

The Consumer Voice in Europe

COMMITMENTS OFFERED BY AMAZON IN E-BOOK INVESTIGATION (AT.40153)

BEUC's comments



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Why it matters to consumers

Consumer welfare depends on the existence of competitive markets. When powerful online platforms such as Amazon impose conditions on their suppliers which would allow them to benefit from terms at least as good as those of its competitors, there is a risk of hampering competition and harming consumers. These practices allow online platforms i.e. marketplaces or booking sites to fix prices and, eventually, push competitors out of the market. As a consequence, consumers could be faced with a lower number of e-retailers and therefore higher prices. In the current eBooks investigation Amazon is offering to lift those clauses in its contracts with publishers, which should help to unleash competition among platforms and e-book retailers.

Summary

Amazon offered commitments to settle the ongoing DG Competition investigation on parity clauses applied to eBook distribution.

Overall BEUC welcomes the commitments offered by Amazon and suggests that the European Commission accepts them. However, we would recommend the European Commission to consider, before taking the decision, whether 'Discount Pool Provisions' in eBook distribution contracts should not be simply "declared invalid" or not enforceable instead of giving to the publishers the possibility to terminate the contract.

The use of parity clauses is not unique in the eBooks market but a common practice across online markets.

BEUC is of the view that 'wide' parity clauses – such as the ones object of this investigation – hamper competition and may lead to market concentration. In particular, when parity clauses are imposed by platforms with significant market power, it becomes impossible for a supplier or competitor to offer better deals to consumers outside the dominant platform.

Therefore, a common approach in relation to parity clauses is needed. Particularly, it is necessary to consider whether an ex-ante prohibition of 'wide' parity clauses is needed at EU level.

1. General remarks on parity clauses

Most-favoured nation clauses (MFNs) or parity clauses are often used in vertical relationships between suppliers and platforms to reduce the risks of free riding on the platforms' investments in promoting the suppliers' products.

These clauses can have different scopes according to the obligations imposed on suppliers:

- First, 'narrow' parity clauses generally link the price and terms offered by the online platform to those available directly on the upstream supplier's website in order to guarantee that the latter will not be less attractive than the offers available on the platform.
- Secondly, 'wide' parity clauses have the same effect as the previous one but in addition they seek to guarantee that the prices available on other platforms, including competitors, would not be lower than those advertised on the platform¹.

There are several examples of the use of parity clauses in online booking platforms. Booking.com was investigated in several Member States concerning the use of wide parity clauses with divergent outcomes.

While commitments have been accepted by the competition authorities of Ireland, United Kingdom, Denmark, the Netherlands and Greece, the *Bundeskartellamt* took a different view². The German authority decided on a complete ban on parity clauses, which was supported by the Düsseldorf Higher Regional Court³.

The Booking.com case showed the need for a common approach across the European Union towards parity clauses.

BEUC is of the view that wide parity clauses hamper competition and may lead to market concentration. In particular, when such parity clauses are imposed by platforms with significant market power, it becomes impossible for suppliers or competitors to offer better deals to consumers alongside the dominant platform. As a result, the dominant platform could basically fix the retail prices of the product for the whole online market in detriment of consumers, as our Italian member, *Altroconsumo*, highlighted when the Italian antitrust authority opened the investigations against Booking.com and Expedia⁴.

Although the effect of narrow parity clauses might be different from wide clauses e.g. because they do not seek to fix prices in relation to competitors of the online platform, BEUC considers that they should also be carefully scrutinised by competition authorities.

For example, our German member, *Verbraucherzentrale Bundesverband*, considers that narrow parity clauses in online booking could have a similar effect as wide parity clauses⁵. This is because by setting a minimum price in the market, booking platforms

¹ On this distinction see: Ezsrachi A., "The Competitive Effects of Parity Clauses on Online Commerce", Oxford Legal Studies Research Paper No. 55/2015

²Ref.: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf%3F_blob%3DpublicationFile%26v%3D3

³ Bundeskartellamt, Press Release 09.01.2015, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html?nn=3591568

⁴ Ref.: <https://www.altroconsumo.it/vita-privata-famiglia/viaggi-tempo-libero/news/expedia-e-booking-sotto-accusa-la-nostra-inchiesta>

⁵ See the contribution of vzbv to the European Commission's consultation on Amazon's commitments.

will not compete for lower commissions paid by hotels, which ultimately should help at bringing prices down for consumers⁶.

2. Amazon's commitments

In 2015 the European Commission opened an investigation against Amazon for imposing obligations on publishers of eBooks that would limit their possibility to offer different prices to distributors and other e-commerce platforms.

Amazon is an important reference point for many consumers to purchase eBooks. As the largest distributor in Europe, Amazon enjoys significant market power which allows the imposition of terms on its suppliers leading to a competitive advantage over other online platforms and retailers.

In particular, the European Commission estimated that clauses granting to Amazon a) the right to be informed of more favourable or alternative terms offered to its competitors and, b) the right to terms and conditions at least as good as those offered to its competitors, could breach EU antitrust rules⁷.

In order to settle the investigation, Amazon offered the following commitments:

- a) Not to enforce (i) any clause requiring publishers to offer Amazon similar terms and conditions as those offered to Amazon's competitors or (ii) any clause requiring publishers to inform Amazon about such terms and conditions. This commitment would cover in particular terms and conditions concerning business models, release date and catalogue of e-books, features of e-books, promotions, agency price, agency commission and wholesale price. Amazon would also notify publishers that it would no longer enforce such provisions.
- b) To allow publishers to terminate e-book contracts that contain a clause linking discount possibilities for e-books to the retail price of a given e-book on a competing platform (so-called Discount Pool Provision). Publishers would be allowed to terminate the contracts upon 120 days' advance written notice.
- c) Not to include, in any new e-book agreement with publishers, any of the clauses mentioned above, including Discount Pool Provisions.⁸

BEUC is of the view that the commitments offered by Amazon would overall meet consumer concerns and therefore should be accepted.

However, we would like to highlight that in relation to the commitment (b) to allow the termination of contracts containing Discount Pool Provisions by the eBook suppliers, this solution could have a negative effect if suppliers taking new contracts are put in a worse position in comparison to their position in the original contract. Therefore, BEUC considers that before taking a decision the European Commission should assess whether Discount Pool Provisions in eBook distribution contracts should not be simply declared

⁶ For example, if a third party platform cuts its commission, the hotel could offer rooms on this platform for a lower price than on its own website. The lower price on popular third party platforms could induce consumers that book their rooms via the hotels own website to book rooms via the third platform. Depending on the consumers price elasticity across distribution channels, the hotel risks losing commission-free bookings. Therefore, there is an incentive for hotels to offer their rooms for the same conditions on third party platforms as on their own website. Hence hotels have an incentive to offer rooms at the same conditions on all platforms. So the narrow parity is unlikely to lead to competition among platforms for better commissions and lower prices. Thus, platforms have little incentive compete on commissions, as lower commissions are unlikely to induce hotels to lower their prices accordingly.

⁷ European Commission Press Release of 11 June 2015

⁸ European Commission Press Release of 24 January 2017

invalid or not enforceable instead of giving the possibility to publishers to terminate the contract

Finally, we would like to highlight that since wide parity clauses are unlikely to meet the conditions of article 101(3) TFEU, they should be considered anticompetitive per se. Therefore, it might be appropriate to either clarify this element in the European Commission's Guidelines on Vertical Restraints⁹ or, to introduce an *ex-ante* prohibition as done by the French legislator in the "Loi Macron"¹⁰.

⁹ SEC(2010) 411

¹⁰ Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques.



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