

**PUBLIC QUESTIONNAIRE FOR THE
2018 EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION**

ETTSA RESPONSE

This submission is made on behalf of the European Technology & Travel Services Association (**ETTSA**).

ETTSA is based in Brussels and is managed by a small head office team, headed by Emmanuel Mounier, ETTSA's Secretary General who is assisted by Raquel Lopes, ETTSA's Director of EU Public Affairs.

ETTSA represents the interests of a wide range of companies (with a significant number of employees) active in the distribution of travel services across the EEA and world-wide, such as GDSs, online travel agencies, travel focused meta search sites and other aggregators and travel booking intermediaries, towards the industry, policy-makers, opinion formers, consumer groups and all other relevant European stakeholders.

ETTSA promotes and supports full transparency, fair competition and consumer choice in the travel distribution chain. Please refer to ETTSA's website for a full list of its members at www.etsa.eu.

Please describe the sectors that your organisation represents, i.e. sectors in which your members are conducting business (1000 characters max):

ETTSA's members typically act as intermediaries in the sector for travel service bookings by consumers and corporates, such as the booking of accommodation, flights, car rental and cruises. ETTSA's members do not provide the actual travel services themselves, i.e., vacation rental property managers, car rental companies or cruise ship operators.

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

- Buyer

ETTSA member are typically "buyers" within the definition of Art 1(h) of VBER on the basis that they act, as intermediaries, "on behalf" of travel services suppliers, such as airlines and hotels, i.e. the application of the term does not require a sale/resale relationship.

Please describe the relevance of the VBER and the VGL for you (1000 characters max):

ETTSA's members are engaged in providing vertical intermediation services, often via online B2C platforms, for travel services suppliers with the aim of generating incremental bookings for these travel services suppliers, such as hotels and airlines.

The VBER and the VGL provide a valuable point of reference and framework for ETTSA's members in allowing them to self-assess the compliance of vertical restraints in their agreements with travel services suppliers with EU competition law.

That said, the focus of the VBER and the VGL remains on more traditional offline distribution models as well as sale/resale based traditional online distribution arrangements. Neither document provides any significant guidance on the treatment of vertical restraints between suppliers (e.g. airlines or hotels) and online intermediaries which assist these suppliers in marketing their services online, in the absence of a sale/resale relationship. Many of the restrictive provisions included in the agreements between the online

agents and intermediaries and their principals are not specifically discussed or discussed only succinctly in the VGL.

Effectiveness (Have the objectives been met?)

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

- Yes, but they contributed only to a certain extent or only in certain sectors

Please explain your reply, distinguishing between sectors where relevant (1000 characters max):

ETTSA considers that, overall, the VBER and the VGL have been effective legal instruments, providing clear and practical guidance to businesses in structuring their vertical supply chain arrangements, balancing the need for keeping markets open and competitive while allowing businesses without single firm market power to structure their distribution arrangements as they consider most efficient and effective. These instruments therefore reduce compliance costs and increase business confidence by providing important comfort regarding the legal enforceability of vertical agreements. Consumers benefit from the resulting efficiencies.

However, these instruments provide greater clarity in relation to well established sale/resale based distribution arrangements in more mature, often offline markets than for vertical arrangements in online supply chains, which frequently involve the services of online intermediaries which are not always engaged in a sale/resale relationship with the “supplier”.

Whilst the VBER and VGL have contributed to promote good market performance generally, ETTSA believes that there is a need to modernise these instruments to extend the full extent of their benefits to undertakings operating in the online supply chain.

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)?

- No

Please explain your reply (1000 characters max):

ETTSA considers that it would be helpful to provide further guidance and legal certainty in the revised VBER and VGL in relation to the concept of “genuine agency” with respect to online intermediaries and the legal assessment of certain vertical restraints in agreements between suppliers and online intermediaries which market and (directly or indirectly) attract sales, including bookings of travel services, on behalf of the supplier, such as in relation to pricing, brand bidding restrictions, platform bans (including bans on OTAs advertising their services on METAs and other price comparison websites) as well as and most-favoured nation clauses (**MFNs**).

The lack of clear guidance on these issues is creating legal uncertainty, based on diverging business practices as well as diverging views expressed (formally and informally) by competition authorities across the EEA. The multiple *Hotel Online Booking* cases in relation to online travel agency (**OTA**) MFNs across the EEA provides a recent example of the very significant costs for both businesses and regulators which result from a lack of legal clarity and consistency in relation to the treatment of vertical restraints in fast-moving online sectors. A lack of clear guidance may also chill conduct that would in fact be pro-competitive.

As online sales are growing, along with related online marketing and advertising practices, such clarification would benefit to all online market players, whatever the industry or sector concerned.

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)	2	2

<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
Agency agreements (recitals 12-21 VGL)	--	2
Subcontracting agreements (recital 22 VGL)	--	N/A
<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)	DN	DN
Non-reciprocal vertical agreements between competitors under certain circumstances (Article 2(4) VBER and recitals 27-28	3	3

VGL)		
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
(3) Hardcore restrictions (Article 4 VBER)		
Resale price maintenance (Article 4(a) VBER and recitals 48-49 VGL)	3	2
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
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)	N/A	N/A
Agreements preventing or restricting the sourcing of spare-parts (Article 4(e) VBER and recital 59 VGL)	N/A	N/A
(4) Excluded restrictions (Article 5 VBER)		

Non-compete obligations with indefinite duration or exceeding 5 years (Article 5(1)(a) VBER and recitals 66-67 VGL)	N/A	N/A
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)	N/A	N/A
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)	--	N/A
Severability (recitals 70-71 VGL)	--	3
Conditions for the withdrawal and disapplication of the block exemption (Article 6 VBER and recitals 74-85 VGL)	2	2

(5) Enforcement policy in individual cases (Section VI VGL)		
The framework of analysis (recitals 96-127 VGL)	--	2
Analysis of specific vertical restraints (recitals 128-229 VGL)		
Single branding (recitals 129-150 VGL)		N/A
Exclusive distribution (recitals 151-167 VGL)		N/A
Exclusive customer allocation (recitals 168-173 VGL)		N/A
Selective distribution (recitals 174-188 VGL)		N/A

Franchising (recitals 189-191 VGL)		2
Exclusive supply (recitals 192-202 VGL)		N/A
Upfront access payment (recitals 203-208 VGL)		N/A
Category management agreements (recitals 209-213 VGL)		N/A
Tying (recitals 214-222 VGL)		N/A
Resale price restrictions (recitals 223-229 VGL)		2

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 characters max):

Whilst generally appropriate, the definition of a vertical agreement in Article 1(1)(a) of the VBER should be expanded to reflect the growth of online intermediation and platform services in the EU. Currently, the definition is limited to agreements to "purchase, sell and resell". Legal certainty would be improved by including a specific reference to agreements to make the supplier's products available to third-parties.

There is currently a degree of legal uncertainty as to whether certain intermediary online B2C platforms (such as OTAs) fall within the definition of "genuine agents" or "non-genuine agents" for EU competition law purposes or, indeed, whether they constitute another form of a "buyer" acting "on behalf" of a supplier for the purposes of Article 1(h) of the VBER.

ETTSA considers that OTAs are unlikely to qualify as "genuine agents", given their significant technology and marketing investments and the resulting risks they likely bear in relation to their intermediation activities. ETTSA would therefore welcome clarification in the VGL that OTAs and similar two-sided platform intermediaries likely fall into the category of "non-genuine agents", as recognised in paragraph 49 of the VGL. As such, they would need to be free to engage in particular in commission splitting (which given the two-sided nature of their business model ought to cover both the compensation paid by the supplier as well as any fees payable by consumers).

While there are strong indications that OTAs are unlikely to be "genuine agents" in light of national competition authority decisions, European case law and the list of factors set out at paragraph 16 of the VGL, the position should be made clear to remove any uncertainty. The uncertainty affects, in some cases, the assessment of a number of vertical constraints, such as pricing, brand bidding restrictions, platform bans and MFNs. ETTSA considers that the concept of "genuine agency" regarding online intermediaries and these vertical restraints in vertical online agreements should therefore be a key focus of the Commission's VBER review and a key area for further guidance in the revised VGL.

ETTSA further considers that the provisions for the withdrawal of the benefits of VBER should expressly recognise that the Commission is particularly well placed to act in cases where the same agreement or similar agreements have effects in more than three Member States. This could be addressed in the recitals of the revised VBER. Currently, the wording of recitals 13 and 14 the preamble does not clearly define the division of competence between NCA's and the Commission with respect to the ability to withdraw the benefit of the VBER in circumstances where an agreement covers multiple Member States. This ambiguity is particularly detrimental in circumstances in which Member States have adopted divergent interpretations of the provisions of the VBER.

The framework analysis in the VGL should recognise, when discussing free-riding problems, the real risk of a supplier free-riding on the investments of a buyer (e.g. a hotel free-riding on the investments by an OTA in marketing that hotel via its B2C sites at no cost to the hotel). This would, for example, apply to rate and condition MFNs between a supplier and an OTA.

The VGL's commentary regarding franchise arrangements should acknowledge more clearly that the ability of a franchisee to determine its prices and market its products freely (subject only to legitimate brand and reputation protection concerns), extends to determining what rates to make available via intermediary distribution partners (e.g. in the hotel sector, via OTAs or hotel meta search sites), including the freedom of a franchisee (e.g. a hotel property) to make available the same rates to third party sites which a franchisee may make available to the franchisor's booking platform.

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

- Yes

Please list the areas for which you consider that the VBER and/or the VGL provide insufficient legal certainty (1000 characters max):

The transition period provisions under Article 7(d) to 7(f) of VBER are unduly uncertain and ultimately restrictive in relation to dynamic and highly competitive sectors, including importantly many online intermediation sectors. ETTSa proposes the introduction of an absolute initial protected period for vertical restraints which fall within VBER at the time the agreement is struck (i.e. become effective). This could be achieved by clarifying that VBER shall in any event continue to apply to such vertical restraints for the earlier of: (i) the duration of the agreement; or (ii) 3 years, after which the present transition periods shall apply (if applicable).

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?

- No

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?

- No

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?

- No

Please explain your selection by providing examples and explain how prevalent these restrictions are in your industry (1000 characters max):

As noted above, it would be helpful to clarify the legal assessment of certain vertical restraints in agreements between intermediary (marketing and similar) platforms and “suppliers” for the purposes of the VBER and the VGL, in particular regarding the price setting of products on the intermediary platform, brand bidding restrictions, platform bans and MFNs.

ETTSa considers that each of these issues could be effectively addressed in the VGL, interpreting the hardcore restrictions in the VBER:

- (i) Regarding price setting of products on intermediary platforms such as OTAs, VGL shall state clearly that, as non-genuine-agents, they should be free to engage in particular in commission splitting (which given the two-sided nature of their business model ought to cover both the compensation paid by the supplier as well as any fees payable by consumers);
- (ii) Regarding **brand bidding restrictions**, there is a need for legal security and clarity regarding their qualification under Article 4 of VBER and related sections of VGL. Several national competition authorities and most recently the European Commission addressed the topic in

cases or published reports, but without providing a clear reliable position on the way the practice should be considered outside the cases studied (Avis de l'Autorité de la Concurrence française du 18 septembre 2012 relatif au fonctionnement concurrentiel du commerce électronique, 12-A-20, paragraphs 357 and 358, Decision of the Bundeskartellamt, ASICS, no B2-98/11, 26 August 2015; Decision of the Bundeskartellamt, ADIDAS, no B3-137/12, 27 June 2014) . As online sales are growing, along with related online marketing and advertising practices, such clarification would benefit all online market players, whatever the industry or sector concerned.

- (iii) Regarding platform bans (bans on OTAs to advertise their services on metasearch engines and other price comparison websites), the VGL shall state clearly that they must be justified by legitimate objective concerns regarding the adverse impact of a distribution channel on the supplier's marks, brands and reputation of the supplier, and are in fact restrictions which are prohibited under the VBER, especially in circumstances in which principals generally distribute their products directly online in competition with online agents and generally advertise their products on the price comparison sites / METAs in question;
- (iv) Narrow MFNs are a permissible vertical restraints (including consumer facing rate, conditions and availability MFNs) between a supplier and an intermediary marketing platform provided the other conditions of the VBER are met;
- (v) ETTSA also strongly believes that wide MFNs have pro-competitive effects within the travel industry. ETTSA invites the Commission to consider whether wide MFNs ought to be excluded from the VBER to allow for individual assessments of each wide MFN in its particular market circumstances or whether wide MFNs ought to fall under the general provisions of the block exemption where the relevant VBER thresholds are met.

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?

- 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

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

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 characters max):

ETTSA is not in a position to provide an estimate of costs across its members. However, the costs of avoidable compliance work and avoidable litigation (discussed below) are considerable.

Overall, the VBER and the VGL are helpful instruments which reduce compliance costs and increase legal certainty and as such are welcome.

There remains a day-to-day compliance cost to businesses (legal and other) which are significant in connection to ETTSA's members undertaking a self-assessment of their vertical agreements. In particular, several topics which are addressed in this submission are unclear and the self-assessment lead to substantial costs in the form of costs for legal advice and a potential chilling effect of pro-competitive and efficient behaviour.

The lack of clarity in the VBER and the VGL regarding certain issues addressed in this response (e.g. MFNs) has also led to, in the view of many ETTSA members, avoidable parallel and duplicative investigations by national regulators which generated very high costs (legal, reputational and other) for affected companies.

As discussed above, these costs could be greatly reduced by improved guidance on the application of the VBER to online intermediaries.

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

Please explain your reply (1000 characters max):

The VBER and the VGL are helpful instruments which reduce compliance costs and increase legal certainty for ETTSA's members. The benefits of the VBER and the VGL instruments in this regard outweigh any costs resulting from the consultation of these documents and seeking legal advice regarding the same.

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

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 characters max):

The introduction of a market share threshold for buyers has added another dimension to the costs of self-assessment. However, this did not have a material effect on compliance costs.

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, negative for my organisation (in case of business associations, for your members)
- Yes, negative for the industry
- Yes, negative for consumers

Please explain your reply and illustrate with concrete examples (1000 characters max):

The current VBER and in particular the VGL do not provide specific guidance for vertical arrangements between suppliers and online intermediaries which provide marketing, booking or other distribution related services to these suppliers, such as OTAs. Given the growing importance and complexity of the travel intermediation sector, this lack of guidance has created a situation of legal uncertainty which has significantly increased legal compliance costs for businesses. For example, the lack of pan-European legal certainty has led to a number of public and private enforcement challenges across the EU in recent years (e.g. in relation to MFNs in agreements between travel services suppliers and OTAs) which were lengthy and costly for the implicated businesses.

A national appeal court in Sweden recently confirmed that narrow MFNs did not raise competition concerns even where the VBER market thresholds may arguably have been exceeded by the platform benefitting from the MFN under the market definition as put forward by the court. The process leading up to these clarifications was both lengthy and costly. Given the competitive nature of many intermediation markets, such costs ultimately mean less investment in lower prices and innovation for the benefit of consumers. ETTSA deems EU clarification important to limit differing approaches between Member States as much as possible.

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, negative for my organisation (in case of business associations, for your members)
- Yes, negative for the industry
- Yes, negative for consumers

Please explain your reply and illustrate with concrete examples (1000 characters max):

The VBER and the VGL generate significant efficiencies in allowing for a more (cost) effective self-assessment process and more legal certainty, avoiding avoidable regulatory investigations. The benefits of the VBER and VGL are clearly illustrated by the 'blind spots' in these instruments. In areas which are not adequately covered the resulting uncertainty creates considerable additional costs for ETTSA members (see, for example, the OTA MFN cases) both in terms of compliance work and litigation.

The significantly higher legal certainty and the correspondingly lower compliance costs mean that companies can focus and invest more on optimizing its services, ultimately to the benefit of consumers.

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

Please explain your reply (1000 characters max):

As explained above, ETTSA considers that the VBER provisions remain generally appropriate to address the increase in online commerce and the growth of online intermediation services. That said, ETTSA considers that it is important that additional guidance is provided in the VGL in relation to the application of these principles to vertical agreements between suppliers and online intermediary marketing and distribution services platforms.

VBER should however be updated in relation to the provisions dealing with: (i) the withdrawal of the benefit of the VBER and (ii) the transition periods under Article 7.

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

Please explain your reply (1000 characters max):

As noted above, the VGL does not provide specific guidance for vertical arrangements between suppliers and online intermediaries which provide marketing, booking or other distribution related services to these suppliers. This lack of guidance has created a situation of legal uncertainty which has significantly increased legal compliance costs for businesses.

ETTSA would welcome clarification in the VGL as regards the concept of “genuine agency” in relation to online intermediaries and as regards certain vertical restraints in agreements between suppliers and such intermediaries, namely pricing issues, brand bidding restrictions, platform bans and MFNs.

It should be made clear that narrow MFNs are very unlikely to give rise to a material restriction of competition and also give rise to substantial efficiencies even where the market share thresholds in VBER are exceeded. ETTSA also strongly believes that wide MFNs have pro-competitive effects within the travel industry.. ETTSA invites the Commission to consider whether wide MFNs ought to be excluded from the VBER to allow for individual assessments of each wide MFN in its particular market circumstances or whether wide MFNs ought to fall under the the general provisions of the block exemption where the relevant VBER thresholds are met.

ETTSA would also welcome clarity on the exact scope of landmark decisions such as Coty and Guess, and their applicability to non-selective distribution schemes.

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	VBER, recitals 13-14	Cross-border nature of many online platforms and the corresponding similar agreements with suppliers across many Member States.	Provide for an express acknowledgement that the Commission is particularly well placed to act in relation to any withdrawal procedures which affect one or more agreements or a network of agreements which have effects in more than three Member States, reflecting expressly the provisions in the Network Notice at paragraph 14.
2	VBER, Article 1(a), definition of “vertical agreement”	Growth of intermediation services which do not involve a sale/resale relationship.	Provide in the definition of “vertical agreements” for the buyer “making available to third parties” the supplier’s products (to expand the current references to “purchase, sell and resell”).
3	VBER, Article 1(h), definition of “buyer”	Growth of intermediation services which do not involve a sale/resale relationship.	Provide in the definition for a “buyer” making available to third parties” the supplier’s products (to expand on the current reference to the buyer “selling goods or services on behalf of another undertaking” (i.e. the supplier).
4	VBER, Article 7(d) to (f), transition periods	Dynamic and competitive nature of online markets characterised by high levels of innovation, including business model innovation.	Provide for a minimum protected term of 3 years where the parties’ market position and the agreement fulfill all the requirements under VBER when it is struck (becomes effective), with the current

			provisions kicking in at the end of the minimum protected period (if applicable).
5			
6	VGL, Section III., hardcore restrictions	Growth of intermediation services which do not involve a sale/resale relationship	<p><u>Article 4(a):</u></p> <p>Clarify that OTAs are unlikely to be a genuine agent for purposes of competition law. As non-genuine agents, they should be free in particular to engage in commission splitting (which given the two-sided nature of their business model ought to cover both the compensation paid by the supplier as well as any fees payable by consumers);</p> <p>Therefore, a supplier which makes available its products on such an intermediary marketing or other distribution services platform (e.g. a hotel offering is rooms via an OTA to consumers for booking) cannot prevent the OTA from discounting the prices set by the supplier.</p> <p>Clarify that narrow rate and condition MFNs do not give rise to any issues under Article 4(a) and are covered by the general provisions of the VBER</p> <p><u>Article 4(b):</u></p> <p>Clarify the approach of the Commission towards bidding restrictions between a supplier and</p>

			<p>a buyer (including an intermediary platform) in regard to restrictions on brands and trademarks as well as any other online search term. In particular, whether bidding restrictions (i) are hardcore restriction in all cases, (ii) are a restriction on active and/or passive selling, and (iii) apply to any type of distribution agreements.</p> <p>Clarify that any platform bans imposed on a buyer (including an intermediary platform), absent any objectively justifiable concerns regarding damage to the supplier's brand and reputation, amount to restrictions of the buyer's ability to engage in active and/or passive selling, as the case may be.</p>
7	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), for example with reference to narrow MFNs
8	VGL, Section VI., franchising	Growth of franchise systems in conjunction with the growth in online marketing and sales channels	Clarify that a franchisee (e.g. a hotel property operating under a franchised brand of a franchisee) must remain free to make effective use of third party online marketing and selling channels , provided no damage results to the brand and reputation of the franchisor, including bidding on the

			franchisor's brand and determining the prices the franchisee makes available via intermediary marketing/sales/ booking channels (such as OTAs and meta-search sites in the above hotel example)
9	VBER, Article 5; VGL, Section V, excluded restrictions	Diverging views expressed (formally and informally) by competition authorities and courts across the EEA	ETTSA invites the Commission to consider whether wide MFNs ought to be excluded from the VBER to allow for individual assessments of each wide MFN in its particular market circumstances or whether wide MFNs ought to fall under the general provisions of the block exemption where the relevant VBER thresholds are met.
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

Please identify the area concerned and explain the reasons (1000 characters max):

As noted above, it would be helpful to clarify the legal assessment of certain vertical restraints in agreements between intermediary (marketing and similar) platforms and “suppliers” for the purposes of the VBER and the VGL, in particular regarding the price setting of products on the intermediary platform, brand bidding restrictions, platform bans and MFNs.

ETTSA considers that each of these issues could be effectively addressed in the VGL, interpreting the hardcore restrictions in the VBER:

- (i) Regarding price setting of products on intermediary platforms such as OTAs, VGL shall state clearly that, as non-genuine-agents, they should be free to engage in particular in commission splitting (which given the two-sided nature of their business model ought to cover both the compensation paid by the supplier as well as any fees payable by consumers);
- (ii) Regarding **brand bidding restrictions**, there is a need for legal security and clarity regarding their qualification under Article 4 of VBER and related sections of VGL. Several national competition authorities and most recently the European Commission addressed the topic in cases or published reports, but without providing a clear reliable position on the way the practice should be considered outside the cases studied (Avis de l'Autorité de la Concurrence française du 18 septembre 2012 relatif au fonctionnement concurrentiel du commerce électronique, 12-A-20, paragraphs 357 and 358, Decision of the Bundeskartellamt, ASICS, no B2-98/11, 26 August 2015; Decision of the Bundeskartellamt, ADIDAS, no B3-137/12, 27 June 2014) . As online sales are growing, along with related online marketing and advertising practices, such clarification would benefit all online market players, whatever the industry or sector concerned.
- (iii) Regarding platform bans (bans on OTAs to advertise their services on metasearch engines and other price comparison websites), the VGL shall state clearly that they must be justified by legitimate objective concerns regarding the adverse impact of a distribution channel on the supplier's marks, brands and reputation of the supplier, and are in fact restrictions which are prohibited under the VBER, especially in circumstances in which principals generally distribute their products directly online in competition with online agents and generally advertise their products on the price comparison sites / METAs in question;
- (iv) Narrow MFNs are a permissible vertical restraints (including consumer facing rate, conditions and availability MFNs) between a supplier and an intermediary marketing platform provided the other conditions of the VBER are met;
- (v) ETTSA also strongly believes that wide MFNs have pro-competitive effects within the travel industry. ETTSA invites the Commission to consider whether wide MFNs ought to be excluded from the VBER to allow for individual assessments of each wide MFN in its particular market circumstances or whether wide MFNs ought to fall under the general provisions of the block exemption where the relevant VBER thresholds are met.

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)?

- No

Please explain your reply (1000 characters max):

Whilst ETTSA does not consider that the VBER or VGL are incoherent with other instruments that provide guidance on the interpretation of Article 101, it does consider that there is a degree of incoherence with Commission policy papers, Commission decisional practice and the interpretation of EU competition law principles in national courts.

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

See comments above.

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 characters max):

The VBER and the VGL provide an important first point of reference for the self-assessment of vertical agreements and these instruments play a critical role in safeguarding a high level of consistency in relation to the application and enforcement of EU competition law (and their national equivalents) in relation to vertical restraints.