

## **THE CMA'S DRAFT GUIDANCE ON THE VERTICAL AGREEMENTS BLOCK EXEMPTION ORDER – RESPONSE FROM TRAVELPORT**

Travelport International Operations Limited (“**Travelport**”) welcomes the opportunity to provide its views on the consultation issued by the CMA on 31 March 2022 concerning the proposed draft guidance to accompany the Vertical Agreements Block Exemption Order (“**VABEO**”).

Terms defined in the CMA’s consultation document and draft guidance have been used in this submission.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 global 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**

Ahead of providing comments on specific sections of the draft guidance concerning parity obligations, Travelport wishes to make the following general observations:

- Although Travelport remains concerned that the CMA has decided to depart from the EU’s approach to parity clauses in vertical agreements, Travelport welcomes the clarification in the draft VABEO and guidance that only wide retail parity obligations will be treated as hardcore restrictions of competition.
- Travelport also welcomes the clarifications in the CMA’s Recommendation to the Secretary of State that business to business markets should **not** be within the scope of the hardcore restriction,<sup>1</sup> and that there are good reasons to exclude such wide parity obligations from the scope of the hardcore restriction.<sup>2</sup>
- Travelport welcomes the additional clarity on the CMA’s parity related proposals in the draft guidance, as well as the departure from a “one-size fit all approach” to parity obligations which would have been neither justified nor proportionate.

Beyond these general observations, Travelport remains concerned about some key aspects of the draft guidance.

<sup>1</sup>[CMA’s Recommendation to the Secretary of State, paragraph 5.93\(a\)](#).

<sup>2</sup>[CMA’s Recommendation to the Secretary of State, paragraph 5.96](#).

## **The CMA's definition of "end user" is unclear and confusing**

Travelport welcomes the inclusion of a "*wide retail parity obligation*" definition in Article 8(5) of the draft VABEO, and confirmation that only wide parity obligations concerning goods or services that are offered to "*end users on a sales channel*" constitute hardcore restrictions of competition.<sup>3</sup> Travelport also welcomes the CMA's draft guidance on the meaning of "*retail parity obligations*", which are described as "*restrictions that apply in the retail context and involve an undertaking offering, selling or reselling goods or services to end users*",<sup>4</sup> as well as the confirmation that "*wide parity obligations that apply to upstream business-to-business markets are not treated as hardcore restrictions*".<sup>5</sup>

However, Travelport is concerned about the ambiguity in the CMA's definition of "*end users*" which the draft guidance, without further explanation, describes as "*generally consumers, but may also include other undertakings*".<sup>6</sup> This description appears to reintroduce the possibility that parity clauses in purely business-to-business agreements, such as contracts between GDSs and TSPs, could be characterised as "retail" parity clauses and consequently, constitute hardcore restrictions of competition.

Such an interpretation would stand in stark contrast to other parts of the draft guidance as well as the draft Explanatory Memorandum to the VABEO, which distinguish more clearly between business-to-business and retail markets. For example paragraph 8.84 of the draft guidance (which is repeated in paragraph 7.40 of the draft Explanatory Memorandum) explicitly links retail parity clauses to "*business to consumer*" markets. Paragraph 10.166 of the draft guidance similarly refers to undertakings that are "*not end users, ie in upstream business-to-business markets*" as being able to benefit from the block exemption. The draft EU guidelines on vertical restraints also more clearly set out that where parity obligations concern goods or services offered to "*retailers*", these are not "*end-users*".<sup>7</sup> To the extent that the CMA is seeking to preserve its ability to include wide parity clauses in business-to-business markets within the "*retail*" definition, Travelport considers that this would be neither justified nor proportionate, and contrary to the plain language in Article 8(5) of the draft VABEO. Even if this is not the intention, the current drafting of the draft guidance is unclear and confusing.

Travelport's understanding is that the use of "*other undertakings*" in paragraph 8.78 of the draft guidance refers to situations where a supplier of a good or service uses an intermediary as an indirect sales channel by which it reaches consumers but where it cannot be excluded that businesses will also be reached (e.g. price comparison websites). Travelport would welcome confirmation that this understanding is correct, as well as further guidance on when "*other undertakings*" would be considered "*end users*" in the final guidance.

## **The CMA's guidance on parity obligations relating to non-retail conditions should be clarified**

Travelport welcomes the CMA's clarifications in paragraph 10.161 of the draft guidance that "[w]ith the exception of wide retail parity obligations [...] which are treated as hardcore restrictions, the block exemption applies to all other types of vertical parity obligation in vertical agreements, provided the market shares of the supplier and the buyer do not exceed 30%". This is a clear summary of the position described in the draft VABEO.

However, while Travelport understands that the draft guidance provided at paragraphs 10.162 to 10.169 concerns the assessment of parity obligations above the market share threshold,<sup>8</sup> it wishes to make an observation on the drafting of paragraph 10.166.

<sup>3</sup>[Draft Vertical Agreements Block Exemption Order, Article 8\(2\)\(f\)](#).

<sup>4</sup>[Draft CMA guidance on Vertical Agreements Block Exemption Order, paragraph 8.74](#).

<sup>5</sup>[Draft CMA guidance on Vertical Agreements Block Exemption Order, paragraph 8.84](#).

<sup>6</sup>[Draft CMA guidance on Vertical Agreements Block Exemption Order, paragraph 8.78](#). Emphasis added.

<sup>7</sup> Draft Guidelines on Vertical Restraints, paragraph 334.

<sup>8</sup>[Draft CMA guidance on Vertical Agreements Block Exemption Order, paragraph 10.161](#).

Paragraph 10.166 of the draft guidance sets out that “[p]arity obligations (wide or narrow) imposed by intermediaries relating to the conditions under which products are offered to undertakings that are not end users, ie in upstream business-to-business markets, benefit from the block exemption provided by the VABEO where both the supplier’s and the buyer’s market shares do not exceed 30%.” Nonetheless, Travelport is concerned that remainder of paragraph 10.166 through its use of the word “however” at the beginning of the second sentence, appears to contradict, or at the very least, significantly caveat this clear position. The current framing of paragraph 10.166 not only suggests that business-to-business parity obligations where both the supplier’s and buyer’s market share are below 30% might be anticompetitive, but also that they may need to be separately (self-)assessed.

From the context provided in paragraph 10.161 of the draft guidance, Travelport understands that this is not the intent, and would therefore suggest that paragraph 10.166 be clarified in the final guidance.

### **The CMA’s guidance on assessment under section 9(1) overly focuses on free riding to the exclusion of other efficiency justifications**

Travelport welcomes the CMA’s guidelines on self-assessment of potential efficiency justifications under section 9(1) where parity obligations do not benefit from the block exemption.

However, Travelport disagrees with the assertion that the “*most common justification for the use of these obligations by intermediaries is to address a free-rider problem*”, which is presented without evidence or detailed analysis.<sup>9</sup> While the CMA devotes two full paragraphs to setting out how businesses can self-assess parity clauses where there is a risk of free riding, it only includes single sentence on other efficiency justifications, noting that these “*will only fulfil the conditions of section 9(1) if the intermediary can show a direct causal link between the benefit claimed and the use of the particular type of parity obligation.*”<sup>10</sup>

This is an overly narrow interpretation of the analysis required under section 9(1) that appears to all but ignore other possible efficiency justifications. The draft guidance is unjustifiably dismissive on this point and, by way of example, completely ignores the key benefits and reasons for the use of parity clauses in the airline ticket sector.

As Travelport has noted in its previous submissions, 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. From the perspective of TAs, GDSs are a highly efficient tool that significantly simplifies searching, booking and servicing itineraries for end-users. Content parity is key in enabling TAs (many of whom single-home) to realise and pass onto consumers, the cost and time-saving properties of GDSs, and to give them and end-users comfort that the fares, availability and ancillary services that can be booked through an agent are the same regardless of the GDS used.

There is no basis for the CMA to assume that these benefits do not fulfil the conditions of section 9(1). Furthermore, the disproportionate focus on free riding to the exclusion of other justifications suggests that the CMA would not seriously consider other efficiency justifications in any investigations it may conduct, which would be highly concerning. The guidance should instead recognise there may be a range of justifications for such provisions, set out clearly the range of factors which are relevant to any self-assessment and be framed so that they are of broad application to all sectors.

Thus, whilst Travelport welcomes the clarification that business to business markets will not be within the scope of the hardcore restrictions, Travelport requests that its comments on the draft guidance are taken into consideration to avoid causing confusion or ambiguity under the VABEO and to provide meaningful guidance to companies for the purposes of self-assessment.

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<sup>9</sup>[Draft CMA guidance on Vertical Agreements Block Exemption Order, paragraph 10.167.](#)

<sup>10</sup> [Draft CMA guidance on Vertical Agreements Block Exemption Order, paragraph 10.168.](#)