

**Consultation on the UK Retained Vertical Block Exemption Regulation ("VBER")  
European Cultural & Creative Industries Alliance (ECCIA) Submission**

**21st July 2021**

**About ECCIA**

ECCIA is delighted to respond to the Competition and Market Authority's consultation process.

ECCIA is composed of the major European Cultural and Creative Industry associations: Circulo Fortuny (SP), Comité Colbert (FR), Altagamma (IT), Walpole (UK), Gustaf III Kommitté (SE) and Meisterkreis (DE). Its members represent over 600 of Europe's leading luxury brands. The aim of ECCIA is to promote the interest of the European high-end industries towards the European Institutions.

ECCIA members are spread across all sub-sectors of the luxury industry (beauty and fragrance, fashion and accessories, food & beverages, tableware, hospitality, jewellery, leather goods, fine watchmaking) as well as many other luxury products and services.

An important element in the continued success of our members is the ability to ensure that their goods are sold efficiently and appropriately. Maintaining the aura of luxury and prestige is a vital component in that endeavour. The ability to put in place appropriate controls through distribution and retail agreements is in turn key to achieving these goals. This consultation is therefore of great importance to ECCIA's members.

We have answered below those of the CMA's questions which are of particular importance to our members.

**Policy and impact questions**

**Question 1: Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained VBER with a new UK VABEO, rather than letting it lapse without replacement or renewing without varying the retained VABER?**

- a) Yes**
- b) No**
- c) Not sure**

**Question 2: Please explain your response providing, where possible, examples and evidence to support your answer.**

The continuation of the safe harbour is essential for the objective of legal certainty. The safe harbour enables businesses to structure their distribution arrangements with confidence. Simply providing guidance without a safe harbour regulation would allow a much greater scope for disagreement which in turn could lead to an increased level of litigation. A safe harbour regulation is more objective, clearer and reduces scope for individual interpretation.

**Question 3: How will the proposed UK VABEO as outlined in the CMA’s proposed recommendation impact consumers?**

- a) Significant positive impact**
- b) Moderate positive impact**
- c) Negligible impact**
- d) Moderate negative impact**
- e) Significant negative impact**

**Policy questions**

**Question 9: What are your views on the CMA’s proposed recommendation on dual distribution?**

In our opinion, the exception for dual distribution must be retained. It is critical for the success of luxury brands to be able to reach customers through both a network of independent outlets alongside their own monobrand shops, as it allows them to develop their brand image while maximising the availability of their products, without compromising on the quality of the retail environment or customer experience.

**Question 10: Do you think that additional guidance on information exchange in the context of dual distribution would be helpful? If so, please provide your views on what that guidance should say.**

The issuance of more guidance in this area is not something we believe is necessary. We do not believe there is any harm to competition where brand owners discuss with their retailers the sale of their own goods. Such dialogue will likely centre around the levels of sales and sales strategies which are working well and less well. The ability to have such conversations will benefit the brand and the retailer and ultimately the consumer, who will see products positioned in a manner which is more responsive to their desires. It also allows for a coherent brand experience. Distribution as a whole should also become more efficient as a result.

We understand that there would be issues around conversations where the brand and retailer shared certain information around the sale of other goods from competing brands which the retailer may stock (as demonstrated in a number of “hub and spoke” cartel cases). Further guidance here would not be problematic although we feel that the general principles are already well understood by our member businesses.

**Impact questions**

**Question 11: To what extent does the dual distribution exception for non-reciprocal vertical agreements, as outlined in the retained VABER, positively impact your business’s operations or the operations of those you represent? Please explain your answer.**

- a) Completely**
- b) Very much**
- c) Moderately**
- d) A little**
- e) Not at all**

The exception enables our members to reach customers through both independent retailers and their own monobrand stores. Each type of outlet has a particular role to play and offers its own distinct

advantages to brand owners. Ending the exception would force brands to choose between one or the other type of sales channel, which would be most unhelpful.

Intrabrand competition between retailers who sell the same brand of goods may be helpful. That leads to innovation and creativity in the way that goods are sold. More importantly, the ability of brand owners to position their goods with appropriate retailers will enhance the perceived value of their goods in the eyes of consumers and therefore boost interbrand competition. Selling through independent stores also enables brand owners to reach a wider geographical area, which also benefits consumers. For fashion items, a multibrand experience may be beneficial to certain consumers who wish to mix and match clothes of two or more different brands.

On the other hand, brands will wish to have a direct experience with customers to learn more about consumer perception of their goods. Monobrand stores are often ideal venues for telling the story of the brand and drawing customers into that story. They are often used for specific events, such as product launches or promotions. It may be useful to use the monobrand store to test more experimental goods which independent resellers may be unwilling to sell without some data to suggest they will sell well at the point of retail.

**Question 12: To what extent does the dual distribution exception for non-reciprocal vertical agreements, as outlined in the retained VABER, negatively impact your business's operations or the operations of those you represent? Please explain your answer.**

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

We do not believe that there is any convincing evidence that dual distribution is harmful. On the contrary it generates significant benefits and efficiencies which would be lost if the exception were ended.

**Question 13: What would be the likely impact on your business's operations, or the operations of those you represent, if the dual distribution exception was not included in the UK VABEO at all? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.**

As we outlined in our response to Question 11, brands would be forced to choose between their own outlets and independent outlets in this scenario. That would lead to a loss of consumer choice and a reduction of efficiencies.

If brands were forced to abandon independent re-sellers, that would increase their cost base as they would need to create and run their own shops (or more such shops). That could raise prices in turn as the investments required would be substantial. It could also reduce the geographical areas in which the goods may be available from offline outlets. Ultimately this would be bad for the retailers themselves as it would exacerbate an already austere trading environment for them in the wake of COVID-19.

On the other hand, if the choice was made to sell through independent stores then without monobrand stores brands would have fewer options for the sale of experimental or slower moving goods. They

would also be denied the useful brand intelligence that comes from having a direct interaction with consumers.

**Question 14: Do you consider the CMA's proposed recommendation, which also applies the exception to dual distribution by wholesalers and by importers, to have a positive or negative impact on business operations? Please explain your answer.**

- a) Significant positive impact**
- b) Moderate positive impact**
- c) Negligible impact**
- d) Moderate negative impact**
- e) Significant negative impact**

#### **Policy questions**

We believe that the extension of the exception of dual distribution by wholesalers and importers will bring enhanced further flexibility and efficiencies. We see no credible theory of harm as to why such an extension should not be made.

**Question 15: Do you agree with the CMA's proposed recommendation on resale price maintenance (RPM)?**

We are broadly in agreement with the proposal by the Commission. ECCIA appreciates that there is a good case for RPM remaining a hardcore restriction in many cases.

We welcome the CMA's proposal for improved guidelines around the use of RPM. ECCIA would welcome additional guidance around the compatibility of RPM for seasonal products or the launch of new products. Seasonal products, for example, require significant initial investment. The brand may wish for these products to be sold at a particular price to recoup that investment, and also to allow retailers to do the same.

**Question 16: Based on your experience, do you have any examples in practice of circumstances where RPM would lead to efficiencies that outweigh the restriction of competition? If so, please provide these examples**

Yes, as indicated for Question 15, it is important for seasonal products for the brand to have confidence that it will recoup a substantial investment. That will be compromised if independent resellers force prices of the product down through discounting. The use of RPM will help the brand recoup its investment. That will avoid a situation where the incentive to make those investments are chilled which in turn could lead to a reduced range of seasonal goods for consumers. We believe that a similar rationale could apply in relation to product launches.

Similar concerns could also be at play in other contexts. For example, a fashion house may undergo a change of designer for one of its lines of products. While consumers are adjusting to the products of the new designer, it may be unhelpful if resellers discount prices wholesale. The monobrand store in that scenario is likely to be forced to follow the lead of the independent resellers in terms of discounting. That would signal to the market that the products are of inferior quality relative to their predecessors and do not possess the same qualities or prestige.

**Question 17: Do you think that additional guidance on when RPM may lead to efficiencies would be helpful? If so, please provide your views on what that guidance should say.**

As indicated in our response to Q 16, we consider that it would be helpful to have guidance which recognised that RPM may be justified for seasonal products where brands had made significant initial investments, for product launches (as are recognised already in the existing EU VGL) and also for situations where brands face short term challenges where RPM is necessary to preserve the market placement of a product as a luxury brand.

#### **Impact questions**

**Question 18: What would be the likely impact on your business, or those you represent, if RPM were not treated as a hardcore restriction for the purposes of the proposed UK VABEO? Please explain your answer.**

- a) Significant positive impact**
- b) Moderate positive impact**
- c) Negligible impact**
- d) Moderate negative impact**
- e) Significant negative impact**

We speak from the standpoint of luxury brands. The impact would be marginally positive. While there may be a degree of loss of intrabrand price competition, this would be moderately offset by the enhanced ability of brands to ensure their goods were priced in a manner which was appropriate for luxury goods. Our members are sometimes harmed where high quality goods are the subject of excessive discounting, which can harm the prestige of the brand and create the impression that the goods are unwanted.

**Question 19: Are you aware of, or have you encountered, any difficulties in your business as a result of the treatment of RPM as a hardcore restriction for the purposes of the retained VABER? If so, please give examples.**

#### **Policy questions**

At Question 16 above, we have given the example of how it is difficult for brands to control discounting which can be harmful to the prestige of goods in a situation where, for example, the designer has been changed for a line of fashion items.

**Question 20: What are your views on the CMA's proposed recommendation on territorial and customer restrictions? In particular, what are your views on the CMA's proposed recommendation to:**

- a) continue to treat territorial and customer restrictions as 'hardcore' restrictions so as to remove the benefit of the block exemption (subject to exceptions);**
- b) maintain a distinction between active and passive sales;**
- c) revisit the distinction between active and passive sales for certain types of online sales in the CMA VABEO Guidance; and**
- d) change the current regime in order to give businesses more flexibility to design their distribution systems according to their needs?**

**In your response please consider whether:**

- a) there are any features of the UK internal market militating in favour or against retaining the treatment of territorial restrictions as ‘hardcore’ restrictions for the purposes of the UK VABEO;**
- b) the distinction between active and passive sales remains valid and whether changes to this categorisation should be made in order to:**
  - i. clarify the situations where online sales amount to passive or active sales; or**
  - ii. give businesses more flexibility to combine different distribution models.**

We are broadly happy with the CMA’s proposals, which we consider represents a balanced approach.

With regard to point (a), we consider that the CMA should confirm in guidance that both active and passive sales may be restrained where this is for the purpose of ensuring that the goods conform to the local regulatory requirements. For example, certain cosmetic products must satisfy location specific rules on labelling. It may be necessary for the brand to impose restrictions in order to ensure that there are no illegal sales which could damage the value of the brand.

We believe that there should be a distinction with regard to point (b).

With regard to point (c), we consider that internet sales have moved on to a point where they no longer require regulatory protection to the same extent. We also consider that means of internet sales have become more sophisticated and nuanced. For that reason, there should no longer be a presumption that online sales are inherently passive. It should depend more upon the specifics of the transaction and the methods used by the reseller. For example, it may be appropriate to consider a sale “active” where the distributor has used certain country specific adwords or a geographically focused forum.

It is also important for the *Coty* case-law to be codified so that luxury brands can restrain online platform sales which are liable to harm the prestige of luxury goods. We would also wish to see guidance on when brands may take steps to impose territorial restrictions (active or passive) where this is warranted to restrain the sale of grey market goods. For example, brands should be able to seek information from resellers in relation to the ultimate end customer.

We welcome the added flexibility set out at point (d) above. Certain of our members have struggled when seeking to create distribution structures which are benign but fall outside the structures of the VABE.

**Question 21: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say including examples of situations where online sales should be regarded as passive or active sales.**

#### **Impact questions**

We think it would be useful to provide more guidance in relation to permissible actions to restrain grey market sales. Continuing the rules on territorial restrictions will limit the ability of brand owners to restrain these.

Grey market sales are the ultimate form of free riding, causing a detrimental effect to all parties in the authorised sales network. They create the impression that goods are being sold for too much by authorised sellers. Retailers, who have often made substantial investments, have their interests damaged more than others.

Online sales have brought about a proliferation in grey market goods. Occasionally, counterfeit goods are sold next to grey market goods at similar prices which creates confusion for clients. The health risk is obviously more acute for food & drink products.

We also consider that the CMA's new guidance should state it is acceptable for a brand owner to require information from re-sellers about the identity of customers and transactional volumes with a view to identifying the source of grey market sales or that it may restrain further sales to resellers whom they reasonably consider to be failing to prevent grey market sales.

As pointed out elsewhere in these responses, it is our view that the CMA should not maintain the presumption set out at para 52 of the VGL that all sales are passive. Instead, it should use a case by case analysis to determine whether a sale is active or passive using territory specific criteria.

The CMA should consider allowing a restraint of sales outside the territory where such a step is required in order to ensure goods are sold in compliance with applicable local rules. We are aware for example that Northern Ireland will continue to apply EU single market rules and regulations in many areas, which may mean that it diverges in some respects from Great Britain and to a more significant extent over time. Brands could be subject to criticism because their goods do not comply with local regulations but they are unable to restrain the sale of these (for example because the sale is passive).

**Question 22: Do you have any examples of circumstances where territorial and customer restrictions might lead to operational efficiencies? Please include examples of locations within the UK and, where possible, quantitative and/or qualitative evidence in your answer.**

The example *par excellence* is the selective distribution system, which will restrain sales outside of the selective distribution network. The ability of the brand to control the environment in which goods are sold (and ensure that resellers are appropriately qualified) protects the value of the brand and leads to stronger interbrand competition.

**Question 23:**

**How helpful is the exemption for restrictions of active sales in the UK to your business or those you represent? Please explain your answer.**

- a) Very helpful**
- b) Somewhat helpful**
- c) Irrelevant**
- d) Unhelpful**
- e) Very unhelpful**

We consider the active sales ban to be helpful to brands in setting up structured distribution systems where they are able to attract high quality retailers and distributors. Without the ability to impose such a ban, retailers and distributors would not have the same incentives to invest in promotion of brands. There is a balance of interests with competition and consumer choice under the current VBER, however, because the possibility of passive sales largely remains so consumers can shop around. The brand may prohibit sales into territories which it has "reserved to itself" (although that concept could be better explained in guidance for example to set out what the brand owner must show in order to prove it has reserved a territory to itself).

**Policy questions**

**Question 24: What are your views on the CMA's proposed recommendation on dual pricing and on the equivalence principle?**

It is important to allow dual pricing as that permits manufacturers to take steps to protect traditional brick and mortar resellers. This class of reseller or retailer faces higher inherent costs than online sellers. Physical retailers have also been hit proportionately harder than online resellers by COVID-19 restrictions. It is in the interests of consumers and the wider UK economy to protect the vibrancy of the High Street and this also supports the wider economy in terms of the creation of high quality jobs and tourism (as tourists are not drawn to dormant town centres).

We also support the CMA's position in relation to the equivalence requirement for selective distribution systems. This places a significant burden on brands because online and offline channels are inherently different and, we submit, a true equivalency between both types of sales channel can never truly be achieved. To set that out as a requirement therefore creates legal uncertainty and risks giving rise to disputes between brands and retailers. We would also point out that in certain innovative omnichannel sales networks, online and offline sales outlets play distinct roles which are integrated in promoting the brand but may not be considered strictly to be equivalent. Speaking for luxury brands, the CMA can rest assured that the brand owner will wish to ensure that the online and offline channels are consistent in order to protect the prestige of the goods which are sold. In order to protect this consistency, we would urge the CMA to codify in the UK vertical guidelines the principles of the judgment in *Coty*. To fail to take this step would cause alarm to luxury brand owners and potentially risk a reduction of dealings with UK based resellers (who could then cite English Law as a defence for selling on platforms the brand considers unsuitable).

**Question 25: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.**

We do not consider that the guidelines should go much further than stating that dual pricing is in principle permitted. We would urge the CMA not to be overly prescriptive in setting out how to calculate the cost differences between online and offline sales channels. It should be sufficient that the brand has made a reasonable estimate of those costs and acted in good faith in order to redress the cost imbalances faced between both types of seller.

#### **Impact questions**

**Question 26: What are your views on the current regime, which treats certain online sales as a form of passive sales? What are some examples of the benefits or costs for your business operations, or the operations of those you represent? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.**

We do not consider that there should be a general presumption that online sales are passive in nature. The internet has moved on to allow sellers to target specific customer groups. Notably, social media allows customer interests to be identified and to target specific customers or types of customer.

Internet sales are an important if not essential channel in the current environment for brand owners to reach customers. As we have set out elsewhere, the use of independent retailers is also essential for most brands. For luxury brands, because of this importance, it is necessary to have an ability to ensure that sales over the internet are in keeping with the high standards of the brand and its general positioning and presentation. That can become more difficult if there is a presumption that online sales are passive in nature.

As we have stated elsewhere, it is important for our members that the UK continue to recognise the principles set out in the judgment of the CJEU, in Case C-230/16 *Coty Germany GmbH v Parfümerie*



**Akzente GmbH.** That confirmed that luxury brands may restrain sales on online platforms such as Amazon and eBay (among others) where this is necessary to preserve the quality and proper use of the products in question. The problem with this for luxury brands is that these platforms do not provide a suitably prestigious sales environment. Luxury goods may be featured alongside lower quality goods and it has been known for counterfeit goods to be sold using these venues. Without such a continued recognition, brands may feel more nervous to deal with UK based resellers as that may result in their goods being sold on these platforms. Enacting these principles will also enhance legal certainty; the CMA will be aware that prior to the *Coty* judgment, there was a divergence of judicial views as to whether or not bans on third party platform sales were allowed.

**Question 27: Does the treatment of online sales bans as a hardcore restriction have an overall positive or negative impact on your business? Where possible, please provide examples of the impact on online channels and offline channels in your answer. Please include qualitative and/or quantitative evidence where possible.**

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

We consider that the internet is an important channel for consumers to obtain goods quickly and conveniently. There would be clear harm if online sales bans were imposed wholesale by brands on resellers. However, in practice, this would be commercial suicide given the overwhelming demand for online sales by consumers. Nevertheless, we consider there may be circumstances where such blanket bans are justified – for example where the sale of the good online would create a risk to health or result in illegal use of the product being sold. A recognition of these common sense principles would be welcome.

The question of outright online sales bans is separate from the question of banning sales on third party online platforms, which we have addressed elsewhere. We therefore advocate the continued recognition of English Law of the *Coty* judgment.

**Question 28: Do you consider that the CMA’s proposed recommendation (to remove dual pricing and the requirement for overall equivalence in selective distribution from the list of hardcore restrictions) will benefit offline channels? If yes, please provide examples where possible**

We strongly support the CMA’s position on this question. Offline sales channels require greater protection. Allowing brands to take this step would enhance the ability of the brand owner to protect offline sales channels from free riding by predominantly online sellers and redress the inherent cost structure advantage enjoyed by online sellers. Dual pricing will be a helpful tool to assist in the preservation of bricks and mortar stores and the vibrancy of the UK High Street. We also consider that this will assist in protecting high quality jobs in physical stores which could otherwise be lost.

## Sustainability

### Policy question

**Question 39: The CMA invites views on the above proposed recommendation in respect of environmental sustainability and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.**

ECCIA agrees with the CMA's recommendations, particularly with regard to making clear that sustainability criteria can be included as entry criteria for selective distribution systems. Consumers are becoming ever more aware of and concerned about sustainability issues. Such a clarification would therefore keep the guidelines in step with the prevailing commercial climate. We would comment that the CMA should include within the scope of "sustainability" issues related to human rights such as forced labour. This is an issue for example within the fashion industry where many brands are trying assiduously to ensure that their products are not tainted with forced labour, for example, through their supply chain. It is reasonable to expect distributors to make similar efforts.

### Impact questions

**Question 40: What are your views, if any, on whether the retained VABER and EU Vertical Guidelines, contain or frustrate initiatives which might support the UK's Net Zero and environmental sustainability goals. Please include examples to support your views where possible.**

Currently, we consider that the silence of the VGL on the question of sustainability may spark disagreements as to whether or not it is legitimate to include such matters as part of the requirements for re-sellers. That point of view may arise because sustainability may be seen as extraneous to the sales environment itself which resellers may consider to be the brand's proper sphere of concern. We would disagree, however, and argue that modern consumers are very concerned by these issues.

**Question 41: Relative to the current regime, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance) have a positive impact on your business's operations, or the operations of those you represent? Please provide examples and evidence where possible about how any such amendments would have a positive impact.**

As stated above, we consider that the added certainty would be welcome by our members. A result of improved certainty may be that brands feel more confident to impose sustainability requirements on their trading partners, which we consider will have a wider societal benefit.

**Question 42: Relative to the current position, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance) have a negative impact on your business's operations, or the operations of those you represent? Please provide examples and evidence where possible about how any such amendments would have a negative impact**

There would only be a negative impact if the CMA became overly prescriptive as to what the sustainability standards should be (e.g. stating that brands could only take account of industry approved sustainability initiatives). We believe it is important for brands to determine what standards to set and not to pre-empt their choices in the guidelines.