

Public questionnaire for the 2018 Evaluation of the Vertical Block Exemption Regulation

Fields marked with * are mandatory.

Introduction

Background and aim of the public questionnaire

Article 101(1) of the Treaty on the Functioning of the European Union ("the Treaty") prohibits agreements between undertakings that restrict competition unless, in accordance with Article 101(3) of the Treaty, they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and unless they are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question (i.e. they "generate efficiencies in line with Article 101(3) of the Treaty").

The prohibition contained in Article 101(1) of the Treaty covers, amongst others, agreements entered into between two or more undertakings operating at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (so-called "vertical agreements").

Commission Regulation (EU) No 330/2010 (Vertical Block Exemption Regulation, "VBER") exempts from the prohibition contained in Article 101(1) of the Treaty those vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The Commission Guidelines on Vertical Restraints ("VGL") provide binding guidance on the Commission for the interpretation of the VBER and for the application of Article 101 of the Treaty to vertical agreements. The VBER will expire on 31 May 2022.

This public questionnaire represents one of the methods of information gathering in the evaluation of the VBER, together with the VGL, which was launched on 3 October 2018. The purpose of this questionnaire is to collect views and evidence from the public and stakeholders. The evaluation of the VBER, together with the VGL, is based on the following criteria:

- Effectiveness (Have the objectives been met?),
- Efficiency (Were the costs involved proportionate to the benefits?),
- Relevance (Is EU action still necessary?),
- Coherence (Does the policy complement other actions or are there contradictions?) and
- EU added value (Did EU action provide clear added value?).

The collected information will provide part of the evidence base for determining whether the Commission should let the VBER lapse, prolong its duration or revise it, together with the accompanying VGL.

If the VBER is not prolonged or revised, vertical agreements currently covered by the VBER, will no longer be block exempted and companies will have to assess whether the vertical agreements they enter into are compliant with Article 101 of the Treaty based on the remaining legal framework (e.g. the Article 101(3) Guidelines and the enforcement practice of the Commission and national competition authorities, as well as relevant case-law at EU and national level).

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page.

Nothing in this questionnaire may be interpreted as stating an official position of the European Commission.

Submission of your contribution

You are invited to reply to this public consultation by answering the questionnaire online. To facilitate the analysis of your replies, we would kindly ask you to keep your answers concise and to the point. You may include documents and URLs for relevant online content in your replies.

For your information, you have the option of saving your questionnaire as a "draft" and finalising your response later. In order to do this you have to click on "Save as Draft" and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again and continue replying to your questionnaire.

In case of questions, you can contact us via the following functional mailbox: COMP-VBER-REVIEW@ec.europa.eu.

In case of technical problem, please contact the Commission's [CENTRAL HELPDESK](#).

Duration of the consultation

The consultation on this questionnaire will be open for 16 weeks.

About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- Gaelic
- German

- Greek
- Hungarian
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* First name

Leo

* Surname

Holzer

* Email (this won't be published)

lho@amchameu.eu

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* Country of origin

Please add your country of origin, or that of your organisation.

- | | | | |
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- American Samoa
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- Antarctica
- Antigua and Barbuda
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- Australia
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- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
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- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- Former Yugoslav Republic of Macedonia
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar/Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- North Korea
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Swaziland
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
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- Tokelau
- Tonga

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Tristan da Cunha | <input type="radio"/> Yemen |
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* Organisation name

255 character(s) maximum

American Chamber of Commerce to the EU

* Scope

- International
- Local
- National
- Regional

* Organisation size

- Micro (1 to 9 employees)

- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

* Please describe the main activities of your organisation:

1000 character(s) maximum

AmCham EU speaks for American business committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters.

Our aim is to ensure a growth-oriented business and investment climate in the European Union. We are committed to transparent and open communication and inclusive dialogue between our members and European policy makers.

* Please describe the sectors that your organisation represents, i.e. sectors in which your members are conducting business:

1000 character(s) maximum

- Agriculture and Rural Development
- Banking and financial services
- Climate Action
- Competition
- Consumers
- Culture and media
- Customs & Trade
- Defence, aerospace and security
- Digital economy and society
- Economy, finance and the euro
- Education and training
- Employment and Social Affairs
- Energy
- Environment
- External Relations
- Food Safety
- Financial services
- Fraud prevention
- Healthcare
- International co-operation and development
- Research and innovation
- Taxation
- Trans-European Networks
- Transport
- etc.

* Are the companies/business organisations that are members of your association suppliers or buyers of products and/or services, or both?

- Supplier
- Buyer
- Both
- Do not know
- Not applicable

* Please describe the relevance of the VBER and the VGL for you:

1000 character(s) maximum

Although the VBER and VGL provide an adequate level of legal certainty in general terms, in today's day and age it appears to be potentially outdated in a number of respects. In our view, the VBER stands a better chance of continuing to provide a sound legal basis if it evolves in line with market developments. The rules and criteria are clear and comprehensible and allow businesses to formulate coherent and consistent commercial strategies. However, the review should be an opportunity to bring a greater level of clarity regarding (i) the application of VBER and a number of its current concepts and (ii) a number of topics in light of current evolutions in the digital economy. These would need to be better addressed and clarified in the next version of the VBER and the VGL. This, in turn, can help to reduce costs on undertakings through the use of standard terms and conditions; distribution models including selective distribution; and related commercial and sales policies.

* Privacy and Confidentiality

In the responses to this questionnaire your identity should be clearly indicated in the section "About you". If available, the ID number of the EU Transparency Register should also be provided.

If your organisation is not registered, we invite you to register here, although it is not compulsory to be registered to reply to this consultation. [Why a transparency register?](#)

Is your organisation included in the Transparency Register?

- Yes
- No

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

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* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

Anonymous

Only your type, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

Public

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

* I agree with the [personal data protection provisions](#)

Effectiveness (Have the objectives been met?)

The **purpose of the EU competition rules** is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union (see e.g. T-458/09 and T-171/10 *Slovak Telekom v. Commission*, ECLI: EU:T:2012:145, para. 38). In line with this objective, the Commission's policy towards vertical agreements is to ensure undistorted and effective competition in European supply and distribution so that consumers can benefit from the lower prices, increased quality and variety of products and services and the greater incentives to innovate that are delivered by competitive markets (see Impact Assessment for the current VBER, SEC (2010)413), para. 60).

The **purpose of the VBER** is to exempt from the prohibition contained in Article 101(1) of the Treaty those vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The VGL provide guidance on the assessment of vertical agreements under both the VBER and Article 101 of the Treaty (see recital 1 of the VGL). Undertakings therefore rely on both the VBER and the VGL in order to assess whether the vertical agreements they enter into are compliant with Article 101 of the Treaty.

* Do you perceive that the VBER and the VGL have contributed to promote good market performance in the EU?

- Yes
- Yes, but they contributed only to a certain extent or only in certain sectors
- They were neutral
- No, they negatively affected market performance
- Do not know

* Please explain your reply, distinguishing between sectors where relevant:

1000 character(s) maximum

- Support undertakings and their advisers in self-determining which vertical agreements are lawful and which ones are not thus creating a welcome safe-harbor;
- Provide a useful framework for assessing the balance of efficiencies in specific circumstances;
- Recognize that vertical restraints can provide significant scope for efficiencies (as opposed to horizontal restraints)
- In the context of selective distribution in particular, contributes to the promotion of a variety of vectors of competition, recognizing that price competition is not the only model (as reiterated by AG Wahl in Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, paragraph 32, ECLI:EU:C:2017:603).

* Do you consider that the VBER and the related guidance in the VGL provide a sufficient level of legal certainty for the purpose of assessing whether vertical agreements and/or specific clauses are exempted from the application of Article 101 of the Treaty and thus compliant with this provision (i.e. are the rules clear and comprehensible, and do they allow you to understand and predict the legal consequences)?

- Yes
- No
- Do not know

* Please explain your reply:

1000 character(s) maximum

- Although the VBER and VGL provide an adequate level of legal certainty in general terms, in today's day and age it appears to be potentially outdated in a number of respects. In our view, the VBER stands a better chance of continuing to provide a sound legal basis if it evolves in line with market developments.
- The rules and criteria are clear and comprehensible and allow businesses to formulate coherent and consistent commercial strategies. However, the review should be an opportunity to bring a greater level of clarity regarding (i) the application of VBER and a number of its current concepts and (ii) a number of topics in light of current evolutions in the digital economy. These would need to be better addressed and clarified in the next version of the VBER and the VGL.
- This, in turn, can help to reduce costs on undertakings through the use of standard terms and conditions; distribution models including selective distribution; and related commercial and sales policies.

Please estimate the level of legal certainty provided by the VBER and the VGL for each of the following areas by providing a qualitative estimate using the following number coding: 1 (very low), 2 (slightly low), 3 (appropriate), or selecting "DN" if you do not know or "NA" if not applicable to your organisation:

Please reply only to rows not numbered. The numbered rows are titles to assist in identifying the relevant areas.

For those rows where only the recitals of the VGL are mentioned, please reply only in the column of the VGL.

	VBER	VGL
Vertical agreements (Article 1(1)(a) VBER and recitals 24-26 VGL)	3	3

<i>(1) Vertical agreements generally falling outside the scope of Article 101(1) of the Treaty</i>		
Agreements of minor importance (recitals 8-11 VGL)	3	3
Agency agreements (recitals 12-21 VGL)	3	3
Subcontracting agreements (recital 22 VGL)	3	3
<i>(2) Additional conditions for the exemption of specific vertical agreements (Article 2 VBER)</i>		
Vertical agreements entered into between an association of undertakings and its members (Article 2(2) and Article 8 VBER, and recitals 29-30 VGL)	3	3
Non-reciprocal vertical agreements between competitors under certain circumstances (Article 2(4) VBER and recitals 27-28 VGL)	3	3
Vertical agreements containing provisions on IPR (Article 2(3) VBER and recitals 31-45 VGL)	3	3
Market share threshold for the supplier (Article 3 and Article 7 VBER, and recitals 86-95 VGL)	2	2
Market share threshold for the buyer (Article 3 and Article 7 VBER, and recitals 86-95 VGL)	2	2
<i>(3) Hardcore restrictions (Article 4 VBER)</i>		
Resale price maintenance (Article 4(a) VBER and recitals 48-49 VGL)	3	3

Territorial/customer restrictions (Article 4(b) VBER and recital 50 VGL) and exceptions to these restrictions (Article 4(b) (i)-(iv) VBER and recitals 51,55 VGL)	3	3
Online sales restrictions (recitals 52-54 VGL)	2	2
Restrictions of active or passive sales to end users by members of a selective distribution system (Article 4(c) VBER and recitals 56-57 VGL)	3	3
Restrictions of cross supplies (Article 4(d) VBER and recital 58 VGL)	3	3
Agreements preventing or restricting the sourcing of spare-parts (Article 4 (e) VBER and recital 59 VGL)	3	3
<i>(4) Excluded restrictions (Article 5 VBER)</i>		
Non-compete obligations with indefinite duration or exceeding 5 years (Article 5(1)(a) VBER and recitals 66-67 VGL)	3	3
Post term non-compete obligations (Article 5(1)(b) VBER and recital 68 VGL)	3	3
Restrictions to sell brands of particular competing suppliers in a selective distribution system (Article 5(1)(c) VBER and recital 69 VGL)	3	3
Hardcore restrictions falling outside the scope of Article 101(1) of the Treaty or likely to fulfil the conditions of Article 101(3) of the Treaty (recitals 60-64 VGL)	3	3
Severability (recitals 70-71 VGL)	3	3
Conditions for the withdrawal and disapplication of the block exemption (Article 6 VBER and recitals 74-85 VGL)	3	3

<i>(5) Enforcement policy in individual cases (Section VI VGL)</i>		
The framework of analysis (recitals 96-127 VGL)	3	3
Analysis of specific vertical restraints (recitals 128-229 VGL)	3	3

Single branding (recitals 129-150 VGL)	3	3
Exclusive distribution (recitals 151-167 VGL)	3	3
Exclusive customer allocation (recitals 168-173 VGL)	3	3
Selective distribution (recitals 174-188 VGL)	3	3
Franchising (recitals 189-191 VGL)	3	3
Exclusive supply (recitals 192-202 VGL)	3	3
Upfront access payment (recitals 203-208 VGL)	3	3
Category management agreements (recitals 209-213 VGL)	3	3
Tying (recitals 214-222 VGL)	3	3
Resale price restrictions (recitals 223-229 VGL)	3	3

If you have rated one or several issues as "very low" or "slightly low", please explain the reasons for your rating. Please also explain whether the lack of legal certainty stems from (i) the definition of the particular area in the VBER or the related description in the VGL, (ii) their application in practice or (iii) the overall structure of the VBER and/or VGL:

2000 character(s) maximum

The provisions and guidance on online sales restrictions would benefit from an update to take into account recent EU case law and technological developments, for example:

- o The guidance provided by intellectual property and trademark cases; and
- o The guidance provided as regards RPM (including any more up-to-date guidance that might be possible in the context of the increasing transparency of online pricing and how to ensure that monitoring of online pricing ensure that and associated mechanisms/technology are used in a manner consistent with the VBER).

* Are there other areas for which you consider that the VBER and/or the VGL provide insufficient legal certainty?

- Yes
- No
- Do not know

The VBER sets out a number of conditions that vertical agreements need to meet in order to benefit from the block exemption. The VGL provide additional guidance on how to interpret these conditions. These conditions have been defined with the purpose of capturing in the exemption only those agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty. For example, the definition and level of the market share threshold aims at identifying those vertical agreements that, in the absence of significant market power of the supplier and the buyer are unlikely to have negative effects, or, if they do, where the positive effects are likely to outweigh the negative effects. Similarly, other rules aim at taking account of consumers' interests of benefitting from new online forms of distribution, while also addressing possible concerns of market segmentation or free-riding (see Impact Assessment for the current VBER, (SEC(2010)413), section 3). **The below set of questions are aimed at verifying whether the conditions as currently defined meet the objective of capturing those agreements for which it can be assumed with sufficient certainty that they**

generate efficiencies in line with Article 101(3) of the Treaty. In particular, this objective is met if these conditions are not subject to two errors: a false positive error (e.g. exempting an agreement that should not be exempted) and a false negative error (e.g. not exempting an agreement that should be exempted).

* Leaving aside the appropriateness of the scope of the current list of hardcore restrictions (Article 4 VBER) and excluded restrictions (Article 5 VBER) (see the last three questions in this section), do you consider that the additional conditions defined in the VBER (i.e. Article 2 and 3 VBER) lead to the exemption of types of vertical agreements that do not generate efficiencies in line with Article 101(3) of the Treaty?

- Yes
- No
- Do not know

* Are there other types of vertical agreements for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not covered by the current scope of the exemption?

- Yes
- No
- Do not know

* Are there any types of vertical restrictions that the VBER considers as hardcore (Article 4 VBER), but for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

- Yes
- No
- Do not know

* Does the list of excluded vertical restrictions (Article 5 VBER) exclude types of vertical restrictions for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

- Yes
- No
- Do not know

* Are there other types of vertical restrictions for which it cannot be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty but which are not captured by the current list of hardcore restrictions (Article 4 VBER) or excluded restrictions (Article 5 VBER)?

- Yes
- No
- Do not know

Efficiency (Were the costs involved proportionate to the benefits?)

* Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs for you (or, in the case of a business association, for the members you are representing)?

- Yes

- No
- Do not know
- Not applicable

* Please provide an estimate both in terms of value (in EUR) and as a percentage of your annual turnover (or, in the case of a business association, of the annual turnover of the members you are representing) and explain the methodology of calculation:

1000 character(s) maximum

It is difficult, particularly in the context of a response on behalf of several members from different industries, to generalize on costs. The costs generated for our members include time spent by in-house legal teams in reviewing specific distribution and other vertical arrangements on a case-by-case basis when required; upfront investment of time and resources in the drafting of distribution agreements involves costs for some members in ensuring that standard form contracts are drafted in such a way as to comply with the terms of the VBER and VGL. Costs are also incurred by members when instructing external counsel for targeted advice on specific vertical restraints issues.

* Does the assessment of whether the VBER, together with the VGL, is applicable to certain vertical agreements generate costs proportionate to the benefits they bring for you (or, in the case of a business association, for the members you are representing)?

- Yes
- No
- Do not know
- Not applicable

Please explain your reply:

1000 character(s) maximum

While difficult to conduct a meaningful cost/benefit analysis in this respect, our members' collective view is that the costs generated by VBER/VGL analysis of specific vertical agreements is proportionate to the benefits which arise from having the legal certainty of VBER/VGL in place. Any wholesale overhaul of the VBER/VGL would entail additional costs for members in the necessary recalibration of existing vertical agreements in order to ensure continued compliance with EU law, but again this may be judged as proportionate taking into consideration the advantages of having a well-tailored VBER to match commercial realities in the market (e.g. in respect of online sales). Any complete removal of the VBER/VGL would lead to a material and significant increase in costs incurred by members on the inevitably increased costs associated with ensuring compliance on a case-by-case basis.

* Would the costs of ensuring compliance of your vertical agreements (or, in the case of a business association, the vertical agreements of the members you are representing) with Article 101 of the Treaty increase if the VBER were not prolonged?

- Yes
- No
- Do not know

* Please explain and provide an estimate of the possible change in compliance costs:

1000 character(s) maximum

Given the whole structure of the VBER – providing a “safe harbour” for certain categories of well-defined vertical agreements – the wholesale abolition of the VBER would inevitably lead to increased costs for our members: members are currently able to calibrate their commercial policies and conduct in order to ensure general compliance with the terms of the VBER/VGL while carrying out case-by-case compliance assessments in cases of vertical restraints which do not fall within the terms of the VBER/VGL. The abolition of the VBER would inevitably require our members to carry out Article 101(1) / 101(3) TFEU assessments for many more types of vertical agreements and arrangements in order to avoid any situation of non-compliance arising. This assessment appears to be more complex and may, very likely, require more specialized in-house as well as, presumably, outside counsel advice, which in turn would increase the costs for our members.

Have the costs generated by the application of the VBER and the VGL increased as compared to the previous legislative framework (Reg. 2790/1999 and related Guidelines)?

- Yes
 No
 Do not know

Please explain your reply:

1000 character(s) maximum

N/A

Relevance (Is EU action still necessary?)

* Would you expect any effect in case the VBER were to be prolonged and the VGL maintained without any change? (multiple answers are allowed)

- Yes, positive for my organisation (in case of business associations, for your members)
 Yes, negative for my organisation (in case of business associations, for your members)
 Yes, positive for the industry
 Yes, negative for the industry
 Yes, positive for consumers
 Yes, negative for consumers
 No
 Do not know

* Please explain your reply and illustrate with concrete examples:

1000 character(s) maximum

Maintaining VBER/VGL is positive in that it is preferable to no prolongation at all. However it would be strongly preferable to adapt VBER/VGL to reflect recent developments in e.g. e-commerce.

Retaining VBER/VGL unchanged would be a missed opportunity: the legal certainty provided by its terms would gradually diminish, and companies would be left with greater costs in attempting to understand under which conditions certain behaviour is legally compliant or not. This would also be a missed opportunity for the Commission to further ensure increased clarity towards Member States in implementing the principles of VBER/VGL. For Consumers, maintaining VBER unchanged will also generate negative effects. Consumers source goods and services overwhelmingly over the Internet, via platforms, across borders and, increasingly, including some transfer of personal data; many of these aspects of today's consumer behaviour are not sufficiently reflected in the VBER/VGL.

* Would you expect any effect in case the VBER were not to be prolonged and the VGL were to be withdrawn? (multiple answers are allowed)

- Yes, positive for my organisation (in case of business associations, for your members)
- Yes, negative for my organisation (in case of business associations, for your members)
- Yes, positive for the industry
- Yes, negative for the industry
- Yes, positive for consumers
- Yes, negative for consumers
- No
- Do not know

* Please explain your reply and illustrate with concrete examples:

1000 character(s) maximum

Withdrawing the protection granted to undertakings by VBER/VGL may be inappropriate as they provide a means by which Article 101(3) TFEU can be interpreted and applied more effectively and predictably in the context of vertical agreements. Withdrawing VBER/VGL would lead to increased compliance cost for companies.

In addition, for consumers, in our opinion, having the VBER and VGL in place provides a degree of protection as they have the reassurance that they are dealing with suppliers and distributors who must design their commercial practices in a way that matches the requirements of the VBER and VGL, thereby minimising the likelihood of anticompetitive practices affecting consumers. Enforcement by consumers against companies who are believed to have engaged in unlawful practices related to vertical agreements would become more difficult and more expensive in the absence of the VBER and VGL.

* Do you see the need for a revision of the VBER in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?

- Yes
- No
- Do not know

* Please explain your reply:

1000 character(s) maximum

Consumption behaviour and the way that businesses and consumers interact today has changed significantly since the entry into force of the current VBER/VGL. We particularly highlight:

- o The ability to offer goods/services to consumers more directly, including online, and more accurately cater to their demand through, eg. the legitimate use of cookies;
- o The possibilities offered by the Internet for companies to more easily supervise compliance by their distributors with distribution criteria;
- o The influx of commerce brought by, among others, non-EU suppliers, platforms and distributors;
- o The greater importance of non-professional participants of consumer goods and services through online platforms (AirBnB, Uber, Deliveroo);
- o The increased use of online search advertising and related online advertising restrictions that may be required to protect brand image as well as the quality and safety of products and services (eg. use of brand names and trademarks).

* Do you see the need for a revision of the VGL (including Section VI) in light of major trends and/or changes during the past 5 years (e.g. the increased importance of online sales and the emergence of new market players)?

- Yes
- No
- Do not know

* Please explain your reply:

1000 character(s) maximum

Like the VBER, the VGL should provide for clearer guidance with reference to issues (such as marketplace bans) deriving from the most significant cases of the last few years. Therefore, a review of recitals 52-54 VGL on online sales restrictions would be required. In addition to this, there are a number of passages of the VGL or terms used where practice and experience have shown that the VGL may benefit from further clarification (e.g. as regards the market share thresholds or the definition of "group of customers"). Also, additional guidance on selective distribution networks would be more than welcome (eg. by incorporating learnings from recent case-law dealing with aspects of selective distribution networks).

Please (i) list the paragraphs of the VBER and/or the VGL that would require a revision, (ii) identify the major trends and/or changes motivating the need for such revision and (iii) provide a short explanation with concrete examples:

	Articles of the VBER and/or recitals of the VGL	Major trends/changes	Short explanation/concrete examples
1	<p>A) Art. 1(c) VBER</p> <p>B) Art. 1(e) VBER</p> <p>C) Art. 1(h) VBER</p> <p>D) Art. 1(i) VBER</p> <p>E) Art 1 VBER</p> <p>F) Art 1 VBER</p>	<p>A) Review the definition of "Competing undertakings" which should also refer to the role of online undertakings.</p> <p>B) Review the definition of "selective distribution system"</p> <p>C) Review the definition of "buyer" in order to include third-party platforms as well.</p> <p>D) Review the definition of "customer of the buyer"</p> <p>E) Add definition of "data"</p> <p>F) Add definition of (i) "active sale" and (ii) "passive sale"</p>	<p>A) This is because this should take into account a new type of distributors, i.e. dual roles of distributor and competing seller.</p> <p>B) To be considered whether the definition of an SDS should also cover the latest relevant case-law.</p> <p>C) This is because it should reflect more the increasing role of online marketplaces and platforms.</p> <p>D) This is because it should reflect more the increasing role of online marketplaces and platforms.</p> <p>E) This should include a concept which is more and more used in today's digital era (data).</p> <p>F) This is because in the Internet era, this distinction may call for further clarifications in particular re online transactions.</p>

2	Recital 51 VGL	Review definition of (i) "active sale" and (ii) "passive sale"	This is because in the Internet era, this distinction may call for further clarifications in particular re online transactions.
3	Art. 4 (a) VBER	Add notion of "price monitoring" + reconsider how to treat RPM	This is because VBER should reflect the recent case law as well as technological developments in respect of RPM and price monitoring.
4	Recitals 47 – 49 VGL	Define notion of "price monitoring" + "marketplace ban"	This is because VBER should reflect the recent case law as well as technological developments in respect of RPM and price monitoring. Likewise, re "marketplace bans", the VGL should provide a harmonized interpretation, in line with recent CJEU case law developments.
5	Art. 4 (b) (i) VBER	Clarify "restrictions on its place of establishment"	It would be necessary to better define when the restriction on the place of establishment would be acceptable.
6	Art. 4 (c) VBER	Clarify the position of the EC vis-à-vis absolute marketplace ban	This should take into account the recent CJEU case law, in order to provide a harmonized interpretation.
7	Art. 5 (a) VBER	Duration of "non-compete clause"	This is because more harmonization across the EU Member States may be needed
			Article 4(a): Clarify that a supplier which makes

8	VGL, Section III., hard-core restrictions	Growth of intermediation services which do not involve a sale/resale relationship	available its products on an intermediary marketing or other distribution services platform (e.g. a hotel offering its rooms via an OTA to consumers for booking) can determine the pricing parameters for the display of its products on the intermediary platform, without giving rise to RPM concerns. Clarify that neither wide nor narrow rate MFNs give rise to any issues under Article 4 (a) and are covered by the general provisions of the VBER (as are other MFNs, such as availability and condition MFNs).
9	VGL, Section VI., framework of analysis	Growth of intermediation services which do not involve a sale/resale relationship	Acknowledge in the discussion of free-riding concerns the real risk of a supplier (e.g. a hotel) free-riding on the significant technology and marketing investments of the intermediary marketing or distribution services platform (e.g. an OTA)
10			

Is there any area for which the VBER and/or the VGL currently do not provide any guidance while it would be desirable?

- Yes
- No
- Do not know

Please identify the area concerned and explain the reasons:

1000 character(s) maximum

Whilst AmCham EU emphasises its opposition to the over-regulation of areas where that is not merited, a number of areas may merit more input/context such as:

- o The interplay between selective distribution and online retail, in particular to clarify the rules in line with recent CJEU case law;
- o Elements of sales into the EU from elsewhere;
- o The value (monetary and otherwise) of (personal)data and the interplay with GDPR;
- o Geo-blocking;
- o The application of VBER in the relationship between an online platform and a supplier;
- o The application of VBER between an online platform and non-professional service providers; and
- o Online advertising restrictions.

Coherence (Does the policy complement other actions or are there contradictions?)

* Based on your experience, are the VBER and the VGL coherent with other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Horizontal Guidelines and the Article 101(3) Guidelines)?

- Yes
- No
- Do not know

* Based on your experience, do the VBER and the VGL contradict other existing and/or upcoming legislation and/or policies at EU or national level?

- Yes
- No
- Do not know

* Please explain your reply:

1000 character(s) maximum

We do not believe that VBER/VGL materially contradicts other EU legislation. However, given recent developments in respect of eg. e-commerce and online marketplaces, there is at least potential for VBER /VGL to give rise to contradiction when viewed in conjunction with the EC's evolving policy on digital commerce.

The EC's treatment of selective distribution under any revised VBER/VGL could, in theory, lead to conflict with developing EU/national policy on encouragement of online sales and on enforcement of competition law in respect of online marketplaces. We would generally encourage the EC to avoid revisions to the VBER and VGL which would lead to incoherence between EU-level policy and the enforcement priorities of Member

States, to the extent possible while ensuring that any revised VBER and VGL are aligned with recent case law.

EU added value (Did EU action provide clear added value?)

* Do the VBER and the VGL add value in the assessment of the compatibility of vertical agreements with Article 101 of the Treaty compared to, in their absence, a self-assessment by undertakings based on other instruments that provide guidance on the interpretation of Article 101 of the Treaty (e.g., the Article 101 (3) Guidelines, the enforcement practice of the Commission and national competition authorities, as well as relevant case-law at EU and national level)?

- Yes
- No
- Do not know

* Please explain your reply:

1000 character(s) maximum

The VBER was specifically set up to deal with vertical agreements and restrictions that occur frequently and is thus less general and thus more useful in its approach.

Final comments and document upload

Is there anything else you would like to add which may be relevant for the evaluation of the VBER and/or the VGL?

1000 character(s) maximum

N/A

If you wish to do so, you can attach relevant supporting documents for any of your replies to the questions above, clearly identifying the number of the question to which they refer.

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

End of the questionnaire. Thank you for your contribution.

Contact

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