**European Commission public consultation on
Vertical Block Exemption Regulation (VBER)**

**1. Background information:**

Agreements between two or more enterprises operating at different levels of the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services are called “vertical agreements”. They fall under the scope of article 101(1) of the Treaty on the functioning of the EU which prohibits agreements between undertakings/enterprises that restrict competition, unless they meet the conditions of article 101(3) (i.e if they contribute to improving the production/distribution of products or to promoting technical or economic progress, and give consumers a fair share of the benefits).

The [EU Vertical Block Exemption Regulation (VBER)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0330) exempts from article 101(1) those vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. In particular, these agreements must:

* fulfil the criteria of article 2, the market share threshold indicated in article 3 (no more than 30% of market share held for the buyer and the seller) and
* shall not contain hard core restrictions mentioned in article 4 (e.g. price fixing, some territorial restrictions, etc.)

The EU has also adopted some [guidelines on the vertical restraints (VGL)](https://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf) which provide guidance on the interpretation of the VBER for various types of vertical agreements (e.g. exclusive supply agreements, tying of products, franchising, agency contracts, resale price restrictions, etc.)

**MFN/parity clauses between hotels and OTAs are considered as vertical agreements. They may fall in the scope of this regulation if conditions are met. The revision of the VBER and related guidelines represents an important opportunity in relation to the fight against MFN/parity clauses.**

**2. Public Consultation**

Shortly before the Christmas break, the European Commission launched a public consultation on the revision of the Vertical Block Exemption Regulation and accompanying Vertical Guidelines. This consultation is part of the on-going review process which was initiated in October 2018 with a view to having revised rules in place when the current rules expire in May 2022.

With this public consultation, the Commission seeks to gather views from stakeholders through an online questionnaire on the different policy options and additional issues outlined in the  [Inception Impact Assessment](http://mmail.dods.co.uk/ls/click?upn=TBSpwH2f8GghBtOAM5wSPcwyYpvVHCQ-2Bg7IODq-2Fb2lE8fzAgmsZOjSKOw8DqzXyImhm1cASsJjzx7f25OVZKfxmTazdh1nrwS9fN4zxo1qaCjI-2BRw3n9dSFKaG16jRLZxTca64oDqOnsbLxt-2FtUzsGV8tBQ9-2FcYLqw-2BiQjUhpQ4F4QE-2BLzDhJLcIfCc1Cknxq0PG_aN1F-2BBb-2FqCmeZA1f82VRgsRk6ta0zKDsaqB4h267J-2BO3w4xKEi91MYLo7GfHnJiJ1pZ329UiHt4QPx-2F9tOyOmZGSawH-2BhgYvx2JhbFaXwWgcJTOFl9x72T-2BtVYJRR23b3LszSYm1IPi3oBJrYGL-2BrpXoHiUIKVKFKU8W2-2BSkJ4nLuf0bp7NbLjhMkeCZe9m1xP0BugO-2Bwe5fUy6o8eRKkT7fXIgpYrIjbJTr-2B9a6hrg-3D). HOTREC provided [input to this Inception Impact Assessment](https://www.hotrec.eu/eu-competition-rules-revision-of-the-vertical-block-exemption-regulation/).

The public consultation forms part of the impact assessment phase of the review that seeks to address the issues raised during the evaluation phase and to assess the impact of the policy options proposed by the Commission. The deadline for providing feedback is 24 March 2020. At a later stage, stakeholders will have the possibility to provide their views on a draft of the revised rules that the Commission will publish on its website for comments.

The preceding  [evaluation](http://mmail.dods.co.uk/ls/click?upn=TBSpwH2f8GghBtOAM5wSPW20uNvZDAK6DU2QvVA4qSAvvg1T92gRUwEDKiaQ1pBC5V-2BcCxTUvAZqw8Q-2F557rAuyDMPvF0DJ1Flk0mOtbpdHk9THNNnrDlDxaYgxY8B4cAzuM_aN1F-2BBb-2FqCmeZA1f82VRgsRk6ta0zKDsaqB4h267J-2BO3w4xKEi91MYLo7GfHnJiJ1pZ329UiHt4QPx-2F9tOyOmcb2DbruAo3o-2F-2F4OUYE7VIyYyfEWwtI2PDDMbiN2bNm7NQSVjOHdafmArQhmHvZqsMB6kDsOJ6PukbGNsK1J-2FBoI8-2FOy2gx1M-2FwJ30HdIANRJGa877czwcRGUf3GJgLPlyAOYU6K-2F3iUw0AGAuDJMKA-3D)  phase showed that the Vertical Block Exemption Regulation and the Vertical Guidelines are useful tools that greatly facilitate the self-assessment by businesses.

At the same time, the evaluation identified a number of issues with regard to the functioning of the rules. The  [Staff Working Document](http://mmail.dods.co.uk/ls/click?upn=TBSpwH2f8GghBtOAM5wSPW20uNvZDAK6DU2QvVA4qSAvvg1T92gRUwEDKiaQ1pBC5V-2BcCxTUvAZqw8Q-2F557rAuyDMPvF0DJ1Flk0mOtbpdHk9THNNnrDlDxaYgxY8B4c1ivh_aN1F-2BBb-2FqCmeZA1f82VRgsRk6ta0zKDsaqB4h267J-2BO3w4xKEi91MYLo7GfHnJiJ1pZ329UiHt4QPx-2F9tOyOmddwLDxK5Omhbf0db0aaAWrfOfV2g9Ree1kpBpooXKYwkGkb2E74FfFsyqRBJvcxeSVB5iq-2BRUTJeF5HQso1T-2BS2qJVW3aDeUQ5n-2BPWZkaCnF6ReID2vlmO9DMKzIA7YSG4rlYsnrj0sOKaMA1I6Mfk-3D)  concluded that legal certainty could be improved by addressing those areas of the rules where gaps exist or there is a lack of clarity, or which have been found to be no longer adapted to recent market developments.

The Commission also outsourced [an external evaluation support study](https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf), in order to analyse more in-depth certain areas and specific vertical restrictions such as resale price maintenance and parity clauses. The evaluation study pays specific attention to narrow price parity clauses in the hotel sector, noting that prices are imposed by the OTA platforms hotels and citing evidence that such practices undermine competition and consumer choice.

**The online questionnaire for the public consultation is available**[**here**](http://mmail.dods.co.uk/ls/click?upn=TBSpwH2f8GghBtOAM5wSPcwyYpvVHCQ-2Bg7IODq-2Fb2lE8fzAgmsZOjSKOw8DqzXyImhm1cASsJjzx7f25OVZKfxmTazdh1nrwS9fN4zxo1qaCjI-2BRw3n9dSFKaG16jRLZxTca64oDqOnsbLxt-2FtUzsGV8tBQ9-2FcYLqw-2BiQjUhpQ64EyKIMpS5X607QX5WJN1dwEwGVpd-2FEDFvLi3fHuwwbQ-3D-3DvF61_aN1F-2BBb-2FqCmeZA1f82VRgsRk6ta0zKDsaqB4h267J-2BO3w4xKEi91MYLo7GfHnJiJ1pZ329UiHt4QPx-2F9tOyOmT6Ci-2Fr5ItqskVSLDoBGpqRHnIsVdBnOYzTey-2FXB1BvYG-2FqMTMPx8YQxIW1jLVialNo1vLW94pAqGSRe40Vxs0HhL-2ByYAwVnp-2FdLS2RmLUjeHauyWFTXWEFxSt-2BKLeLbTUFyaLAE9b0f298z3crMUN8-3D)and more information about the review process can be found  [here](http://mmail.dods.co.uk/ls/click?upn=TBSpwH2f8GghBtOAM5wSPW20uNvZDAK6DU2QvVA4qSAvvg1T92gRUwEDKiaQ1pBC5V-2BcCxTUvAZqw8Q-2F557rAqtIgc6sI64Io6Y9AwAC8oQ-3Db1eg_aN1F-2BBb-2FqCmeZA1f82VRgsRk6ta0zKDsaqB4h267J-2BO3w4xKEi91MYLo7GfHnJiJ1pZ329UiHt4QPx-2F9tOyOmTgQirp3QCIw8RqGiq0z-2BNZ-2Be3POuPAnsf8MykzKG2cdWisctFiVc1vnl4JuyTvrhA0XbM-2FLyg3jN2GKDVRtO5sQrM78vgvLTrERWBgFu6j6bguOfR2NYa75pavoutkDK4NmngteQmMKnuku2lsLJnI-3D).

It should also be noted that HOTREC provided a response to a previous public consultation on the revision of the VBER in May 2019, available [here on the HOTREC Members’ website](https://www.hotrec.eu/wp-content/customer-area/storage/1677212cb66d206a9e92a58201d66d3a/HOTREC-reply-24-May-2019-Contribution61ad561a-19cd-4f2c-94d5-870568be597a.pdf).

**3. HOTREC current position**

The VBER was conceived at the time where the online travel agent market was emerging. Market-players had not acquired yet such a collective dominant position. The VBER is currently not fit to apprehend this market, as it is based on a traditional supply chain concept which does not match digital market realities and new dominance of online platforms.

 **Market dominance test**

This test gives uncertainty on the demarcation of the market, especially on online markets and is not the most relevant to assess market dominance in online platform markets**.**

**We propose to replace the market share test by a dominance test which would a) interconnect arts. 101 and 102 TFEU, b) allow undertakings to use the case law of art. 102 TFEU (on abuse of dominant position and collective dominance) for their self-assessments and c) oblige undertakings to make a comprehensive analysis of the market conditions and their relative market power before imposing vertical restraints.**

**Narrow MFN Clauses – price parity**

A 2nd issue results from the wording of art. 4 (1) VBER on the prohibition of resale price maintenance (RPM). The economic effects of MFN clauses are largely identical to those of RPM, but are not caught by the wording of art. 4 (1) VBER, because the wording does not cover cases in which a powerful “buyer” imposes RPM obligations on the supplier (e.g. MFN clauses).

The anti-competitive effects are, however, identical in both cases. Art. 4 VBER should therefore abandon the concept of buyer / supplier but follow a holistic approach through a ban as a hardcore restriction under art. 4 (a) VBER of any restriction of a trading partner’s liberty to freely set its sales prices. Restriction of sales prices are not compatible with EU competition law and should in any event only be justifiable under art. 101 (3) TFEU.

**MFN clauses should be included in the list of hard-core restrictions (art. 4 VBER), in line with the prohibitions established in several Member States.** MFN clauses are widespread in online distribution markets. Existing competition case law on hotel booking portals show that MFN clauses entail – by object and by effect – massive restrictions of competition within the meaning of art. 101 (1) TFEU. The VBER / VGL do not provide a sufficiently robust basis to prevent them, creating legal uncertainties. MFN clauses have become the key instrument for dominant suppliers, purchasers and internet platforms to shield themselves against competition. There is absolutely no benefits neither for competition nor for consumers which could justify the use of MFN clauses. Existing case law shows that the allegations that MFN clauses would be procompetitive (i.e. free-riding argument) are unfounded.

**Towards a new VBER**

The VBER is not restrictive enough to ensure that only competitively neutral agreements are caught by the block exemption. It is based on a traditional supply chain concept which does not match digital market realities. Using a market share test instead of a dominance test includes jointly dominant undertakings in the ambit of the block exemption as long as their market share remains short of the 30%. From a competition policy and economic perspective, however, it does not seem appropriate for online markets. **Art. 4 VBER should be rephrased to ensure that the exemption does not apply to undertakings which solely or together with others hold a dominant position within the meaning of art. 102 TFEU.**

For the reasons stated above, hotels and other accommodation providers are still today exposed to MFN clauses across the EU – in particular in those EU Member States where neither the national competition authority, nor the legislator has intervened, such as in Spain or the Netherlands for instance. If the VBER and VGL were prolonged without changes, the legal uncertainties and shortcomings as described above would persist and – most importantly – the online booking portals would likely continue to use these legal uncertainties and loopholes as the basis for a continued use of MFN clauses. The massive restriction of competition caused by these clauses to the detriment of accommodation providers and end-customers would continue.

**VBER and brand-bidding**

Article 2(3) of the VBER provides that the block exemption applies to contractual provisions that regulate the use of the supplier’s Intellectual Property by its distributors (provided that all conditions for the exemption are satisfied). However, the Guess case (Case AT.40428, decision of 17 December 2018) has created legal uncertainty on the possibility for companies who do not operate within a selective distribution system to pursue a strategy of imposing restrictions on keyword bidding in online search advertising auctions.

It would be excessively far-reaching to interpret the Guess case as meaning that any restriction on keyword bidding in online search advertising would amount to a by object infringement and/or a hardcore restriction under Article 4(b) or 4(c) of the VBER.

**Therefore, a clarification is needed that the VBER applies to provisions which relate to both the use and/or the limitation to use the supplier’s Intellectual Property, both offline and online – especially in cases where there is no selective distribution systems in place.** This is fundamental in the hospitality sector, as online distribution is controlled by a duopoly of two dominant platforms which enjoy significant market power. Given the massive SEO spending by these dominant platforms, some restrictions on keyword bidding is the only way for hotel, and in particular SMEs, to ensure an even limite https://ec.europa.eu/competition/antitrust/legislation/guidelines\_vertical\_en.pdfd direct visibility on search engines websites like Google.

**4. Next steps**

HOTREC will share a draft response to the public consultation in due time, providing Members with sufficient time to provide feedback ahead of the public consultation deadline set on 24 March 2021.

In the meantime, in order to ensure that the HOTREC submission fully reflects the views of Members is fully up to date, **we would welcome general feedback on the consultation as well as responses to the following questions by Friday 19 February 2021**:

1. In addition to the issues outlined under point 3 of this memo, are there any other issues HOTREC should raise in its response to the public consultation?
2. Bearing in mind that some EU Member States have already banned narrow price parity/MFN clauses under national law (France, Belgium, Italy, Austria, process underway in Switzerland), should any specific elements be considered by HOTREC in order to ensure that existing bans under national law are not undermined by a revised VBER?
3. Would you have any statistical or economic evidence that shows that narrow price parity clauses imposed by OTAs on hoteliers undermine competition and/or consumer choice?

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