

Fédération Européenne des Parfumeurs Détaillants

Organisation déclarée conformément aux dispositions ministérielles
Siege Social: Paris



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FEPD SUBMISSION TO DG COMPETITION

Preliminary Report on the e-commerce sector inquiry (HT.4607)

- (1) The FEPD – the *Fédération Européenne des Parfumeurs Détaillants* – is the umbrella organization of the national European federations in the perfumery retail industry¹. The FEPD also represents international retail trade groups within the perfumery industry which are active in at least four European countries.
- (2) On 6 May 2015, the European Commission launched a sector inquiry into the e-commerce sector based on the observation that cross-border e-commerce remains limited. The Commission explained that one ground for this could be that some undertakings active in the e-commerce sector might be engaged in anti-competitive agreements, concerted practices or abuses of a dominant position, beyond other barriers such as language, consumer preference and differences in the legal frameworks in Member States.
- (3) In March 2016, the Commission published its initial findings on geo-blocking in which it found that geo-blocking is widespread in the EU but pointed out several reasons, including unilateral decisions by companies not to sell abroad and contractual barriers set up by companies preventing consumers from shopping online across Member States.

¹ <http://www.fepd.eu/fr/>

- (4) On 15 September 2016, the Commission published its preliminary report (the “Preliminary Report”), reporting in a very detailed and instructive way on the information and comments gathered among market players in a broad range of industry sectors, and providing a review on that basis of a number of online distribution issues.
- (5) It is naturally a challenge for a sector investigation to address the variety of distribution models depending on the sector or type of goods considered. The notion of goods indeed encompasses a wide variety of products with very different distribution/customer requirements resulting in different distribution models (books, consumer electronics, healthcare products etc.).
- (6) With such a variety of situations, the FEPD strongly believes that the right approach is to preserve contractual freedom in all cases where a given distribution mechanism is likely to produce restrictive effects or not depending on the context, especially when such a mechanism can moreover be justified under Article 101(3) in some cases. The scope for hardcore and excluded restrictions should be limited to mechanisms that are restrictive in all cases and cannot – or can only very exceptionally – be justified under Article 101(3).

- 1. The justification for selective distribution in the luxury perfumes and cosmetics sector has long been established by the Court of Justice**
- 2. This justification was reaffirmed in recent trademark cases**
- 3. The Pierre Fabre judgment did not call this well established case-law into question**
- 4. The recent lower courts case law in France is not relevant in this context**
- 5. The Vertical Block Exemption Regulation in any event exempts selective distribution agreements until 2022**
- 6. The issues at stake in the perfumes and cosmetics industry with the ongoing debate relating to the justification of selective distribution, the pure player issue and sales through/by ecommerce platforms**

1. The justification for selective distribution in the luxury perfumes and cosmetics sector has long been established by the Court of Justice

- (7) The first finding in the investigation with respect to selective distribution is that the *“number and variety of products for which selective distribution is being applied has increased considerably”*².
- (8) However, the Preliminary Report does not suggest limiting the use of selective distribution in any respect. It points out that the existing Regulation *“exempts selective distribution regardless of the nature of the product”* as long as the other conditions laid down in the Regulation are met.
- (9) This is the right approach being noted that perfumes and cosmetics unquestionably qualify as products for which selective distribution is justified, as established by a long line of court cases³.
- (10) In several cases⁴, the Court of Justice and the General Court indeed ruled that Article 101, paragraph 1, TFEU, is not applicable to selective distribution contracts for luxury perfumes and cosmetics, as long as these contracts fulfill the conditions provided for in Article 101, paragraph 3, TFEU.
- (11) The Court of Justice notably recalled that a selective distribution system, based on qualitative criteria, is covered by the exemption provided for in Article 101, paragraph 3, TFEU, as long as two cumulative conditions are satisfied:
- a selective distribution system is a legitimate requirement considering the characteristics of the product in question, notably its high quality or technicality, in order to preserve its quality and ensure its proper use⁵;
 - resellers are chosen on the basis of objective criteria of a qualitative nature laid down uniformly and applied in a non discriminatory fashion; the criteria are not going beyond what is necessary to preserve the quality and the proper use of the product⁶.
- (12) In 1996, in the Givenchy and Yves Saint Laurent cases, the General Court confirmed on that basis that the exemption provided for in Article 101, paragraph 3, TFEU applies to the selective distribution of luxury perfumes and cosmetics.
- (13) The General Court indeed ruled that the nature and characteristics of luxury perfumes and cosmetics necessitate such a selective distribution system in two respects:
- They are *“sophisticated and high-quality products which are the result of meticulous research, and which use materials of high quality, in particular in their presentation and packaging”*;
 - These products enjoy a *“luxury image’ which distinguishes them from other similar products lacking such an image”* and, *“that luxury image is important in the eyes of consumers”*, according to which there is *“a low degree of substitutability*

² Preliminary Report para. 226.

³ See the judgments of the Court of Justice 31/80 L’Oréal, 26/76 Metro, C-59/08 Copad, and of the General Court T-88/92 and T-19/92 Leclerc.

⁴ Judgments of the Court of Justice 31/80 L’Oréal, 26/76 Metro, C-59/08 Copad, and of the General Court T-88/92 and T-19/92 Leclerc.

⁵ Judgment of the Court of justice 31/80, 11 December 1980, NV L’Oréal and SA L’Oréal v. PVBA “Die Neuwe AMCK”, p.16.

⁶ Judgment 31/80 aforementioned, p.15 and 16.

between luxury cosmetic products and similar products falling within other segments of the sector”.

- (14) The General Court therefore concluded that the use of a selective distribution system was justified in this sector: *“it is in the interests of consumers [...] that the luxury image of such products is not tarnished, as they would otherwise no longer be regarded as luxury products”* and then *“selective distribution systems which seek to ensure that they are presented in retail outlets in an enhancing manner also contributes to that luxury image and thus to the preservation of one of the main characteristics of the products which consumers seek to purchase”*.
- (15) To the contrary, the General Court pointed out that *“generalized distribution of the products at issue, as a result of which Givenchy would have no opportunity of ensuring that its products were sold in appropriate conditions, would entail the risk of deterioration in the presentation of the products in retail outlets which could harm the ‘luxury image’ and thus the very character of the products concerned”*⁷.
- (16) The General Court finally considered that the use of a selective distribution system is also justified with a view to preserve the manufacturer’s interest in *“preserving its prestige brand image and safeguarding the fruits of its promotion activities”*, in particular by ensuring *“appropriate marketing that brings out the specific aesthetic or functional quality’ of the products”*⁸.
- (17) As a result, the use of qualitative criteria, uniformly laid down, not applied in a discriminatory fashion and that do not go beyond what is necessary complies with Article 101, paragraph 1, TFEU.
- (18) Among these compliant criteria, the Court of Justice and the General Court have hence notably validated:
- criteria linked to the advice and professional qualification of the retailer since *“a person in the retail outlet capable of giving consumers appropriate advice or information is in principle a legitimate requirement for the sale of luxury cosmetics and an integral element in the proper presentation of those products”*⁹;
 - criteria linked to the localization and display of the point of sale, such as for physical stores, the environment, the outlet’s external appearance, a presentation in enhancing conditions and a sufficient separation from the sale of lower-quality products or a retail name which *“does not detract from the luxury image of luxury cosmetics”*¹⁰, knowing that similar criteria adapted to online sales apply over the internet.
 - other criteria participating to the completion of qualitative requirements.

⁷ Judgment T-88/92, 12 December 1996, Groupement d’achat Édouard Leclerc v. Commission p.114.

⁸ Judgment T-88/92 aforementioned, p. 110 .

⁹ Judgments T-19/92, 12 December 1996, Groupement d’achat Édouard Leclerc v. Commission p.132 and T-88/92, p. 126.

¹⁰ Judgments T-19/92, p.137,138,146, and 158.

2. This justification was reaffirmed in recent trademark cases

- (19) In several judgments in the trademark field, the Court of Justice reasserted that the prestigious image of luxury products is linked to the quality of these products and that, therefore, any damage done to a luxury product's image is likely to affect the quality of this product, and to affect in turn the legitimate objectives of selective distribution.
- (20) In a first case¹¹, the Court of Justice ruled on the grounds that are legitimate for a trademark owner to oppose an unauthorized retailer from using its trademark to advertise the marketing of its products.
- (21) Christian Dior claimed that such an advertisement by an unauthorized pharmacy chain supplying products through parallel imports does not correspond to the luxury and prestigious image of the Dior trademarks and therefore undermines the rights of the trademark holder.
- (22) Recalling the case-law according to which *"the owner of a trade mark has a legitimate interest [...] in being able to oppose the commercialization of those goods if the presentation of the repackaged goods is liable to damage the reputation of the trade mark"*, and that the reseller *"must therefore endeavor to prevent his advertising from affecting the value of the trade mark by detracting from the allure and prestigious image of the goods in question and from their aura of luxury"*, the Court of Justice ruled that the trademark owner could only oppose the advertising using its trademark if it is established that *"the use of the trade mark in the reseller's advertising seriously damages the reputation of the trademark"*¹².
- (23) The Court of Justice considered that *"such damage could occur if, in an advertising leaflet distributed by him, the reseller did not take care to avoid putting the trade mark in a context which might seriously detract from the image which the trade mark owner has succeeded in creating around his trade mark"* and therefore confirmed the legitimate reasons to oppose the advertising in question¹³.
- (24) In a second case¹⁴, the Court of Justice answered questions referred to for a preliminary ruling concerning the exhaustion of trademark rights in the context of a litigation between Christian Dior and Copad, a discounter.
- (25) Analyzing whether the license agreement had been infringed, the Court underlined that *"the quality of luxury goods such as the ones at issue in the main proceedings is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury"*. Having noted that *"luxury goods are high-class goods, the aura of luxury emanating from them is essential in that it enables consumers to distinguish them from similar goods"*, the Court of Justice concluded that *"an impairment to that aura of luxury is likely to affect the actual quality of those goods"*¹⁵.
- (26) On this occasion, the Court furthermore recalled its case law concerning the legitimate nature of selective distribution in the luxury perfumes and cosmetics sector since *"the characteristics and conditions of a selective distribution system can, in themselves, preserve the quality and ensure the proper use of such goods"*. Ensuring *"that the goods are displayed in sales outlets in a manner that enhances their value, 'especially as regards the positioning, advertising, packaging*

¹¹ Judgment C-337/95, 4 November 1997, Parfums christian Dior SA and Parfums Christian Dior BV v. Evora BV.

¹² Judgment C-337/95 aforementioned, p.43 to 46.

¹³ Judgment C-337/95 aforementioned, p.7.

¹⁴ Judgment C-59/08, 23 April 2009, Copad SA v. Christian Dior couture SA.

¹⁵ Judgment C-59/08 aforementioned, p.24 to 26.

as well as business policy', contributes [...] to the reputation of the goods at issue and therefore to sustaining the aura of luxury surrounding them"¹⁶.

3. The Pierre Fabre judgment did not call this well established case-law into question

- (27) The judgment rendered two years later by the Court of Justice in the Pierre Fabre case¹⁷ does not call into question this well established case-law.
- (28) In this case, the Appeal Court of Paris referred a question to the Court of Justice concerning the qualification of restriction of competition "by object" under article 101, paragraph 1, of a clause providing that the sale of cosmetics and personal care products in a selective distribution system must be made in a physical space, in which a qualified pharmacist must be present, excluding "*de facto all forms of selling by internet*"¹⁸.
- (29) Firstly, it should be noted that this case does not concern luxury perfumes and cosmetics but cosmetics and personal care products resold in pharmacies and drugstores, i.e. products which do not enjoy the same image of luxury and were not either covered by the aforementioned case law.
- (30) Secondly, far from calling into question the founding principles, the Court recalled that selective distribution agreements "*are to be considered, in the absence of objective justification, as 'restrictions by object'*" but immediately added that "*there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favor of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 101(1) TFEU*"¹⁹.
- (31) In this regard, the Court added that, according to established case-law "*the organization of such a network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary*".
- (32) The fact that the term "luxury image" does not expressly appear in this reminder is of no relevance, considering:
- that the products in question in this case are not luxury perfumes and cosmetics;
 - that the Court used a non-limitative statement (the Court refers to objective justifications "*such as*" the high-quality or technicality of a product);
 - that the Court, notably in the aforementioned Copad judgment, clearly includes the luxury image in the concept of high-quality products.

¹⁶ Judgment C-59/08 aforementioned, p.28.

¹⁷ Judgment C-439/09, 13 october 2011, Pierre Fabre Dermo-cosmetiques SAS v. French Competition Authority.

¹⁸ Judgment C-439/09 aforementioned, p. 14.

¹⁹ Judgment C-439/09 aforementioned, p. 39 and 40.

- (33) Thirdly, when the judgment mentioned the fact that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition, the Court only referred to the specific provision of the contract it was analyzing, and by no means to the use of selective distribution system as such.
- (34) The Court indeed specified that it was providing “*the points of interpretation of European Union law*” to enable “*the referring court to examine whether the contractual clause at issue prohibiting de facto all forms of internet selling can be justified by a legitimate aim*”²⁰ before specifically addressing the two arguments raised by Pierre Fabre, in relation to this clause:
- In response to the argument that an online sales ban would be justified by the need to provide clients with personalized advice and to ensure their protection against an improper use of the products, the Court recalled, in line with its case-law concerning the sale of non-prescription medicines and contact lenses, that this reason does not justify a total prohibition to sell online.
 - In response to the argument according to which this prohibition could be justified by the need to preserve the prestigious image of the products in question, the Court stated that “*the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU*”²¹.
- (35) In its conclusion, the Court again only covers the clause in question: “*Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified*”²².
- (36) In addition, if the Court of Justice had intended to respond in general on the justification of selective distribution based on the luxury image, it would have expressly done so without referring to the details of the clause itself.

4. The recent lower courts case law in France is not relevant in this context

- (37) Some commentators have drawn excessive conclusions from two recent judgments of the Paris Court of Appeals.
- (38) On 25 May and 29 June 2016, the Paris Court of Appeal delivered two judgments²³ on actions initiated by the luxury perfumes brands licensee Coty Prestige towards two unauthorized online retailers. In both judgments, the Court did not rule on the justifications of selective distribution in the luxury perfumes sector nor on the compliance of Coty’s selective distribution contracts with Article 101, TFEU.

²⁰ Judgment C-439/09 aforementioned, p. 42.

²¹ Judgment C-439/09 aforementioned, p. 46.

²² Judgment C-439/09 aforementioned, p. 60.

²³ Paris Court of Appeal, 25 Mai 2016, n°14/03918 and 29 June 2016, n°14/00335.

- (39) The Paris Appeal Court was only assessing whether Coty had met the standard of proof on the existence and compliance of its selective distribution system to ask for certain measures against third parties to this distribution system.
- (40) Therefore, the Court had to assess whether Coty had sufficiently evidenced that its contracts benefited of the VBER or of an individual exemption. And the Court concluded it was not presented by sufficient evidence in that respect.
- (41) It may however be noticed that the Court's findings as to the compliance based on the elements put forward are very brief and do not provide for details on the reason some clauses in Coty's contract template could raise issues towards the hardcore restrictions in the VBER.
- (42) We understand that these two judgments have been appealed before the French Supreme Court.

5. The Vertical Block Exemption Regulation in any event exempts selective distribution agreements until 2022

- (43) Selective distribution systems benefit of an exemption from the prohibition under Article 101, paragraph 1, TFEU, on the basis of the conditions established by Regulation n°330/2010, which are developed in the Guidelines on Vertical Restraints²⁴.
- (44) The Regulation defines a category of vertical agreements *"for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty "*. This category *"includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights"*²⁵.
- (45) This definition therefore encompasses selective distribution contracts, as confirmed further by several provisions of the Regulation expressly referring to them²⁶.
- (46) The Regulation therefore protects selective distribution agreements from any challenge on the basis of Article 101, TFEU as long as they satisfy two conditions:
 - *"the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30 %";* and
 - *"the agreements do not contain certain types of severe restrictions of competition", such as "such as minimum and fixed resale-prices, as well as certain types of territorial protection" that are likely "to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects"*²⁷.

²⁴ Regulation (EU) n° 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; Guidelines on Vertical Restraints of 19 May 2010, (2010/C 130/01).

²⁵ Regulation n° 330/2010, p.3 and 5.

²⁶ Regulation n° 330/2010, Article 1,e), 4,b) c) d), 5,c).

²⁷ Regulation n° 330/2010, p.9 and 10.

- (47) The Guidelines confirms that these two conditions are sufficient and adds that “*the Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria*”²⁸.
- (48) Many selective distribution systems have been set up and have constantly enriched their products and services offering on the basis of the legal certainty thus provided by the Regulation. Selective distribution retailers have developed on the basis of these principles which could not be questioned now without raising very sensitive legitimate expectations issues.
- (49) The rationale for these agreements to benefit of the block exemption has not changed and therefore the benefit shall remain without imposing subjective conditions such as a condition related to the grounds justifying the use of selective distribution. To the contrary, the last reform of the Regulation was organized to simplify the conditions for exemption in order to reinforce legal certainty. Introducing additional conditions, particularly if they are subjective, would be a step backwards at a time companies do not have the opportunity anymore to notify their draft agreements in order to obtain an individual exemption.
- (50) Assuming that some selective distribution agreements could be found restrictive, it is possible for the European Commission or a National Competition Authority to withdraw the benefit of the block exemption in case of effects incompatible with Article 101, paragraph 3, TFEU. The existence of such a procedure is sufficient to maintain the balance, if necessary, without the need to introduce new conditions, at this time or in the frame of the upcoming revision of the Regulation.

6. The issues at stake in the perfumes and cosmetics industry with the ongoing debate relating to the justification of selective distribution, the pure player issue and sales through/by ecommerce platforms

- (51) Selective distribution has proven its benefits for consumers in the luxury perfumes and cosmetics sector.
- (52) Selective distribution allows consumers to benefit from targeted advice adapted to a large and constantly renewed range of products. Aside from the efforts developed by retailers themselves, professional education systems in numerous Member States have created training programs for beauty advisors.
- (53) Even more directly, selective distribution brings consumers the possibility to touch and test the products in nearby points of sale where conditions of presentation, conservation and storage are adapted to the products characteristics. Selective distribution also plays a key role in the fight against counterfeited products, which is an ever growing issue in the luxury products sector, not to mention consumer protection and product safety²⁹.
- (54) It is therefore crucial that the merits of the system are not undermined by the admission of certain form of competition that would cause the disappearance of the retailers offering these benefits and that online players cannot deliver to consumers.

²⁸ Guidelines aforementioned, p.176.

²⁹ http://ec.europa.eu/health/scientific_committees/opinions_layman/perfume-allergies/en/
<https://euipo.europa.eu/ohimportal/documents/11370/80606/2015+Situation+Report+on+Counterfeiting+in+the+EU>
http://plagiarius.de/download.php?ID=2_2_6

- (55) As pricing restrictions between online and offline retailers are considered at this stage as restrictions by object by most of European Competition Authorities, selective distribution indeed is the only available protection for the investments made in physical points of sale, along with the possibility to require distributors to have one or more brick and mortar shops. This protection is already limited since certain online retailers own only a symbolic brick and mortar shop and realize most of their sales online. Any additional weakening would significantly undermine the competitive balance between these two types of retailers, considering the major differences between their respective economic models.
- (56) The FEPD stresses that it is essential that internet sales are subject in every case to the same conditions and to qualitative criteria equivalent to those applied in physical and online stores in order to avoid similar exclusionary effects towards retailers having invested into physical shops.
- (57) Failing to preserve the balance between offline and online trade, the first will disappear given the fundamental costs differences between the two trading models, even more extreme in the luxury perfumes and cosmetics sector than in many others. At the end of the day, this would reduce competition at the level of multi-brands retailers and between independent retailers and manufacturers' points of sale.
- (58) The whole value chain would itself be jeopardized in the long run. Luxury perfumes and cosmetics manufacturers which have opted out of selective distribution have seen their sales collapse, the products not corresponding anymore to their distribution model. In a trivialized distribution model, in particular out of large cities where it is doubtful manufacturers' outlets will develop, consumers would soon only have access to mass market products and lose the benefit of innovation, services and luxury image that have been developed so far by independent retailers of luxury perfumes and cosmetics.

William G. Koeberlé
President

A handwritten signature in dark ink, consisting of a stylized 'W' and 'G' followed by a long horizontal stroke.