

MODEL ANSWERS

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

Please describe the main activities of your organisation.

Below you find the answer of IUCAB. Please update the IUCAB figures with YOUR national figures!

See enclosure

IUCAB is the Worldwide Alliance of National Associations of commercial agents, brokers as well as independent sales companies. With more than 60 years of experience along with deep knowhow around the topic of sales, IUCAB successfully represents as a strong partner the career and economic interests of its Member Associations as well as their members (mainly commercial agents) at an international level. Today's Membership of IUCAB consists of 21 National Associations, thereof 17 Associations throughout Europe, representing approximately 600,000 commercial agencies in the EU, practically all SMEs. The agencies generate a turnover of appr. EUR 1.000 Billion and providing employment to over 1.6 Million people. 40% of the agents represent at least 1 EU-foreign principal. Commercial agencies are independent professional providers of field sales and marketing services to manufacturers or suppliers. They are arranging the sales for an estimated 1.7 Million principals, 88% of which are SMEs.

1. Please describe the relevance of the VBER and the VGL for you.

A commercial agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal).

According to Chapter II. 2. of the Guidelines on Vertical Restraints (VGL), Commercial Agency agreements are excluded from the scope of Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU). The full exemption to the scope of Article 101 (1) TFEU is justified with the fact that commercial agents are usually bound by the principal's instructions in terms of prices and conditions of the transactions concluded by the agent. Commercial agents have an *auxiliary* function, forming an economic entity with the principal. Thus, commercial agency agreements are not "agreements between companies" according to competition law. An exception to this principle is made where the agent assumes financial or commercial risks in relation to the initiation, conclusion and execution of the respective transaction (Para 13 et seq. of the Guidelines).

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

Please explain your reply, distinguishing between sectors where relevant.

The commercial agent's exemption from Article 101 (1) TFEU which results from the VGL, ensures legal certainty for commercial agents. In accordance with the criteria established in the VGL, commercial agents can clearly assess whether they are to be qualified as commercial agents from an antitrust point of view or as independent dealers. This exemption has proven its effectiveness, meaning that the collaboration between commercial agents and principals can be initialized and executed with legal certainty.

A non-prolongation of the exemption would deprive commercial agents from the necessary decision-making basis which derives from the VGL. This leads to a threat to this very important distribution channel and thus to the essential good market performance in the EU. *[The commercial agents represented by our member associations generate a turnover of approximately 1000 billion euros per year and 40% of the commercial agents represent at least one EU-foreign principal.-->fill in your national figures!]*. Small and medium-sized companies in particular, often depend on a cooperation with commercial agents in order to place their products on the market nationally and especially internationally at economically justifiable conditions.

3. 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 or the Treaty and thus compliant with this provision (i.e. are the rules clear and comprehensive, and do they allow you to understand and predict the legal consequences)? ➤ **Yes**
Please explain your reply.

The VBER and the VGL, paragraph 13 et seq., guarantee legal certainty which is necessary for commercial agents and principals in order to cooperate. In accordance with the criteria described in paragraph 14 et seq. of the VGL, commercial agents and principals can assess whether the agreed transaction is qualified as a commercial agency agreement, or if the activity, due to the acquisition of financial or commercial risks, must be classified as a trader agreement. The demarcation criteria laid down in the VGL are clear and understandable.

As stated in the VGL in paragraph 17, the additionally arranged overall assessment and individual case consideration with regard to the costs and risks assumed also ensures individual justice.

4. 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, positive for the industry**
Please explain your reply and illustrate with concrete examples.

The VBER and the VGL which expressly exempt commercial agency agreements from Article 101 (1) TFEU are indispensable regulations for commercial agents. The commercial agency exemption is a prerequisite for commercial agents executing their activity with legal certainty. In compliance with the regulations, agents can clearly estimate when a commercial agency activity, due to the acquisition of financial or business risks, cannot be assumed. The same applies to principals who would like to place their products and services on the national and international market with the help of commercial agents.

5. 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**

Please explain your reply and illustrate with concrete examples.

A non-prolongation of the VBER and VGL would lead to a legal uncertainty for both commercial agents and principals. Both parties would lack the decision-making guidance which the VGL guarantees. If commercial agency agreements are not expressly excluded from Article 101 (1) TFEU, the distribution channel via commercial agents would disappear to the disadvantage of many principals organised as SME's. The importance of the distribution channel via commercial agents for the EU internal market has been recently approved by the EU Commission and the Commercial Agents Directive was confirmed and maintained during the REFIT program in 2015.

6. 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

Please explain your reply.

The exemption of commercial agency agreements from Article 101 (1) TFEU, as it is stated in the VBER and the VGL, ensures legal certainty and the essential decision-making guidance. Based on the criteria listed in the VGL, the parties can clearly assess whether the cooperation is a privileged antitrust agreement with the commercial agent or if the agent qualifies as a trader, with the legal consequences for both sides.

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

The contents of the VBER and VGL are urgently required also in the future. Particularly, taking into account the development of the digitalisation and the fact that manufacturers benefit from all possible distribution channels in parallel, the exception of commercial agency agreements from the prohibition on restrictive agreements is important. Otherwise, the distribution channel via commercial agents would lack legal certainty and could not exist anymore. This would be particularly counterproductive to the Commission's approval of the maintenance of the Commercial Agents Directive during the REFIT program. The results confirm that the distribution channel via commercial agents is particularly important for SMEs in order to get fast market access for their products in other EU countries. This added value for the internal market would be endangered without the exemption.

