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**BAKER & MCKENZIE**

**BRANDS FOR EUROPE**

**E-commerce Sector Inquiry – Interim Report**

**Response**

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## A. EXECUTIVE SUMMARY

1. This response is submitted by Brands for Europe, a group of leading brands and brand organisations across all relevant industry sectors that are covered by the European Commission's ("Commission") sector inquiry. The group works under the auspices of AIM and is represented by Baker & McKenzie. This response provides a cross-sectoral brand owner view on the key points made in the Interim Report.
2. Brands for Europe considers that the Interim Report gives a balanced overview of the current state of e-commerce. Today, all brands operate in an omnichannel world. E-commerce is a fundamental part of any commercial strategy. Brand owners and their retailer partners want to accompany consumers on their purchasing journey wherever that takes place, and ensure consumers have a consistent brand experience.
3. Brand owners welcome the Commission's guidance on online marketplace restrictions. We encourage the Commission to adopt an equally clear position regarding the assessment of price comparison websites. Restrictions on the use of price comparison websites should not be treated differently from online marketplace restrictions.

*We encourage the Commission to adopt a position regarding the assessment of price comparison websites, that is consistent with its position on online marketplace restrictions.*

4. Brand owners would also welcome a relaxation of the Commission's position on dual pricing. The current rules on dual pricing are simply not workable in practice. They force manufacturers to equally treat retailers which are not in an equal position, and can actually disadvantage high-service retailers. Brand owners should have the flexibility to offer retailers a specific discount off products that are sold in-store to support the retailer's in-store efforts. The Commission should at the very least give further guidance on the situations in which dual pricing could be justified under Article 101(3) TFEU (e.g. to support product launches or short term in-store promotions).

*We encourage the Commission to relax its position on dual pricing, or at the very least to provide further guidance on the situations where dual pricing may be justified under Article 101(3) TFEU.*

5. The observed increase in the number of selective distribution systems should not be a cause for a stricter regulatory approach by the Commission. Selective distribution systems help manufacturers alleviate free riding and incentivise retailers to invest and increase sales efforts. They also ensure that the consumer's experience of the brand is consistent, whether in a bricks and mortar or online environment. This increased retail quality benefits brand owners, retailers and consumers alike. Brand owners are concerned by observations made by the Commission regarding closer scrutiny and/or further investigation into bricks and mortar requirements, and transparency and objectivity of selective distribution criteria. Brand owners believe that, save in exceptional market circumstances, such further scrutiny would be unjustified and unnecessary.

*We urge the Commission not to adopt a stricter regulatory approach towards selective distribution systems, including as regards bricks and mortar requirements, and transparency and objectivity of selective distribution criteria.*

6. Brand owners are very concerned by the increasing divergence in the interpretation and application of the Block Exemption and Guidelines by national competition authorities ("NCA") and national courts. We urge the Commission to make a much more pro-active use of its existing powers under Regulation 1/2003 (*amicus curiae* briefs before national courts under Article 15(3), review of NCA decisions under Article 11(4), removing the competence of NCAs to apply Article 101 TFEU in a specific case under Article 11(6)) and to intervene in national court cases and NCA investigations where the correct and uniform interpretation and application of the Block Exemption and Guidelines is at stake.

*We urge the Commission to make a much more pro-active use of its powers under Regulation 1/2003, to address the increasing divergence at national level in the interpretation and application of the Block Exemption and the Guidelines.*

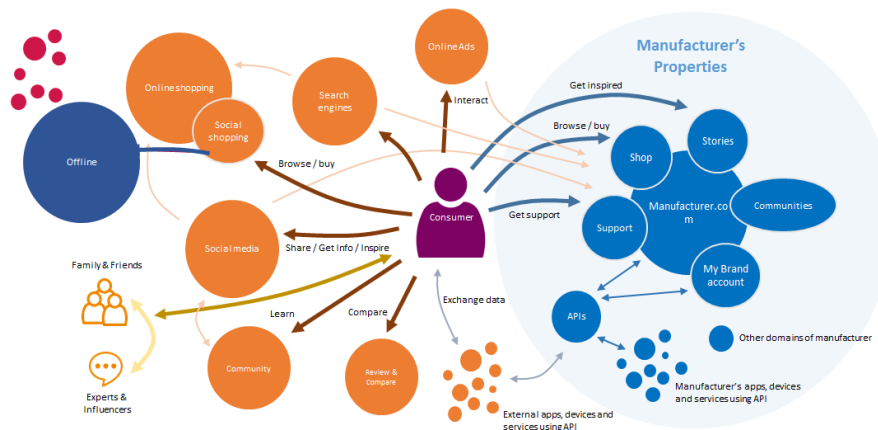
## B. COMMENTS ON GENERAL FINDINGS IN THE INTERIM REPORT

### 1. Price transparency

- 1.1 The growth of e-commerce has increased price transparency. Free riding is a major concern for brand owners and retailers. We welcome the Commission's observation that these concerns can be addressed legitimately.

### 2. The importance of non-price competition

- 2.1 We welcome and agree with the Commission's finding that price is not the only parameter of competition. As the Commission rightly observes, price competition can also have negative consequences for other parameters of competition (quality, innovation, consumer experience, service, brand image, etc.). This is sometimes overlooked in the analysis of antitrust regulators, who tend to focus solely on price competition.
- 2.2 The retail chain is under intense price pressure, and bricks and mortar stores are suffering most. In the past, the consumer decision flow used to be linear, in the sense that the consumer would view an advertisement or receive a flyer and then go to the store to purchase the product. Nowadays, the consumer decision flow is much more complex and diverse, due to the omnichannel approach. The digitally-empowered consumer moves at his own pace. The consumer's decision is informed by regular interactions with the brand, experts and influencers, family and friends, social media (Facebook, LinkedIn, Instagram), customer reviews, search engines, online ads, etc.



- 2.3 Brand owners need the flexibility to be able to give the appropriate support to bricks and mortar stores, so they continue to invest in customer service and a high quality retail environment on the high street. A recent survey conducted for the CMA<sup>1</sup> has made the alternative scenario clear: a crowding out of bricks and mortar retailers, and hence a reduction of product availability and competition. This could lead to less consumer choice and higher prices. None of these outcomes are in the consumer interest.

<sup>1</sup> "Vertical restraints: new evidence from a business survey", 24 March 2016, prepared for the Competition and Markets Authority by Oxera Consulting LLP and Accent.

- 2.4 At the same time, brand owners need to be able to meet consumers' expectations in terms of product availability, brand presentation and services wherever the brand is sold, whether in a bricks and mortar or digital environment.

### **3. E-commerce dynamics require more quality controls**

- 3.1 We note the Commission's observation that the growing importance of e-commerce has led to more significant control by brand owners over this channel. This is not surprising. Closer control is needed to allow brand owners to manage their brands in an online environment that is rapidly evolving and continuously growing. The "look and feel" of a website can (and does often) change on an almost daily basis, compared to the lay-out of and product presentation in bricks and mortar stores. The online environment requires closer management by its very nature.
- 3.2 Moreover, online is no longer only about making sales. It is also about *experiencing* the brand, just like in the bricks and mortar environment. With the growth of e-commerce, the strategy of many brand owners is to create a seamless omnichannel consumer experience, whereby the consumer not only shops but also enjoys services of the brand, whether online or offline.

### **4. Cross-border online sales**

- 4.1 Brand owners note that the limited growth in cross-border e-commerce is mainly due to costs for customers/retailers (transportation, returns, dispute resolution), and not to restrictions imposed by manufacturers (paragraph 14). The removal of any such barriers should be the subject of legislative action where appropriate, not antitrust intervention.

### **5. Marketplaces are not an essential online entry point**

- 5.1 The Commission's finding that the majority of retailers sell both offline and online, with 92% selling via their own website and only 4% selling solely via marketplaces, clearly shows that marketplaces are not an essential tool for retailers/SMEs to be found on the internet, as the German competition authority claims (paragraph 70 - 71).

### **6. Price comparison websites should be subject to the same rules as marketplaces**

- 6.1 Brand owners note the Commission's finding that large retailers are more likely to use price comparison websites than smaller retailers. This clearly demonstrates that price comparison websites are not an essential tool that smaller retailers need to be found online, as the German competition authority claims (paragraph 480).

### **7. Price differentials**

- 7.1 Brand owners note the Commission's finding that 80% of retailers sell for the same price online and offline, and that any price differences are due to the retailer's business model or decisions, and not the result of restrictions imposed by manufacturers (paragraph 130-131). In the same vein, brand owners are not surprised by the Commission's finding that approximately 70% of dealers offer the same range of products online and offline, while in 20% of cases the online range is greater due to retailer considerations (limits to store size, competitive pressure), but not as a result of restrictions imposed by manufacturers (paragraph 135-147).

## 8. Market concentration and the confusion generated by market share thresholds

- 8.1 Brand owners note the Commission's finding (section 2.1) that none of the sectors it examined is highly concentrated, and that a significant number of manufacturers compete across sectors and throughout the different regions of the EU. As a result, the Commission has not found evidence of market power in any of the sectors, that would justify a stricter approach or tighter regulation in any sector, for any product category or in any EU Member State.
- 8.2 Nonetheless, the enforcement by NCAs and national courts that brand owners are confronted with regularly, shows a very different picture. We refer to paragraphs 9.2 to 9.4 below, where we highlight some specific examples and explain that a more proactive monitoring and intervention by the Commission in cases at national level would be necessary and appropriate to secure a uniform application of the regulatory framework, leading to more legal certainty for all stakeholders.

## C. COMMENTS ON SPECIFIC RESTRICTIONS

### 9. Third party platform restrictions

- 9.1 Brand owners agree with the Commission's conclusion that absolute marketplace bans do not amount to a *de facto* prohibition to sell online under the *Pierre Fabre* case law, and that absolute marketplace bans do not amount to a hardcore restriction under Article 4 (b) or (c) of the Block Exemption (paragraph 469). It is absolutely correct that third party platform restrictions only determine *how* the distributor can sell over the internet, not *where* or to *whom* the distributor can sell (paragraph 472).
- 9.2 Brand owners welcome the Commission setting out the law on this issue in a very clear manner. We hope that this will put an end to the unjustifiably strict and interventionist approach taken on this point by the German competition authority in the *Asics* and *Adidas* cases. The German competition authority's actions forced brand owners to weaken their selective distribution systems, and to sell to retailers that are unable to meet the brand owner's quality criteria and that undermine the brand image in the eyes of the consumer, in direct violation of the current regulatory framework. This leaves a brand owner's selective distribution system open to constant challenge, even in the absence of market power, and in circumstances where all the requirements of the Block Exemption have been met. This approach leads to intolerable legal uncertainty, and to an ever greater divergence of the rules at national level which must be stopped. NCAs should not re-engineer selective distribution systems that fall within the Block Exemption.
- 9.3 Brand owners take note of the circumstances where the Commission considers a case by case effects assessment is necessary, notably where (1) the 30% market share threshold is exceeded, and (2) marketplace bans *de facto* amount to a total ban of the use of the internet as a method of marketing (paragraph 468). Based on the Commission's own market data outlined in the Interim Report, these market circumstances appear not to be present:
  - (1) The Commission concludes that there is an absence of market concentration/market power in the relevant sectors and across all EU Member States (section 2.1).

- (2) The Commission finds that an own website is very important for retailers, with a very low percentage of retailers selling only via marketplaces. It is hard to imagine circumstances in any national market where a total ban on the use of third party platforms would "de facto amount to a total ban of the use of the internet as a method of marketing" (paragraph 468). The German competition authority's position that the German market is somehow special in this respect, is without merit and factually incorrect in light of the Commission's findings.

9.4 Notwithstanding these encouraging findings, we invite the Commission to reach clearer conclusions in the final report on the following points:

- (1) **How to define product markets and calculate the 30% market share threshold:** The ever-increasing online availability of products and the move to an omnichannel environment both indicate that a broad view should be taken as regards geographic markets. In addition, inter-brand competition increases in an omnichannel environment, which should relax any intra-brand competition concerns. Practical experience shows that NCAs and national courts sometimes take an overly restrictive approach when it comes to market definition, and therefore to the application of the Block Exemption safe harbour. Two examples are the Paris Court of Appeal judgement concerning *Coty France* of 25 May 2016, and the German Higher Regional Court of Frankfurt judgement concerning *Deuter* of 22 December 2015. In both cases the Courts stated that the companies did not demonstrate that their market shares did not exceed 30%, and held that their agreements fell outside the Block Exemption. Cases such as these show that the Commission should provide more guidance on this point, and get proactively involved in national court cases and investigations where the correct interpretation and application of the Block Exemption is at stake.
- (2) **Extension of findings to social media:** The Commission should clarify that the findings it has made as regards third party platforms also apply to social media sites on which products are sold.

## 10. Price comparison websites

- 10.1 We agree with the Commission's position that restrictions on the use of price comparison websites that are based on qualitative criteria generate efficiencies, particularly in the context of selective distribution, where they are part of the overall quality standards of product promotion (paragraph 503). Consequently, such restrictions based on qualitative criteria are covered by the Block Exemption, regardless of the nature of the product.
- 10.2 However, brand owners are concerned by the Commission's statement that absolute bans on price comparison websites, i.e. restrictions which are not linked to quality criteria, may give rise to competition concerns where they exclude an effective method for retailers to attract traffic to their website.
- 10.3 The vagueness of the notion of what constitutes an "effective method to generate traffic" (paragraph 502) means that it is not an appropriate or relevant legal test to determine whether absolute bans on price comparison websites are covered by the Block Exemption.



- 10.4 The Commission should apply the logic and methodology for the assessment of absolute marketplace bans to absolute bans on price comparison websites.
- 10.5 Marketplaces and price comparison websites are essentially comparable and complementary online sales tools which have many features in common.
- 10.6 As the Commission points out at paragraph 101 of the Interim Report, price comparison websites offer a number of services to customers in addition to the price comparison function, such as customer reviews, professional product reviews, possibility to ask product-related questions. Consequently, price comparison websites are part of *how* the products are sold online. This convergence means that a different approach is unjustified and artificial in light of current and future market reality.
- 10.7 The Commission's own findings in the Interim Report do not show that price comparison websites are an essential tool for retailers to be found online or to be able to sell online (as mentioned above, the Commission's findings in paragraph 480 indicate that large retailers are more likely to use price comparison websites than smaller retailers). In line with the logic and findings which underpin its approach for third party platforms, the Commission should hold that absolute bans on price comparison websites are not tantamount to a ban on internet sales, and do not amount to a hardcore restriction under Article 4 (b) or (c) of the Block Exemption.
- 10.8 As we have argued above for absolute marketplace bans, we urge the Commission to be more forthright in its conclusions on the need for a case by case effects assessment where the 30% market share threshold is exceeded, or where price comparison websites are *de facto* key to generate traffic to the retailers' website. Based on the Commission's own market data, these market circumstances appear not to be present anywhere. We also urge the Commission to clarify that brands that allow the use of price comparison websites must be free to set quality criteria for such websites, and monitor abundance by them.

## **11. Restrictions on the use of trademarks on search engines' referencing services**

- 11.1 The Commission observes 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 search engines' paid referencing services, or are only allowed to bid on certain positions (paragraph 580).
- 11.2 These are limited restrictions, 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.

## **12. Cross-border geographic and e-commerce sales restrictions**

- 12.1 Brand owners welcome the confirmation that, in the absence of a dominant position, unilateral decisions not to sell in a territory are not caught by EU competition rules. We note that the majority of decisions not to sell in a territory are taken unilaterally by retailers for reasons that are often legitimate. For example, a decision not to sell in a territory may be due to regulatory requirements, such as the need for labelling to be in the national language of the territory.
- 12.2 Where illegal contractual territorial sales restrictions are found to exist, the existing Block Exemption and Guidelines provide sufficient clarity on the law.

### 13. Price restrictions

- 13.1 **Recommended resale prices:** Brand owners acknowledge that price recommendations are widely used by manufacturers. However, price recommendations should be distinguished from resale price maintenance. Price recommendations are entirely legitimate. It is therefore unfortunate that the Commission chose to include the practice under the heading of “price restrictions” (paragraph 506 et seq.).
- 13.2 Brand owners also note the Commission's finding that an almost equal percentage of retailers indicate that they do / do not follow price recommendations – entirely for their own reasons.
- 13.3 **Margin guarantees / compensation requests:** The Commission observes that large retailers / groups of retailers have a strong negotiating position vis-à-vis manufacturers as regards the achievement of a certain expected profit margin (paragraph 520 - 523).
- 13.4 Brand owners confirm that they are often subject to significant pressure from retailers to have a guaranteed profit margin, and/or be compensated for losses or decreased profit margins. Brand owners invite the Commission to provide guidance on whether such practices may lead to an infringement of Article 101 TFEU. In particular, the Commission should provide guidance on the extent to which such practices may be incompatible with the obligation on brand owners to respect retailers' commercial freedom to set resale prices.
- 13.5 **Dual pricing:** Brand owners are not surprised that manufacturers have indicated that a dual pricing policy is not viable due to the very restrictive guidance in the Guidelines (paragraph 543). We strongly encourage the Commission to relax its policy on this point.
- 13.6 The current rules on dual pricing are not workable in practice, and are not justified in the current retail landscape.
- 13.7 The Guidelines allow manufacturers to support bricks and mortar sales efforts by means of a fixed fee. They also allow the setting of a minimum in-store turnover target for bricks and mortar stores. In real commercial life, however, these possibilities are not useful or workable. There is a significant burden involved in administering a fixed fee or a standard minimum turnover threshold that applies to all bricks and mortar stores, or even to a category of bricks and mortar stores. Every bricks and mortar store (even of one and the same retailer) is different, and operates in a different retail environment compared to another store, even though that other store may be of a similar size. In order to support in-store sales appropriately, and in line with the Commission's guidance, manufacturers need to engage in a case by case analysis to determine a reasonable fixed fee or amount of in-store sales for each individual bricks and mortar store. They also need to update this analysis regularly to reflect changes in the local retail environment, the retailer's own circumstances, the product portfolio etc. For some brands that work with hundreds and thousands of retailers across the EEA, this is an impossible task.

- 13.8 The Guidelines do not allow manufacturers to apply different pricing for products that are sold in bricks and mortar stores and for products that are sold online. However, different pricing may be necessary to support a retailer's in-store efforts and costs:
- Bricks and mortar sales and online sales tend to have very different annual growth projections. For example, a 5% annual growth in sales is likely to be easily achievable in the current online environment, but less so in the current bricks and mortar environment. So it is not commercially reasonable for a manufacturer to be required to offer the same bonus to a retailer for attaining the requisite level of annual growth, irrespective of whether the sales took place in the retailer's bricks and mortar store or online store. The manufacturer should be able to offer to the retailer a bonus for annual growth in bricks and mortar sales only, or a different bonus for annual growth in bricks and mortar sales and in online sales, which rewards the retailer for its greater in-store sales promotion efforts.
  - Bricks and mortar stores and online stores have very different product assortment capabilities. Bricks and mortar stores face space limitations, which make it more difficult for them to stock and display a large amount of products. The same does not apply to online stores, which can stock and display a large amount of products with much lower cost. A manufacturer should be able to offer better prices and terms to a retailer for stocking and displaying an enlarged or full assortment of the products in its bricks and mortar store, than for stocking and displaying an enlarged or full assortment of the products in its online store. This would reward the retailer for the greater cost it assumed in relation to product assortment in its bricks and mortar store.
- 13.9 Consequently, the current rules should be amended to allow brand owners to offer retailers a specific discount off products that are sold in bricks and mortar stores to support the retailer's in-store efforts and costs.
- 13.10 This is in line with recent statements made by Commissioner Vestager. The Commissioner noted that "*[p]ricing restrictions can help to stop physical shops from disappearing. Without them, people might go to a brick-and-mortar shop only to get a feel for a product, but then buy it more cheaply online. And limits on where products can be sold can help to keep up the exclusive image that people look for in certain brands.*"<sup>2</sup>
- 13.11 At the very least, the Commission should provide further guidance under which circumstances dual pricing strategies might be justified under Art. 101 (3) TFEU (paragraph 225 of the Guidelines). For example, it should be acceptable for a brand owner to:
- support the launch of a new product by offering its retailers special prices and conditions that are only available for the demonstration and sale of the product in-store;
  - offer its retailers special prices and conditions to support a short-term promotion campaign for its products in-store.

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<sup>2</sup> Speech by Commissioner Vestager at the Forum for EU-US Legal-Economic Affairs, Paris, 15 September 2016, available at [https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-and-digital-single-market\\_en](https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-and-digital-single-market_en).

- 13.12 This position is supported by established economic theory<sup>33</sup>, which acknowledges that "[t]he main objection to any efficiency claims invariably put forward by competition authorities is that, if certain actions are so important to enhance demand, the manufacturer could pay the retailer directly for these services. This argument assumes that writing a complete contract between the manufacturer and each retailer is always possible.

*However, such claims defy business reality. How does a manufacturer write into the contract that the sales person treat the customer well and have a nice smile? Even if such conditions could be written into a contract, they would not be enforceable in court. How does the manufacturer of a product, that can only be efficiently sold in a department store with many brands, write binding contracts on the general way the sales environment is structured? How can a contract be written that guarantees a provision of sufficient sales space if that space can easily be used for other brands? Realistically, many aspects of retailing that a manufacturer needs to boost demand for its products cannot be written into a contract. Incomplete contracting is therefore a feature of reality. But when contracts are incomplete incentives have to be given indirectly.*

*[...] in the past there were significant barriers to [...] free riding: Once in the store the customer might have had to incur significant costs to leave the store and make the purchase somewhere else. With the internet this has changed dramatically. A customer can assess a product in the store, be it a refrigerator, a book, or a mattress and – without leaving the store – order the product for a lower price on the internet using his or her smart phone. This type of arbitrage between high store prices where customers enjoy sales services and purchases on the internet, where these are not paid, is today a regular occurrence.*

*Differential pricing between the brick-and mortar sales channel and the internet sales channel, known as dual pricing, is an obvious efficient solution to this problem. It leaves the selection of the right mix of incentives for brick and mortar non-price services and using the low costs of internet retailing to the competition between brand manufacturers. If a sports shoe manufacturer raises the price for internet retailing too much, it will lose out in competition with a rival branch that can also experiment with the right retail mix between brick and mortar and internet outlets. Competition policy has been interfering in some jurisdictions with this type of competition in a number of cases without any compelling theory why differential pricing would be anticompetitive in any economically meaningful way."*

- 13.13 **Price differentiation:** We invite the Commission to clarify in the final report the difference between price differentiation (charging different prices to different retailers, which is acceptable in the absence of dominance) and dual pricing (charging different prices to the same retailer, depending on whether the product is sold online or offline).
- 13.14 This distinction appears to be unclear to some, and leads to decisions from NCAs and national courts (particularly in Germany) that are not in line with the Guidelines. For instance, there have been several settled cases in Germany where manufacturers were forced to change their rebate schemes, so that pure online players were granted a similar level of rebates as other retailers, even though there were no market power

<sup>33</sup> Kai-Uwe Kühn, "Economic deficits in the competition policy analysis of e-commerce: is the current enforcement practice justified from an economic perspective?", Competition Law & Policy Debate, Volume 2, Issue 2, June 2016, page 53 (56).

concerns (*LEGO* of 18 July 2016; *Dornbracht* of 13 December 2011; *Gardena* of 28 November 2013).

- 13.15 In the absence of market power, a brand owner should be free to charge different prices to pure online players and other retailers. It is essential for brand owners to be able to offer to bricks and mortar retailers different prices than to pure online retailers. This is because bricks and mortar retailers have to assume costs that pure online players do not (e.g. lease of premises, hiring of staff, refurbishments, new displays, training and customer services, etc.). If brand owners are obliged to offer the same prices and conditions to bricks and mortar retailers as pure online retailers, bricks and mortar retailers will have no incentive to commit these investments.

## D. COMMENTS ON DISTRIBUTION SYSTEMS

### 14. Selective distribution

- 14.1 Selective distribution in an increasingly omnichannel-driven world is all about brand owners, in close cooperation with their retailers, creating, strengthening and safeguarding the trust between the brand and the consumer. Brands increasingly use all available channels to give consumers the expected brand-related experience, in terms of both product purchase and services (e.g. through practices such as click and collect, designing and ordering products online, signing up for activities at a retailer's premises or website, etc.).
- 14.2 Brand owners must be free to choose which retailers to engage with, i.e. retailers who are able in the brand owner's view to offer value to the consumer and the brand, thereby optimizing distribution and retail experiences and catering to ever-increasing consumer demands and expectations. In this respect, brand owners welcome the clear confirmation that selective distribution systems are covered by the Block Exemption regardless of the nature of the product or the selection criteria.
- 14.3 The observed increase in the number of selective distribution systems (paragraph 223) should not be a cause for concern or a reason for increased scrutiny by the Commission:
- Selective distribution systems help manufacturers alleviate free riding, and incentivise retailers to invest and increase sales efforts.
  - Selective distribution is key in ensuring consumers will have a consistent experience with the product, whether this is provided by the brand directly or by its selected partners, online or in a bricks and mortar environment. This increased retail quality benefits consumers, retailers and brand owners alike, and has a positive effect on local economies and SMEs.
  - Finally, selective distribution allows for innovation on the market. Selective distribution helps new products launch successfully. And successful new products generate the revenue required for further innovation to take place.
- 14.4 Increased recourse to selective distribution is a response to the rapid evolution of the e-commerce environment. As also explained at paragraph 3.1 to 3.2 above, the online environment requires much closer management by brand owners to ensure that it continues to reflect the brand image, that product presentation is of a sufficiently high quality, that the consumer experiences a consistent level of service (whether the seller

is the brand owner or an authorised retailer, or the purchase happens online or offline). This allows an increase of online sales of products while meeting consumers' ever-increasing expectations.

- 14.5 The current rules function well in practice and strike the right balance between providing sufficient legal certainty and allowing sufficient flexibility and commercial freedom for brand owners to shape distribution systems in a manner that best fits their specific products.
- 14.6 Brand owners do not dispute that a refusal to admit a retailer to a selective distribution system because they sell online is inadmissible. At the same time, the observation (paragraph 218 – 219) that retailers may be removed from a selective distribution system as a result of new online sales criteria should not be considered as evidence of an unduly strict approach to online sales by manufacturers. Rather, it shows that brand owners continue to invest and raise the bar in terms of quality online and offline (omnichannel) and search for retailers that add value, in the interest of consumers and in line with market trends.

## **15. Bricks and mortar requirement in selective distribution systems**

- 15.1 Brand owners are concerned by the observation that the use of certain clauses in selective distribution agreements may require further scrutiny, depending on the products for which they are used.
- 15.2 In this respect, the Commission appears to focus on the bricks and mortar requirement as a clause that “may go beyond what is necessary to achieve the goals of selective distribution” (paragraph 908).
- 15.3 The Commission indicates that a bricks and mortar requirement remains covered by the Block Exemption, but warns that individual assessment and even withdrawal of the Block Exemption may be appropriate “for certain product categories or certain lines of products which online retailers might be equally qualified to sell” (paragraph 908).
- 15.4 Brand owners wish to stress that the Commission should follow the spirit and logic of the Block Exemption. In the absence of market power, it is for the manufacturer to decide on its commercial strategy, regardless of the nature of the product, product line or product category. Any stricter approach would allow NCAs and national courts to re-engineer selective distribution systems and interfere with a supplier's commercial freedom. In the absence of market power, it is not up to NCAs and national courts to decide on a case by case basis whether a product, product line or product category “deserves” a bricks and mortar criterion, or whether it can be sold in an online environment equally well as in a bricks and mortar environment. This would leave a brand owner's selective distribution system open to constant challenge with the risk of even more divergence of the rules at national level.
- 15.5 A bricks and mortar requirement is an efficient and legitimate way to limit free-riding issues, which can legitimately be addressed by brand owners as the Commission has acknowledged in the Interim Report. As indicated in the Interim Report (paragraph 291), free-riding on the services offered by bricks and mortar stores increase the marginal costs of bricks and mortar retailers. Physical premises, the furniture, the

trained staff and the customer service require much higher investment than an online store. A consumer that enters a shop uses all these costly features.

- 15.6 A withdrawal of the Block Exemption can only be appropriate in extremely exceptional circumstances (as outlined in the Guidelines), which have not been found to exist by the Commission during its thorough inquiry.

## **16. Transparency and objectivity of criteria in selective distribution systems**

- 16.1 Brand owners are very concerned by the comments made by the Commission concerning the lack of transparency and objectivity of selection criteria in light of certain retailer complaints (paragraph 229-232).
- 16.2 Absent market power, each brand owner should be free to choose with whom they want to do business, without having to share a set of selection criteria with each and every potential candidate retailer, or without having to justify to each candidate retailer why they will not get admitted to the brand owner's selective distribution system. Any other approach will create an enormous administrative burden and invite ever more litigation at national court level. Moreover, the specific criteria on the basis of which a retailer is admitted to a selective distribution system constitute a parameter of competition between brand owners, and should therefore be kept confidential.
- 16.3 We recall that the Court of Justice confirmed in *Auto24*<sup>4</sup> that there is no obligation on manufacturers to be “transparent” or “non-discriminatory” in their choice or application of criteria. Furthermore, the Block Exemption applies regardless of the nature of the criteria.

## **17. Exclusive distribution**

- 17.1 Brand owners agree with the Commission's findings on exclusive distribution and the reasons why exclusive distribution is beneficial. Exclusivity is in some cases necessary to protect against free-riding from other distributors, and territorial exclusivity can be important to ensure that a retailer has sufficient sales in return for investments such as in case of a new product launch (paragraph 195). The current rules are clear and work well in practice. On this basis, brand owners see no need for additional guidance or closer scrutiny on this point.

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<sup>4</sup> *Auto 24 vs JLR*, case C-158/11 of 14 June 2012.