain.

(4) Meliá is one of the largest hotel companies in the world and the largest hotel chain in Spain in both resort and city hotels. In 2015, Meliá operated 314 hotels in 35 countries on 4 continents, under 7 different brands.[4]

(5) Meliá's business model comprises three divisions: i) Hotels; ii) Real Estate and iii) Club Meliá. This Decision concerns the Hotels division, which is responsible for the operations of Meliá's hotels, including all of the hotel brands.

(6) Meliá uses four different systems for operating hotels as follows:

- ownership: Meliá owns and manages the hotel;
- management: the hotel is owned and operated under a Meliá brand by a third party and Meliá provides management services;
- lease: the hotel is owned by a third party and leased to Meliá, which operates it under one of its brands;
- franchise: Meliá grants a third party (the franchisee) the right to use one of its brands for a certain period of time to operate a hotel.

(7) In 2018, the last full business year in respect of which figures are available, Meliá's total net turnover was EUR 1 831 310 000.[5]

3. THE SERVICE CONCERNED

3.1. Distribution of Meliá's hotel accommodation

(8) Meliá sells its hotel accommodation to consumers via direct and indirect channels. The direct channel encompasses Meliá's website and call centre, as well as direct calls and walk-in bookings.

(9) The indirect channel includes various travel and accommodation companies - such as travel agents, tour operators (both online and brick-and-mortar), incoming agencies and bedbanks - which act as intermediaries between Meliá and its consumers for the distribution of accommodation at Meliá's hotels.

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[4] Meliá's hotel brands are the following: Gran Meliá, Meliá, ME by Meliá, Innside by Meliá, TRYP by Wyndham, Sol and Paradisus.

[5] ID 259.

(10) Travel agents and tour operators are mainly business-to-consumer companies, which source accommodation from hotels directly or from other intermediaries (incoming agencies and bedbanks) and distribute it to consumers. They can distribute hotel rooms stand-alone or combine them with other tour and travel components to create a package holiday.[6]

(11) Incoming agencies and bedbanks are business-to-business companies which source hotel capacity from hotels and supply it to travel agencies and tour operators.[7] They conclude contracts with hotels, on the one hand, and tour operators and travel agencies, on the other hand.

3.2. The service concerned, the relevant time period, and the geographic areas concerned

(12) The service concerned by the present proceedings is the distribution of hotel accommodation at Meliá's holiday resorts through vertical contracts between Meliá, on the one hand, and tour operators, on the other hand.

(13) Those contracts contained clauses which specified the countries for which the contracts were valid. Thereby, the contracting parties differentiated between EEA consumers on the basis of their country of residence. The countries concerned are all EEA countries. This Decision covers the contracts in force in the years 2014 and 2015. According to Meliá, the residence criterion was used as a proxy to reflect differences in consumer behaviour.

4. PROCEDURE

(14) By decision of 2 February 2017,[8] the Commission initiated proceedings pursuant to Article 2(1) of Regulation (EC) 773/2004[9] against Meliá in order to further investigate whether Meliá´s contracts with tour operators for hotel accommodation contained a clause which could be used to discriminate between customers based on their nationality and/or country of residence.

(15) On 5 August 2019, Meliá submitted a formal offer to cooperate in Case AT.40528 in view of the adoption of a decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 ("the settlement submission"). The settlement submission contained:

(1) an acknowledgement, in clear and unequivocal terms, of Meliá's liability for the infringement described in the settlement submission, as regards the main facts, their legal qualification, Meliá's role in the infringement and the duration of Meliá's participation in the infringement;

(2) an indication of the maximum fine that Meliá would expect the Commission to impose and would accept in the context of a cooperation procedure;

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[6] A travel agent is a company that distributes travel services to the end-customer. A tour operator is a company that manufactures tourism products by purchasing individual travel components from travel suppliers and combining them into package holidays.

[7] An incoming agency organises and/or co-ordinates touristic services to mainly foreign holidaymakers within a certain area. A bedbank negotiates special rates with accommodation providers and acts as a wholesaler, selling the accommodation through the travel trade.

[8] Commission decision of 2 February 2017 under the previous case number AT.40308 – Holiday Pricing.

[9] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18).

(3) confirmation that Meliá's rights of defence had been fully respected, in particular that Meliá had been sufficiently informed of the objections the Commission envisaged raising against them and that they had been given sufficient opportunity to make their views known to the Commission;

(4) confirmation that Meliá had been granted sufficient opportunity to access the evidence supporting the Commission´s objections and all other documents in the Commission's file, and that it did not envisage requesting further access to the file or to be heard again in an oral hearing, unless the Commission did not reflect the settlement submission in the Statement of Objections and the Decision;

(5) Meliá's agreement to receive the Statement of Objections and the Decision adopted pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English.

(16) The settlement submission was made conditional upon the imposition by the Commission of a fine not exceeding the amount specified in the settlement submission.

(17) On 4 November 2019, the Commission adopted a Statement of Objections concerning Meliá's participation in the anticompetitive conduct as described in this Decision.

(18) On 20 November 2019, Meliá submitted its reply to the Statement of Objections. Meliá reiterated its commitment to follow the cooperation procedure and confirmed that the Statement of Objections reflected the content of its settlement submission.

5. FACTS

(19) Meliá's commercial relationships with tour operators for the distribution of hotel accommodation at Meliá's holiday resorts are based on written contracts. Some of those contracts are based on Meliá's standard terms and conditions ("Meliá's Standard Terms").[10]

(20) One of the clauses of Meliá's Standard Terms ("the Clause ") stated as follows:

"APPLICATION MARKET: contract valid only and exclusively for the markets that are detailed in the observation 16. the hotel will be able to request to the agency/to [tour operator] to verify the market of origin of any reservation on which it exist any reasonable doubt, in any case, if at the arrival of the clients to the hotel, it is verified that the country of residence of them is different than the one agreed as per contract, the hotel would be entitled to reject the reservation".[11]

(21) In the individual contracts with tour operators, Observation 16 was either empty or specified the country or countries for which the contract was valid.

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[10] The distribution of accommodation at Meliá's city hotels through tour operators as well as Meliá's commercial relationship with other intermediaries (travel agencies, bedbanks, incoming agencies) is based on a different set of standard terms and conditions, which does not contain any clause limiting the validity of the contract to certain markets only.

[11] Annex 1 to Meliá's reply of 6 April 2016 (ID 46) to the Commission's request for information of 2 March 2016 (ID 36).

(22) According to the information submitted by Meliá,[12] 2 212 of Meliá's contracts with tour operators containing the Clause specified at least one EEA country in Observation 16 in contracts that were in force in 2014. In 2015, that figure was 2 004 contracts. The contracts containing the Clause and specifying at least one EEA country in Observation 16 that were in force in 2014 and 2015 are together referred to as the "Relevant Contracts". For each of those years, this represented approximately 30% of the contracts in force for Meliá's holiday resort hotels.

(23) In 2014 and 2015, 140 of Meliá's hotels were party to at least one Relevant Contract (which corresponds to approximately 44.6% of all hotels - city and resort - operated by Meliá in 2015, see recital (4)).

(24) The hotel accommodation that was distributed on the basis of the Relevant Contracts stemmed from hotels that are owned, managed[13] or leased by Meliá. Nearly all Relevant Contracts were signed by a person acting "in name and representation of Meliá Hotels International"[14]. Only in a few instances Relevant Contracts were signed by a person acting in name and representation of Apartotel S.A., an entity 99.73% owned and exclusively controlled by Meliá.[15] In the latter case, Apartotel S.A. was instructed by Meliá to use the Meliá Standard Terms and which countries to insert in Observation 16.[16] Accordingly, either Meliá or Apartotel S.A. were party to all Relevant Contracts.[17]

(25) The total value of sales[18] generated by the Relevant Contracts was EUR 75 908 194 in 2014[19] (which corresponds to approximately 5.19% of Meliá's net turnover in 2014)[20] and EUR 68 145 187 in 2015 (which corresponds to approximately 3.92% of Meliá's net turnover in 2015).[21]

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12 Meliá's submissions of 16 October 2017 (ID 114 and ID 116), 20 November 2017 (ID 121-123) and 25 September 2018 (ID 150).

13 As to the managed hotels, Meliá has explained in its submissions of 22 March 2019 (ID 254), 4 April 2019 (ID 254) and 30 April 2019 (ID 257) that the capacity of Meliá and of Apartotel S.A. (an entity 99.73% owned and exclusively controlled by Melia) signing these contracts to act on behalf of the hotel operating company or the hotel owner arises from the management agreement that provides Meliá and Apartotel S.A. with the largest powers for the commercialisation of the hotel. Accordingly, in case of managed hotels it would have been either Meliá that concluded Relevant Contracts containing the Clause and specified countries in Observation 16, without any instruction from the hotel operating company or the hotel owner, or Melia instructed Apartotel S.A. to do so. Moreover, Meliá declared in its submission of 25 February 2019 (ID 254) that it was fully responsible for the contents of the Relevant Contracts that were signed with tour operators for the managed hotels.

14 Meliá's submission of 22 March 2019 (ID 254).

15 In 2014, out of 2 212 contracts only 65 (that is to say, less than 3%; representing 0.2% of affected turnover) were signed by Apartotel, S.A., and all the rest, 2 147, were signed by Meliá.
In 2015, out of 2 004 contracts 49 (that is to say, less than 2.5%; representing 0.3% of affected turnover) were signed by Apartotel, S.A., and all the rest, 1 955, were signed by Meliá (ID 257).

16 Meliá's submission of 30 April 2019 (ID 257).

17 Meliá's submission of 4 April 2019 (ID 254).

18 As far as managed hotels are concerned, the value of sales corresponds only to the management fee paid for the management services.

19 Meliá's submission of 30 October 2018 (ID 166).

20 Meliá's total net turnover was EUR 1 463 300 000 in 2014.

21 Meliá's total net turnover was EUR 1 738 207 000 in 2015.

(26) Meliá has confirmed that the necessary measures have been taken to fully remove the Clause and Observation 16 from its contracts.[22]

6. LEGAL ASSESSMENT

6.1. The TFEU and the EEA Agreement

(27) Article 101(1) TFEU prohibits as incompatible with the internal market agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Member States and (ii) have as their object or effect the prevention, restriction or distortion of competition within the internal market, unless they meet the conditions set out in Article 101(3) TFEU.

(28) Article 53(1) of the EEA Agreement prohibits as incompatible with the functioning of the EEA Agreement agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Contracting Parties to the EEA Agreement and (ii) have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement, unless they meet the conditions set out in Article 53(3) of the EEA Agreement.

(29) The conduct described in Section 5 of this Decision concerns the territory of the Union and the EEA. Insofar as the conduct affected trade between Member States, Article 101 TFEU is applicable. As regards the operation of those agreements and concerted practices in Norway, Iceland and Liechtenstein and their effect on trade between the Union and those countries, it falls within Article 53 of the EEA Agreement.

(30) In this case, the Commission is the competent authority to apply both Article 101 TFEU and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the conduct had an appreciable effect on trade between Member States.

(31) In as far as the EEA Agreement is not specifically mentioned, references in the following recitals of this Decision to Article 101 TFEU, to effect on trade between Member States, or to competition within the internal market are to be taken to include, respectively, Article 53 of the EEA Agreement, effect on trade between Contracting Parties to the EEA Agreement, and competition within the territory covered by the EEA Agreement.

6.2. Agreement between undertakings

6.2.1. Principles

(32) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market.[23]

(33) The concept of an agreement within the meaning of Article 101(1) TFEU centres around the existence of a concurrence of wills between at least two parties, the form

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[22] Meliá's submissions of 30 October 2018 (ID 165-169), 31 October 2018 (ID 170-172), 21 December 2018 (ID 190), 10 January 2019 (ID 196-207), 18 January 2019 (ID 215-216).

[23] Judgment of the General Court of 16 June 2015, *FSL and others / Commission*, T-655/11, ECLI:EU:T:2015:383, paragraph 441 (upheld on appeal in Judgment of the Court of Justice of 27 April 2017, *FSL and others / Commission*, C-469/15 P, ECLI:EU:C:2017:308).

in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention. For there to be an agreement within the meaning of Article 101(1) TFEU, it is therefore sufficient that the undertakings in question should have expressed their common intention to conduct themselves on the market in a specific way.[24] The will of the parties may result from the clauses of contractual agreements concluded between them.[25]

6.2.2. Application to this case

(34) The Relevant Contracts constitute agreements within the meaning of Article 101(1) TFEU and Article 53(1) of the EEA Agreement.

(35) The Relevant Contracts were concluded between, on the one hand, Meliá or Apartotel S.A. (see recital (24))[26] and, on the other hand, various tour operators. The parties to the agreements all constitute undertakings for the purposes of Article 101 TFEU and Article 53 of the EEA Agreement.

(36) In the Relevant Contracts, Meliá and the contracting tour operators specified the territories to which each contract applied and thereby differentiated between European consumers on the basis of their country of residence.

(37) Article 1(1)(a) of Commission Regulation (EU) No 330/2010[27] defines a vertical agreement as "an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".

(38) For the purposes of the Relevant Contracts, Meliá (the provider of the accommodation service) and the tour operators (the distributors of or sales intermediaries for) the accommodation service, operate at different levels of the supply chain. Therefore, the Relevant Contracts are vertical agreements between undertakings within the meaning of Article 1(1)(a) of Regulation (EU) No 330/2010.

6.3. Restriction of competition by object

6.3.1. Principles

(39) Certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. This reasoning derives from the fact that certain types of coordination

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[24] Judgment of the Court of Justice of 11 January 1990, *Sandoz Prodotti Farmaceutici v Commission*, C-277/87, EU:C:1990:6, paragraph 13; Judgment of the General Court of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242, paragraphs 67 and 173.

[25] Judgment of the Court of Justice of 13 July 2006, *Commission v Volkswagen AG*, C-74/04 P, EU:C:2006:460, paragraphs 39.

[26] References in the following recitals of this Decision to Meliá as a party to the Relevant Contracts also include Apartotel S.A. as a party to the Relevant Contracts.

[27] 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 (OJ L102, 23.4.2010, p. 1).

between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.[28]

(40) To determine whether an agreement reveals such a sufficient degree of harm to competition that it may be considered a restriction of competition by object, regard must be had inter alia to i) the content of its provisions; ii) the objectives it seeks to attain; and iii) the economic and legal context of which it forms a part.[29] The parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive.[30]

(41) According to the Union Courts' case-law, an agreement which tends to restore the divisions between national markets is liable to frustrate the TFEU's objective of achieving the integration of those markets through the establishment of an internal market. Any practice that leads to market partitioning is seen by the Union Courts to run counter to the very idea of the TFEU of eliminating national barriers: "*An agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market. Thus, agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) TFEU*".[31] Such is the case for contractual clauses which differentiate between European consumers on the basis of their nationality or country of residence.

(42) Furthermore, according to settled case-law, there is no need to take account of the concrete effects of an agreement, once it appears that its object is to prevent, restrict or distort competition.[32] The Commission considers that behaviour aimed at partitioning national markets may be considered so likely to have negative effects, in particular on the price, choice, quantity or quality of the goods and services, that it is considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that it has actual effects on the market.

6.3.2. Application to this case

(43) The Clause in conjunction with Observation 16 is an example of a clause which, by specifying the territories to which the contract applies, differentiates between

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28 Judgments of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires (CB) v. Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49 and the case-law cited therein; 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 113.

29 Judgments of the Court of Justice of: 11 September 2014, *Groupement des cartes bancaires (CB) v. Commission*, paragraph 53; 4 October 2011, *Football Association Premier League and Others*, cases C-403/08 and C-429/08, EU:C:2011:631, paragraph 136.

30 Judgments of the Court of Justice of: 14 March 2013, *Allianz Hungária Biztosító Zrt*, C-32/11, EU:C:2013:160, paragraph 37 and the case-law cited; 11 September 2014, *Groupement des cartes bancaires (CB) v. Commission*, paragraph 54.

31 Judgment of the Court of Justice of 4 October 2011, *Football Association Premier League Ltd*, paragraph 139; see also, to that effect, Judgments of the Court of Justice of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission* C-501/06, 513/06, 515/06, 519/06, EU:C:2009:610, paragraph 61; 16 September 2008, *Sot. Lelos kai Sia and Others* C-468/06 to C-478/06, EU:C:2008:504, paragraph 65.

32 Judgments of the Court of Justice of 13 July 1966, *Consten and Grundig v Commission*, Joined cases C-56/64 and C-58/64, EU:C:1966:41, p. 339; 8 December 2011, *KME Germany and Others v Commission*, C-272/09 P, EU:C:2011:810, paragraph 65.

European consumers on the basis of their country of residence and which may result in the partitioning of the internal market according to national borders.

(44) In particular, the first sentence of the Clause set out that the contract was "*valid only and exclusively for the markets that are detailed in the observation 16*". In the individual contracts between Meliá and the tour operator, Observation 16 specified the country or countries in which the contract was valid, such as Spain, the United Kingdom, Germany and Italy.

(45) The second and subsequent sentences of the Clause empowered Meliá to verify the *"market of origin of any reservation"* directly - upon the arrival of the consumer at the hotel - or indirectly - through the tour operator party to the contract when "*it exist*[ed] *any reasonable doubt*". If it was verified that the country of residence of the consumer was not among those listed in Observation 16, Meliá was entitled to reject the reservation.

(46) The overall objective of the Clause and Observation 16 was therefore to ensure that the tour operator adhered to the terms of the contract and that those contractual terms (in particular, price) were valid only for reservations of consumers who were resident in the country or countries specified in Observation 16. Those provisions deterred the tour operators, party to the Relevant Contracts, from distributing the hotel accommodation in countries other than those listed in Observation 16. Accordingly, those agreements restricted the ability of the tour operators to freely sell the hotel accommodation in all EEA countries and therefore might have resulted in the partitioning of the internal market according to national borders.

(47) In this regard, the Clause did not distinguish between reservations which followed unsolicited requests from consumers and those actively sold by the tour operators. Therefore, the Clause not only discouraged the tour operators from advertising Meliá's hotel accommodation outside the specified market or markets but also covered situations in which a reservation at one of Meliá's hotels was made upon direct request of consumers, who were resident outside the defined markets, to a tour operator party to the Relevant Contracts.

(48) Accordingly, the content and the objective of the Clause of Meliá's Standard Terms, in conjunction with Observation 16 of the Relevant Contracts was to restrict the ability of the tour operators to sell Meliá's hotel accommodation to, and/or to respond to unsolicited requests from, consumers residing outside the country or countries specified in Observation 16.

(49) Clauses in contracts for the distribution of hotel accommodation which restrict the ability of the tour operators to freely sell the hotel accommodation in all EEA countries - such as the Clause and Observation 16 of the Relevant Contracts - have the object of restricting competition by limiting cross-border sales and thus constitute an infringement of Article 101(1) TFEU and Article 53(1) of the EEA Agreement.

6.4. Single and continuous infringement

6.4.1. Principles

(50) An infringement of Article 101(1) TFEU and Article 53(1) of the EEA Agreement may consist not only of an isolated act but also of a series of acts or a course of conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of those provisions. Accordingly, if the different actions form part of an "overall plan", because their identical object distorts competition within the internal market, the

Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[33]

6.4.2. Application to this case

(51) For the distribution of accommodation at its resort hotels, in 2014 and 2015 Meliá entered into a series of contracts (the Relevant Contracts, see recital (22)) that specified the countries for which the contract was valid. Thereby, the contracting parties differentiated between EEA consumers on the basis of their country of residence.

(52) The Relevant Contracts prove the existence of a similar pattern followed by Meliá as regards the distribution of its hotel accommodation in 2014 and 2015. This is underpinned by the fact that the Relevant Contracts were all based on Meliá's Standard Terms containing the Clause. The identical object of all Relevant Contracts in force in that period was to differentiate between European consumers on the basis of their country of residence. Therefore, the agreements resulting from the Relevant Contracts (see recitals (34) and (49)) constitute a single and continuous infringement of Article 101(1) TFEU and Article 53(1) of the EEA Agreement.

6.5. Effect on trade

6.5.1. Principles

(53) Article 101 TFEU applies to agreements which may harm the attainment of an internal market between Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market.[34] Article 53(1) of the EEA Agreement is similarly aimed at agreements which might harm the attainment of an internal market between Contracting Parties to the EEA Agreement.

6.5.2. Application to this case

(54) In 2014 and 2015, the tour operators who were party to the Relevant Contracts distributed accommodation at Meliá hotels located in various Member States to consumers resident in various Member States or EEA countries. Since the Relevant Contracts contained cross-border sales restrictions, they were liable to affect trade between Member States. The very purpose of these types of restrictions is to prevent trade between Member States. Therefore, the Relevant Contracts had an appreciable effect on trade between Member States and between contracting parties to the EEA Agreement.

6.6. Non-applicability of Regulation (EU) No 330/2010, of Article 101(3) TFEU and of Article 53(3) of the EEA Agreement

6.6.1. Principles

(55) Article 101(1) TFEU may be declared inapplicable pursuant to Article 101(3) TFEU where an agreement or concerted practice contributes to improving the production or

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[33] Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland and Others v Commission*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 258; Judgment of the Court of Justice of 21 September 2006, *Technische Unie v Commission*, C-113/04 P, EU:C:2006:593, paragraph 178.

[34] Judgment of the General Court 15 March 2000, *Cimenteries CBR v Commission*, Joined Cases T-25/95 and others, EU:T:2000:77, paragraph 3930; Judgment of the Court of Justice of 28 April 1998, *Javico*, Case C-306/96, EU:C:1998:173, paragraphs 16 and 17. See also Judgment of 13 July 1966, *Consten and Grundig v Commission*, Joined Cases C-56/64 and C-58/64, EU:C:1966:41, pp.341-342.

distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and where it does not (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (ii) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(56) The Commission is empowered to apply Article 101(3) TFEU by regulation to certain categories of agreements falling within Article 101(1) TFEU which can be regarded as normally satisfying all the conditions laid down in Article 101(3) TFEU.[35] Regulation (EU) No 330/2010 was adopted under that empowerment.

(57) Article 2 of Regulation (EU) No 330/2010 provides that Article 101(1) TFEU shall not apply to vertical agreements, subject to the other provisions of that Regulation. Article 4 (b) of Regulation (EU) No 330/2010 provides that the block exemption does not apply to vertical agreements which have as their object, directly or indirectly, *"the restriction of the territory into which, or of the consumers to whom, a buyer party to the agreement, […], may sell the contract goods or services"*. Such is the case of contractual provisions that differentiate between customers on the basis of their nationality or of their country of residence. This holds irrespective of the market share of the undertakings concerned.

(58) Even where a restriction by object pursuant to Article 101(1) TFEU is established and Regulation (EU) No 330/2010 is not applicable, there is in principle the possibility of an exemption from the prohibition in Article 101(1) TFEU if it is proven that the agreement fulfils the conditions for exemption set out in Article 101(3) TFEU.[36]

6.6.2. Application to this case

(59) Clauses in contracts for the distribution of hotel accommodation which specify the nationality of customers or the country/countries for which the contract is valid restrict the territory/territories into which, or the consumers to whom, the tour operator party to the contract can sell the hotel accommodation. In this case, the Clause restricted the ability of the tour operators to actively sell the accommodation to consumers outside of the country/countries specified in Observation 16 and also to respond to unsolicited requests from consumers residing in a country not specified in Observation 16. The exceptions in Article 4(b) (i), (ii), and (iii) of Regulation (EU) No 330/2010, which are designed to enable a supplier to set up exclusive or selective distribution systems do not appear to be applicable in this case.

(60) Therefore, contracts containing restrictive clauses such as the Clause in conjunction with Observation 16 are a hard-core restriction under Article 4 (b) of Regulation (EU) No 330/2010, and do not benefit from the exemption from the application of Article 101(1) TFEU provided by that Regulation.

(61) Nor does Meliá's conduct fulfil the conditions for exemption under Article 101(3) TFEU and Article 53(3) of the EEA Agreement. Meliá did not discharge its burden of proof in this respect and there are no indications that its conduct met the

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[35] Regulation No 19/65/EEC of the Council of 2 March 1965 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (OJ 36, 6.3.1965, p. 533).

[36] Judgment of the General Court of 15 July 1994, *Matra Hachette v Commission*, T-17/93, EU:T:1994:89 and Judgment of the General Court of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraph 59.

conditions for exemption under Article 101(3) TFEU and Article 53(3) of the EEA Agreement.

(62) Firstly, the Clause - like any other clause of a similar nature - did not directly address the efficiencies sought by Meliá, namely to increase the room occupancy rate by accounting for different consumption patterns in the various markets (such as seasonality, different booking, behavioural and traveling habits of different countries' residents); or to ensure that the low prices for rooms to be included in packages reached the targeted consumers and were not used by the tour operators in the high-price markets.

(63) Secondly, consumers should get a fair share of the resulting benefit. In this case, even though there might have been a positive effect for consumers in certain markets (namely those for whom the lower price was earmarked), "*negative effects on consumers in one geographic market or product market* (namely the consumers who were prevented from buying the accommodation at that lower price) *cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market*".[37]

(64) Thirdly, clauses that restrict the ability of tour operators to sell accommodation to consumers outside of specified country/countries - such as the Clause - are not indispensable for improving the efficiency of Meliá's hotel accommodation distribution system. The objectives sought (namely higher occupancy rate and better yield management) can be achieved by other more direct, tailored solutions which do not differentiate between consumers based on their country of residence or nationality (such as seasonality rates and "only-packages" clauses). Moreover, the investigation has shown that the vast majority of hotels do not have clauses like this, which calls into question the existence of efficiencies and indispensability under Article 101(3) TFEU and Article 53(3) of the EEA Agreement.

(65) Therefore, a conduct such as that pursued by Meliá through the Clause and Observation 16 in the Relevant Contracts is not exempted under Regulation (EU) No 330/2010, nor does it meet the conditions for exemption in Article 101(3) TFEU and Article 53(3) of the EEA Agreement.

7. DURATION OF THE INFRINGEMENT

(66) The Relevant Contracts were in force during 2014 and 2015. The duration of the infringement of Article 101 TFEU and Article 53 of the EEA Agreement was from 1 January 2014 to 31 December 2015.

8. LIABILITY

8.1. Principles

(67) Union competition law applies to the activities of undertakings. The notion of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status or the way in which it is financed.[38]

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[37] Paragraph 40 of the Guidelines on the application of Article 81(3) of the Treaty.

[38] Judgment of the General Court of 13 June 2013, *Versalis v Commission*, C-511/11 P, EU:C:2013:386, paragraph 51.

(68) When an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. However, the infringement must be imputed unequivocally to a legal person on whom fines may be imposed, and the Decision must be addressed to that person.

8.2. Application to this case

(69) As set out in Section 5, nearly all the Relevant Contracts were concluded by Meliá Hotels International, S.A. All of the Relevant Contracts incorporated Meliá's Standard Terms with Observation 16 filled in with at least one EEA country.

(70) In the few instances where Relevant Contracts were signed by a person acting in name and representation of Apartotel S.A., Meliá Hotels International, S.A. instructed its subsidiary Apartotel S.A. to use Meliá's Standard Terms containing the Clause and also instructed Apartotel S.A. which countries to insert in Observation 16 (see recital (24)). Accordingly, Meliá Hotels International, S.A. is directly responsible for the content of the Relevant Contracts of Apartotel S.A.

(71) Therefore, also having regard to Meliá's clear and unequivocal acknowledgement of the facts and the legal qualification thereof, for all Relevant Contracts, independently of whether Meliá Hotels International, S.A. or Apartotel S.A. were contracting party, liability should be imputed to Meliá Hotels International, S.A. for its direct participation in the infringement of Article 101 TFEU and Article 53 of the EEA Agreement from 1 January 2014 until 31 December 2015.

9. REMEDIES AND FINES

9.1. Remedies under Article 7 of Regulation (EC) No 1/2003

(72) Where the Commission finds that there is an infringement of Article 101 TFEU and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003. The Commission is also empowered to require the undertakings concerned to refrain from repeating the act or conduct in question and to refrain from any act or conduct having the same or a similar object or effect.[39]

(73) As explained in recital (26), Meliá has confirmed that the necessary measures have been taken to bring the infringement to an end. However, it is necessary for the Commission to formally require Meliá to bring the infringement effectively to an end, if it has not already done so, and to refrain from any agreement or concerted practice which might have the same or a similar object or effect.

9.2. Article 23(2) of Regulation (EC) No 1/2003

(74) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 101 TFEU or Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.

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[39] See for example Judgment of the General Court of 27 October 1994, *Fiatagri and New Holland Ford v Commission*, T-34/92, EU:T:1994:258, paragraph 39 and Judgment of the General Court of 20 April 1999, *LVM v Commission*, Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 1254.

(75) In this case, a fine should be imposed on Meliá for the single and continuous infringement described in this Decision.

9.3. Calculation of the fine

9.3.1. General methodology

(76) Under Article 23(3) of Regulation (EC) No 1/2003, in fixing the amount of a fine the Commission must have regard to a number of elements, in particular the gravity and the duration of the infringement. The Commission will also refer to the principles laid down in the Guidelines on Fines.[40]

(77) In calculating the fine, it is first necessary to determine a basic amount. The basic amount of the fine is set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.[41] The basic amount consists of a percentage of the value of sales up to a maximum percentage of 30%,[42] depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.[43] The Commission may also include in the basic amount an additional amount of up to 25% of the value of sales (an "entry fee") to deter undertakings from entering into anticompetitive agreements.[44]

(78) Second, the Commission may increase or decrease the basic amount to take into account any aggravating or mitigating circumstances in accordance with points 28 and 29 of the Guidelines on Fines. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.[45]

(79) Third, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect.[46]

9.3.2. Intention or negligence

(80) Based on the facts described in section 5, it is concluded that the infringement was committed intentionally or at least negligently.

9.3.3. Value of sales

(81) For calculating the value of sales, the Commission normally takes the sales made by the undertaking during the last full business year of the undertaking's participation in the infringement.[47] If the turnover of the undertaking during that year is not sufficiently representative of its annual turnover during the infringement, the Commission may use some other year, or other method, for calculating the value of sales.

(82) In this case, there is no reason to deviate from the general principle of the Guidelines on Fines. Therefore, the relevant value of sales is Meliá's revenues[48] for hotel

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40 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ C 210, 1.9.2006, p. 2).

41 Point 13 of the Guidelines on Fines.

42 Point 21 of the Guidelines on Fines.

43 Point 19 of the Guidelines on Fines.

44 Point 25 of the Guidelines on Fines.

45 Point 27 of the Guidelines on Fines.

46 Point 30 of the Guidelines on Fines.

47 Point 13 of the Guidelines on Fines.

48 As far as managed hotels are concerned (see recital (24)), the value of sales corresponds only to the management fee paid for the management services.

accommodation services generated during the last full business year of Meliá's participation in the infringement, which was 2015, and sold in accordance with Meliá's Standard Terms, and where the contract between Meliá and the tour operator specified at least one EEA country in Observation 16, thereby excluding residents of other EEA countries.

(83) Accordingly, the value of sales that should be taken into account in this case is EUR 68 145 187.

9.3.4. Gravity

(84) The basic amount relates to a proportion of the value of sales of up to 30%, depending on the degree of gravity of the infringement.[49]

(85) The gravity of the infringement determines the percentage of the value of sales to be taken into account in setting the fine. In assessing the gravity of the infringement, the Commission has regard to a number of factors.[50]

(86) In this case, account should be taken of the fact that restrictions of active and passive sales, by their very nature, restrict competition within the meaning of Article 101(1) TFEU and Article 53 of the EEA Agreement. However, the fact that vertical restraints are generally less harmful than horizontal ones should also be taken into account.

(87) Taking into account these factors and the fact that Meliá's restrictions of active and passive sales covered the whole EEA, the percentage of the value of sales used for calculating the fine in this case should be set at 7%.

9.3.5. Duration

(88) The amount determined on the basis of the value of sales is multiplied by the number of years of participation in the infringement.[51] In this case, the total duration of the infringement as set out in Section 7 should be taken into account. Therefore, the amount determined on the basis of the value of sales should be multiplied by 2.

9.3.6. Calculation of the basic amount

(89) Applying the criteria explained in section 9.3.1., the basic amount of the fine to be imposed in this case should be EUR 9 540 000.

9.3.7. Additional amount

(90) No additional amount should be included in the basic amount.

9.3.8. Aggravating or mitigating factors

(91) There are no aggravating or mitigating circumstances present in this case.

9.3.9. Deterrence

(92) Point 30 of the Guidelines on Fines provides for the possibility of increasing the fine to ensure that fines have a sufficiently deterrent effect in the case of undertakings which have a particularly large turnover beyond the sales of goods and services to which the infringement relates.

(93) In this case, it is not necessary to apply any such increase.

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[49] Points 21 and 29 of the Guidelines on Fines.
[50] Point 22 of the Guidelines on Fines.
[51] Point 24 of the Guidelines on Fines.

9.3.10. Application of the 10% of turnover limit

(94) The fine to be imposed on Meliá does not exceed 10% of Meliá's total turnover relating to the business year preceding the date of adoption of this Decision, in accordance with Article 23(2) of Regulation (EC) No 1/2003.

9.3.11. Reduction of the fine in view of cooperation

(95) Point 37 of the Guidelines on Fines allows the Commission to depart from the methodology set out in those Guidelines if the particularities of the case justify it. In order to reflect Meliá's cooperation with the Commission beyond its legal obligation to do so, the basic amount of the fine should be reduced by 30% pursuant to point 37 of the Guidelines on Fines.

(96) Meliá cooperated with the Commission beyond its legal obligation to do so by acknowledging the infringement of Article 101 TFEU and Article 53 of the EEA Agreement in relation to the conduct, as well as cooperating on the provision of evidence, thereby strengthening to a certain extent the Commission's ability to prove the infringement, and waiving certain procedural rights, resulting in administrative efficiencies.

9.3.12. Final amount of the fine

(97) In conclusion, the final amount of the fine to be imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 should be EUR 6 678 000,

HAS ADOPTED THIS DECISION:

Article 1

Meliá Hotels International, S.A. has infringed Article 101 TFEU and Article 53 of the EEA Agreement through a single and continuous infringement in the period from 1 January 2014 to 31 December 2015 by concluding and/or implementing vertical contracts which differentiated between EEA-consumers on the basis of their country of residence and thereby restricted active and passive sales of hotel accommodation.

Article 2

For the single and continuous infringement referred to in Article 1 a fine of EUR 6 678 000 is imposed.

The fine shall be credited, in euro, within three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: ***EC**/BUFI/AT.40528*

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where the undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council[52].

Article 3

Meliá Hotels International, S.A. shall immediately bring the infringement referred to in Article 1 to an end, if it has not already done so, and refrain from any agreement or concerted practice which may have the same or a similar object or effect.

Article 4

This Decision is addressed to Meliá Hotels International, S.A., c/ Gremio Toneleros 24, 07009 Palma de Mallorca, Spain.

This Decision shall be enforceable pursuant to Article 299 TFEU and Article 110 of the Agreement on the European Economic Area.

Done at Brussels, 21.2.2020

For the Commission
Margrethe VESTAGER
Executive Vice-President

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

[52] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the European Union (OJ L 193, 30.7.2018, p. 80).