



Camera Nazionale della Moda Italiana

CNMI CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE EUROPEAN COMMISSION'S PRELIMINARY REPORT ON THE E-COMMERCE SECTOR INQUIRY

1. BACKGROUND

On 6 May 2015, the European Commission ('**Commission**') launched a sector inquiry into e-commerce in the European Union ('**EU**') ('**Sector Inquiry**'), as part of its Digital Single Market strategy, pursuant to Article 17 of Regulation 1/2003.

On 15 September 2016, the Commission published its Preliminary Report on the Sector Inquiry ('**Preliminary Report**') which provides an overview of the main competition-relevant market trends identified in the Sector Inquiry and points to possible competition concerns in the sector.

With the publication of the Preliminary Report, the Commission intends to start a "*facts-based exchange of views with stakeholders*" through a Public Consultation on its Preliminary Report ('**Public Consultation**'), inviting all interested stakeholders to submit their views and comments not later than 18 November 2016.

2. PRESENTATION OF CNMI

Camera Nazionale della Moda Italiana (the National Chamber for Italian Fashion, hereinafter referred to as '**CNMI**') welcomes the Commission's invitation to the industry for contributions in the framework of the Sector Inquiry.

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 almost all of the Italian fashion brands. In 2015, the Italian fashion industry, including textiles, clothing, leather, jewellery, sunglasses, shoes, cosmetics and perfumes generated revenues of more than EUR 82 billion, i.e. an increase of 2.4% compared to the previous year. The brands that are members of CNMI account for more than 50% of total sales.



Camera Nazionale della Moda Italiana

3. POSITION OF CNMI

3.1 BRAND PROTECTION AND PRODUCT QUALITY

Brands are the main asset for the fashion industry and deserve full and effective protection.

CNMI considers that effective brand protection ensures certainty, transparency, traceability and authenticity of the product consistent with the brand's values. It allows consumers to effectively benefit from creative and high quality goods without being misled as to their origin. Fraudulent uses of a brand significantly impact the brand's image by putting at risk the good reputation and loyal customer base hard won over time, as well as the substantial and long-term investments made by the manufacturer or brand owner to build these up. It is also important to stress the amount of investments that manufacturers have to make in order to ensure that consumers fully benefit from the omni-channel experience.

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 terms of creativity, design, building and maintaining a brand image, quality reputation and manufacture capabilities. It also supports employment.

Brand protection is of critical importance for both the offline and online channels. The Commission's Preliminary Report highlights that manufacturer respondents consider product quality and brand image to be of greatest importance in attracting customers. This is even truer for the fashion industry where the parameters of competition are mainly brand reputation and quality of the products.

In its Preliminary Report, the Commission recognises that manufacturers may legitimately seek to protect their brand image and reputation by means of contractual obligations in distribution agreements. For example, the Commission acknowledges that manufacturers: *"might find it necessary to introduce selective distribution systems for certain products or introduce detailed selection criteria"* (Preliminary Report, para. 249).

CNMI respectfully requests the Commission to take full advantage of the opportunity provided by the Sector Inquiry to ensure effective brand protection and to strengthen the fight against counterfeiting, particularly online. CNMI believes that this phenomenon poses considerable threats to branded products, including in the fashion industry, together with consumers and the economy. Without adequate brand protection there will be fewer investments and lower employment, coupled with significantly higher risks for consumers.



Camera Nazionale della Moda Italiana

3.2 IMPORTANCE OF THE ONLINE CHANNEL

Sales over the Internet in the fashion industry are increasingly important.

The Preliminary Report highlights that one of the most common reactions of manufacturers to the growth of e-commerce over the last 10 years has been to open their own consumer-facing online shops. Such vertical integration leads to pro-competitive effects to the benefit of consumers. For instance, it may lead to lower retail prices (because manufacturer and distributor decisions are coordinated with a view to maximising their joint profits) and better coordination of pre- and post-sale services.

CNMI is a convinced advocate of the need for a further development of appropriate online distribution channels. This needs to be achieved in line with the objectives of ensuring quality, traceability and authenticity of the product to the benefit of consumers, as well as fostering high quality consumer shopping and post-sales experiences.

3.3 LIABILITY OF INTERNET INTERMEDIARIES

The sale of counterfeit goods over the Internet is damaging and harmful to all legitimate stakeholders, including the brands and, most importantly, consumers.

Given the steady growth of online counterfeiting, CNMI respectfully requests the Commission to strengthen the liability of Internet intermediaries so as to establish effective brand protection. The Commission could take concrete actions to ensure effective and timely enforcement in connection with illegal conducts so as to reinforce the 'duty of care' of intermediaries, requiring them to exercise greater responsibility and due diligence in the way they manage their networks and systems. It is important to ensure a proper rebalancing of the responsibilities in order to create a safe and sustainable digital environment to the benefit of consumers.

3.4 GEO-BLOCKING

CNMI is an enthusiastic advocate of the Single Market and supports the objective of creating better cross-border access to goods and services online in the EU.

CNMI understands that geo-blocking measures are designed to reject cross-border purchase requests and may raise competition concerns if they are required in a contract with the manufacturer or otherwise required by the manufacturer (e.g. orally or through applying pressure).



CNMI concurs with the Commission's approach that business decisions, unilaterally taken by an undertaking that is not dominant in its market, not to sell cross-border or not to sell to customers in certain Member States, which are not contractual restrictions, are not problematic from a competition law perspective (Preliminary Report, para. 366).

CNMI considers brand protection to be a relevant objective when dealing with geo-blocking issues as confidence in product authenticity, quality, reputation and sales and post-sales experience significantly helps to improve consumers' confidence to buy products cross-border in the EU.

3.5 SELECTIVE DISTRIBUTION

Selective distribution systems are an important distribution model for luxury and premium branded goods, including products in the fashion industry. The use of quality criteria that retailers need to meet in order to become part of the distribution network allows manufacturers to have a better control of the distribution quality and to alleviate free-riding by retailers that do not make adequate investments in providing a quality consumer experience.

As recognized by the Commission, the use of a selective distribution system: *"may also help suppliers build reputation for high quality and convey a desired brand image"* (Preliminary Report, para. 33, and 2010 Commission's Guidelines on Vertical Restraints, '**Vertical Guidelines**', para. 107(i)).

Established case-law recognizes that the organisation of a selective distribution 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"*, that the criteria are *"laid down uniformly for all potential resellers and not applied in a discriminatory manner"* and that *"the criteria laid down do not go beyond what is necessary"*.¹ Significantly, the systems of selective distribution are compliant with competition law rules if: *"the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use"* (Preliminary Report, para. 224).

CNMI believes that selective distribution systems are justified in relation to products of the fashion industry, which have the characteristics in terms of quality and brand image that justify the use of qualitative criteria for a selective distribution system.

CNMI also considers distribution via brick and mortar shops to be of great importance for the fashion industry. The requirement for retailers to operate at least one brick and mortar shop is generally covered by the Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements

¹ Judgment in *Metro SB-Großmärkte v Commission*, 26/76, EU:C:1977:167, para. 20, judgment in *L'Oréal*, 31/80, EU:C:1980:289, paras. 15 and 16, judgment in *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken*, 107/82, EU:C:1983:293, para. 35, judgment in *Groupement d'achat Edouard Leclerc*, T-19/92, EU:T:1996:190, paras. 112 to 120 and judgment in *Pierre Fabre Dermo-Cosmétique SAS*, C-439/09, EU:C:2011:649, para. 41.



Camera Nazionale della Moda Italiana

and concerted practices (**‘Vertical Block Exemption Regulation’**). This approach should be maintained as this requirement contributes towards enhancing consumers’ experience, in particular given that fashion articles are designed to be tried on and worn by consumers and their quality to be judged in person. In addition, this approach minimizes free-riding by pure online sales players on the significant investments made by high-quality physical points of sale.

CNMI respectfully requests the Commission to ensure that the selective distribution principles enshrined in its Vertical Block Exemption Regulation and Vertical Guidelines are applied consistently and uniformly at the national level in the EU, to assist with commercial and legal certainty for economic operators trading across the EU, and thus enhance the Single Market.

3.6 MARKETPLACES

Consistency and coherence in the approach at the EU and at the national level is also required for online marketplace restrictions. This is an area that for some time has been in a state of flux and that has caused significant uncertainty for brands trading in Europe. Consistent with the Vertical Guidelines, the Commission’s preliminary findings helpfully address the issue of product resale bans through online marketplaces.

The Vertical Guidelines provide that: *“where the distributor’s website is hosted by a third party platform, the supplier may require that customers do not visit the distributor’s website through a site carrying the name or logo of the third party platform”* (Vertical Guidelines, para. 54). The possibility to guarantee that suppliers trade under their own name is one of the qualitative criteria that brand owners have established and that it is essential that it is maintained.

In line with the Commission’s preliminary findings (Preliminary Report, page 156), CNMI believes that (absolute) marketplace bans do not constitute hardcore restrictions within the meaning of the Vertical Block Exemption Regulation (Article 4(b) and (c)) because they do not have the object of segmenting markets in the Single Market based on territory or customers. As pointed out by the Commission, marketplace bans: *“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, para. 472).

In addition, as clarified by the Commission, absolute marketplace bans do not generally amount to a *de facto* prohibition to sell online and: *“can therefore not be equated to a prohibition to sell via the internet”* (Preliminary Report, para. 469), consistent with the case-law of the European Court of Justice (in particular, the *Pierre Fabre* judgment).



While there is hope that the preliminary ruling to be issued by the European Court of Justice in the *Coty* case (Case C-230/16 *Coty Germany GmbH vs. Parfümerie Akzente GmbH*) may bring further clarity as regards selective distribution and online marketplace restrictions, CNMI invites the Commission to take advantage of the dialogue opportunities within the European Competition Network to ensure, to the maximum extent possible, uniformity in the EU at the national level. As mentioned above, predictability and uniformity support the growth of e-commerce to the benefit of consumers.

3.7 PRICE RECOMMENDATIONS

CNMI notes that price recommendations are generally part of an effort made by the manufacturer to ensure brand protection (i.e. a suggestion of appropriate brand positioning, which retailers often request guidance upon) and high quality of distribution. It is not uncommon for the manufacturer to suggest equivalent recommended resale prices for online and offline independent retailers as an attempt to limit free-riding.

Price recommendations enable manufacturers to address the structural differences that exist between the offline and the online channel which are characterized by substantial differences in terms of investments (the offline channel requiring substantially higher investments and thus involving significantly more commercial risk than the online channel).

As recognized by the Commission in its Preliminary Report, a harmonized online-offline resale price policy is one of the most typical reactions to free-riding. Vertically integrated manufacturers generally set equal prices online and offline, including equivalent discounts and promotional periods (e.g. seasonal sales periods) (Preliminary Report, para. 297).

CNMI respectfully requests the Commission to keep its approach to price recommendations unchanged (i.e. price recommendations do not raise competition law concerns).

3.8 KEY WORDS

CNMI would also like to draw the Commission's attention to the relevance and use of key words for the fashion industry. There is limited discussion on this topic in the Commission's Preliminary Report. It is suggested in the Preliminary Report that restrictions on a retailer's ability to use manufacturer trademarks for advertisement purposes may raise concerns, whereas restrictions on the use of the manufacturer trademark in the retailer's own domain name help to avoid confusion with the manufacturer's website (Preliminary Report, para. 580).



Camera Nazionale della Moda Italiana

CNMI believes that particular caution should be placed on the use of key words in order to ensure adequate protection and recognition of the brand ownership. Consumers should not be misled when searching for products online and the brand's image should not be negatively impacted.

The Preliminary Report notes that: *"[t]he preliminary results of the sector inquiry suggest that some retailers are limited in their ability to use or bid on the trademarks of certain manufacturers in order to get a preferential listing on the search engines paid referencing service (such as Google Adwords) or are only allowed to bid on certain positions. Such restrictions typically aim at preventing retailer's websites from appearing prominently in the case of usage of specific keywords. This may be in the interest of the manufacturer in order to allow its own retail activities to benefit from a top listing and keep bidding prices down"* (Preliminary Report, para. 580).

CNMI does not dispute the importance of search engines for attracting customers to retailers' websites and improving the findability of their online offer, as noted by the Commission.

However, CNMI believes it is important not to underestimate the serious impact and potential unsustainability of the 'bidding price war' on Google, which has become an 'unavoidable channel of communication' for brands and retailers seeking to sell online their products. For many of the CNMI brands, retailers' desire to attain the top position on search listings (in order to have any real e-commerce 'relevance'), coupled with Google's ability to demand increasingly high bidding prices, has led to a position where the prices for securing good listings are disproportionately high. This is damaging in a number of respects. First, it can harm an authorized online retailer network as a whole, as all retailers are required to pay higher costs to appear on search results, with smaller retailers in particular potentially suffering the most as a result of only being able to afford a weak listing position. Second, it impacts upon brands themselves, which are forced to pay disproportionate amounts to purchase Adwords which strictly comprise their own intellectual property in which they have made significant investments. Third, linking online brand presence solely with the ability (or willingness) to pay the highest amount for a Google Adword has the potential to significantly distort search results, leading consumers to websites that might not be of greatest relevance to them or of greatest service quality or range.

CNMI respectfully requests the Commission to consider, in the context of its investigations into Google or the Sector Inquiry, measures allowing for moderation in the price of certain keywords that are essential for brands and authorized retailers.

It is also worth investigating whether there might potentially be circumstances where certain restrictions on purchasing trademark-protected key words (including by authorized retailers in a selective distribution system) would be objectively justifiable.

Such restrictions encourage the significant investments made by manufacturers and brand-owners in developing their intellectual property and brand reputation, together with investments in enhancing the quality and innovation of



their products and design. An unfettered ability by resellers to purchase trademarked terms might potentially discourage such investments as well as mislead consumers as to the rightful brand owner, thus undermining the protections afforded by intellectual property laws in the EU. As noted by the Court of Justice of the European Union, there is a likelihood of confusion of consumers when they are not enabled, or enabled only with difficulty, to ascertain whether certain products originate from the proprietor of the trade mark or from an undertaking economically linked to it or, on the contrary, originate from a third party.²

3.9 ROLE OF THE COMMISSION

CNMI respectfully requests the Commission to take the opportunity of the Sector Inquiry and the subsequent actions to reinforce brand protection. In particular, this could be achieved by recognizing the specific characteristics of the fashion industry and by strengthening the fight against counterfeiting, particularly online.

CNMI also believes that predictability and uniformity in the interpretation of competition rules in e-commerce would benefit significantly both businesses and consumers across the EU.

4. CONCLUSION

CNMI has outlined above its position in relation to the main issues raised in the Preliminary Report that are particularly relevant for the fashion industry.

CNMI stands ready to further discuss any of the issues above or any other issues, and to assist the Commission with any additional information or clarification it might require during its Sector Inquiry.

² See, in particular, judgment in *Portakabin Ltd and Portakabin BV v Primakabin BV*, C-558/08, EU:C:2010:416, paras. 51 and 54. See also judgment in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, C-342/97, EU:C:1999:323, para. 17, judgment in *Medion AG v Thomson multimedia Sales Germany & Austria GmbH*, EU:C:2005:594, para. 26, and judgment in *adidas AG and adidas Benelux BV v Marca Mode CV and Others*, C-102/07, EU:C:2008:217, para. 28.