Confidential

Non-compliance of Booking.com with Digital Markets Act obligations

- Article 5(3) DMA prohibits Booking.com from preventing businesses from making better offers outside the Booking platform – also known as parity clauses.
- According to Articles 13(3) DMA compliance with Article 5(3) DMA lies with the gatekeeper.
- Articles 13(4) (anti-circumvention provisions) plays an important role in ensuring that the gatekeeper should not engage in any behaviour that undermines the effective compliance with the prohibition in Article 5(3). Measures of equivalent effects is a way to circumvent Article 5(3) DMA.

PARITY CLAUSES AND MEASURES WITH EQUIVALENT EFFECT

I. Introduction

Parity clauses have been part of Booking.com's business model for over two decades. While Booking.com no longer uses parity clauses in its Delivery Terms since 2nd December 2024, **it has already put in place a strategy which deters hotels from deviating from price and availability parity. This strategy allows Booking.com to continue to adopt measures that have an equivalent effect to parity clauses and clearly circumvent the DMA.**

Booking.com has created performance programmes, such as the *"Preferred Partner Programme"*, for which parity clauses are not an eligibility requirement. However, these programmes are characterised by a set of non-transparent criteria which encourage members to adopt measures which lead to effects equivalent to parity clauses.

Moreover, the abovementioned effects are corroborated by **Booking.com bundling its payment system with the automatic price adjustment-mechanisms which discourage business users from offering more competitive prices on other distribution channels**.

II. Booking.com's performance programmes

The greater visibility hotels have on Booking.com, the higher the chances they will receive booking requests. Booking.com enhances this system by offering programmes that should increase hotels' visibility.

The Preferred Partner Programme is an exclusive programme that gives greater visibility to the top 30% of Booking.com's partners. In addition, among others, preferred partners also receive, on average, 65% more search views and 20% more bookings[1]. Booking.com explicitly states *"for properties located in no parity countries, external prices are not an eligibility requirement"*. However, in order to be eligible to join the programme, the gatekeeper mandates hotels to have a high *"performance score"*. The latter is based on a combination of hotels' expected annual bookings and traveller demand for their properties, for which, hotels need a score of at least 70%. Since external prices affect both the calculation of *"expected annual bookings"* and traveller demand and conversion rates, they will affect the eligibility for programmes that increase hotel visibility.

Moreover, **Booking.com's ranking system and performance measurements are not transparent**. Indeed, the wide majority of HOTREC's members complain about the lack of transparency of Booking.com's algorithms. In addition, several members of **HOTREC acknowledge that most communication between Booking.com and hotels is taking place over phone or video calls or in person on-site visits.** Following calls from Booking.com's market manager, hotels are often left with the impression that maintaining parity is probably best for performance without understanding why.

Thus, by offering a programme which is highly coveted for hotels' visibility on its platform, Booking.com is essentially encouraging hotels to adopt measures that have equivalent effects to parity clauses. While parity clauses are not required in order to access the programme, hotels have to adopt the most competitive pricing on Booking.com if they want to reach the performance score required by Booking.com to be eligible for the Preferred Partner Programme. Moreover, **Booking.com does not pose any restrictions on the geographical scope of the Preferred Partner Programme, so it is essentially replicating parity clauses at a European level.**

[1] Booking.com, *All you need to know about the Preferred Partner Programme*, available here.

III. The bundling of Booking.com's payment system and BSB

"Payments by Booking" is a payment processing service offered by Booking.com to its business users, such as hotels. The service manages payments from guests on behalf of the property, including prepayments, security deposits, or other payments made at the time of booking. Almost half of all reservations on Booking.com are handled through the platform's payment system, and the share is growing year by year. **It is becoming more important for hotels to opt in to Booking.com's payment system and the accompanying automatic price adjustments, which is automatically activated as soon as a hotel joins Booking.com's prepayment system**. In some countries, Booking.com has announced it will stop supporting prepayment policies for properties that charge guests directly, consequently leading to no available prepayment alternative.[2] Most smaller and independent hotels must calculate how a loss of visibility or performance by not using Payments by Booking or being part of the Genius or Preferred programs impacts them. If a hotel does not offer payment options on Booking.com, it will be ranked lower than other hotels. Either as a direct effect of how Booking.com presents and filters search results based on consumers expectations, or as an indirect effect from lower conversion rates. Booking.com' payments system is therefore crucial for many hotels that do not want to be marginalized on the platform. It is not unlikely that Booking.com will in the future - to consolidate market power and dependency on its platform - make it mandatory to be part of its Payments by Booking to participate on the platform.

Booking.com bundles the Payments by Booking with the Booking Sponsored Benefit (BSB). Through the BSB, Booking.com automatically adjusts prices of hotels that offer a discount on their own website or on other distribution channels. Booking.com covers a portion of the room cost and reduces the rates to end-users. The hotels will still receive the full value of the transaction at the rate previously set. However, Booking.com states that hotels are *"required to pay the standard commission percentage on the room price as originally set"* [3]. The consequence is a higher commission for Booking.com. **Automatic price adjustments are one of Booking.com's most powerful tools to limit the contestability of markets now that enforcement of rate parity through contractual clauses are prohibited.** The main purpose of the mechanism is to ensure that Booking.com will outcompete any competitor on price and thereby preserve its gatekeeper position. This goal is achieved by crawling distribution websites, including hotel brand websites for cheaper rates and, automatically, without consulting the hotels, discounting the price on the corresponding offer on the Booking.com platform at their discretion.

[2] Booking.com, *Enhancing prepayment policy security in Greece, Ireland and Poland*, available here
[3] Booking.com, *Understanding Booking Sponsored Benefit*, available here

Automatic price adjustments directly undermine hotels control of their pricing strategy. Most hotels use different distribution channels and intermediaries and try to have oversight and control over pricing and availability through a channel manager. Professional revenue or distribution managers will determine a strategy for pricing and availability that suits the needs for a specific property. An important aspect is determining which platforms to incentivise bookings through, either by differentiating prices or availability. Any hotel subjected to the BSB-mechanism who chooses to offer a discount on their own website or on other distribution channels will see their efforts neutralized by the automatic price adjustments. Furthermore, although the price-adjustments are based on external signals, **the system does not merely "price-match", it undercuts the price. The price on the offering is discounted with a standardised percentage with the result that the external price is undercut rather than matched. The penalty for hotels intentionally or unintentionally practicing price disparity across distribution channels is severe**. The undercutting mechanism results in a loss of pricing control, more price inconsistencies across distribution channels, and deceptively influences consumers' perception of how pricing functions in the hotel market. Furthermore, the practice of undercutting rather than price-matching has an additional, compounding, effect on restricting hoteliers in their pricing strategy and misleading consumers about how the hotel room market should function. In particular:

- It ensures that the damaging effects on consumers' perceptions from the last 20 years of price parity clauses and measures with equivalent effect will persist.
- It denies freedom of choice to adopt pricing strategies that will have relatively predictable trade-offs. For example, less business on Booking.com and more business through direct sales channels, or less business from Booking.com and more business through a competing intermediary.

Booking.com's aim is to achieve three goals. Firstly, hotels are sufficiently restricted in their pricing autonomy to ensure that the BSB-mechanism is activated as seldom as possible, thus costing Booking.com less in discounted commission fees. Secondly, if there is price disparity across platforms, consumers are more likely to choose to book their rooms on Booking.com which is a Core Platform service (CPS) characterised by strong network effects. Lastly, consumers will over time be more likely to believe that OTAs can offer better prices compared to booking directly with the hotel.

HOTREC is of the opinion that **if automatic price adjustments based on external price signals are a part of Payments by Booking.com the service, it is a measure with equivalent effect to parity.** The use of automatic price adjustments forces hotels to keep consistent pricing across all distribution channels to perform well on the platform and mitigates perceived risks. This practice, coming from a gatekeeper, limits the contestability of the market and the long-term interest of consumers for alternative distribution

channels. Moreover, the unilateral and automatic price adjustments on offerings results in hotels losing control over their pricing strategy. This will restrict inter-platform competition as well as competition between Booking.com and direct suppliers.

It should be highlighted that **hotels suffer from loss of pricing control also when Booking.com does multi-sourcing in collaboration with other OTAs and tour operators or wholesalers.** Indeed, through these partnerships, Booking.com gains access to room allocations from operators and wholesalers at discounted net rates. Booking.com has launched programs such as "Booking.basic" offering these discounted third-party rates significantly undercutting the rates offered directly by hotels on Booking.com. These offers are no longer listed under the "Booking.basic" label on Booking.com but are now marked as “partner offers”. Once again, through this initiative, Booking.com effectively ensures rate parity on its own, even if hotels do not provide it voluntarily or deliberately. By implementing this strategy, Booking.com can challenge any price reduction proposed by hotels on different distribution channels. This deters hotels from deviating from price and availability parity. According to a Europe-wide online survey conducted by HOTREC, 43% of hotels in Europe were affected by portal multi-sourcing in 2023. Among these hotels, 46% reported negative implications from the practice.

Conclusion

Booking.com has put in place **a strategy** which enables it to replicate parity clauses at the EU level **in breach of Art. 5(3) and Art. 13(4) DMA**.

Booking.com, has adopted a whole commercial strategy that eventually **prevents hotels from offering prices that are different from those offered through Booking.com**. Indeed, Booking.com is offering **highly coveted programmes** that increase hotels’ visibility, for which **parity clauses are de facto necessary for eligibility requirements**. This strategy is corroborated by the **imposition of the BSB** mechanism to hotels that use the **Booking.com’s payment services** which are **essential** in order to be competitive on the platform.

The DMA’s non-compliant strategy of Booking.com is also accompanied by lack of transparency regarding its algorithms which offuscates hotels’ understanding of ranking mechanisms and contributes to encouraging hotels in engaging with measures that have effects equivalent to parity clauses.