

POSITION PAPER VBER

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CONFIDENTIAL

INTRODUCTION

In October 2018, the European Commission launched a public consultation on the Commission's Regulation (EU) No 330/2010 (the "**VBER**") and its Vertical Restraints Guidelines (the "**VGL**"), that will expire on 31 May 2022.

Our company welcomes the opportunity to engage with the European Commission on the evaluation of the VBER and VGL in terms of effectiveness, efficiency, relevance, coherence and would like to hereby provide some additional comments those set out in its answers to the public consultation.

1. Introduction

In the European Union, our company, like all other luxury brands, has been distributing its products through a selective distribution network consistent with the VBER and VGL for decades. This has allowed it to select its authorized resellers on the basis of objective criteria key to preserving its brand image, such as the quality and esthetics of the point of sale layout and fitting, the quality of the display of the products, the level of services and tailored advice offered by qualified staff and other things, such as the availability of appropriate testers and samples, the location of the point of sale and its surroundings. All of these require our company as well as its authorized retailers to make substantial and constant investments in the quality and image of their points of sale, their websites, their customers or after sale services, not only to enter into, but also to remain part of the network.

An internal "Brand Equity" Survey in 2017 singled out the importance of "*Qualitative Shopping experience with a Meaning*". This survey on the retail experience revealed the critical importance of shopping experience as a top desirability driver, along with exceptional quality of the products. This physical retail experience increasingly allows, in a hyper-connected and dematerialized world, to leave a stronger mark in the memory, because it connects senses, emotions and human interactions, creating and conveying the dream that is at the essence of luxury. Without this dream, the actual sustainability of the luxury industry would ultimately be questioned.

In 2017, the European Cultural and Creative Industries Alliance ("ECCIA") published a report¹ defining luxury products as "*the result of a creative process, combined with a cultural heritage, supported by a powerful story*". Creativity and innovation are and always have been at the heart of luxury industries and are the driving forces behind their products.

A significant part of our business is realized in Europe on the basis of the selective distribution model, with thousands of authorized physical points of sale and around fifty authorized e-retailers. Our company also started selling its products online through its own e-commerce platform in France a few years ago and is currently expanding its own e-commerce activity to other European Member States.

¹ SECURING THE LEADERSHIP OF THE EUROPEAN HIGH-END AND LUXURY INDUSTRIES IN THE DIGITAL ERA, ECCIA, October 2017

Our company's product development and research and development teams apply high standards of excellence not only to the quality of our products, but also to the colors, textures and, where applicable, olfactive components of its products. Our company has made substantial investments over the years in order to create and maintain a highly qualitative network of brick and mortar points of sale, ensuring that customers have sufficient physical points of sale in their vicinity offering "best in class client experience", meaning professional advice and services and the physical experience of the above-mentioned product qualities by touching, smelling, and/or having visual contact with the products in an environment that is consistent with the image of the brand.

At the same time, our company strives to ensure that a customer's online experience is not a "separate" customer journey from the physical store experience, but is seamlessly integrated, offering a "before" and "after" experience complementing the store visit, providing additional information about the product or allowing the purchase of a product online from authorized retailers or our company, directly after having experienced it or obtained services in a physical store. In this sense, our company has, over the last years, become a major omnichannel player, applying its standards of excellence both offline and online to extend its exceptional client experience, increasing its support to retailers online by providing visual charters and large numbers of digital assets available for multiple channels (including smartphones and apps) that are reflective of the value and the standards of the brand. Furthermore, our company invests both in people and resources for the implementation of its e-retail strategy and the constant monitoring of the high quality of authorized retailers' websites.

However, the luxury sector has been significantly challenged by the emergence of tech giants with very different business models, which significantly challenge the traditional luxury product experience by waging pricing and "commodity" wars which seemingly offer clients better services, but which in reality not only erode brand value through free-riding on the brands' and retailers' investments but are also destructive to brand value and to the business models of small and medium-sized retailers through the ruthless competitive practices.

Our company has historically not worked with pure online retailers, as they did not have the required brick and mortar presence which ensured the necessary investments in money and services that maintained the brand image (store rent in prestigious locations, high quality store fittings, hiring and training of qualified staff and regular product trainings to be able to offer personalized services, store animations, etc.), to the benefit of the entire network, avoiding free-riding.

This is different where selective online retailers are willing to consider different business models and invest in the quality, innovation, creative relevance and impeccable reputation (such as investments to ensure avoidance of counterfeits or parallel products on their site, etc.) important to the image of luxury brands. Consequently, in the past years, our company has concluded partnerships with "best in class" digital actors notably by launching an online pop-up boutique selling products directly to consumers, for a limited period of time, and by exploring the implementation of new tailored services in order to bring consumers an upgraded shopping experience within our company's stores.

However, because the internet in particular has led to a host of problems detrimental to the brands and the end-customers, in particular with regard to counterfeiting, illegal selling

practices and other problems with regard to product quality, such as lack of traceability or the sale of altered products which could represent health risks, notably for Fragrance and Beauty products, the safety of which can only be guaranteed within the safeguards of authorized distribution networks, it is crucial in all of these cases that the brand be able to protect its sizeable investments.

The total upheaval around traditional business models and the incredibly rapid rise and sheer size of a number of pure online players and their anti-competitive practices have created uncertainty over the last decade.

We are therefore of the opinion that although the EU rules on vertical agreements are to a large part still applicable in today's business reality, they need to be refreshed and strengthened to reflect the changing economic landscape with the emergence of new business players as well as the rise of new modes of consumption amongst consumers. They also could to be clarified with regard to their applicability to new kinds of agreements and business models in order to bring more legal certainty both at European and national levels and provide harmonized tools throughout all member states to protect selective distribution networks.

Some of the necessary changes have already been pointed out in the European Commission's report on e-commerce, as well as in decisions of the ECJ and certain national courts, and in particular in the landmark Coty case², as well as in the National Competition Authorities' ("NCA") decisional practices. We would welcome the European Commission integrating some of these changes in the VBER and its VGL to provide global legal certainty and binding guidance of value to all stakeholders.

² ECJ, aff. C-230/16, Coty Germany GmbH/ Parfümerie Akzente GmbH

PART I – THE LEGAL FRAMEWORK APPLICABLE TO EU SELECTIVE DISTRIBUTION NETWORKS COULD BE FURTHER IMPROVED

The VBER and VGL are a strong and useful tool allowing companies to have a harmonized and consistent framework, which provides legal clarity and certainty. However, our company would like to take this opportunity to raise certain points that require further clarification to continue to improve the effectiveness and harmonization of vertical relations in the European Economic Area (“EEA”).

1. CLARIFICATION AS TO VALIDITY OF SELECTIVE DISTRIBUTION NETWORKS

Call for clarification regarding the distinction between active sales and passive sales – The distinction between active and passive sales must be preserved, both for offline and online sales, but a clarification needs to be made about application to Internet sales.

Indeed, in conformity with the VGL, Internet sales are generally considered as “*a form of passive selling, since it is a reasonable way to allow customers to reach the distributor*”³. However, in our new digital era, passive sales and active sales are no longer easy to define notably because of the arrival of social media and new technical ways to gain customers’ attention. According to many observers, the opening of an Internet website requires the implementation of promotional techniques systematically falling into the definition of active sales. As a result, the presumption of online sales’ passive nature is no longer relevant.

Therefore, we recommend removing the presumption set out in paragraph 52 VGL which generates much more confusion than clarity. Such as procedural rules to determine jurisdiction and applicable law, we could revert to a case by case assessment based on a set of concordant items of evidence allowing to define if a seller is actively targeting specific consumers - such as, *inter alia*, language, currency, website domain (i.e. national or generic domain), paid-referencing, certain forms of retargeting, newsletters, processing of personal data, etc. - all of which are reasonable criteria to define whether the reseller is trying to actively sell on a territory.

Call for clarification regarding the application of Metro Criteria - The question as to whether selective distribution is compatible with competition law is considered as settled. Indeed, the European Court of Justice (“ECJ”) confirmed in the Metro Case in 1977, and upheld many times, that notwithstanding the inherent restrictions of selective distribution schemes, such systems may be considered to be compatible with Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) where the following criteria are met:

- the properties of the product necessitate a selective distribution system;
- resellers are chosen based on objective criteria of a qualitative nature which are determined uniformly for all potential resellers and applied in a non-discriminatory manner; and
- the restrictions do not go beyond what is necessary (hereinafter the “**Metro Criteria**”).

³ Para 52 VGL

These conditions are clearly pointed out in paragraph 175 of the VGL⁴, where the European Commission states that *“Purely qualitative selective distribution is in general considered to fall outside Article 101(1) for lack of anti-competitive effects, provided that the three [Metro] conditions are satisfied”*.

However, a doctrinal and case law debate emerged as some academics and NCAs understand by reading Paragraph 175 of the VGL in combination with Paragraph 176 of the VGL⁵, that should one supplier not fulfil the Metro Criteria, such supplier could still be exempted provided neither the supplier nor the distributor has a market share higher than 30% and that the agreement does not contain any hardcore restriction (hereinafter the **“Exemption Conditions”**). For instance, such interpretation has been endorsed by certain French Courts and French Competition Authority⁶.

A clear position from the European Commission is required regarding discrimination at the entrance, throughout the performance of the agreement and termination.

2. LUXURY BRAND IMAGE WITH APPROPRIATE CONDITIONS OF SALE

In order to protect its brand image as well as the authorised retailers, the brand owner must implement certain criteria within its network.

The current regulation and the European Court of Justice recognize that it is essential for luxury brand owners to be able to select their retailers based on qualitative and objective criteria throughout the European market to ensure the high-quality customer experience associated to their products and the image of the luxury goods⁷. Selection of retailers based on qualitative criteria allows brand owners to control their image and reputation all the way to final customers and to address potential free-riding of non-authorized vendors that do not comply with said criteria nor bear corresponding investments.

Our company has implemented offline and online qualitative and quantitative criteria to ensure that customers experience the high-quality environment of the brand. These criteria have evolved over time in order to take into consideration new technologies and provide a full omni-channel shopping experience to customers as well as to apprehend more effectively free-riding. We however believe that certain criteria set out in the current regulation must be clarified or supplemented.

Brick and Click - VBER currently states that a brand owner may require its distributors to have one or more brick and mortar shops as a condition for selling products online⁸.

From a customer’s point of view, our company believes that this brick and click criterion is crucial because of the specificities of luxurious products which necessitates for the customer to try the products and “experience” the high-quality environment and services of authorized

⁴ Para 175 VGL

⁵ Para 176 VGL

⁶ For example: Paris Court of Appeal, 27 March 2019, n°17/09056; French Competition Authority, decision n°19-D-08, 9 May 2019 relative to automotive aftermarket

⁷ ECJ, aff. C-230/16, Coty Germany GmbH/ Parfümerie Akzente GmbH

⁸ Para 54 VGL

physical points of sale. These exceptional services within points of sale are crucial for the perception of luxury products as it guarantees high-end and tailored advice in the customers' vicinity. Customers can thus have direct contact with the products to touch and smell and/or have visual contact, with experienced staff who can provide expert knowledge on the products, in an environment that is consistent with the image of the brand.

Hence, brands could wish to examine how many authorized physical points of sale they may require per country/agglomeration/merchant area ("*maillage*") in order to ensure that authorized physical points of sale still fulfil the purpose they were originally envisaged for in order to ensure high-end customer experience and tailored advice on luxury products.

In addition, the brick and click prerequisite also enables suppliers to face the challenge of free-riding from unauthorised vendors who sell products without participating to the selective distribution network's investments efforts. In the same vein, we notice a new tendency of certain players that open one physical point of sale only to sell the products on their website. Thus, the physical point of sale is only used by these players to become members of selective distribution networks.

For customers to fully benefit from the additional brick and mortar value, as well as for the whole chain of the distribution to fight effectively against free-riders, it is key that the brick and mortar prerequisite be maintained and reinforced.

Appropriate sales conditions offline/online - Pursuant to the current VBER, a supplier is entitled to sell goods only to authorized retailers selected on the basis of quantitative criteria. These criteria enable the supplier to ensure that customers benefit from an adequate shopping experience in authorized physical points of sale and support investments made by authorized retailers developing infrastructures necessary to such shopping experience.

Thus, a supplier can require that the authorized retailer achieve a minimum amount of annual purchases per point of sale provided that:

- such an amount does not represent a significant proportion of the authorized retailers' total turnover achieved with the type of products in question⁹, and
- it does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realize economies of scale in distribution.

Our company recommends that the minimum annual purchase be maintained as it is. However, certain points should be clarified in the VGL, such as the conditions for the application and calculation of the minimum annual purchase.

In addition, the current VGL provides that suppliers can require that the authorized retailers sell a certain absolute minimum number of products offline (in value or volume) to ensure an efficient operation of its authorized physical point of sale¹⁰. 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 location¹¹.

⁹ European Commission n°92/33/CEE Yves Saint Laurent 16/12/91 & European Commission n°92/428/CEE Givenchy 24/07/92

¹⁰ Para 52 VGL

¹¹ Para 52 VGL

This requirement helps protecting the efforts and investments of authorized retailers bearing substantial costs for the development of physical points of sale (real estate, staff, advertising, services, etc.). It also helps brand owners to fight against the development of fictitious physical points of sale set up by retailers that mostly sell products online.

The principal regarding minimum offline sales¹² may be renewed as is. However, the European Commission could provide guidelines relative to the amount and conditions of calculation of said minimum offline sales.

Moreover, we suggest that provisions relative to dual pricing could be further clarified. As indicated above, selective brands owners request that retailers make significant investments to maintain the quality and image of their physical points of sale and offer adequate service, advice and after-sales services to satisfy customers' demand for high quality retail environments. In order to take into consideration these differences of investments between online and offline sales channels, and compensate the costs borne by retailers developing their physical points of sale necessary to in-store experience and personalized advice, we suggest that the European Commission clarify the current rules as regards the application of different commercial conditions to offline and online retailers. These rules are currently interpreted differently by EU Member States. For example, we understand that the German Competition Authority has a very strict position and considers that when a company grants discounts to retailers for services rendered in physical points of sale (e.g. shelf space dedicated to the brand owner products), this practice constitutes a dual pricing policy as it allegedly involves a structural disadvantage for online retailers which cannot benefit from these discounts¹³. Other national authorities refuse such an interpretation and accept that suppliers may grant different commercial conditions to offline and online retailers¹⁴. A more flexible approach would enable suppliers to encourage retailers to support investments of more costly value-added services necessary to preserve a high-quality environment for luxurious products.

Therefore, more flexibility and a clear position from the European Commission could be helpful as regards annual minimum purchases, offline sales and dual pricing.

¹² Para 52 VGL

¹³ Bundeskartellamt, 18 July 2016, Lego

¹⁴ Dutch Competition Authority Report, June 2009 Civil Court of Arnhem, 7 July 2005, n°125946 / KG ZA 05-246 ; Civil Court of Zutphen, 30 December 2005, n°74100 / KG ZA 05-309 Court of Zutphen, 8 August 2007, n° 79005 / HA ZA 06-716. French Competition Authority, 18 September 2012, n°12-A-20

PART II - EU SELECTIVE DISTRIBUTION NETWORKS NEED TO BE PROTECTED AGAINST DISRUPTORS

The essence of a selective distribution system is the ability for a supplier to select its distributors based on qualitative criteria compatible with the brand image and prohibit such distributors to resell the products outside of the network. Hence, selective distribution allows manufacturers to control the commercialization of their products throughout the distribution channel until their resale to final customers.

Increase of unauthorized sales - When a brand decides to implement a selective distribution network, it will, from time to time, find products outside the closed network and sold under conditions which are not in line with the image and reputation of the brand.

This situation may have various explanations, notably products being stolen - within authorized points of sales or warehouses or even during the carriage of the goods - or loopholes in the organization of some authorized retailers requiring the supplier to identify these breaches and stem the sources to strengthen the tightness of its network.

Our company also noticed the expansion of several phenomenon, such as “Global Shoppers” by which EU organised buying rings (entities or individuals) are making repetitive buys within many authorized points of sale for the sole purpose of reselling in numerous EU countries and which makes it very hard to detect.

These behaviours severely affect our company’s authorized retailers and unfortunately, despite its efforts, our company finds it very difficult to end these disturbances as the authorized retailers are sometimes not voluntarily breaching their prohibition of resale outside the network (indeed, in certain circumstances, they are not aware of the final purpose of the purchases if they are made by individuals presenting themselves as final consumers) and, brand owners do not benefit from harmonized EU legal grounds allowing them to take appropriate legal actions against these “Global Shoppers”.

Moreover, it is undeniable that resales outside selective networks have considerably developed with the arrival of the Internet, providing not only more visibility to unauthorized vendors but also technical and digital means, to individuals and professionals, to resell the products outside the network and contributed *de facto* to the expansion of networks’ disruptions.

Platforms, and more specifically marketplaces, seem to play a key role in the development of unauthorized resales and the disruption of selective distribution networks.

We welcomed the Commission's position statement and the ECJ position in the Coty case about marketplace bans. Indeed, both the Commission and the ECJ confirmed that marketplace bans do not constitute a hardcore restriction within the meaning of the VBER. This position is consistent with the criteria of selective distribution for high-end luxury products intended to protect investments and preserve the aura of a high-luxury brand.

However, the persistent presence of counterfeits and grey market products sold by unauthorized vendors on these marketplaces as well as altered products, which constitute a risk for the consumer and, for some of these marketplaces, infringements to our brand as they do not correspond to our quality standards, still represents an issue.

Unauthorized resellers can be professionals as individuals. These individuals may sell products in huge quantities and, thus, should comply with regulations applicable to professionals. Moreover, these individuals are free-riding on investments made by the brand and its authorized distributors in the same way as professionals.

Our company is also concerned because marketplaces may tend to hide behind the limited liability regime applicable to hosting service providers set in the E-Commerce Directive to avoid (i) implementing proactive measures to limit the presence of counterfeits on their platforms and (ii) removing grey market products on the basis that they are not clearly illegal and do not fall under the scope of their obligations under the E-Commerce Directive.

However, our company notes a growing social and legal awareness when dealing with platforms, which are highly powerful actors detaining a major position (e.g. concerns relative to breach of private data, unfair competition methods, etc.). Such awareness should be transposed in the upcoming VBER, by adopting a more balanced approach as regards online sales/advertising which are deeply rooted in the European Single Market and certain identified online practices clearly demonstrating tangible detrimental effects on consumers and luxury brand owners. Our company would also recommend keeping a trustworthy EU legal framework and providing stronger legal remedies in the VBER to allow brand owners to protect their selective distribution network from the use of platforms by unauthorized resellers (see part III below).

The identification of other existing or upcoming disruptors – Our company identified many other existing or upcoming disrupting factors which mainly relate to access to personal data, the growing impact of social networks, advertising tools and voice sales.

- Access to Data -

As evoked in the final report Competition Policy for the digital era¹⁵, data is an essential input for online service, production processes, logistics, smart products and AI. The competitiveness of firms thus increasingly depends on timely access to relevant data.

The regulation on promoting fairness and transparency for business users of online intermediation services¹⁶, provides for the creation of a legal framework for online intermediation services, as the growing intermediation of transactions through online intermediation services, fueled by strong data-driven indirect network effects, lead to an increased dependence of such business users on those services for them to reach consumers.

Certain marketplaces/pure online players are active not only as retailers, but also control many or even all aspects of fulfilment, own search engines and other social networks which allow them to collect and analyze masses of big data. The significant data they are collecting and their wide client base give them a significant competitive advantage over the brands.

Access to data is also a critical aspect in the advertising sector. In May 2016, the French Competition Authority and the German *Bundeskartellamt* published a joint report on big data and its implications for competition law¹⁷. While the *Bundeskartellamt* followed up the report

¹⁵ Competition Policy for the digital era; Final report, 4 April 2019

¹⁶ Council of the European union, Proposal for a regulation on promoting fairness and transparency for business users of online intermediation services, 19.02.2019 voted by the European Parliament on 17.04.2019

¹⁷ Competition Law and Data; 10th May 2016, French Competition Authority and Bundeskartellamt

with investigations in the social media sector, the French Competition Authority initiated a sector-specific inquiry focused on display online advertising, which complemented its earlier 2010 report on search advertising. Such inquiry stresses the need to act as quickly as possible in addressing potential anticompetitive advertising practices in digital markets.

- Growing importance of social media as third-party platforms or direct sellers

Certain social media are working on standalone applications dedicated to shopping, which will let users browse collections of goods from merchants that they follow and purchase them directly within the application. Interestingly, the Staff Working Document mentions that social media has a growing importance on manufacturers' online sales¹⁸. The potential is huge since millions of business profiles are active on social networks.

Since social media may act as a marketplaces or direct sellers, the Commission may recognize the market power of certain social media and take into consideration this issue in the upcoming VBER.

- Price Comparison Tools -

The Commission has not yet taken a position on whether and under which conditions restrictions on the use of price comparison tools may violate Article 101 TFUE.

The Commission Staff Working Document seems to state that restrictions on the usage of price comparison tools based on objective qualitative criteria would be covered by the current VBER¹⁹. Also, in the above-mentioned Asics case, we understand that the Federal Court of Germany held that a per-se prohibition to make use of price comparison tools, without any quality requirement, constitutes a hardcore restriction within the meaning of the VBER²⁰. The Dutch Competition Authority showed a similar approach while revising its vertical guidelines by providing that prohibiting the purchaser from using price comparison tools can be a hardcore restriction if this restriction is not based on objective quality criteria²¹.

In October 2016, the European Commission and EU consumer protection authorities launched a coordinated screening of 352 price comparison and travel booking websites across the EU. They found that prices were not reliable on 235 websites representing 2/3 of the screened websites. Additional price elements, added at a late stage of the booking process without clearly informing the consumer or promotional prices, did not correspond to any available service. According to the Commissioner for Justice, “[...] *if the reviews on comparison websites are biased or prices are not transparent, these websites are misleading consumers.*”²²

The German Competition Authority recently found that price comparison tools were “*unsatisfyingly respecting*” certain legal provisions in the field of competition and consumer law²³. Indeed, price comparison tools may often be involved in horizontal cooperations, as compared data are often provided by the same service provider.

¹⁸ Commission Staff Working Document, Final report on the E-commerce Sector Inquiry, §998

¹⁹ Commission Staff Working Document, Final report on the E-commerce Sector Inquiry, §999

²⁰ European Commission, Case AT.40428, Guess, §118 and §119

²¹ Autoriteit Consument & Markt (ACM), Leidraad – Afspraken tussen leveranciers en afnemers, §9

²² Results of a coordinated screening of 352 price comparison and travel booking websites across the EU - http://europa.eu/rapid/press-release_IP-17-844_en.htm; 7 April 2017,

²³ Bundeskartellamt, Sektoruntersuchung Vergleichsportale, Bericht, 11.04.2019

Luxury good consumers seek the exclusivity of a brand and the quality of a product and are not always looking for the lower price. According to ECJ case law, competition by quality and innovation needs to be promoted without being sacrificed to price competition. Price comparison tools, if not subject to rigorous criteria, might harm a brand owner's or product's image, mislead price-conscious customers into buying products of a lesser quality or even counterfeits and help certain players breach selective distribution networks.

- Growing importance of paid search and other bidding practices by authorized distributors

Such practices are not specifically treated by the current VBER nor its VGL. However, in the staff document the European Commission emphasized the growing importance of restrictions to advertise online and raised competitive concerns if they were to restrict the effective use of the Internet as a sales channel by limiting the ability of retailers to direct customers to their website²⁴.

In the Guess case²⁵, the Commission held that a restriction on the use of trademarks as keywords for Google AdWords constitutes a "by object" restriction. However, the brand at stake as well as quality requirements shall remain relevant and shall lead to a case-by-case analysis. Indeed, it appears from the circumstances of the case that the restriction did not pursue the (legitimate) objective to preserve the image of the brand but aimed at reducing competitive pressure by authorized retailers on Guess' own online retail activities and keeping down its own advertising costs.

Therefore, keeping in mind relevant IP case law²⁶, a luxury brand owner may request prior authorization, from authorized retailers, for any use of its trademark; in particular as referencing keywords justified by the preservation of the quality and the image of the marked products.

- Voice Technologies -

In the past years, clear advancements in computing emerged but the way consumers interact with their devices and the Internet has remained somewhat unchanged and consistently relied on "touch" devices, such as keyboards and touchscreens. However, the arrival of voice technologies will have a major role in consumers' life, will change the way they consume and will probably spread very fast. This technology may be very complex to frame.

In view of all the above, the European Commission needs to address all these concerns in the upcoming VBER and VGL and find a balance between the fast-growing economy as well as the development of disruptors and brand owners which are at major risk, notably by providing efficient legal remedies to brands allowing them to protect their EU selective distribution networks.

²⁴ Commission Staff Working Document, Final report on the E-commerce Sector Inquiry, §533

²⁵ Case AT.40428-GUESS dated December 17, 2018

²⁶ European Court of Justice, 23.03.2010, C-236/08 to C-238/08, Google; European Court of Justice, 22.09.2011, C-323/09, Inteflora.

PART III – LEGAL REMEDIES NEED TO BE STRENGTHENED AT EU LEVEL

As clearly explained above, selective distribution networks are unfortunately subject to more and more disruptions mostly due to the development of new powerful digital stakeholders and technical means facilitating trademark infringements and resales outside selective distribution networks.

Indeed, unauthorized vendors are clearly benefiting from the luxury brands' image and reputation, investments made by the brands and by authorized distributors without having to meet the strict requirements and bear investment costs, and, for some of them, without complying with the same obligations. Moreover, the recent ECJ preliminary ruling in *Concurrence vs. Samsung and Amazon Case*, illustrates how unauthorized sales in a European member state A can harm distributors located in a member state B²⁷. Luxury brands' networks are also clearly suffering from the role of European marketplaces and the persistent presence of counterfeited and grey market products which constitute a risk for the consumer, and which are presented for sale by some unauthorized marketplaces themselves, unauthorized professionals and unauthorized individuals carrying out illegal professional activities.

Considerable efforts are made by our company in order to ensure high and consistent standards of quality and ensure tightness of our network. Our company does everything in its power to protect its brand image and the authorized distributors which are investing in its network to provide customers with high quality products and a client experience which is in line with the high expectation customers can have from the Brand.

Despite some provisions allowing the brand to prohibit the resale of the products by authorized retailers outside the selective distribution network²⁸ and some other tools such as quota recommendations to ensure resale at a retail level to final consumers²⁹, brand owners and authorized distributors are clearly suffering from a lack of harmonized and efficient legal provisions to protect their network and *in fine* the brand itself.

On the contrary, notwithstanding the recognition of selective distribution lawfulness and positive impact on consumers, selective distribution may be in contradiction in certain circumstances with other European principles, namely free circulation of products and exhaustion of right. Indeed, resales outside a selective network are not considered as a legitimate reason to exclude such exhaustion of rights.

Brand owners and distributors investing heavily in the network do not have any uniform legal grounds to protect the network against existing and upcoming disruptors. Therefore, a way to provide strong legal remedies to brand owners could be the recognition that resales of products outside a selective distribution network are considered as an exception to the exhaustion of trademark rights along with offenses to the integrity of the product, likelihood of association and protection of brand reputation. However, this could require the amendment of Article 7 of EU Directive 89/104/CEE³⁰ or complementing the list of exceptions through case law such as in *Copad Case*³¹.

²⁷ ECJ, Case. C- 618/15, *Concurrence SARL/ Samsung Electronics France SAS, Amazon Services Europe Sàrl*

²⁸ Article 4 b) iii) of the VBER and Para 174 VGL

²⁹ Para 55 VGL

³⁰ First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trademarks - Article 7 "1. The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.

Other ways to protect selective distribution networks exist such as the introduction of a harmonized legal procedure (i.e. injunction procedure) to facilitate communication of sources of supply of unauthorized vendors and the introduction of a specific provision aimed at protecting selective distribution networks.

Our company would also like to bring to the attention of the European Commission that some countries, already aware of the risks to which brand owners are exposed, have been precursors and introduced such specific provisions. For instance, France has been a pioneer in this area and introduced in 1996 within the French Commercial Code providing the following:

“The liability of any producer, merchant, industrial company or person registered with the register of trades is incurred and requires it to compensate the damage caused, when it:

6° Participates directly or indirectly in the infringement of the distributor’s prohibition to sell outside a network when such distributor is bound by an exempted selective or exclusive distribution agreement under the applicable rules of competition law.”

This article has been used many times and has demonstrated its value and strength to initiate legal proceedings against unauthorized vendors and thus to protect our selective distribution networks.

Aware of the importance of this article for the protection of selective distribution for brand owners, this Article was amended on April 25, 2019 becoming now an article by itself (Article L.442-2 of the French Commercial Code) and providing a larger scope as follows:

"Engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait, par toute personne exerçant des activités de production, de distribution ou de services de participer directement ou indirectement à la violation de l'interdiction de revente hors réseau faite au distributeur lié par un accord de distribution sélective ou exclusive exempté au titre des règles applicables du droit de la concurrence."

The President of the Republic report motivates such amendment as follows:

"Dans la mesure où le champ d'application de la pratique illicite du 6° du I de l'actuel article L. 442-6 ne concerne pas uniquement les relations entre deux cocontractants, mais a vocation à sanctionner aussi les tiers au contrat, il a été décidé de séparer cette pratique des trois autres pratiques précitées et d'en faire un article spécifique (nouvel article L. 442-2). En effet, le nouvel article L. 442-1 a vocation à s'appliquer entre les parties au contrat, ce qui n'est pas le cas de la pratique illicite régie par le 6° du I de l'actuel article L. 442-6 du code de commerce. Le maintien de cette pratique illicite dans le code de commerce, qui avait initialement été supprimée du projet d'ordonnance, a été unanimement souhaité par les professionnels consultés par le

2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market. ”

³¹ ECJ April 23, 2009 C-59/08 Copad / Dior para 37 “The proprietor of a trade mark can invoke the rights conferred by that trade mark against a licensee who contravenes a provision in a licence agreement prohibiting, on grounds of the trade mark’s prestige, sales to discount stores such as the ones at issue in the main proceedings, provided it has been established that that contravention, by reason of the situation in the main proceedings, damages the allure and prestigious image which bestows on them an aura of luxury”

gouvernement. Elle exerce un effet dissuasif à l'encontre d'une pratique qui tend à fragiliser les réseaux de distribution sélective."

Therefore, our company recommends that the European Commission introduces a similar or identical provision within the upcoming VBER. Beyond the protection of brand owners and their selective distribution networks, the introduction of such a provision at an EU level would position the European Union as a very attractive region for many selective brand owners leading thus to positive impact on economic efficiency, competition and finally on the wellbeing of consumers.

The upcoming suitable legal remedies could take into account the learnings of the Caudalie case law against the platform 1001pharmacies³², holding that such a platform violated Article L.442-6 I 6 ° of the French Commercial Code even if its role was limited to the promotion of products and did not directly intervene as a reseller. Therefore, this category clearly addresses intermediaries acting between Internet users and third-parties, such as search engines, price comparison tools, marketplaces and any platforms for the collaborative exchange of services among private individuals the introduction of an equivalent of the new Article L.442-2 of the French Commercial Code.

To conclude, in view of the above, our company would like to stress that the upcoming VBER and VGL enable more clarity and flexibility for brand owners, considering the actual context and the growing imbalance in the foreseeable future between different stakeholders in the vertical channel. Our company is legitimately concerned of the maintenance of its selective distribution network in the long way and how it is going to meet any forthcoming challenges.