



Camera Nazionale della Moda Italiana

VBER EVALUATION

ADDITIONAL CONTRIBUTION TO THE EUROPEAN COMMISSION

1. BACKGROUND

Between 4 February and 27 May 2019, the European Commission (“**Commission**”) conducted a public consultation on the evaluation of the Vertical Block Exemption Regulation (“**VBER**”)¹ and the accompanying Guidelines on Vertical Restraints (“**VGL**”). This public consultation was followed by a stakeholder workshop on 14 and 15 November 2019, attended by contributors to the public consultation. These Commission’s initiatives attracted the attention of companies, law firms and business associations representing a variety of sectors (with many major brands and manufacturers).

Members of *Camera Nazionale della Moda Italiana* (the National Chamber for Italian Fashion, hereinafter referred to as “**CNMI**”) are particularly impacted by these rules as they rely on vertical agreements for the distribution of products across Europe. As such, recognising that its opinion may be of significant value for the purpose of the ongoing evaluation, in April 2019 CNMI submitted its contribution to the public consultation and took part in the stakeholder workshop on 14 and 15 November 2019.

As part of an open dialogue, guided by the objective of gathering feedback on the functioning of the VBER and the VGL, CNMI would like to thank the Commission for the opportunity to submit this additional contribution aiming at bringing to the Commission’s attention additional details on topics of particular interest and importance for the European fashion industry.

2. CNMI MEMBERSHIP AND REPRESENTATION

CNMI, a non-profit making association, has represented, promoted and protected the values and the development of the Italian fashion industry in Italy and globally since 1958.

CNMI represents nearly all of the well-known Italian fashion brands. In 2019, the Italian fashion industry, including textiles, clothing, leather, jewelry, sunglasses, shoes, cosmetics and perfumes generated revenues of more than EUR 67 billion. Brands that are members of CNMI account for more than 33% of total sales.

¹ Commission Regulation (EU) No 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.



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CNMI took part in the public consultation launched by the Digital Single Market Task Force in the context of the Commission's e-commerce sector inquiry and provided its views to the Digital Single Market Task Force on the European Court of Justice's ruling in *Coty*².

3. KEY ISSUES

3.1 APPROACH TO ONLINE SALES

Ten years ago, the VBER was aiming at supporting the increase of online sales. However, since the VBER and VGL were drafted, the retail landscape has changed remarkably and, nowadays, e-commerce is a well-established sales channel. Indeed, as highlighted by the Commission's Final Report on the e-commerce sector inquiry,³ sales over the Internet are increasingly important for conducting business and engaging with consumers. As a result, e-commerce no longer needs any special protection offered by competition rules. CNMI considers that the VBER and VGL should be updated to reflect this shift in the market in order to rebalance the legal framework between online and offline sales.

CNMI also considers that ensuring full and effective brand protection is of paramount importance in this context. Brand protection produces several and substantial 'positive externalities' for the economy as a whole. It preserves the significant investments made by the fashion industry, in particular in terms of creativity, design, building and maintaining a brand image, quality reputation and manufacture capabilities for the benefit of consumers. In order to ensure effective brand protection and sustainability of investments, the fight against counterfeiting must be strengthened, in particular concerning practices which take place online (which cause the most detrimental and long-lasting damage to the consumer's perception of a brand's quality and image). The lack of adequate brand protection tools would in the long-term lead to decreased investment and lower employment levels, coupled with significantly higher risks for consumers.

In addition, CNMI considers that the Commission should take this opportunity to adapt the concept of active/passive sales to reflect current market trends in the e-commerce space, in particular giving way for more flexibility in the organization by brand owners of their distribution and supply chain networks in a digital and cross-border environment. In the current applicable framework, online sales are *prima facie* presumed to be "passive sales", even though it is very difficult to distinguish a passive sale from an active one in this context. For example, online

² Judgment of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941 ("*Coty*").

³ Final Report from the Commission to the Council and the European Parliament on the e-commerce Sector Inquiry, 10 Mai 2017, Com(2017) 229 Final.



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advertisement, notably on social media, plays an increasing role and it is currently difficult to determine whether it constitutes active or passive sales. Therefore, it is difficult to demonstrate in practice if and when a distributor is targeting a country outside of its domestic or allocated territory, thereby leading to the undesirable, and unintended, conclusion that any online sale is a passive sale. CNMI thus considers that it is appropriate to remove the presumption that online sales equate to passive sales. In this view, the Commission should consider that any online action directed, or capable of being directed, towards a specific territory or customer can qualify as an active online sale.

In CNMI's opinion, the rules should also clarify how selective criteria must be applied to online and offline sales. Paragraph 56 of the VGL considers the following 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"*. However, both sales channels have their particularities and it is difficult for brands in practice to balance the particularities of each channel whilst complying with the rule of equivalence. Accordingly, CNMI thinks it is very important to reflect in the amended VBER and the new VGL the confirmation that brands can enjoy a level of freedom when designing and applying selective criteria adapted to the specificities and real nature of each sales channel, without running the risk of being accused of treating one sales channel unfairly in comparison to the other.

CNMI is a convinced advocate for the growth and development of online distribution channels. However, this cannot be achieved at the cost of the offline, brick-and-mortar channel. Instead, it should be achieved in line with the objectives of ensuring quality, traceability and product authenticity, ultimately for the benefit of consumers who can enjoy high quality products and services. Indeed, fashion brands offer a genuine omnichannel experience to consumers, combining the advantages of online channel (swift and easy access) and of offline channel (high quality pre-sales services, unique shopping experience and valuable after-sales services).

3.2 BANS OF SALES VIA ONLINE MARKETPLACES

The *Coty* ruling brought welcome clarification on a number of areas, which have for some time been in a state of flux and caused significant uncertainty for the fashion industry in the European Union ("EU"). In particular, it recognizes the importance of selective distribution and limits the scope and application of the *Pierre Fabre* ruling.⁴ The Court of Justice further found that a

⁴ Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, C-439/09, EU:C:2011:649 ("*Pierre Fabre*").



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marketplace ban might not constitute a restriction of competition at all under certain circumstances, and that in any event is not a hard-core restriction. CNMI respectfully invites the Commission to consolidate the *Coty* ruling in the future amendment of the applicable laws and guidance.

CNMI also welcomes the interpretation of the *Coty* ruling made by the Commission in its Policy Brief of April 2018. In particular, the Commission indicated that “*the Coty judgment does not exclude that marketplace bans in selective distribution agreements for other product categories such as "high-quality" or "high technology" products could also comply with Article 101(1) TFEU, if the Metro-criteria are fulfilled.*”⁵ CNMI advises the Commission to expressly clarify that the admissibility of marketplace bans is not limited to selective distribution systems and that they also apply to high level and high quality products.⁶

3.3 ADWORDS RESTRICTIONS

CNMI would like to stress the importance and utility of online advertising for online sales, as was briefly mentioned in the Commission’s Final Report on its e-commerce inquiry. CNMI acknowledges that online search advertising is a novel and growing issue that needs to be properly addressed. However, CNMI notes that there is little guidance provided to companies on how to assess their online advertising reseller policies and which restrictions can be considered problematic.

The *Guess* decision⁷ does not provide details about the restrictions imposed by Guess on the use of its trademarks as a keyword for online search advertising. The *Guess* decision suggests that a total ban of keyword use is excessive as it prevents retailers from advertising online.

However, the impact of online search advertising restrictions in a vertical relationship may depend on the specific form of these restrictions and on their economic context. It is arguable whether a ban of keywords use would always be problematic in circumstances where the retailer has the ability to use and generate all its online sales through its website. In such a situation, retailers with sufficient visibility on the Internet do not appear to need an unfettered ability to bid on keywords. Accordingly, restrictions of online search advertising would appear to be problematic for smaller retailers, which can only reach their customers through online advertising

⁵ European Commission Competition policy brief, 2018-01, April 2018, page 3.

⁶ This position has already been taken by the French Competition Authority in the *Stihl* decision of 24 October 2018 and by the Paris Court of Appeal in the *Caudalie* judgement of 13 July 2018, the latter referring to the European Commission’s policy brief mentioned in the previous footnote.

⁷ Commission Decision of 17 December 2018, *Guess*, Case AT.40428.



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(as highlighted in the Commission's summary of the national competition authorities ("**NCA**s")'s contribution to the VBER Evaluation). In any event, certain restrictions imposed by trademark owners should be permissible on the use of their trademarks as keywords in order to ensure brand protection and to prevent consumer confusion. Such permissible restrictions would also be useful to avoid excessive bidding wars. Bidding wars are particularly harmful for brands and smaller retailers, which do not have the financial and technical means to outbid. In the end, Google (or other online search engines) is the sole beneficiary of this war.

In this respect, legitimate and justifiable restrictions to online search advertising appear to be appropriate and there should be more clarity for companies on what kinds of restrictions would be legally acceptable. For instance, consistent with established principles regarding selective distribution, restrictions based on objective criteria could be envisaged in the VGL. For example, it could be possible to restrict bids on the sole trademark, in order to prevent confusion and ensure that consumers are always directed to the origin of the brand, while allowing bids on combination of keywords and the trademark. Such restrictions do not prohibit completely the use of brand names and do not remove the possibility for retailers to take measures in order to improve the search ability of their web shops or their prominence on searches. They also do not constitute a substantial restriction of the possibility for retailers to sell their products online. At present, there is a lack of clarity and guidance with respect to online search advertising restrictions. The Commission should provide in the VBER and VGL the requisite level of clarity, recognizing the benefits that are associated with restrictions on online search advertising, notably in order to prevent confusion for consumers.⁸

3.4 RESALE PRICE MAINTENANCE (EXCEPTIONS AND EFFICIENCY)

The growth of online sales has brought certain aggressive practices from online resellers causing significant harm to brands. In particular, online resellers benefit from the investments and efforts of brands and offline resellers without contributing to the costs incurred by them (so-called free-riding).

In order to protect the significant investment in consumer experience, CNMI considers that, under certain circumstances, resale price maintenance ("**RPM**") can lead to efficiencies to the benefit of consumers. The VBER could also set out a *de minimis* exemption for companies with low market shares or provide an *ex post* assessment rather than an *ex ante* ban of RPM.

⁸ Consumers often assume that the first result displayed on a search engine result page is the website of the relevant brand.



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CNMI takes the view that the VBER and the VGL should set out clear criteria under which RPM would benefit from the exemption provided by Article 101(3) TFEU.

The VBER and the VGL do not appear to provide sufficient legal certainty with regard to the assessment of RPM in the context of selective distribution. The VBER and the VGL could provide clarity as to scenarios where RPM might be permissible when applied to products that require high-level retail services and detailed information to consumers (e.g., high-end products). Overall, there should be clarity as to whether (and, if so, to what extent) brands can use these RPM justifications to interfere in the pricing policy of their retailers. For example, it should be recognized that, in a selective distribution system, brands have a predominant role in defending the quality of the distribution system and the reputation of the brand. As a result, the VBER should allow brands within a selective distribution system to set up a price alignment or to prohibit promotional campaigns if such prices/campaigns create significant damages to the reputation of the brand.

CNMI also calls for clarity on the exceptions to the prohibition of RPM set out in the VGL. Indeed, these exceptions (set out in paragraph 225 of the VGL) are not sufficiently clear. In order to provide legal certainty, CNMI would welcome more clarity on how these exceptions work in practice.

3.5 ALGORITHMS/ PRICING SOFTWARE

The question of algorithms and competition has been increasingly debated. Many retailers use pricing software to monitor and adjust prices and many manufacturers use such software to track the prices of their products on the market. Such algorithms help retailers to react competitively and swiftly to price changes, assist consumers in finding competitive prices and help brands to understand market trends.

CNMI acknowledges that there are possible antitrust issues associated with the use of price monitoring tools, in both a vertical and horizontal context. However, the benefits of algorithms and pricing software should not be underestimated, as they enable retailers to compete more strongly and effectively and enhance competition significantly. From a consumer benefit perspective, algorithms can help provide personalised shopping recommendations, assist consumers with their purchasing decisions, ensure quick access to information thanks to better organisation of the information, and provide new information on quality and consumer preferences.

As CNMI assumes that the Commission will address the increasing use of algorithms in the VBER or the VGL, CNMI would like such efficiencies to be reflected in the expected revisions of the applicable rules.



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CNMI notes that, in its recent decisional practice,⁹ the Commission highlighted the anticompetitive use of algorithms when combined with RPM. However, considering the increased use of price monitoring, price comparison and price algorithms in an online environment, the Commission should clarify in the VBER and the VGL that the use of price monitoring algorithms and price monitoring tools is not restrictive when not combined with RPM.

3.6 OFFLINE SALES REQUIREMENTS

CNMI observes that physical criteria for the selection of distributors play a critical role to ensure that resellers contribute to the promotion of brands and to offer a true omnichannel experience for consumers. For this reason, CNMI welcomes the VGL's recognition that it is reasonable for brands to require physical presence as a condition to selling online. CNMI would further welcome the recognition in the VGL that the offline requirement ensures that customers benefit from the best customer experience. This would give brands the necessary legal certainty they need to ensure high quality services to consumers and brand recognition.

In addition, CNMI would welcome more guidance on the allowed offline requirements set out in paragraph 52 of the VGL. This could be done by providing objective criteria helping brands assessing how many physical stores they can require from online retailers and how to calculate the volume of offline sales required (e.g., number of stores in a specific geographic area, retailer's size, total sales, location). Such clarity would ensure the legal certainty brands need to enforce their distribution systems in compliance with competition law.

3.7 CLARITY ON THE DEFINITION / SCOPE OF GENUINE AGENCY

CNMI welcomes the consideration that, where an agreement is a genuine agency agreement, certain restrictions under Article 101(1) TFEU will not apply. However, CNMI would welcome more clarity on the conditions an agreement must meet to be considered a genuine agency agreement. Indeed, the development of e-commerce has brought hybrid sales models, which are difficult to classify under the current legal framework. The VGL should provide practical examples based on specific situations. This would be particularly relevant for marketplaces as it is unclear whether they can be considered as genuine agents.

CNMI also suggests that the Commission consolidates and reflects in the VGL the national decisional practice with respect to the qualification of genuine agency. The Commission could

⁹ For example, Commission Decision of 24 July 2018, *Denon & Marantz*, Case AT. 40467.



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take into account the notion of *contratto estimatorio*, a type of agreement which features elements of both distribution and agency.

3.8 IMPLEMENTATION OF DECISIONAL PRACTICE AND CASE LAW AT THE NATIONAL LEVEL

The fundamental principle of uniform application of EU law ensures the legal certainty brands need when they operate a distribution system that applies throughout the EU. However, recent national decisional practice has demonstrated that some NCAs tend to deviate from EU competition law. For instance, the German Federal Cartel Office (“**FCO**”) and German courts consider a more limited scope for the application of the *Coty* ruling. In particular, the German Federal Court of Justice ruled in the *Asics* case¹⁰ that marketplace bans are limited to luxury products whereas the French Competition Authority in the *Stihl* decision¹¹ considered that marketplace bans can be justified for other types of products (in particular, outdoor power equipment). CNMI also notes a diverging approach (more or less lenient) to the current prohibition of RPM in various jurisdictions of the EU.

In the context of a selective distribution system, it appears to be a lack of tools that enable brands to effectively enforce selective distribution rules against unauthorised resellers or any other players offering directly or indirectly for sale products that are subject to selective distribution. Selective distribution is key in preventing free-riding by other retailers or distributors and maintaining the brand image.

Accordingly, there should be consistency with the level of protection granted in this regard at national level and the Commission could reinforce this critical distribution system by clarifying in the VGL that brands can intervene against unauthorized resellers whenever they sell in breach of the selective distribution rules. This would significantly benefit consumers in terms of product safety, integrity, authenticity, liability and aftersales services.

Considering that brands - like any company doing business in Europe - need legal certainty and effective brand protection in all jurisdictions of the EU, the Commission should ensure a uniform and coherent implementation of competition rules. Such legal certainty allows brands to reduce the cost involved in obtaining legal advice and in carrying out a proper legal and commercial assessment for specific area, for the benefit of consumers.

4. ROLE OF THE COMMISSION

¹⁰ Judgment of the Federal Court of Justice of 12 December 2017, *Asics*, case KVZ 41/17.

¹¹ Decision of the French Competition Authority of 24 October 2018, *Stihl*, case 18-D-23.



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CNMI respectfully requests the Commission to make sure that the voice of the fashion industry is heard, by recognizing the specific characteristics of the sector.

CNMI would like to stress the importance of predictability, clarity, flexibility and of an effects-based approach for the ongoing evaluation of the VBER. All these requirements would in fact significantly benefit both consumers and businesses across the EU.

Therefore, CNMI takes the view that the VBER and VGL should be updated to reflect all the changes over the past ten years in order to ensure the necessary flexibility that this new retail environment requires.

5. CONCLUSION

CNMI wishes to thank the Commission again for the constructive dialogue and for the opportunity to express its position on a number of topics of interest for the fashion industry.

CNMI stands ready to continue this open dialogue with the Commission and to further discuss these or any other issues, and to assist the Commission with any additional information or clarification it might require in the ongoing evaluation of the VBER.