17 September 2021

Fédération Française de la Parfumerie Sélective (FFPS)

Comments on the proposed revised Vertical Block Exemption Regulation and Vertical Guidelines dated 9 July 2021

(1) The FFPS represents the entire business of selective distribution of luxury perfumes and cosmetics in France, which includes national retail chains (Sephora, Nocibé, Marionnaud), department stores (le Bon Marché, les Galeries Lafayette, le Printemps, le BHV), franchise groups and networks (Beauty Success, Passion Beauté, Une Heure Pour Soi) as well as independents. The FFPS represents around 2,570 stores to which must be added authorized retailers' online shops. Taken as a whole, these various distributors record annual sales of nearly 2.9 million euros and directly employ over 17,700 people.

(2) A large number of the FFPS members are active in the luxury cosmetics and perfumery sector where the competitive landscape is regularly evolving on the basis of new product developments and marketing initiatives launched by suppliers, even if some brands are more iconic than others.

(3) On 9 July 2021, following a comprehensive consultation process initiated in 2019, the European Commission published its proposals for a revised Vertical Block Exemption Regulation ("Draft VBER") and revised Vertical Guidelines ("Draft VGL"), due to replace the existing VBER and VGL which expire on 31 May 2022.

(4) The FFPS actively participated in the successive steps of the consultation and submitted contributions and responses to the questionnaires of the Commission. The FFPS also participated in the stakeholders workshop that was held in November 2019.

(5) In these contributions, the FFPS has sustained that it was key to maintain and extend the present VBER and VGL in order to ensure the level of legal certainty necessary for its members to continue delivering the services consumers are asking for, and distribute luxury cosmetics and perfumes under appropriate conditions.

(6) Luxury perfumes and cosmetics retailers indeed need to invest each year very significant amounts in the physical network which provide customers with services and a customer experience they cannot find online – therefore it is crucial that the protection of the brick and mortar environment is further strengthened in the Draft VGL (1).

(7) In this context, the FFPS welcomes the proposals made by the Commission to maintain and improve the conditions for the exemption of selective distribution agreements and respectfully submits additional amendments to better address the need to ensure a fair contribution of selective distributors to the costs of the physical network (2).

(8) The FFPS also provides comments below on the proposed rules relating to dual distribution, the equivalence principle and dual pricing, which in essence are similarly guided by the need to ensure sufficient legal certainty (3).

1. INVESTMENTS MADE BY PERFUME RETAILERS IN PHYSICAL SHOPS ARE ESSENTIAL TO MEET CUSTOMER NEEDS AND ENSURE ADAPTED DISTRIBUTION CONDITIONS

(9) Selective distribution enables perfume retailers to ensure compliance with very high and consistent standards governing physical and online points of sale and in order to support the luxury image which forms part of the essential characteristics of these luxury products. The proper application of the quality criteria (notably concerning the point of sale environment, product presentation, advisory and demonstration services, the possibility to see touch and test the products) requires significant and regular investments by retailers.

(10) In the frame of the launch of a professional certification of beauty consultant, the FFPS has commissioned an independent customer survey which has also revealed that physical points of sale are essential to fully address customer needs (1.1.).

(11) Each year, luxury cosmetics and perfumes retailers are indeed making highly significant investments in their physical points of sale in order to offer the level of service expected by consumers (1.2.).

(12) If they fully exploit the benefit of omni-channel strategies (1.3.) their exposure to free riding is very significant as directly evidenced by this 4 year customer survey (1.4.).

1.1 Physical points of sale are essential to fully address customer needs

(13) **While online sales of luxury perfumes and cosmetics continue to grow over the years in France, they nevertheless remain relatively low compared to other sector: in 2020, even with the Covid lockdowns, online sales in France only accounted for 16.3% of total sales** (with some products representing even less, such as perfumes with only 13 % of online sales)[1].

(14) If the Covid-19 related lockdowns have temporarily entailed an increase in the share of online sales of (online sales of prestige beauty products doubled in 2020[2]), this increase was not sufficient to offset the decrease in offline sales: the total market decreased by 20% in 2020.

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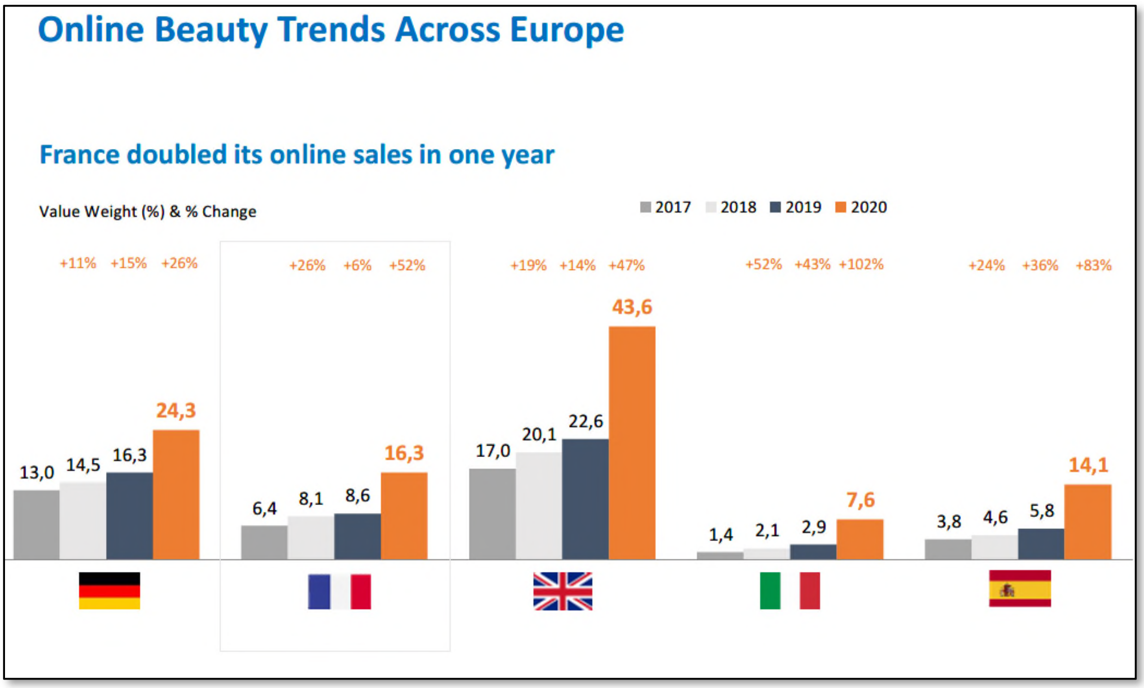
[1] NPD, "the changing face of prestige beauty" February, 2021 : https://www.npdgroup.fr/wps/portal/npd/fr/actu/communiques-de-presse/le-nouveau-visage-de-la-beaute-prestige/.

[2] Ibid.



(15) Indeed, as soon as physical stores reopened, consumers were back in physical shops to a significant extent and online sales declined again almost to their 2019 level. The share of online sales right after the two lockdowns reduced to 12.2-12.9%, i.e. almost down to the level of 2019 (8.6% in 2019)[3].

- Covid lockdown periods in France

17.03.2020 – 11.05.2020

20.10.2020 – 28.11.2020 *in between: gauge, curfew, closure of larger galleries*

14.03.2021 – 11.05.2021

11.05.2020 : shops reopen

28.11.2020 : shops reopen

Total Online	2019 (total)	2020 (total)
Sales (Value)	€ 260.564.880	€ 395.496.256
Share of total sales	**8,6%**	**16,3%**

September 2020 (month)	January 2021 (month)
€ 25.700.115	€ 19.818.137
12,2%	**12,9%**

3 NPD, Evolution of the selective market (perfumes+ beauty products+ make up) in France by distribution channels, December 2020; NPD, “the changing face of prestige beauty” February, 2021 : https://www.npdgroup.fr/wps/portal/npd/fr/actu/communiques-de-presse/le-nouveau-visage-de-la-beaute-prestige/.

(16) This did not come as a surprise to FFPS members and fully confirms the results of the consumer survey conducted by an independent provider at the request of the FFPS in the frame of its certification process (see (27) below).

(17) **Year after year, this customer survey shows that luxury cosmetic products still very much require client support in physical stores even if significant investments have been made to develop and improve the customer experience online**[4].

(18) The survey shows that consumers look for the possibility to see and test the products and for advice/services offered in physical stores, whereas online purchases are still mainly motivated by prices (although to a decreasing extent) and the possibility to purchase at convenience.

(19) The information consumers are interested in differs based on the distribution channel and trends are impressively stable between 2018 and 2021: consumers visit stores mainly to test products (36% for beauty products in general in 2021) and to make the most of advice (35% for beauty products in 2021), whereas internet and applications are mainly used to get interesting prices (54 %, + 2 points since 2018).

(20) Indeed, customers constantly explained that information about products and advice, and more largely the shopping experience they expect, are <u>still better found in physical shops</u>.

ifop Reasons for purchase of beauty products via the channel - EVOLUTION

Purchase their beauty products...

- EVOLUTION

	In stores				On the Internet/App with delivery to pick up point or home				On the Internet with delivery to store			
	2016	2018	2020	2021	2016	2018	2020	2021	2016	2018	2020	2021
100%=	806	795	749	707	557	531	604	574	290	283	324	296
I can see the products	58%	↗63%	↘56%	57%	6%	6%	9%	9%	8%	9%	10%	7%
I can test the products	41%	44%	40%	36%	NE	NE	NE	NE	4%	↗8%	6%	7%
I can make the most of advice/services/events	**34%**	**↗43%**	**↘37%**	35%	**10%**	**7%**	**↗11%**	9%	**15%**	**13%**	**17%**	14%
Advice / services is available	**33%**	**↗41%**	**↘36%**	34%	**10%**	**6%**	**9%**	8%	**14%**	**10%**	**15%**	12%
I can obtain expert advice	20%	↗27%	↘22%	18%	6%	4%	5%	4%	6%	5%	9%	↘4%
I can obtain advice on how to apply / use the products	21%	↗26%	23%	22%	4%	4%	5%	5%	5%	6%	10%	7%
I can make the most of services (makeup, application of varnish, eyebrow plucking...)	5%	↗9%	7%	6%	NE	NE	NE	NE	4%	3%	2%	3%
There are often events	2%	3%	3%	2%	2%	2%	3%	2%	3%	4%	3%	3%
I can purchase when I want	36%	38%	38%	36%	39%	↗47%	42%	43%	26%	32%	28%	3%
I can find special offers	32%	34%	33%	34%	44%	47%	42%	44%	28%	28%	26%	↗34%
It is near my home	30%	33%	↘26%	↗34%	NE	NE	NE	NE	26%	24%	22%	27%
Easy access	27%	31%	28%	31%	30%	33%	32%	36%	17%	↗31%	26%	24%
There is a big choice of products	28%	29%	28%	26%	28%	26%	26%	26%	17%	18%	21%	↘13%
Prices are interesting	16%	17%	18%	↗25%	50%	↗60%	↘49%	54%	36%	38%	32%	32%
I can immediately check whether products I have ordered meet my needs	NE	NE	NE	NE	NE	NE	NE	NE	19%	17%	21%	↘15%
Other reasons	2%	2%	1%	1%	2%	2%	3%	5%	2%	2%	2%	3%

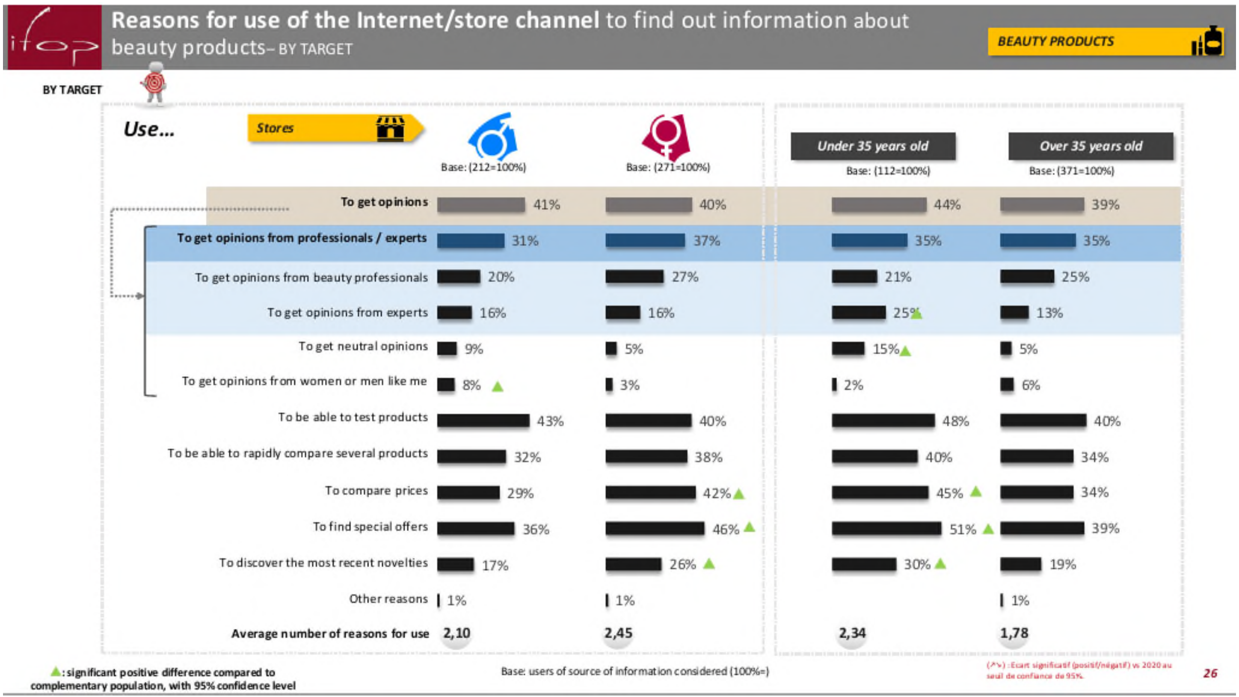
(↗↘): Significant (positive, negative) evolution vs the previous point in 2020, with 95% confidence level

NSt.: not studied

(21) The reasons to purchase of perfumes and cosmetics products also vary depending on the distribution channel but the survey results show that <u>consumers continue to be looking for the possibility to see the products</u> (57% of those surveyed in 2021) <u>test the products</u> (40 %) <u>and enjoy advice/services offered in physical stores</u> (35%), whereas online purchase are mainly motivated by prices (54%).

4 IFOP, study carried out in February 2021, "Identification of points of contact and purchasing channels for beauty products.

(22) The 2021 survey results also illustrate that young people (under 35 years of age), as in previous years, consider services and professional advice available in physical stores as a determining factor when choosing to purchase in store. For this population category, the main reasons for purchasing beauty products in store are related to the ability to test products, to benefit from the advice of experts, services (make-up, nail polish application, hair removal, etc.) and to take advantage of promotional activities.



(23) **All these elements converge to show that physical points of sale provide services and a purchasing experience that meet consumer needs which online shops are unable to provide**.

1.2 Every year, physical shops require significant investments by retailers

(24) As a consequence of the strategic importance of physical shops, luxury cosmetics and perfumes retailers are making highly significant investments in their physical points of sale each year in order to offer the services expected by consumers and to implement distribution conditions that are in line with the prestigious image of these luxury products.

(25) In 2018, these investments amounted to over € 600 million of annual investments dedicated solely to their physical points of sale[5]. Perfume retailers thus reinvest 25 % of total sales in France. The amount and proportion have not significantly varied since then.

(26) These investments are connected to the premises themselves but also include the salaries of numerous employees and training costs.

[5] The FFPS has prepared a questionnaire addressed to its members to estimate the volume of annual investment in works carried out at the point of sale, rents paid for points of sale, payroll and training costs at points of sale. The figures above correspond to the 2018 data provided by those members that submitted a response to an independent consultant, which then aggregated this data and produced a total figure for all declared investment.

Investment item	Annual spend (in euros)
Work and refurbishment and maintenance expenses for new and existing points of sale	60 million
Points of sale leasing	175 million
Salaries paid to point of sale personnel	400 million
Training provided to sales consultants	15 million
Total investments made to ensure compliance with selective criteria	**600 million**

(27) The in-shop services are so significant to address customer needs and develop sales that FFPS members have decided to invest additional time and efforts to develop a certified training program for Selective Perfumery Beauty Consultants.

(28) In the framework of this certification process, the FFPS has organized a consumer survey on 4 successive years (2016, 2018, 2020 and 2021)[6] in order to identify and keep up to date the standard skills which need to be acquired to work in the selective perfumery retail sector to meet customer expectations as accurately as possible.

(29) The results of the survey have been used to tailor training sessions leading to certification as Selective Perfumery Beauty Consultant (greeting customers, customer relations, products and services knowledge, marketing strategy, team spirit and brand ethos, selective distribution concept, digital and online selling) validated by the French National Register of Professional Certifications has been filed (*Répertoire National des Certifications Professionnelles*).

(30) In 2020, notwithstanding the Covid-19 outbreak, a number of employees have already been through the training session and passed the qualification test.

1.3 Perfumes retailers fully exploit the benefits of omni channel strategies

(31) If physical shops are key to address customer needs, a number of FFPS members have been particularly active developing online services. For a long time now, perfumes retailers have been developing omni channel strategies, addressing the online demand from consumers while at the same time guaranteeing the luxury image of these products, in line with the quality criteria of the different brands applying selective distribution systems.

(32) E-commerce investments however bear no comparison with those made in physical shops and, while it is difficult to put forward an annual figure for the corresponding costs given the non-linear nature of these investments (which rise sharply when tools are launched/re-launched/upgraded), publicly-available data shows that the same level of sales can be achieved online at a much lower cost. In particular, employee costs are 2 to 5 times lower online compared with traditional retail channels[7].

[6] IFOP, studies carried out in April 2016 and March 2018, "Identification of points of contact and purchasing channels for beauty products.

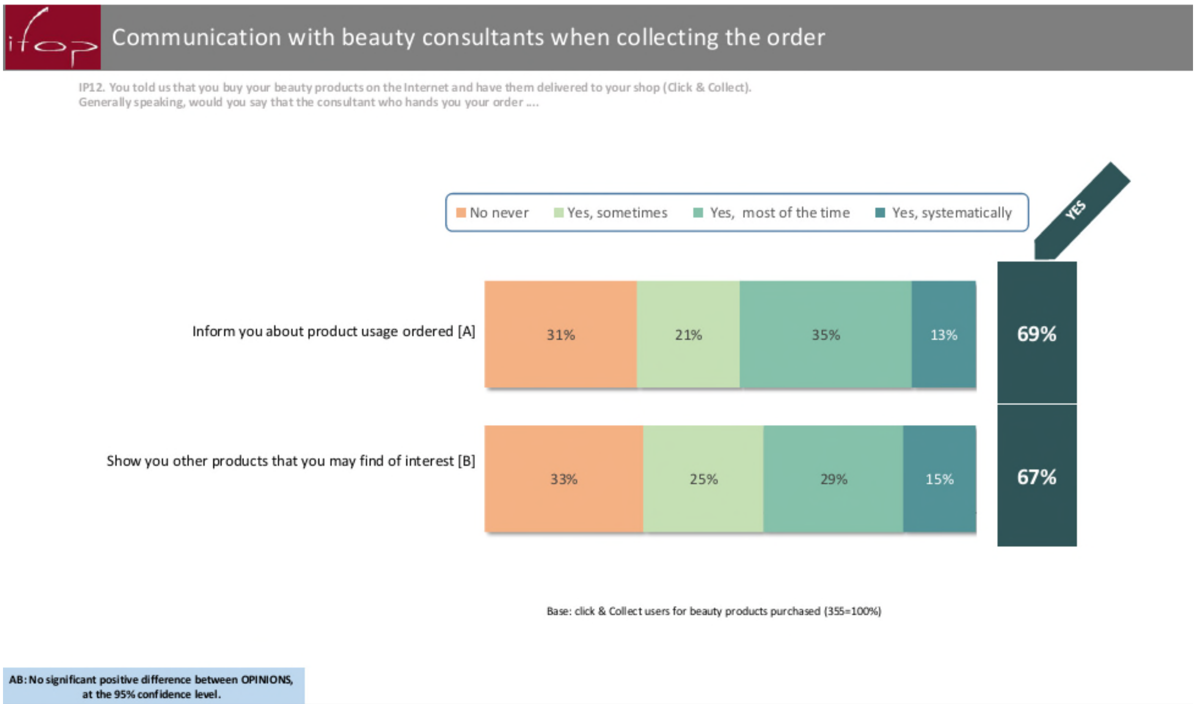
[7] Conseil du Commerce de France, *Une nouvelle politique pour le commerce* [A new policy for retailing], 30 January 2017.

(33) For consumers, these e-shops connected to a network of physical points of sale provide the option of benefiting both from personalized advice and demonstration services in store and the ability to purchase online, notably on the basis of click and collect services.

(34) FFPS members have seen "click and collect" grow rapidly because they enable customers to order via the Internet but still keep their connection to the store as a number of them continue to go to collect their orders in-store and benefit from the other services available there: product testing, personalized advice, complementary purchases, etc.

(35) For 14% of the respondents in the FFPS survey, the fact that they can make the most of advice in physical stores by using click and collect is a driving reason to choose this distribution channel when purchasing luxury perfumes and cosmetics.

(36) **The complementarity of the online and offline services reinforced in the context of the Covid-19 outbreak**. Respondents are more numerous than in 2018 to value the advice they receive when collecting products in physical stores rather than when they order online. The survey shows indeed that, when collecting their purchases, 69% of customers have a discussion with a beauty consultant on how to use the products and/or any other products that may be of interest to them.



1.4 Their exposure to free riding risks is very significant

(37) In such an environment, the free riding risk is particularly high on retailers investing to a more significant extent in the development of the physical network.

(38) Indeed, the FFPS study show that consumers of beauty products use the Internet to obtain information mainly to compare product prices or find promotions and that they do also purchase online (32%).

(39) In line with these results, purchases made online are still motivated by prices (49%) and promotions (47%). The 2021 study also shows that, in parallel, online purchases are now less and less motivated by the provision of advice (9% in 2020, 8% in 2021), which confirms that consumers find out information and advice in physical stores and then purchase online if they find more attractive prices.

(40) As a result, consumers are likely to be provided with information and tailored advice in physical stores and purchase online at the end of the day.

(41) **The potential disconnection between purchase and information remains without consequences as long as it takes place between the online and offline stores of retailers belonging to the same selective distribution system, in which all retailers invest to a significant extent in the development of the physical network**.

(42) **But the situation would dramatically change and investments in physical stores would be jeopardized if the fair contribution of all retailers to the costs of the physical network cannot be effectively ensured by suppliers: consumers would have the ability to enjoy freely the luxury experience in physical stores while purchasing the products at a better price from pure players or quasi pure players not investing in the physical network.**

(43) A majority of suppliers of luxury cosmetics and perfumes today require retailers to invest into the physical network by opening one or several shops and there are therefore so far relatively few authorized pure players or quasi pure players. If they had the opportunity to operate on these markets, the difference between the two economic models described above and the fact that consumers do disconnect purchasing and using services would create a very significant free riding potential.

(44) **If pure players or quasi pure players were to develop to a wider extent, it would deter selective retailers from investing in the physical network and consumers would ultimately lose the benefit of distribution conditions and services tailored to these products and to their needs.**

(45) As a result, the FFPS has called for the existing conditions for exemption of selective distribution agreements to be maintained and further reinforced in the light of the development of ecommerce and the economic reality of 2021 and beyond.

2. ENSURING THE FAIR CONTRIBUTION OF ALL RETAILERS TO THE COSTS OF THE PHYSICAL NETWORK

(46) The FFPS fully supports the fact that the Draft VBER and VGL propose to maintain the framework for the exemption of selective agreements (2.1.). In addition, the FFPS considers that the introduction of the possibility to impose a fair contribution to the costs of the physical network will reinforce legal certainty, subject to a few additional comments developed below (2.2.) just as the introduction of the Coty case law (2.3).

2.1 The FFPS approves the maintained framework for the exemption of selective distribution

(47) The current VBER and VGL provide the minimum conditions necessary to maintain the investments of FFPS members by establishing that selective distribution agreements benefit from an exemption to the prohibition set out in article 101(1) TFEU, when the parties' market share remains below a certain threshold and the agreements do not include any hardcore restraint, as defined by the VBER**.**

(48) The block exemption enables suppliers and distributors to avoid a burdensome individual assessment of the distribution agreements and their effective implementation with regard to the criteria set by the case law (the so-called Metro criteria[8]), knowing that the precise level of requirement of transparency, objectiveness and non-discrimination are not always totally clear. Furthermore, such a factual assessment involves costs and risks exposing both parties to litigation, which is itself particularly costly.

(49) The Draft VBER and VGL maintain the framework for the exemption of selective distribution agreements, and thus preserve the legal certainty which is key to ensure continued investments of perfumes retailers in physical points of sale.

(50) **The FFPS fully supports the fact that the Draft VBER and VGL propose to maintain the framework for the exemption of selective agreements, which is key to ensure continued investments of perfumes retailers in physical points of sale – which are essential to maintain sales in this industry and address customer needs.**

(51) **In particular, introducing the need to establish that the Metro criteria would be met, as suggested by some respondents, would have ruined the benefits of a block exemption. It is therefore positive that this proposal has not been retained by the Commission and it is essential that the proposed texts are not amended further in that respect.**

(52) **The FFPS also approves the new development introduced at para. 14 of the VGL to recognise that some restrictions are justified to avoid free riding issues (being noted that further amendments to this paragraph are needed, as detailed at (59) below):**

"*Free-riding between buyers may occur at the wholesale or retail level, in particular where it is not possible for the supplier to impose effective promotion or service requirements on all buyers. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. Pre-sales efforts on which free-riding may occur may be important, for example, when the goods or services are relatively new, technically complex or of a high value, or when the reputation of the goods or services is an important determinant of their demand. Non-compete restrictions can help overcome free-riding between suppliers".*

2.2 The FFPS approves the possibility to impose a fair contribution to the costs of the physical network and suggest several improvements which appear necessary in that respect

(53) In its successive contributions, the FFPS has asked that the ability to exclude pure players within selective distribution networks (Current VGL, para. 54) is absolutely maintained and that it is reinforced further in the light of the development of ecommerce since the last revision process and the market conditions in 2021: "*There is now a need to launch a more in-depth evaluation process focusing on the criteria which may validly be used by suppliers to guarantee the fairness of the contribution to the physical network made by each member of the network (number of physical*

[8] European Court of Justice, decisions 26-76 of 25 October 1977, *Metro SB-Großmärkte GmbH & Co. KG v Commission*, para. 20; later reiterated in decision 31/80, 11 December 1980, *NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK"*, para. 15. Exemption to selective distribution agreements is only applicable if resellers are selected on the basis of objective and proportionate qualitative criteria, set in a uniform manner and applied without discrimination.

points of sale required in relation to the total sales achieved, specific level of online sales being made, proportionality of sales made via physical points of sale in comparison to online sales, minimum percentage of sales made via physical points of sale, etc.)”[9].

(54) The Draft VGL (para. 194 b) do maintain the possibility to exclude pure players from selective distribution networks by allowing a supplier to require from its distributors to have one or more physical point(s) of sale:

"*a requirement that the buyer operates one or more brick and mortar shops or showrooms as a condition for becoming a member of the supplier’s distribution system*“.

(55) In addition, the Draft VGL now provide that the supplier may impose on retailers a requirement to sell a certain amount of the contract goods offline in order to ensure a fair contribution to the costs of the physical network (Draft VGL, para. 194, c):

“*Vertical agreements including a restriction on the use of a specific online sales channel, such as online marketplaces, or setting quality standards for selling online, can benefit from the block exemption […]. Such block-exempted restrictions in principle include: […]*

(c) a <u>requirement that the buyer sells at least a certain absolute amount</u> (in value or volume, but not in proportion of its total sales) of the contract goods or services <u>offline to ensure an efficient operation of its brick and mortar shop</u>. This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer’s size in the network or its geographic location.”

(56) This draft provision therefore builds upon the proposal made by the FFPS.

(57) **The FFPS approves that the possibility for suppliers to require from its authorized distributors to have one or several physical point(s) of sale is maintained in para. 194 b of the Draft VGL. It is however only a minimal requirement to preserve legal certainty but it is not sufficient as only one or a few points of sale do not necessarily amount to a fair contribution to the costs of the physical network.**

(58) **The FFPS thus welcomes the Commission’s proposal inserted in para. 194 c of the Draft VGL in order to create the conditions for suppliers to require a minimum level of offline sales to ensure a fair contribution of all authorized retailers to the costs of the physical network.**

(59) **The FFPS nonetheless respectfully submits that the following additional amendments are necessary in order to ensure that this new provision is effectively used by suppliers:**

- **It is essential that the mechanism introduced is simple for suppliers and does not create further legal risks – otherwise they will not use this new possibility and legal certainty will therefore not be reinforced as needed.**

- **A requirement based on an absolute amount in value or volume, applicable to all retailers whatever their size, may not reach the objective as suppliers may be legitimately concerned not to exclude smaller distributors on that basis. On the other hand, the same absolute amount for all distributors would be *de minimis* for**

[9] FFPS, Report attached to the answer to the questionnaire issued by the European Commission, 27 May 2019 and 26 March 2021.

a large quasi pure player and might not result in more contribution to the costs of the network that the opening of one single shop.

The possibility to set individual absolute amounts in value or volume would provide more room for manoeuver but would represent very significant time and efforts in designing and negotiating, potentially every year, the amount in question with all retailers (thousands at the EU level in the perfumes and cosmetics sector). Some suppliers are therefore likely to refrain from using this possibility to protect investments made by their distributors.

As proposed in its March 2021 contribution, the FFPS therefore considers necessary that this amount can also be set as a proportion of sales (in value or in volume), as long as this proportion does not amount to a restriction of the right to sell online.

- **The FFPS believes that it would be justified to refer more directly to investments and imbalance in the investments costs in para. 14 of the VGL and state that such a free riding issue can be handled by suppliers on the basis of the mechanism proposed under para. 194 c.**

  "*Free-riding between buyers may occur at the wholesale or retail level, in particular where it is not possible for the supplier to impose a fair investment contribution into the network, effective promotion or service requirements on all buyers. Suppliers can protect investments made into the network from free-riding risks using fair contribution requirements. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. Pre-sales efforts on which free-riding may occur may be important, for example, when the goods or services are relatively new, technically complex or of a high value or when the reputation of the goods or services is an important determinant of their demand. Non-compete restrictions can help overcome free-riding between suppliers".*

2.3 The FFPS also approves that the possibility to exclude the use of third-party platforms is now clearly stated in the VGL

(60) The FFPS has called for the integration into the VGL of the benefits of the Coty Germany decision[10].

(61) The Draft VGL now expressly incorporate the benefit of the Coty decision, providing that the prohibition imposed by a supplier on its authorized distributors to use visible third-party platforms for the internet sale of the luxury goods does not constitute a hardcore restriction :

"*Suppliers may wish to restrict the use of online marketplaces by their buyers, for instance to protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains direct a relationship with customers. The restrictions may range from a total ban on the use of online marketplaces to the imposition of certain qualitative requirements which the marketplaces must meet. For instance, suppliers may prohibit the use of marketplaces on which products are sold by auction, or they may require buyers to use specialised marketplaces, in order to ensure certain quality standards*

[10] CJEU, 6 December 2017, aff. C-230/16, Coty Germany.

regarding the environment and parameters of the sale of their goods or services. Some qualitative requirements may de facto ban the use of online marketplaces, because no online marketplace is capable of meeting the requirement, for example, where the supplier requires that the logo of the online marketplace is not visible or requires that the domain name of any website used by the retailer contains the name of the retailer's business."

(62) **The FFPS welcomes the proposed integration of the benefits of the Coty ruling into the para. 194 of the VGL – which is absolutely key for luxury products. The FFPS also notes and fully supports that the Draft VGL directly refer to selective distribution as an environment in which these prohibitions are frequently found.**

(63) **The proposed reinforcement of the VGL on this point is a decisive improvement for undertakings involved in the selective distribution of luxury cosmetics and perfumes.**

3. OTHER COMMENTS

(64) In addition to the points discussed above, the FFPS submits additional comments on the amendments proposed by the Commission in the Draft VBER and VGL on dual distribution (3.1), the equivalence principle (3.2) and dual pricing (3.3).

3.1 The limitation of the benefit of the block exemption in case of dual distribution

(65) At present, the block exemption does not apply to vertical agreements between competing undertakings, except in cases where a supplier and a distributor are in a situation of dual distribution (as the supplier also sells directly to customers)[11]. Furthermore, the current rules do not identify a situation of dual distribution when the distributor sells private or white label products manufactured by third parties[12].

Situation in which the supplier sells directly to consumers in parallel of its selective distribution network

(66) The classic situation of dual distribution is the situation where the supplier also competes with its retailers by selling directly to consumers and the Commission proposes to maintain the existing regime in that case, but proposes a to limit the full benefit of the exemption to agreements for which the parties' combined market share in the relevant market at retail level does not exceed 10%[13].

(67) If the combined market share of the parties exceeds 10% at the retail level but remains below the market share threshold of Article 3 of the Draft VBER (i.e. 30 % of the relevant market), the agreement is block exempted[14], except for any exchange of information between the parties, which must be assessed separately on a case-by-case basis under the rules applicable to horizontal agreements.

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11 Current VGL, para. 28.
12 Current VGL, para. 27.
13 Draft VBER, Article 2(4).
14 Draft VGL, para. 90.

(68) In practice, this new threshold is likely to raise significant difficulties of implementation.

(69) First, the VGL do not give any indication on the definition of the relevant market in relation to which to calculate the thresholds and many issues may arise in that particular situation in terms of products (overall retail of all products, products concerned by the exchange?) and geography, especially where the supplier is only selling online whereas the retailer is selling online and offline (local, national, European level?). The new market share thresholds will therefore lead to significant practical issues and therefore create legal uncertainty.

(70) The FFPS believes that most of the data sent by retailers in the perfumes industry would not raise issue under Article 101 but, should the 10% threshold be maintained, it would be important that the VGL do provide guidance on the type of data likely to raise issues in this specific vertical/horizontal environment and the corresponding theories of harm business would need to consider in that respect. The guidance provided in the Horizontal VGL is largely insufficient in that respect.

(71) Finally, the proposed new Article 2(4) would not either improve the situation of retailers in relation to other potential issues in dual distribution conditions, as raised by the FFPS during the consultation process, such as price squeeze and reservation of stocks[15]. The Draft VBER and VGL do not so far address these issues and the FFPS therefore reaffirms that developments in the VGL would be needed in the light of the development of direct distribution by suppliers.

(72) **The FFPS is therefore considering necessary (i) to avoid creating legal uncertainty with the proposed 10 % threshold and associated consequences and (ii) to add that other forms of restrictive behaviour by a supplier competing with his retailers (such as price squeeze and reservation of stocks) are not either covered by the VBER.**

Situation in which the distributor is also selling private label products

(73) The Commission proposes to amend the VGL to state that a distributor who sells products manufactured within its the group is considered to be a manufacturer, and therefore a competitor of the manufacturers whose products he also distributes:

"[D]istributors that produce goods in-house under their brand name are considered manufacturers. This means that the exemption in Article 2(1) VBER does not apply to agreements between those distributors and suppliers of branded goods in the same relevant market. Such agreements must therefore be assessed under the Horizontal Guidelines"[16].

(74) On the other hand, the Draft VGL propose to maintain unchanged the possibility for a distributor to retail goods produced by a third-party manufacturer under the distributor's brand name.

"A distributor that provides specifications to a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods and thus a competitor of the manufacturer. Consequently, the exemption in Article 2(1) VBER applies to agreements between a distributor selling such own-brand goods manufactured by a third party and a supplier of branded goods on the same relevant market"[17].

[15] FFPS contribution on dual distribution, 24 June 2021.
[16] Draft VGL, para. 85.
[17] Draft VGL, para. 85.

(75) The FFPS believes that when retailing other products than those of the supplier, the distributor is essentially ensuring his role of distributor and almost all perfume distributors supply and resell multi-brand products, including products under their own brand. As most suppliers have strong brands and sophisticated selective distribution networks, the fact that retailers do have alternative sources of supplies is not likely to imbalance the relationship, as this is the case the other way round.

(76) **The FFPS therefore believes that the new provision in para. 85 of the VGL is not necessary in the perfumes and cosmetics sector.**

(77) **On the other hand, it is absolutely necessary to avoid creating any legal uncertainty on the ability of distributors to rely on third parties to produce white label and/or private label products. The FFPS therefore strongly supports that para. 85 of the VGL is maintained as proposed.**

2.1 The deletion of the equivalence principle between online and offline criteria

(78) The current VGL provide that imposing criteria that are not overall equivalent between online and offline sales (the so-called equivalence principle) is a hardcore restriction[18].

(79) In the consultation process, the FFPS has stressed that the equivalence principle certainly needed to be applied based on a rule of reason as the online and offline environments are so different but that the deletion of the principle would involve more issues than bring advantages[19].

(80) In the Draft VGL, suppliers would no longer be required to impose overall equivalent criteria on online and offline sales. The Commission recognizes that both channels are inherently different in nature and the requirement of different criteria is no longer mentioned as a hardcore restriction[20]:

"*In the context of a selective distribution system, the criteria imposed by suppliers in relation to online sales no longer have to be overall equivalent to the criteria imposed on brick-and-mortar shops, given that both channels are inherently different in nature.*"

(81) **Rather than completely suppressing the equivalence principle, the FFPS supports an amendment of the existing VGL in order to introduce more flexibility to adjust the criteria to the differences between the two environments.**

(82) **In case the hardcore restriction would be suppressed, at the very least the VGL should state that both sets of criteria have to ensure the same qualitative standard set by the supplier and which constitutes the basis of the selective distribution network.**

18 Current VGL, para. 56.

19 FFPS, Report attached to the answer to the questionnaire issued by the European Commission, 26 March 2021.

20 Commission, Explanatory note on the Revision of the VBER, 9 July 2021.

2.2 The suppression of dual pricing as a hardcore restriction

(83) Under the current rules, a requirement for the buyer to pay a different price for products intended to be resold online and offline (so-called “dual pricing”), is currently considered as a hardcore restriction[21].

(84) In the Draft VGL, the Commission has adopted a streamlined approach to dual pricing, which would no longer be considered as a restriction provided that it is intended to incentivize or reward an appropriate level of investment and relates to the costs incurred for each sales channel[22]:

“*Such difference in price should be related to the differences in the costs incurred in each channel by the distributors at retail level. To that end, the wholesale price difference should take into account the* <u>*different investments and costs incurred by a hybrid distributor so as to incentivize or reward that hybrid distributor for the appropriate level of investments respectively made online and offline*</u>*, as where the wholesale price difference is entirely unrelated to the difference in costs incurred in each channel, such price difference is unlikely to bring about efficiency-enhancing effects.”*

(85) **While dual pricing may protect against free riding, the FFPS considers that the proposal in para.195 of the VGL is likely to result in legal uncertainties.**

(86) **The contribution of retailers to the costs of the network definitely needs to be taken into as suggested above and should notably appear in para. 14 and 194 c of the VGL (see above).**

(87) **On the other hand, the FFPS believes that annual price negotiations is not the appropriate forum to discuss and compensate for an appropriate level of investments made online and offline for a number of reasons: (i) the proposal would be difficult to implement in an omni-channel distribution context (e.g. click and collect, ship from store, online orders in stores) (ii) investments such as the ones made by perfumes retailers need to be planned upstream and they are implemented over several years ; they cannot be reconsidered every year and (iii) reflecting investment levels in wholesale prices would result in a very significant differentiation margin and there is a risk that the pricing policies of suppliers would become less comprehensive (if not completely opaque) for retailers.**

(88) **This is the reason the FFPS does not consider dual pricing to be a solution to free riding issues in itself.**

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(89) Physical shops are essential to address customers needs in the selective perfumes and cosmetics sector. They are also contributing to sustain commercial activity and generate jobs in city centers.

(90) The FFPS considers that the Draft VBER and VGL achieve most of the expectations and needs of FFPS members to preserve sufficient legal certainty for them to maintain their investments in physical shops which are offering customers a purchasing experience online points of sale cannot completely address.

[21] Current VGL, para. 52.
[22] Draft VGL, para. 195.

(91) These physical shops have been through very difficult conditions in the past months due to the Covid-19 crisis and online sales have not compensated for the losses due to lockdowns and curfews – which further reinforces these needs and expectations.

(92) The FFPS thanks the Commission for having the opportunity to provide comments throughout the VBER revision process and remains available until the adoption of the final texts, considering their impact on the viability of their business activity.

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