

FEEDBACK ON THE COMMISSION'S DRAFT REVISED VERTICAL BLOCK EXEMPTION REGULATION AND ACCOMPANYING GUIDELINES

1. INTRODUCTION AND BACKGROUND

Founded in 1973, the *Fédération de la Haute Couture et de la Mode* (FHCM – hereinafter, the “**Fédération**”) represents over a hundred French and international brands and is the voice of the creative and luxury fashion industry.

Members of the Fédération are particularly impacted by rules of the Vertical Block Exemption Regulation (“**VBER**”) and the accompanying Guidelines on Vertical Restraints (“**VGL**”) as they heavily rely on vertical agreements for the distribution of products across Europe. The Fédération has been significantly involved in the ongoing review process of these rules conducted by the European Commission (“**Commission**”):

- In April 2019, the Fédération contributed to the Commission’s first public consultation on the review of the VBER and the VGL.
- In November 2020, the Fédération submitted input on the Commission’s inception impact assessment.
- In March 2021, the Fédération submitted its contribution to the second public consultation on the review of the VBER and the VGL.

On 9 July 2021, the Commission published drafts of the revised VBER and VGL (“**Draft Revision**”), which is now open for comments until 17 September 2021. The Fédération wishes to thank the Commission for ensuring, through this exercise, that the voice of stakeholders (including the luxury and fashion industry) is heard. The objective of this position paper is to provide the Fédération’s considerations on the Commission’s Draft Revision, focused on the issues that are key to the European luxury and fashion industry.

2. FEEDBACK ON THE DRAFT REVISION

2.1 DUAL DISTRIBUTION

The Fédération considers that the current rules on dual distribution already ensure efficiency for the benefit of brands and consumers and no change would be required. In particular, the Fédération considers that dual distribution should be encouraged not curbed, because it has the effect of significantly increasing both inter-brand (multi-brand stores) and intra-brand competition (more sources for consumers). It constitutes an efficient way of maximizing the availability of

products and high quality services, all to the benefit of consumers. With dual distribution, consumers enjoy additional choices, as well as a more varied customer experience, with particular emphasis on elements such as quality of service, contents and assortments.

The Fédération notes that the vast majority of (if not all) of its members has engaged in some form of dual distribution for decades without any concerns being raised. As mentioned above, selling directly to consumers and, in parallel, resorting to exclusive or selective distribution allows brands to maximise the availability of their products while ensuring that retail sales from customers are in line with the brand image and the expected shopping experience.

As already developed in its contribution to the second public consultation on the review of the VBER and the VGL, in the Fédération's view, the growth of online sales should not call into question the exemption granted to dual distribution.

Since the end of 2018, stakeholders have been given a number of opportunities to provide their opinion in the revision process of the VBER and VGL. However, the alleged issue of dual distribution was first mentioned during the final public consultation of the impact assessment phase. In that respect, the Summary Report of the Commission's final public consultation reveals that only 22% of the respondents considered that there was a need to change the dual distribution rules.

In general, the Fédération considers that the introduction of the provisions proposed by the Commission would be negative. In particular:

- the inclusion of a 10% market share threshold in the VBER has very limited utility and appears redundant bearing in mind the existing provisions of the *De Minimis* Notice. In addition, the combination of the various market share thresholds in Articles 2 (based on market share at the retail level) and 3 (based on market share at the supply level) of the Draft VBER risks creating confusion and bringing legal uncertainty. This goes against the core principle of the VBER and the VGL, which is to give companies security and legal certainty through the safe harbour of Article 3 of the VBER. Also, it is worth noting that calculating and discussing market share with sales partners could result in information exchange. The Fédération suggests that, if the Commission considers that concerns arise from the suppliers' dual distribution, then the Commission should only look at a supplier's market share at the retail level, regardless of the retailer's market share.
- The Fédération notes that, to the best of its knowledge, dual distribution has not created specific antitrust concerns at the European level, when it comes to exchange of information. As indicated above, the Commission has not provided evidence of actual issues stemming from exchange of information in the context of dual distribution. To the extent that such potential concerns may exist, instead of excluding information exchanges

between the parties to the vertical agreement from the safe harbour, the VGL should provide concrete guidance with that regard. Additional conditions with respect to dual distribution introduce unnecessary and unwanted complexity. This would be extremely burdensome in terms of cost (related to legal advice) and would remove the current legal certainty offered by the VBER as well as offset the benefits of the additional flexibility granted to brands in the Draft Revision. While the Commission's guidelines on horizontal co-operation agreements ("**Horizontal Guidelines**") do provide helpful guidance on information exchange, they are not adapted to the context of dual distribution. Indeed, the Horizontal Guidelines cover situations where competing companies sell different products while dual distribution covers situations where companies sell the same product. This difference is significant as, in the context of dual distribution, companies find a common interest in selling the maximum of a specific product.

- The VGL should provide further guidance specific to dual distribution situations. If the Commission considers that there might be exceptional circumstances pursuant to which information exchanges would not be permitted in the context of a supplier/distributor relationship, then the Commission should identify such types of exchanges on the basis of a "black list". Indeed, in order to provide a genuine omnichannel experience, certain information on products and sales (aggregated or anonymised) may need to be shared between partners. As an illustration, in the context of selective distribution, the exchange of certain past data between a supplier and its retailer may help them identifying grey market players such as organized buying rings (entities or individuals), pretending to act as consumers and which make repetitive purchases (to the detriment of genuine consumers) from authorized points of sales or websites for the sole purpose of reselling the products outside selective distribution networks.
- Brands should not be disincentivised from selling directly to consumers, or being forced to erect rigid and artificial barriers with other sales partners. The introduction of confusing and complicated market share thresholds will ultimately result in less dual distribution, rather than less horizontal concerns, to the detriment of consumers. As indicated above, the Commission should instead provide guidance in the VGL on exchanges of information specific to dual distribution situations.

2.2 SELECTIVE DISTRIBUTION SYSTEMS

Rules on selective distribution are a key tool for the Fédération's members. They ensure that products are sold and distributed in a consistently high-quality manner, that suppliers have the necessary tools to protect their brands and goodwill, and that customers benefit from the personalized and luxury retail experience they expect. The Fédération welcomes the steps taken

vis-à-vis selective distribution at large. The Fédération notably welcomes the clarification that selective distribution may be appropriate for any high quality products. The Fédération also welcomes the inclusion in Article 4(c) of the Draft VBER of enhanced protection for brands from sales by unauthorised distributors located within the selective distribution territory.

The Fédération's members note that national specificities often require brands to segment their distribution systems at national level. In this context, the Fédération welcomes the clarification provided in the Draft Revision on the possibility to combine selective distribution in one territory with other forms of distribution in other territories.

Having said that, the Fédération considers that the Commission could have gone further in order to ensure effective implementation of selective distribution systems. In particular:

- the Fédération would have welcomed more clarity regarding the extent to which it is possible to combine selective and exclusive distribution within one territory. Brands often rely on the use of exclusive and selective distribution models at different levels of the distribution chain, which constitutes a very efficient way of putting certain types of goods on the market. With respect to luxury products, using exclusive distribution at the wholesale level allows brands to rely on a key wholesale partner with experience and connections to grow a network of resellers by establishing relationships with quality retailers. This also ensures a streamline and efficient logistic process. At the retail level, selective distribution is a common model, as it ensures the protection of the luxury and high quality nature of the products and allows brands to offer a high level of sales environment and services. This combination ensures a broader dissemination of tailored consumer experience and access to high quality products, to the benefit of consumer welfare. Considering this, the Fédération would welcome further clarity with respect to the extent and types of restrictions brands can impose on their partners to ensure an effective combination of exclusivity and selectivity in the same territory.
- The Fédération would also have welcomed the introduction of a mechanism at an EU-level giving brands the proper means and tools to enforce selective distribution rights against unauthorized distributors (with whom brands obviously do not have direct contractual relationships and hence no direct rights to enforce) notwithstanding if they are located inside or outside the selective distribution territory. In terms of enforcement, the Fédération is wondering how its members could implement the above-mentioned update of Article 4(c) of the VBER before national and EU courts and would welcome any corresponding clarification in the VGL.
- In France, Article L 442-2 of the French Commercial Code provides a mechanism to allow brands to enforce their selective distribution systems *vis-à-vis* third parties. This constitutes

a very effective tool to prevent unauthorized sales. Considering that brands sell all around the EU, a similar EU-wide tool is very much needed. This is crucial in the context of operating a legitimate selective distribution system which requires to be enforced uniformly and objectively - otherwise, the protections and benefits offered to authorised partners become mere theoretical promises.

- In the Coty judgment, the CJEU pointed out that: *“the absence of a contractual relationship between the supplier and third-party platforms is (...) an obstacle which prevents that supplier from being able to require, from those third-party platforms, compliance with the quality conditions that it has imposed on its authorized distributors”* and highlighted a corresponding *“risk of deterioration of the online presentation of those goods which is liable to harm their luxury image and thus their very character”*. Such reasoning is simply to be transposed to any unauthorized distribution channels.
- If the Commission considers that the VBER is not the right vehicle for the implementation of this enforcement tool, then it should at least highlight officially its crucial importance for suppliers and authorized selective distributors in the EU and call for the creation of a dedicated regulation dealing, for instance, with unfair commercial practices between businesses.

2.3 APPROACH TO ONLINE SALES

The Commission has recognized that the internet has developed into a well-functioning sales channel, whereas physical stores are facing increasing pressure. The Fédération also considers that online sales no longer need the same level of protection as was required in the past. In this context, the Fédération appreciates the Commission’s efforts to rebalance the legal framework between online and offline sales, as well as to consolidate the Coty ruling.

The Fédération welcomes the clarity provided by the Draft Revision around “active” and “passive” selling in the online context, notably through the definitions provided in Article 1(l) to (n) of the Draft VBER. Online selling has changed significantly since the VGL came into force and the categorisation of online selling as a form of passive sale is no longer appropriate or reflective of the way markets operate currently.

The Fédération also welcomes that dual pricing is no longer considered as a hardcore restriction. Dual pricing is an effective tool to compensate/reward higher investments incurred in physical shops in comparison to online shops, and is also capable of helping physical shops to address issues such as those that were brought by the COVID-19 crisis. In the same vein, the Fédération welcomes the recognition that imposing different criteria on online and offline dealers (to adapt to the specificities of each sales channel) is not considered a hardcore restriction. These two

recognitions would facilitate the possibility for brands to offer a genuine omnichannel experience to consumers, combining the advantages of the online channel and the offline channel. In general, the Fédération considers that any online sales restrictions which do not result in an outright online sales ban should not be considered a hardcore restriction.

Having said that, the Fédération invites the Commission to reconsider certain issues, which are crucial for suppliers to be able to offer consumers a genuine omnichannel experience and to ensure brand protection. In particular:

- the Fédération encourages better coordination and supervision to ensure a more uniform interpretation of online distribution rules. Member States enforce EU competition rules at national level in a different manner depending on the actual impact of online sales in the country. Brands selling all around the EU must deal with the resulting disparity, which translates into significant costs. In that respect, the Commission should use the European Competition Network (“**ECN**”) to engage with Member States with a view to ensuring that there is uniformity in interpretation and application of the rules.
- The Fédération would welcome guidance with respect to the last sentence in recital 13 of the Draft VBER, to clarify when online sales restrictions can in practice be exempted. This could be achieved through the inclusion of practical guidance in the VGL, as it is provided for instance for resale price maintenance (“**RPM**”).
- The Fédération understands the need to regulate the platform economy, which has taken a significant role. However, the assumption that providers of online intermediation services are *de facto* suppliers appears to be too rigid and restrictive. The Fédération considers that providers of online intermediation services should be considered suppliers only if/when they produce and sell products on their platform in competition with their suppliers, regardless of whether they do so in their own name or not. In addition, the Fédération considers that the “in competition” relationship set out in Article 2(7) of the Draft VBER should be limited to competition between providers of online intermediation services and their customers at supply level. If competition is determined at retail level, it would be impossible for providers of online intermediation services to sell any products, since they would always be selling products which are in competition with their suppliers. More broadly, the distinction between the definitions: (i) of online intermediation services providers (notably in Article 2(7) of the Draft VBER); and (ii) online marketplaces (in paragraph 313 of the Draft VGL) is unclear and creates a great deal of confusion for stakeholders. The definition of providers of online intermediation services shall therefore be urgently clarified and narrowed down.

2.4 BANS OF SALES VIA ONLINE MARKETPLACES

The Fédération welcomes the reflection of the *Coty* ruling where the Draft Revision provides that a marketplace ban shall be outside the scope of Article 101 of the TFEU if it meets the requirements laid down in the *Metro* ruling. The Fédération welcomes that the Draft Revision provides that a marketplace ban shall be exempted if it meets certain criteria (e.g., the market shares of each of the supplier and the buyer do not exceed 30%, other online channels remain available, etc.).

However, the Fédération encourages the Commission to reconsider its views on quality-related justifications which could be brought forward by a supplier in the context of applying Article 101 (3) of the TFEU. The examples provided by the Commission on individual exemption *vis-à-vis* online marketplace bans (e.g., paragraph 322 of the Draft VGL) shall not be exhaustive nor peremptory. A supplier should, for instance, be able to implement marketplace bans even if: (i) it itself uses the online marketplaces in question (for instance, in exclusive/highly qualitative partnership); or if (ii) it authorises the operator of the online marketplace as an authorised member of its selective distribution system *via*, for instance, the creation of a separate selective distribution system for marketplaces involving dedicated high end qualitative criteria (without any obstacle in terms of cross supplies between such networks). The Commission needs to keep in mind that the protection of the aura of a luxury brand is a constant challenge in the permanently evolving digital landscape. An individual qualitative assessment shall be undergone to ensure fulfilment with requirements of appropriateness and necessity.

The Fédération also welcomes the consolidation of the Commission's suggestion, set out in the Policy Brief of April 2018, that marketplace bans are allowed even outside the luxury sector and a selective distribution system if they do not lead to a total ban of online sales. This is in line with recent case law and decisional practice in France. Indeed, in the *Stihl* case, the French competition authority, confirmed by the Paris Court of Appeal, applied the *Coty* ruling to the sales of garden products such as chainsaws and brushcutters. The authority also recognised the applicability of marketplace bans outside a selective distribution system in the *Dammann Frères* case.

However, the Fédération considers that steps need to be taken to ensure that there is no divergence in approach/interpretation of the *Coty* ruling and, more broadly, on the new rules set out in the VBER and the VGL regarding marketplace bans, between Member States. For example:

- Germany has traditionally taken a more restrictive stance in that regard. After the publication of the *Coty* ruling, the German Federal Court of Justice ruled in the *Asics* case that marketplace bans are limited to luxury products.
- This diverging approach risks creating artificial legal barriers within the EU single market. As suggested above, the Commission should make use of the ECN to address this issue.

2.5 AdWORDS RESTRICTIONS

The Fédération welcomes the guidance concerning the *Guess* decision provided in the Draft VGL. However, the Fédération considers this approach too conservative, considering that certain National Competition Authorities have taken a more flexible approach when restrictions of online search advertising regarding brand-related keywords are justified by the objective of ensuring the protection of brand image. The Fédération also considers that the *Guess* decision should be interpreted in the context of combined illicit conducts which do not reflect the efficiencies generated by online search advertising restrictions when they are objectively justified. Furthermore, the Fédération regrets that the Commission did not address potential harms related to a 'bidding effect' caused by the purchase of keywords by the brand owner and its authorized resellers as well as how unauthorized resellers may free-ride by purchasing brand-related keywords.

2.6 RPM

The Fédération welcomes the Commission's greater willingness to accept potential pro-competitive effects arising from RPM (as set out in para. 182 of the Draft VGL), notably with respect to new products.

The Fédération also welcomes the practical guidance provided on the possibility of exemption in the case of maximum or recommended RPM above the 30% threshold.

The recognition that the use of algorithms/price monitoring software is not problematic, in and of itself, is also greatly appreciated. These are useful tools that help businesses react competitively and swiftly to price changes, assist consumers in finding competitive prices and help brands to understand market trends.

Having said that, the Fédération would have welcomed more guidance from the Commission with respect to:

- the assessment of RPM in the context of selective distribution networks (i.e., for products that require a high-level retail service as well as for products perceived by consumers *via* their allure and prestigious image which bestow on them an aura of luxury).
- The relationship between RPM and seasonal products or products that do not yet have an established market value associated. The Fédération understands that the use of RPM for seasonal products or products that do not yet have an established market value associated with them is covered by para. 182 of the Draft VGL. However, the Fédération would have appreciated that the VGL specifically mentions such cases.

- The Fédération would have also welcomed clarification on what is meant by “experience or complex products” (para. 182(c) of the Draft VGL).

2.7 “GENUINE” AGENCY

The Fédération welcomes the Commission’s clarifications concerning the definition of genuine agency, as well as practical examples based on specific situations. In particular, it has now been clarified that a brief temporary passing of title will not in itself preclude the existence of genuine agency if the partner is otherwise not taking on certain risks.

Having said that, the Fédération suggests that it should be made clearer that, where the VGL criteria for genuine agency are met, the profile, type, or business model of the genuine agent should not play any role. This is relevant in relation to providers of online intermediation services. In particular:

- as mentioned above, the assumption that providers of online intermediation services are *de facto* suppliers and as such cannot qualify as genuine agents does not appear to be in line with the principle that the genuine agency criteria must be assessed *in concreto*. As indicated above, the Fédération considers that providers of online intermediation services should be considered suppliers only if/when they produce and sell products on their platform in competition with their suppliers. Otherwise, providers of online intermediation services could qualify as genuine agents if they meet the relevant criteria. The Fédération believes that the approach taken by the Commission is too restrictive and would simply deprive suppliers and distributors in the EU from concluding partnerships with online players other than on a purchase-resale relationship basis. Not only would it create additional risks of free riding on “traditional” retailers, but this would also deprive consumers from innovative/complementary customer experiences online.
- In the same vein, the Commission should clarify that an undertaking (e.g., a department store operating its own website) can sell online as a genuine agent on behalf of a supplier (itself acting as a principal) without being categorized as an online intermediation service. In other words, the status of online intermediation service does not affect the possibility for an undertaking to carry out online sales in its own name but on behalf of a supplier.
- The Commission should also reconsider its views on distributors that also act as agents for certain products for the same supplier. If all the costs/risks behind agency must be borne by the principal, it shall be understood that agency, which often involves enhanced services and the ultimate expression of brand owners, requires more investment at large than independent distribution (more staff, higher capex, etc.). In certain situations, stakeholders may therefore need time and flexibility to gradually convert their business

models to their best interest without this being regarded as a misuse of the agency concept. In this scenario, a distributor would therefore need to act for a limited period of time as an agent in a city and as a distributor in another with complete separation of such activities. Individual assessments are therefore more than welcomed on this matter.

2.8 FRANCHISING

Franchising is an efficient way for brands to ensure the high quality sales environment that customers expect when purchasing luxury and fashion products. In this context, the Fédération welcomes the clarifications provided by the Draft Revision with respect to franchising. In particular, the new provisions recall that franchise agreements must be analysed in light of the rules applicable to the distribution system most closely resembling them (e.g., selective distribution). This provides legal certainty for brands. In addition, the Commission highlighted the specificities of franchising falling outside Article 101 of the TFEU on the transfer of know-how and non-compete clauses exceeding five years.

However, in order to ensure a seamless omnichannel experience, the Fédération calls for clarity on what franchisors are entitled to do to protect their franchisees (and the franchisees' high upfront investments) from other players. In particular:

- the Fédération would welcome the inclusion of practical examples in the VGL on the restrictions that franchisors should be allowed to implement in territories/channels where their franchisees are active.

2.9 TACITLY RENEWABLE NON-COMPETE OBLIGATIONS

The Fédération considers that, absent market power, non-compete obligations exceeding 5 years are not problematic. The current limitation is subjective and does not account for the brands' need to protect their products, investments and know-how for longer periods. Accordingly, the Fédération welcomes the clarification provided by the Commission that a non-compete obligation which is tacitly renewable beyond five years will benefit from the safe harbour.

2.10 IMPLEMENTATION OF DECISIONAL PRACTICE AND CASE LAW AT THE NATIONAL LEVEL

As mentioned above, brands sell all around the EU. The fundamental principle of uniform application of EU law ensures the legal certainty brands need when they operate a distribution system that applies throughout the EU.



However, past decisional practice (notably with respect to marketplace bans and parity obligations) showed that, if each Member State implements/interprets decisional practice differently, this results in higher legal costs for brands and higher uncertainty. In that regard, the Commission ought to safeguard the uniform and coherent implementation of the distribution rules across the EU. This could be achieved by taking a more active monitoring role in the context of the ECN. This would ensure an actual level playing field in the EU, as well as allow brands to offer a seamless omnichannel experience.

The Fédération stands ready to continue the open dialogue with the Commission and to further discuss these or any other issues, and to assist the Commission with any additional information or clarification it might require in the ongoing review of the VBER and the VGL.