**Subject: HT.5455 - submission from an organisation - HOTREC comments on VBER draft of 9 July 2021**

Recipient: DG COMP A1

Dear Sir, Madam/To Whom it may concern

HOTREC – Hospitality Europe - represents the hotel, restaurant and café industry at European level. The sector counts in total around 1.8 million businesses, being 99,5% small and medium sized enterprises (91% are micro enterprises, i.e. employing less than 10 people). These businesses make up some 60% of value added. In 2019, the industry provides some 10 million jobs in the EU alone. Together with the other tourism industries, the sector is the 3rd largest industry in Europe. HOTREC brings together 45 national associations representing the interest of this industry in 34 different European countries.

**The Vertical Block Exemption Regulation (VBER) and related guidelines are of high relevance for the European hospitality sector**, as they regulate some common type of vertical agreement used in sector in which our members operate (e.g. agency contracts, distribution contracts, tying and exclusive supply, franchising, etc.)

HOTREC welcomes the opportunity to provide open comments on the draft revised Regulation on vertical agreements and vertical guidelines, as published by the European Commission on 9 July 2021. We however **consider that the draft put forward partially fail to address certain key market developments which have become increasingly problematic for the hospitality sector over the course of the past decade**. In both instances, the VBER enables much larger companies to impose unfair conditions on hospitality businesses, which are in vast majority of cases micro-enterprises and which would not accept these conditions should they have any possibility to oppose them.

1. The first issue arises from the **application of most favoured nation (MFN) clauses by Online Travel Agents (OTAs) on hotels in the online platform economy**. While the Commission’s latest VBER draft would now effectively prohibit the application of so-called ‘wide’ MFN clauses by OTAs on hotels – which OTAs have in any case refrained from applying in the EU since 2015 – the latest draft fails to address legal uncertainty around the possibility for OTAs to impose ‘narrow’ MFN clauses.

We believe that such **legal certainty would be best achieved by issuing 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 in the updated VBER and related guidelines**.

1. The **second issue concerns ‘brewery contracts’/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.

These concerns have already been extensively highlighted in previous HOTREC submissions to the EU public consultations of 2019 and 2021, which are added to our contribution as separate attachments.

1. **Narrow MFN clauses are anti-competitive and severely undermine the digitalisation efforts of European hospitality SMEs**

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.**

Furthermore, and since the closure of the European Commission’s public consultation of 2021, [**Decision KVR 54/20 of 18 May 2021**](https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021099.html?nn=15276914) **by the German Federal Court of Justice has clarified that narrow MFN clauses applied by the leading OTA in Europe, Booking.com, on hotels, are incompatible with EU competition law and should not be exempted from the application of Article 101(1).**

In doing so, the Bundeskartellemt has thoroughly addressed all aspects of the ongoing debate regarding the application of narrow price parity clauses by OTAs on hoteliers:

* The application of Article 101 (1) TFEU is not excluded because the narrow price parity clause is an ancillary restraint for a vertical agreement that is neutral in terms of competition law. The pro-competitive aspects the narrow price parity clauses are claimed to have, such as securing adequate remuneration for a platform’s service by solving the “free-rider problem” (guests book directly with a hotel after gathering information on booking.com) or providing increased market transparency for consumers, must be carefully weighed against their anti-competitive aspects. Considering the structure of Article 101 TFEU this process can only take place when examining the preconditions for an exemption from the prohibition of anti-competitive agreements under subsection 3 of the Article.
* In view of this contractual purpose the narrow price parity clause is not an essential ancillary restraint. Upon a request by the appellate court the Bundeskartellamt conducted investigations after Booking.com had stopped using the narrow price parity clause. The [investigations showed](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_VII.pdf?__blob=publicationFile&v=3) that based on all relevant parameters such as turnover, market share, booking volumes number of hotel partners and number of hotel locations, Booking.com had been able to further strengthen its market position in Germany.
* Booking.com’s narrow price parity clause is not exempted from the prohibition of Article 101(1) TFEU under Article 2(1) of the VBER as the company’s market share on the relevant market for hotel booking platforms in Germany exceeds 30% (Article 3(1) VBER).
* The first pre-condition for excluding the application of Article 101(1) TFEU to the narrow price parity clause to an individual exemption cannot be established, i.e. the improvement of the production or distribution of goods or the promotion of technical or economic progress.
* Narrow price parity clause significantly restricts the online sales managed by the hotels themselves without using the platform.

HOTREC has [warmly welcomed this verdict](https://www.hotrec.eu/german-supreme-court-ruling-prohibiting-narrow-price-parity-clauses-is-a-breath-of-fresh-air-for-hoteliers/) which puts an end to a legal saga which began when the German Bundeskartellamt established in December 2015 that such narrow price parity clauses violated competition law and prohibited their further use from 1 February 2016. This decision was then revoked following Booking.com’s appeal the Düsseldorf Higher Regional Court in 2019. By its latest decision of May 2021, the Bundeskartellamt annulled the decision of the Düsseldorf Higher Regional Court and rejected Booking.com’s appeal.

HOTREC nevertheless notes that the Bundeskartellamt decision is the result of the court’s interpretation of existing European competition rules and takes national elements into account, such as Booking.com’s market share in Germany. **We urge the European Commission to put an end the further legal uncertainty at EU level regarding the interpretation of the effects of the VBER on narrow price parity clauses and avoid growing regulatory fragmentation in the EU** (as national laws in Austria, Belgium, France and Italy already outlaw narrow price parity clauses), by clearly outlining that **narrow price parity clauses are a hardcore restriction under art. 4 (a) VBER as a restriction of a trading partner’s liberty to freely set its sales prices in the updated VBER and related guidelines.**

Furthermore, **with regard to the fact that the digitalisation of European SMEs is a long-standing EU policy priority, we wish to underline that the imposition of narrow price parity clauses by OTAs on hoteliers act as a major disincentive in this area and counteracts substantial efforts made at EU level to support such digitalisation** via funding, trainings and exchange of best practices. 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 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.

The decision to move forward with the development of an attractive website and the capacity to generate meaningful insights from data gathered from a hotel’s online presence presents a considerable investment in terms of finances, resources and staff and as such a dilemma for many hoteliers and is particularly challenging for smaller companies with limited staff. Narrow price parity clauses will have a chilling effect on any plans by hoteliers to move ahead towards an improved online presence: they effectively deprive hoteliers from the option to offer better prices via their own website. It goes without saying that pricing policy is a pivotal issue when considering a marketing strategy which must take both offline and online sales into account, while bearing in mind that hotels cannot forego being listed on OTA websites. Continued application of narrow price parity clauses will therefore further entrench the dependency of hoteliers towards OTAs and continue working against the policy ambition, shared by both the EU and Europe’s hospitality sector, to support the digitalisation of European SMEs.

Last but not least, from a consumer angle, **narrow parity clauses also 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. In this regard, we wish to highlight the [position presented by BEUC regarding the revision of the VBER](https://www.beuc.eu/publications/beuc-x-2020-114_revision_of_the_vertical_block_exemption_regulation_and_the_vertical_guidelines.pdf), which states that “parity obligations should be seen as effectively hardcore restrictions for sectors in which they have clearly been demonstrated to be harmful”, clearly referencing the ongoing debate regarding the application of narrow price parity clauses by OTAs on hotels.

1. **The VBER does not supply sufficient legal protection for hospitality businesses against the power of the breweries in Belgium and in the Netherlands**

The VBER and related guidelines make it possible for practically all breweries and all drink suppliers in the Netherlands and Belgium (except Inbev) to force hospitality-businesses into very one-sided contracts where the hospitality business is obliged to purchase all drinks (often with a stipulated minimum amount of drinks/liters) and other products or services (such as insurance, gaming machines, maintenance contracts, etc.) under exclusivity clauses from its brewery or drink supplier without being able to negotiate the best price for these products and services.

This very often leads to situations where a hospitality entrepreneur that is bound by such a contract pays up to 50% more than competitors that are ‘free’/not bound by such a contract (which of course the consumers –partly- pay for), because the brewery/drink supplier does not have to negotiate with bound entrepreneurs. ‘Bound’ establishments therefore face an additional disadvantage compared to ‘free’ establishments given that the latter are not paying for ancillary products at a non-negotiable price.

In addition to a clear competitive disadvantage, hospitality businesses in Belgium and the Netherlands which are bound by such contracts experience unfair conditions and practices from the brewers they are contractually bound to:

* The obligation imposed on the entrepreneur to also purchase drinks for private use;
* Imposing mandatory sales prices;
* Require access to premises that are not connected to the business;
* The provision that, except for gross shortcomings by the entrepreneur as a tenant, the lease/rent may also be terminated due to non-compliance with the minimum purchase obligations;
* Declare the agreement applicable to business addresses not specified;
* minimum purchase obligations, for example minimum 250 hectoliter beer, etc.;
* To impose that the legal successors of the hospitality entrepreneur, for example heirs, buyers, etc., are obliged to continue the drink purchase contract.

Such exclusivity clauses are particularly abusive in cases where the hospitality entrepreneur rents the real estate from a brewery. Under the VBER, the exclusivity clause can only last for a period of 5 years, unless, as stipulated under Article 5 paragraph 2, the entrepreneur rents the real estate from the brewery. In case of the latter, the hospitality business is on the premises owned or rented by the brewery, the exclusivity clause in those cases can last indefinite or ‘forever’. In the Netherlands, 75% of bars have contracts with a brewery which go beyond just the supply of beer, and 16% effectively rent their premises from brewers It should be noted that in general, such establishments rented by brewers are situated in the best parts of town.

**HOTREC considers that hospitality establishments should not be bound by exclusivity contracts towards brewers for a period exceeding three years.** We therefore ask the European Commission to:

* remove the exception under Paragraph 2 of article 5, which enables land owners, as suppliers, to impose indefinite exclusivity contracts on tennents.
* The 5-year term in paragraph 1(a) of article 5 should be changed in 3 years. 3 Years time is enough to protect the interests of breweries (and other suppliers).

*Attachments:*

* *HOTREC response to VBER consultation of 2019*
* *HOTREC response to VBER consultation of 2021*
* *HorecaVlaaderen response to VBER consultation of 2019*
* *KHN response to VBER consultation of 2019*

*\*\*\*\*\**