THE CMA'S RETAINED VERTICAL AGREEMENTS BLOCK EXEMPTION REGULATION CONSULTATION – RESPONSE FROM TRAVELPORT

Travelport International Operations Limited ("**Travelport**") welcomes the opportunity to provide its views on the consultation issued by the CMA on 17 June 2021 concerning the CMA's proposals for the replacement of the EU Vertical Block Exemption Regulation (as the retained VABER).

Terms defined in the CMA's consultation document have been used in this submission.

Travelport

Travelport is a travel commerce platform providing distribution, technology, mobile and other solutions for the global travel and tourism industry. Travelport facilitates travel commerce by connecting travel service providers ("**TSPs**"), such as airlines and hotel chains with online and offline travel agencies ("**TAs**" or "**Subscribers**") including travel management companies and corporations and other travel buyers. These connections take place in our proprietary business-to-business Travel Commerce Platform which is underpinned by the Global Distribution Systems known as Galileo, Worldspan and Apollo. Travelport is a global business and currently operates in approximately 180 countries.

Travelport's Travel Commerce Platform enables those with access to our systems to electronically search travel related data such as schedules, availability, services, and prices offered by TSPs and to book travel for end consumers. A majority of our business revenue is driven from airline bookings made via our system. GDS companies such as Travelport provide significant added value to TSPs by offering an efficient and cost effective distribution channel and to Subscribers by offering a centralised global database through a single user-friendly interface making it more effective and less time-consuming than multi-channel searches to match TSP offers to end-consumers.

General observations

The focus of this submission principally concerns the CMA's proposals regarding parity obligations. However, Travelport wishes to make the following general observations about the CMA's consultation proposals:

- Travelport welcomes the CMA's proposal to continue to adopt a block exemption approach within the UK competition law framework and to replace the current retained VABER with a UK Vertical Agreements Block Exemption Order (UK VABEO). We consider that overall a block exemption approach provides a useful framework in which businesses can self-assess many of their agreements and identify likely competition issues.

- Travelport also broadly supports the CMA's findings that there are areas where the retained VABER has become out of date in relation to current market conditions, particularly given the growth of e-commerce, and that the replacement UK VABEO provides an opportunity to address these concerns.

- That said, Travelport considers it critically important that any replacement UK VABEO should retain flexibility and thus should not be overly prescriptive. The EU's VBER and the recent and significant developments in e-commerce have illustrated that too rigid a framework centred in the commercial realities of the time in which the relevant framework is adopted can quickly become

outdated and inflexible. Whilst it is clear that the UK VABEO should provide clear boundaries, it should also provide parties and their advisors with sufficient flexibility and clear guidance to self-assess their agreements under UK competition law, rather than providing strict bright line rules in an effort to codify recent case-law.

- Travelport welcomes the CMA's desire not to depart significantly from the EU approach to vertical agreements. Travelport, like many other companies, operates on an international basis and has in place agreements with commercial partners which are worldwide in scope. As with other companies, Travelport has structured our distribution and commercial arrangements which operate both in the UK and EU so as to comply with EU law and it is key to having in place efficient commercial arrangements that the UK vertical framework retains alignment with the EU competition rules. The European Commission has just recently issued its proposals in respect of its review of the EU VBER.

- Whilst Travelport recognises that the CMA may seek, in part, to take a slightly different approach to that under the proposed replacement EU VBER, it does not support the UK taking a materially different approach with regard to hard-core restrictions, as is the case with the CMA's proposals for parity obligations, as further discussed below. It would seem that in proposing that indirect sales channel parity obligations be treated as hard-core, the CMA has been influenced by a small number of enforcement cases in specific sectors. This approach could have significant unintended consequences for the travel sector.

- However, Travelport strongly supports the continued coverage within the proposed VABEO, consistent with the proposed EU VBER, of direct sales channel parity obligations. This approach is consistent with case-law. Direct sales channel parity obligations provide important commercial safeguards against free-riding by suppliers and provide the incentive to intermediaries to develop and invest in their distribution channels.

- Whilst Travelport welcomes the proposed one-year transitional period to allow business to implement any changes as between the current retained VABER and the proposed VABEO, a longer period would provide businesses greater leeway to adjust any agreements, particularly if the CMA were to proceed with its parity obligation proposals.

Question 29: What are your views on the CMA's proposed recommendation on parity (or 'most favoured nation') obligations? As part of this, you might like to consider whether indirect sales channel parity obligations can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations – if so, please provide evidence or examples in practice of circumstances where this may be the case.

Please see the combined response to questions 29 and 31- 33 below.

Question 30: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.

As set out more broadly in this submission, the context in which parity clauses are used and the types of obligations applied are complex. In contrast, the CMA makes simplistic yet sweeping proposals to make many parity obligations hard-core restrictions. Whilst Travelport strongly urges the CMA to reconsider its

approach to its parity related proposals, it is imperative that any guidance on the treatment of parity clauses is clear, practical and comprehensive to aid businesses in applying the UK VABEO.

Question 31: To what extent are indirect sales channel parity obligations relevant for your business's operations, or the operations of those you represent? Please explain your answer.
a) Completely
b) Very much
c) Moderately
d) A little
e) Not at all

Travelport response: Completely.
Please see the combined response to questions 29 and 31 – 33 below.

Question 32: To what extent are direct sales channel parity obligations relevant for your business's operations, or the operations of those you represent? Please explain your answer.
a) Completely
b) Very much
c) Moderately
d) A little
e) Not at all

Travelport response: Very Much. Historically many airlines in the industry have negotiated traditional "full content" type arrangements with GDS which include direct channel parity. However, in the last 5+ years many agreed parity provisions exclude the airline's direct channel since that represents a key marketing channel for the airline so they want to reserve it.

Question 33: Are you aware of any difficulties to your business if indirect sales channel parity obligations are treated as hardcore restrictions for the purposes of the proposed UK VABEO? Please explain your answer.

Please see the combined response to questions 29 and 31 – 33 below.

It is widely known and recognised by the CMA and European Commission that GDS providers, including Travelport, apply forms of content parity obligations in their commercial relationships with airlines and have done for some years. As such, Travelport has significant concerns with regards to the CMA's approach and its recommendation of making indirect sales channel parity obligations a hard-core provision under the UK VABEO.

There is a lack of clarity as to the scope of the proposals

Travelport understands the core proposition of CMA's proposals to be that "indirect sales channel parity obligations" would be treated as hard-core restrictions under the UK VABEO whilst "direct sales channel parity obligations" would fall outside this restriction.

What is not clear, however, is the scope of "indirect sales channel obligations." Specifically:

- The CMA references that the definition would refer to restrictions which ensure that the "prices (or other terms)" at which a suppliers goods or services are offered on a sales channel. It will be important to define what is covered. For example, the term "prices" in an airline ticket context comprise of multiple components including base fare, surcharges, fees etc. Similarly, what "other terms" in addition to price would be caught by this definition? Would it capture, for example, obligations with regards to the range or nature of the products or services offered on a sales channel?

- The definition of "indirect sales channel parity obligations" is not clear and is confusing. In particular, the CMA notes that the term "broadly reflects" the notion of a "wide" parity obligation which it refers to as typically specifying that a product or service may not be offered on better terms on any other channels but fails to give any more detailed explanation. The CMA further distinguishes between retail and wholesale parity obligations and later in the consultation paper references that wholesale parity obligations are generally less problematic; however, there is nothing in the proposed definition of indirect sales channel obligations that clearly reflects this distinction. Travelport's understanding is that indirect sales channel obligations applied in a wholesale context would be caught, but a "traditional" wholesale parity clause would not be. If this is the intention of the scope of the hardcore restrictions, then this is not apparent from the consultation document which does not define clearly the scope of the proposals. If the CMA proceeds to specifically address parity obligations in the UK VABEO, then it will need to address in detail and with clarity the definitions used to describe different types of parity obligations and what is intended to be captured in each definition.

A one-size fit all approach to parity obligations is neither justified nor proportionate

The CMA notes that the retained VABER does not refer to parity obligations; however, it asserts that such obligations have become more common since the EU VBER was adopted and that such obligations have been the scrutiny by various competition regulators. The CMA further explains that much of this scrutiny has been due to the growth of e-commerce and the use of such obligations in the context of online platforms. Indeed, the CMA refers to a number of cases concerning "wide" parity obligations that it has investigated in the e-commerce sector.

We urge the CMA to ensure that it has a broader and more holistic focus with regards to the types of parity obligations found in commercial agreements and that it should look beyond online platforms in the retail context to inform its policy approach. There is no discussion within the consultation document of the broader types and variety of parity obligations nor the justifications for such parity obligations. Instead, not only does CMA's approach seems to be driven purely by its specific enforcement actions which are not representative of the broader context in which parity obligations are commonly used, but it fails to consider potential broader pro-competitive effects of such obligations. No detailed discussion or justification is provided why in all cases such obligations should be considered as hard-core restrictions; rather the CMA simply asserts "Based on the CMA's experience of scrutinising such obligations in its case work referred to above, the CMA is concerned that indirect parity obligations soften competition between indirect channels and reduce the incentives (such as online platforms) to compete on price, to innovate or to enter and expand".

We consider that this superficial assessment should not result in such a far reaching and disproportionate proposal.

The CMA's approach is at odds with the proposed approach of the European Commission

Since publication of the CMA's proposals in mid-June, the European Commission has published its detailed recommendations for the new Block Exemption Regulation (EU VBER). The European Commission has also sought to address the inclusion of parity obligations within the revised EU VBER and has proposed that wide parity obligations used by online intermediaries, to prevent suppliers from offering better terms on other online intermediary sites, will be an 'excluded restriction' under the revised EU VBER, but not a hardcore restriction as has been proposed by the CMA.

As a result, the EU and UK positions are significantly different. Whilst excluded restrictions do not automatically obtain the benefit of the block exemption, it will be a matter for parties to self-assess the relevant obligations under Article 101(3) and establish that the obligations do not give rise to anti-competitive effects. This provides parties with some flexibility and allows parties to adjust any restriction so as to have a better chance of being considered an excluded restriction. This is in contrast to the UK position in which such obligations will be regarded, without any form of self-assessment, as having an anti-competitive object and therefore have the effect of automatically infringing UK competition law.

There is no clear justification for this difference in approach and it positively frustrates any efforts to create a streamlined framework for businesses which rely on cross-border distribution arrangements between the UK and the EU.

Further, the CMA will be aware that the European Commission announced on 19 July 2020 that it had closed its GDS investigation into Amadeus and Sabre without any findings of anti-competitive conduct. The stated reason for closing the investigation was on the basis on there being insufficient evidence to justify continuing to pursue the case. Thus, aside from concluding that the European Commission did not find any clear basis for finding parity obligations in the context of airline distribution to be anti-competitive, it is not unreasonable to conclude that the European Commission's decision not to make any findings of anti-competitive conduct has informed its position in respect of parity obligations in the proposed EU VBER.

The use of parity obligations in the distribution of airline tickets provides a clear illustration why the CMA's approach is unjustified and would have negative consequences for consumers

GDS platforms, such as Travelport, provide a highly efficient distribution channel for airlines (and other TSPs) by providing access to a large network of TAs. The need for each airline to replicate such a distribution system and its functionality would be costly and result in an unnecessary duplication of resources.

From the perspective of TAs, a GDS significantly simplifies the search/ book /service activities of the TA enabling them to plan and book their customer's itinerary rather than using and connecting to multiple different technology platforms which would involve additional costs (which may be passed on to the end consumer) and complexity.

The value of a GDS and its value to TAs rests predominantly on its ability to secure access to content. This was a fact plainly recognized by the European Commission in 2007, when it noted that "*in this market, the crucial issue is content*".[1] Specifically, the Commission noted that "*GDS providers must be able to provide*

[1] Case No COMP/M.4523 - *TRAVELPORT/ WORLDSPAN,* paragraph 20.

full content (in particular the lowest fares) to TAs. If a GDS provider is unable to offer TAs full content, the GDS provider risks losing customers".[2] This observation cannot be overstated. It would severely undermine the role and viability of a GDS should airlines be able to freely discriminate against one GDS in terms of content and fares, with resulting implications for the competitiveness and structure of the GDS segment of the market. As a result, parity-type content obligations as between GDS providers and airlines which are highly negotiated by airlines and are typically limited in scope have become commonplace to ensure that the range of airline fares offered by one GDS is comparable to that offered by another GDS.

The importance of content parity is underlined by the specific characteristics of the two-sides of the market in which GDS providers operate. In particular, multi-homing on the part of airlines and single-homing on the side of small or mid-sized Subscribers.

The European Commission previously identified this market feature, noting that "*virtually all airlines subscribe to all GDS providers. Other TSPs (car rental firms and hotel chains) tend to do the same, whereas TAs generally tend to use single-homing*."[3] The CMA has more recently observed that many TAs single-home in respect of GDS content[4].

The European Commission referred to evidence that "*subscribing to a second GDS may increase the operational costs of a small or medium TA by 5% to 10%.*" While, at a larger scale of operations, dual-homing is often adopted for a variety of reasons, including to mitigate the risk of service disruption, to diversify content or product offerings, or to obtain the most favourable terms from a GDS, many small to mid-sized agencies typically rely on a single GDS to offer a credible offering to their customers.

The existence of single-homing by small to mid-sized TAs means, in simple terms, that each TA must be able to access the most complete and competitive fare content from a single GDS in order to credibly compete in the market. A small or mid-sized TA maintaining multiple GDSs or direct connections to several airline vendors can result in increased technology costs for the TA which are in turn passed onto consumers. Moreover, given the role and purpose of TAs, consumers tend to assume that a given TA has access to equally complete and competitive content and that the availability, choice, and fares do not differ materially from one agent to another. Indeed, they are highly unlikely to even be aware of the existence of the GDS, let alone which specific system a given agent uses (and shop around accordingly). Therefore, a market in which content neutrality as between agents did not exist and in which airlines differentiated content between GDS would additionally result in worse outcomes and increased costs for consumers.

Accordingly, content parity gives the TA and end consumer the necessary comfort that the fares, availability and ancillary services that can be booked through an agent are the same regardless of the GDS that the TA uses, which in turn provides a level playing field for TAs and reduced costs for consumers.

A GDS is a technology solution to allow TAs to connect to airlines. As such, and notwithstanding content neutrality, TAs compete vigorously on a range of elements including other travel services, price, customer service and geographic reach and similarly the fares set by airlines remain at the discretion of airlines at all times allowing them to compete fully in the market.

There is therefore no basis for the CMA to assert that all such parity obligations should be considered as hard-core restrictions. Whilst the CMA may be keen to codify a recent enforcement approach, there is no

[2] Ibid, paragraph 88.
[3] Ibid, paragraph 15.
[4] CMA Final Report Sabre/Farelogix, April 2020, para 7.6

detailed evidence or analysis (nor indeed any recent enforcement activity in relation to the distribution of airline tickets) that provides any justification for why such provisions should fall within the scope of the hard-core restriction. It would have a significant adverse impact on TAs, would have a negative impact on transparency and ultimately would increase costs for consumers.

The proposal to allow parity clauses where there are efficiency justifications would provide significant uncertainty for businesses

At para. 4.76 of the consultation, the CMA notes that it is minded to clarify in the UK VABEO guidance that that it is open to ”considering on a case-by-case basis, carefully and objectively, any efficiency arguments made in the course of any investigations under the Act relating to the use of indirect sales channel parity obligations”.

This would appear to suggest there is no general basis to argue that such obligations may generate efficiencies; rather this comment seems to suggest only that the CMA will not preclude consideration of efficiencies in any investigation it may conduct. This is very unsatisfactory for businesses.