Consultation on Draft Vertical Agreements Block Exemption Order

Walpole British Luxury Submission

16 March 2022

Introduction

Walpole welcomes the opportunity to respond to the Government's consultation on the Draft Vertical Agreements Block Exemption Order (**the Draft Order**) issued on 21 February 2022.

Walpole previously provided a response to the related consultation paper issued by the Competition and Markets Authority (**CMA**) on 17 June 2021 entitled "The retained Vertical Agreements Block Exemption Regulation Consultation document". Prior to this Walpole had also participated in a round table session with the CMA in April 2021.

Walpole notes that the CMA will be consulting shortly on draft guidance to accompany the draft Order (**the Draft Guidance**) and so may have further comments on the Draft Order in light of the Draft Guidance.

Walpole – who we are

Walpole is the official sector body for UK luxury. Founded in 1992 as a not-for-profit organisation, it counts more than 250 British brands in its membership and is recognised in both Westminster and Brussels. As the voice of British luxury, Walpole's purpose is to promote, protect and develop a sector worth £48 billion to the UK economy and that is a leading creator of long-term sustainable employment and driver of tourism into the UK.

Walpole's 250 members are spread across all sub-sectors of the luxury industry (automotive, beauty & fragrance, fashion, food & drink, hospitality & services, jewellery, interiors, property and retailers) from small and medium-sized enterprises (SMEs) to internationally owned and publicly listed companies. Walpole promotes international business opportunities, driving growth in the sector through a programme of initiatives, including the annual trade mission and press showcase to the US. As founders of the European Cultural and Creative Industries Alliance (ECCIA), Walpole actively represents the views and interests of the UK luxury sector with Europe's luxury and creative sectors.

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 Walpole's members.

Summary

Walpole welcomes the approach adopted in the Draft Order. However, there are two areas where Walpole considers that further clarification should be provided in the Draft Order:

- the drafting of the definition of “active sales” (Article 8(5) of the Draft Order);
- the scope of the provision permitting greater protection for members of selective distribution systems against sales from outside the geographical area (Article 8(3)(c) of the Draft Order).

A. The definition of active sales

As currently drafted, it is unclear from Article 8(5) of the Draft Order whether the elements of the definition of “active sales” are cumulative or alternatives.

It is assumed that the elements are intended to present a non-exhaustive, non-cumulative list of behaviours that may indicate an active sale (which Walpole considers to be the correct approach), in which case we would encourage such a clarification. For example, it would be helpful for “*or*” to be inserted at the end of paragraph (d) in the definition.

B. Protection for members of selective distribution systems against sales from outside the geographical area

Walpole welcomes the inclusion in the Draft Order of Article 8(3)(c), which permits the provision of greater protection for members of selective distribution systems against sales from outside the geographical area to unauthorised distributors inside that geographical area.

However, as currently drafted the scope of this provision is unclear. In particular, it is unclear:

- who can be restricted from making sales into the relevant geographical area; and
- what type of sales can be restricted.

In Walpole’s view, the block exemption should permit a restriction on <u>any</u> buyer from making <u>active or passive</u> sales to unauthorised distributors located in a geographical area where the supplier operates a selective distribution system.

Walpole considers that this position could be achieved by replacing the current wording of Article 8(2)(b)(iii) of the Draft Order with the following wording:

> “*the restriction of active sales or passive sales to distributors not authorised by the supplier located in a geographical area where the supplier operates a selective distribution system*.”

In addition to these necessary restrictions on sales from <u>outside</u> the geographical area where the selective distribution is operated, restrictions on sales from <u>inside</u> that area to unauthorised distributors inside and/or outside that area are equally essential. Any member of an authorised network (exclusive and selective at wholesale and/or retail level) set-up for certain products should clearly be prevented from supplying such products to any unauthorised entity (i.e non-authorised member of the said network).

Respectively, any unauthorised entity should be legally prevented from soliciting or acquiring from authorised members of the network, as well from offering for sale and/or selling such

products. Such an approach is the natural counterpart of the responsibilities attached to selective distribution, as well as an essential condition for this business model's survival.

We remain convinced that contractual restrictions will remain toothless without a mechanism allowing brands to enforce their selective distribution networks vis-à-vis third parties.

We would therefore still advocate for the creation of such an enforcement mechanism, as we have consistently called for throughout the CMA's consultation process, as well as the European Commission's consultation process on its draft revised Vertical Block Exemption Regulation and Vertical Guidelines.

This protection is all the more important, given that the future scope of the UK's exhaustion of intellectual property rights regime is currently unclear.

Follow-up

We trust this input will assist the Government in its consideration in relation to the Draft Order. Walpole also looks forward to inputting into the CMA's Draft Guidance in due course and, as noted above, may have further comments on the Draft Order in light of the Draft Guidance.

We remain at the disposal of the Government should you have any follow-up questions on any of the points we have raised.

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