

Vertical Block Exemption Regulation & Vertical Guidelines review – Submission in response to the Commission’s Inception Impact Assessment Roadmap

Booking.com is pleased to provide feedback to the Commission’s review of the Vertical Block Exemption Regulation (VBER) and the Vertical Guidelines. In particular, we would like to offer our perspective on the policy options presented for the future treatment of price parity clauses.

At the outset, we believe it is important to recall that online intermediaries, such as Booking.com, provide a valuable public good in increasing transparency and reducing search costs for consumers. Jean Tirole has summarised this very clearly:

[T]he most significant transaction costs are no longer transportation costs, but rather assessing what is on offer and choosing who to do business with, along with the signalling costs (seeking to convince potential trading partners of one’s reliability). Our almost infinite sources of information, and the limited time we have to process and understand them, put intermediaries and platforms that help us find these partners at the heart of the economic process. The more the other costs (transportation, customs, duties, listing) fall, the more important the costs associated with signaling, reading, and selecting become, and the more we need sophisticated platforms to match the buyers and sellers.

These platforms supply precious information about both the quality of what is on offer and who would be the best match, by communicating the reputation of vendors (the ratings of hotels on Booking.com [...]). They put us in contact with partners who are either more reliable or just better suited to our needs. They enable us to find a way, at low cost, through the maze of offers. [...]

The ease of finding suppliers leads to trade that would otherwise be unimaginable. It often also causes prices to fall by putting suppliers in competition.¹

Price parity clauses are employed to prevent free-riding and ensure platform viability. Companies such as Booking.com undertake substantial upfront investments, including offering free advertising to partners and a free search tool for consumers, and – with a commission based business model – these investments can only be sustained if transactions happen via the platform. Surveys have shown that alternative monetization models, e.g. fixed fees or pay-per-click charges, are not viable because producers (i.e. hoteliers in the case of Booking.com) are mostly risk-averse and strongly prefer success-based fees.

Without price parity clauses, over time free-riding would become ever more prevalent. Consumers would use a platform to search for and compare offers but then purchase elsewhere, e.g. from the producers directly, who can offer a lower price than on the platform, as

¹ J. Tirole (2017). Economics for the Common Good, Princeton, p. 381

no commission payment will be incurred. While the effects of removing parity clauses in the short and medium term might be limited, as consumers become aware of the option to consistently free-ride, platform revenues will decline, investments will have to be reduced, and eventually the platform will unravel. As a result, consumers would no longer benefit from the public good provided through the platform.

The importance of free-riding is also recognised by the courts. For example, the OLG Düsseldorf, in its decision upholding narrow parity clauses as ancillary restraints, explicitly recognised the substantial risk of free-riding if hotels were to offer lower prices on their own websites.² In addition, the Swedish Patent and Market Court of Appeal found that there is a lack of evidence of anti-competitive effects for narrow parity clauses.

Given the existing economic theory, empirical evidence, and case law, it is therefore clear that there can be no presumption of anti-competitive effects of price parity clauses.³ We therefore encourage the Commission to pursue Option 1, i.e. no policy change. There is no justification to presume that parity clauses below the VBER market share threshold have an adverse effect. In fact, price parity clauses might encourage and foster market entry, e.g. by enabling new firms to initially focus on quality or service differentiation.

The Commission should also make it clear in the Vertical Guidelines that parity clauses above the VBER market share threshold do not carry any anti-competitive presumption. In fact, we believe that narrow parity clauses should be treated as ancillary restraints while wide parity clauses should be subject to an effects based analysis under Article 101(3) TFEU.

² OLG Düsseldorf, decision of 4 June 2019, VI - Kart 2/16 (V) – Booking.com.

³ Please see our response to the VBER support study for a detailed assessment