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## **CONTRIBUTION OF *FÉDÉRATION FRANÇAISE DE LA COUTURE, DU PRÊT-À-PORTER DES COUTURIERS ET DES CRÉATEURS DE MODE* TO THE EUROPEAN COMMISSION'S PRELIMINARY REPORT ON THE E-COMMERCE SECTOR INQUIRY**

### **1. INTRODUCTION**

On 15 September 2016, the European Commission ('**Commission**') published its Preliminary Report on the e-commerce sector inquiry ('**Preliminary Report**') ('**Sector Inquiry**') launched on 6 May 2015 as part of its Digital Single Market strategy.

The *Fédération Française de la Couture, du Prêt-à-Porter des Couturiers et des Créateurs de Mode* (hereinafter '**Fédération**') wishes to thank the Commission for its Preliminary Report. The *Fédération* considers that the Preliminary Report provides a comprehensive overview of the current state of e-commerce in the European Union ('**EU**'). The preliminary findings are particularly relevant for the members of the *Fédération*, as the brands ensure that their customers benefit from an *omnichannel* experience.

With this contribution, the *Fédération* wishes to present to the Commission its views as regards certain findings of the Preliminary Report and, in particular, on the following issues: brand protection (3.1), selective distribution (3.2), restrictions on the use of marketplaces (3.3), exclusive distribution (3.4), cross-border sales restrictions (3.5), pricing recommendations (3.6) and key words/Adwords (3.7).

### **2. PRESENTATION OF THE *FÉDÉRATION***

Founded in 1973, the *Fédération* includes the *Chambre Syndicale de la Haute Couture*, whose members are companies designated as Haute Couture houses, the *Chambre Syndicale du Prêt-à-Porter des Couturiers et des Créateurs de Mode*, including Haute Couture houses and fashion designers producing women's ready-to-wear, and the *Chambre*



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*Syndicale de la Mode Masculine* with members including top brands of men's ready-to-wear. Through these three trade associations, the *Fédération* includes about 100 internationally-known brands.

In France, fashion accounts for EUR 150 billion in direct sales and represents 2.7% of the French GDP.

### **3. COMMENTS ON THE PRELIMINARY REPORT'S FINDINGS**

#### **3.1 Preliminary remarks and centrality of brand protection**

Brands are the main assets for the fashion industry and their relevance must be duly taken into account.

Although the primary focus of the Commission's Sector Inquiry is on restrictions limiting the cross-border online resale of goods in the EU, its preliminary findings go significantly further than this, addressing a number of areas which have for some time been in a state of flux and caused significant uncertainty for brands trading in Europe. The *Fédération* welcomes the clarifications provided by the Commission in its Preliminary Report.

The Commission acknowledges that intra-brand competition should not solely be based on price. The Commission's findings illustrate how the incentives of suppliers and retailers are often misaligned when it comes to building and maintaining a brand image and quality reputation. Whilst the great majority of supplier respondents consider product quality and brand image to be of greatest importance in attracting customers, price is most often identified as being of greatest importance to retailers.<sup>1</sup>

The Commission helpfully recognises that this possibility of misaligned incentives may lead suppliers to legitimately seek to protect their brand image and reputation by means of contractual obligations in distribution agreements.

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<sup>1</sup> Preliminary Report, paras. 247-248.



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The Preliminary Report further highlights that in addition to adopting a selective distribution model, the most common reaction of suppliers to the growth of e-commerce over the last 10 years has been to open their own consumer-facing online shops, thereby competing in many cases with their own independent retailers. Significantly, whilst the Commission recognises that such vertical integration may reduce the number of independent retailers (and thus intra-brand competition), it can also streamline the incentives of the manufacturing and the retail level. It may for example actually lead to lower retail prices (because supplier and distributor decisions are coordinated with a view to maximising their joint profits) and could also lead to better coordination of pre-and post-sale services.

The *Fédération* concurs with the Commission's general recognition about the importance of competition based on non-price parameters such as quality.

The *Fédération* is also a convinced advocate of the need for a further development of appropriate online distribution channels that enable consumers to effectively benefit from an *omnichannel* experience. Sales over the Internet in the fashion industry are increasingly important. However, online distribution channels need to be developed in compliance with the objectives of ensuring quality, authenticity and security of the products to the benefit of consumers.

Accordingly, the *Fédération* invites the Commission to take full advantage of the opportunity provided by the Sector Inquiry to ensure that brand protection and consumer *omnichannel* experience are effectively achieved. The *Fédération* considers selective distribution and the online marketplace restrictions exception, as provided by the Vertical Guidelines,<sup>2</sup> to be critical in order to ensure an adequate distribution of branded products and the authenticity of the products that consumers buy.

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<sup>2</sup> Commission's Guidelines on Vertical Restraints ('**Vertical Guidelines**').



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### 3.2 Selective distribution

The Preliminary Report highlights that one of the most frequent reactions of manufacturers to the growth of e-commerce was the increased use of selective distribution and the introduction of new selection criteria.<sup>3</sup> The selective distribution enables brands to select their retailers on the basis of specific criteria. This distribution system helps brands to ensure quality requirements and alleviate free-riding concerns, provided that the 30% market share thresholds are not exceeded.<sup>4</sup>

The *Fédération* welcomes the Commission's findings that manufacturers: "*might find it necessary to introduce selective distribution systems for certain products or introduce detailed selection criteria*"<sup>5</sup> as the *Fédération* believes that the fashion industry must be able to use this distribution model in order to ensure adequate protection of their brands and a consistent brand image.

In its Preliminary Report the Commission also points out that: "[a] selective distribution system may also help suppliers build reputation for high quality and convey a desired brand image."<sup>6</sup> Such a purpose of selective distribution is of particular importance for the fashion industry which is concerned by the development and protection of brand image.

Brick and mortar shops remain of significant importance for the fashion industry. This is confirmed by the preliminary findings from the Sector Inquiry, according to which: "[d]espite 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."<sup>7</sup>

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<sup>3</sup> Preliminary Report, page 89.

<sup>4</sup> 30% for the supplier on the market on which it sells the contract goods and 30% for the buyer on the market on which it purchases the contract goods.

<sup>5</sup> Preliminary Report, para. 249.

<sup>6</sup> Preliminary Report, para. 33; Vertical Guidelines, para. 107(i).

<sup>7</sup> Preliminary Report, para. 163.



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Under the current legal framework, the requirement to operate at least one brick and mortar shop is generally block exempted. The *Fédération* wishes to stress that it is essential for brands to continue to be able to rely on this requirement. Physical points of sale enable brands to offer a high-end shopping environment that customers expect and also give the possibility to customers to see in person the quality of the products.

The brick and mortar requirement in selective distribution systems is also an efficient and legitimate way to limit free-riding issues, whose harmful effects are also noted among the key preliminary findings in the Preliminary Report.<sup>8</sup> These effects negatively impact the manufacturers' and retailers' ability to invest, innovate and conduct R&D activities.

However, the Commission notes that the brick and mortar requirement: "*may need further assessment in individual cases when used for certain product categories or certain lines of products which pure online retailers might be equally qualified to sell.*"<sup>9</sup> At the same time, it does not further explain what product lines or product categories would be more concerned by such potential scrutiny.

This position may lead to uncertainty and may leave brands' selective distribution systems open to challenge on the basis of alleged misuse of the brick and mortar requirement. The *Fédération* strongly believes that, in the absence of market power, any manufacturer is free to decide its commercial strategy and that brands' selective distribution systems should not be open to such antitrust risk.

Accordingly, the *Fédération* fully supports the view that selective distribution must continue to be exempted since it allows brands to include in their distribution networks those retailers that satisfy the quality criteria. This is necessary to maintain a coherent brand image and ensure the appropriate experience that customers expect.

The *Fédération* respectfully requests the Commission to provide further clarity on the circumstances that would warrant scrutiny of the brick and mortar requirement. The

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<sup>8</sup> Preliminary Report, para. 905.

<sup>9</sup> Preliminary Report, para. 228.



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approach currently adopted by the Commission in its Vertical Block Exemption Regulation<sup>10</sup> – i.e., the requirement for retailers to operate at least one brick and mortar shop – should be maintained. This requirement effectively contributes towards enhancing consumers' experience and ensures protection of brands' investments.

### 3.3 Restrictions on the use of marketplaces

The Vertical Guidelines provide: *“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.”*<sup>11</sup> The Preliminary Report helpfully reaffirms the scope of this exception by indicating that marketplace bans are not to be considered hardcore restrictions of competition.

The *Fédération* notes that the absence of direct contractual relationship between the marketplace and the manufacturer undermines compliance with and enforcement of selective distribution criteria.

The *Fédération* welcomes the preliminary findings of the Sector Inquiry, which did not demonstrate that: *“absolute marketplace bans generally amount to a de facto prohibition to sell online irrespective of the markets concerned”*.<sup>12</sup> As the Commission further clarifies in its Preliminary Report, marketplace restrictions do not constitute a ban to sell online, pursuant to the Court of Justice's judgment in *Pierre Fabre*.<sup>13</sup> In particular, marketplace restrictions: *“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”*.<sup>14</sup>

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<sup>10</sup> Commission Regulation (EU) No 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices (**Vertical Block Exemption Regulation**).

<sup>11</sup> Vertical Guidelines, para. 54.

<sup>12</sup> Preliminary Report, para. 469.

<sup>13</sup> Case C-439/09 *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*, EU:C:2011:649.

<sup>14</sup> Preliminary Report, para. 472.



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The *Fédération* considers the Commission's guidance on marketplace restrictions to be particularly helpful for brands, which may not always find that marketplaces correspond to their aim of preserving their brand image. A key concern for brands is that the appropriate consumer experience may not be adequately achieved if sales are made through unauthorised third party platforms. This is reflected in the Preliminary Report where it is stated that: “[m]ost marketplaces do not differentiate in terms of product presentation between luxurious products and everyday consumer goods”.<sup>15</sup>

Fighting against counterfeit products is also an issue of primary importance for the *Fédération* and its members. These practices heavily affect the entire industry as Couturiers and designers are regularly affected by counterfeits: illegal copies of their creations, counterfeiting of their brand or illegal use of the brand and/or its logo on products. As a result, protection of the rights of brands and the control over the distribution of images is of particular concern to the *Fédération* and its members. These practices are harmful not only to brands, but also to consumers.

The *Fédération* is expecting further clarity as regards the scope of the marketplace restrictions in the *Coty* case, which is currently pending before the Court of Justice.<sup>16</sup> The *Fédération* concurs with the position put forward by the Commission in the *Coty* case, whereby mere marketplace bans are not hardcore restrictions under certain conditions – i.e. those provided by the Vertical Guidelines.

The *Fédération* respectfully requests that the Commission take full advantage of the Sector Inquiry and of the dialogue opportunities within the European Competition Network to ensure uniformity at EU and national level. In fact, the scope of the marketplace restriction exception has not been consistently applied at national level. This incoherent approach leads to significant legal uncertainty and growing divergence of the rules at the national level, which has to be halted. Predictability and uniformity support the growth of e-commerce to the benefit of consumers.

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<sup>15</sup> Preliminary Report, footnote 265.

<sup>16</sup> Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*.



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### 3.4 Exclusive distribution

The Preliminary Report states that: *“Exclusivity may be considered necessary by manufacturers (and demanded by distributors) to protect against free-riding from other distributors in cases in which a distributor is required to significantly invest in order to build up a business in a certain territory. Such investments can among others relate to necessary warehouse facilities and the setting up of logistical distribution arrangements; human resources such as sales and back-office personnel; showrooms; high-quality customer services; and promotion and marketing activities. Territorial exclusivity can guarantee a sufficient return on investment for the distributor and thereby ensure a long-term commitment. Without territorial exclusivity distributors may in certain cases not be willing to enter into a distribution agreement and commit to these investments.”*<sup>17</sup>

The *Fédération* concurs with these findings and believes that the current framework on exclusive distribution provides sufficient guidance to brands.

### 3.5 Cross-border sales restrictions

The *Fédération* welcomes the confirmation that companies' unilateral decisions not to sell in a territory, absent dominant position, do not fall within the scope of EU competition rules.<sup>18</sup> This is also particularly relevant for geo-blocking measures: *“In the absence of a dominant market position, the EU competition rules are not concerned with geo-blocking on the basis of unilateral business decisions taken by companies, but only with geo-blocking measures which implement contractual restrictions limiting the ability of online retailers to sell to certain territories or customer groups.”*<sup>19</sup> The *Fédération* 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).

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<sup>17</sup> Preliminary Report, para. 195.

<sup>18</sup> Preliminary Report, para. 366.

<sup>19</sup> Preliminary Report, para. 385.



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It should also be noted that once a reseller is appointed as authorised retailer, no territorial restrictions can be imposed upon it.

The *Fédération* notes that there may be several commercial reasons and sometimes regulatory requirements for not selling in a given territory (e.g., use of national language for labelling). Where there may be contractual restrictions, the Vertical Block Exemption Regulation and the Vertical Guidelines apply.

### 3.6 Pricing recommendations

Price recommendations are widely used by brands. Price recommendations should be distinguished from illegal resale price maintenance. According to established EU competition rules, imposing fixed or minimum resale prices is illegal. However, a mere recommendation of the retail prices does not raise competition concerns, provided that the retailer retains its discretion to set its own resale prices. Equally, the practice of requiring the retailer to respect a maximum resale price is covered by the Vertical Block Exemption Regulation and the Vertical Guidelines (para. 226), provided that the market share thresholds set out in the regulation are not exceeded. It is unclear why the Commission chose to list the practice of price recommendations under the heading “pricing restrictions”.<sup>20</sup>

The *Fédération* respectfully requests the Commission to maintain, unchanged, its approach towards recommended prices as they enable proper brand positioning.

### 3.7 Key words/Adwords

The *Fédération* welcomes the Commission’s preliminary conclusion that: “restrictions on the ability of retailers to use the trademark/brand name of the manufacturer in the retailer’s own domain name rather help avoiding confusion with the manufacturer’s website.”<sup>21</sup>

<sup>20</sup> Preliminary Report, paras. 505 et seq.

<sup>21</sup> Preliminary Report, para. 580.



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However, according to the preliminary results of the Sector Inquiry: “*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.*”<sup>22</sup>

The Commission seems to suggest that restrictions on the use of trademarks for advertisement purposes may raise concerns under Article 101 TFEU. However, these are limited restrictions, which may be justified on the basis of legitimate commercial reasons. They do not amount to a complete ban on online advertising, and do not constitute a hardcore restriction of Article 101 TFEU.

Whilst the *Fédération* does not dispute the relevance of search engines for attracting customers to the retailer’s website and for improving the findability of their online offer, it would caution the Commission from taking an overly restrictive approach. The *Fédération* considers that key words/Adwords restrictions may encourage the significant investments made by brands in developing their intellectual property and brand reputation.

Certain key words/Adwords restrictions can be related to the product lines the retailer actually distributes, in order to avoid that the consumer is misled into thinking that the retailer offers the entire product range.

An unlimited ability by resellers to purchase trademarked terms might potentially discourage the investments mentioned above, 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, there is a likelihood of confusion of consumers when they are not enabled, or enabled only with difficulty, to ascertain whether certain products originate

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<sup>22</sup> Preliminary Report, para. 580.



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from the proprietor of the trademark or from an undertaking economically linked to it or, on the contrary, originate from a third party.<sup>23</sup>

#### **4. Conclusion**

The *Fédération* wishes to thank the Commission for the opportunity to present its contribution on the Sector Inquiry's preliminary findings.

The *Fédération* 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.

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<sup>23</sup> 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.