

## EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION

### Executive summary

Since 2010, the Vertical Block Exemption Regulation and its accompanying Guidelines have proven to be an effective and efficient tool for cosmetic brands, operating selective distribution networks, enabling them to organise the distribution of their products consistently across the EEA under a relatively predictable framework, which confirms the **added-value** of a European regulatory framework.

Cosmetics Europe therefore considers that it is undoubtedly necessary to **maintain such a block exemption**, as it brings legal certainty for the definition and implementation by brand owners of their distribution strategy across the EEA, thus contributing to the reinforcement of the Single Market.

That being said, **the evolution of the social and economic context** over the last decade (namely the rise of e-commerce, the evolution of consumer habits and the variety of decisions at EU level and from national competition authorities and courts) calls for certain changes to both the VBER and its Guidelines, to maintain and reinforce its **relevance** and **coherence**.

Notably, the rise of e-commerce and the opportunities brought to brands by digitalisation have revolutionized the social and economic environment in which cosmetic brands evolve. In contrast to the situation in 2010, brand owners are now **omni-channel players** with **digital sales being an integral part and a key element of their strategy**, with no interest or incentive to limit online sales.

For these reasons, Cosmetics Europe considers that the Commission, in the context of the revision of the VBER and its Guidelines, **should grant brand owners more flexibility** in the manner they define and apply their selective criteria and - more generally - the way they organize their distribution networks, particularly given the **strong inter-brand competition** existing in the cosmetic industry.

Physical stores are vital to provide consumers with a unique shopping experience and preserve the equity of selective cosmetic brands. **Brick & mortar criteria for the selection of distributors play a critical role** in ensuring that resellers contribute to the promotion of the brands and guarantee the required level of services, which are non-price factors undoubtedly contributing to consumer welfare. These efforts and investments made by brand owners and authorized retailers must be adequately protected and compensated under the EU regulatory framework, including through the application of a brick and mortar requirement.

Furthermore, the rise of digital platforms and cross-border sales have resulted **in an increase of free-riding occurrences** with selective brands facing recurring violations of the selective distribution rules by unauthorised retailers who sell their products illegally, benefiting from EU-wide large scale visibility on third-party platforms (e.g. marketplaces, price comparison tools).

It is thus essential that the EU legal framework adapts to these new market and competition characteristics by introducing **appropriate safeguards** to offset and/or to prevent the effects of free-riding.

The main **areas of modernisation** of the VBER and the Guidelines that Cosmetics Europe identifies at this stage are the following:

- **Brand owners should have more flexibility in the definition and application of qualitative criteria:** Cosmetics Europe deems it fundamental to introduce further flexibility in the manner in which selective brands define, apply and adapt qualitative criteria and requirements, in taking into consideration the fast-evolving environment of the digital business and the key role now held by platforms such as marketplaces, price comparison tools, search engines and social media.
- **Brand owners should have more leeway in defining different qualitative and quantitative criteria and/or commercial conditions** between online and offline channels in order to balance the efforts and investments made for each of these channels to promote the brand's products and in order to maintain in-store services.
- **EU case law should be integrated and consolidated in the VBER and the Guidelines**, especially the **Coty case**, relating to third-party platforms restrictions.
- **The VBER and its Guidelines should ensure better coherence in the decisional practice of Member States:** the VBER should strive for greater coherence not only in the applicable principles, but also in their interpretation and implementation by National Competition Authorities at national levels with respect to the distribution of products, in order to further enhance the level playing-field and consolidate a greater Single Market integration.
- **The definition of active and passive sales should also be clarified and adapted** to the reality of e-commerce sales for more flexibility in the organization by brand owners of their distribution network in a digital and cross-border environment.

Furthermore, taking into account the increasing number of free-riding occurrences, Cosmetics Europe considers that the Commission should go beyond providing, in the VBER and its Guidelines, the conditions of validity of selective distribution networks. It is necessary that brand owners benefit from legitimacy and relevant legal tools to enforce and defend their selective distribution network from **free riders and protect the integrity of their distribution networks throughout the whole EEA.**

A homogenous protection of brand equity and selective distribution networks across the EU would contribute to the Single Market integration and greater consumer welfare.

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The above changes will ensure that the Regulation and the Guidelines are fit for purpose for the 21st century and strike the appropriate balance between consumer welfare, a level playing-field for all market players, the contractual freedom of brand owners and Single Market integration.

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## 1. INTRODUCTION

### 1.1 Foreword

Since 1962, Cosmetics Europe - The Personal Care Association ("**Cosmetics Europe**") has been the leading voice of the cosmetics and personal care industry in Europe. Cosmetics Europe's members include international companies as well as European national associations thereby representing the whole range of manufacturers, from international cosmetics manufacturers to small family-run businesses operating in niche markets.

Since the industry is closely regulated at a European level, Cosmetics Europe works closely with policy makers to ensure that EU regulation is as appropriate and effective as possible. As a natural consequence, it has a thorough understanding of the regulatory and legal issues inherent to the cosmetics and personal care industry.

Cosmetics Europe welcomes the opportunity to engage with the European Commission (the "**Commission**") on the Evaluation of the Vertical Block Exemption Regulation (the "**VBER**")<sup>1</sup> and its related Guidelines on Vertical Restraints (the "**Guidelines**")<sup>2</sup>.

Besides the comments already provided in reply to the Public Consultation, and notably in light of the criteria of effectiveness, efficiency, relevance, coherence and EU added value, Cosmetics Europe wishes to provide additional comments, which build and elaborate upon the answers to the aforementioned questionnaire.

Cosmetics Europe considers that the VBER, together with its Guidelines, is essential in providing legal certainty to industry stakeholders and is therefore a very important part of the EU legal framework, in particular for selective brands manufacturing and marketing luxury, dermo-cosmetics and professional cosmetics products that deploy and manage their distribution networks throughout the EEA (or in a large part thereof).

It is widely admitted that selective distribution generates pro-competitive effects (*i.a.*) for consumers, in particular for products whose nature requires significant effort and investment in preserving the brand image and quality of the sales environment and retail experience, as well as to ensure their proper use, such as cosmetic products.

The VBER and its Guidelines require a modernisation to properly reflect the evolving retail landscape and to maintain consistency throughout the EU and on a national level. This also contributes to the achievement of the EU Single Market.

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<sup>1</sup> Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

<sup>2</sup> Commission Notice, Guidelines on Vertical Restraints, SEC(2010) 411.

Positions expressed in this paper are those of the members of Cosmetics Europe that sell cosmetics through selective distribution networks. For the purpose of this paper and unless otherwise stated, the reference to the “cosmetics industry” only comprises the companies selling high-end and technical cosmetics products through selective distribution networks. For a complete overview of the overall cosmetics industry and its socio-economic impact, please refer to Cosmetics Europe’s website [www.cosmeticseurope.eu](http://www.cosmeticseurope.eu).

**Cosmetics Europe views the current Evaluation process of the VBER and its Guidelines as an opportunity to reaffirm the need for brand owners using a selective distribution network to benefit from the clear, binding and consistent legal framework provided through the VBER and its Guidelines.**

**Cosmetics Europe calls for the VBER and its Guidelines to be maintained as they benefit to consumers and increase legal certainty and predictability for brand owners in the definition and the implementation of their EU-wide commercial and distribution strategies.**

**A revision of the VBER and the Guidelines is necessary to take into account and reflect the evolving retail landscape and ensure consistency at European and national level, and competition authorities’ practices governing the marketing and distribution of products with the ultimate objective of achieving a level-playing field and a greater Single Market integration.**

**In this context, Cosmetics Europe also calls for further flexibility in the VBER and its Guidelines, to enable brand owners to adapt their distribution strategy by taking into account the fast-evolving e-commerce environment.**

## 1.2 The overall cosmetic industry in Europe

The European cosmetics and personal care market is the largest cosmetics and personal care market in the world, with a value of €78.6<sup>3</sup> billion (retail sales) in 2018. Within Europe, the largest national markets for cosmetics and personal care products are Germany (€13.8 billion), France (€11.4 billion), the UK (€10.9 billion), Italy (€10.1 billion) and Spain (€7 billion).

The overall cosmetic industry annually contributes over €29 billion in added value to the European economy annually. Roughly €11 billion is contributed directly through the manufacturing of cosmetic products and €18 billion indirectly through the supply chain.

The vast majority of Europe’s 500 million consumers use cosmetic and personal care products on a daily basis to protect their health, enhance their well-being and boost their self-esteem. Ranging from dermo-cosmetics, fragrances, make-up and shampoos, to soaps, sunscreens and toothpastes, these products play essential roles in all stages of consumers’ lives and have important functional and emotional benefits. For a complete overview of the overall cosmetics

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<sup>3</sup> Socio-Economic Contribution of the Cosmetics Industry 2019 (to be published June 12, 2018).

industry and its socio-economic impact, please refer to Cosmetics Europe's website [www.cosmeticseurope.eu](http://www.cosmeticseurope.eu).

### 1.3 Digital business is key in the cosmetic industry

Operators of the cosmetic industry embrace the rise of the digital economy in the EU and strive to seize the opportunities provided by the reinforcement of the Digital Single Market which enable the cosmetic industry to expand its business and for consumers to recognize the value, desirability and reputation of the brands<sup>4</sup>.

Over the last two decades, the rise of internet sales of cosmetic products has allowed the brand owners, as well as the retailers, to enlarge their customer base as well as to increase their sales. Internet sales offer additional services to consumers such as the possibility to choose products at home 24/7 or home delivery, while consumers can still benefit from the advice and test and try experience in stores.

The cosmetic industry is thus a typical omni-channel player, as the products concerned are sold in various types of physical stores such as perfumeries, pharmacies, hair-dressers, beauty institutes, spas and department stores as well as online through brand owners' merchant websites or via retailers, which in turn operate their own e-merchant websites. Certain cosmetics brands also include online pure players in their networks.

Brand owners consider e-commerce as a core part of their commercial strategy to ensure, across all distribution channels, the most consistent purchasing journey for consumers. They are constantly seeking a high level of qualitative standards for offline and online sales, although the qualitative criteria for online sales and those for offline sales do not need to be fully aligned with each other, given the objective differences existing between offline channel and online channel.

**Cosmetic brands are fully aware of the importance of digital business and over the years digital business has become an integral part of their brands strategy. Cosmetics Europe considers that there is no reason to believe that cosmetic brands would have any incentive in reducing or limiting online sales.**

**Cosmetics Europe considers that the renewal of the VBER and the Guidelines is an opportunity to confirm and underline the objective differences which exist in the nature of internet sales and sales made in stores.**

**Therefore, the renewed VBER and Guidelines should also confirm that selective brands have flexibility in the definition of distinct criteria depending on the sales environment (online or offline), provided that such criteria pursue equivalent and legitimate objectives.**

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<sup>4</sup> During the E-commerce inquiry, the European Commission noted that 64% of manufacturers questioned in the sector inquiry have been opening their own e-shops (Commission Staff Working Document accompanying the Final report on the E-commerce Sector Inquiry, §179).

#### 1.4 Protection of brand equity and consumer welfare in an omni-channel environment

Selective distribution enables brand owners to establish an environment supported by significant investments to create a unique shopping experience, to maintain its prestige image/reputation and to guarantee the authenticity of the product. Through selective distribution, customers have access to a sales environment that meets their expectations and offers an experience tailored to the values and image of a brand (such as luxury, high-end, innovation, personal advice, customization, etc.).

The efficiencies provided by such a selective distribution approach have been confirmed by European and national courts over the years, especially for high-quality products such as cosmetics, dermo-cosmetics and perfumes<sup>5</sup>. The Commission, national courts and authorities have scrutinized selective distribution in the cosmetic industry several times without questioning the legitimacy of such system in the sector<sup>6</sup>. In the *Coty* case, the ECJ in fact emphasized the legality of selective distribution networks for cosmetic products and reaffirmed the validity of practices linked to the protection of such networks<sup>7</sup>.

While Cosmetics Europe underlines the key role of digital business in the development of the cosmetic industry throughout Europe, it also observes that, if brand owners are not able to uphold the quality environment in which their products are sold and to guarantee the excellence of the physical customer experience they wish to offer, digitalisation entails a risk of losing the excellence of services and sales environment that brands have been building for several decades.

It is absolutely key that brand owners remain able - through selective distribution systems and qualitative criteria - to provide a high-level shopping experience both in physical stores, where customers choose, test and/or purchase cosmetic products, and online, where customers purchase or repurchase the products or get information about them.

In the cosmetic industry, competition amongst brands should not be seen solely in terms of prices but rather in terms of services provided (demonstration and personalized advice), attractiveness of the sales environment, innovation, guarantee of authenticity, product quality etc. For that purpose, it is essential that brand owners are able to ensure that the efforts and investments dedicated both by themselves and by the members of their network, who provide a real life service to consumers through physical points of sale, are not undermined.

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<sup>5</sup> See *Coty Germany GmbH* Case C-230/16 of 6 December 2017; *Leclerc v Commission (Givenchy)* Case T-88/92 of 12 December 1996, paras. 113 et seq.; *Leclerc v Commission (YSL)*, Case T-19/92 of 12 December 1996, paras. 119 et seq.; *Copad SA v Christian Dior* Case C-59/08 of 23 April 2009, para. 24 and *Parfums Christian Dior* Case C-337/95, of 4 November 1997, para. 45.

<sup>6</sup> *Givenchy* Case T-88/92; *Yves-Saint-Laurent* Case T-19/92; *L'Oréal* Case C-31/80 of 11 December 1980.

<sup>7</sup> See *Coty Germany GmbH* Case C-230/16.

In order to preserve the value and the reputation of their brands as well as to ensure that customers receive an appropriate level of services, Cosmetics Europe calls for providing suppliers with the means and flexibility necessary to preserve the value of their brand (brand equity) and adapt to the ever-evolving market environment.

Among the relevant measures that already exist, Cosmetics Europe considers that maintaining the possibility for selective brands to require retailers to sell through one or more physical points of sale is essential to ensure that consumers may experience, touch and feel the products on the one hand and that each member of their network participates concretely in the efforts and investments necessary to preserve brand value on the other hand.

Flexibility for brands to define differentiated criteria, taking into account the characteristics of the distribution channels (online and offline) should be allowed, provided that these criteria pursue the same objective.

## 2. THE VBER'S RENEWAL IS NECESSARY TO PROVIDE LEGAL CERTAINTY AND PRESERVE THE BRAND EQUITY

The current regulation (No. 330/2010) applicable to vertical agreements in the EU provides legal certainty as well as an **effective** and **efficient** means for brand owners to develop their business all over the EEA and to define a consistent commercial strategy which goes beyond national boundaries.

The Public consultation launched by the Commission in view of the renewal of the VBER may influence the impact and **relevance** of the VBER positively by taking into account the structure of the market and the evolution of online purchase habits of consumers. This would also be **consistent** with other policies followed by the Commission and with the decisional practice and existing EU and national case law.

Over the past few years, a large part of the cosmetic industry's players have successfully developed their distribution strategy at a European level, without necessarily needing to adapt their strategies in each Member State. Consequently, these players need national competition authorities ("**NCAs**") to apply and enforce the VBER uniformly. This in itself confirms the **added-value** of a European regulatory framework.

It is therefore essential to maintain this EU-framework, by eliminating obstacles in order to promote and enhance a real and unique Single Market.



## 2.1 The current VBER and the Guidelines offer a unique and EU-wide safe harbour for brand owners

Cosmetics Europe welcomes the presumption of legality currently provided by the VBER based on the supplier's and buyer's market shares.

Such a safe-harbour mechanism, according to which market players with market shares below the 30% threshold (generally) benefit from the applicability of the block exemption, provides legal certainty. In this respect, the VBER and its Guidelines have proven to be effective and Cosmetics Europe considers the current supply-side threshold as appropriate and should not be reduced.

Such safe harbour leads to fewer financial and human resources being required to assess competition compliance of vertical agreements, which generates savings for companies as well as for NCAs and courts in their assessment of the validity of agreements.

In fact, Cosmetics Europe notes that the safe harbour offered by the VBER is constantly used by NCAs and national courts in vertical restraints cases and offers them legal certainty to assess the validity of selective distribution networks as well as illicit behaviours from free-riders.

For many years, the cosmetic industry's brand owners have run their commercial and distribution strategies beyond national borders aiming to approach the EEA market consistently. Accordingly, they have also organized their distribution networks and agreements as well as their evaluation process of qualitative criteria on an EU-wide basis (or at least in a large part of Europe).

Absent such a safe harbour mechanism, there would be a high risk of divergences between decisions of NCAs which would certainly lead brand owners to define different selective distribution systems, specific qualitative criteria and different commercial strategies for every Member State. In other words, without any EU framework, there would be no legal certainty as selective distribution rules would be defined at a national level, which would prevent the implementation of an EU-wide commercial strategy, against the objectives of the EU Single Market.

Certainly, the absence of an EU-wide regulation would lead to a significant burden (wasting both time and financial resources), not only on companies but also on NCAs and national courts in the evaluation of selective distribution agreements. Therefore, Cosmetics Europe considers that the VBER and its Guidelines should be maintained in this regard.

**Cosmetics Europe considers the VBER and its Guidelines to be an effective and efficient tool in order to reach the objective of reinforcing the integration of the Single Market with a positive impact on the definition by brand owners of consistent commercial and distribution strategies EU wide.**

**The VBER and the Guidelines, through the legal certainty they offer, lead to indisputable and significant cost savings for all brand owners in the definition of their commercial and distribution strategies as well as in the monitoring of their selective distribution system in Europe, in line with the EU Single Market objective.**

## 2.2 Non-price competition and the benefit of selective distribution for consumer welfare

Price is undeniably a relevant parameter of competition. However, and especially in a market facing an increasing transparency of prices through digitalisation such as the cosmetic industry, it is not the only relevant aspect of competition.

Cosmetics Europe fully shares the vision of the Commission regarding non-price aspects of competition in the cosmetics industry, where such aspects play a more than significant role in the competition process and contribute to consumer welfare as much as competition on price does<sup>8</sup>.

In this regard, it should be noted that operators of the cosmetic industry compete on a number of other factors, ranging from quality, innovation, consumer service, in-store presence and visibility to product range and availability, brand strength, perceived value or personalization, multi-functionality, packaging, etc.

As far as demand in the cosmetic industry is concerned, consumers usually take into account the following criteria: the possibility to benefit from personal advice given by specialized and trained personnel, the ability to obtain demonstrations on product use and their specific performance, the possibility to see, smell, touch, feel and personalize the products before purchase; the possibility to choose the product on site and receive it right after purchase, the possibility to feel the luxurious nature of the products, the positive buying experience, the guarantee of the origin of the products and the provision of security indications, etc.

It is therefore essential that, in the context of the revision of the VBER and its Guidelines, the Commission continues to acknowledge the importance of factors of competition other than prices and the benefit of qualitative selective distribution for consumer welfare.

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Cosmetics Europe fully shares the conclusion of Commissioner Margrethe Vestager who indicated that: *"Because as consumers, we don't always look just for the lowest price. Consumers may be looking for the exclusivity of a brand. Sometimes, we want to go to a real, physical shop, to get a feel for the product we're buying. I understand, for example, why businesses are worried about the future of real, physical shops. If people get into the habit of going to the high street just to see the products and ask for advice, but then buy them cheaper online, how can physical shops survive?"*.

**Cosmetics Europe shares the approach of the Commission, which considers that inter-brand and intra-brand competition is not limited to competition on prices but includes many other factors such as innovation, quality, service, guarantee of origin etc.**

**It further considers as essential that the Commission confirms the legitimacy of selective distribution in the VBER and its Guidelines as well as the benefit of such system for the consumer welfare, especially in a digital environment facing higher price transparency.**

### 2.3 The importance of the brick and mortar criteria

Cosmetics Europe considers that the possibility provided for in the Guidelines<sup>9</sup>, according to which brand owners are able to require their retailers to operate one or more brick and mortar shop(s) is of great importance.

Selective cosmetic brands formulate and offer a wide range of products, and constantly research new technologies to meet their consumers' specific needs. Experiencing the products in-store and receiving expert advice is critical for them to make an informed choice and buy products that respond to their expectations. Moreover, in an environment where consumers are demanding rapid delivery of the product, there is no greater form of instant gratification than an in-store pick-up.

To ensure a high level of services and the best possible consumer experience, brand owners and members of their selective distribution networks make significant in-store investments. Not only do they invest in high-end real estate, located in attractive locations, mostly in high street and in premium shopping centres, but they also generally provide, in each point of sale, the availability of a minimum number of references, sufficient and trained sales force, who can give expert advice as well as demonstration and promotion materials to enhance the consumers' shopping experience and support the exclusive image of the brands.

Cosmetics Europe observes that although consumers continue to go to physical points of sale to benefit from the pre-sale services offered, a proportion of these consumers then purchase their products on merchant websites, who are able to sell the products at a lower price while benefiting from the efforts and investments made by brand owners and members of their selective distribution networks<sup>10</sup>.

In this respect, digitalisation may become a source of distortion of competition between different

<sup>9</sup> "(...) the supplier may for instance require its distributors to have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system. Subsequent changes to such a condition are also possible under the block exemption, except if these changes have as their object to directly or indirectly limit the online sales by the distributors" (Guidelines on Vertical Restraints, paragraph 54).

<sup>10</sup> During the e-commerce inquiry, the Commission noted that: "Customers can switch swiftly between online and offline sales channels. Many customers use the pre-sales services offered by one sales channel (such as product demonstration, personal advice in a brick and mortar shop or search for product information online) but then purchase the product on the other sales channel. In such cases the costs of pre-sales services become difficult to recoup ("free-riding")" (Preliminary Report, § 967).

channels of sale detrimental to brick and mortar points of sale and, ultimately, to consumer welfare. Such a distortion is likely to lead to a disappearance or at least a reduction of services offered in physical points of sale (or even a reduction of the number of the points of sale), which would entail a reduction of consumer welfare.

Whereas physical selective distribution channels have higher operation costs than online channels, some authorised e-tailers with (very) limited physical points of sale, are able to sell the products at lower prices while benefiting from the efforts and investments made by brand owners and members of the selective distribution networks<sup>11</sup>. Due to digitalisation of the sales channel(s) and the consumer's behavioural evolution, such actors cannot be excluded from the selective distribution networks, which is not what brand owners want either.

Therefore, to prevent free-riding within the set up distribution networks, brand owners should have the possibility to require (quasi-)pure players<sup>12</sup> to participate in the costs of setting up physical networks. While there is no incentive to limit online sales by excluding certain types of actors, brand owners should be able to ensure that all the members of the selective distribution network contribute fairly to the costs of establishing and running these networks.

Up until this day, the most efficient way for brand owners to induce online players to make investments in order to add value to their products and protect their selective distribution networks is to have the possibility to require that the retailers operate one or several brick and mortar shops.

In that regard, Cosmetics Europe notes that the possibility to require to operate one or more brick and mortar shops or showrooms is not considered disproportionate by new players entering the market. In fact, a lot of new e-retailers have recently developed large online platforms and have then opened several physical stores at a later stage.

Regarding the content and the nature of the brick and mortar criteria (such as the number of stores required, the surface, the presence of qualified staff on site, the equipment required for demonstration services, etc.), Cosmetic Europe considers that every brand owner should benefit from a certain level of freedom - depending on its commercial strategy - in deciding what the most suitable qualitative conditions are for preserving its brand equity and for offering customers a high level of services.

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<sup>11</sup> During the e-commerce inquiry, the Commission noted that: *"Customers can switch swiftly between online and offline sales channels. Many customers use the pre-sales services offered by one sales channel (such as product demonstration, personal advice in a brick and mortar shop or search for product information online) but then purchase the product on the other sales channel. In such cases the costs of pre-sales services become difficult to recoup ("free-riding")"* (Preliminary Report, § 967).

<sup>12</sup> Quasi-pure players are pure players who have opened or purchased a small, but high quality bricks and mortar shop, which allows it to become an authorized retailer.

While reaffirming the legitimacy of the possibility to require one or more brick and mortar stores in the Guidelines, Cosmetics Europe is of the opinion that the Commission should also clarify that such a possibility must not impede the brand owners' ability to set specific criteria for pure players; these resellers may present specificities that would justify their appointment as authorized members of the selective distribution system, without jeopardizing the right for the brand owners to require that non-pure players have one or more brick and mortar shops or showrooms as a condition for becoming a member of the distribution system.

Finally, from a socio-economic perspective, it should also be noted that the possibility to require one or more brick and mortar stores ensures, through the maintenance of an appropriate territorial network, the creation of jobs at a local level while also preserving the local economic tissue of city centres in smaller towns and in areas with low density of population, thus ultimately benefitting Member States and, on a larger scale, the European economy.<sup>13</sup>

**Cosmetics Europe considers it essential for brand owners that the VBER and its Guidelines confirm the possibility for brand owners to define their online and offline distribution strategy and to provide for a brick and mortar shop requirement.**

**This provides brand owners the possibility to maintain a high level of pre-sale and demonstration services for consumers in stores (in terms of number of points of sales and/or presence of qualified staff and/or qualification, etc.) as well as a fair means of compensation for these investments.**

**Cosmetics Europe encourages the Commission to maintain the legitimacy of such an option and to offer brand owners the necessary flexibility to decide on the exact conditions under which they apply them.**

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This has also been indicated by Martijn Snoep, head of the Dutch Competition Authority in an interview with MLex: Suppliers may have good reasons for giving offline sales a price break, particularly if they're seeking to keep bricks-and-mortar stores open in rural areas, or they want to maintain physical stores for product testing. *"It's important that we give clarity to the market soon because it may be that this could help to maintain a physical store infrastructure that many people appreciate,"* Snoep said. Source: <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/europe/misleading-online-ads-and-eu-dual-pricing-ban-scrutinized-by-dutch-authority>.

### 3. THE NEED FOR A MODERNISATION OF THE VBER AND ITS GUIDELINES

The current VBER and its Guidelines were adopted in a specific legal and economic context. The main objective of the Commission, when adopting the current VBER and its Guidelines, was to ensure the promotion of e-commerce. As also noted by the Commission, recent years have witnessed numerous changes, especially concerning the development of online sales of goods and services. Insofar, the VBER and its Guidelines can be considered as successful.

For instance, the sector inquiry into the e-commerce of consumer goods and digital content in the EU launched by the Commission provides useful insight into the recent market developments in relation to consumer goods and confirmed the rise of online sales across all product categories.

This growth trend has been clearly confirmed in the cosmetic industry. A recent Xerfi study showed that online cosmetics sales nowadays account for a significant share of the total of cosmetics sales, which doubled as compared to 2008<sup>14</sup>. Yet, a large part of cosmetic sales is still made in brick and mortar stores.

Simultaneously, there has been a significant increase in price transparency, especially regarding online prices. This price transparency has resulted in certain positive developments (greater price competition), while also giving rise to a number of concerns (e.g. price monitoring through algorithms, free-riding phenomenon, etc.).

These trends occur in a specific competition context, namely the development of (pure) online players as well as the rise of marketplaces and other platforms, such as price comparison tools and social media.

Taking into consideration these social and economic developments as well as the digitalisation of the business over the last two decades and the recent developments in EU and national case law with direct and major consequences, Cosmetics Europe considers that the current framework provided by the VBER and its Guidelines would benefit from a modernisation.

In this regard, it should be borne in mind that digitalisation is key for the cosmetic industry and brand owners do not have any incentive to limit online sales. The only reason for which selective brands may want to constrain online sales in the cosmetic sector is to ensure a high level of service at retail level, to guarantee the authenticity and security of the products offered to consumers as well as to prevent and compensate any free-riding effect.

Hence, Cosmetics Europe considers that more flexibility should be granted to brand owners in the definition of the criteria and commercial conditions that are required or applied to both click and mortar and pure players.

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<sup>14</sup> Xerfi Study, *The Global Perfumes and Cosmetic Industry: the Market, Market Analysis*, Alessandro Schiliro, May 2018.

### 3.1 The need for more flexibility regarding the equivalence of criteria between online and offline sales

The Guidelines state today that the Commission considers as a hard core restriction “any obligations which dissuade appointed dealers from using the internet to reach more and different customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop”<sup>15</sup>.

This part of the Guidelines introduces an equivalence test between qualitative criteria defined for online sales and those defined for offline sales. For the cosmetic industry, it is important to ensure that the Guidelines reflect an appropriate balance between the application of qualitative criteria to online sales and the application of qualitative criteria to brick and mortar stores.

There are many selection criteria that apply to physical points of sale which cannot be transposed to online sales and vice versa. This is reflected in §56 of the Guidelines, which states that “*This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes*” (paragraph 56).

This differentiation of criteria is also identified in the Commission's Staff Working Document published during the e-commerce sector inquiry, which sets out a list of transversal criteria applicable to both online and offline sales, a list of criteria applicable only to online sales<sup>16</sup> and others applicable only to physical outlets.<sup>17</sup>

The qualitative selection criteria applicable to online sales and brick and mortar shops cannot be identical by virtue of the nature and properties of the sales channels, as online sales are carried out at distance and do not allow physical interaction, whereas brick and mortar sales are carried out immediately and allow for physical interaction, the provision of personalized advice and demonstration of the product at the point of sale.

Cosmetics Europe notes that the principle of equivalence of criteria as currently provided for in §56 of the Guidelines may have given rise to certain ambiguities and may have been used against brand owners by actors wishing to challenge the validity of their network. However, this principle of equivalence was provided for at a time when concerns may have potentially existed as to the will of selective brands to limit sales on the Internet.

Since then, the Court of Justice has clarified in the *Pierre Fabre* case<sup>18</sup> that an outright prohibition of online sales is considered to be a hardcore restriction.

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<sup>15</sup> Guidelines on Vertical Restraints, para. 56.

<sup>16</sup> The Commission pointed out, for example, the following criteria: a clear and easy navigation on the website, the use of secure payments systems, dedicated webpage, technical requirements (such as 99.9% of availability of the website or a hotline/call centre), delivery terms, etc. See also Staff Working Document, para. 241 (c).

<sup>17</sup> The Commission pointed out, for example, the following criteria: the geographic location (such as city centers, high streets, premium shopping malls etc.), minimum number of points of sales, minimum size of physical shops, trained staff, minimum opening hours, etc. See also Staff Working Document, para. 241 (c).

<sup>18</sup> *Pierre Fabre* case, C-439/09 of 13 October 2011.



Moreover, as noted above, digital business has become key for selective brands, so that they do not have any incentive to limit online sales. Even more, brand owners have also to deal with online advertising players (such as search services), in order to be and remain visible on the internet. In other words, there is no reason to assume that brand owners could have any inclination to limit online sales.

**Cosmetics Europe considers that brand owners should be granted with more flexibility in the definition of the criteria for online and offline sales, without systematically being challenged on the basis on an alleged lack of equivalence between the qualitative criteria defined for each channel.**

**Cosmetics Europe calls for the deletion of the reference to an "equivalence" between online and offline criteria and proposes flexibility and a review on a case-by-case basis, by taking into consideration the nature of these two distribution modes.**

### **3.2 The need for more flexibility in dual pricing and different commercial conditions for offline and online channels**

To offset the effects of free-riding and associated damages it may cause, the VBER and the Guidelines should provide brand owners with more flexibility in the organization of their networks.

The current Guidelines do provide some measures, albeit limited, to ensure that bear at least some of the efforts invested by retailers operating physical stores. For instance, the Guidelines state that the supplier may require, *"without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its brick and mortar shop (physical point of sales), nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model"*<sup>19</sup>.

Furthermore, while the Guidelines prohibit a restriction according to which the distributor would pay a higher price for products intended for resale online ("dual pricing"), they allow the supplier to determine a *"fixed fee (that is, not a variable fee where the sum increases with the realized offline turnover as this would amount indirectly to dual pricing) to support the latter's offline or online sales efforts"*<sup>20</sup>.

Even if it fully shares their objective, Cosmetics Europe notes that these provisions are impracticable for brand owners, who cannot reasonably define absolute quantities or fixed fees every year, for each of their retailers, let alone per point of sale, to offset investments made in physical sales outlets. These mechanisms are considered as too complex for brand owners and retailers to be implemented on a day-to-day basis.

Cosmetics Europe considers it relevant to look for other ways to compensate for investments dedicated to maintaining and developing the network of physical sales outlets. The setting of a

<sup>19</sup> Guidelines on Vertical Restraints, paragraph 52(c).

<sup>20</sup> Guidelines on Vertical Restraints, paragraph 52(d).



minimum share of sales made in physical outlets could be a more appropriate solution. Requesting a minimum turnover online and a minimum turnover offline could also be a relevant measure.

An alternative or complementary option would be to allow more flexibility to brand owners to apply different prices and/or commercial conditions (dual pricing) for online sales and offline sales, that reflect differences in costs.

More particularly, Cosmetics Europe considers as essential that brand owners be in capacity to provide specific prices and/or commercial conditions for brick and mortar stores as these touchpoints have undoubtedly higher operation costs than the online channels: e.g. lease in high street or premium shopping centres, trained/qualified staff, merchandising, etc. .

Cosmetics Europe understands that the Commission was reluctant to provide flexibility as to pricing and commercial conditions in 2010, as it then feared that selective brands would use this tool to favor offline sales to the detriment of online sales.

However, as previously indicated, the economic landscape has significantly changed since 2010. A large part of sales is now made online in the cosmetic sector and every selective brand sees digital business as an opportunity as detailed above, and significantly invests in developing e-commerce, in Europe and worldwide.

**As there is no reason to consider that brand owners would have any interest or incentive to prevent online sales, Cosmetics Europe considers that dual-pricing and differentiated commercial conditions could be an efficient way for selective brands to offset any free-riding effect between online sales and offline sales.**

**Such a differentiation in terms of price and/or commercial conditions between online sales and offline sales would generate efficiencies and enhance consumer welfare as, combined with the brick and mortar requirement it will be the best leverage to ensure and promote the maintenance by retailers of a sufficiently high-quality in-store experience and to ensure that personalized advice and product demonstration is actually provided by retailers.**

**Cosmetics Europe calls for an update in the VBER and its Guidelines to provide more flexibility to brand owners in defining different commercial conditions and/or different supply prices between online and offline channels in order to balance the efforts and investments made by each of these channels to promote the brand's products.**

### 3.3 The need for additional enforcement measures against free-riding

The globalisation and digitalisation of business have led brand owners operating selective distribution networks to witness an escalation of free-riding, notably from unauthorized retailers violating the rules of selective distribution, which is extremely hard to manage with the current - limited - means available.

Sales on parallel markets by unauthorized retailers are gravely detrimental to consumers and to the image and reputation of brands. For example, cosmetic products sold by unauthorized retailers may be damaged or may even be sold next to counterfeit goods on third-party platforms, eventually creating confusion for consumers, with an inevitable impact on the image and reputation of brands and the distribution network as a whole. Brand owners need efficient means to enforce their selective distribution network.

Because of digitalization and the struggle for brand owners to obtain information from third-party platforms and/or withdrawal of/on illicit resellers, it is quite challenging for brand owners to police their selective distribution networks.

Although some Member States do provide for an effective arsenal of legal provisions against such behaviors, not all Member States do so.

In France for instance, article L. 442-2 of the Commercial Code<sup>21</sup> holds liable any entity involved in the violation by an authorized retailer or an unauthorized retailer of a prohibition to resell the products outside the network on grounds of third-party complicity<sup>22</sup>. In Germany, national courts recently welcomed an action from a cosmetic manufacturer against a mass market retailer on the sole ground that such a distribution format harmed the brand reputation<sup>23</sup>.

Cosmetics Europe therefore considers that selective brands should benefit from efficient legal tools enabling actions against grey market players, as some EU-jurisdictions already have.

In other words, the Commission should go beyond providing the conditions of validity of selective distribution networks in the VBER and its Guidelines and ensure that brand owners can rely on legitimacy and relevant legal tools to enforce and defend their selective distribution networks against free riders in order to protect the integrity of their distribution networks throughout the whole EEA.

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<sup>21</sup> In that regard, it is interesting to note that, as part of the recent reform introduced to simplify the law on unfair commercial practices (Order No 2019-359 of 24 April 2019 "*portant refonte du titre IV du livre IV du code de commerce relatif à la transparence, aux pratiques restrictives de concurrence et aux autres pratiques prohibées*"), the French Government has chosen to consider direct or indirect participation in a selective distribution network to be an autonomous practice, considering that: "*Upholding [the prohibition of] this illegal practice in the Commercial Code, which had initially been withdrawn from the draft order, was unanimously desired by the professionals consulted by the Government. It has a deterrent effect against a practice that tends to weaken selective distribution networks*" (see Report to the French Republic President on Order No 2019-359 of 24 April 2019).

<sup>22</sup> For a recent application by national courts, cf. Paris Court of Appeal, *Caudalie*, 13 July 2018, 17/20787.

<sup>23</sup> See the Kanebo case - Higher Regional Court of Düsseldorf, *Kanebo*, 6 March 2018, I-120 U 113/17.

Cosmetics Europe finally observes that a large and increasing number of illicit resellers are listed on third-party market places and price comparison tools. Despite the growing presence of illicit resellers on third-party platforms, brand owners face difficulties in seeking the platforms' liability as such platforms often hide behind the exemption from liability enjoyed by providers of purely technical or hosting services under Articles 12 to 15 of the Directive on e-commerce<sup>24</sup>.

In France, national courts have already considered that a third-party platform may be held liable for having listed illicit resellers<sup>25</sup>. Here again, it may be relevant for the Commission to examine the possibility for brand owners to request (and obtain) the delisting of illicit resellers from platforms and/or to seek their liability for having participated in violating a selective distribution network.

**The protection of their selective distribution networks and the struggle against free-riding behaviours is essential for brand owners to ensure the protection of the investments made for the preservation of the brand reputation and for an appropriate shopping experience and level of service.**

**Since it is acknowledged that selective distribution has a pro-competitive effect to the benefit of consumers, it is natural and legitimate for Cosmetics Europe that selective brands should have access to tools enabling them to tackle any illicit behaviour of non-authorized retailers and third-party platforms throughout the EEA, which would be detrimental to selective distribution.**

**In this respect, Cosmetics Europe considers that the creation of the Single Digital Market cannot be achieved without offering brand owners an efficient means of taking action and countering such unlawful conduct in all Member States.**

**Cosmetics Europe considers that it is up to the Commission to raise the issue and ensure that selective brands have the possibility to protect their network throughout the EEA and that, beyond the validity of selective distribution, the VBER and the Guidelines also recognize the legitimacy of brand owners to enforce and defend their selective distribution networks against third-parties.**

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<sup>24</sup> See Directive 2000/31/EC.

<sup>25</sup> Paris Court of appeal, 13 July 2018, no 17/20787.

### 3.4 The need for consistency and the integration of the EU and national case law and decisional practice

Beyond the evolution of the economic environment, Cosmetics Europe notes that the legal landscape has evolved, notably through the ECJ case law and several decisions by NCAs and national courts.

Cosmetics Europe would like to see existing EU case law consolidated in the VBER and the Guidelines as well as national case law and decisional practice to be taken into consideration where such national case law and decisional practice is based on article 101 of the TFEU. Such consolidation at EU level would provide market players and national authorities with legal certainty on the application and interpretation of any vertical restrictions (hardcore or not).

By way of illustration, the ECJ has issued a key judgment in the *Coty* case<sup>26</sup> in which it clarified the possibility for brand owners to prevent their authorized resellers from selling on third-party marketplaces, and confirmed that the preservation of the prestigious image of a good justified the restriction imposed by the brand owner on authorized retailers to select - in a discernible manner - third-party platforms for the sale of such goods on the basis of qualitative criteria, provided that these restrictions are objective, uniform and apply without discrimination to all retailers.

Cosmetics Europe considers the clarifications provided by the ECJ in the *Coty* case to be particularly important and is of the opinion that these should be reflected in the VBER and its Guidelines. So far, the Guidelines only provide for the possibility to require that consumers cannot access the distributor's website via a website bearing the name or logo of the third-party platform. Cosmetics Europe sees this as a minimum requirement for the consumer to benefit from the appropriate sales environment.

In this respect, Cosmetics Europe expects more clarity and flexibility from the Guidelines in particular regarding the prohibition of sales on third-party platforms as confirmed by the ECJ in the *Coty* case and/or the qualitative criteria which can or cannot be used.

From a practical point of view, Cosmetics Europe notes that there is currently no contractual/legal leverage for brand owners to impose qualitative criteria and/or any obligations on third-party platforms. The absence of any contractual/legal leverage on third-party platforms is not compatible with, *i.a.* a high level shopping experience and all relevant security obligations applicable to the cosmetic industry. In addition, third-party platforms should not be able to escape to the legal framework on cosmetic products in the Single Market<sup>27</sup>.

The only possibility for brand owners to directly require third-party platforms to comply with the qualitative criteria and contractual obligations would be to set up partnership agreements with these third-party marketplaces and to limit the distributors' access to third-party marketplaces only to those "authorised" by the supplier. To be efficient, such contractual arrangements should include a "*white listing*" system pursuant to which platforms - when they are ready to do so - would verify if any listed reseller is duly authorized to resell products by a brand owner or not.

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<sup>26</sup> Cf. Judgment in *Coty Germany GmbH*, Case C-230/16.

<sup>27</sup> E.g. the applicability of Regulation no 1223/2009 on cosmetic products.

Cosmetics Europe also notes that over the past years, an increasing number of discrepancies can be found in the interpretations of the notion of “restrictions by object” by NCAs and national courts.

For instance, the German competition authority, despite the *Coty* case, continues to be reluctant to allow bans of third-party market places within a selective distribution system, while it does not view requesting retailers to have physical contacts with their clients (when it concerns complex and dangerous products<sup>28</sup>) as a restriction by object. In contrast, the French competition authority explicitly allowed a ban on third-party market places<sup>29</sup>, but - as opposed to the German competition authority - views the requirement of physical contact with buyers of complex and dangerous objects as a restriction by object.

In another case, the Commission considered that limiting the capacity of retailers to bid on Google AdWords was a restriction by object<sup>30</sup>, while the French competition authority took a different approach during its e-commerce inquiry<sup>31</sup>.

Cosmetics Europe considers, in light of evolving practice and recent case law as described above, that it would be appropriate to revisit the hard core restrictions and provide clear explanations in the Guidelines regarding potential harmful effects on competition and the assessment of such effects compared to and balanced with economic efficiencies resulting from selective distribution

Indeed, a consistent approach on hard core restrictions at EEA-level and at national level will enable brand owners to benefit from more flexibility and legal certainty in the organization of their distribution networks across the EU, in line with the objective of a further integration of the Single Market.

The fact that NCAs and national courts interpret obligations in distribution agreements differently is uncomfortable, not to say detrimental, for cosmetic brand owners that manage their selective distribution systems at an EEA-level, and undermines a uniform and efficient national application of EU regulations.

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<sup>28</sup> See the quote of the French Competition Authority in the *Stihl* case, French Competition Authority case no 18-D-23 of 24 October 2018, para. 109.

<sup>29</sup> See also the *Stihl* case, French Competition Authority, case no 18-D-23 of 24 October 2018.

<sup>30</sup> Cf. *Guess* Case AT. 40428 of 17 December 2018.

<sup>31</sup> French Competition Authority, Opinion no 12-A-20 on e-commerce of 18 September 2012, para. 358.

In that respect, Cosmetics Europe considers that the Commission should clarify in its Guidelines the extent to which different interpretations of restrictions by object can or cannot be used by NCAs and national courts when examining and assessing vertical agreements. Beyond any clarification to be added to the text of the Guidelines, Cosmetics Europe considers it relevant to integrate any items of the Guidelines regarding hard core restrictions in the VBER in order to be fully enforceable at national level before NCAs and national courts.

**Cosmetics Europe suggests that the existing case law and decisional practice both at EU and national levels be consolidated and taken into consideration in the VBER and its Guidelines in such a way that both companies and NCAs have legal certainty and more flexibility on the application and interpretation of any identified or listed hard core restrictions.**

**In this respect, Cosmetics Europe welcomes the clarifications provided by the ECJ in the *Coty* case<sup>32</sup> and considers that they should be clearly reflected in the VBER and the Guidelines. So far, the Guidelines only provide for the possibility to require that consumers cannot access the distributor's website via a website bearing the name or logo of the third-party platform. This is a minimum requirement for the consumer to benefit from the appropriate sales environment.**

**In this respect, Cosmetics Europe expects more clarity and flexibility from the Guidelines in particular regarding the possibility to prohibit sales on third-party platforms as approved by the ECJ in the *Coty* case and/or the qualitative criteria which can or cannot be used.**

**Cosmetics Europe calls for a future-proof and flexible legal framework to catch the development of new sales channels. This framework should strike the appropriate balance between on the one hand competition law principles and Single Market integration and on the other hand the rights of brand owners in terms of contractual freedom.**

**Bearing these objectives in mind will allow ensuring that the (revised) VBER and its Guidelines do not become an outdated, inflexible competition tool for the next period of applicability, but remains coherent, relevant and effective for many years to come.**

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See Judgment in *Coty Germany GmbH*, Case C-230/16.

### 3.5 The necessity to clarify the definition of active and passive sales

Active and passive sales are currently defined in the Guidelines<sup>33</sup>. Given the importance of such definitions, Cosmetics Europe welcomes an EU-wide, VBER-based definition of these terms.

Whereas the full description provided for under the Guidelines today does not need to be codified in its entirety in the text of the VBER, it would be helpful to include the following definition of active sales under Article 2 of the VBER: "*'Active sales' means actively approaching individual customers or actively approaching a specific customer group or customers in a specific territory through promotions specifically targeted at that customer group or targeted at customers in that territory. 'Passive sales' means responding to unsolicited requests from individual customers including delivery of goods or services to such customers*"

In addition, Cosmetics Europe considers that the detailed definitions of active and passive sales in the Guidelines should be adapted to the current day-to-day context of online sales.

In the current applicable framework, online sales are *prima facie* presumed to be "passive sales", even though it is actually very challenging to clearly distinguish a passive sale from an active sale. It can hardly be demonstrated when and if a distributor is targeting a country outside of its domestic or allocated territory, which leads to the unwanted conclusion that any online sale is a passive sale.

However, without a clear distinction between online and offline sales, it is quite difficult for brand owners to incentivise a distributor with an exclusive right for a specific group of clients or a territory.

Cosmetics Europe thus considers that it would be relevant to clarify the definitions provided in the Guidelines and, in particular, to remove the presumption that online sales are necessarily passive sales. In this view, it should be considered that any online action directed towards a specific territory or customer can qualify as an active online sale.

<sup>33</sup>

Active sales are currently defined in the Guidelines as "*actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory*" and Passive sales are currently defined as "*responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are passive sales. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.*" (Vertical Guidelines, para. 51).

For instance, the following behaviours may be considered as “active sales”:

- using a country extension different from the one where it is located (such as “.fr” for France or “.de” for Germany);
- using specific languages for certain countries (except for English which is assumed to be understood by a large part of EU consumers);
- using referencing on search engines and/or on price comparison tools or any other platforms that are targeted at another territory;
- advertising on social networks in a specific country;
- use retargeting directed at consumers in a specific country, as well as direct mailing direct toward a specific country (even if such consumer accepted it), etc.

**Cosmetics Europe calls for a clearer, more up-to-date definition of passive and active sales in the VBER and explication thereof in its Guidelines which would consider online behaviour targeted at a specific territory as “active sales” in such territory.**



### 3.6 The need for more flexibility as a response to a fast-evolving digital environment

While the use of internet as both a sale and an advertising channel is increasing, it has become more and more difficult for brand owners to monitor the use of their brands on internet or the association of their brands with illegal or non-appropriate content and to swiftly adapt to any evolution of the e-commerce.

The lack of possibility for brand owners to rapidly adapt their qualitative requirements may endanger their capacity to ensure the protection of their brands as well as the protection of their entire selective distribution networks, including the existing authorized retailers which invest great amounts of money in order to deliver a high level of pre-sale service in stores and specific shopping experiences to consumers.

As already stated, the cosmetic industry is characterized by a strong intra-brand competition. The dynamic of competition between brands should legitimate further flexibility in the criteria implemented within a selective distribution system, without the validity of such new qualitative criteria being systematically challenged.

✓ *Price comparison tool, social media, search engines*

This is especially the case on the different interfaces where the products can be displayed, such as price comparison tools, social media, search engines etc., which enable large scale visibility for authorized resellers (but also non-authorized resellers) on internet.

Because of the very broad audience of such advertising platforms, any behaviour, claim or communication made on selective brands can significantly harm brand equity and reputation. It therefore remains essential for selective cosmetic brands to be able to protect their value and reputation as well as the shopping environment attached to such products.

It is thus of the utmost importance to clarify whether brand owners can monitor and/or constrain the use of price comparison tools and social media (such as Facebook or Instagram) by resellers.

In that regard, Cosmetics Europe suggests that the reasoning of the ECJ in the *Coty* case on the treatment of third-party online marketplaces could be extended to price comparison tools. Surely, these price comparison tools cannot provide any further guarantee than market places on the authenticity and quality of products as well as on the identity of resellers, both of them being generally reluctant to verify whether the resellers listed on their interface are authorized or not.

The same would apply to social media platforms, as the majority of them refuse to withdraw any content upon request of a brand owner, even where it is likely to discredit a brand's image, unless the reseller is engaging in obviously illicit practices, such as counterfeiting.

✓ *Domain names and trade name*

Regarding the use of brands as domain names, it would be useful to clarify to what extent a brand owner can monitor or limit the use of a domain name or which compulsory terms the brand owner may require authorized distributors to display in order to facilitate the identification of authorized retailers for the benefit of consumers (such as the use of specific logos and trade name).

Cosmetics Europe would thus welcome more leeway regarding the possibility for a brand owner to ensure that the domain name or any other commercial name or sign used by a reseller does not harm the reputation of its brand and is appropriate as regards the shopping environment it intends to offer to customers.

✓ *Key words*

Cosmetics Europe considers that brand owners (who invest vast amounts of cash, for instance through search engines, to promote their products and protect their brand image) should have more flexibility in overseeing the use of their brands as a keyword on search engines, without it being considered as a restriction by object.

In addition, a monitoring of key words purchased by resellers would also be justified in light of the bidding war existing on the brands that network members are authorized to sell, which leads to unnecessary expenses, only profitable to search engine operators, such as Google AdWords. Such restriction should be considered as justified and pro-competitive considering the significant cost savings resulting from rationalizing bid campaigns made through Google AdWords and to avoid members of the network cannibalizing each other.

**The current socio-economic context, in which brand owners have no incentive to limit online sales and where inter brand competition is strong, justifies (from an economic standpoint) that more flexibility be granted to suppliers in designing the qualitative criteria and conditions that each of them considers as appropriate to protect brand equity and the shopping experience, to the benefit of consumers.**

**Then, as digital business is a fast-evolving environment, Cosmetics Europe calls for more leeway for brand owners to monitor and limit the use of their brands on the internet, namely on social media, price comparison tools, search engines or in association with domain names and any other commercial name.**

**More flexibility will enable cosmetic brands to adapt their requirements and qualitative criteria to any evolution in the sphere of e-commerce business, without fearing to be in breach of competition law and without facing systematic opposition from retailers which refuse to cooperate and invest in the protection of brand equity and in the delivery of a level of service in line with the consumers' expectations and brand standards.**

### 3.7 The flexibility necessary for selective brands to choose the members of their distribution networks

Another rationale behind selective distribution systems is that such systems allow the distribution of certain goods to be extended, in particular to geographically remote areas, while maintaining stability by selecting undertakings authorised to distribute the contract goods. While the ECJ confirmed in several cases that brand owners of selective brands are indeed required to apply their selective criteria in a uniform and non-discriminatory manner, it did not state that they were obliged to approve all distributors who fulfil the criteria.

At the same time, French courts have ruled that brand owners were free to organise their distribution networks and could refuse to renew a previously authorised distributor's contract in specific circumstances, and also free to decide to terminate an authorised retailer agreement without losing the benefit of the exemption provided in the VBER<sup>34</sup>.

Such flexibility was acknowledged by national courts<sup>35</sup>, provided that there was no dominance/market power nor behaviours proceeding from anticompetitive practices. Such an approach is justified in light of the principle of freedom to contract (or not), provided that any termination or refusal to authorize a retailer or to renew a selective distribution agreement does not have a substantial effect on competition.

In other words, provided that it remains isolated and unilateral<sup>36</sup>, a brand owner may refuse to renew or decide to terminate a selective distribution agreement, even if the retailer complies with the qualitative criteria of the brand.

**Cosmetics Europe calls for a clarification of the Guidelines regarding the conditions under which brand owners may decide to terminate or not to renew authorized retailer agreements where such refusal has no effect on the market nor does it conduct to discrimination of retailers implementing low-prices.**

Brussels 27 May, 2019

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<sup>34</sup> Cf. Paris Court of appeal, 30 September 2015, *Horlogerie Doux v Rolex France*; French Court of cassation., 8 June 2017, *Lailler v Caudalie*.

<sup>35</sup> Cf. French Court of cassation, 8 June 2017, no 15-28355, *Caudalie*; Paris Court of appeal, 12 December 2018, no 16/19853; Paris Court of appeal, 23 January 2019, no 16/16856, *Mazda*.

<sup>36</sup> Cf. Paris Court of appeal, 12 December 2018, no 16/19853, *Sony*; Paris Court of appeal, 23 January 2019, no 16/16856, *Mazda*.