

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

Fields marked with \* are mandatory.

## Introduction

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### ***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](mailto: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

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#### \* 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

Sarah

\* Surname

Long

\* Email (this won't be published)

sarah.long@euclid-law.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

\* Please specify

*255 character(s) maximum*

Boutique competition law firm

## \*Country of origin

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

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\* Organisation name

*255 character(s) maximum*

Euclid Law

\* 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*

Euclid Law is a boutique competition law firm. Euclid Law was created by experienced competition lawyers with a common desire to build a new competition law firm that is agile, collaborative, highly commercial in its thinking, innovative in its approach to delivering results and free from the constraints of larger law firms.

Our core expertise covers all aspects of competition law, including cartels and anti-competitive agreements, merger control, abuse of dominance, state aid, competition litigation, market investigations as well as audit and compliance.

With offices in both London and Brussels, in-depth experience and a network of contacts in key jurisdictions around the world built up over many years of practice, we have the ability to advise clients across Europe and worldwide. We represent clients before EU, UK, German and Belgian authorities and courts.

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

*1000 character(s) maximum*

Euclid Law regularly advise clients on vertical agreements, and in particular companies and brands active in e-commerce and digital markets.

\* 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.

**\* 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?)

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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*

The VBER and the VGL are extremely valuable tools for both companies and their advisors to provide clarity and certainty around vertical business practices. However, while the VGL does provide some guidance relevant to an online sales environment, it fails to take account of how the online marketplace channel has developed, and specifically the prevalence of online marketplace sales, in particular Amazon marketplace. This results in significant confusion for companies (in particular brands) selling on marketplaces as to what they can and cannot do.

In order to provide some context around how the Amazon marketplace works, we have attached an expert report entitled 'Amazon and the growth in online marketplace sales' (the BuyBox Report) by James Thomson, formally the business head of Amazon services, and now a partner at BuyBox Experts, which is a managed services agency supporting brands selling online.

\* 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*

As explained above, the VBER and VGL do not provide sufficient legal certainty for companies and brands that sell on marketplaces such as Amazon. In particular there is a lack of clarity around the ability for brands to (i) set trifurcated criteria within a selective distribution system that differentiates between brick and mortar (b&m), online and marketplace sellers and (ii) appoint a single or limited number of authorised sellers for each marketplace, and prevent other sellers from selling a brand's products on that market place (see para 41 of the BuyBox Report).

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)		
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<b><i>(1) Vertical agreements generally falling outside the scope of Article 101(1) of the Treaty</i></b>		
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
<b><i>(2) Additional conditions for the exemption of specific vertical agreements (Article 2 VBER)</i></b>		
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)	3	3
Market share threshold for the buyer (Article 3 and Article 7 VBER, and recitals 86-95 VGL)	3	3
<b><i>(3) Hardcore restrictions (Article 4 VBER)</i></b>		
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)	2	2
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)	2	2
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
<b><i>(4) Excluded restrictions (Article 5 VBER)</i></b>		
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
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<b><i>(5) Enforcement policy in individual cases (Section VI VGL)</i></b>		
The framework of analysis (recitals 96-127 VGL)	3	3
Analysis of specific vertical restraints (recitals 128-229 VGL)	2	2

Single branding (recitals 129-150 VGL)	3	3
Exclusive distribution (recitals 151-167 VGL)	3	3
Exclusive customer allocation (recitals 168-173 VGL)	2	2
Selective distribution (recitals 174-188 VGL)	2	2
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 low legal certainty for each of the areas identified above relates to the lack of clarity around online marketplace and third party platform sales.

Territorial/customer restrictions: The hardcore restriction relates to market partitioning by territory or by customer group, and the VBER does not limit the way an exclusive customer group can be defined (VGL para 168). This definition and description means it is unclear whether, for example, customers purchasing from a specific marketplace such as Amazon could be defined as a customer group. If so, then appointing a single or limited number of authorised resellers on a particular marketplace for a particular territory (e.g. a member state) could conceivably be considered as a hardcore restriction. This is a very unsatisfactory outcome, as it fails to take account of the specific selling environment on marketplaces such as Amazon, and the need for companies to put in place additional controls on this channel to protect their brand.

Online sales restrictions: This section of the VGL was drafted to ensure that distributors did not try to impose unreasonable limits on online sales in order to protect traditional b&m sales, or reduce price transparency online. The world of online sales has moved on considerably, and now very few companies are concerned about protecting b&m sales. Instead, their main concern is managing the online sales environment, and specifically online marketplace sales and the potential damage of channel conflict to their brand value. Para 54 of the VGL recognises that a supplier may impose certain restrictions on its distributors using third party platforms. However, this guidance does not account for the specificities of selling on Amazon in particular (see Buybox Report, paras 28 - 38), and needs to be significantly updated to reflect the current realities of this sales channel.

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

- Yes  
 No  
 Do not know

\* Please list the areas for which you consider that the VBER and/or the VGL provide insufficient legal certainty:

*1000 character(s) maximum*

Selective distribution systems (SDS): The guidance on SDS needs to be updated to allow for trifurcated criteria for b&m, online and marketplace sales. Para 56 of the VGL states that criteria for online sales must be overall equivalent to criteria imposed for b&m sales, and refers to the different nature of the two distribution modes. This guidance fails to account for the specificities of selling through online marketplaces, in particular Amazon, including product listings (paras 8 - 10 of Buybox Report), search placement (paras 11- 16 of Buybox Report), winning the buy-box (paras 17 - 20 of BuyBox Report) customer reviews (paras 21 - 24 of BuyBox Report) and logistics/fulfilment (paras 25 - 27 and paras 28 - 28 of BuyBox Report). There should consequently be a recognition of the three different distribution modes: b&m, online (including direct to consumer websites) and online marketplaces, with the ability to set different criteria appropriate for each mode.

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

\* Please list those types of agreements and explain your reasons:

*1000 character(s) maximum*

Companies selling on online marketplaces in Europe, such as Amazon, should be allowed to appoint a single or limited number of authorised third party (3P) sellers for each marketplace, and bar other sellers from selling a brand's products on that marketplace. This would allow companies to select 3P sellers familiar with the relevant marketplace, and able to manage the very specific logistical challenges that distributing on these channels present. Provided that there is sufficient inter-brand competition present on the relevant marketplace, then restricting intra-brand competition by limiting the number of 3P sellers should not cause any anti-competitive foreclosure.

\* 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?)

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\* 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 explain your reply:

*1000 character(s) maximum*

The assessment of whether the VBER and VGL is applicable to vertical agreements does not generate costs for Euclid Law. However, it does generate costs for our clients who instruct us to provide advice on their vertical agreements.

\* 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

\* 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*

Note that this is not applicable for Euclid Law. However, the costs for our clients would certainly increase as instead of having the relative certainty provided under the VBER and VGL, a bespoke legal self-assessment would need to be carried out. This could be particularly problematic for smaller start-up or challenger companies operating in the digital economy who have extremely limited budgets for legal advice, but want to ensure that they have sufficient legal certainty around their vertical agreements.

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 and provide an estimate of the possible change in costs:

*1000 character(s) maximum*

The previous legislative framework was designed for b&m stores, and was relatively uncontroversial. Over time companies became comfortable that their vertical agreements benefitted from the VBER, and had less need to seek legal advice. The proliferation of e-commerce and online sales has provided an increased level of uncertainty for companies as to whether their vertical agreements could now be problematic. The result has been more companies seeking legal advice than under the previous legislative framework, which has increased the costs for those companies.

## Relevance (Is EU action still necessary?)

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\*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*

The VBER and VGL must be updated to account for the online marketplace channel. Failure to do so will mean companies and brands have insufficient clarity on the controls that they can put in place to limit unauthorised sales and to control their brand image online. As set out above, the VBER and VGL needs to provide clarity in two key areas:

1. Confirmation that trifurcated criteria for b&m, online and marketplace sales channels are permitted.
2. Confirmation that companies can appoint a single or limited number of authorised third party sellers for each marketplace, and prevent other sellers from selling the brand's products on that marketplace.

\*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*

As explained above, if the VBER and VGL were not to be prolonged this would significantly reduce the legal certainty for companies. This would result in increased costs for companies, as they may be required to seek legal advice to carry out a self-assessment to ensure their vertical agreements are not problematic. This may reduce companies' willingness to engage in certain vertical agreements, potentially denying consumers from an innovative new product or service.

\* 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*

As set out above, the major development in the past 5 years has been the significant growth of online marketplace sales and the need for companies to manage a very different sales channel. In particular, companies need to be able to manage their sales on the Amazon marketplace. Amazon marketplace enables products to be sold either 1P (first-party) through Amazon, or 3P (third-party) through a reseller (see paras 4 - 7 of BuyBox Report). However, anyone can set themselves up as a 3P seller on Amazon, and start selling products. While this enables an open marketplace, it also means that significant numbers of unauthorised or grey market sellers are able to sell products in a way that is detrimental to both the brand and the consumer - for example by selling products that are damaged, out of date or in unsuitable packaging. Companies must therefore be able to limit 3P resellers on the marketplace channel to those that can manage the challenges of online presentation and delivery.

\* 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*

As above.

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	Article 4(b) VBER	The growth in online marketplace sales	An additional exclusion should be added to clarify that it is not a hardcore restriction for suppliers to appoint a single or limited number of authorised 3P sellers for each marketplace, and bar other sellers from selling the brand's products on that marketplace.
2	Para 50 VGL	The growth in online marketplace sales	Additional guidance should be provided to clarify that it is not a hardcore restriction for suppliers to appoint a single or limited number of authorised 3P sellers for each marketplace, and bar other sellers from selling the brand's products on that marketplace.
3	Paras 52 - 54 VGL	The growth in online marketplace sales	Additional guidance should be provided on third party platforms and marketplace sales, and the need to clarify how companies can manage the potential channel conflict that could cause serious harm to their brands.
			Clarification that separate qualitative criteria for the online marketplace

4	Paras 56, and 174 - 188 VGL	The growth in online marketplace sales	channel is justifiable within a SDS, provided it is designed to account for the specificities of that channel. In particular this would allow for criteria to ensure appropriate presentation of a companies' products and brand in a marketplace environment, and the ability to manage the logistical challenges posed by delivery within this channel.
5			
6			
7			
8			
9			
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*

As set out above, the VBER and VGL need to be updated to provide specific guidance to companies as to how they can effectively manage the online marketplace channel. Clear guidance is required on the restrictions companies can put in place to prevent unauthorised and grey market resellers selling their products in a way that is harmful to their brand, and harmful to the consumer. There is a particular risk to consumers, who may receive a sub-standard product as a result of fulfilment practices such as repackaging (see para 30 of BuyBox Report) and commingling (see para 32 of BuyBox Report).

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

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\* 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

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

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\* 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 and VGL are both extremely valuable tools to provide guidance to companies on the legality of their vertical agreements. This avoids companies having to carry out a self-assessment which is likely to be both time-consuming and costly. The illustrative examples provided in the VGL are particularly valuable for enabling companies to understand how the benefit of the VBER works in practice. However, both the VBER and VGL need to be updated to account for the significant growth in online marketplace sales, and to provide clarity for companies' operating in this environment. This updating is required to ensure that the value of both the VBER and VGL can be maintained in the current online sales environment.

## Final comments and document upload

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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*

Please see the attached BuyBox Report, which provides further context around the growth of online marketplace sales and specifically the unique challenges created by the Amazon marketplace that do not exist in b&m or other online non-marketplace channels.

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

**b17affe8-4bfd-4d68-8ede-c14013e99b94/Euclid\_Law\_VBER\_Evaluation\_Questionnaire\_-\_BuyBox\_Expert\_Report\_-\_May\_2019.pdf**

End of the questionnaire. Thank you for your contribution.

## Contact

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