

Fédération Européenne des Parfumeurs Détaillants

Organisation déclarée conformément aux dispositions ministérielles
Siege Social: Paris



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European Federation of Perfumes Retailers – FEPD

Report attached to the answer to the questionnaire issued by the European Commission on the assessment of Regulation no. 330/2010

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- (1) The Fédération Européenne des Parfumeurs Détaillants (hereinafter, the "FEPD") is the umbrella organization of the national European federations and organizations in the perfumery retail trade, which is active in 21 Member States. The FEPD notably intervenes to express the views of its members on regulatory and competition issues in connection with their activities. It also promotes the image of the profession and provides information on the sector to stakeholders.
- (2) The luxury perfumes and cosmetics retail sector gathers retailers which are authorized by luxury perfumes and cosmetics suppliers to sell their high quality and sophisticated products on the basis of selective distribution criteria. These criteria are intended to ensure the distribution of these specific products under conditions appropriate to their luxury and prestigious image which forms part of their essential characteristics. To that end, authorized retailers make significant investments each year to ensure compliance with these standards governing physical and online shops. Authorized retailers thus offer a genuine shopping experience to consumers who are given targeted advice from qualified beauty consultants and the possibility to see, touch and test the products in a quality environment.
- (3) In the luxury cosmetics and perfumery sector, the selective distribution system is applied at all levels. A large number of suppliers are active in this sector, and even if some brands are more iconic than others, the competitive landscape is regularly evolving on the basis of new product developments and marketing initiatives. The same applies at the distribution level where numerous and diverse players are active, including global chains, regional players, independent retailers and department stores.

- (4) In the present report, the FEPD sets out the arguments it has put forward in its answers to the questionnaire in favour of the extension and updating of the Regulation and its Guidelines so that its members are able to continue offering the services consumers are asking for and distribute luxury cosmetics and perfumes under appropriate distribution conditions. In that aim, luxury perfumes and cosmetics retailers indeed need to invest each year very significant amounts, calling for sufficient legal certainty of their contractual environment. As legal certainty is here essentially created by the Vertical Block Exemption applicable to selective distribution agreements, the duration of the Regulation and its Guidelines need to be extended (1).
- (5) In addition, the FEPD calls for a clarification of the Guidelines on several points which have given rise to challenges lately or which have brought up renewed questions, in order to maintain the same level of legal certainty for the future. This also entails integrating the benefits of the recent case law of the European Court of Justice and the conclusions of the e-commerce inquiry¹ carried out by the Commission and adapting the Guidelines to the most recent technological developments and purchasing evolutions (2).

1. THE EXTENSION OF THE REGULATION AND GUIDELINES IS KEY TO ENSURE THE REQUISITE LEVEL OF LEGAL CERTAINTY IN THE PERFUMES RETAIL SECTOR

- (6) Each year, luxury cosmetics and perfumes retailers are making highly significant investments in their physical points of sale 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 (1.1). Maintaining such levels of investments calls for legal certainty, which is presently largely based on the Regulation and its Guidelines (1.2).

1.1 Investments made by perfumes retailers to ensure distribution conditions that are tailored to the products

- (7) Selective distribution enables perfumes retailers to ensure compliance with very high and consistent standards governing physical and online points of sale, 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) pre-supposes highly significant and regular investments by retailers.
- (8) As case law has emphasised on several occasions², the possibility of limiting the distribution of luxury cosmetics and perfumes to those distributors which meet these quality criteria is essential to guarantee the luxury image attached to these products in the eyes of the consumer.
- (9) These quality criteria allow consumers to be provided with services in physical points of sale that meet a genuine need (notably the possibility to see, touch and test the products, and to receive targeted advice from qualified beauty consultants). Recent consumer surveys indeed show that

¹ E-commerce sector inquiry by the European Commission, Staff Working Paper and Final Report published on 10 May 2017.

² See in particular, European Court of Justice, decision C-230/16 of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

consumers turn to the internet for information about prices but that information about products and advice, and more largely the shopping experience they expect, are better found in physical shops³.

Contributions made by physical points of sale

- (10) To preserve the luxury image surrounding their products, suppliers choose to limit the number of points of sale on the basis of quality-related criteria in order to guarantee adapted sales conditions and to ensure a suitable environment, the aim being to preserve their aura of exclusivity and prestige in the eyes of the consumer.
- (11) As long as these qualitative and quantitative criteria are fully objective, proportionate and non-discriminatory, luxury perfumes retailers perfectly understand and agree on the relevance and importance to ensure that their investments are well founded to meet consumers expectations and deliver results.
- (12) Moreover, the technical complexity of these products, which are constantly being updated, and the significant number of product references available from a given point of sale (an average of 10,000 different product references and around 22,000 products held in stock, available for immediate sale, in a 150 m² store) call for tailored advice and demonstration services. Customers also need to see, touch and test these products in constant evolution.
- (13) In order to implement these quality criteria which constitute the added value expected by European consumers, **each year, FEPD members invest several billion euros dedicated solely to their physical points of sale⁴.**
- (14) These investments are of course connected to the premises themselves but also involve the salaries of numerous employees and training costs. Perfumes retailers thus reinvest a significant proportion of their turnover each year in order to ensure the implementation of the quality criteria that are adapted to the distribution of these luxury products.

Development of online services alongside physical points of sale

- (15) If physical shops are key to address customer needs, a number of FEPD members have nonetheless been particularly active developing online services. For a long time now, perfumes retailers have been developing e-shops in line with the quality criteria of the different brands, addressing the online demand from consumers while at the same time guaranteeing the luxury image of these products.
- (16) 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 channels⁵.

³ See the consumer survey prepared for the FFPS (the French national federation) presented in the FFPS submission.

⁴ This can be directly inferred from the figures collected and put forward by its French member, the FFPS, See the submission of the FFPS.

⁵ Conseil du Commerce de France, *Une nouvelle politique pour le commerce* [A new policy for retailing], 30 January 2017.

- (17) For consumers, these e-shops connected to a network of physical points of sale provide the option of benefiting both from personalised advice and demonstration services in store and the ability to purchase online, notably on the basis of “click and collect” services.
- (18) With counterfeit cosmetics representing 10% of the global cosmetics market⁶, e-shops operated by FEPD members also provide consumers with a guarantee that the products they are purchasing are safe and genuine, because FEPD members have been authorized by suppliers and have a long standing market presence. A study published by MarkMonitor on 18 July 2017 shows that nearly 30% of consumers already have received counterfeit goods after having ordered pharmaceuticals or cosmetics online. The customers surveyed explained that they found these products by clicking on adverts published on social media (20%), in marketplaces (39%), on mobile apps (22%) and via search engines (34%)⁷.
- (19) These authorized e-shops of retailers operating physical stores also provide a guarantee that products will be delivered in perfect quality, having been stored under conditions identical to those applied in their physical points of sale, and in attractive, pristine packaging tailored to match the luxury image of the products.
- (20) While online sales continue to grow, they nevertheless remain relatively low within the selective cosmetics and perfumery sector compared with other sectors, with the share of online turnover being estimated around 8% (as opposed to an average of 8.5% for retail sales in general) in France.
- (21) Indeed, consumers use the Internet mainly to obtain information, not about product characteristics (which they tend to do at the point of sale instead) or to benefit from the advice of professionals, but rather to compare product prices or find promotions. Similarly, purchases made online are motivated by price and promotions, or even the ability to complete a sale at any time, day or night.
- (22) FEPD members have also seen “click and collect” growing rapidly because they enable customers to order via the Internet but still keep their connection to the store where a number of them continue to go to collect their orders to benefit from the other services available there: product testing, personalised advice, complementary purchases.
- (23) **And the two (finding information and advice in stores and purchasing online) can perfectly be disconnected. This is illustrated today with the success of click and collect services. A growing number of customers use these services in order to enjoy a better shopping experience : they purchase online and collect their order in the shop where they can enjoy the time they have to test new products or obtain advice instead of asking for the products and queueing to pay. Click and collect services are growing fast and will certainly continue to grow (as they offer consumers both easy access and the ability to test the products and make the most of advice and services).**
- (24) **Presently, the disconnection between finding information and purchasing is without consequences because it takes place between the website and shops of the same authorized retailers or more largely among retailers all investing in the development of the network. But the situation would dramatically change if selective distribution agreements did not enjoy anymore the protection they currently benefit from vis-à-vis pure players : consumers would have the ability to enjoy the services freely in shops while purchasing the products at a better price from pure players not investing in the physical network delivering the services.**

⁶ YesMyPatent, *Brevet et contrefaçon en produits cosmétiques: les chiffres à retenir* [Patents and counterfeiting in relation to cosmetics]. Factsheets 2017.

⁷ MarkMonitor Online Barometer, *Global Online Shopping Survey 2017, Consumer Goods*.

- (25) A majority of suppliers of luxury cosmetics and perfumes today effectively require retailers to invest into the physical network and there are therefore relatively very few authorized “pure players”. If pure players or quasi pure players 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 definitely creates a “free riding” potential, that would rapidly develop.
- (26) Should such “free riding” potential be allowed to develop, retailers that are currently investing in the development of their physical network would lose the incentive to do so and consumers would ultimately lose the benefit of distribution conditions and services tailored to these products and to their needs, which also contributed to this industry’s success.

1.2 The Regulation and Guidelines do provide improved legal certainty, which is key for the continuation of these investments

- (27) Indeed, while the use of selective distribution for luxury cosmetics and perfumes has been fully supported by the case law of the European Court of Justice and by the European Commission for many years now (*Yves Saint Laurent* and *Givenchy* cases T-88/92 and 19/92 92 of 12 December 1996, and *Parfums Christian Dior* and *Copad* cases C-337/95 of 4 November 1997 and C-59/08 of 23 April 2009), the case law itself is not sufficient to provide the requisite level of legal certainty.
- (28) Under the case law, luxury products such as perfumes and cosmetics fully justify selective distribution agreements but restricting distribution to selective distributors is only exempted if resellers are selected on the basis of objective and proportionate qualitative and quantitative criteria, set in a uniform manner and applied without discrimination (the so-called Metro criteria⁸). These criteria were recently reaffirmed by the European Court of Justice in its *Coty Germany v Parfümerie Akzente* ruling (decision C-230/16 of 6 December 2017).
- (29) If members of the FEPD obviously subscribe to such principles, these criteria require a factual assessment of distribution agreements and their effective implementation, knowing that the precise level of requirement of transparency, objectiveness and non-discrimination are not always totally clear. This assessment involves costs and risks exposing both parties to litigation, which is itself particularly costly.
- (30) Against this backdrop, the Regulation and Guidelines do provide legal certainty by establishing that selective distribution agreements benefit from an exception to the prohibition set out in article 101(1) TFEU, when the parties’ market share remains below a certain level and the agreements do not include any hardcore restraint, as defined by the Regulation. This legal certainty is all the more essential as a number of specific investments made by FEPD’s members require a contract duration proportionate to the time necessary to ensure adequate return on such investments.

2. THE COURT'S CASE LAW, THE RESULTS OF SECTOR INQUIRY INTO E-COMMERCE AND CHANGES IN DISTRIBUTION METHODS SHOULD BE REFLECTED IN THE GUIDELINES

- (31) In addition to the extension of the Regulation and its Guidelines, the updating of certain aspects of these Guidelines now appears necessary in order to reflect the recent case law of the European

⁸ European Court of Justice, decisions 26-76 of 25 October 1977, *Metro SB-Großmärkte GmbH & Co. KG v Commission*, point 20; later reiterated in decision 31/80, 11 December 1980, *NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK"*, point 15.

Court of Justice, the results of the Commission's e-commerce sector inquiry and the latest evolutions in distribution practices.

- (32) In particular, the FEPD considers that the possibility of imposing a fair contribution to the costs of the physical network, which is a deciding factor in maintaining and developing retailers' investments in this sector, must be reinforced (2.1) and that the possibility of excluding the use of visible third-party platforms should also be properly reflected in the Guidelines (2.2).

2.1 The possibility to impose a fair contribution to the costs of the physical network must be reinforced

- (33) At present, protecting the investments necessary to implement the quality criteria is amongst other things based on the ability of suppliers to require authorised distributors to have one or more physical shops in close contact with the customer base in order to guarantee their contribution to the costs of the physical network, necessary to address customers' needs.
- (34) This possibility not to admit "pure players" in selective networks is set out in para 54 of the Guidelines, which confirms that the requirement to have one or more physical shops does not constitute a hardcore restriction.
- (35) The extension and reinforcement of the Guidelines on this point is a deciding factor for undertakings involved in the selective distribution of luxury cosmetics and perfumes.
- (36) Indeed, given that the costs of running physical shops and the investments made to guarantee the luxury image of the products in physical shops are a great deal higher than the costs of operating online retail websites, such an obligation to invest in the physical network is the basis to guarantee that each retailer is making a fair contribution to the costs generated by a physical distribution network. It is also the sole way to guarantee a uniform service to customers in all areas.
- (37) While this principle is clear and well established, the requirement to have "one or several brick and mortar shops" is insufficiently precise and, in the current circumstances, is no longer sufficient in order to guarantee that contributions to the costs of the physical network are being shared fairly among retailers. 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 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.).
- (38) The Guidelines include provisions referring to the possibility to require the distributor to sell at least a certain absolute quantity (in value or volume) of products offline, which may be the same for all or set individually on the basis of objective criteria⁹. The Guidelines also refer to the possibility to agree on a fixed fee to support the distributor's off-line sales efforts¹⁰. In practice, these sections have failed to provide the legal certainty required to see any significant and genuine development in this direction, and the doubts expressed about dual pricing in the Guidelines also contributed to that effect.
- (39) Some National Competition Authorities have themselves expressed doubts as to whether such measures could effectively avoid being considered as hardcore restrictions. For example, the

⁹ Guidelines, point 52 under c).

¹⁰ Guidelines, point 52 under d).

French Competition Authority, in relation to the possibility of setting a fixed quantity of products sold offline, has emphasised that *“when it approaches this threshold, the distributor will be discouraged from making sales online [...] [and] such pricing conditions could then limit the percentage of sales made by the distributor via the Internet, which constitutes a hardcore restriction”*¹¹. The French Authority also noted that a price difference between online and offline sales driven by fees invoiced to authorized distributors could constitute a hardcore restriction if the fees increase with the sales achieved offline as this would amount to a prohibited form of dual pricing¹².

- (40) Moreover, in addition to the practical difficulties for the supplier to set a fixed fee for participation in network costs (knowing that the supplier only has a very indirect knowledge of these costs), the European Commission, in its e-commerce sector inquiry, noted that the possibility of imposing a fixed fee to support offline sales efforts only offers *“limited possibilities to address differences in the costs of investments between sales channels”*¹³.
- (41) The FEPD therefore believes that the consultation process should be extended to cover the revision and improvement of the Guidelines in that respect in order to set precisely the extent to which a supplier can effectively guarantee fair contribution of authorized retailers to the costs of developing and maintain the physical distribution network required for the distribution of its products and for the benefit of the consumer.

2.2 The possibility to exclude the use of third-party platforms must be clearly stated in the Guidelines

- (42) Hardcore restrictions, and notably articles 4b) and 4c) of the Regulation, have given rise to a number of interpretation questions in France (see in particular the decisions of the Paris Court of Appeal dated 28 February 2018, case no. 16/02263 *Coty France v Showroomprive.com*, of 29 June 2016, case no. 14/00335, *Coty France v Brandalley*, of 2 February 2016, case no. 15/01542, *Caudalie v eNova Sante*) and at the European level (European Court of Justice, decisions C-439/09 of 13 October 2011, *Pierre Fabre*, and C-230/16 of 6 December 2017 *Coty Germany v Parfümerie Akzente*) which show that these restrictions should be set out in greater detail or clarified further in the Guidelines.
- (43) In its *Coty Germany*¹⁴ decision, the European Court of Justice considered 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 is proportionate in the light of the objective pursued as it provides the supplier with a guarantee that those goods will be exclusively associated with the authorised distributors and will be sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorised distributors. Such distribution conditions cannot be required in the absence of a contractual relationship between the supplier and the third-party platform. The European Court of Justice also confirmed that this prohibition does not go beyond what is necessary as it is not an absolute prohibition to sell the contract goods online¹⁵. The European Court of Justice noted in this respect that distributors were permitted to sell online via platforms that are not

¹¹ Opinion no. 12-A-20 of 18 September 2012 on competition in the e-commerce sector, point 263.

¹² Opinion on e-commerce op. cit., point 262.

¹³ Staff Working Paper op. cit., point 599.

¹⁴ European Court of Justice, decision C-230/16 of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

¹⁵ In the *Pierre Fabre* decision op. cit., the European Court of Justice considered that a total ban on re-selling via the Internet could not be accepted because the aim of protecting the prestigious image could not constitute legitimate grounds on which to limit competition.

discernible to the consumers and that, in practice, the main distribution channel, in the context of online distribution, was nevertheless constituted by distributors' own online shops¹⁶.

- (44) The ECJ's conclusions must be integrated into the Guidelines, especially given that some National Competition Authorities have expressed far more restrictive, even divergent positions in that respect. The French Competition Authority in particular indicated, in relation to the distribution of brown goods, that "*a general ban on sales via non-authorised websites and/or any third-party websites, notably marketplaces*" could constitute evidence "*of vertical restrictions on active and passive sales by retailers operating in the relevant market*"¹⁷. The French Competition Authority later confirmed its position by indicating that it had closed an investigation into the distribution of Adidas products following the termination by the brand of all its agreements containing a clause prohibiting its retailers from using marketplaces¹⁸.
- (45) In other EU Member States, some Authorities and Courts have, on occasion, adopted diametrically opposed positions in the context of the cases brought before them. For example, in the *Deuter Sport* case¹⁹ in Germany, the Frankfurt regional Supreme Court upheld the selective supplier's legitimate interest in prohibiting resales via platforms in order to ensure that its products are perceived as high quality goods, which are offered for sale in combination with high quality advice. This decision therefore confirmed that the clause complied with German and EU law. In contrast, in the *Adidas* and *Asics* cases, the Bundeskartellamt ruled, in line with the French authorities, that a similar prohibition could be restrictive and obtained that the suppliers concerned modify their selective distribution agreements on this basis²⁰.
- (46) The conclusions of the European Court of Justice in its *Coty Germany* decision moreover support the initial indications given by the European Commission in the conclusions resulting from its e-commerce inquiry²¹, with a Final Report concluding that "*(absolute) marketplace bans should not be considered hardcore restrictions within the meaning of Article 4(b) and Article 4(c) of the Vertical Block Exemption Regulation*"²². The Commission however noted that "*the Commission or a national competition authority may decide to withdraw the protection of the Vertical Block Exemption Regulation in particular cases when justified by the market situation*"²³.
- (47) On this basis, the FEPD calls for a revision of para 54 of the Guidelines, which presently merely refers to the possibility to require that the logo of the entity that hosts the e-commerce website of a distributor be hidden from the consumer when the latter accesses the website. The only point covered by the Guidelines therefore relates to website hosts, which should be distinguished from visible e-commerce platforms (such as Amazon, eBay). On the basis of the aforementioned *Coty Germany* decision, it should be stated that clauses resulting in the prohibition of the use of visible third-party platforms do not constitute hardcore restrictions within the meaning of article 4, c) when such a prohibition is appropriate in order to protect the image of luxury products, transposing the requirements relating to the brick and mortar environment to online sales. This condition further needs to be detailed in order to clarify the circumstances in which the test is effectively met.
- (48) Finally, the FEPD is questioning the relevance of retaining the possibility for a National Authority to decide to withdraw the protection provided by the exemption, in particular in light of such divergences. If a withdrawal was to be necessary for reasons specific to an EU Member State, it is

¹⁶ European Court of Justice, *Coty Germany* decision op. cit., points 44 et seq.

¹⁷ French Competition Authority, decision no. 14-D-07 of 23 July 2014 on practices applied in the "brown goods" distribution sector, in particular re: television sets, points 181 and 184.

¹⁸ French Competition Authority, press release dated 18 November 2015.

¹⁹ *Oberlandesgericht Frankfurt am Main*, decision no. 11 U 84/14 dated of 22 December 2015, *Deuter Sport*.

²⁰ *Bundeskartellamt*, press releases dated 2 July 2014 and 27 August 2015.

²¹ European Commission, Final Report on e-commerce sector inquiry SWD (2017) 229 dated 10 May 2017, points 42 et seq.

²² Idem, point 42.

²³ Idem, point 43.

essential that this assessment be made by the European Commission itself in order to ensure the uniform application of anti-trust rules within the European Union.

A handwritten signature in black ink, consisting of a stylized 'W' followed by a long, sweeping diagonal line.

William G. Koeberlé
Président