

WALPOLE'S DRAFT RESPONSE TO THE PUBLIC QUESTIONNAIRE FOR THE 2018 EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION

INTRODUCTION

1) Organisation Name Walpole (255 characters max)

2) Scope

- National but Walpole's members trade internationally

3) Organisation size

- Large (250 or more)

4) Please describe the main activities of your organisation (1000 characters max)

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.

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

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, lobbying the EU on key policy issues like selective distribution and IP protection, and supporting pan-European business and cultural connections post-Brexit.

Representing suppliers and re-sellers, Walpole hosts at least 50 events each year for its members, bringing the sector together to share ideas, best practice and to make meaningful connections with peers. In the media, it also provides a collective voice for luxury on key topics, commissions industry-leading research and works with government on issues affecting the sector.

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

- Both

7) The 2 digit NACE Rev.2 code referring to the level of "division" that applies to your company/business organisation (see part III, pages 61 – 90 of Eurostat's statistical classification of economic activities in the European Community)

8) The product(s) and/or service(s) provided by your company/business organisation]
(1000 characters max)

N/A

9) Indicate the countries/geographic areas where your main business (es) is (are) located

Walpole's member brands are predominantly UK-based although some are owned by parent companies in Europe, North America and/or Asia. Walpole has a small number of international members headquartered out of France and North America

10) Is your company/business organisation a supplier or buyer of products and/or services, or both?

- Both

11) Please estimate the percentage of your company's annual turnover generated by direct sales to consumers (i.e. sales to final customers who consume the good/service) and by indirect sales (i.e. sales to third party intermediaries, such as distributors and wholesalers):

N/A – members preferred not to share these information and/or said it would have been difficult for them to provide such figures.

12) Please estimate the percentage of your company's annual turnover generated by direct sales through the Internet ("online sales") and by physical sale channels ("offline sales"):

N/A – members preferred not to share these information and/or said it would have been difficult for them to provide such figures.

13) Please estimate what percentage of your company/business organisation's annual turnover generated by online direct sales is generated via third party market places/platforms:

N/A – members preferred not to share these information and/or said it would have been difficult for them to provide such figures.

14) Please describe the relevance of the VBER and the VGL for you:

Walpole members are both suppliers and re-sellers of luxury goods. As participants in commercial distribution systems, the VBER and VGL are of great importance to them. It is important for our members to have confidence that their distribution arrangements are effective and legally compliant. Our members invest a great deal in the brands and require confidence on the enforceability of the legal agreements they rely upon for the sale and distribution of goods. They need to exercise certain controls and maintain certain standards around the presentation of their goods. Equally, they are anxious to ensure that the controls they put in

place are legally compliant and do not infringe competition law. That would not only put at risk the legal effectiveness of their distribution systems but also endanger their reputations as responsible commercial organisations.

These factors mean our members require clear and comprehensive legal guidelines to put in place distribution systems which work, giving them an appropriate level of control while minimising the prospect of unpleasant surprises and the possibility of a challenge to the validity of their distribution agreements.

15) Is your organisation included in the Transparency Register? (255 characters max)

Not currently.

Note: it is not compulsory to be registered to reply to this consultation.

16) Publication privacy settings: the Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or remain anonymous.

- Public – your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

EFFECTIVENESS

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

- **Yes**
- Yes, but they contributed only to a certain extent or only in certain sectors
- They were neutral
- No, they negatively affected market performance
- Do not know

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

On the whole, our members consider that these have contributed to good market performance insofar as they are reasonably clear in terms of what is required in order for a distribution system to be legally compliant. This legal certainty enables members to invest with confidence in creating channels for the sales of their goods.

A concern for a majority of our members is to ensure the preservation of the rules and guidelines concerning selective distribution which, in their view, have contributed to the sale of higher quality products. Without the ability to protect the luxury image of their brands at all levels of the sale chain, there may be a chilling of the incentive to invest in new and innovative, high quality goods. Members also emphasised the desirability of avoiding additional rules and restrictions with a view to safeguarding creativity and innovation.

19) 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)?

- Yes
- No
- Do not know

20) Please explain your reply

We consider on the whole that the level of certainty provided is satisfactory. Elsewhere in our response paper we have noted a number of areas for potential improvement. This includes for example a greater level of certainty of what is meant by “luxury brand”.

21) 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

Table 1:

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) | 3 | 3 |
| ----- | | |
| (1) Vertical agreements generally falling outside the scope of Article 101(1) of the Treaty | | 3 |
| Agreements of minor importance (recitals 8-11 VGL) | | 3 |
| Agency agreements (recitals 12-21 VGL) | | 3 |
| Subcontracting agreements (recital 22 VGL) | | N/A |
| (2) Additional conditions for the exemption of specific vertical agreements (Article 2 VBER) | 3 | 3 |
| Vertical agreements entered into between an association of undertakings and its members (Article 2(2) and Article 8 VBER, and recitals 29-30 VGL) | 3 | 3 |

| | | |
|---|---|---|
| Non-reciprocal vertical agreements between competitors under certain circumstances (Article 2(4) VBER and recitals 27-28 VGL) | 3 | 3 |
| Vertical agreements containing provisions on IPR (Article 2(3) VBER and recitals 31-45 VGL) | 3 | 2 |
| 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) | 3 | 3 |
| Resale price maintenance (Article 4(a) VBER and recitals 48-49 VGL) | 3 | 3 |
| 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 | 3 |
| Online sales restrictions (recitals 52-54 VGL) | | 3 |
| 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) | 3 | 3 |
| Restrictions of cross supplies (Article 4(d) VBER and recital 58 VGL) | 3 | 3 |
| Agreements preventing or restricting the sourcing of spare-parts (Article 4 (e) VBER and recital 59 VGL) | 3 | 3 |
| (4) Excluded restrictions (Article 5 VBER) | 3 | |
| Non-compete obligations with indefinite duration or exceeding 5 years (Article 5(1)(a) VBER and recitals 66-67 VGL) | 3 | 3 |
| 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) | 3 | 3 |
| 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) | 3 | 3 |

| | | |
|---|---|---|
| Severability (recitals 70-71 VGL) | | 3 |
| Conditions for the withdrawal and disapplication of the block exemption (Article 6 VBER and recitals 74-85 VGL) | 3 | 3 |
| ----- | | |
| (5) Enforcement policy in individual cases (Section VI VGL) | | 3 |
| The framework of analysis (recitals 96-127 VGL) | | 3 |
| Analysis of specific vertical restraints (recitals 128-229 VGL) | | 3 |
| Single branding (recitals 129-150 VGL) | | 3 |
| Exclusive distribution (recitals 151-167 VGL) | | 3 |
| Exclusive customer allocation (recitals 168-173 VGL) | | 3 |
| Selective distribution (recitals 174-188 VGL) | | 3 |
| Franchising (recitals 189-191 VGL) | | 3 |
| Exclusive supply (recitals 192-202 VGL) | | 3 |
| Upfront access payment (recitals 203-208 VGL) | | 3 |
| Category management agreements (recitals 209-213 VGL) | | 3 |
| Tying (recitals 214-222 VGL) | | 3 |
| Resale price restrictions (recitals 223-229 VGL) | | 3 |

22) 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 are 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)

Article 4(b)(iii) effectively states suppliers can restrict “sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system.” We think this should be clarified to state that the supplier can also retrain sales outside the territory to unauthorised distributors in *other* territories where the supplier also operates a similar system.

Recitals 31-45 VGL could in our view be updated to codify the rules in relation to trade mark licensing. Currently these are very limited in content. They should be expanded to deal with the grant of non-exclusive trade mark licences to re-sellers and to cover the principles around territorial restrictions around use of trade marks.

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

- Yes
- No
- Do not know

24) Please list the areas for which you consider that the VBER and/or the VGL provide insufficient legal certainty

The VGL are unclear on whether it is possible for a supplier to appoint a “master distributor” within a member state and to assign the responsibility to that master distributor of its self-appointing selective distributors to sell goods at a retail level in the territory. We consider this to be a benign arrangement, but it does not fit well within the VBER. We consider such an arrangement to be logical and therefore in the revision of the VGL it may be possible for the Commission to include some commentary in relation to multi-tiered distribution systems involving a master distributor.

We consider that the VGL could better define what is meant by “channels” and “customer groups”. One of our members has commented that in putting in place a distribution system where distributors were allocated to specific “channels”, these being particular types of customer, they were unsure about how the Commission would apply the concept of “customer groups” for the purpose of allocating exclusivity. This was a concern because they wanted to avoid any suggestion that they were allocating customers unlawfully.

We also consider that the VGL could define what is meant by “luxury goods”.

25) Leaving aside the appropriateness of the scope of the current list of hardcore restrictions (Article 4 VBER) and excluded restrictions (Art 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?

- Yes
- No**
- Do not know

26) Please mark the conditions responsible for the exemption of those vertical agreements by ticking “Yes”. Otherwise, tick “No”:

| | Yes | No |
|---|-----|----|
| Vertical agreements entered into between an association of undertakings and its members (Article 2(2) and Article * VBER, and recitals 29-30 VGL) | | X |
| Non-reciprocal vertical agreements between competitors under certain conditions (Article 2(4) VBER and recitals 27-28 VGL) | | X |
| Vertical agreements containing provisions on IPR (Article 2(3) VBER and recitals 31-45 VGL) | | X |
| Market share threshold for the suppliers (article 3 and Article 7 VBER, and recitals 86-95 VGL) | | X |
| Market share threshold for the buyer (Article 3 and Article 7 VBER, and recitals 86-95 VGL) | | X |

27) Please explain your selection by providing examples and explain how prevalent they are in the industry (1000 characters max)

We do not consider that any additional restrictions need to be added. We generally favour not making the regulation more onerous in order to ensure that innovation and creativity are safeguarded in distribution which will in itself promote efficiencies. Arguably, Article 4 should be slightly liberalised with regard to end customer restrictions in order to allow suppliers to fight grey market sales. We have also proposed a slight clarification of Article 4(

28) 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?

- Yes**
- No
- Do not know

29) Please list those types of agreements and explain your reasons:

Suppliers should be able to limit the number of individual units sold in any one Internet order with a view to restraining mass ordering of products by business customers for the purpose of preventing them a sale of goods on the “grey market“. We consider that the VGL could permit

this practice and provide clarity. This is justified by the need to secure the integrity of authorised distribution systems and to avoid damage to the luxury image of goods.

30) 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) for the Treaty?

- Yes
- No
- Do not know

31) Please select these types of vertical restrictions by ticking “Yes”. Otherwise, please tick “No”.

| | Yes | No |
|---|-----|----|
| Resale price maintenance (Article 4(a) VBER and recitals 48-49 VGL) | | X |
| 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) | | X |
| Online sales restrictions (recitals 52-54 VGL) | X | |
| Restrictions of active or passive sales by members of a selective distribution system (Article 4(c) VBER and recitals 56-57 VGL) | | X |
| Restrictions of cross supplies (Article 4(d) VBER and recital 58 VGL) | | X |
| Agreements preventing or restricting the sourcing of spare-parts (Article 4(e) VBER and recital 59 VGL) | | X |

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

It would be useful for the guidelines to clarify that placing quantity restrictions on individual orders over the internet is defensible in order to restrain goods being subject to counterfeiting or otherwise finding their way onto the grey market. We also consider suppliers should be able to intervene where distributors allow goods to be marketed on comparison websites in a misleading way.

33) 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?

- Yes
- No
- Do not know

34) Please select these types of vertical restrictions by ticking "Yes". Otherwise please tick "No":

| | Yes | No |
|---|-----|----|
| Non-compete obligations with indefinite duration or exceeding 5 years (Article 5(1)(a) VBER and recitals 66-67 VGL) | | X |
| Post term non-compete obligations (Article 5(1)(b) VBER and recital 68 VGL) | | X |
| Restrictions to sell brands of particular competing supplier in a selective distribution system (Article 5(1)(c) VBER and recital 69 VGL) | | X |

35) Please explain your selection by providing examples and explain how prevalent they are in the industry:

On the whole, article 5 does not cause a problem for all members. One of our members commented, however, that it would be helpful for the Commission to include additional guidance in the VGL as to when an exclusive purchase application which exceeds five years is likely to benefit from an individual exemption under article 101(3). For example, it would be useful for the commission to include greater detail on the methodology which reviewing advisors should apply when considering whether the duration is likely to be considered justified.

36) Are there any 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
- No
- Do not know

37) Please list these types of restrictions and explain your reasons:

We do not consider that any additional restrictions need to be added. We generally favour not making the regulation more onerous in order to ensure that innovation and creativity are safeguarded in distribution which will in itself promote efficiencies.

EFFICIENCY

38) 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**
- No
- Do not know

39) 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:

Within the time available, it has not been possible to compile accurate statistics for the costs.

40) Please explain your reply:

N/A

41) 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
- No
- Do not know

42) Please explain your reply:

We have discussed this with question our members. Generally speaking the cost of compliance with the PR is proportionate. Largely, this is incurred in advisors' fees in considering whether an agreement would benefit from an exemption. In many cases, however, these are situations where the advisors would be required to review the agreement anyway. The cost of advisors' fees should be offset against the cost of seeking to enforce distribution agreements in the absence of clear guidelines and a block exemption. We consider the latter would be a greater cost.

43) 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

44) Please explain your reply:

This would be a more complex regime where members would need to consider whether, their agreements would benefit from an individual exemption in light of different judgements from EU and national courts. This would be more cumbersome and generate greater legal uncertainty. Our members frequently do not have confidence that they can conclude with certainty whether or not an agreement will benefit from an individual ~~exemption~~ ^{exemption} as opposed to assessing an agreement in light of the current block exemption. Added uncertainty is also likely to increase litigation between parties to distribution arrangements. Furthermore, there is the possibility of greater divergence in case law between courts of different national jurisdictions.

Our members considered that on the whole the costs generated were proportionate to the benefits the legislation brings in terms of added legal certainty and the ability to protect their

investment. The cost of compliance is likely to be higher for smaller businesses. One member commented that they employ someone to ensure compliance with the VBER and the VGL and noted that such a cost would be prohibitive for a smaller organisation.

45) Please provide an estimate of the possible change in compliance costs (1000 characters)

To provide an estimate, we consider that assessing whether an individual exemption is applicable to a situation is likely to incur advisors costs which are 4 to 5 times the amount of an assessment of whether or not the VBER is applicable to any given agreement. That does not take into account the added litigation costs which may be incurred as a result of the uncertainty brought about by the cessation of the VBER.

46) 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

47) Please explain your reply

N/A

48) Please explain your reply and provide an estimate of the possible change in costs

N/A

RELEVANCE

49) 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, negative for my organisation (in case of business associations, for your members)**
- Yes, positive for the industry
- Yes, negative for the industry
- Yes, positive for consumers
- Yes, negative for consumers
- No
- Do not know

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

Our members feel that while the current regime is working well for them, updates need to be made to the VGL in order to codify the recent case-law of the ECJ in relation to selective distribution. Our members are keen to see the *Coty* judgment reflected in the VGL, as it is important for them to control the sale of goods on third party platform websites where this could damage their brand.

51) 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, positive for my organisation (in case of business associations, for your members)
- Yes, negative for my organisation (in case of business associations, for your members)**
- Yes, positive for the industry
- Yes, negative for the industry
- Yes, positive for consumers
- Yes, negative for consumers
- No
- Do not know

52) Please explain your reply and illustrate with concrete examples

One of the challenges recognised by our members is the divergent approach is sometimes taken by national courts to the application of the rules on distribution in EU competition law. The VBER is set out in very concise terms but needs to be accompanied by guidance for courts and advisors in order to ensure that it is interpreted appropriately, particularly when applied to new and evolving practices such as online selling. Without these guidelines, competing interpretations will be possible and this will lead to uncertainty. Furthermore, if the VG outward to be withdrawn, this will make it harder for advisors to determine whether or not an arrangement may benefit from an individual exemption under Article 101(3) where this does not benefit from the Block Exemption.

53) 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
- No**
- Do not know

54) Please explain your reply:

Whereas updates are needed, we consider the VGL to be the appropriate place for these to be made (see question below).

55) 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**
- No
- Do not know

56) Please explain your reply:

Updates are needed to the VGL in order to cover matters such as sales by re-sellers on third party electronic platforms. To an extent, this entails the codification of case law in relation to this question. The increasing sale of goods on the grey market is a concern for our members. The VGL need to be updated to provide clearer guidance on what suppliers can do to restrain such unauthorised activity. For example, can a supplier have a residual right to restrict active and passive sales to certain customers who are reasonably believed to facilitate grey market sales? Can a supplier require distributors to provide information about its sales activity grey market activity is taking place?

57) Table 2

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 | VGL (64)) | Grey market activity | We would like to see here a recognition that suppliers may have the ability to prevent specific online sales activity where this results in grey market or counterfeiting activity. That may be necessary to preserve brand image and protect product investment. |
| 2 | VGL Recital (186) – (188 | Increase in online selling in selective distribution | This section needs to say more about how the supplier can permissibly control online selling and reflect the Coty judgment in relation to third party platforms. |
| 3 | VGL Recital (230) | Use of price comparison websites in a way that is misleading. | We would like to see here the inclusion of a possibility for suppliers to restrain the use of price comparison websites by distributors where this results in misleading or |

| | | | |
|---|------------------|--|---|
| | | | damaging marketing or at least to take steps to require them to correct such marketing. |
| 4 | VGL Recital (64) | Growth in use of search engine marketing | Recognition here that the use by a distributor of country specific adwords in search engine or online platform (e.g. Facebook) marketing may evidence active selling. |

58) Is there any area for which the VBER and/or VGL currently do not provide any guidance while it would be desirable?

- Yes
- No
- Do not know

59) Please identify the area concerned and explain the reasons

It would be helpful for the VGL to codify the application of EU Competition Law to trademark licence agreements as trademarks are mentioned only tangentially in the VGL. Other types of intellectual property (patents, know-how and software copyright) benefit from greater levels of guidance, for example, in the guidelines accompanying the Technology Transfer Block Exemption. We would also like to see more guidance on when extra-EEA sales restrictions can infringe Article 101(1).

COHERENCE

60) 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)?

- Yes
- No**
- Do not know

61) Please explain your reply:

On the whole, we are not aware of any incoherence.

62) 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**
- No
- Do not know

63) Please explain your reply:

In light of the pending departure of the UK from the European Union, our members consider that the Commission and UK Competition and Markets Authority should seek to apply a harmonised legal regime with regard to the rules on distribution. This is to ensure that businesses are not required to roll out distribution systems which satisfy two different sets of rules. That would be inefficient and create uncertainty.

EU ADDED VALUE

64) 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

66) Please explain your reply

Part of the value of the VBER and VGL is that they codify comprehensively and in one place the principles which are applicable to an assessment of distribution systems. Whilst there is value in, for example, the decision practice of the EU Commission, it is necessary to find the most appropriate decisions and consider the extent to which the findings of the Commission were specific to the facts of the case. Likewise, we would have a concern in relying to a greater extent on decisions of national courts because they have in certain cases adopted competing interpretations of the rules on Article 101 (for example with regard to restraining sales on third party platforms).

FINAL COMMENTS

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

We emphasise the importance of the rules on selective distribution reminding that these are not only important to allow brand owners to create legal relationships allowing them to control the manner in which their goods are sold, but also to protect the interests of those retailers who make the necessary investments to preserve the image of the luxury goods in the manner instructed by the brand owner. Without the ability for suppliers to enforce the rules of the

selective distribution system, appointed distributors would suffer from the free rider problem (particularly with regard to online sales) and would be dis-incentivised to make the necessary investments to preserve high quality retail environments to the benefit of consumers. We outlined how the grey market is a real problem and our members wish for the Commission to do more to allow brand owners to restrain grey market sales where these degrade brand image. We would also encourage infringement actions against member states where incorrect interpretations are made by national courts as this damages legal certainty.

