

Consultation on draft guidance to accompany the Vertical Agreements Block Exemption Order

Walpole British Luxury Submission

4 May 2022

Introduction

Walpole welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) in respect of its consultation on draft guidance to accompany the Vertical Agreements Block Exemption Order (**the Draft Guidance**) issued on 5 April 2022.

Walpole previously provided a response dated 21 July 2021 to the consultation paper issued by the CMA on 17 June 2021 entitled “The retained Vertical Agreements Block Exemption Regulation Consultation document” (**Walpole Response to the CMA**). Prior to this Walpole also participated in a round table session with the CMA in April 2021.

More recently, Walpole responded to the consultation issued by the Department for Business, Energy and Industrial Strategy (**BEIS**) on 21 February 2022 in respect of the draft Vertical Agreements Block Exemption Order (**the Draft Order**).

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 Guidance. However, there are a number of areas where Walpole considers that further clarification should be provided:

- the section relating to “active sales” (paragraph 8.46 of the Draft Guidance);
- the section relating to Article 8(3)(c) of the Draft Order (paragraphs 8.69 and 8.70 of the Draft Guidance);
- the section relating to the circumstances when resale price maintenance may qualify for individual exemption (paragraph 8.22 of the Draft Guidance);
- the section relating to restrictions on the use of price comparison tools, referred to as “DCTs” in the Draft Guidance (paragraphs 10.134 to 10.137 of the Draft Guidance);
- the inclusion of guidance on environmental sustainability issues, in particular in relation to the criteria for admission to selective distribution systems.

Our comments on the first two areas mirror the comments we made in response to BEIS’ consultation on the Draft Order. However, we recognise that BEIS and the CMA may consider that it is more appropriate for our comments to be reflected in the Draft Guidance, rather than the Draft Order.

The other comments mirror comments previously made in the Walpole Response to the CMA.

A. Active sales

As currently drafted, it is unclear from paragraph 8.46 of the Draft Guidance and 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 in the CMA’s guidance.

B. Article 8(3)(c) of the Draft Order

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 and there does not appear to be any reference to, or guidance on, its scope in the Draft Guidance. 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 any buyer from making active or passive sales to unauthorised distributors located in a geographical area where the supplier operates a selective distribution system.

In addition to these necessary restrictions on sales from outside the geographical area where the selective distribution is operated, restrictions on sales from inside 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).

We consider that the CMA's guidance should make explicit that such restrictions are covered by the block exemption.

Moreover, any unauthorised entity should be legally prevented from soliciting or acquiring from authorised members of the network, as well as 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.

C. Resale price maintenance

Although paragraph 8.22 of the Draft Guidance on the circumstances when resale price maintenance (**RPM**) may qualify for individual exemption is helpful, as noted in the Walpole Response to the CMA Walpole members would welcome the inclusion of further guidance for the luxury sector in the following specific areas:

- With regard to product launches for luxury goods, Walpole members would appreciate more guidance as to how long would be considered a reasonable period for RPM to subsist in order to support the product launch, noting that, in the context of luxury goods price competition is less important as a differentiating factor between comparable products;
- RPM may be justified for seasonal luxury products, which require substantial upfront investment (e.g. to launch and promote) but have a short lifespan on the shelves. If these products were substantially discounted, it would also put a strong downward pressure on prices charged both by independent resellers and by the brand direct from its own outlets, which would be forced to follow suit. In those circumstances, RPM may

be needed in order to recoup the substantial investment and to protect their positioning as luxury products.

- We would propose a further more general set of guidelines to recognise those situations where a brand owner may need to use RPM in order to preserve the aura of luxury in relation to a specific product (citing the given example below of a fashion line where there is a change of designer). There may be circumstances where a brand is subject to short term challenges or changes in circumstance with part of its product line where RPM may be needed to preserve the luxury status of the affected products. An example would be where the designer of a line of fashion items changes. Preserving continuity with the previous products under the predecessor designer would require ensuring that the price of those products is not radically cut at retail level, or consumers may be deterred by what they perceive to be a new and less prestigious line. The value of the brand may be significantly harmed as a result.

D. Price comparison tools/DCTs

Paragraph 10.134 of the Draft Guidance states that, in the context of selective distribution arrangements, *“it is unlikely that preventing the use of DCTs will be appropriate or necessary to preserve the quality or ensure the proper use of contract goods or services.”*

Price competition is less important for luxury goods and the positioning of goods on price comparison sites will frequently damage the image of the goods, in terms of being based on scarcity of supply and possessing a quality of luxury.

We believe there should be greater recognition in the Draft Guidance that preventing the use of price comparison websites in respect of luxury goods may be justified. We would also welcome clarification that it is permissible for brand owners to restrict the use of price comparison websites where that would result in misleading or damaging marketing.

E. Environmental sustainability issues

In its recommendation to BEIS on the Vertical Agreements Block Exemption Regulation issued on 3 October 2021 (**CMA Recommendation**), the CMA stated that it was minded to provide guidance on environmental sustainability issues in the context of its guidance on the vertical agreements block exemption, in particular in relation to the criteria for admission to selective distribution systems.¹

Although the Draft Guidance includes cross references to the CMA’s advice to the Government on environmental sustainability and the UK competition and consumer regimes, it does not include any additional guidance, in particular in relation to admission criteria for selective distribution systems.

As noted in the Walpole Response to the CMA, we consider that it would be helpful for the CMA to set out explicitly in its guidance that it is legitimate for brand owners to require

¹ See paragraph 7.18 of the CMA Recommendation.

distributors to meet environmental sustainability related criteria as a condition of admission into a selective distribution system.

In particular, we consider that it would be appropriate for the brand owner to have discretion to set environmental criteria as they see fit, which may in some cases become a matter of negotiation with resellers. We would not think it appropriate for the CMA to dictate in its guidance what specific criteria would be appropriate (e.g. carbon emissions targets). It may be appropriate for manufacturers to reference industry schemes related to ESG criteria in their own criteria. However, they should be able to refer to other criteria as well if they considered that to be appropriate.

Follow-up

We trust this input will assist the CMA in its consideration in relation to the Draft Guidance. We remain at the disposal of the CMA should it have any follow-up questions on any of the points we have raised.

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