

Vertical Block Exemption Regulation consultation

BEUC comments

Preliminary remarks

BEUC welcomes the possibility to comment on the drafts of the revised Vertical Block Exemption Regulation ("VBER") and Vertical Guidelines ("VG"). These instruments are of great significance for consumers not only because agreements between companies in a supply chain are important for products to reach consumers, but also because they can harm consumers if such agreements limit consumers' ability to choose where to buy the products they want or restrict their ability to benefit from the lowest possible prices and ways of finding these.

In addition to the comments BEUC provided to the [Inception Impact Assessment](#) and to the [public consultation](#), we would like to submit the below non-exhaustive considerations on a few elements of the draft VBER and Vertical Guidelines.

Resale price maintenance

The draft revised VBER continues to classify Resale Price Maintenance (RPM) as a hardcore restriction under Article 4(a). BEUC considers this is the right approach considering the strong and direct negative effects of RPM on consumers.

RPM can be directly harmful to consumers in several ways. Whether in the fixed format or in the form of recommended resale prices with positive or negative incentives, RPM first of all precludes retailers from lowering their resale price for the product in question. This effect is particularly acute considering its immediate impact on final consumers. Second, RPM may facilitate collusion among suppliers by increasing price transparency and enabling easier detection of any deviation from the collusive price. It is to be expected that the resale price, in either scenario will be above the competitive level characterised by fierce intra-brand competition. Third, a supplier may find that implementing RPM reduces the pressure on its own margins since retailers may have less incentive to negotiate lower wholesale prices from that supplier. Fourth, RPM may discourage entry of rival retailers offering lower prices—for example, through discount (online) stores—or hinder innovation in distribution systems.

We also support the clarifications concerning the draft revised Vertical Guidelines (§§ 161-186). However, we would suggest revising §174 to avoid the risk of hidden RPMs in minimum advertised price policies as the current wording give the impression there is flexibility regarding what could or not be considered as RPM.

Dual distribution

Dual distribution can have positive and negative effects on competition. Manufacturers selling their products directly to consumers can have two advantages for consumers. First, it can increase consumer choice by potentially increasing the number of retailers consumers can choose from for particular products. Second, it can lead to more competitive prices as selling directly to consumers avoids double marginalisation, potentially leading to lower prices for consumers.

Nonetheless, a potential anti-competitive effect of dual distribution is that it can facilitate collusion between manufacturers and retailers, as they will inevitably exchange (sensitive)

information that would normally be prohibited between competitors. This could drive up consumer prices and drive other retailers out of the markets.

It is important that the Commission in its revised VBER and VG takes into account those horizontal concerns.

Exclusive distribution

On “shared exclusivity”, the draft guidelines suggest that efficiencies can be generated if it is possible “to secure a certain volume of business that preserves the investment effort for the distributors” (§125). While commercial actors would favour such an approach, we are concerned that this solution provides too much flexibility for companies without clear benchmarks to assess such distribution arrangements.

Price parity clauses

Although we support the classification of wide parity clauses as an excluded restriction under Article 5 of the draft revised VBER, narrow parity clauses should also be included under the revised Article 5 VBER.

The use of parity clauses has increased in recent years due to the rise of marketplaces and online booking platforms.¹ However, the VBER and Vertical Guidelines are unclear regarding the assessment of these clauses.² This has led to different approaches among national competition authorities and national courts.³ The French,⁴ Italian,⁵ and Swedish⁶ NCAs accepted in 2015 commitments from Booking.com to replace its wide parity clauses with the narrow version in the entire EU. The German NCA rejected those commitments and decided that same year that all price parity clauses were illegal.⁷ The Bundeskartellamt’s decision prohibiting Booking.com’s narrow parity clauses has in the meantime been upheld by Germany’s highest court.⁸ In 2015, France imposed a legislative ban on all parity clauses between hotels and online travel agents (“OTAs”);⁹ Austria and Italy followed suit in 2017.¹⁰

Several recent empirical studies appear to suggest that the switch from wide to narrow parity clauses, or alternatively, the complete ban of parity clauses, has led to lower prices on direct sales channels compared to the price on booking platforms. In a 2018 study based on an analysis of hotel room prices between 2014 and 2016 in France, Italy and Spain, the data suggests that the switch to narrow parity clauses or their complete

¹ European Commission, ‘Commission Staff Working Document: Evaluation of the Vertical Block Exemption Regulation’ (2020) SWD(2020) 172 final SWD(2020) 172 final 38, 181.

² *ibid* 61.

³ For an overview of enforcement at national level, see e.g., Mark-Oliver Mackenrodt, ‘Price and Condition Parity Clauses in Contracts Between Hotel Booking Platforms and Hotels’ (2019) 50 IIC - International Review of Intellectual Property and Competition Law 1131; Andrea Mantovani, Claudio Piga and Carlo Reggiani, ‘On the Economic Effects of Price Parity Clauses - What Do We Know Three Years Later?’ (2018) 9 Journal of European Competition Law & Practice 650; Francisco Enrique González-Díaz and Matthew Bennett, ‘The Law and Economics of Most-Favoured Nation Clauses’ (2015) 1 Competition law & Policy Debate 17.

⁴ Autorité de la Concurrence, decision n° 15-D-06 21 April 2015 *sur les pratiques mises en œuvre par les sociétés Booking.com B.V., Booking.com France SAS et Booking.com Customer Service France SAS dans le secteur de la réservation hôtelière en ligne*.

⁵ Autorità garante della Concorrenza e del Mercato, decision of 21 April 2015, 1779, *Booking.com*.

⁶ Konkurrenssverket, decision of 15 April 2016, Ref. No. 596/2013, *Booking.com*.

⁷ *Decision of 22 December 2015, B 9-121/13 — Booking.com*. Booking.com appealed the decision and the Oberlandesgericht Düsseldorf (the Higher Regional Court) annulled the Bundeskartellamt decision (OLG, 4.6.2019 - VI-Kart 2/16 (V)).

⁸ Bundesgerichtshof judgement of 18 May 2021 – KVR 54/20.

⁹ Loi n° 2015-990 of 6 August 2015 *pour la croissance, l’activité et l’égalité des chances économiques*, Article L. 311-5-1 du code de tourisme.

¹⁰ Mantovani, Piga and Reggiani (n 3) 2.

prohibition led to a reduction of room prices on one OTA.¹¹ The same authors concluded in 2019 that the legislative ban of all MFN clauses in France in 2015 and in Italy in 2017 had relatively limited effects in the short term but resulted in significantly lower room prices in the medium term.¹² A 2018 study based on 30,000 hotel listings concluded that a ban on all price parity clauses induced hotels to increase their use of Booking.com; it also led hotels to charge the lowest prices on their direct channel.¹³ Finally, the authors of a 2020 study concluded that the removal of wide MFN clauses increased the probability that the direct channel was the cheapest option indicating that wide MFN clauses may result in a softening of price competition between these channels.¹⁴ In addition, the Bundeskartellamt also reviewed in 2020 the changes in the OTA market following the ban on all parity clauses in 2015. It concluded, *inter alia*, that, despite the complete prohibition of MFN clauses, Booking.com continued to grow and that price differentiation between Booking.com and the direct sales channel increased.¹⁵

These empirical analyses support the conclusion that parity clauses are generally harmful to consumers. From BEUC's perspective. The draft revised VBER should explicitly include both wide and narrow parity clauses to ensure legal certainty while avoiding the strong anti-competitive effects of parity clauses.

Online and passive sales restrictions

The draft revised VBER brings much need clarification on the restriction of online sales, which is now explicitly defined in Article 1(n) of the draft VBER.

Further guidance is provided at §§188-201 of the draft revised VG. The Commission also explicitly acknowledges that direct or indirect bans on sales through online marketplaces are in principle block-exempted, irrespective of the distribution method used by the supplier (§194 of the draft VG).

While after to *Coty*,¹⁶ it is clear that a supplier of luxury goods that has implemented a selective distribution system is allowed to prevent his retailers from reselling the product on online marketplaces, it should not be extended outside the scope of selective distribution system. Online marketplaces bring benefits to both retailers and consumers as long as they comply with competition law. Restrictions on their use reduces the number of online sellers for a particular product or service and reduces price transparency and price competition. Online marketplace bans are thus detrimental to distributors' business opportunities and to consumer choice. Online platforms/marketplaces can be an important way for small and medium-sized companies (SMEs) to access consumers. They can promote the visibility of SMEs that do not have the financial, technical and marketing knowledge to increase their presence through other routes. In such circumstances, online marketplace bans can have a substantial impact on competition to the detriment of consumers.

¹¹ *ibid* 4.

¹² Andrea Mantovani, Claudio Piga and Carlo Reggiani, 'Much Ado about Nothing? Online Platform Price Parity Clauses and the EU Booking.Com Case' (Economics, The University of Manchester 2019) The School of Economics Discussion Paper Series 1909.

¹³ Matthias Hunold and others, 'Evaluation of Best Price Clauses in Online Hotel Bookings' (2018) 61 International Journal of Industrial Organization 542.

¹⁴ Sean Ennis, Marc Ivaldi and Vicente Lagos, 'Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change' (2020) TSE Working Papers 20-1106.

¹⁵ Bundeskartellamt, 'The Effects of Narrow Price Parity Clauses on Online Sales – Investigation Results from the Bundeskartellamt's Booking Proceeding' (2020) 7 paras 4–15, 91–95.

¹⁶ The Court of Justice of the European Union clarified in the *Coty* case in 2017 that in the context of a selective distribution system, a manufacturer could impose a ban on sales through third-party platforms since it could safeguard the strong brand image of luxury products. This ruling created some uncertainty about the scope of this exemption and the meaning of "luxury" products.

Price comparison websites

The draft VG now explicitly considers bans on the use of price comparison websites or advertising on search engines as a hardcore restriction (§ 192 of the draft VG). This is marked improvement and will ensure legal certainty for players involved in online distribution.

Dual pricing

Under the revised VG (§195), dual pricing would not constitute a hardcore restriction anymore and would be block-exempted provided the dual pricing is intended to incentivise or reward an appropriate level of investment and relates to the costs incurred for each sales channel. This change could bring flexibility for both suppliers and hybrid retailers that resell goods and services both online and offline. Nonetheless, it is crucial to ensure that block-exempting dual pricing does not lead to a situation where consumer prices are artificially increased in online channels.

END.