Camera Nazionale della Moda Italiana

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

1. INTRODUCTION AND BACKGROUND

Established in 1958, *Camera Nazionale della Moda Italiana* ("**CNMI**") represents, promotes and protects the values and the development of the Italian fashion industry in Italy and globally. CNMI represents almost all of the major Italian fashion brands.

The Vertical Block Exemption Regulation ("**VBER**") and the accompanying Guidelines on Vertical Restraints ("**VGL**") are of great practical significance to CNMI members, given our members' use and reliance on vertical agreements for the resale of their branded products. CNMI has been actively engaged in the European Commission's ("**Commission**") review process of these rules:

(a) *April 2019*: CNMI contributed to the Commission's first public consultation on the review of the VBER and the VGL.

(b) *November 2020*: CNMI submitted input on the Commission's inception impact assessment.

(c) *March 2021*: CNMI submitted its contribution to the second public consultation on the review of the VBER and VGL.

CNMI wishes to thank the Commission for ensuring, through the publication of its drafts of the revised VBER and VGL ("**Draft VBER**") in July 2021, that the views of all stakeholders (including the fashion industry) are sought and reflected upon. With this submission, the CNMI would like to share some views on the Commission's Draft VBER, as seen through the prism of European fashion industry participants.

2. CNMI VIEWS

2.1 Online sales

(a) The Draft VBER reflects the fact that e-commerce has grown immensely into a very important sales channel, while brick and mortar stores have been subjected to ever increasing challenges. CNMI views the internet as no longer requiring the, once necessary, safeguards in order to grow further. CNMI therefore welcomes the Commission's attempt to revisit the legal balance between online and offline sales. In particular, CNMI welcomes the clarity provided by the Draft VBER around "active" and "passive" selling (and its restriction) in the online context, notably through the definitions provided in Article 1(l) to (n) of the Draft VBER.

(b) Dual pricing no longer being identified as a hardcore restriction is most welcomed by CNMI, as dual pricing serves the purpose of compensating higher investments typically required in physical shops in comparison to online shops. Indeed, dual pricing has the potential and benefit of ensuring that the right incentives are offered to sales partners, while maintaining a level playing field across the two channels. The Covid-19 pandemic has also shown that dual pricing can help physical shops to counter other issues and pressures. Based on CNMI's experience and observations, CNMI also generally considers that any online sales restrictions which do not constitute absolute prohibitions on online sales should not be considered as hardcore, but should rather be subject to a case-by-case assessment, in particular focusing on any genuine and legitimate objectives and justifications of those restrictions.

(c) CNMI also welcomes the recognition that imposing different quality criteria on online and offline dealers - in the context of a selective distribution system - should not amount to a hardcore restriction of competition. This has very important and far-reaching implications for fashion brands in that it aids them in offering consumers a truly consistent omnichannel experience. Similarly, CNMI considers as positive the Commission's clarification that selective distribution may be appropriate for any high quality products. With the fashion industry heavily relying on selective distribution systems in order to protect their brands and to ensure a consistently high retailer environment, it is of paramount importance to have clear guidance as to the scope of applicability of the EU rules on this form of distribution.

(d) However, there are a number of points and issues in relation to which CNMI would respectfully invite the Commission to devote further consideration. The below-listed issues are all crucial in the struggle for fashion brands to protect the reputation and goodwill of their quality products, and to offer consumers a genuine omnichannel experience. In particular:

(i) Brick and mortar shops have over the years been subjected to a significant number of regulations. However, the same is not true for the online channel which has been allowed to grow and operate with limited regulatory intervention. For instance, brick and mortar shops have to comply with regulations dictating when sales periods can or cannot take place. The same is not true for the online channel, thus leading to unwanted distortions and pressures exerted on offline outlets by online retailers throughout the entire year. As such, it should be acknowledged that there should be more uniformity and equivalence in the way offline and online shops are regulated.

(ii) There continues to be disparity amongst the Member States in the way that distribution rules, especially those applicable to the online channel, are interpreted and enforced. CNMI encourages better coordination and supervision to ensure a more uniform interpretation of the relevant

rules. It cannot be the case that brands selling within the EU are faced with legal inconsistencies and barriers when selling cross-border. The Commission is therefore invited to use its powers to ensure greater uniformity in the way distribution rules are interpreted and applied by Member States' authorities.

(iii) Counterfeiting is a long-standing issue for fashion brands, and one that has in particular been exacerbated by the recent Covid-19 pandemic. CNMI encourages the Commission to use its powers to better equip fashion brands in their fight against counterfeit products, such as by expressly recognising that combatting counterfeiting is a legitimate objective in the context of imposing sales restrictions (in particular, online sales restrictions).

(iv) Finally, a rather broad statement has been included at the end of recital 13 to the Draft VBER about online sales restrictions benefitting from the safe harbour. It is difficult to properly reconcile this statement with other parts of the Draft VBER. As such, further clarification as to what the Commission meant in recital 13 would be most welcome.

2.2 Marketplaces

(a) CNMI welcomes the Commission referencing the *Coty* judgement in the Draft VBER, and providing that a marketplace ban shall be exempted if it meets the *Metro* case criteria. CNMI also welcomes the consolidation of the Commission's suggestion, as laid down in the Policy Brief of April 2018, that marketplace bans are allowed outside the luxury sector and outside a selective distribution system if they do not lead to a total ban of online sales.

(b) However, CNMI considers that further action is needed to ensure the *Coty* judgement is interpreted and applied uniformly across the Member States. For example, Germany has taken a more restrictive stance with the German Federal Court of Justice ruling in the *Asics* case that marketplace bans are limited to luxury products. Any legal barriers and divergences between the Member States should be avoided.

2.3 Online search advertising

(a) CNMI welcomes the Commission's guidance regarding the *Guess* decision, in particular as regards what amounts to a hardcore restriction and what can be exempted under the safe harbour, with respect to online search advertising.

(b) However, CNMI considers that, as opposed to certain National Competition Authorities, which have adopted more flexible approaches regarding the monitoring of brand-related keywords when justified by the objective of protecting the brand image, the Commission's approach to search engine bidding restrictions is too conservative. CNMI also believes that the *Guess*

decision needs to be interpreted in the context of a combination of several prohibited practices, which does not reflect the potential benefits of those restrictions, when they are objectively justified. In addition, the Commission did not seem to take into due account the harmful impacts linked to the bidding effect caused by the purchase of keywords by a brand and the members of its network, as well as the free riding effects resulting from unauthorized resellers purchasing brand-related keywords.

(c) The Draft VBER does not adequately address what is often the key issue for fashion brands and trade mark owners - i.e., the ability for brands to prevent others bidding for the trademark alone. It is clearly in the interest of consumers and online users to be directed to the official branded website when searching for the brand/trademark alone. This has the effect of preventing confusion (e.g., as to the origin of the goods).

(d) CNMI considers that further and more detailed attention ought to be devoted to practices that brand owners can employ in the context of paid online search advertising. This would also be in line with recent developments in the U.S., where the case-law found that brands' restrictions to the ability of others to bid for their trademark should not be considered "inherently suspect" (see case 1-800 Contacts vs. *Federal Trade Commission,* U.S. Court of Appeals for the Second Circuit).

2.4 Resale Price Maintenance ("**RPM**")

(a) Showing willingness to accept pro-competitive effects arising from RPM is a key and welcome step taken by the Commission. CNMI also welcomes the Commission's practical guidance regarding the possibility of exempting maximum or recommended resale prices exceeding the 30% market share threshold. CNMI furthermore welcomes the recognition that the use of price monitoring tools is not per se problematic.

(b) Against the above, CNMI would have welcomed the adoption of further measures by the Commission, aimed at the permitted uses of RPM to protect the significant investment that brands make in ensuring a quality consumer shopping experience. In particular, the VBER should provide a *de minimis* exemption for RPM for companies with low market shares, or at least provide an *ex post* assessment rather than an *ex ant*e ban.

(c) Concerning the criteria under which RPM could benefit from the exemption provided by Article 101(3) TFEU, the requirement to prove that there is no less anti-competitive alternative to the proposed RPM measure remains a high threshold in practice. The VBER and the VGL should set out clear and detailed criteria under which RPM could benefit from the exemption provided by Article 101(3) TFEU. In the same vein, the VBER and the VGL could also provide more clarity on the scenarios where RPM might be permissible when applied

to products requiring a high-level of retail services (i.e., high investments), such as high-end fashion products.

2.5 "Genuine" agency

(a) The Commission took a significant step forward by providing useful guidance on the definition of "genuine" agency. CNMI, in particular, welcomes the much needed clarification that a brief and temporary passing of title will not in itself prevent an agent from being qualified as a genuine agent.

(b) However, CNMI respectfully notes that the Commission should clarify that, where the VGL criteria for genuine agency are met, other characteristics of the genuine agent (e.g., whether the agent is an "online intermediation service") should be irrelevant. Indeed, the test for a genuine agent is already detailed, tested and well set out. It appears wholly unnecessary to introduce confusing assumptions about certain operators' profiles in this context. For example, such confusing and unnecessary remarks can have significant implications on the use of e-concession models by fashion brands. With that regard, explicit reference should be made to the "merchant" operator of the brand website, which should be considered as a genuine agent.

2.6 Franchising

(a) Through the use of franchise networks, brands can efficiently ensure a high quality sales environment to customers purchasing luxury and fashion products. CNMI therefore welcomes the Commission's clarifications on franchising. In particular, the Draft VBER provides that franchise agreements must be analysed in light of the rules applicable to the distribution system most closely resembling them (e.g., selective distribution). In addition, the Commission highlighted the specificities of franchising falling outside Article 101 TFEU on non-compete clauses exceeding five years and transfer of know-how.

(b) However, CNMI would welcome clarity on what actions can be taken by franchisors to protect their franchisees (and the franchisees' high upfront investments) from other players. CNMI would welcome the inclusion in the VGL of practical examples, such as a specific exemption for RPM, on the restrictions that franchisors should be allowed to implement in territories/channels where their franchisees are active.

2.7 Dual distribution

(a) In general, CNMI's members typically engage in dual distribution with their clients. As already pointed out in its submission to the second public consultation on the review of the VBER and VGL, CNMI considers that treating dual distribution under the vertical rules is appropriate and hence that the exception under Article 2(4) of the VBER should remain unchanged.

(b) The removal of the exception for dual distribution would have a negative impact for the fashion industry and the market. In that respect, CNMI notes that only 22% of the respondents to the second public consultation on the review of the VBER and VGL considered that there was a need to change dual distribution rules, as stated in the Commission's summary report dated 24 June 2021. In particular:

(i) Article 3 of the VBER provides a safe harbour granting the necessary stability that allows brands to engage in dual distribution, hence increasing competition at the retail level of trade. Legal advice costs for brands would increase significantly in the absence of the exception for dual distribution to the detriment of businesses and ultimately consumers. Moreover, we are not aware of recent cases in which dual distribution has led to specific concerns from an EU law standpoint in terms of exchange of information, nor the proposition to amend the rules on dual distribution seems to be supported by relevant studies.

(ii) CNMI 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. To the extent that such potential concerns may exist, further concrete guidance in the VGL is necessary on how to lawfully exchange information within a dual distribution context. Greater clarity on information exchanges in the context of dual distribution is expected not only to lower legal costs for brands, but also to remove the legal uncertainty currently created by the VBER (which could otherwise offset the benefits of the additional flexibility granted to brands in the Draft VBER). The circumstance that the Commission Guidelines on horizontal co-operation agreements do not provide guidance specific to dual distribution cannot serve as a justification for the same treatment in the context of the VBER. Indeed, in the context of vertical agreements, companies selling the same product may have the common interest to sell the maximum of such product, and that should be seen as cooperating rather than competing. In such context, guidance should come, for instance, in the form of a "black list" of information exchanges that would be excluded, with particular reference also to selective distribution schemes. Since CNMI considers information exchanges not to be problematic, in and of itself, in the context of a supplier/distributor relationship, CNMI believes that the Commission should list the <u>exceptional circumstances</u> (if any) pursuant to which information exchanges would not be permitted.

(iii) CNMI considers that the new threshold proposed by the Commission brings unnecessary and unwanted complexity among operators. If the Commission considers that concerns arise from the suppliers' dual distribution, then CNMI suggests that the Commission should only look

at a supplier's market share at the retail level, regardless of the retailer's market share.

(iv) Finally, brands should not be discouraged from selling directly to consumers: instead, dual distribution has to be promoted to facilitate the increase of inter-brand and intra-brand competition. The ability for brands to freely engage in dual distribution means that another source of supply not only exists, but constitutes a safe, quality and credible sales environment for consumers. As a result, in order to avoid that dual distribution is hindered or made less attractive, measures such as confusing market thresholds should not be adopted.

2.8 Non-compete obligations

(a) CNMI considers that, absent market power, non-compete obligations exceeding five years are not problematic. The current limitation is subjective and does not account for the need to protect branded products, investments and know-how. Accordingly, CNMI 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.

2.9 Implementation of EU case law in the Member States

(a) CNMI generally invites the Commission to take a more active role in the preservation of the uniform and coherent implementation of the distribution rules across the Member States. As noted above, it is not a desirable outcome to have legal barriers in the EU when selling products cross-border. Legal certainty and uniformity are a fundamental aspect of doing business in the EU Single Market and any legal "arbitrage" as between the Member States must be avoided.

(b) CNMI is thankful of the chance given to engage in a constructive dialogue with the Commission, as well as to further discuss and deepen the relevant issues arising in the contest of the EU rules on distribution agreements. Should the Commission need any additional information or clarification, CNMI is available to assist.