**HOTREC: Draft VBER Consultation SubmissionTop of Form**

**Q** 23 Please describe the relevance of the VBER and the Vertical Guidelines for your organisation.

*1000 character(s) maximum*

The VBER and VGL impact the hotel accommodation sector as they apply to vertical agreements between suppliers (hoteliers) and online distributors (OTAs).

Considering the structure of this questionnaire, our response focuses on the imposition of narrow and wide MFN clauses by OTAs on hoteliers under section B.4 on parity obligations.

Under question 113, we also briefly raise 3 related issues, as we consider that these issues consolidate the unilateral relationship of dependency of hoteliers *vis à vis* OTAs.

• The 30% market share threshold on the distributor side, which has created a practical impediment to effective oversight in the online hotel booking market.

• The licensing and lack of means for a trademark owner to restrict trademark use in keyword bidding for online search.

• The lack of clarity regarding how the principles of agency apply to OTAs.

Separately under Q112, we would also draw attention to an issue raised by HOTREC Members in the Netherlands and Belgium regarding brewery contracts. The VBER does not supply sufficient legal protection for hospitality businesses in these Member States against the power of the breweries. Exclusive drink supply contracts proposed by large brewery companies to hospitality entrepreneurs, often tied to a premise rented by the brewery. The market consolidation in the brewery sector and their importance in some specific national markets create market performance issues, especially as they bought the best locations for bars/pubs in city centres.

**B.4 Parity obligations**Parity clauses require a company to offer the same or better conditions to its contract party (for example, an online platform) as it offers on certain other sales channels. So-called wide parity clauses generally relate to the conditions offered on all sales channel (including other platforms and the company’s direct sales channels), whereas so-called narrow parity clauses generally relate only to the company’s direct sales channels (for example, the company’s website).

Parity obligations can be agreed at wholesale or retail level, and they can relate to price or non-price conditions (e.g. inventory or the availability of goods or services).

All types of parity obligations are currently block-exempted by the VBER. The evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms. National competition authorities and courts have identified anti-competitive effects of obligations that require parity with other indirect sales or marketing channels (e.g. other platforms or other online or offline intermediaries).

Regarding parity obligations, the following policy options are proposed:

**Option 1**: no policy change;

**Option 2**: removing the benefit of the block exemption for obligations that require parity relative to specific types of sales channels, by including such obligations in the list of excluded restrictions (Article 5 VBER). These obligations would thus require an individual effects-based assessment under Article 101 of the Treaty. Conversely, parity obligations relating to other types of sales channels would continue to be block-exempted, on the basis that they are more likely to create efficiencies that satisfy the conditions of Article 101(3) of the Treaty. For example, the benefit of the block exemption could be removed for parity obligations that relate to indirect sales and marketing channels, including platforms and other intermediaries, while maintaining this benefit for parity obligations that relate to direct sales and marketing channels, including own websites;

**Option 3**: removing the benefit of the block exemption for all types of parity obligations, by including them in the list of excluded restrictions (Article 5 VBER), thus requiring an individual effects-based assessment in all cases.

**\*** 75 **Do you have experience/knowledge of parity obligations?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |

76 **If you have experience/knowledge of parity obligations, please indicate whether you have this experience/knowledge because you requested a parity obligation or because you accepted a parity obligation?** (multiple answers possible)

|  |  |
| --- | --- |
|  | I have requested a parity obligation |
|  | I have accepted a parity obligation |
|  | Other experience/knowledge |

77 **If you have experience/knowledge of parity obligations, please explain this experience/knowledge.**

*5000 character(s) maximum*

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.

Price parity obligations are imposed by the leading online distribution and intermediary platforms (OTAs) on both independent and chain hotels. Because of the several factors, and in particular OTAs’ importance in generating bookings for hotels and capacity to buy the most relevant ad-words on search engines via an auctioning process and thus generate significant web traffic, hotels that attempt to do without a listing on the two (or three in Germany taking the national market position of HRS) largest platforms that impose MFNs put themselves at a serious disadvantage. As such, hotels are in practice obliged to accept the imposition of MFNs by OTAs.

The current OTA market structure exacerbates the problem. Over the past decade, the OTA market has experienced strong concentration and there are now two predominant OTAs – Booking.com Holdings (“Booking.com”) and Expedia Group (“Expedia) – who respectively control 68,4% and 16,3% of this market in Europe in 2019, according to HOTREC research conducted in collaboration with the Institute of Tourism HES-SO Valais-Wallis.

Our research on the European hotel distribution market shows that the share of online hotel booking intermediated by Booking.com and Expedia is steadily increasing since 2013 whilst the share of direct bookings continues to decline. In 2019, Expedia and Booking.com captured 85% of all European hotel bookings intermediated through online platforms. It is also important to note that both platforms offer business users almost identical terms and conditions, mobilizing increased market power to impose non-competitive terms towards both independent and chain hotels.

Their market share has been steadily growing since 2013 to the detriment of direct bookings. Our study also reveals that most hoteliers (56%) feel pressured by OTAs to accept platforms terms and conditions (e.g. regarding cancellation policy, special discounts) that hotels would otherwise voluntarily not offer. As expected, the higher the volumes of room nights generated by OTAs in a hotel, the higher the perceived pressure

Link to the HOTREC 2020 distribution study: <https://www.hotrec.eu/wp-content/customer-area/storage/49dead30c08f8623e14fc30678e409fd/2020-European-Distribution-Study.pdf>

In the hotel industry, each of the two leading OTAs has been able to simultaneously impose parity/MFN clauses to hotel operators in Europe, which effectively prevent hotels from offering better prices, conditions and availabilities to consumers via their own online sales channels (i.e. hotels’ own websites).

OTAs also take advantage of their predominant market position and hotel owners’ lack of control to restrict the use of their brand in online searches to sell at lower prices than and collecting a high commission. In addition, the lack of flexibility on the part of OTAs to stipulate cancellation policies in accordance with the requirements of each establishment has recently been highlighted.

**\*** 78 **Do you have experience or knowledge of instances where parity obligations raise competition concerns?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |

79 **Please explain your answer.**

*5000 character(s) maximum*

The use of MFN clauses – and their negative impact on competition – has increased significantly with the rise of online distribution over the last decade. MFN clauses are now widespread in online distribution markets. These abusive clauses undermine free competition and limit the hotelier's own commercial capacity, which is detrimental with regard to the conditions that the end customer ends up receiving, limiting his or her ability to compare different suppliers.

While wide price parity/MFN clauses have largely eliminated, their application in the past by OTAs, until 2015 in the EU, has helped entrenched their very strong market position. Narrow price parity/MFN clauses continue being imposed in the majority of EU Markets, except in France, Belgium, Austria and Italy where they have been rendered void by national legislation.

By preventing hotels from freely establishing their pricing policies, narrow price parity/MFN clauses entrench the dependency relationship of hotels towards the OTAs and, combined with the possibility for and means at the disposal of OTAs to buy trademark-protected ad-words via brand-bidding (see Q 113), severely undermine hoteliers' (and independent hoteliers in particular) capacity to develop a genuine digital marketing strategy. In effect, narrow MFNs act as a disincentive for hoteliers to attempt to develop their presence online.

We believe that such price parity obligations significantly restrict competition within the meaning of art. 101 (1) TFEU and this substantiated by existing competition case law. The VBER / VGL do not provide a sufficiently robust basis to prevent such price parity obligations, creating legal uncertainties. MFN clauses have become the key instrument for dominant suppliers, purchasers and internet platforms to shield themselves against competition. There are 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 pro-competitive (i.e. free-riding argument) are unfounded.

OTAs justify the imposition of price parity clauses to prevent 'free-riding'. There is widespread evidence that this is not the case and this is substantiated in several relevant publications, including:

* the Commission Report on the Monitoring Exercise Carried Out in the Online Hotel Booking Sector (2017) – which found “no evidence” of free-riding;
* the Bundeskartellamt’s investigations on Booking.com’s narrow parity clauses (2020) – which found that “[a]round 99% of consumers who first found their accommodation on Booking.com subsequently also booked it there”, and that “it can thus be ruled out […] that free-riding is of any quantitative relevance”; and
* the European Commission’s Support study for the evaluation of the VBER – which states that “free-riding between online and offline channels is only relevant for about 2-15% of all consumers/purchases, depending on the product. Free-riding between different types of online channels is relevant to an even lesser extent, with 1-9% of all purchases affected, depending on the product”.

We would further highlight that at a 2017 parliamentary hearing in Switzerland on price parity clauses, Booking.com itself confirmed that there was/is no free-rider problem. To contextualize the following statement, it must noted that narrow price parity clauses had been temporarily rendered void in Germany at the time of the hearing.

"The CEO of Booking.com, who was interviewed, testified at the hearing that in Germany there had not been a massive impact in terms of free riders, despite the ban, and that despite the ban on the narrow parity clauses, hoteliers, although they themselves exercise competition, usually give Booking.com the preference."

Original quote (in German) and text: <https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=39365>

«Der CEO von Booking.com, der befragt wurde, hat in der Anhörung ausgesagt, dass in Deutschland keine massive Auswirkung im Sinne von Trittbrettfahrern zu vermerken gewesen sei, trotz des Verbots, und dass die Hoteliers trotz des Verbots der engen Paritätsklauseln, obwohl sie selber den Wettbewerb ausüben, Booking.com in der Regel die Präferenz geben.»

We also note that OTAs maintain a strong position in EU Member States where narrow price parity clauses have been rendered void. We note form our above-mentioned research that:

* In Italy, the share of hotel bookings made via OTAs increased from 20.3% to 24.1% between 2017 and 2019, despite a ban on narrow price parity obligations set in 2017. In 2019, Booking.com controlled 70.4% of the Italian OTA market.
* Hotel bookings made via OTAs in France increased from 22.4% to 25.6% from 2017 to 2019. Booking.com and Expedia account for a market share of over 90% in 2019.

**\*** 80 **If you replied 'yes' to the previous question, please indicate whether the competition concerns raised by the parity obligations are linked to the type of sales/marketing channels that the obligation covers**:

|  |  |
| --- | --- |
|  | The competition concerns raised by the parity obligation are linked to the fact that it covers indirect sales/marketing channels (e.g. other platforms or intermediaries) |
|  | The competition concerns raised by the parity obligation are linked to the fact that it covers direct sales/marketing channels (e.g. own website) |
|  | The competition concerns raised by the parity obligation are linked to the fact that it covers both direct and indirect sales/marketing channels |
|  | The competition concerns raised by the parity obligation are due to other reasons (please provide details below) |
|  | No opinion |

**\*** 81 **Please explain your answer by reference to the competition concerns of which you have knowledge or experience.**

*5000 character(s) maximum*

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 described in our response 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.

Various recent studies commissioned by the European Commission led to the conclusion that the parity clauses imposed by the OTAs in the online hotel distribution sector hurt competition and consumers. The Support studies for the evaluation of the VBER found that narrow MFNs have generated the same anti-competitive effects as wide MFNs in the hotel sector. Commissioner Vestager Special Advisors’ Report found that “if competition between platforms is weak, then pressure on the dominant platforms can only come from other sales channels (e.g. in the case of hotel booking platforms, direct sales by hotels on their own websites) and it would be appropriate to also prevent "narrow" MFNs”.

MFN clauses have the potential of raising fees paid by hotels which ultimately harm consumers. By establishing parity clauses, OTAs effectively shield their commission rates from downward pressure as hotels cannot offer, via any other channel, more favorable terms and rates.

In the earlier days of the development of the OTA market, wide parity clauses limited the market entry or expansion of other OTAs, and thus have a negative impact on investment and innovation. While wide price parity clauses have been voluntarily removed by OTAs in favour of narrow price parity clauses, they have effectively acted as a barrier for market newcomers and helped incumbent OTAs leverage network effects and attract an increasingly large share of consumer traffic.

Crucially, narrow parity clauses serve as a disincentive for consumers to use other platforms or contact a hotel directly because OTAs guarantee that they offer the best prices. This tends to ‘lock-in’ consumers to a single platform and in turn further consolidates OTAs’ market positions.

82 **Based on your experience/knowledge, does the extent to which parity obligations raise competition concerns depend on the sector in which they are used?**

|  |  |
| --- | --- |
|  | Yes, to a large extent |
|  | Yes, to a small extent |
|  | No |
|  | No opinion |

83 **Please explain your reply**

*5000 character(s) maximum*

For the online intermediation market, market conditions changed since the adoption of the VBER. Today, 93% of the market is controlled by 3 OTAs, with very similar conditions for hotels. Together, booking.com and Expedia control 85% of this market; booking.com alone accounts for a market share of 68.4%, which has increased by 8 percentage points since 2013. It should be noted that HRS – the third major OTA in Europe – mainly draws its revenues and market share from the German market, where it enjoys an 18.3% market share in 2019 compared to a 7.2% in Europe in 2019.

Distributors with low market shares can still enjoy significant market power (based on network effects, data advantages and resulting barriers to entry and financial strengths); failing to recognize this leads to regulatory failure; the 30% threshold has created a practical impediment to effective oversight in the online hotel booking market where Expedia has been able to escape regulatory enforcement despite constituting a duopoly with Booking.com.

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.

The VBER use a market share test to assess the market powers of undertakings. 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 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.

Furthermore, Art. 2(4) VBER and recitals 27-28 VGL are not restrictive enough to ensure that only competitively neutral agreements are caught by the block exemption. They are based on a traditional supply chain concept which does not match digital market realities. We make 3 proposals:

1. Clarify (in art. 1 c) VBER) that the term “competing undertakings” covers intra-brand competition and emphasize that a manufacturer and its distributors (including internet platforms) can qualify as “competing undertakings” within the meaning of art. 2(4) to the extent that they compete for the same (end) customers.

2. In art. 2(4) VBER, new criteria should be developed to ensure that the exempted agreements are unlikely to affect the competitive relationship between the parties.

3. Rephrase art. 3 VBER, so 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.

84 **As regards any competition concerns raised by parity obligations, based on your experience do you consider it necessary to apply further distinctions?** (multiple replies possible)

|  |  |
| --- | --- |
|  | Yes, it is necessary to consider whether the parity obligation concerns the retail or the wholesale level |
|  | Yes, it is necessary to consider whether the parity obligation relates to price, inventory, availability or other conditions |
|  | Yes, if intermediaries are concerned, it is necessary to consider the type of intermediary, i.e. sales intermediaries (e.g. sales platforms) or advertising/marketing intermediaries (e.g. websites that offer only price comparison) |
|  | Yes, it is necessary to consider whether the transactions covered by the parity obligation take place online or offline |
|  | Yes, it is necessary to consider further distinctions (please specify these in the box below) |
|  | No |
|  | No opinion |

85 **If you replied yes to any of the options in this question, please explain in each case why you consider it necessary to apply the distinction by reference to the competition concerns raised by the particular type of parity obligation.**

*5000 character(s) maximum*

The following elements highlight the specific nature of the hotel/OTA market and underline why price parity clauses create raise competition concerns:

- Given the strong presence of OTAs and visibility in search engines, hotels cannot bypass the possibility to be listed on the main platforms that impose parity clauses.

- a significant albeit decreasing share of hotel room bookings are still made directly, either through digital means (hotel's website) or analogue means (phone call, walk-in).

- A direct booking will represent a lower costs for a hotelier because of the high commission fees charged by OTAs for bookings,

Hoteliers should be in a position to implement their own digital marketing strategies by mobilising the various options at their disposal and adapting their pricing policies accordingly. The absence of price parity clauses does not render the options provided OTAs uninteresting for consumers, who value the possibility to identify and compare hotel offers and book rapidly, and as such hoteliers still have strong incentives to provide OTAs with competitive offers. The fact that the share of bookings made via OTAs has not decreased and in most cases increased in countries where narrow price parity clauses have been rendered void by laws clearly highlights this.

**\*** 86 **Do you have experience or knowledge of instances where parity obligations create benefits?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |

94 **Taking into account any competition concerns that may be raised by parity obligations and any benefits they may create, based on your experience/knowledge do you consider that the benefit of the block exemption should be removed for these obligations, by placing them in the list of excluded restrictions in Article 5 VBER?**

No, parity obligations should continue to be block-exempted.

Yes, the benefit of the block exemption should be removed for parity obligations, but only for parity obligations that relate to indirect sales/marketing channels (e.g. other platforms/intermediaries)

Yes, the benefit of the block exemption should be removed for parity obligations, but only for parity obligations that relate to direct sales/marketing channels (e.g. own website)

Yes, the benefit of the block exemption should be removed for all parity obligations

No opinion

95 **Please explain your answer, in particular by reference to any differences or similarities between parity obligations relating to direct and indirect sales/marketing channels.**

5000 character(s) maximum

Wide MFN clauses have been phased out in Europe but as stated above, have significantly contributed to strengthening and entrenching the position of market players in a highly concentrated market. However, eliminating of wide price parity clauses by EU law should be still be a key objective of VBER, as they could re-emerge as a tool to undermine competition in the OTA market: as stated above, they help dominant players entrench their position and lock out newcomers.

Narrow MFN clauses continue being imposed by OTAs on hoteliers and continue having damaging effects on competition, consumer welfare and the digitalisation of hotel accommodation businesses. They undermine and disincentivise hotel businesses' capacity and ambition to develop their own digital presence and promote the development of direct sales channels.

Either way, price parity clauses imposed by OTAs have damaging effects for competition, consumer welfare and hoteliers capacity to conduct their business as they see fit.

96 **Based on your experience/knowledge, what would be the impact on the following aspects of removing the benefit of the block exemption for parity obligations that relate to indirect sales/marketing channels?**

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  | x |  |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  | x |  |  |  |
| **c. Legal certainty for businesses** |  |  |  | x |  |  |
| **d. Efficiency of distribution systems** |  |  |  | x |  |  |
| **e. Costs for businesses** |  |  |  | x |  |  |
| **f. Consumer welfare** |  |  |  | x |  |  |
| **g. Investment / Economic growth** |  |  |  |  | x |  |
| **h. Sustainability objectives** |  |  | x |  |  |  |

97 **Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the row of the impact you are referring to.**

*5000 character(s) maximum*

There is clear evidence that the parity clauses unilaterally imposed by the OTAs seriously restrict competition and innovation, and are not beneficial to consumers.

Competition on the market (A), costs for businesses (E) and consumer welfare (F): parity clauses impact competition between established OTAs and as a result have the potential of raising fees paid by hotels which ultimately harm consumers. Parity clauses protect OTA commission fees from downward pressure because hotels cannot offer, via any other channel, more favourable terms. OTAs can thus charge high rates of commission knowing that those rates will be spread across all bookings and that consumers cannot find better alternatives. OTA commission fees have a knock-on effect on hotels which can lead to higher room prices and/or reduced levels of investment. In turn, this is detrimental for the consumers and innovation. Furthermore, the application of narrow price parity clauses restricts or prevents hoteliers from passing on the potential cost savings that could be achieved via direct bookings on to the consumer.

Competition on the market (A): Definitively removing wide parity clauses from the block exemption should increase competition on the market. Despite wide parity clauses in online hotel distribution being prohibited or abandoned in most jurisdictions in Europe, they enabled OTAs to build high barriers to entry until 2015 and alleviated competition among OTAs already benefitting from a strong market position.

Competition on the market (A), efficiency of distributor systems (D) and investment (G): parity clauses have consolidated the position of dominant players, and as consequence this has impacted efficiency, innovation and investment. Potential newcomers to the OTA market have not been in a position to compete effectively by, among other things, offering hotels lower commissions, negotiating for greater room volumes or possibly lower room rates.

Incumbent market leaders therefore maintain a hold on an increasingly large share of consumer traffic, with the possibility to better leverage network effects. In turn, growing traffic and by consequence, revenues, enables the leading incumbent OTAs to consolidate the strong market position by offering perks, promotions and better rates that smaller competitors cannot match, and imposing higher commission rates on hotels, as the latter’s position to negotiate is undermined. In turn, OTAs capture a significant share of hoteliers’ revenue, which enables OTAs to continue strengthening their market position, capacity to dominate the ad-word market and invest in online visibility, while hotels miss out on a share of revenue which could be reinvested in good digital marketing, property maintenance and development, recruitment and training of staff and the improvement of services and amenities.

98 **In your opinion, what would be the impact on the following aspects of removing the benefit of the block exemption for parity obligations that relate to direct sales/marketing channels?**

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  | x |  |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  | x |  |
| **c. Legal certainty for businesses** |  |  |  |  | x |  |
| **d. Efficiency of distribution systems** |  |  |  |  | x |  |
| **e. Costs for businesses** |  |  |  |  | x |  |
| **f. Consumer welfare** |  |  |  |  | x |  |
| **g. Investment / Economic growth** |  |  |  |  | x |  |
| **h. Sustainability objectives** |  |  |  | x |  |  |

99 **Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the row of the impact you are referring to.**

*5000 character(s) maximum*

The responses provided under Q97 are also relevant for this section. In addition:

Competition on the market (A), consumer welfare (F) and costs for businesses (E): The removal of narrow price parity clauses would act as an incentive for independent hotels to develop, improve and ultimately better master their digital marketing strategies. This would lead to enhanced competition between hotels and towards OTAs. It could also have beneficial impacts on the costs of digital marketing for hoteliers. Combined, this would also pave the way for more interesting pricing for consumers.

Harmonisation (B): narrow price parity clauses have already been rendered void in France, Belgium, Austria and Italy. It would be consistent to generalise these requirements across the EU by removing narrow parity clauses from the benefit of the block exemption, given that they are beneficial for hotels and not harmful to OTAs.

Consumer welfare (F): Consumers would undeniably benefit from a removal of narrow price parity clauses, which would give hotels much-needed freedom to set their own rates via their own sales’ channels. With a narrow price parity clause, a consumer booking a room via an OTA pays for the room plus a commission fee, while a hotel must offer via its own sales channel a room at the price set by the OTA, even though the hotel does not take a commission fee: the consumer therefore pays an inflated price for a direct booking compared to a booking via an OTA. Without a narrow price parity clause, the hotel has more pricing options at its disposal and is in a position to offer a better price or compensate the gains (incurred by not paying a commission fee) by offering additional perks, services and/or amenities to the consumer. In addition, the direct link between the hotel and the consumer established by a direct booking means that the hotel is in a much better position to process and act upon consumer requests or questions: this is particularly important in the current epidemiological context where consumers often wish to directly ask the hotelier about, for example, health and safety protocols in place at the establishment.

Legal certainty (C): The VBER / VGL do not provide a sufficiently robust basis to prevent such price parity obligations, creating legal uncertainties. If the VBER and VGL were prolonged without changes, the legal uncertainties and shortcomings described in our response 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 price parity obligations. VGL Section VI.2. should be amended to clarify that parity clauses cannot be imposed by online intermediaries on business users in cases where:

* business users make a significant number of sales both via their own direct sales channels and via online intermediaries, and
* business users have no realistic alternative to offering their services via online intermediary platforms.

100 **Based on your experience, what would be the impact on the following aspects of removing the benefit of the block exemption for all parity obligations?**

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  | x |  |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  | x |  |
| **c. Legal certainty for businesses** |  |  |  |  | x |  |
| **d. Efficiency of distribution systems** |  |  |  |  | x |  |
| **e. Costs for businesses** |  |  |  |  | x |  |
| **f. Consumer welfare** |  |  |  |  | x |  |
| **g. Investment / Economic growth** |  |  |  |  | x |  |
| **h. Sustainability objectives** |  |  |  | x |  |  |

101 **Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the row of the impact you are referring to.**

*5000 character(s) maximum*

See previous replies to questions 97 and 99.

Consumer welfare (F): Considering the combined effects of two factors:

* that OTAs are in an unchallengeable position to buy trademark-protected ad-words via brand-bidding – i.e. the top search slots on search engine results pages;
* that OTAs impose price parity clauses;

then it is clear that consumers have little incentive nor easily accessed options to look beyond the offers provided by OTAs and ‘shop around’ when booking a hotel room online. In other words, price parity obligations are an essential component of a strategy aiming to lock-in consumers to the OTA platform. This situation also disincentivizes hotels to engage in more ambitious digital marketing strategies of their own.

Investment / Economic growth (G) and Sustainability Objectives (H): As stated under Q97, price parity obligations affect hoteliers’ available revenue and therefore their capacity to invest and consider taking risks from a business perspective. In addition to the examples of investment provided under Q97, hoteliers’ capacity to invest in more sustainable and ecological facilities and services are also affected. Our responses have also highlighted that price parity obligations serve as a disincentive for the digitalization of hotels, in particular for small independent owned establishments. Finally, we would point out that in the current epidemiological circumstances, and despite dealing with an unprecedented crisis and shortage of liquidity, many hotels must consider substantial investment to ensure that establishments meet higher levels of health and safety to meet growing consumer expectations (e.g. improved ventilation, touchless interfaces and menus, reconfiguration of common areas to ensure less crowding, etc.)

**B.5 Other aspects**

**B.5.1.** Resale price maintenance (“RPM”) refers to restrictions that set a fixed or minimum resale price to be observed by the buyer. Given that RPM eliminates price competition between a supplier’s distributors and, based on enforcement experience, is generally unlikely to lead to efficiency gains, it is considered a hardcore restriction under the VBER (i.e. it cannot benefit from the safe harbour) and a by object restriction under Article 101 of the Treaty. However, the Vertical Guidelines recognise that supplier-driven RPM may, in certain circumstances, lead to efficiencies, e.g. to achieve an expansion of demand during the launch of a new product or to avoid the undercutting of a coordinated short-term low price campaign in a franchising system. The evaluation has identified a lack of clarity and guidance as regards the conditions under which such efficiencies can be argued and the evidence needed to meet the threshold for an individual exemption under Article 101(3) of the Treaty. Stakeholders pointed out that, as a result, companies prefer not to run the financial and reputational risk of including RPM restrictions in their vertical agreements.

102 **Taking into account that RPM is considered a hardcore restriction under the VBER and that, as stated in the Vertical Guidelines, RPM may exceptionally lead to efficiencies, do you have experience or knowledge of concrete instances where RPM has led to efficiencies, or could have led to efficiencies if the parties had not refrained from using RPM?**

|  |  |
| --- | --- |
|  | Yes, I have experience or knowledge of concrete instances where RPM has led to efficiencies |
|  | Yes, I have experience or knowledge of concrete instances where RPM could have led to efficiencies if the parties had not refrained from using RPM |
|  | No |
|  | No opinion |

104 **The evaluation has shown a lack of clarity and guidance as regards the conditions under which efficiencies can be argued for the use of RPM and the evidence needed for this purpose, in your view, what measures could be taken to address this lack of clarity and guidance?**

Please substantiate your reply.

*5000 character(s) maximum*

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.

**B.5.2.** Non-compete obligations of an indefinite duration or exceeding 5 years are excluded from the benefit of the VBER and therefore require an individual effects-based assessment under Article 101 of the Treaty. Non-compete obligations that are tacitly renewable beyond a period of 5 years are deemed to have been concluded for an indefinite duration. The evaluation has indicated that this broad exclusion of non-compete clauses from the benefit of the block exemption may result in false negatives, by covering non-compete obligations that satisfy the conditions of Article 101(3) of the Treaty. In particular, the exclusion of tacitly renewable non-compete obligations could be considered unjustified, to the extent that the buyer is able to terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost. Moreover, the overly broad scope of the exclusion is considered to create an unnecessary administrative burden and additional transaction costs for businesses, since it forces them to periodically renegotiate their contracts despite there being a willingness on both sides to continue the contractual relationship beyond five years.

In this context, the Commission is exploring the possibility of block-exempting tacitly renewable non-compete obligations for the duration of the agreement, provided that the buyer can terminate or renegotiate the agreement at any time with a reasonable notice period and at reasonable cost.

105 **Do you have experience or knowledge of instances where it would not be appropriate to block-exempt a tacitly renewable non-compete obligation?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

**B.5.3** **Sustainability agreements**

In recent years, there have been increasing discussions about the compatibility of agreements between supply chain operators to foster sustainability objectives with Article 101 of the Treaty. No specific issues relating to sustainability agreements in the vertical supply chain were identified during the evaluation. However, in line with the objectives of the European Green Deal, specific considerations as regards the impact of the current framework for vertical agreements on sustainability objectives will be taken into account in the impact assessment phase of the VBER review.

107 **Do you have experience or knowledge of situations where the current rules create obstacles for vertical agreements that pursue sustainability objectives?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

109 **Do you see a need for specific guidance on vertical agreements that pursue sustainability objectives? If so, what type of guidance would be necessary? Please explain your reply. What particular aspects should this guidance cover?**

*5000 character(s) maximum*

**B.5.4. Impact of the Covid crisis**The COVID-19 crisis that began in March 2020 has had a significant impact on the economy. In particular, there appears to have been a significant increase in e-commerce as a result of the measures taken to contain the spread of the pandemic. Given that these developments are very recent, they could not be taken into account during the evaluation phase of the VBER review. However, as indicated in the staff working document, in view of their importance, the effects of the COVID-19 crisis on the supply and distribution arrangements should be evaluated and, if possible, quantified at this stage of the review of the rules.

110 **Do you have experience or knowledge regarding the impact of the Covid-19 crisis on market trends that are relevant for the revision of the VBER and Vertical Guidelines (e.g. innovation in or impacts on distribution models and strategies or on consumer behaviour)?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

111 **Please explain your answer by reference to market trends and their relevance for specific rules in the VBER and Vertical Guidelines (please specify which ones).**

The current COVID-19 crisis risks worsening this economic dependency of hotels vis-à-vis the leading OTAs.

This market trend risks being accelerated by the pandemic. The hotel sector, globally and across the EU, has been hit extremely hard by the COVID-19 crisis in an unprecedented manner. The hotel sector has seen revenue declines more than four times greater than during the previous two crises combined. Many hotels have seen considerable workforce reductions and furloughs, and many were forced to close their doors, either temporarily or even permanently. Hotel demand may not reach pre-COVID-19 levels until 2023, while revenue per available room may not recover until 2024.

The virus’ spread, lockdown measures (including restrictions on gatherings and closing of bars, restaurants, spas, swimming pools and fitness centres), travel bans and other measures to contain the global pandemic have heavily impacted all types of business and leisure travel around the world and in the EU.

Taking the hospitality sector as a whole (accommodation services and food and beverage services) – Eurostat figures:

- During Q2 2020, the sector’s turnover in the EU dropped by 61.85% compared to Q2 2019

- During Q3 2020, despite a slight turnaround in activity, the sector’s turnover in the EU dropped by 26.5% compared to Q3 2019

- in Q4 2020, the sector’s turnover was less than half of what it was during the same period in 2019 in the EU27, with a 50,2% drop.

Despite these unprecedented and extremely difficult circumstances, the hospitality sector has strived to show solidarity and support, with hotels offering for example free accommodation or discounted rates to medical and other front-line workers.

Hoteliers have witnessed on several occasions the power/dominance OTA exercise over them during the crisis. While the following examples may not all be directly linked to VBER, they result from the imbalance of bargaining power between the largest OTAs and hotel, enabling OTAs to behave unilaterally in a way that is unfair and harmful to the legitimate interests of hotels and consumers in the EU. The use of parity obligations and 'brand-bidding' power support this imbalance.

In March 2020, at the beginning of the crisis, Booking.com harmed hotels liquidity and stretched the legal limits of its broker status, unilaterally calling for "force majeure" cases for several weeks, using its market power to intervene in their customer relations at the expense of the hotels. Non-cancelable rates suddenly became as "cancelable". Two days later, due to the “workload for both sides and incorrect operation by the hotel”, Booking.com changed the activation date for all outstanding and future virtual credit cards to just one day after arrival. Bookings that were subject to force majeure in accordance with Booking could be canceled by guests free of charge and the hotel could no longer charge the virtual credit cards. Similarly, Expedia extended its "Flex Policy" for force majeure to all bookings worldwide. The hotel partners were given the opportunity 24 hours to prevent their automatic inclusion in the so-called " Cancellation Waiver Programme.

 With the "Sponsored Discount" scheme, Booking.com promised the hotels more bookings on January 19, 2021 at attractive prices without additional costs for the hotel. What sounds good has a powerful catch: in fact, the portal then grants the booker a price reduction on behalf of the hotel from its commission income, whereby the hotel not only gives up price control over its product, but also ruins its price credibility in direct sales.

Booking.com told its hotel partners on December 28, 2020, inviting them to “ unlock local bookings with a domestic price ” Offering domestic prices would be a blatant violation of the European regulation against unjustified geoblocking.

112 **Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.**

113 **Do you have any further comments on this initiative on aspects not covered by the previous questions?**

*3000 character(s) maximum*

Brewery contracts: see our attached replies under Q112

Market share threshold: see response to Q83

Brand-bidding: Online advertising has become a key aspect of online competition. A level playing field is required to ensure that consumers can still have a direct access to the suppliers’ advertising of their products or services. The leading online platforms capture massive income streams which enable these operators to further entrench their position, through massive online advertising spending. As a result of this self-reinforcing cycle (where network effects facilitate an exclusionary level of promotions that lead to even greater use of the dominant platforms), the leading platforms may capture substantial market power, enabling them to cut the direct relationship between the supplier and consumers, to impose terms of service that may increase industry costs and ultimately harm consumers. One of the best ways to counter this would be to allow suppliers to restrict the use of their brands/trademarks as keywords to ensure some visibility on search engine results to the benefit of consumers.

Article 2(3) of the VBER provides that the block exemption applies to contractual provisions that regulate the use of the supplier’s IP by its distributors (provided that all conditions are satisfied). This is of the utmost importance and should be kept in any revision of the VBER. Clarification should be provided to confirm that the block exemption applies to provisions which relate to both the use and/or the limitation to use the supplier’s IP, both offline and online. A new section of the VGL should be created to provide additional guidance, to clarify the conditions under which restrictions on keyword bidding may infringe EU competition law. This is all the more important for online platform markets in the hotel sector, where hotels face direct competition from dominant platforms on SEO spending to attract customers.

Clarifying the agency relationship under the VGL: The VGL does not provide sufficient legal certainty with respect to the qualification of a “genuine” agency relationship, in particular in the online environment. The legal test should not be whether the agent bears any risk but rather to assess the degree or magnitude of this risk in relation to the sale or distribution of the specific contract goods or services. The VGL sets a threshold that is stricter than the conditions set out by the case-law. There is a need (i) to clarify the conditions under which an intermediary may be qualified as a “genuine” agent, and (ii) to confirm that the same principals apply offline and online. Whether an online intermediary operates as a “genuine” agent must remain dependent on the nature and extent of the risks borne. Therefore, where the supplier keeps title to the goods or services, bears all risks in relation to the goods or services and directly contracts with customers, the online intermediary must be treated as a genuine agent.

**\*** 114 **Please indicate whether the Commission services may contact you for further details on the information submitted, if required**.

|  |  |
| --- | --- |
|  | Yes |
|  | No |

If you're human, leave this field blank

ANNEX – Questions not covered by HOTREC’s response

**B. Policy options for revising the VBER and Vertical Guidelines**

During the evaluation phase, the following areas of the rules were identified as not working well or as well as they could. During the impact assessment phase, the Commission is exploring policy options for revising the VBER and/or the Vertical Guidelines in these areas.

**B.1 Exception for dual distribution**

Agreements between competitors are not covered by the VBER and should be assessed under the competition rules for horizontal agreements. However, Article 2(4) of the VBER and paragraph 28 of the Vertical Guidelines provide an exception to this rule for dual distribution, namely the situation where a supplier sells its goods or services directly to end customers, thereby competing with its distributors at the retail level (“exception for dual distribution”). When the VBER was adopted, the retail activities of suppliers engaging in dual distribution were considered negligible and unlikely to give rise to horizontal competition concerns. However, the growth of e-commerce has enabled suppliers to engage in dual distribution more easily than in the past.

Against this background, the following policy options are considered as indicated in the Inception Impact Assessment regarding the exception for dual distribution **(Options 2 and 3 could be applied cumulatively)**:

**Option 1**: no policy change;

**Option 2**: limiting the scope of the exception to scenarios that are unlikely to raise horizontal concerns by, for example, introducing a threshold based either on the parties’ market shares in the retail market or on other metrics, and aligning the coverage of the exception with what is considered exemptible under the rules for horizontal agreements;

**Option 3**: extending the exception to dual distribution by wholesalers and/or importers;

**Option 4**: removing the exception from the VBER, thus requiring an individual assessment under Article 101 of the Treaty in all cases of dual distribution.

1 **Do you or your suppliers engage in dual distribution?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

3 **Based on your experience, do you consider that the exception for dual distribution set out in Article 2(4) of the VBER and paragraph 28 of the Vertical Guidelines should be maintained?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

5 **Based on your experience/knowledge, what would be the impact on the following aspects if the exception for dual distribution was to be removed, which would mean that dual distribution was subject to a self-assessment in all cases?**

Please use the follow-up question to give concrete examples of the likely impacts.

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  |  | x |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  |  | x |
| **c. Legal certainty for businesses** |  |  |  |  |  | x |
| **d. Efficiency of distribution systems** |  |  |  |  |  | x |
| **e. Cross-border trade** |  |  |  |  |  | x |
| **f. Costs for businesses** |  |  |  |  |  | x |
| **g. Consumer welfare** |  |  |  |  |  | x |
| **h. Investment / Economic growth** |  |  |  |  |  | x |
| **i. Sustainability objectives** |  |  |  |  |  | x |

7 **Do you have experience/knowledge of instances where situations of dual distribution currently covered by the exception may raise horizontal competition concerns?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

9 **Based on your experience/knowledge, do you consider that an additional threshold should be introduced to ensure that only dual distribution situations that do not raise horizontal competition concerns are block-exempted?**

|  |  |
| --- | --- |
|  | Introduce an additional threshold based on the combined market share at the retail level (i.e. dual distribution would be block-exempted if the combined market share of the parties to the agreement does not exceed a certain level in the retail market) |
|  | Introduce an additional threshold, but not based on the combined market share at the retail level |
|  | No need for an additional threshold |
|  | No opinion |

15 **Based on your experience/knowledge, what would be the impact of introducing an additional threshold of 20% combined market share in the retail market (in line with the threshold in Article 3 of the Block Exemption Regulation for specialisation agreements) on the following aspects?**
**Please, use the follow-up question to give concrete examples of the likely impacts.**

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  |  | x |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  |  | x |
| **c. Legal certainty for businesses** |  |  |  |  |  | x |
| **d. Efficiency of distribution systems** |  |  |  |  |  | x |
| **e. Cross-border trade** |  |  |  |  |  | x |
| **f. Costs for businesses** |  |  |  |  |  | x |
| **g. Consumer welfare** |  |  |  |  |  | x |
| **h. Investment / Economic growth** |  |  |  |  |  | x |
| **i. Sustainability objectives** |  |  |  |  |  | x |

19 **Do you have experience/knowledge of instances where agreements between a wholesaler, which is also active at the retail level, and its distributors could raise horizontal competition concerns?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

21 **Do you have experience/knowledge of instances where agreements between an importer, which is also active at the retail level, and its distributors could raise horizontal competition concerns?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

23 **In your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to wholesalers impact the following aspects?**
**Please use the follow-up question to give concrete examples of the impacts.**

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  |  | x |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  |  | x |
| **c. Legal certainty for businesses** |  |  |  |  |  | x |
| **d. Efficiency of distribution systems** |  |  |  |  |  | x |
| **e. Cross-border trade** |  |  |  |  |  | x |
| **f. Costs for businesses** |  |  |  |  |  | x |
| **g. Consumer welfare** |  |  |  |  |  | x |
| **h. Investment / Economic growth** |  |  |  |  |  | x |
| **i. Sustainability objectives** |  |  |  |  |  | x |

25 **Based on your experience/knowledge, how would a potential extension of the scope of the exception for dual distribution to importers impact the following aspects?**
**Please use the follow-up question to give concrete examples of the impacts.**

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  |  | x |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  |  | x |
| **c. Legal certainty for businesses** |  |  |  |  |  | x |
| **d. Efficiency of distribution systems** |  |  |  |  |  | x |
| **e. Cross-border trade** |  |  |  |  |  | x |
| **f. Costs for businesses** |  |  |  |  |  | x |
| **g. Consumer welfare** |  |  |  |  |  | x |
| **h. Investment / Economic growth** |  |  |  |  |  | x |
| **i. Sustainability objectives** |  |  |  |  |  | x |

27 **Based your experience/knowledge, would any of the following actions be able to**

**ensure that the scope of the exception for dual distribution is appropriate (i.e. instances that may raise horizontal competition concerns are not block-exempted and instances that do not raise horizontal competition concerns or that satisfy the criteria of Article 101(3) of the Treaty are block-exempted)? You can select more than one of the following options:**

|  |  |
| --- | --- |
|  | Introduce an additional threshold |
|  | Extend the scope of the exception to include wholesalers that engage in dual distribution |
|  | Extend the scope of the exception to include importers that engage in dual distribution |
|  | No action required, the current scope of the exception for dual distribution is appropriate |
|  | Remove the exception for dual distribution (dual distribution would no longer be block-exempted and would therefore require an individual effects-based assessment under Article 101 of the Treaty) |
|  | Other |

30 **Based on your knowledge/experience, please indicate whether you have any other comments or suggestions with regard to the exception for dual distribution. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.).**

**Please upload the information in files with a maximum size of 1 MB each, using the button below.**

**B.2 Active sales restrictions**

Agreements or concerted practices aimed at restricting the territory into which, or the customers to whom, a buyer can sell the contract goods or services (“territorial and customer restrictions”) are considered hardcore restrictions under the VBER (i.e. they cannot benefit from the safe harbour) and by object restrictions under Article 101 of the Treaty. This means that the buyer should generally be allowed to actively approach individual customers (“active sales”) and respond to unsolicited requests from individual customers (“passive sales”). While the current rules generally do not allow restrictions of passive sales (except as provided by Articles 4(b)(iii) and 4(b)(ii) of the VBER), they do permit restrictions of active sales in certain limited cases, notably to protect investments by exclusive distributors (i.e. active sales into exclusive territories can be restricted (4(b)(i) of the VBER) and to prevent sales by unauthorised distributors in territories where a supplier operates a selective distribution system (i.e. members of this system can be restricted from selling to non-members (4(b)(iii) of the VBER).

The evaluation has shown that the current rules are perceived as preventing suppliers from designing their distribution systems according to their business needs. The main issues raised in this context include the possibility of combining exclusive and selective distribution in the same or different territories. Moreover, the current rules are considered as not allowing for the effective protection of selective distribution systems against sales from outside the territory in which the system is operated.

Against this background, the following policy options are proposed regarding the exception for active sales restrictions **(Options 2 and 3 could be applied cumulatively)**:

**Option 1**: no policy change

**Option 2**: expanding the exceptions for active sales restrictions to give suppliers more flexibility to design their distribution systems according to their needs, in line with Article 101 of the Treaty;

**Option 3**: ensuring more effective protection of selective distribution systems by allowing restrictions on sales from outside the territory in which the selective distribution system is operated to unauthorised distributors inside that territory.

**\*** 31 **Do you or your supplier(s) apply any of the active sales restrictions that are permitted by Article 4 of the VBER?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |

**\*** 33 **Based on your experience/knowledge, do you consider that the current rules allowing certain active sales restrictions should remain unchanged?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

35 **Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in the same territory (e.g. an EUMember State) but at different levels of the distribution chain may not fully comply with the current rules (e.g. exclusivity at the wholesale level within a selective distribution system)?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

37 **Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the same territory (e.g. an EU Member State) at different levels of the distribution chain (e.g. exclusivity at the wholesale level within a selective distribution system)?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

39 **Do you have experience or knowledge of instances where the combination of exclusive and selective distribution systems in different territories (e.g. different EU Member States, with exclusive distribution in Member State X and selective distribution in Member State Y) may not fully comply with the current rules?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

41 **Do you have experience or knowledge of concrete benefits that are created by combining exclusive and selective distribution systems in the different territories (e.g. different EU Member Stateswith exclusive distribution in Member State X and selective distribution in Member State Y)?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

43 **Based on your experience/knowledge, what actions would ensure that the exceptions for active sales restrictions provide suppliers with more flexibility to design their distribution systems according to their needs?**

|  |  |
| --- | --- |
|  | allow exclusivity at the wholesale level within a selective distribution system |
|  | other action (please specify below) |

44 **Please explain your answer**

*5000 character(s) maximum*

45 **Based on your experience/knowledge, what would be the impact on the following aspects of allowing exclusivity at the wholesale level within a selective distribution system?**

**Please use the follow-up question to give concrete examples of the likely impacts.**

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  |  | x |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  |  | x |
| **c. Legal certainty for businesses** |  |  |  |  |  | x |
| **d. Efficiency of distribution systems** |  |  |  |  |  | x |
| **e. Cross-border trade** |  |  |  |  |  | x |
| **f. Costs for businesses** |  |  |  |  |  | x |
| **g. Consumer welfare** |  |  |  |  |  | x |
| **h. Investment / Economic growth** |  |  |  |  |  | x |
| **i. Sustainability objectives** |  |  |  |  |  | x |

46 **Please explain your answers above and give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.**

*5000 character(s) maximum*

47 **Do you have experience or knowledge of benefits that can result from restricting sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

49 **Based on your experience/knowledge, what would be the impact on the following aspects of allowing restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory?**
**Please use the follow-up question to give concrete examples of the likely impacts.**

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  |  | x |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  |  | x |
| **c. Legal certainty for businesses** |  |  |  |  |  | x |
| **d. Efficiency of distribution systems** |  |  |  |  |  | x |
| **e. Cross-border trade** |  |  |  |  |  | x |
| **f. Costs for businesses** |  |  |  |  |  | x |
| **g. Consumer welfare** |  |  |  |  |  | x |
| **h. Investment / Economic growth** |  |  |  |  |  | x |
| **i. Sustainability objectives** |  |  |  |  |  | x |

50 **Please explain your answers above and, if possible, give concrete examples of the impacts you indicated. Please specify the letter of the row of the impact you are referring to.**

*5000 character(s) maximum*

51 **Based on your experience/knowledge, which of the following actions could ensure an appropriate list of permitted active sales restrictions in the VBER (i.e. block-exempting restrictions that do not raise competition concerns or that satisfy the criteria of Article 101(3) of the Treaty, and not block-exempting restrictions that may raise competition concerns)? You can select more than one of the following options:**

|  |  |
| --- | --- |
|  | Extend the scope of the exceptions to allow exclusivity at the wholesale level within a selective distribution system |
|  | Extend the scope of the exceptions to allow restrictions on sales from outside the territory in which a selective distribution system is operated to unauthorised distributors inside that territory |
|  | Maintain the current rules |
|  | Other |

54 **Based on your experience, please provide any other comments or suggestions you may have on the rules on active sales restrictions. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in documents with a maximum size of 1 MB each using the button below.**

**B.3 Indirect restrictions of online sales**Online sales are generally considered a form of passive sales and restrictions preventing distributors from selling through the internet are considered hardcore restrictions that cannot benefit from the safe harbour and as by object restrictions under Article 101 of the Treaty. The current rules apply the same approach to two types of indirect measures that may make online sales more difficult. Paragraph 52(d) of the Vertical Guidelines provides that charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline (“dual pricing”) is a hardcore restriction. Paragraph 56 of the Vertical Guidelines states that the same applies to imposing criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical shops (“equivalence principle”) in the context of selective distribution. A supplier may, for example, require delivery within specified timeframes in online stores as an equivalent to a requirement for immediate delivery in physical stores or require the creation of an online helpdesk for online stores as equivalent to the service provided in physical stores.

Over the last decade, online sales have developed into a well-functioning sales channel, whereas physical stores are facing increasing pressure. During the evaluation, stakeholders indicated that the rules on dual pricing prevent them from incentivising investments, notably in physical stores, by not allowing them to differentiate wholesale prices based on the costs of each channel. Stakeholders also pointed to a lack of legal certainty in the application of the equivalence principle, as online and offline sales channels are inherently different, and it is difficult to assess when a divergence in the criteria used for each channel amounts to a hardcore restriction under the VBER.

Against that background, the following policy options are proposed for these two types of indirect restrictions of online sales **(Options 2 and 3 could be applied cumulatively)**:

**Option 1**: no policy change;

**Option 2**: no longer treating dual pricing as a hardcore restriction, with safeguards to be defined in line with the case law;

**Option 3**: no longer treating as a hardcore restriction the imposition of criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical stores in a selective distribution system, with safeguards to be defined in line with the case law.

55 **Do you have experience or knowledge of benefits that can be generated by dual pricing between online and offline sales?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

57 **Do you have experience or knowledge of instances where dual pricing between online and offline sales would raise competition concerns?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

59 **Based on your experience/knowledge, what would be the impact on the following aspects of block-exempting dual pricing between online and offline sales?**
Please use the follow-up question to give concrete examples of the likely impacts.

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  |  | x |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  |  | x |
| **c. Legal certainty for businesses** |  |  |  |  |  | x |
| **d. Efficiency of distribution systems** |  |  |  |  |  | x |
| **e. Cross-border trade** |  |  |  |  |  | x |
| **f. Costs for businesses** |  |  |  |  |  | x |
| **g. Consumer welfare** |  |  |  |  |  | x |
| **h. Investment / Economic growth** |  |  |  |  |  | x |
| **i. Sustainability objectives** |  |  |  |  |  | x |

61 **Case law provides that prohibiting online sales is a hardcore restriction that cannot benefit from the safe harbour provided by the VBER. What would in your view be the appropriate safeguard to ensure that dual pricing between online and offline sales would not result in a prohibition of online sales?**

*5000 character(s) maximum*

62 **Do you have experience or knowledge of benefits that can be generated from the application of different criteria for online and offline sales in selective distribution systems?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

64 **Do you have experience or knowledge of instances where the application of different criteria for online and offline sales in selective distribution systems would raise competition concerns?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

66 **Based on your experience/knowledge, if the application of different criteria for online and offline sales in selective distribution systems were to be block-exempted, what would be the impact on the following aspects?**

|  | **Very negative** | **Negative** | **Neutral** | **Positive** | **Very positive** | **No opinion** |
| --- | --- | --- | --- | --- | --- | --- |
| **a. Competition on the market** |  |  |  |  |  | x |
| **b. Harmonised application of the competition rules by competition authorities and national courts** |  |  |  |  |  | x |
| **c. Legal certainty for businesses** |  |  |  |  |  | x |
| **d. Efficiency of distribution systems** |  |  |  |  |  | x |
| **e. Cross-border trade** |  |  |  |  |  | x |
| **f. Costs for businesses** |  |  |  |  |  | x |
| **g. Consumer welfare** |  |  |  |  |  | x |
| **h. Investment / Economic growth** |  |  |  |  |  | x |
| **i. Sustainability objectives** |  |  |  |  |  | x |

68 **Case law provides that prohibiting online sales is a hardcore restriction that cannot benefit from the safe harbour provided by the VBER. In your view, what would be the appropriate safeguard to ensure that that the application of different criteria for online and offline sales in a selective distribution system would not result in a prohibition of online sales?**

*5000 character(s) maximum*

69 **Based on your experience/knowledge, which of the following actions should be taken in relation to the two types of indirect restrictions on online sales mentioned in this section?**
You can select more than one of the following options:

|  |  |
| --- | --- |
|  | No longer treating dual pricing between online and offline sales as a hardcore restriction, with safeguards to be defined in line with the case law |
|  | No longer treating the application of different criteria for online and offline sales in selective distribution systems as a hardcore restriction, with safeguards to be defined in line with the case law |
|  | Maintaining the current rules: these types of indirect restrictions of online sales should continue to be treated as hardcore restrictions |
|  | Other |

70 **Please explain your answer, in particular why you consider your preferred action(s) to be more appropriate than other possible actions.**

*5000 character(s) maximum*

71 **Please explain your answer, indicating what would be the appropriate action and its likely impact on the aspects mentioned in the table on question 66.**

*5000 character(s) maximum*

72 **Would your reply to this question be different, if the rules on active sales restrictions included more permitted exceptions (see section B.2 above)?**

|  |  |
| --- | --- |
|  | Yes |
|  | No |
|  | No opinion |

74 **Based on your experience/knowledge, please provide any other comments or suggestions you may have on the rules for these two types of indirect restrictions on online sales. You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please upload the information in files with a maximum size of 1 MB each, using the button below.**

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