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LEGAL TREATMENT IN THE EUROPEAN UNION OF PRICE PARITY CLAUSES USED BY DIGITAL PLATFORMS

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ABSTRACT

Price parity clauses have frequently been included by digital platforms in the agency agreement binding them with the businesses using their intermediation services to sell their products. Whereas the narrow price parity clause prevents sellers from offering their products at a lower price on their direct online sale channels, the wide parity clause prohibits them to sell a cheaper price on any sale channels at all.

Several national competition authorities throughout the EU considered these clauses to be anticompetitive and therefore unlawful under the terms of articles 101 of the TFEU. Nevertheless, as the Booking.com case reveals, many divergences appeared among member states. Some prohibited both wide and narrow price parity clauses, others decided to allow narrow parity clauses or did not take a stand. The situation eventually led to a regulatory fragmentation and legal uncertainty on the issue in the EU.

To achieve coherence within the single market, in 2022 the European Commission adopted a new version of the VBER and the Digital Markets Act. Both regulations give the clarity the digital economy and its gatekeepers require in order to keep on growing, in accordance with the welfare of the European market and its consumers.

TABLE OF CONTENTS

Introduction 2

1. Price parity clauses *and digital platforms*: description and analysis 3

1.1 Price parity clauses in vertical agreements 3

1.2 Digital platforms: role and organisation 4

1.2.1 An intermediary between businesses and final consumers or between businesses 4

1.2.2 Agency model and merchant model 6

1.3 Effects of price parity clauses on platforms, sellers and buyers 6

1.3.1 Benefits of price parity clauses 6

1.3.2 Negative effects of price parity clauses 8

2. First legal responses towards price parity clauses in the European Union 10

2.1 Legal framework to analyse price parity prices in the EU 10

2.2 Member States' responses to price parity clauses from hotel booking platforms 13

2.2.1 Divergences within Member States: the relevant case of Germany 13

2.2.2 Divergences between Member States: regulatory fragmentation and legal uncertainty 16

2.3 Effects on the European online booking market 18

3. P2B, new VBER and DMA: a new set of regulations in the European Union 20

3.1 Price parity clauses in the P2B Regulation and in the new VBER 20

3.2 Price parity clauses in the Digital Markets Act 21

3.3 Short term effects of the new regulations 23

Conclusions 25

INTRODUCTION

It only took a few decades for the Information and Telecommunication Technologies (ICTs) to develop a new digital economy and boost a considerable change in our lives and the performance of markets, especially due to the prompt development of e-commerce. Websites, applications, algorithms… all these new technologies contributed to the rather recent boom of digital platforms and generated the appearance of new business practices which have progressively jeopardised the competition in these new markets, to such an extent that on the 5th of July 2022 the European parliament adopted the Digital Markets Act (DMA) and the Digital Services Act (DSA), in order to regulate the dos and don'ts of the digital economy.

Price parity clauses are one of these questionable business practices, sometimes included by digital platforms in their agreement tying them with businesses willing to use their services.

The aim of this paper is to understand how price parity clauses work, why they may represent a threat to competition in digital markets, how competition authorities and courts within the European Union responded to the challenge, and whether the responses were appropriate.

To do so we will first describe price parity clauses and analyse their impact on the platforms and their competitors, but also on the businesses which use their services as well as on the final consumers. We will then see the different responses of the national legal authorities to the price parity clauses within the European Union, and the consequences of these reactions on digital markets. Thirdly, we will analyse how the renewed version of the Vertical Block Exemption Regulation (VBER) and the Digital Markets Act both address the concerns raised by price parity clauses and to what extent it is an adequate answer to confront all the problems which this practice has raised.

Price parity clauses are recurrent in many different economic sectors (entertainment, digital goods, payment systems…)[1]. To provide a better understanding of the main issues at stake, this paper will mostly focus on one significant digital market, the hotel booking platforms, and more particularly, on the Booking.com case.

[1] Mantovani, A.; Piga, C.; Reggiani, C. (January 2021). Online platform price parity clauses: evidence from the EU Booking.com case. The European Economic Review (retrieved from: https://www.sciencedirect.com/science/article/abs/pii/S0014292120302555)

1. PRICE PARITY CLAUSES: DESCRIPTION AND ANALYSIS

1. 1 Price parity clauses in vertical agreements

Contrary to horizontal agreements (reached between two or more companies competing on the same level of production or distribution), which may by nature often be considered to be a threat to competition principles, vertical agreements, the most common type of commercial agreements, are not *per se* considered anti-competitive. This kind of agreement ties two or more companies acting at different levels of the production or distribution chain (a supplier and a retailer for instance) and sets the conditions under which they agree to collaborate[2].

Price parity clauses (PPCs), also known as most favoured nation pricing clauses (MFNs) or best price clauses, can be included in a vertical agreement between suppliers and distributors. These clauses limit the supplier's ability to choose the price at which he sells his products or services and have become more frequent with the development of digital platforms, which often imposed this kind of clause in the contract tying them to the companies willing to sell through their website. Booking.com, for instance, the leading online travel agency in Europe, in the "Partner agreement, policies and local laws" menu of their web page, clearly explains to their future potential partners how parity works. They distinguish between two different kinds of price parity clauses.

The first one is known as narrow parity. The narrow price parity clause prevents the seller using the platform as an intermediate to *directly* sell his products or services at a lower price or with more advantageous conditions to the final customers on his own website.

The wide price parity clause, on the other hand, applies indistinctly to *any* other buyers, whether the products or services are offered directly or indirectly through other distribution channels (for example other rival platforms). A wide parity clause therefore extends the prohibition to the seller from selling at a lower price or with better conditions at all, be it online or offline[3].

[2] Summary of European Commission notice of 9 September 2022. Guidelines on vertical restraints (retrieved from: https://eur-lex.europa.eu/EN/legal-content/summary/guidelines-on-vertical-restraints.html)
[3] Booking.com Partner Hub, "How does parity work?" (retrieved from: https://partner.booking.com/en-gb/help/legal-security/policies-local-laws/how-does-parity-work)

The narrow price parity clause is thus significantly more flexible than the wide parity clause. For example, a hotel tied to a narrow price parity clause with Booking.com will still be able to sell a room at a lower price than the price which appears on the platform, provided the room is advertised at the same price and conditions in their own website. With a wide price parity clause, on the other hand, Booking.com makes sure that the hotel will not be able to sell the room at a lower price or at better conditions than advertised on the platform, neither directly nor indirectly through any other channel (whether tour operators or other competing online booking platforms).

1. 2 Digital platforms: role and organisation

1. 2. 1 An intermediary between businesses and final consumers or between businesses

Digital platforms serve as intermediaries between buyers and sellers. They can be intermediaries between two businesses (B2B), or between a business and final consumers (B2C).

Platforms can indeed serve as a meeting point between two businesses, typically between wholesalers and retailers, as it is the case in the wholesale plane ticket market for example. In this market, platforms serve as a meeting point between airline companies on one hand, who act as wholesalers (and pay a commission to the platform), and travel agencies on the other hand, who act as buyers (buying at wholesale price). The travel agencies will then sell the plane tickets at retail price to the final customers, while airline companies will still massively sell their plane tickets directly to the final customers[4]. While the role of platforms is yet relevant in this scenario, there still remains a certain balance between platforms and wholesalers (the airline companies in our example) mostly due to the size of the wholesalers and their negotiating power, which is normally rather similar to that of platforms[5].

[4] Picciolo S., Prasad K. (15 November 2021). Competitive effects of price parity agreements (retrieved from: https://www.compasslexecon.com/the-analysis/competitive-effects-of-price-parity-agreements/11-15-2021/)
[5] Rosencrance L. (June 2021). B2B, business-to-business (retrieved from: https://www.techtarget.com/searchcio/definition/B2B)

It is when they act as an intermediary between businesses and final consumers (B2C) that their role in the market becomes particularly questionable. In this case businesses are often small and medium firms. The role of platforms is then very useful because, on the one hand, they give those rather small businesses the opportunity to broaden their market drastically, and on the other hand, they facilitate final customers the access to a wider marketplace. The core business of the digital platforms therefore really seems to go in favour of competition: not only do they enlarge the marketplace, benefitting both buyers and sellers, but they also bring price transparency by putting at hand the sellers' offers, thus stimulating competition between them.

Yet, their intermediate role has grown to be so important that they gradually became indispensable actors in their own market as the digital economy expanded. To such an extent that some economists consider that many small and medium businesses have become economically dependent on digital platforms, giving them a stronger bargaining position which they may use to force the adoption or the continuity of unfair practices[6].

A market study ordered by the European Commission illustrates this central position digital platforms are acquiring. Carried out in six different European countries, it focuses on the role of online travel agency platforms in the hotel room booking business. It estimated that in only six years, the online hotel booking platforms had increased their market share by more than 50% (from 19,7% of room sales in 2013 to 29,9% in 2019), to the detriment of direct hotel bookings (made physically or via website, mail, phone…) which had decreased by more than 20% during the same period (from 57,6% to 45,6%, see annex 1 and 2 for more details)[7]. The report also underlines the fact that the European online booking market has an oligopolistic structure, as it tends to be the case in many digital markets. In 2021, Booking.com was by far the clear leader of the online booking platforms in the EU with a 71,2% market share, and together with Expedia and Hotel Reservation Service (HRS.com) they held more than 90% of the whole European online hotel booking platforms market[8].

[6] Graef, I. (12 November 2019). Differentiated treatment in platform-to-business relations: EU competition law and economic dependence. Yearbook of European Law, Volume 38 (retrieved from: https://academic.oup.com/yel/article/doi/10.1093/yel/yez008/5622729)

[7] European Commission (2020), Market study on the distribution of hotel accommodation in the EU, COMP (2020) OP 02 pages 10

[8] HOTREC (Confederation of National Association of Hotels in the EU) (June 2022), European hotel distribution study 2022. Results for the reference year 2021 (retrieved from: https://www.hotrec.eu/wp-content/customer-area/storage/f634411d54352e2abe45b457fc6c99f9/HOTREC-European-Hotel-Distribution-Study-2022.pdf

1. 2. 2 Agency model and merchant model

Digital platforms including price parity clauses in their contracts propose an "agency model" type of distribution agreement with the sellers they expose in their website. In this model, sellers are at the centre: they set the sale price (which is the reason why digital platforms need to impose the price parity clauses), get paid directly by the final customers, and then pay a commission (which usually ranges between 10 to 25%) to the platform[9].

The other distribution model used by platforms, the "merchant model", gives them more control: the platform sets the final price of the product, sells it directly to the buyer, and later pays the net price (having deducted its commission) to the seller. This model though does not seem to have been as successful as the aforementioned.

Sellers indeed seem to have preferred the agency model, not only because they get to set the final price, but also because it has a more positive impact on their cash flow than the merchant model. Booking.com, for instance, during many years mostly used the agency model: in 2015, for example, 86% of the bookings made on their platform corresponded to hotels with an agency model[10]. During the same year, Expedia, on the other hand, mostly used the merchant model: it generated 63% of its incomes (against 28% for the agency model)[11]. Booking.com owes an important part of its success to its agency model based strategy, because it helped the company attract hoteliers and therefore gave credibility and visibility to the platform.

1. 3 Effects of price parity clauses on platforms, sellers and buyers

1. 3. 1 Benefits of price parity clauses

Though fully aware that, intrinsically, the clauses that we are dealing with represent a vertical price fixing, digital platforms claim that price parity clauses are legitimate, firstly because they aim at benefiting consumers. With a wide parity clause, customers who use platforms not only

[9] Mantovani, A.; Piga, C.; Reggiani, C. (January 2021). Online platform price parity clauses: evidence from the EU Booking.com case. The European Economic Review (retrieved from: https://www.sciencedirect.com/science/article/abs/pii/S0014292120302555)

[10] Delgado, P (June 2022). Understanding Booking.com's shift to the merchant model and a roadmap for hotels to compete with it (retrieved from: https://www.hospitalitynet.org/opinion/4110788.html)

[11] Green System Solutions (17 September 2017). Business models compared: Booking.com. Expedia, TripAdvisor (retrieved from: https://www.greensystem.vn/en/blog/business-models-compared-booking-com-expedia-tripadvisor.html)

know that they will be able to easily compare many different options and thus find the offer which best suits them, but they will even be guaranteed to pay the best price on the market. That is the reason why Booking.com, in their General Delivery Terms, explains that the purpose of price parity clauses is merely there to "ensure that rates and conditions posted on [their] platform are competitive".

Platforms also argue that price parity clauses allow to avoid free-riding as described immediately below. In its webpage, Booking.com reminds hoteliers that platforms "attract guests" in order to "enable them to compare accommodations" and that price parity clauses allow to prevent what is known in the sector as "showrooming"[12]. Showrooming is a practice which consists in final consumers acting as free riders: they use platforms to find the product which best suits them, but then they directly contact the seller of the product they picked to see if they can get a better offer and, should this be the case, contracting directly the product with the seller.

Such a practice is indeed problematic for platforms because it jeopardises their business model. Showrooming prevents them from being rewarded for the service they provide, since they do not receive the commission from the seller who ends up closing the purchase directly. This therefore only seems logical that platforms consider that price parity clauses are necessary: they are only meant to ensure their fair retribution and, ultimately, the survival of a business model which provides customers with a tool conceived to reduce their search costs, and hotels with a platform aimed at enlarging their market.

Besides, Booking.com explains that platforms need to undertake "significant investments" (technology, advertising…) to attract final customers[13]. Price parity clauses not only ensure platforms' viability, but they also encourage their investments, which end up benefiting both sellers and buyers.

It can be added that parity clauses do not harm competition when platforms act as B2B intermediate: since final customers can choose to buy either directly to the airline or to a travel agency, platforms have no interest in using price parity clauses in order to increase their commission or customers will choose the direct sale channel. Competition is guaranteed

[12] Booking.com Partner Hub, "How does parity work?" (retrieved from: https://partner.booking.com/en-gb/help/legal-security/policies-local-laws/how-does-parity-work)
[13] Ibidem.

because there are two different channels final customers can choose, which lessens platforms' leverage[14].

In short, looking at it from the platforms' perspective, price parity clauses merely allow the market to work and be efficient. To suppress those clauses would simply end up affecting not only the platforms, but eventually the position of each and all the actors of the market.

1. 3. 2 Negative effects of price parity clauses

Nevertheless, numerous voices consider price parity clauses to be a harm to competition thus impacting on the other competing platforms, but also upon the sellers and in the end on the buyers too.

To start with, even the narrow parity clause, presumably the most inoffensive of both clauses as far as competition is concerned, distorts the market by giving the platforms who use it a privileged position when it comes to setting its own commission. If you try showrooming several times but you find that there is no difference between sale prices for the product you selected on the platform and the seller's direct price, you will conclude that there is no point in checking the seller's webpage. Eventually, you will save time and effort and use the platform for both purposes: choose the product that best meets your needs and realise the purchase. The consequence is that in the long term, the platform will get a much stronger position in its partnership with the sellers advertised on the platform, and may use this position as a leverage to impose a higher commission. Consequently to this potential commission increase, the seller, tied by the narrow price parity clause, may have no other choice but to increase their prices in order to maintain his margin. This price increase would be, of course, to the detriment of consumers. Ironically, even to the detriment of those consumers who do not use platforms…[15]

With a wide clause the situation is even worse of course, because it also impacts competing platforms, above all those with a weaker market power. If consumers know that they will not get a better deal with Expedia or HRS, and they are already familiar with Booking (their website, the way deals are closed, the wide range of accommodations they propose…), why would they bother to visit other websites[11]?

[14] Picciolo S., Prasad K. (15 November 2021). Competitive effects of price parity agreements (retrieved from: https://www.compasslexecon.com/the-analysis/competitive-effects-of-price-parity-agreements/11-15-2021/)
[15] Peitz M. (January 2022). The prohibition of price parity clauses and the Digital Markets Act, page 5. TechReg Chronicle

This even applies to potential newcomers: a wide parity clause can be considered as a barrier to entry. There would be very few incentives left for potential new entrants to enter the market if they know they cannot challenge competitors on price. Such a clause is all the more negative that, as we have seen earlier, digital markets tend to be oligopolies. As Nobel Prize in economic sciences winner Jean Tirole stated: "to keep the market contestable, we must prevent the tech giants from swallowing their future competitors"[16].

A wide price parity clause therefore protects platforms from competition coming either from other platforms, or from potential new competitors. But wide and narrow clauses protect above all platforms from their biggest threat: the sellers, who are prohibited to compete against platforms directly offering better prices (and still having the possibility to get a better margin, since platforms' commissions are rather high). Of course, all this loss of competition ends up affecting prices too. That is the reason why price parity clauses can be considered to be particularly harmful to both consumers and sellers.

Price parity clauses are all the more problematic that platforms could very well obtain quite a similar effect simply using a tool which is at the core of their business: their algorithm. Algorithms give customers a list of the products or services which correspond to the criteria of their search. The better fit the product is, the more it sells and the higher it comes on the list. Algorithms could therefore be used to lessen the protagonism of sellers who aim at using the platform for showrooming, by putting forward products or services with high approval rate on the platform[17]. In consequence, the argument of the necessity of price parity clauses to avoid showrooming is questionable.

Platforms therefore are key actors of the market they are involved in, to such a point that leading platforms like Booking.com have gradually developed what may be considered as a dominant position on the market which they might have abusively used. The legality of the price parity clauses some of the leading platforms use might therefore be considered as anti-competitive, firstly because they may have contributed to the development of this privileged position, hindering the competition between platforms and potential new competitors, and weakening the competition coming from the sellers themselves. Secondly because they may represent an unlawful abuse of the dominant position, pressuring hotels to accept to pay a higher

[16] Tirole J. (November 2017) Interview by David A. Price for Econ Focus (retrieved from: https://www.richmondfed.org/publications/research/econ_focus/2017/q4/interview)

[17] Peitz M. (January 2022). The prohibition of price parity clauses and the Digital Markets Act, p.6-7. TechReg Chronicle

commission and therefore damaging the interest of final consumers[18]. Nevertheless, they may also be considered necessary to avoid free-riding and thus to guarantee the fair retribution of the platforms, which enabled a drastic improvement of the market efficiency, widening significantly the business opportunities for hoteliers facilitating the access to new potential customers. How did the European Union tackle this complex dilemma?

2. FIRST LEGAL RESPONSES TOWARDS PRICE PARITY CLAUSES IN THE EUROPEAN UNION

2. 1 Legal framework to analyse price parity clauses in the EU

The Treaty on the Functioning of the European Union (TFEU), which entered into force on 1 December 2009, is one of the primary treaties of the European Union. It provides the legal framework for the functioning of the EU and its institutions, setting the scope for action within its policy areas, settling among others its competition policy[19].
The European Union legislation regulates anti-competitive conducts with two central rules contained in the TFEU: Articles 101 and 102[20].

Article 101 TFEU (previously Article 81 of the Treaty establishing the European Community), prohibits agreements between two or more independent market operators which undermine competition in the European internal market. More specifically, it forbids "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between EU Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market" (101.1). The article states that any of these conducts "shall be automatically void" (101.2). It also provides

[18] Graef, I. (12 November 2019). Differentiated treatment in platform-to-business relations: EU competition law and economic dependence. Yearbook of European Law, Volume 38 (retrieved from: https://academic.oup.com/yel/article/doi/10.1093/yel/yez008/5622729)
[19] Summaries of EU Legislation (15 December 2017), Treaty on the Functioning of the European Union (retrieved from: https://eur-lex.europa.eu/EN/legal-content/summary/treaty-on-the-functioning-of-the-european-union.html)
[20] European Commission. Competition Policy. "Antitrust Overview" (retrieved from: https://competition-policy.ec.europa.eu/antitrust/antitrust-overview_en)

an exception to the prohibition of these agreements when four conditions are fulfilled: they must contribute "to improving the production or distribution of goods or to promoting technical or economic progress", allow "consumers a fair share of the resulting benefit" being consumers both final consumers or other purchasers, and they must neither "impose on the undertakings concerned restrictions which are not indispensable" nor "afford such undertakings the possibility of eliminating competition" (101.3). If these conditions are met the disadvantages caused in the field of competition are considered to be compensated.

Another regulation, the Vertical Block Exemption Regulation (VBER)[21], adopted in May 2010, also sets a block exemption from the prohibition of Article 101.1 TFEU for vertical agreements (the type of agreement binding platforms and businesses using their intermediation services). The necessary requirements are as follows: the vertical agreement should not contain any of the "hardcore" restrictions of competition defined in Article 4. One of those restrictions refers to the buyer's ability to determine the sale price of its products (Article 4.a). In addition, neither the supplier, nor the buyer should surpass 30% of the relevant supply or purchase market (Article 3.1). If these requirements are fulfilled, the vertical agreement is exempted from Article 101.1 TFEU. The regulation has a twelve-year validity and was renewed in May 2022 (see page 23 for more information on the new VBER).

Article 102 TFEU (previously Article 82 of the Treaty establishing the European Community) prohibits abusive conducts by undertakings holding a dominant position on a given market which may damage competition within the European internal market.
The concept of *dominance* is defined as "an appreciable influence"[22] on the conditions under which the competition will develop in the market, due to the "position of economic strength"[23] of the undertaking. The main indicator to evaluate the existence of a dominant position is the *market share*. EU case law and Commission guidance set relevant thresholds to evaluate dominant position. A market share of over 50% is considered to be a refutable presumption of

[21] Regulation of the European Commission of 27 May 2010 on the application of Article 101.3 of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (461/2010)
[22] Judgement of the ECJ of 13 February 1979 (Hoffmann-La Roche & Co. AG v Commission of the European Communities) (Case 85/76 979) para. 39
[23] Judgement of the ECJ of 14 February 1978 (United Brands Company and United Brands Continentaal BV v Commission of the European Communities) (Case 27/76) para. 65

dominance[24]. A market share between 40% and 50% will not permit an automatic presumption of dominance and the Court will deliberate the dominance depending on the strength and the number of competitors in the market[25]. A market share below 40% will generally denote a negative presumption of dominance[26]. It is important to underline that even though having a dominant position is not in itself unlawful, in such a position the undertaking has a "special responsibility" [27] not to allow its conduct to harm competition on the internal market.

The enforcement rules of Articles 101 and 102 TFEU covered above, are given by the Council Regulation 1/2003[28], applicable since 1 May 2004. This regulation confers powers to the Commission and to National Competition Authorities (NCAs) of all EU Member States and designates them as public antitrust enforcers; it also confers powers to national courts who are the private antitrust enforcers[29]. Furthermore, it created the European Competition Network formed by the Commission and all National Competition Authorities of the EU to cooperate in the efficient implementation of EU competition law.

The regulation therefore sets a *decentralised* system, giving National Competition Authorities the power to act against anticompetitive practices that affect their national markets and letting them implement their national competition legislation on their territory as long as it is compatible with EU general principles. Nevertheless, it must be underlined that the regulation also seeks *uniform* implementation of Community competition law, (e.g., National Competition Authorities and national courts cannot take decisions which are inconsistent with decisions of the Commission[30]).

[24] Judgement of the ECJ of 3 July 1991 (AKZO Chemie BV v Commission of the European Communities) (Case 62/86) para. 60
[25] Judgement of the ECJ of 14 February 1978 (United Brands Company and United Brands Continentaal BV v Commission of the European Communities) (Case 27/76) para. 108-111
[26] Communication from the Commission of 24 February 2009 - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (DO C 45) para. 14
[27] Ibidem para. 1 and 9
[28] Council Regulation (EC) of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (1/2003)
[29] Ibidem, Articles 4, 5 and 6.
[30] Ibidem, Article 16.

2. 2 Member States' responses to price parity clauses from hotel booking platforms

Although they were all based on Article 101 TFEU, the responses of the Member States' antitrust enforcers regarding price parity clauses on hotel booking platforms were different, not only between Member States, but even within Member States. Price parity clauses generated a lot of decisions emanating from national competition authorities, rulings from national courts, and legislations from parliaments, which ended up leading to regulatory fragmentation and legal uncertainty in the single market.

2. 2. 1 Divergences within Member States: the relevant case of Germany

It is in Germany where price parity clauses have generated the most intense debate among antitrust enforcers. Over the years, the *Bundeskartellamt* (the German national competition agency) and national courts developed elaborate positions on the lawfulness of price parity clauses between online platforms and hotels, deeply studying and justifying it with several reports, decisions and sentences which exposed their deeply contending views.

The *Bundeskartellamt* first investigated HRS, one of the leading hotel booking platforms in Germany, in 2013. Their conclusion was that HRS wide parity clause constituted a significant restraint of competition by effect and violated both national competition law[31] and Article 101.1 TFEU since this type of clause was likely to affect trade between Member States. It considered that no exemption could be applied in this case: neither Vertical Block Exemption Regulation (as HRS market share exceeded 30%), nor individual exemptions of Article 101.3 TFEU. The *Bundeskartellamt* therefore banned HRS from using wide price parity clauses in Germany from 1 March 2014[32]. This prohibition was upheld by Higher Regional Court of Düsseldorf (or OLG Düsseldorf) on 9 January 2015[33]. HRS did not appeal the Court's decision.

[31] Section 1 of the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen)
[32] Decision of the Bundeskartellamt of 20 December 2013. Decree in accordance with Section 32.1 of the Act Against Restraints of Competition, Public Version (B9-66/10).
[33] Decision of the OLG Düsseldorf of 9 January 2015, Case VI-Kart 1/14 (V).

Regarding Expedia, the Cologne District Court in first instance[34], and the Higher Regional Court of Düsseldorf in second instance[35] validated their use of wide price parity clauses in 2017. Although they went against Article 101.1 TFEU, Expedia, whose market share was under 30%, was exempted from its application thanks to the Vertical Block Exemption Regulation (Article 3.1 VBER).

The *Bundeskartellamt* also started an investigation against Booking.com, the biggest hotel booking portal in Germany, on 20 December 2013. Although during this proceeding, on 1 July 2015, Booking.com reduced the scope of its price parity clauses in the EU, restricting it to narrow parity, the investigation continued, as the narrow price parity clause also raised competition concerns. The decision was published on 22 December 2015[36]. The *Bundeskartellamt* considered Booking.com practices restricted competition between digital platforms and between accommodation establishments. Firstly, because the narrow parity clause restricted hotels pricing sovereignty on their website and on different hotel booking platforms. Secondly, because the lack of price differentiation with hotel portals suppressed the incentives Booking.com needed to improve its commissions policy or to offer other more favourable conditions to hotels. Thirdly, because Booking.com failed to prove that the prohibition of the narrow price parity clause would cause relevant free-riding issues. As a result, on 22 December 2016, the *Bundeskartellamt* banned Booking.com from applying the narrow price parity clause, declared contrary to both the German competition law and Article 101.1 TFEU. Booking.com, whose market share was larger than 30%, could not fall neither under Article 3.1 VBER, nor under any individual exemption of Article 101.3 TFEU.

Booking.com submitted an interim order against this decision to the Higher Regional Court of Düsseldorf, but at first the Court rejected the complaint on the same grounds as the *Bundeskartellamt* on 4 May 2016[37]. Nevertheless, on 4 June 2019, the Higher Regional Court eventually released its final resolution with a contradictory verdict, overturning the

[34] Decision of the LG Cologne of 16 February 2017. Case 88 O (Kart) 17/16.
[35] Decision of the OLG Düsseldorf of 4 December 2017. Case VI-U (Kart) 5/17.
[36] Decision of the Bundeskartellamt of 22 December 2015. Case Summary, "Best price' clause of online hotel portal Booking also violates competition law" (retrieved from: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B9-121-13.pdf?__blob=publicationFile&v=2
[37] Decision of OLG Düsseldorf of 4 May 2016, VI-Kart 1/16 (V)

Bundeskartellamt decision[38]. The Court found that narrow price parity clauses impaired competition under the definition of Article 101.1 TFEU and German competition law because they restricted hotel rooms price determination. Nevertheless, the Court exempted narrow price parity clauses from the scope of prohibition of Article 101.1 TFEU and German competition law, considering they were in fact ancillary restraints. The *ancillary restraints doctrine* in EU case law exempts any competition restraint from the application of Article 101.1 TFEU, when the restraint is directly related and objectively necessary to the implementation of an agreement which is overall compatible with competition law. OLG Düsseldorf deemed that narrow price parity clauses were indeed directly related to contracts between platforms and hotels, and that they were necessary to avoid showrooming. The Court therefore ruled narrow price parity clauses to be legal[39].

Finally, the definitive pronouncement on the lawfulness of Booking.com narrow price parity clauses was taken by the German Federal Supreme Court. The *Bundeskartellamt* appealed on points of law to have its decision reinstated. On 18 May 2021 the Federal Supreme Court repealed the precedent decision of the Düsseldorf Higher Regional Court and declared Booking.com narrow parity clauses unlawful[40]. It stated that the use of narrow price parity clauses had anticompetitive effects and consequently violated Article 101.1 TFEU. They restrained hotels' ability to offer better prices to consumers on their own online sales channel, or on competing platforms. The Federal Supreme Court found that narrow price parity clauses were not ancillary restraints because they were not objectively necessary for the execution of the agreements between platforms and hotels. The Supreme Court stressed the fact that, based on the study carried out by the *Bundeskartellamt*, Booking.com had continued to strengthen its market position, despite the facts that in 2015 they had voluntarily abandoned wide parity clauses and that the *Bundeskartellamt* had prohibited them to use narrow parity clauses. Booking.com practices could neither be exempted from the prohibition of Article 101.1 TFEU by the VBER, nor enter in the scope of the individual exemptions of Article 101.3 TFEU since Booking.com did not meet the condition of "improving the production or distribution of goods

[38] Decision of OLG Düsseldorf of 4 June 2019, VI-Kart 2/16 (V)
[39] Mackenrodt, M.O. (2019, November 4). Price and condition parity clauses in contracts between hotel booking platforms and hotels. International Review of Intellectual Property and Competition Law, Volume 50 (retrieved from: https://link.springer.com/article/10.1007/s40319-019-00886-x)
[40] Decision of Federal Court of Justice of 18 May 2021 KVR 54/20

or to promoting technical or economic progress". Germany was therefore back to square one now: the Federal Supreme Court had ruled Booking.com narrow price parity clauses to be illegal.

2. 2. 2 Divergences between Member States: regulatory fragmentation and legal uncertainty

The price parity clauses adopted by hotel booking platforms also generated an extensive legal treatment among many EU Member States. There was a concern that they could violate national competition policies and Article 101.1 TFEU.

First actions were taken in April 2015, in the context of domestic investigations led by the French, Italian and Swedish competition authorities and coordinated by the Commission, and found wide parity clauses to go against Article 101.1 TFEU. Because of the investigation, Booking.com voluntarily committed to limit its price parity clauses to the narrow model with all their accommodation partners in the European Union (July 2015), and so did Expedia (August 2015). The authorities accepted the commitment considering that this measure could solve the competition concerns related to Booking.com practices[41].

Legislators entered the matter soon after, in several EU countries. French, Italian, Austrian and Belgian parliaments passed laws banning both wide and narrow price parity clauses between hotels and online platforms. In France, booking platforms price parity clauses were outlawed in a reform package: the "Law for growth, activity and equal economic opportunities" also called "Macron law", enacted on 6 August 2015[42]. In Austria, on 9 November 2016, an amendment of the Federal Act against Unfair Competition and the Price Labelling Act rendered null and void all online booking platforms price parity clauses[43]. The Italian Senate's approval to ban all forms of price parity clauses on hotel booking platforms entered into force on 29

[41] Press release of the Autorité de la Concurrence of 21 April 2015. Online hotel booking sector (retrieved from: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/21-april-2015-online-hotel-booking-sector)
[42] Regulation of the French Parliament of 6 August 2015. Loi pour la croissance, l'activité et l'égalité des chances économiques" Article 133 (2015-990).
[43] Regulation of the Austrian Parliament of 9 November 2016. Änderung des Bundesgesetzes gegen den unlauteren Wettbewerb 1984 – UWG und des Preisauszeichnungsgesetzes.

August 2017[44]. Belgium did the same on 19 July 2018, adopting an act on pricing freedom in the online hotel booking sector. These proscriptions were due, as it is exposed in the Austrian amendment, to the "factual imbalance" between platform operators and accommodation establishments. Micro and small enterprises, which represent the majority of hotel companies, are "disproportionately exposed" to unfair practices of online hotel booking platforms. A "transparent ex ante regulation" was an appropriate and an effective solution according to Austrian lawmakers[45].

Like in Germany, Sweden did not legislate against price parity clauses and the Swedish Courts were asked for a verdict regarding Booking.com narrow parity clauses. Yet, the conclusions they reached were exactly opposite to those of the German Courts… In first instance, the Swedish Patent and Market Court found that Booking.com's narrow price parity clauses went against Article 101 TFEU. But in May 2019, the Court of Appeal overturned the judgement[46] because the plaintiff (the Swedish hotel association) could not prove that the narrow price parity clause had an actual negative effect on competition. Nevertheless, the Court of Appeal also declared that the anti-competitive effects of the narrow parity clause could not be excluded if deeper investigations were held, leaving a degree of legal uncertainty on the matter[47].

Another point to take into account to evaluate the regulatory fragmentation within the EU is the fact that several European countries have not taken a stand on price parity clauses so far. Neither their national competition authorities nor their legislators took any decisions on the matter. In Spain for instance, the *Comisión Nacional de los Mercados y la Competencia*, the Spanish competition authority, opened formal proceedings against Booking.com for possible anticompetitive practices in 2022[48], after two complaints from the Spanish Association of Hotel Managers and the Regional Hotel Association of Madrid. The CNMC is assessing whether

[44] Regulation of the Italian Parliament of 4 August 2017. Legge annuale per il mercato e la concorrenza (124/2017).
[45] Press release of the Austrian Parliament of 11 September 2016. National Parliament: best price clauses from booking platforms are history. Unanimous against unfair competition (retrieved from: https://www.parlament.gv.at/aktuelles/pk/jahr_2016/pk1184#XXV_I_01251)
[46] Judgement of the Swedish Patent and Market Court of Appeal of the 9 May 2019 (case PMT 7779-18).
[47] Isaksson, U.; Nilsson M. (2019, May). The Swedish Patent and Market Court of Appeal: not established that narrow price parity clauses restrict competition (retrieved from: http://antitrust-alliance.org/the-swedish-patent-and-market-court-of-appeal-not-established-that-narrow-parity-clauses-restrict-competition/).
[48] Press release of the CNMC of 17 October 2022. The CNMC opens formal antitrust proceedings against Booking.com for possible anticompetitive practices affecting hotels and online travel agencies (retrieved from: https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2022/20221017_NP_Incoacion_BookingEs_ENG.pdf

Booking.com conducts breach Article 102 TFEU and the Spanish Competition Act. No official decision has been taken at this stage.

Thus, the European decentralised system, far from achieving the desired uniform implementation of Community competition law, had finally created a regulatory fragmentation.

2. 3 Effects on the European online booking market

The European Commission and national competition authorities ordered market studies in the 2010s to have a better understanding of the hotel room booking market and to measure the impact of the limitation or the end of price parity clauses on online booking platforms.

From its study, the European Commission concluded that the lack of uniformity between Member States affected the platforms because it generated a legal uncertainty, putting at stake their international strategies. The restrictions of wide and/or narrow price parity clauses in some countries also increased their compliance costs[49]. Nevertheless, in spite of those restrictions, the same study showed that the overall market share of the booking platforms in the European Union had kept on increasing steadily. As described earlier, from 2013 to 2019 their weight in the global hotel booking market increased by more than 50%, (see page 7 and annexes 1 and 2).

In 2020, the *Bundeskartellamt* released the results of the investigation ordered to measure the impacts of the proceeding the German justice had held against Booking.com in the previous years. The investigation compared the situation in Germany in 2013 (when Booking.com was using both wide and narrow parity clauses) and in 2017 (when Booking.com had dropped the use of wide parity clauses, and the *Bundeskartellamt* had prohibited the platform from using narrow parity clauses). The investigation reached the same conclusion than the European Commission: the ending of price parity clauses had not affected the online booking platforms

[49] European Commission (2020), Commission staff working document; Impact assessment report accompanying the document proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 363 final, 15.12.2020, page 61.

in the German market, since between 2013 and 2017 their sales volume had increased by more than 80% and their market share had increased to up to 75% of the total online booking sales[50]. Concerning Booking.com, the investigation showed that between 2013 and 2017 its growth rate had been considerable (almost 130%)[51]. To such an extent that the platform was described as being "almost indispensable in economic terms" by the German hoteliers, comforting the notion of economic dependence developed earlier (page 7). The *Bundeskartellamt* underlined the fact that this important growth rate had been achieved even though more than 50% of the hotels using the platform had taken advantage of the ending of narrow parity clauses to adopt a price differentiation strategy[52].

More important even, the showrooming threat, which legitimated the narrow price parity clause according to Booking.com, was proved to be insignificant thanks to the investigation, since it reached the conclusion that less than 1% of the customers who managed to find a new accommodation thanks to Booking.com eventually decided to visit the hotel's website to actually purchase the room there. According to the investigation, free-riding is therefore insignificant, even without the narrow parity clause[53].

Another study, led by the Toulouse School of Economics, focused on the short-term effect on prices of the prohibition of wide and narrow clauses in France and the withdrawal of wide clauses by Booking.com and Expedia in the European Union. The conclusion was that these changes did not have a major impact on prices: they decreased for top and mid-level hotels but increased for cheaper hotels. Yet, the study also pointed out that wide parity clauses could have reduced the price-competition between platforms and hotel direct channels[54].

During approximately one decade, the decentralised system of the European Union did not manage to reach a uniform implementation of Community competition law regarding price

[50] Bundeskartellamt (2020, August). The effects of narrow price parity clauses on online sales - Investigation results from the Bundeskartellamt's Booking proceeding, pages 3 and 4 of the footnotes.
[51] Ibidem.
[52] Ibidem p.5.
[53] Ibidem p.6.
[54] Ennis S., Ivaldi M. and Lagos V. (November 2022). Price parity clauses for hotel room booking: empirical evidence from regulatory change. Toulouse School of Economics Working Paper nº1106, page 19.

parity clauses from hotel booking platforms. This is a problematic situation for the EU and the Member States because it affects the development of the platforms and the online booking market as a whole. How did the European Union react to these circumstances?

3. P2B, NEW VBER AND DMA: A NEW SET OF REGULATIONS IN THE EUROPEAN UNION

The lack of uniformity and legal certainty within the European Union caused by the new business practices of digital platforms led the EU policy-makers to consider a shift from ex-post antitrust intervention to ex-ante regulation. The European Union adopted four texts in three years: the P2B Regulation, a new VBER and the Digital Markets Act.

3. 1 Price parity clauses in the P2B Regulation and in the new VBER

On 20 June 2019 the Regulation on promoting fairness and transparency for business users of online intermediation services (known as the P2B Regulation)[55] was adopted. Although the P2B Regulation does not tackle the competition issues the clauses created, Article 10.1 stipulates that digital platforms using price parity clauses need to comply with more transparency on their economic, commercial and legal implications.

On 10 May 2022, the European Commission adopted the new Vertical Block Exemption Regulation[56]. In the former VBER, price parity clauses were not mentioned. But considering the numerous enforcement actions against price parity clauses, in this new version, the Commission decided to take a stand.

On one hand, the new VBER excludes wide parity clauses from its safe harbour (Article 5.1.d) and now imposes a case-by-case assessment under Article 101 TFEU to any vertical agreement including wide parity clauses. On the other hand, narrow price parity clauses still benefit from the safe harbour of the Vertical Block Exemption Regulation, under two conditions. Firstly,

[55] Regulation of the European Parliament and Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (2019/1150).
[56] Regulation of the European Commission of 10 May 2022 on the application of Article 101.3 of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (2022/720).

the exemption cannot be applied to companies whose market share is superior to 30% (Article 3.1). Secondly, the agreement will probably be excluded from the exemption if the digital platform using the clause is involved in a concentrated market and has a large share of users[57].

Nevertheless, those new dispositions on price parity clauses are deemed insufficient by the European Commission. In the document "Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act)", published in December 2020, the Commission explains that there is still a need for a specific regulation focusing on a particular type of digital platforms: the *gatekeepers*. Defined by the Commission as "undertakings that enjoy market power"[58], digital gatekeepers are excluded from the safe harbour of the new VBER and require a specific regulation. The Commission also underlines that only a regulation can efficiently address all the challenges raised by the ever-growing digital economy, stressing the significant weight it has already reached (estimated at being in between 4,5% and 15,5% of the total European Union total GDP in 2019[59]) and the crucial role played by platforms sometimes involved in anti-competitive practices. Finally, the Commission emphasises that digital platforms operate at an international level: their cross-border activity makes a European regulation even more necessary[60].

3. 2 Price parity clauses in the Digital Markets Act

The Digital Markets Act[61] was presented together with the Digital Services Act (DSA)[62] by the Commission as part of the Digital Services Act package to the European Parliament and the Council on 15 December 2020. The DMA and the DSA are two complementary regulations. They both aim at ensuring "safe, fair, open and accountable digital services" [63] in the single

[57] European Commission (10 May 2022). Explanatory note on the new VBER and vertical guidelines, pages 3-4.
[58] European Commission (10 May 2022). Explanatory note on the new VBER and vertical guidelines, page 5.
[59] European Commission (15 December 2020), Commission staff working document; Impact assessment report accompanying the document proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020)363 final, page 1.
[60] Ibidem, page 6.
[61] Regulation of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (2022/1925)
[62] Regulation of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (2022/2065).
[63] European Economic and Social Committee (2021). Digital Services Act and Digital Markets Act: stepping stones to a level playing field in Europe (EESC-2021-33-EN) page 1.

market. Price parity clauses fall out of the scope of the Digital Services Act, since it focuses on protecting the consumers' fundamental rights ensuring safe and transparent online platforms, but are treated in the Digital Markets Act.

The Digital Markets Act, which entered into force on 1 November 2022, is only addressed to *gatekeepers*, i.e. digital platforms operating one or multiple core platform services (as, for example, online intermediation services like booking platforms) which must satisfy three qualitative criteria, each one having rebuttable presumption quantitative thresholds[64]. The first criterion gatekeepers must satisfy is to have a "significant impact on the internal market": the undertaking EU annual turnover must equal or surpass 7,5 billion euros in the last financial year, and provide core platform services in three Member States or more. The second criterion is controlling "an important gateway for business users to reach end-users": the undertaking must provide core platform services to more than 45 million monthly active final customers and 10.000 yearly active business users established in the European Union. The third criterion, finally, is enjoying or going to enjoy an "entrenched and durable position": the second criteria thresholds must be met during the last three financial years. On 6 September 2023 at the latest, the Commission will submit a list of the platforms corresponding to all these criteria. They will then have a six-month period to adapt their practices to the DMA. Booking.com seems to fit each of the three criteria, and will probably be designated as a gatekeeper.

The Digital Markets Act imposes directly applicable obligations and prohibitions to gatekeepers. Article 5.3 DMA explicitly prohibits both wide and narrow price parity clauses: a gatekeeper will have to let its business users freely put different prices or conditions to end users, either through "third-party online intermediation services" or through "their own direct online sales channel". Although in the Proposal of the regulation[65] the legal precept which dealt with price parity lawfulness could be interpreted as prohibiting only wide price parity clauses, in the draft later elaborated by the European Parliament[66] the prohibition was eventually extended to narrow price parity clauses.

[64] Article 3.1 of the Digital Markets Act.
[65] Proposal for a Regulation of the European Parliament and of the Council of 15 December 2020 on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.
[66] Draft of the European Parliament Legislative Resolution of 30 November 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) A9-0332/2021.

The DMA will be enforced by the Commission, assisted by a high-level group of digital regulators (Article 40 DMA). Gatekeepers which do not comply with the regulation will face sanctions: fines corresponding to up to 10% of their worldwide annual turnover, up to 20% for repeated offenders, and structural remedies if the undertaking systematically violates its obligations. Based on a prior market investigation, the Commission can present a legislative proposal to update gatekeepers' obligations, adding new obligations or supplementing or amending existing ones.

3. 3 Short term effects of the new regulations

Firstly, the new VBER and the DMA bring together a systemic change on how price parity clauses need to be legally considered throughout the European Union. The Digital Markets Act, on one hand, addresses the specific case of the platforms designated as gatekeepers. The new VBER, on the other hand, gives the general exemption criteria of Article 101 TFEU which will apply to the rest of the digital platforms. Thanks to those two regulations, the European Union provides a uniform legal framework adapted to the competition issues raised by price parity clauses.

Besides, Articles 37, 38 and 39 DMA aim at ensuring collaboration and a uniform application within the European Union of this new Regulation. Article 37.1 calls for the cooperation and coordination between the competition authorities of the Member States "to ensure coherent, effective and complementary enforcement of the legal instruments applied to gatekeepers within the meaning of this Regulation". Article 38.1 also calls for their collaboration for the enforcement of the DMA together with the Commission through the European Competition Network. Article 39, at last, requires cooperation with national courts. Article 1.5 DMA even prohibits Member States to "impose further obligations on gatekeepers by way of laws, regulations or administrative measures" for matters falling inside the scope of this regulation. The risk of legal fragmentation has been addressed[67]. Nonetheless, Booking.com claims that the DMA does not guarantee that the regulations on price parity clauses established by some

[67] European Parliament Think Tank (December 2022). Briefing from the Digital Markets Act, by Madiega, T.A. p.4

Member States before the DMA will have to be abandoned. According to Booking.com, there would therefore still be legal fragmentation within the single market[68].

Furthermore, the two regulations now provide a clear legal framework for price parity clauses. The DMA prohibits wide and narrow price parity clauses to gatekeepers. The new VBER now imposes a case by case assessment to wide parity clauses and limits its safe harbour to narrow parity clauses only to certain concrete situations. The explicit prohibition under the DMA and the clear limits imposed by the VBER now give the legal clarity digital platforms need to plan their long term European strategic development.

Thirdly, the DMA is an *ex-ante* regulation: its aim is to prevent harmful anti-competitive conduct from occurring. In the Booking.com case, antitrust national authorities acted *ex-post*, and in some countries regulated the use of price parity clauses, forcing the platform to even abandon voluntarily wide parity clauses. But Booking.com benefitted from the clauses during several years before that, which considerably helped the platform to gain a dominant position in the digital hotel booking market to the detriment of their competitors, potential new entrants and hotels even. Time is crucial in new digital markets: in just a few years, platforms can achieve a dominant position and discard competitors. This *ex-ante* regulation is decisive in order to guarantee a fair and efficient competition in digital markets[69].

Added to all this, Recital 39 DMA also addresses other measures gatekeepers might use as a substitute for price parity clauses, such as "increased commission rates or delisting of the offers of business users". Thus, gatekeepers might not replace price parity clauses imposing alternatively higher commission rates to those hotels who choose to sell at a lower price, directly or through other platforms. Nor might they use their algorithms in order to lower the ranking of hotels offering lower prices elsewhere[70].

As a result of the investigations, the national legislations or judgements, and the new VBER and the DMA Regulations, Booking.com gradually changed its business model. First, shifting from the agency model to the merchant model: the latter, which used to steadily represent around 15% of the total of its bookings between 2014 and 2017, had quickly increased to up to

[68] European Commission (5 May 2021). Feedback from Booking.com B.V.: position paper on the Digital Markets Act (DMA), para. 5.
[69] European Parliament Think Tank (December 2022). Briefing from the Digital Markets Act, by Madiega, T.A. p.2
[70] Peitz, M. (January 2022). The prohibition of price parity clauses and the Digital Markets Act, page 7. TechReg Chronicle

40% in the first quarter of 2022 (see annex 3). Secondly, finding new ways of generating alternative revenues to booking, like advertising[71].

CONCLUSIONS

Several digital platforms, acting as intermediate between businesses and final consumers, imposed price parity clauses in the vertical agreement tying them with the businesses in order to avoid free-riding and to guarantee their customers with competitive prices. Yet, in only a few years, as the power of those platforms grew and their intermediation services became crucial for many of the businesses which used them, price parity clauses started to raise a serious competition problem. In the online hotel booking market the problem became particularly sensitive, and in the past ten years, the price parity clauses some of those platforms used went under close legal scrutiny in the European Union.

Price parity clauses cannot receive a unique legal treatment, because they cannot be considered as anticompetitive *per se*. The legal treatment will depend on the nature of the clauses (wide or narrow), and on the size and position of the undertaking imposing the clauses.

Although it was not immediate, the consensus reached around the anticompetitiveness of wide parity clauses under 101.1 TFEU in the Booking.com case was logical. Wide parity clauses distort competition between platforms and can be considered as a barrier to the entry for new competitors. Besides, the market share of Booking.com excluded the undertaking from the VBER exemption. The fact that in 2015 Booking.com and even Expedia voluntarily abandoned wide parity clauses in all the European Union soon after an investigation was launched by the French, Italian and Swedish competition authorities in coordination with the Commission only proves the point. Wide parity clauses are *a priori* anticompetitive, and even when the market share is under 30%, it might only be exempted from Article 101.1 TFEU in concrete circumstances, thus requiring a case by case assessment, as indicates the new VBER (Article 5.1.d).

[71] Delgado, P (June 2022). Understanding Booking.com's shift to the merchant model and a roadmap for hotels to compete with it (retrieved from: https://www.mirai.com/blog/understanding-booking-coms-shift-to-the-merchant-model-and-a-roadmap-for-hotels-to-compete-with-it/)

Narrow price parity clauses, on the other hand, require a more detailed analysis. Considered by various European courts as ancillary restraints preventing free-riding in the Booking.com case, they can be seen as a necessary limit to competition in order to allow an undertaking to penetrate a new area. This is the reason why it is also necessary to analyse various criteria: not only the size of the undertaking, but also the circumstances under which the undertaking is operating. Thus, if the market share of the undertaking exceeds 30%, then narrow parity clauses fall out of the exemptions, explicitly says the new VBER. It will also probably be the case if the market is concentrated. But besides the notion of dominant position, the Digital Markets Act also puts the focus on the privileged position some undertakings might benefit from. When the intermediate role of the digital platform is such that it has become a key gateway for businesses to the final consumers, and it has been so for three years, then the undertaking is considered by the DMA as a "gatekeeper" and will under no circumstance be allowed to use narrow (nor wide) price parity clauses. The bottom line for narrow price parity clauses therefore is: the bigger the undertaking and the more influence it has on the market, the more restrictive must be the stand.

It took several years of legal debate on price parity clauses throughout the European Union for the Commission to eventually reach these conclusions. Price parity clauses are legally complex to deal with, and Member States competition authorities and courts did not share the same views on the topic, giving rise to legal fragmentation within the European Union (rendering a specific European regulation on digital economy all the more necessary). The problem, though, is that meanwhile, platforms like Booking.com used the now regulated price parity clauses as a significant part of their development strategy in order to achieve their dominant position on their market. Privileging by far the agency model (including price parity clauses) instead of the merchant model, unlike its competitors (Expedia and HRS), Booking.com quickly reached almost a 70% market share among the European online hotel booking platforms and has increased its grasp on the whole online hotel booking market (see page 8 and annexes 1 and 2 for more information). To such an extent that, now, Booking.com's dominant position seems hardly contestable, as it is the case for other digital platforms in other markets (Amazon, Airbnb…).

The new VBER and the Digital Markets Act aim at making the digital economy fairer and more contestable, and they do. Yet, in markets like the online hotel booking market, the digital

economy grew much quicker than it took for the European Union to respond thoroughly with regulations especially built for this new environment.

ANNEXES

Annex 1

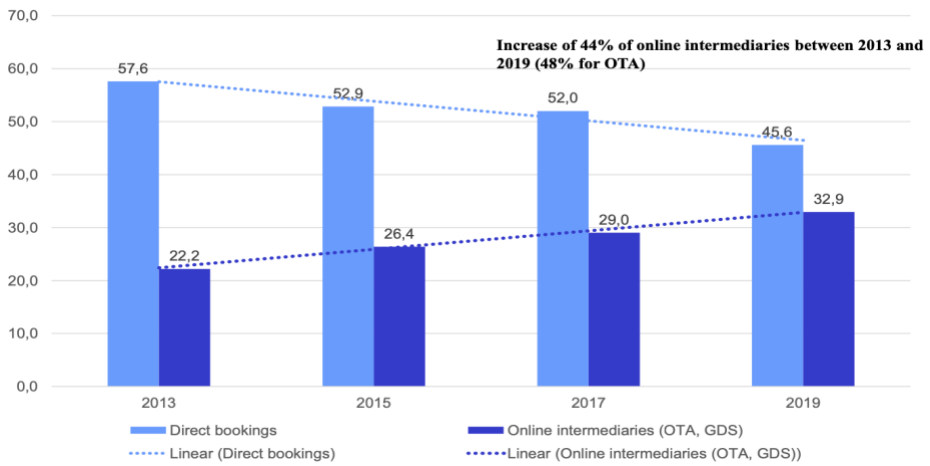
Shares on the distribution channels of hotel accommodation in Europe (2013-19)

Distribution channel	Weighted market share (in %) 2019		2017		2015		2013		Change (in pp) 2019-2013	
Direct - Phone	14.2	45.5	16.5	52.0	17.2	52.9	20.5	57.6	-6.3	-12.1
Direct - Mail / fax	1.7		2.1		2.4		3.2		-1.5	
Direct - Walk-In (persons without reservation)	3.7		4.5		4.5		5.8		-2.1	
Direct - Contact from own website (without availabilty check)	4.2		5.3		5.4		5.8		-1.5	
Direct - Email	12.9		14.6		15.6		14.9		-2.0	
Direct - real time booking over own website (with availabilty check)	8.8		9.0		7.7		7.4		1.4	
Destination Marketing Organization (DMO / trade associations	0.6	0.8	0.9	1.3	0.9	1.4	1.1	1.6	-0.5	-0.8
National Tourism Organization (NTO)	0.2		0.4		0.5		0.5		-0.3	
Tour operator / Travel agency	11.4	18.1	9.5	16.3	9.1	17.9	10.3	17.2	1.1	0.9
Hotel chains and cooperations with CRS	1.0		1.1		2.4		1.6		-0.5	
Wholesaler (e.g. Hotelbeds, Tourico, Gulliver, Transhotel, etc.)	3.1		3.2		3.5		3.4		-0.3	
Event and Congress organizer	2.5		2.6		2.9		1.8		0.6	
Online Booking Agency (OTA)	29.9	32.9	26.0	29.0	23.1	26.4	19.7	22.2	10.2	10.7
Globale Distributionssysteme (GDS)	2.4		2.5		2.9		2.0		0.3	
Social Media Channels	0.7		0.5		0.4		0.4		0.2	
Other distribution channels	2.7	2.7	1.4	1.4	1.4	1.4	1.5	1.5	1.2	1.2

Source: European Commission (2022), Market study on the distribution of hotel accommodation in the EU, p.10

Annex 2

Evolution of direct bookings and bookings via online intermediaries in the EU (2013-19)



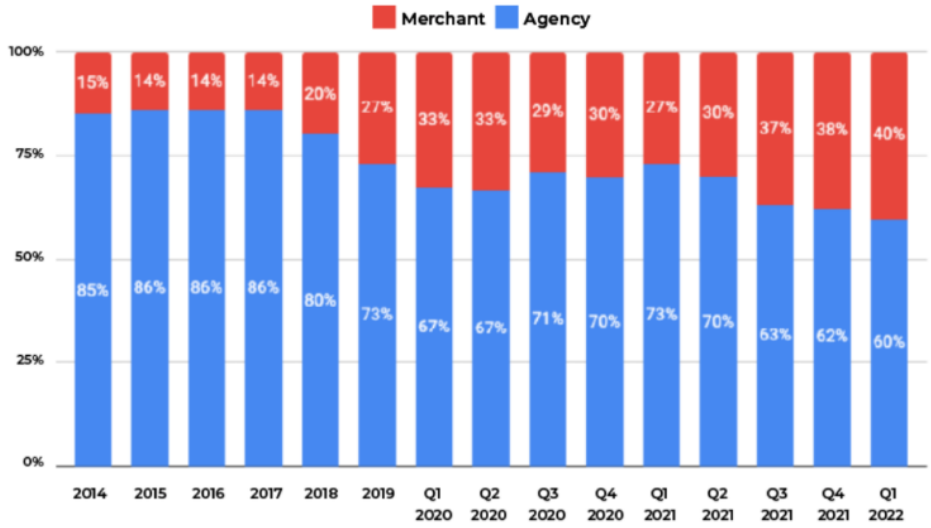
Nota: a Global Distribution System (GDS) is a reservation system which enables transactions between hotels and offline or online travel agencies[72].

Source: HOTREC (Confederation of National Association of Hotels in the EU) (2020), 2020 European Hotel Distribution Study, page 18. Retrieved from: https://www.hotrec.eu/wp-content/customer-area/storage/98a3fffbd8aae43948f117d4d8ab7e8e/2020_European_Hotel_Distribution_Survey_HOTREC_1607 2020_KeyFigures.pdf

[72] "What is GDS in the hotel industry?" Retrieved from: https://www.siteminder.com/r/global-distribution-system/

Annex 3

Booking.com distribution of bookings according to participation model



Source: Delgado, P (June 2022). Understanding Booking.com's shift to the merchant model and a roadmap for hotels to compete with it (retrieved from: https://www.mirai.com/blog/understanding-booking-coms-shift-to-the-merchant-model-and-a-roadmap-for-hotels-to-compete-with-it/)

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