

Contribution to the *Preliminary Report on the E-commerce Sector Inquiry*

INTRODUCTION

The Comité Colbert, the association gathering luxury houses and cultural institutions working together to promote French art de vivre at international level, wishes to thank the European Commission for the publication of its well-balanced and relevant *Preliminary Report on the E-commerce Sector Inquiry* (later “*Report*”).

The *Report* being multi-sectorial, we aim in this contribution at sharing with the European Commission the specificities of the high-end sector, a truly European sector and a virtuous player in the digital world through its global contribution to Europe (A). We will specifically focus on some key findings of the *Report* which we think important to stress, namely (B) the demonstration of the growth of e-commerce in a highly competitive environment, (C) the recognition of the validity of the selective distribution principle when used appropriately in line with the detailed guidelines of the European Commission which have remained relevant and flexible enough to apply to the fast-moving digital environment, (D) the conclusion that marketplaces bans are not a hardcore restriction if based on justified criteria and (E) the recognition of the harmful effects of free-riding.

A – CONTRIBUTION OF THE HIGH-END SECTOR TO EUROPE

The high-end sector is, more than any other industry, a European specificity, core to Europe's reputation and a strong driver of growth and employment in Europe, both directly and indirectly through the large ecosystem of suppliers, sub-contractors, service providers and distributors that it requires for the development and sale of its products (many of them small and micro-businesses).

European brands represent over 70% of the world's high-end cultural and creative market. It is the only sector in Europe that enjoys such a competitive advantage worldwide¹. The strength of Europe in the sector can be explained by its tradition of luxury, its strong artistic culture, the exceptional craftsmanship inherited from the Past, as well as its high capacity for innovation and creativity. In terms of growth, European high-end companies enjoy an annual output of €547 billion which represents 4% of the EU GDP².

The high-end sector constitutes a large ecosystem gathering some international groups and a majority of SMEs³; investing massively and creating excellence clusters in Europe. It is a key contributor to the creation of sustainable jobs and growth.

The high-end sector also contributes to the preservation of European expertise and craftsmanship skills by actively **supporting the development of SMEs** (suppliers, subcontractors, distributors) **based in Europe** which often live exclusively from the services they provide to this industry.

¹ Frontier Economics report on ‘The European high-end cultural and creative industries’ contribution to the European economy’, December 2014, (p.2).

² *Ibid footnote 1*, (p.34).

³ In the ecosystem of the French haute couture sector, 80% of the companies have fewer than four employees, Comité Colbert & BCG, ‘Luxury: A Growth Driver For 21st-Century Europe’, 2008, (p. 20).

It employs over 1.7 million people in Europe and created over 200,000 jobs in Europe between 2010 and 2013⁴.

The high-end sector has always boosted the European economy both within and outside of Europe. European luxury goods are the most traded luxury commodities in the European Single Market and the European luxury companies are by far the **world's first exporter of luxury goods** (EU: 75%, China: 4.7%, USA: 2.1%)⁵ and represent around 17% of the EU's total merchandise exports.

In addition, the luxury sector is **a constant driver of innovation**, with high investments into high-end technologies, innovation in the product offering and modern marketing methods (driving the artistic industries). Generally relying on long-term strategies, luxury brands also invest heavily into training and research, expertise and new technologies. Thus, in addition to being a catalyst for innovation in its own sector, the luxury industry is ideally positioned to trigger economic effects in other sectors.

High-end products have an immaterial value and **an aura that appeal to consumers worldwide**. In this regard, the sector plays a **key role in the development of tourism and the image of Europe**, many foreign tourists coming to Europe in order to purchase luxury products as part of their travel experience⁶.

B – A CLEAR DEMONSTRATION OF THE GROWTH OF E-COMMERCE IN A HIGHLY COMPETITIVE ENVIRONMENT

We note with interest that the *Report* clearly demonstrates the **growth of e-commerce⁷ in a highly competitive environment under the current rules**.

This is especially true of the European high-end sector which is today a major digital player, with the internet being a cornerstone of its business model and a very efficient direct vector of the high-end image of its products towards consumers, in line with the ambitions of the « Digital Single Market » strategy.

The European high-end sector is a major digital player meeting the consumers expectations

Luxury consumers have high expectations, regardless of the communication or distribution channel used to connect with them. The development of e-commerce has enabled the luxury industry to propose new, tailor-made high-quality environments to its clients with authentic products, personalized curated content, qualitative on- and off-line advice with dedicated trained staff, high-quality delivery, fast and seamless returns and high-class after-sale service and advice, all with solutions that strictly respect their privacy and ensure safe payment.

The quality of online luxury services has **boosted consumers' confidence in e-commerce**. The share of online sales of luxury products has been increasing considerably over the last years and is expected to grow even quicker in the near future (from 6% in 2014 to 12% in 2020 and 18% by 2025)⁸.

This progress is closely linked with the development of a real **omnichannel experience which enables high quality distribution networks of high-end products in which the complementary on- and offline experiences** allow customers of luxury goods to fully experience the universe of a brand in line with their expectations.

⁴ *Ibid footnote 1*, (p.34).

⁵ Lionel Fontagné & Sophie Hatte, G-MonD working paper n°37, 'European High-End Products in International Competition', 2013.

⁶ More than 50% of luxury goods bought in Europe are purchased by extra-regional tourists, Bain & Company, 'Luxury Goods worldwide market study', 2015, (p.13).

⁷ *E-commerce in the EU has grown steadily over the past years. Today the EU is the largest e-commerce market in the world. The percentage of individuals aged 16 to 74 having ordered goods or services over the internet, has continuously grown from 30% in 2007 to 53% in 2015. Preliminary Report on the E-commerce Sector Inquiry*, European Commission, SWD(2016) 312, 15.9.2016, (p.8).

⁸ McKinsey & Company, 'Digital inside: get wired for the ultimate luxury experience Apparel, Fashion & Luxury Group', July 2015, (p.11).

Indeed, recent studies⁹ demonstrate that 58% of all luxury products sold are influenced by the customer's overall digital experience.

In this regard, the **luxury industry is among the pioneers of online creative content creation** and acts as a trendsetter for the quality of contents, notably on all forms of the social media. With an average of 2.6 Mio images posted every month on Instagram, luxury items and high quality food are the most “shared” products on the internet¹⁰.

A highly competitive industry driven by creativity and innovation

The *Report* emphasizes the lack of concentration of the sectors covered by the sector inquiry¹¹.

Indeed, the European high-end cultural and creative sector is an open sector characterized by little concentration and high competitiveness which enables the constant emergence of new entrants. The main players have a small market share – the top 5 players own only 30% of total market shares and the top 10 less than 50%¹². The sector has also a low level of vertical integration: independent players are present at all levels of the distribution channel¹³.

In all high-end segments, **the main drivers of success are creativity and innovation** and therefore many new players have appeared in the last few years both in Europe and internationally, allowing for intense competition. Luxury companies permanently seek to develop and expand their savoir-faire into new product segments, which in turn feeds their competitors' quest for excellence through innovation and creativity. **The ultimate beneficiary is the consumer**, who is offered a large choice of new products, in all areas and price ranges.

We are satisfied that the *Report* emphasises that **the quality of the product and the brand image** – rather than the product's price – are the **essential components of the brands' ability to attract customers**¹⁴.

Beyond the creation of new players, competitive positions within the luxury industry are constantly evolving, which means **permanent challenge for the existing players**. Indeed, competition is strong and brands are continuously renewed and diversified.

C – THE VALIDITY OF THE SELECTIVE DISTRIBUTION PRINCIPLE

We are pleased that the *Report* acknowledges the validity of the selective distribution principle when it is used appropriately and in line with the European Commission guidelines on vertical restraints – which is the case for the high-end sector. Indeed **selective distribution is recognized by regulators and jurisprudence as a key pillar of the high-end business model** and used by brands to commercialize their specific, high-end products within the European market.

This distribution model is used by our sector **with a creative omnichannel vision that takes into account the nature of our products in order to meet consumer expectations for innovative products**. The aura of our brands – a subtle mix between craftsmanship, creativity and cultural heritage – necessitates the creation of a **brand environment** supported by significant investments in marketing, innovation and research and guaranteed by a control over their distribution networks.

⁹ Altagamma & BCG, ‘The Global Consumer Insight’, February 2016.

¹⁰ Albatross & 1000mercis, ‘Voyage au Cœur du luxe’, 2015.

¹¹ “None of the sectors covered by the sector inquiry seems highly concentrated: the number of manufacturers and retailers perceived as main competitors is significant throughout the different regions of the EU” Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 312, 15.9.2016, (p.112).

¹² Deloitte, ‘Global Powers of Luxury Goods – Disciplined innovation’, 2016, (p.14, our analysis).

¹³ Comité Colbert, “Luxury: A Growth Driver for 21st-Century Europe”, December 2008, (pp. 11-15).

¹⁴ The preliminary results of the sector inquiry (see section B.2.2) reveal that the great majority of manufacturers in all product categories consider the quality of the product and the brand image to be of high importance for their ability to attract customers. A much lower proportion of manufacturers considers the price to play a primary role to attract customers. Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 247, 15.9.2016, (p.93).

The combination of a strong physical retail presence (own-shops and/or a network of authorized resellers), combined with an online distribution network (of both the brands and their distributors), allows the development of both online and offline commerce, using the specificities of both channels without one being detrimental to the other.

The report recognizes the **relevance of the brick and mortar shops, in particular for the luxury sector**¹⁵. Indeed, while the omnichannel experience has become an essential aspect of our distribution strategies and a major growth opportunity, physical retail remains at the heart of our relationship with the consumer and the source of substantial investments.

In light of the above, we welcome that the report recalled the existing legal framework and confirmed that the proportionality of the brick and mortar requirement should only be assessed on an individual case basis.

Selective distribution also guarantees the consumers the authenticity and consequently safety of the products they buy. Recent studies by the EU Intellectual Property Office demonstrate that the total trade in counterfeit and pirated products to the European Union is very intensive (5.1% of EU imports in 2013 aka EUR 85 billion) and it largely targets the high-end sector (watches, articles of leather, travel goods, handbags, footwear, perfumes and jewellery)¹⁶. The protection of authenticity is also crucial for the economic performance of Europe. A 2016 report stresses that IPR-intensive industries generated more than 42% of EU GDP (worth € 5.7 trillion) and that it accounted for 82.2 million (38.1%) direct and indirect jobs in the EU for the 2011-2013 period¹⁷.

Selective distribution **does not limit cross-border commerce nor restrict access to goods for consumers**. It rather enables brands to choose the right partners which enable them to maintain control over the quality of their distribution networks on- and offline, for the benefit of consumers. Luxury companies, through selective distribution, require that their distributors supply a large variety – often two-thirds – of items within a product range and not limit themselves to “best-sellers”, traceability of the products, correct storage and shelf-life, and qualified advice fitting with a given consumer’s needs. Otherwise, many distributors might be tempted to focus on products that are easy to sell, denying choice to consumers.

D – MARKETPLACES BANS ARE NOT A HARDCORE RESTRICTION

In this context, we are also pleased that the *Report* **underlines that the decision not to sell on marketplaces when in particular it is based on justified criteria is not considered as a hardcore restriction** which is in line with the current Vertical Restraints Block Exemption Regulation No 330/2010 and its guidelines¹⁸.

¹⁵ *Despite the growing importance of e-commerce, many manufacturers stress the importance of selling their products via brick and mortar shops. In particular, manufacturers of luxury branded goods, such as fashion clothing or perfumes, consider the traditional shopping experience in a specific luxury shopping environment with extensive pre-sale advice to be a central element of their distribution strategy. Some respondents report that the introduction of websites for the sale of certain luxurious brands/products was not successful and disappointing, as customers prefer to purchase high priced products in a traditional luxurious shopping environment.* Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 163, 15.9.2016, (p.65).

¹⁶ OECD & EUIPO, ‘Trade in counterfeit and pirated goods, mapping the economic impact’, 2016, (pp.72-80); BASCAP, “Roles and responsibilities of intermediaries: fighting counterfeiting and piracy in the supply chain”, March 2015, (p.5).

¹⁷ EPO & EUIPO, ‘Intellectual property rights intensive industries and economic performance in the European Union’ October 2016, (pp.6-7).

¹⁸ (472) *The preliminary findings of the sector inquiry do not indicate that marketplace bans should be considered hardcore restrictions within the meaning of Article 4(b) and/or Article 4(c) of the Vertical Block Exemption Regulation. The Commission considers that such clauses do not have as their object (i) a restriction of the territory or the customers to whom the retailer in question may sell or (ii) the restriction of active or passive sales to end users. They are not aimed at segmenting markets in the internal market based on territory or customers. Such an approach is in line with the Vertical Guidelines which specify that marketplace restrictions requiring the retailer to use third party platforms (e.g. marketplaces) only in accordance with the quality criteria agreed between the manufacturer and its retailers for the retailer’s use of the internet are not considered a hardcore restriction. They concern the question of how the distributor can sell the products over the internet and do not have the object to restrict where or to whom distributors can sell the products.* Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 312, 15.9.2016.

There is a multiplicity of ways to be present on the internet and the members of our industry, of which many are SMEs, are strongly attached to their liberty of choice regarding their online image¹⁹ and the quality of their products distribution.

As explained before (section C), the nature and guarantee of authenticity of our products, as well as the preservation of the image and positioning of the brands are criteria that may justify marketplaces bans.

The *Report* emphasizes the importance – specifically for the luxury sector – that these qualitative criteria are met, considering the negative impact it may cause on the brands because of unsatisfied customers²⁰.

Today, however, many online marketplaces fail to meet qualitative criteria and to take into account the nature of our products, the protection of the image and the positioning of the high-end sector²¹. Our products are largely available online, either through our own brand websites, through our authorised retailers' websites, or through other pure players who meet the qualitative criteria defined by each brand individually.

In line with this trend, it is also worth noting that the *Report* has shown that few retailers use marketplaces, generally preferring to operate through their own website²².

E – RECOGNITION OF THE HARMFUL EFFECTS OF FREE-RIDING

The report recognizes **as a key finding the harmful effects of free-riding on the investments of manufacturers and retailers as well as on the innovation and research capacities of the sector** and we welcome its conclusion regarding the necessity to find a solution to this particularly important problem²³.

As the report observes, because of the unfair free-riding by competitors²⁴, the retailers may be reluctant to engage in pre-sales high quality services, a situation which is, in the end, detrimental to consumers who are denied this crucial opportunity to have the full capacity of choice awarded by a true experience of the product and personal advice.

¹⁹ (446) Moreover, marketplaces are often considered to be too rigid in the way the content and information is presented to the customer. Many brands want to present to their customers a special image (including by means of pictures, text and potentially videos) which is sometimes considered as not sufficiently possible on marketplaces. Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 312, 15.9.2016.

²⁰ (444) ... The required high level of quality of the selling environment does not only ensure that the customer gets the product that he or she wants, but also allows the customer to understand the key features of the products as well as key differences compared to other products/brands. Products which are sold without meeting the customer expectation will trigger complaints and dissatisfaction and negatively impact the reputation of the products and brands.

(445) Presenting the products on a non-specialized marketplace alongside products of a lesser quality or alongside used or defect products is often considered harmful for the brand image. In particular, owners of luxurious brands have concerns that the presentation on marketplaces in a non-luxury environment without personalized advice and a luxurious shopping experience does not reflect the brand's reputation and therefore diminishes the brand image.

(448) The presentation of authentic products alongside counterfeit products is considered to be detrimental for the brand image and some manufacturers consider the level of control over sales on the marketplace as insufficient to address this issue adequately. Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 312, 15.9.2016.

²¹ Most marketplaces do not differentiate in terms of product presentation between luxurious products and everyday consumer goods, Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 312, 15.9.2016, (footnote 265).

²² 61% of retailers use their online shops as the sole online selling channel; 4% sell online only via marketplaces, Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 312, 15.9.2016, (figure B.55).

²³ (905) Creating a level-playing field between offline and online distribution channels and finding a solution to free-riding, thereby preserving the investments in high-level presale services is a consideration that is claimed by stakeholders to play an important role in generating some of the observed market trends and restrictions. Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 312, 15.9.2016.

²⁴ (30) Horizontal externalities may arise between distributors of the same product when a distributor cannot appropriate fully the benefits of his (costly) sales effort. For instance, demand enhancing pre-sale services offered by one distributor, such as personalised product advice, may lead to increased sales from competing distributors offering the same product and, thus, create incentives among distributors to free-ride on costly services provided by others. For example, customers may visit a brick and mortar shop to try out a product or obtain other useful information on the basis of which they take the decision to purchase, but then order the product online from a different distributor. The possibility of such free-riding and the respective inability of the distributor that offers customer services to appropriate fully the benefits, may lead to suboptimal provision (in terms of quantity and/or quality) of such services from the point of view of the vertical supply chain. Preliminary Report on the E-commerce Sector Inquiry, European Commission, SWD(2016) 312, 15.9.2016.

CONCLUSIVE REMARK

European high-end industries have long been virtuous actors of selective distribution which is beneficial to the consumers and to the growth of e-commerce. This distribution model is vital in order for the sector to maintain excellence over the entire value chain – from the creation of the products to the relationships our brands develop with their clients.

The steady progress of e-commerce demonstrates the validity of the current rules which allow the entire European high-end eco-system to thrive in a fair and competitive environment.