

EU COMMISSION¹

Decision of 17 December 2018

relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area

In Case AT.40428 Guess²

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and in particular Article 7(1) and Article 23(2) thereof,

Having regard to the Commission Decision of 6 June 2017 to initiate proceedings in this case,

Having given the parties concerned the opportunity to make known their views pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

1. INTRODUCTION

- (1) This Decision concerns Guess?, Inc., Guess? Europe, B.V. and Guess Europe Sagl. The undertaking comprising those three entities is referred to in this Decision as "Guess".
- (2) Guess implemented practices aimed at restricting authorised distributors in its selective distribution system (i) from using the Guess brand names and trademarks for the purposes of online search advertising; (ii) from selling online without first obtaining a specific authorisation from Guess which Guess had full

¹ This is an unofficial text published on the European Commission website.

² Language of the case: English.

discretion to either grant or refuse and where no quality criteria had been specified for deciding whether or not to grant an authorisation; (iii) from selling to end users located outside the authorised distributors' allocated territory; (iv) from cross-selling among authorised wholesalers and retailers; (v) from determining resale prices independently.

- (3) This Decision establishes that those practices constitute a single and continuous infringement of Article 101 of the Treaty and of Article 53 of the Agreement on the European Economic Area ("the EEA Agreement").

2. THE UNDERTAKING CONCERNED

- (4) Guess specialises in the design, marketing and distribution of apparel and accessories for men, women and children.
- (5) Guess?, Inc. is a USA-based company, incorporated in Delaware and listed on the New York Stock Exchange.
- (6) Guess?, Inc. designs, markets, distributes and licenses contemporary apparel and accessories. The product lines include full collections of clothing, including jeans, trousers, skirts, dresses, shorts, blouses, shirts, jackets, knitwear and intimate apparel. The apparel is marketed under numerous trademarks including "GUESS", "GUESS?", "GUESS U.S.A.", "GUESS Jeans", Triangle Design, "MARCIANO", Question Mark and Triangle Design, a stylised G and a stylised M, "GUESS Kids", "Baby GUESS", "YES", "G by GUESS", and "GUESS by MARCIANO".
- (7) Guess?, Inc. also grants licences to third parties to manufacture and distribute a broad range of products that complement the apparel lines, including eyewear, watches, handbags, footwear, kids and infants apparel, outerwear, fragrance, jewellery and other fashion accessories.
- (8) Through Guess? Bermuda Holdings L.P., acting as the holding company, Guess?, Inc. owns Guess? Europe, B.V. (incorporated in the Netherlands in 1996). In turn, Guess? Europe, B.V. controls Guess Europe Sagl (referred to in this Decision as "Guess Europe"), which is incorporated in Switzerland. Guess? Europe, B.V. is the 100% parent company (directly or indirectly) of the Guess subsidiaries incorporated in the European Economic Area ("EEA").
- (9) Pursuant to the "master" trademark licence and distribution agreement between Guess?, Inc. and Guess Europe, Guess Europe is entrusted with manufacturing and distributing Guess products (clothing, including kids and infant apparel, underwear, swimwear, shoes, accessories, jewellery) in Europe. Handbags are exclusively distributed by Guess Europe in the EEA (although Guess?, Inc. licenses their manufacturing to a third party). Guess Europe manages licensing, logistics and financial reporting for all EEA-based Guess subsidiaries. Guess Europe is the legal entity which is the contracting party in the distribution agreements in the EEA. Guess has subsidiaries in most of the countries that are Contracting Parties to the EEA Agreement ("EEA countries").

- (10) In the period concerned by this Decision, the EEA-wide distribution of Guess products was managed by Guess Europe.

3. THE PRODUCT AND GEOGRAPHIC MARKETS CONCERNED

- (11) The products concerned by this Decision are the apparel and accessories lines marketed by Guess Europe at wholesale and retail level under numerous trademarks, including "GUESS", "GUESS?", "GUESS U.S.A.", "GUESS Jeans", Triangle Design, "MARCIANO", Question Mark and Triangle Design, a stylized G and a stylized M, "GUESS Kids", "Baby GUESS", "YES", "G by GUESS", and "GUESS by MARCIANO", and, in particular, apparel, denim, swimwear, underwear, footwear, footwear kids, jewellery and accessories, each for men, women and kids.
- (12) The geographic areas covered by this Decision are the following 27 EEA countries where Guess distributes its products via a selective distribution system: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Sweden and the United Kingdom.

4. PROCEDURE

- (13) The Commission's investigation started as a follow-up to the e-commerce sector inquiry.
- (14) The Commission sent several requests for information pursuant to Article 18(1) of Regulation (EC) No 1/2003 to Guess Europe. It also sent requests for information to wholesalers, to mono-brand store owners and to multi-brand retailers.
- (15) By decision of 6 June 2017 adopted pursuant to Article 2(1) of Regulation (EC) No 773/2004, the Commission initiated proceedings against Guess in relation to agreements concerning the distribution of clothing, shoes and accessories in the Union and the EEA that contain cross-border sales restrictions, cross-selling bans among members of a selective distribution system, internet sales limitations and resale price restrictions.
- (16) On [...], Guess submitted a formal offer to cooperate in Case AT.40428 in view of the adoption of a decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 (the formal offer is referred to in this Decision as "the Settlement Submission"). The Settlement Submission contained:
- an acknowledgement, in clear and unequivocal terms, of Guess?, Inc.'s, Guess? Europe, B.V.'s and Guess Europe's joint and several liability for the infringement described in the Settlement Submission, as regards its object,

the main facts, the legal characterisation of the infringement and of the main facts, including Guess' role and the duration of Guess' participation in the infringement;

- an indication of the maximum fine that Guess?, Inc., Guess? Europe, B.V. and Guess Europe would expect the Commission to impose and that they would accept in the context of a cooperation procedure;
- confirmation that Guess?, Inc., Guess? Europe, B.V. and Guess Europe have been sufficiently informed of the objections the Commission envisages raising against them and that they has been given sufficient opportunity to make their views known to the Commission;
- confirmation that Guess?, Inc., Guess? Europe, B.V. and Guess Europe do not envisage requesting further access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect the Settlement Submission in the Statement of Objections and the decision;
- agreement to receive the Statement of Objections and the final decision adopted pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English;
- a statement that the Settlement Submission is conditional upon the imposition of a fine by the Commission which does not exceed the amount specified in the Settlement Submission.

(17) On 12 November 2018, the Commission adopted a Statement of Objections addressed to Guess?, Inc., Guess? Europe, B.V. and Guess Europe, in which it raised objections on the basis of the events as described in Section 5.2 of this Decision.

(18) On 21 November 2018, Guess?, Inc., Guess? Europe, B.V. and Guess Europe submitted their joint reply to the Statement of Objections. Guess?, Inc., Guess? Europe, B.V. and Guess Europe reiterated their commitment to follow the cooperation procedure and confirmed that the Statement of Objections reflected the content of the Settlement Submission and that they did not wish to be heard again by the Commission.

5. FACTS

5.1 Distribution of Guess' products in the EEA

(19) Guess products are sold in all EEA countries except Iceland.

(20) At *wholesale level* Guess products are distributed via two distribution models:

- (a) in 14 EEA countries, Guess Europe or its national subsidiary acts as the only wholesaler operating a selective distribution system for all Guess product lines;

- (b) in 16 other EEA countries, Guess' national subsidiary acts as the wholesaler for some product lines and one third-party wholesaler is in charge of the distribution of one or more other product lines. In these EEA countries the wholesaler operates a selective distribution system in the allocated territory with respect to the product lines specified in the wholesale agreement. Guess Europe has 13 wholesale distribution agreements with third parties.
- (21) At *retail level* Guess products are distributed in bricks-and-mortar stores under three distribution models:
- (a) Guess and its affiliates own and operate 348 stores in 12 EEA countries. Guess has a strong direct offline retail presence in particular in Austria, Finland, France, Germany, Italy, the Netherlands, Poland, Portugal and Spain;
 - (b) independent third parties operate mono-brand stores selling only Guess products. In 2017 there were 113 third party-owned mono-brand stores, operated by more than 30 companies in the EEA;
 - (c) Guess products are sold by about [3000 – 5500] third party-owned multi-brand retailers across the EEA.
- (22) Guess also sells its products online directly through its own online shop and as a seller on online marketplaces. Guess products are also sold online by pure online retailers.

5.1.1 *Selective Distribution System*

- (23) Guess Europe runs a selective distribution system through agreements with its wholesalers and mono-brand retailers, as well as through general sales terms with its multi-brand retailers. The wholesale agreements (see recitals (24) – (28)) provide that the “SUBDISTRIBUTOR acknowledges that the exclusive and prestigious GUESS image can be safeguarded if the Products are distributed through a selective distribution system”. The retail agreements (see recitals (29) - (31)) state that the contract products are “fashionable high quality clothing, fashion accessories and other products”. Within this selective distribution network, independent mono-brand retailers are selected directly by Guess Europe and multi-brand retailers are pre-selected by the independent national wholesalers and approved by Guess Europe.

5.1.2 *The wholesale agreements*

- (24) The wholesale agreements (called “*selective subdistributorship agreements*”) are concluded between Guess Europe and national wholesalers (called “*subdistributors*”). They all follow the same template with some modifications and adjustments.
- (25) According to the wholesale agreements, each wholesaler has the mandate to distribute and promote the Guess product lines specified in the agreement in its allocated territory.

- (26) The allocated territory in the agreements is typically defined as one EEA country and in some cases two or three neighbouring EEA countries. In most cases Guess Europe provides exclusive distribution rights for the wholesaler in a given territory, as stipulated under point 3.1 of the wholesale agreement. The main objective of the wholesale agreements is described as follows: *“SUBDISTRIBUTOR shall exercise its best efforts to actively promote the Products within the Territory and to sell the Products to GUESS licensed stores, and to other retail store operators whose retail stores otherwise meet GUESS’s standards for quality, image, services and appearance. [...]”*.
- (27) The wholesale agreements also stipulate that the wholesaler has to operate as part of a selective distribution system. In particular, the wholesaler has to pre-select suitable retailers in the territory who fulfil the criteria defined by Guess Europe. In practical terms, for every pre-selected retailer, the wholesaler has to fill out a *“Customer Evaluation Form”*. According to the wholesale agreements, as well as in practice, every pre-selected retailer has to be ultimately approved by Guess Europe on the basis of the Customer Evaluation Form.
- (28) The wholesale agreements stipulate that the wholesaler has to maintain a showroom and has to report regularly to Guess Europe about its activities. The agreements also set out detailed rules on advertisement and promotion activities undertaken by the wholesalers.

5.1.3 *The agreements with mono-brand retailers*

- (29) Independent third parties operating mono-brand stores are selected directly by Guess Europe and sign formal retail agreements (called *“retail store sublicense agreements”*) with Guess Europe. These retailers are referred to as *“sublicensees”* or *“mono-brand retailers”*. The agreements all follow the same template with some modifications and adjustments.
- (30) According to point C of the retail store sublicense agreements: *“Pursuant to that certain Retail Store Agreement by and among GUESS and GUESS EUROPE dated January 1, 2008 (“Master Agreement”) as amended, GUESS appointed GUESS EUROPE as its exclusive retail store licensee for the operation of stores for the sale of GUESS products in Europe, whereby GUESS EUROPE has the right, upon the prior written consent of GUESS, to appoint sublicensees for the operation of such stores within its territory.”*
- (31) The agreements set out the criteria that Guess Europe's mono-brand retailers need to fulfil in order to be authorised as a mono-brand retailer, including with respect to store design and construction requirements, quality standards relating to the operation of the store, as well as requirements relating to advertising. Each of the agreements sets out the physical address of the store(s) to which it relates, the territories to which the agreement applies and the initial term and renewal term of the agreement. The *“Territory”* is defined under point 1.9 of the agreement as a whole EEA country or in some cases as a group of neighbouring EEA countries.

5.1.4 *The agreements with multi-brand retailers*

- (32) The multi-brand retailers, as described in recital (27), are pre-selected by the independent national wholesaler and approved by Guess Europe. There is no long-term distribution agreement in place with the multi-brand retailers. Instead, by submitting a purchase order and receiving a subsequent order confirmation, they abide by the relevant version of Guess Europe's general terms and conditions (called the "*General Sales Terms*"). According to point 2 of the General Sales Terms: "*With the specific written confirmation of this order from GUESS EUROPE, the Purchaser may take on the denomination of «authorised retailer» limited to the season for which the supply has been ordered and confirmed.*"
- (33) Guess Europe's General Sales Terms are used in the entire territory of the EEA, except for France, Spain, Portugal and Italy. Specific General Sales Terms are in place for those particular EEA countries.

5.2 The relevant conduct

- (34) Guess Europe's wholesale agreements, its retail store sublicense agreements and the General Sales Terms used with multi-brand retailers in the EEA contain a number of restrictive provisions, notably:
- (a) online search advertising restrictions;
 - (b) online sales restrictions;
 - (c) restrictions on cross-selling among members of the selective distribution system;
 - (d) restrictions on cross-border sales to end users; and
 - (e) resale price maintenance clauses.

5.2.1 General presentation of Guess' commercial strategy

- (35) As a reaction to the growing importance of e-commerce over the last ten years, Guess developed a comprehensive e-commerce strategy aligning B2C activities (direct sales to consumers via its own website, initially launched in 2009) and its B2B activities (sales to third party wholesalers and retailers). This is confirmed by Guess' internal documents: "*[e]commerce is the most important channel for a Company, which gives first brand positioning and integrity perception to customers. It's the fastest growing channel. It has to be given priority in showing/selling products, launching promotions and investing in the brand presentation [...]*". Guess' strategy was steadily directed at expanding this key distribution channel. At the heart of this strategy was the development of an own website with an online shop.
- (36) Thus, Guess worked with third party wholesalers and retailers while trying "*[t]o avoid cannibalisation of [the] official Guess website*". As explained in Guess' internal documents, "*[...] the online market has to be strictly controlled in order to avoid wholesale cannibalizing retail sales. Retail expansion potential is enormous, but if it's strongly limited and obstructed by online wholesale, the expansion would be very hard to achieve*". According to an internal presentation,

one of the strategic objectives of the company was to: “[...] create a winning ecommerce and mobile platform to overperform the market”. Another internal document states: “Our strategy and goal is to grow our B2C channel [...]. [Internal document regarding Guess’ business strategy] the goal is to direct traffic to our B2C site”. To attain that objective, Guess Europe tried to control the competitive pressure from Guess’ independent distributors selling Guess products online.

- (37) The second factor which influenced Guess Europe’s distribution strategy (with respect to brick-and-mortar shops) over the last years was vertical integration. Following a global company-driven strategy implemented since (at least) 2008, a material and growing percentage of Guess Europe’s overall retail sales in the EEA were made by the company directly.
- (38) That strategy lay behind the restrictive advertising policy and the restrictive provisions contained in Guess Europe’s wholesale agreements, retail agreements and General Sales Terms in the EEA.
- (39) Those restrictions were conceived in line with Guess’ strategy to safeguard the prestigious brand image of Guess products and to enhance the value and reputation of its trademarks. However, the restrictive provisions in the agreements were infrequently and inconsistently enforced.

5.2.2 Online search advertising restrictions

- (40) A key instrument used by Guess Europe to implement its e-commerce strategy and to control the expansion of online sales by its independent distributors was to restrict the use of the Guess brand names and trademarks, in particular in Google AdWords.
- (41) Google AdWords is the largest and most widely used online search advertising service. That service allows economic operators, by reserving or bidding on one or more keywords, to obtain the placing of an advertising link to their website whenever an internet user enters one or more of those words as a request in the Google search engine. The advertising links typically appear on Google’s general search results pages next to the so-called generic/natural search results.
- (42) Google selects the advertisers that will be displayed in AdWords by means of a keywords auction which then determines the position of each advertisement and each advertiser’s cost per click. Advertisers pay when users click on the advertisement. Google uses two key factors to determine the ranking of an advertisement: (i) maximum bid (the highest amount that an advertiser is willing to pay for a click); and (ii) a quality score determined by Google using an algorithm that determines how relevant and useful the advertisement is to users.
- (43) Google has set up an automated process for the selection of keywords and the creation of advertisement. Advertisers select and bid on the keywords, draft the commercial message, and input the link to their website.
- (44) It follows that competition in the form of multiple bids for a specific keyword, such as “Guess”, increases the cost per click, thus the overall advertisement cost of a company.

- (45) Guess Europe systematically banned its authorised retailers, both mono-brand and multi-brand retailers, from using or bidding on Guess brand names and trademarks as keywords in Google AdWords in the EEA.
- (46) That online search advertising restriction was not included in the distribution agreements, but was systematically applied whenever an authorised retailer asked for permission to use any of the Guess brand names or trademarks as keywords in Google AdWords in the context of seeking approval from Guess for its advertising. Authorisations were granted only twice in the EEA since introduction of the policy.
- (47) As Guess documents explain: *“[The] policy is not to let our wholesale customers bid on Google adwords using the Guess Trademark. [...]”; “We’ve never authorized third parties to advertise our brand keywords on Google (both wholesale and marketplace parties) as the only one authorized to do this is the official GUESS online seller, i.e. guess.eu”.*
- (48) Although Guess Europe operated a selective distribution system in order to preserve the brand image of its products, Guess Europe pursued different objectives when it came to Guess’ Google AdWords policy because *“[a]uthorizing third parties would generate an important increase in our Google costs and decrease in visibility and sales for www.guess.eu.”*
- (49) In particular, it pursued the following objectives. First, Guess sought to maximise traffic to its own website at the expense of the independent Guess distributors: *“Our strategy and goal is to grow our B2C channel and Google search is a very important marketing channel that gives our B2C site an advantage when our ads appear first or are the only ads using the Guess Trademark”.* Second, given the Google AdWords auction system, Guess sought to minimise its own advertisement costs: *“Letting our B2B customers bid on Google terms drives up our advertising costs and puts our B2C site at a distinct disadvantage.”*
- (50) One of the objectives was therefore to reduce competitive pressure from authorised retailers on Guess’ own online retail activities by curtailing the ability of authorised retailers to use this advertising tool effectively, and to keep down its own advertisement costs.
- (51) From Guess’ perspective, Google AdWords represents a very important advertising tool. Guess invested on average [...] of its total Europe *“media budget”* in Google AdWords in the years 2016 to 2018 and almost [20 – 40%] of the visits to its website (online shop) were generated by Google AdWords during this period.
- (52) Banning the use of the Guess brand names and trademarks in Google AdWords restricted the “findability” and ultimately the viability of authorised online retailers within Guess’ selective distribution system.

5.2.3 Online sales restrictions

- (53) Another part of Guess’ e-commerce strategy which favoured its own website (online shop) was to have a *“limited number of independent operators selling Guess products online”*. This was achieved through a contractual term making online sales by authorised retailers conditional on the retailer first obtaining

explicit authorisation from Guess to conduct online sales. Additionally no quality criteria were specified for deciding whether or not to grant authorisation and Guess had full discretion to decide whether or not to allow authorised retailers to sell online.

- (54) Guess' employees were aware of the fact that selection criteria could be used to cut the number of distributors selling Guess products through the internet in line with Guess' e-commerce strategy. As one of the e-mails containing instructions to Guess employees explains: "[...] E COMMERCE Team will decide on which customers we will work with. AGAIN, LESS IS MORE. We need to set up very clear criteria which will help us not to answer positively on every request". The restrictive online sales policy is also confirmed by Guess in its official legal statement on eBay's website: "GUESS does not permit third parties to sell its apparel products on the world wide web." And by an internal e-mail exchange [Internal document regarding Guess' business strategy].
- (55) The primary objective of this part of Guess Europe's e-commerce strategy was to protect its own online sales activities and to limit intra-brand competition by authorised retailers, as opposed to ensuring compliance with a set of objective quality criteria within a selective distribution system.
- (56) The restrictive online admission strategy was achieved through the distribution agreements. In particular, the entire wording and spirit of the retail agreements concerned offline activities and suggested that mono-brand retailers were supposed to carry out offline sales activities only.
- (57) According to point C of the retail store sublicense agreements, the main activities of retailers (sublicensees) was to operate stores: "*Pursuant to that certain Retail Store Agreement by and among GUESS and GUESS EUROPE dated January 1, 2008 ("Master Agreement") as amended, GUESS appointed GUESS EUROPE as its exclusive retail store licensee for the operation of stores for the sale of GUESS products in Europe, whereby GUESS EUROPE has the right, upon the prior written consent of GUESS, to appoint sublicensees for the operation of such stores within its territory.*" According to point 1.6 of the retail store sublicense agreements: "*“Retail Sale” means a sale made in the Store at retail price to a consumer.*" Store is defined in point 1.8 as follows: "*Store” means the retail store located at, owned and operated entirely by SUBLICENSEE that (a) carries the Products exclusively for sale to the general public, (b) bears as its store name, exclusively, the “GUESS?” service mark, and (c) conforms to the requirements of GUESS.*"
- (58) In all the executed agreements submitted to the Commission, stores are always defined as one or more physical locations. None of the agreements submitted refer to a website as an acknowledged store. Point 3.1 of the retail agreements also only refers to retail sale in stores and operation of stores: "*Rights Granted. Subject to the terms and conditions contained herein and GUESS EUROPE's rights under the Master Agreement, GUESS EUROPE hereby grants to SUBLICENSEE, and SUBLICENSEE hereby accepts a non-assignable, non-transferable non-exclusive right to use the Trademarks and the IP Rights only in connection with the promotion and Retail Sale of the Products in the Store and in the operation of Store in the Territory.*" Point 3.2 of the retail store sublicense agreements prohibits any sales outside the store: "*Rights Not Granted. THE RIGHTS LICENSED BY GUESS EUROPE HEREUNDER ARE LIMITED TO*

THE OPERATION OF RETAIL STORE AND DO NOT INCLUDE THE RIGHT TO MANUFACTURE OR DISTRIBUTE THE PRODUCTS AT WHOLESALE, OR TO SELL THE PRODUCTS AT RETAIL OTHER THAN IN THE STORE.”

- (59) Point 5.1 of the retail store sublicense agreements sets out the quality standards and additional requirements that retail store owners need to fulfil in order to comply with the requirements of Guess Europe’s selective distribution system. The long list of standards and requirements relate to offline retail sale activities only and explicitly exclude online sales under point 5.1(o): “(o) *not to sell any Products through the Internet or any other electronic or computer-based system, without GUESS’s prior written consent [...]*”. Points 4.1, 4.2 and 4.7 of the agreements also define the conditions that stores need to fulfil and the process for obtaining approval. Similarly, the Customer Evaluation Form used for multi-brand retailers wishing to be admitted to the Guess selective distribution network contains quality criteria for offline sales only, for example information on the store (type, number of windows, turnover, area, number of employees, external appearance (including street facade, windows), internal appearance (including flooring, walls ceiling, fixtures, advertising, brand identification), overall impression, and information on the brands sold per product category. Wholesalers are also required to attach photos to the signed Customer Evaluation Form showing the retail store, internally and externally, and neighbouring stores.
- (60) The same approach is reflected in the General Sales Terms used with multi-brand retailers. According to point 10: “*The Purchaser undertakes to sell the garments in the stores indicated and/or authorised in this proposal and shall not display or sell them in any of its other stores without prior written authorisation from GUESS EUROPE. [...] The Purchaser also agrees not to sell the garments through Internet or any other computerised or electronic system, without prior written authorisation from GUESS EUROPE*”. Similar wording is used in point 8 of the Italian General Sales Terms, which also classifies a breach of the restriction to sell online as “fundamental” allowing Guess to terminate the agreement immediately and giving rise to a right to penalty payments.
- (61) Thus, online sales by authorised retailers were generally not permitted and were only allowed following written authorisation from Guess Europe. The practical instruction within Guess Europe was: “*[...] all sales made through the Internet must be authorized by the E-Commerce department*”. Accordingly, the E-Commerce department was entrusted with the authorisation process of both pure online and hybrid retailers.
- (62) However, the decision to grant authorisation was not based on a list of set quality criteria. Guess Europe did not have any document containing a written list of quality criteria for websites, as it never formally adopted any such criteria for online sales activities. Neither the agreements nor any other document communicated to retailers by Guess Europe during the period covered by this Decision specified the criteria or conditions to be fulfilled by retailers in order to obtain authorisation to sell online. Guess Europe also did not have a specific formal/written approval process for online sales. Written approvals only existed for physical points of sale.
- (63) Therefore, instead of ensuring compliance with objective criteria of a qualitative nature, the contractual provisions described in this Section gave Guess Europe the greatest possible discretion in deciding whether to allow authorised

retailers to sell online.

5.2.4 Restrictions on cross-selling among members of the selective distribution network (wholesale and retail)

- (64) A number of provisions in Guess Europe's distribution agreements limited the ability of wholesalers and authorised retailers to promote and sell Guess products to other wholesalers or authorised retailers within the selective distribution network of Guess Europe.
- (65) The restrictions in the wholesale agreements took various forms.
- (66) Points F and 3.2 limited the right to market and advertise the products to the allocated territory for one or more Guess product lines. As indicated in recital (20)(b), Guess Europe typically appoints one wholesaler for an allocated territory, which is always defined in the agreements either as one EEA country or sometimes as two or three neighbouring EEA countries. Points 6 and 9.2 of the wholesale agreements restricted promotion and advertisement outside the wholesaler's allocated territory.
- (67) Five wholesale agreements provided in point 22.6(i) for a specific termination clause in the event of promotion outside the allocated territory. In any case, all wholesale agreements had a general sanction provision in point 22.3: "[...] *if SUBDISTRIBUTOR breaches any of its obligations under this agreement, GUESS EUROPE may terminate this agreement [...]*", which also covered the obligations contained in points 17 and 19.6 (see recitals (68) and (70)). In addition, under point 15 "*All Products must be shipped directly to the Territory, and all shipping documents must reflect direct shipment.*"
- (68) The wholesale agreements also contained a provision which provided strong incentives for each wholesaler to purchase the products from Guess Europe only, not from the other members of the selective distribution system. In particular, point 17 stipulated that the wholesaler was obliged to observe minimum purchase obligations. Failure to respect the minimum purchase obligation was one of the grounds giving rise to a right to terminate the wholesale agreement immediately. Compliance with this obligation also affected whether or not the agreement was renewed. Point 1.4 of the wholesale agreement excluded any purchases of Guess products from other authorised members of the selective distribution system from the calculation of the minimum net purchases of the wholesaler: "*“Net Purchases” means all purchases of the Products from GUESS EUROPE or its affiliates, less returns accepted by GUESS EUROPE. Net Purchases do not include purchases of Products from GUESS’s manufacturing licensees or distributors.*"
- (69) Furthermore, the contractual provision obliging the wholesaler to report to Guess Europe any of its product purchases from sources other than Guess Europe (point 5.1(b)) allowed Guess Europe to monitor the restrictions imposed on wholesalers and provided additional disincentives for wholesalers to purchase from other authorised members of the selective distribution system.
- (70) Finally, point 19.6 of the wholesale agreements required wholesalers to ensure at their own expense that the products sold to their retail customers "*remain*" within the "*Territory*".
- (71) It follows, given that Guess Europe normally only nominates one wholesaler

per territory per product line, that a Guess wholesaler did not have the contractual right to advertise products outside its allocated territory or to approach other Guess wholesalers within the selective distribution network, as they were necessarily established outside the wholesaler's allocated territory. It also follows that the wholesaler could only sell to authorised retailers located in its own allocated territory.

- (72) The obligations on the wholesaler in point 19.6 of the agreement to keep the products within the territory and to monitor any diversion of the products outside the territory were intended to ensure that the national markets remained separated.
- (73) The cross-border sales restrictions in retail agreements followed the same logic and complemented the restrictions in the wholesale agreements. Both types of Guess retail agreement, the retail store sublicense agreements (in points 3.2, 12.6(f) and 17), and the General Sales Terms (point 10) and Italian General Sales Terms (point 8) applied to multi-brand retailers, expressly restricted sales to non-retail customers. In particular, they only allowed sales to end users and restricted purchases across the selective distribution network.
- (74) Point 3.2 of Guess Europe's retail store sublicense agreements only licenced the rights to sell the products at the retail level. Point 12.6(f) provided that any sales to non-retail customers gave rise to a right of immediate termination.
- (75) Point 17 stipulated that the store operator could only purchase products from Guess Europe or Guess Europe's local distributor (i.e. wholesaler) or from an authorised Guess manufacturing licensee for its own account and for resale only in the store in the territory.
- (76) The provisions in points 3.2, 12.6(f) and 17 stipulating that retail store sublicensees could only sell to final (retail) customers were found in 36 agreements.
- (77) Point 10 of the General Sales Terms applied to multi-brand retailers prohibited transactions among authorised retailers: “[.] *The Purchaser must never sell the garments purchased from GUESS EUROPE to another retailer.*”
- (78) The Italian General Sales Terms (which are somewhat different from the General Sales Terms for the rest of the EEA) contained a similar provision in point 8, coupled with severe sanctions: “*The Purchaser undertakes to sell the products purchased from Guess exclusively in the stores indicated in this proposal and shall not display and/or sell them in any other stores and/or point of sale and/or exposition places open to public without prior written authorisation from Guess. In any case, the Purchaser shall not sell the products purchased from Guess to another shop/retailer/wholesaler or through Internet or any other computerised or electronic system or through other forms of distant selling, not even in case of unsold stocks without prior written consent of Guess. If the Purchaser is in breach of any obligations under provision 8, Guess is entitled to suspend any further delivery and to claim a penalty payment from the Purchaser amounting to 50% of the purchase order. In addition, any breach of the obligations under provision 8 shall be considered a fundamental breach of contract entitling Guess to consider the contract, and eventual additional orders to be terminated immediately by reason of the Purchaser's fault and to claim from the Purchaser penalty payment as set out in provision 19. This is without prejudice to Guess' right to prove a greater loss and claim corresponding damages.*”

5.2.5 Restrictions on cross-border sales to end users

- (79) As outlined in recital (31), the retail store sublicense agreements typically defined “Territory” in point 1.9 as one EEA country or, in some cases, as two or three neighbouring EEA countries.
- (80) Point 3.1 confined sales (promotion and right to sell) to the allocated territory: *“Rights Granted. Subject to the terms and conditions contained herein and GUESS EUROPE’s rights under the Master Agreement, GUESS EUROPE hereby grants to SUBLICENSEE, and SUBLICENSEE hereby accepts a non-assignable, non-transferable non-exclusive right to use the Trademarks and the IP Rights only in connection with the promotion and Retail Sale of the Products in the Store and in the operation of Store in the Territory.”*
- (81) Furthermore, point 6.2 confined any advertising activity to the allocated territory. *“All Advertising by SUBLICENSEE hereunder shall be limited to Advertising and marketing within the Territory and SUBLICENSEE acknowledges and agrees that it has no right to Advertise or otherwise market the Products outside the Territory and is expressly prohibited from doing so.”*
- (82) Point 12.6(e) provided that selling outside the allocated territory gave rise to a right of immediate termination. *“GUESS EUROPE may terminate this Sublicense immediately without any right to cure upon the occurrence of any one or more of the following: [...] (e) SUBLICENSEE sells or ships the Products to customers outside the Territory or to customers whom SUBLICENSEE knows or should know will resell or ship the Products outside the Territory;”*
- (83) The objective of these provisions was to prevent retailers from selling Guess products to end users outside their allocated territory. The restrictions were aimed at both active and passive sales, in other words they allowed neither advertising nor sales outside the allocated territory. Internal Guess documents confirm this policy: *“We also want to ensure that their use is limited to their specific territory, e.g. their websites are not shipping guess products outside of their authorized country/territory”*.

5.2.6 Resale price maintenance

- (84) Point 11 of the General Sales Terms used for Guess’ multi-brand retailers stated as follows: *“For each sample range GUESS EUROPE shall fix a minimum price for sale to the public of its own products, by means of a «recommended pricelist» inclusive of VAT, for the purpose of making the product image uniform on the market. The Purchaser undertakes to sell the goods purchased at prices that comply with those indicated on the aforementioned pricelist. Failure to observe this obligation by the Purchaser shall give rise to the obligation to reimburse the damages incurred and shall entitle GUESS EUROPE to discontinue all future supplis.”*
- (85) The General Sales Terms were used throughout the EEA, with the exception of France, Spain, Portugal and Italy.
- (86) The stated objective of the provision quoted in recital (84) was to have uniform retail prices in specific markets in order to make *“the product image uniform on the market”*.
- (87) Guess Europe monitored pricing of third-party retailers and tried to influence

them to correct resale prices “misaligned” with Guess Europe’s “recommended” resale prices. E-mail exchanges show instances when one of the Guess subsidiaries signals that a distributor is deviating from the resale prices provided and requests Guess Europe to take action to “*solve the problem*”.

- (88) The resale price maintenance has to be seen in particular in the light of Guess Europe’s pricing policy and the parallel trade restrictions that Guess Europe was employing. More concretely, the company applied higher retail prices generally in Eastern Europe than in Western Europe, with an average price difference of 5-10%.

6. LEGAL ASSESSMENT

- (89) Article 101(1) of the Treaty prohibits as incompatible with the internal market agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Member States and (ii) have as their object or effect the prevention, restriction or distortion of competition within the internal market, unless they meet the conditions for an exemption set out in Article 101(3) of the Treaty.
- (90) Article 53(1) of the EEA Agreement prohibits as incompatible with the functioning of the EEA Agreement agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Contracting Parties to the EEA and (ii) have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement, unless they meet the conditions for an exemption set out in Article 53(3) of the EEA Agreement.
- (91) The agreements and concerted practices referred to in this Decision concerned the territory of the Union and the EEA. Insofar as the conduct affected trade between Member States, Article 101 of the Treaty is applicable. As regards operation of those agreements and concerted practices in Norway and Liechtenstein and its effect on trade between the Union and those countries, it falls within Article 53 of the EEA Agreement.
- (92) In this case, the Commission is the competent authority to apply both Article 101 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the conduct had an appreciable effect on trade between Member States or EEA countries.
- (93) References in the succeeding recitals of this Section to Article 101 of the Treaty, to effect on trade between Member States or to competition within the internal market are to be taken to include Article 53 of the EEA Agreement, effect on trade between Contracting Parties to the EEA Agreement, and competition within the territory covered by the EEA Agreement.

6.1 Concept of undertaking

6.1.1 Principles

- (94) Article 101(1) of the Treaty applies to undertakings and associations of undertakings. The notion of an "undertaking" covers any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed.

6.1.2 Application to this case

- (95) Guess and each of the distributors referred to carry out independent economic activities and, therefore qualify as undertakings for the purposes of Article 101(1) of the Treaty.

6.2 Agreements and concerted practices

6.2.1 Principles

- (96) For the purposes of Article 101(1) of the Treaty, in order for there to be an agreement between undertakings, it is sufficient that at least two undertakings have expressed their joint intention to conduct themselves on the market in a specific way. Although Article 101(1) draws a distinction between agreements and concerted practices, the notions of an agreement and a concerted practice are to be interpreted widely.
- (97) According to settled case-law, general sales terms and conditions, even if accepted tacitly, and even if they are allegedly "*imposed*", amount to an agreement for the purposes of the application of Article 101(1) of the Treaty.
- (98) Likewise, measures or practices that are adopted or imposed in an apparently unilateral manner by a supplier, in contrast with genuinely unilateral measures, can constitute an agreement or a concerted practice within the meaning of Article 101(1) of the Treaty if, at the very least, tacit acquiescence of the other party is established (i.e. in the context of vertical relationships the acquiescence of the dealer to a measure adopted by the supplier).
- (99) Also, in addition to cases where measures are explicitly contained in a contract, a concurrence of wills may also be said to occur where a contract authorises the supplier to adopt measures, even though the measures were not explicitly provided for in the contract.

6.2.2 Application to this case

- (100) In this case, there were three different types of agreements between Guess Europe and its distributors. Wholesale agreements were negotiated and signed by the 13 independent wholesalers individually, although most of the provisions of those agreements were identical as they followed the template wholesale agreement. The 36 retail store sublicense agreements submitted to the Commission were negotiated and signed individually, although their structure and most of their provisions were identical across the EEA as they again followed the same template. As outlined in recital (32), multi-brand retailers, by submitting a purchase order and receiving a subsequent order

confirmation, abided by Guess Europe's General Sales Terms applicable to the territory in question. Thus, the General Sales Terms were used repeatedly by Guess Europe for orders by multi-brand retailers.

- (101) All those three types of agreements entered into by Guess Europe amount to an agreement within the meaning of Article 101(1) of the Treaty.
- (102) The online search advertising restrictions were not explicitly contained in any of those three types of agreements. Nevertheless, the conduct described in Section 5.2.2 constitutes an agreement or a concerted practice based on the fact that, under both the wholesale agreements and the retail store sublicense agreements, Guess' prior written approval was needed for advertising campaigns and materials and for other promotion activities carried out by authorised distributors. Also, in the General Sales Terms applicable to multi-brand retailers, Guess' prior authorisation was required for sales through the internet and for any promotional or advertising activities, in particular "*for everything pertaining to the use of brands [...]*". In the event of unauthorised advertising, penalties could be imposed under both the wholesale agreements and the retail agreements. The online search advertising restrictions were linked to those provisions and formed part of that contractual framework.
- (103) The online search advertising restrictions were covered therefore by the three types of agreements between Guess Europe and its distributors and constitute an agreement within the meaning of Article 101(1) of the Treaty.

6.3 Restriction of competition

6.3.1 Principles

- (104) It is settled case-law that certain types of conduct reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. This arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition. Consequently, certain collusive behaviour may be considered so likely to have negative effects on competition that it may be considered redundant, for the purposes of applying Article 101(1) of the Treaty, to prove that this behaviour has actual or potential effects on the market.
- (105) To determine whether an agreement reveals such a sufficient degree of harm to competition regard must be had *inter alia* to:
 - (a) the content of its provisions;
 - (b) the objectives it seeks to attain; and
 - (c) the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.
- (106) The Court of Justice has ruled that the organisation of a selective distribution network is not prohibited by Article 101(1) of the Treaty, 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.

- (107) However, it is settled case-law that an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of an internal market. Thus, agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) of the Treaty.
- (108) The Court of Justice has noted in several judgements that the fact that parallel trade restrictions are not implemented does not disqualify them from being anti-competitive.
- (109) In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing preventing the Commission from taking that aspect into account.
- (110) It is also settled case-law that certain collusive behaviour, such as resale price maintenance, may be considered so likely to have negative effects, in particular on the price, choice, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) of the Treaty, to prove that it has actual effects on the market.

6.3.2 Application to this case

6.3.2.1 Selective distribution

- (111) Article 1(1)(e) of Commission Regulation (EU) No 330/2010 (referred to in this Decision as the Vertical Block Exemption Regulation or VBER) defines a selective distribution system as *"a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system"*.
- (112) Thus, selective distribution has two distinctive features: (a) the supplier undertakes to sell the contract products only to distributors selected on the basis of specified quantitative or qualitative selection criteria; and (b) the selected distributors are prohibited from selling the contract products to other distributors not belonging to the authorised distribution network.
- (113) Guess Europe's distribution network fulfils both those criteria to qualify as a selective distribution system. First, Guess Europe sells the contract products only to distributors selected on the basis of specified selection criteria and, second, the selected distributors are prohibited from selling the contract products to other distributors not belonging to the selective distribution network.

6.3.2.2 Online search advertising restrictions

- (114) In *Hasselblad*, the Court of Justice found that a clause in a selective distribution

agreement which prevented dealers from advertising their prices was contrary to Article 101(1) of the Treaty. The Court of Justice rejected Hasselblad's assertion that such a clause was justified to ensure a common advertising programme of a high standard.

- (115) The Court of Justice held in Coty that a specific contractual clause within a selective distribution agreement was lawful under Article 101(1) of the Treaty provided that it had a legitimate objective, was laid down uniformly for all potential resellers, applied in a non-discriminatory fashion, and did not go beyond what was necessary.
- (116) Furthermore, according to settled case-law, Union trademark law entitles the proprietor of a trademark to prohibit an advertiser from advertising goods or services identical to those for which the trademark is registered using a keyword identical to that trademark and selected by the advertiser without the proprietor's consent in connection with an internet referencing service, in circumstances where the advertisement does not allow an average internet user, or makes it difficult for an average internet user, to ascertain whether the goods or services originate from the trademark proprietor or an undertaking economically connected to it or, conversely, from a third party.
- (117) That case-law concerns potential trademark infringements through a search engine. It cannot be relied on to justify a restriction of the ability of authorised retailers in selective distribution systems, who sell genuine Guess products, to use or bid on Guess' brand names and trademarks, as in this case there is no risk of confusion as to the origin of the products.
- (118) The objective of the online search advertising restriction was to reduce competitive pressure by authorised retailers on Guess' own online retail activities and to keep down its own advertising costs.
- (119) Therefore, the online search advertising restrictions cannot be said to serve the legitimate objective of Guess' selective distribution system claimed by Guess, namely to protect the brand image.
- (120) By severely curtailing the use of online search advertising by its authorised retailers, Guess limited the "findability" and ultimately the viability of retailers selling its products online. While Guess' retailers were – subject to the authorisation requirement – in principle able to sell online, they were deprived of the ability to effectively generate traffic to their own websites by means of online search advertising. This restricted their ability to sell the contractual products to customers, in particular outside the contractual territory or area of activity.
- (121) An exclusive right reserved for Guess Europe to use the Guess brand names and trademarks in online search advertising provided Guess with a considerable competitive advantage over its retailers with whom it competed online and restricted intra-brand competition.
- (122) Another aim of the policy was to reduce advertising costs. In this regard the Court of Justice has held, in a judgement related to trademarks, that internet advertising using a referencing service on the basis of keywords corresponding to another person's trademark(s) constitutes a practice inherent to competition as it offers internet users alternatives to the trademark proprietor's goods or services even if it leads to the trademark proprietor having to intensify its advertising in order to maintain or enhance its profile with consumers. In the light of this reasoning, it cannot be said that the online search advertising

restriction constitutes an aspect of competition that is compatible with Article 101(1) of the Treaty.

- (123) Given that the restriction on the use of the Guess brand names and trademarks in online search advertising did not pursue any other legitimate objectives in the context of the operation of the selective distribution system, there is no need to assess whether such a prohibition is appropriate or whether it goes beyond what is necessary to achieve that objective.
- (124) It is necessary to determine, however, whether the online search advertising restriction reveals a sufficient degree of harm to competition that it may be considered a restriction of competition "by object" within the meaning of Article 101(1) of the Treaty or whether its effects need to be examined.
- (125) Assessed in its context, the online search advertising restriction had as its object to reduce the ability of authorised retailers to advertise and ultimately to sell the contract products to customers, in particular outside the contractual territory or area of activity and to limit intra-brand competition.
- (126) Therefore, the restriction, as described in Section 5.2.2, had the object of restricting competition within the meaning of Article 101(1) of the Treaty.

6.3.2.3 Online sales restrictions

- (127) The Commission set out its position with regard to restrictions of online sales in its Guidelines on Vertical Restraints ("Vertical Guidelines"): *"The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods [...]. In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor."*
- (128) This position has been confirmed by the Court of Justice in *Pierre Fabre*. In this judgement, the Court held that a contractual provision prohibiting *de facto* the internet as a method of marketing amounts to a restriction of competition by object within the meaning of Article 101(1) of the Treaty. It has at the very least as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.
- (129) A supplier operating a selective distribution system may legitimately require quality standards for the use of websites that resell its goods, just as the supplier may require quality standards for a brick-and-mortar shop or for selling by catalogue or for advertising and promotion in general.
- (130) In *Coty*, the Court of Justice held that a specific contractual clause within a selective distribution agreement which pursues a legitimate objective is lawful under Article 101(1) of the Treaty only if the quality criteria are laid down *"uniformly"* and *"not applied in a discriminatory fashion"*.
- (131) In this case, as set out in Section 5.2.3, the written authorisation requirement was not linked to any specified quality criteria. In line with Guess' e-commerce strategy, which aimed at promoting its own website (online shop), that requirement had as its main object to restrict sales on authorised retailers' websites. It protected Guess' own online sales activities from intra-brand competition by its authorised retailers and facilitated market partitioning as it limited the authorised retailers' ability to sell the contract products to

customers, in particular outside their authorised area of activity. Therefore, the written authorisation requirement which was not linked to any specified quality criteria constitutes a restriction of competition by object within the meaning of Article 101(1) of the Treaty.

6.3.2.4 Restrictions on cross-selling among members of the selective distribution network (wholesale and retail)

- (132) The contractual provisions listed in Section 5.2.4 aimed at restricting sales of Guess products among members of the selective distribution network, albeit in different ways. Some of the provisions prevented solicitation of customers outside the allocated territory (active sales restrictions). Other provisions restricted unsolicited sales to other network members and prevented or provided disincentives for purchases from other network members (passive sales restrictions). All cross-selling restrictions aimed at ensuring that only Guess Europe and/or the appointed national wholesaler could supply the retailers operating on a national market and that wholesalers purchased only from Guess Europe and did not resell the contract products to other wholesalers or retailers outside their allocated territory. These restrictions mutually reinforced each other.
- (133) It is settled case-law that a restriction of sales between authorised distributors within a selective distribution network constitutes a restriction of competition by object within the meaning of Article 101(1) of the Treaty.
- (134) Therefore, the provisions described in Section 5.2.4, which restrict cross-supplies between members of a selective distributions system, restrict competition by object with the meaning of Article 101(1) of the Treaty.

6.3.2.5 Restrictions on cross-border sales to end users

- (135) The provisions listed in Section 5.2.6 individually and in combination restrict active and passive sales by members of a selective distributions system to end users located outside the allocated territory of those members and, therefore, are capable of creating, maintaining or restoring national divisions in trade between Member States so as to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of an internal market. In accordance with established case-law, those provisions restrict competition by object with the meaning of Article 101(1) of the Treaty.

6.3.2.6 Resale price maintenance

- (136) The Court of Justice has held on several occasions that agreements that impose upon retailers' minimum or fixed retail prices, thereby restricting the ability of those retailers to determine their resale prices independently, restrict competition by object within the meaning of Article 101(1) of the Treaty. More specifically, with regard to selective distribution agreements, the Court has held that in a selective distribution system, which by its very nature inherently restricts price competition, the imposition of fixed or minimum sales prices goes beyond the requirements of such a distribution system.
- (137) Therefore, the provisions listed in Section 5.2.6, which restricted the ability of Guess' retailers to determine their resale prices, restrict competition by object

with the meaning of Article 101(1) of the Treaty.

6.3.2.7 Conclusion

- (138) By means of the contractual provisions and practices referred to in Section 5.2, Guess Europe effectively restricted intra-brand competition and partitioned national markets for its products contrary to Article 101(1) of the Treaty. There are no circumstances in the economic or legal context of those provisions and practices to support a finding that they were not liable to impair competition or did not have an anticompetitive object within the meaning of Article 101(1) of the Treaty.

6.4 Single and continuous infringement

6.4.1 Principles

- (139) An infringement of Article 101(1) of the Treaty may consist not only of an isolated act but also of a series of acts or a course of conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that Article. Accordingly, if the different actions form part of an “overall plan”, because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.

6.4.2 Application to this case

- (140) The conduct described in Section 5.2 constitutes a single and continuous infringement of Article 101(1) of the Treaty. This is notwithstanding the fact that each of the restrictions described in Section 5.2, taken in isolation, constitutes a restriction of competition within the meaning of that Article.
- (141) The single and continuous nature of the infringement is demonstrated by the fact that the restrictions described in Section 5.2 formed part of the same strategy and served the same aim, namely restricting intra-brand competition and partitioning national markets.

6.5 Effect on trade between Member States

6.5.1 Principles

- (142) Article 101(1) of the Treaty is aimed at agreements and concerted practices which might harm the attainment of an internal market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market.
- (143) The Court of Justice has also found that agreements constituting a selective distribution system are capable of affecting competition in the internal market.

6.5.2 *Application to this case*

- (144) Guess' distribution agreements covered a large part of the EEA. More specifically, the wholesale agreements containing territorial sales restrictions covered the following 16 EEA countries: Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Germany, Greece, Hungary, Latvia, Liechtenstein, Lithuania, the Netherlands, Slovakia, Slovenia and the United Kingdom. Guess Europe also had mono-brand store agreements containing territorial sales restrictions in the following 18 EEA countries: Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. The same General Sales Terms were used in all EEA countries with the exception of France, Spain, Portugal (where Guess Europe used different General Sales Terms) and Iceland (where Guess Europe had no sales). The Italian General Sales Terms were used in Italy.
- (145) Since the agreements contained, in particular, internet sales restrictions and cross- border sales restrictions, they were liable to affect trade between Member States. The very purpose of these types of restrictions is to prevent trade between Member States.
- (146) Therefore, the Commission concludes that the conduct described in Section 5.2 was capable of having an appreciable effect on trade between Member States in the EEA within the meaning of Article 101(1) of the Treaty.

6.6 Appreciable effect on competition

6.6.1 *Principles*

- (147) The Court of Justice held that an agreement affecting trade between Member States and having an anticompetitive object, "by its nature" constitutes an appreciable restriction of competition in violation of Article 101(1) of the Treaty, independently of any concrete effect that it may have.

6.6.2 *Application to this case*

- (148) As set out above, the Commission concludes that the conduct described in Section 5.2 restricted competition by object. Therefore, those restrictions, by their nature, appreciably affected competition.

6.7 Non-applicability of Article 101(3) of the Treaty

6.7.1 *Principles*

6.7.1.1 Article 101(3) of the Treaty

- (149) Article 101(1) of the Treaty may be declared inapplicable pursuant to Article 101(3) of the Treaty where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting

benefit, and which does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

- (150) The Commission is empowered to apply Article 101(3) of the Treaty by regulation to certain categories of vertical agreements falling within Article 101(1) of the Treaty, which can be regarded as normally satisfying all the conditions laid down in Article 101(3) of the Treaty. The Vertical Block Exemption Regulation was adopted under that empowerment.
- (151) Even where a restriction by object pursuant to Article 101(1) of the Treaty is established and the VBER is not applicable, there is in principle the possibility of an exemption from the prohibition in Article 101(1) if the parties prove that the agreement fulfils the four conditions for exemption set out in Article 101(3) of the Treaty.

6.7.1.2 The Vertical Block Exemption Regulation

- (152) Pursuant to Article 101(3) of the Treaty, the VBER exempts, under certain conditions, categories of vertical agreements from the application of Article 101(1) of the Treaty.
- (153) Under Articles 2 and 3 of the VBER, in the context of a selective distribution system, a supplier may, in principle, benefit from the block exemption where each its market share and the buyer's market share does not exceed 30% in the relevant markets. The VBER excludes certain types of restrictions that have severely anticompetitive effects ("hard-core restrictions"), irrespective of the market share of the undertakings concerned. Article 4 of the VBER lists the types of restrictions that are excluded irrespective of the markets shares of the supplier or the buyers.
- (154) Pursuant to point (c) of Article 4 of the VBER, the exemption does not apply to vertical agreements which directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.
- (155) Point (d) of Article 4 of the VBER specifically aims to ensure the freedom of members of a selective distribution network to approach other members within the network with the aim of exploring cross-supply opportunities. In particular, it points out that wholesalers, just as much as retailers distributing the same products, are part of the same selective distribution system. It follows that, whereas the supplier in a selective distribution system may agree to appoint only one (wholesale) distributor in a given territory, it cannot protect that (wholesale) distributor against active or passive sales in its territory from other authorised distributors. Thus, cross- network sales must not be restricted either among authorised wholesalers, or among authorised retailers and wholesalers.
- (156) Finally, pursuant to point (a) of Article 4 of the VBER, the block exemption does not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of the buyer's ability to determine its sale price, without

prejudice to the supplier's right to impose a maximum sale price or recommend a sale price, provided that the maximum sale price or recommended sale price do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

6.7.2 *Application to this case*

6.7.2.1 The non-applicability of the VBER

- (157) The Commission concludes that the object of the online search advertising restrictions was to restrict the ability of authorised retailers to advertise and ultimately to sell the contractual products to customers, in particular outside the contractual territory or area of activity. Their object was therefore to partition the market since they limited the ability of the authorised retailers' to sell the contract products actively or passively (depending on the targeted audience or territory). Pursuant to point (c) of Article 4 of the VBER, those restrictions cannot therefore benefit from the block exemption.
- (158) The object of the online sales restrictions was to partition the market since they restricted authorised retailers from actively or passively selling the contract products to customers, in particular outside the contractual territory or area of activity, by restricting their ability to effectively sell the products online on their website. Pursuant to point (c) of Article 4 of the VBER, the restrictions cannot therefore benefit from the block exemption.
- (159) The same reasoning applies to the restrictions on cross-border sales to end users.
- (160) As explained in Section 5.2.4, Guess Europe's selective distributors (retailers and wholesalers) were contractually limited from sourcing from or selling to, actively or passively, other authorised members of the selective distribution system, including in other EEA countries. Therefore, pursuant to point (d) of Article 4 of the VBER, the restrictions on cross-selling among members of the selective distribution network (wholesale and retail) cannot benefit from the block exemption.
- (161) The resale price maintenance by Guess Europe cannot be exempted pursuant to point (a) of Article 4 of the VBER, because it had as its object to restrict the ability of retailers to independently determine their sale price.
- (162) In conclusion, the conduct described in Section 5.2 does not qualify for an exemption under the VBER.

6.7.2.1 No exemption under Article 101(3)

- (163) Guess' conduct does not meet the conditions for an exemption under Article 101(3) of the Treaty either.
- (164) In particular, there are no indications that the conduct contributed to improving the production or distribution of Guess' products, or to promoting technical or economic progress, while allowing consumers a fair share of the potential benefits resulting from Guess' restrictive practices. In addition, there are no indications either that the conduct was indispensable, for example to address free-riding, or to protect Guess' brand image.

7. SCOPE AND DURATION OF THE INFRINGEMENT

7.1 Product scope

- (165) As Guess Europe submits, a range of products were reserved solely for its own distribution in the Guess-owned stores and on its website and were not distributed by any third-party retailers. As the infringement related to intra-brand competition, the products reserved for Guess Europe's own distribution should be excluded from the scope of the infringement. Those products (covering apparel, accessories, footwear and Marciano products for women as well as men's apparel), distributed only by Guess, accounted for [...] of Guess' total product mix for the period Spring- Summer 2016 and [...] for the period Fall-Winter 2016 (which corresponds to an average of [...] for 2016).

7.2 Geographic scope

- (166) In view of the geographic scope of the relevant restrictions, the Commission considers that the infringement covered the territories of the following 27 EEA countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Sweden, and the United Kingdom.
- (167) The relevant restrictions affected all Guess product sales in those territories (excluding product sales for those products reserved solely for Guess' own distribution as explained in recital (165)) as they limited intra-brand competition between Guess products.

7.3 Duration of the infringement

- (168) The duration of the infringement is calculated from the date when all the relevant restrictive measures that formed part of Guess' e-commerce strategy (both contractual and non-contractual) were first implemented in full.
- (169) The full roll-out of Guess' own website at EEA-level, which was completed on 1 January 2014, marks the date when all the relevant restrictions aimed at controlling the competitive pressure coming from Guess' authorised retailers were effectively put in place. Therefore, the start date of the infringement is 1 January 2014.
- (170) On 31 July 2017, Guess Europe informed the Commission of new template agreements that it intended to roll out in the future together with new General Sales Terms that had already been deployed in July 2017. As Guess Europe demonstrated, those new agreements without the restrictive provisions were effectively put in place in the second half of 2017. The Commission therefore considers that the infringement ended on 31 October 2017, which was the date when the new agreements entered into force for the vast majority of Guess' wholesalers and retailers.
- (171) Therefore, the infringement started on 1 January 2014 and ended on 31

8. LIABILITY

8.1 Principles

- (172) As indicated in recital (94), Union competition law applies to the activities of undertakings. The notion of an “undertaking” covers any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed.
- (173) When an entity infringes Union competition law, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. However, the infringement must be imputed unequivocally to a legal person on whom fines may be imposed, and the statement of objections must be addressed to that person. Where several legal persons may be held liable for an infringement committed by one and the same undertaking, they must be regarded as jointly and severally liable for the infringement.
- (174) The conduct of a subsidiary may be imputed to the parent company, even if the parent company does not participate directly in the infringement, where the parent company and the subsidiary form a "single economic unit" and therefore form a single "undertaking" for the purposes of Union competition law.
- (175) In particular, that may be the case where a subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities.
- (176) In the specific case in which a parent holds all or almost all of the capital in a subsidiary that has committed an infringement of Union competition rules, there is a rebuttable presumption that that parent company in fact exercises a decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies.

8.2 Application to this case

- (177) In the period concerned by this Decision, the EEA-wide distribution of Guess products was managed by Guess Europe, a wholly owned subsidiary of Guess? Europe, B.V., which in turn is wholly owned by Guess?, Inc. The national subsidiaries of Guess in the EEA are directly or indirectly held by Guess? Europe, B.V. and ultimately by Guess? Bermuda Holdings L.P., the entity acting as the holding company for all European subsidiaries.
- (178) Having regard to the body of evidence and the facts described in Section 5.2, the Parties' clear and unequivocal acknowledgement of the facts and their legal characterisation thereof and to the fact that Guess?, Inc. and Guess? Europe, B.V. have not provided any evidence to rebut the presumption that they exercised decisive control over Guess Europe during the relevant period, the Commission concludes that liability for the single and continuous

infringement should be imputed to the following legal entities:

- (a) to Guess Europe for its direct participation in the infringement;
- (b) to Guess? Europe, B.V. as the parent company of Guess Europe; and
- (c) to Guess?, Inc. as the parent company of Guess? Europe, B.V.

9. REMEDIES AND FINES

9.1 Remedies under Article 7 of Regulation (EC) No 1/2003

- (179) Where the Commission finds that there is an infringement of Article 101 of the Treaty, it may by decision require the undertaking concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003. For this purpose, it may also impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.
- (180) The requirement that a remedy has to be effective also empowers the Commission to require the undertaking concerned to refrain from repeating the act or conduct in question and to refrain from any act or conduct having the same or an equivalent object or effect.
- (181) The Commission concludes in this case that it is appropriate to require Guess to bring the infringement to an end (if it has not already done so) and to refrain from any future measure which has the same or an equivalent object or effect.

9.2 Fines under Article 23(2) of Regulation (EC) No 1/2003 – principles

- (182) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty. For each undertaking participating in the infringement, the fine cannot exceed 10% of its total turnover in the business year preceding the Commission decision.
- (183) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of fine, have regard both to the gravity and to the duration of the infringement. The Commission will also refer to the principles laid down in its Guidelines on the Method of Setting Fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 ("the Guidelines on Fines").
- (184) First, the Commission must determine a basic amount. The basic amount of the fine is to be set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. The basic amount consists of a percentage of the value of those sales up to a maximum percentage of 30%, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement. In assessing the gravity of the infringement, the Commission has regard to a number of factors, such as the nature of the infringement, the market share of the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.
- (185) For calculating the value of sales, the Commission normally takes the sales

made by the undertaking during the last full business year of its participation in the infringement. If the turnover of the undertaking during that year is not sufficiently representative of its annual turnover during the infringement, the Commission may use some other year for calculating the value of sales.

- (186) The Commission may also include in the basic amount an additional amount of a sum up to 25% of the value of sales to deter undertakings from entering into anticompetitive agreements.
- (187) Second, the Commission may increase or decrease the basic amount to take into account any aggravating or mitigating circumstances in accordance with points 28 and 29 of the Guidelines on Fines. It does so on the basis of an overall assessment which takes account of all the relevant circumstances.
- (188) The Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.

9.3 The intentional or negligent nature of the infringement

- (189) The Commission concludes that, based on the facts described in Section 5, the single and continuous infringement was committed intentionally.

9.4 Calculation of the fine

9.4.1 Value of sales

- (190) The products to be taken into consideration for the purposes of calculating the value of sales in this case are Guess apparel and accessory products in the following 27 EEA countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Sweden and the United Kingdom. The Guess products taken into account in calculating the value of sales should exclude those Guess products that, as described in Section 7.1, are reserved solely for Guess' own distribution in the Guess-owned stores and on its website.
- (191) Based on the principles outlined in Section 9.2 and on the information provided by Guess, the value of sales relating to those products should be based on the value of sales made by Guess in the financial year 2017 (running from 31 January 2016 to 28 January 2017), which was the last full business year of its participation in the single and continuous infringement in those 27 EEA countries.
- (192) Accordingly, the value of sales to be taken into account is EUR [250 000 000 – 300 000 000].

9.4.2 Gravity

- (193) Based on the facts described in Section 5, the Commission takes into account the fact that each of the restrictions, namely (i) online search advertising

restrictions; (ii) online sales restrictions; (iii) restrictions of cross-selling among members of a selective distribution system; (iv) restrictions of cross-border sales to end users and (v) resale price maintenance restrict competition within the meaning of Article 101(1) of the Treaty and Article 53 of the EEA Agreement by their very nature. However, vertical agreements and concerted practices of the kind in issue in this case are, by their nature, often less damaging to competition than horizontal agreements.

- (194) In the light of the specific circumstances of the case, as set out in Section 5 above, the percentage of the value of sales to be taken into account in this case should therefore be set at 7%.

9.4.3 Duration

- (195) The duration of the infringement, as set out in Section 7.3, was 1400 days. The multiplier for calculating the fine is therefore 1400.

9.4.4 Calculation of the basic amount

- (196) Applying the criteria explained in recitals (182) to (188), the basic amount of the fine to be imposed in this case therefore amounts to EUR [75 000 000 – 85 000 000].

9.4.5 Aggravating or mitigating factors

- (197) The Commission considers that there are no aggravating or mitigating circumstances applying in this case.

9.4.6 Application of the 10% turnover limit

- (198) The fine for the infringement does not exceed 10% of Guess' total turnover relating to the business year preceding the date of adoption of this Decision pursuant to Article 23(2) of Regulation (EC) No 1/2003.

9.4.7 Reduction of the fine in view of cooperation

- (199) In order to reflect that Guess?, Inc., Guess? Europe, B.V. and Guess Europe Sagl have effectively cooperated with the Commission beyond their legal obligation to do so, the fine that would otherwise have been imposed should, for the following reasons and pursuant to point 37 of the Guidelines on fines, be reduced by 50%.
- (200) Guess?, Inc., Guess? Europe, B.V. and Guess Europe have cooperated with the Commission beyond their legal obligation to do so by, first, revealing a restriction of competition which was not known to the Commission until then, second, providing additional evidence representing significant added value compared with the evidence already in the Commission's possession and strengthening the Commission's ability to prove the infringement as a result, third, acknowledging the infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement arising from the conduct, and, fourth, waiving certain procedural rights, resulting in administrative efficiencies.

9.4.8 *Conclusion: final amount of the fine*

- (201) In conclusion, the final amount of the fine to be imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 for the infringement amounts to EUR 39 821 000,

HAS ADOPTED THIS DECISION:

Article 1

Guess?, Inc., Guess? Europe, B.V. and Guess Europe Sagl infringed Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area by participating in a single and continuous infringement consisting of practices restricting authorised distributors in a selective distribution system from doing the following:

- (a) using the Guess brand names and trademarks for the purposes of online search advertising;**
- (b) selling online without first obtaining from Guess a specific authorisation which Guess had full discretion to either grant or refuse and where no quality criteria had been specified for deciding whether or not to grant an authorisation;**
- (c) selling to end users located outside the authorised distributors' allocated territory;**
- (d) cross-selling among authorised wholesalers and retailers;**
- (e) determining their resale prices independently.**

The infringement lasted from 1 January 2014 until 31 October 2017.

Article 2

For the single and continuous infringement referred to in Article 1, a fine of EUR 39 821 000 is imposed on Guess?, Inc., Guess? Europe, B.V. and Guess Europe Sagl, jointly and severally.

The fine shall be credited, in euro, within a period of three months from the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT

1-2, Place de Metz

L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000 BIC: BCEELULL

Ref.: European Commission – BUFI/AT.40428

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where Guess?, Inc., Guess? Europe, B.V. or Guess Europe Sagl lodges an

appeal, that entity shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.

Article 3

Guess?, Inc., Guess? Europe, B.V. and Guess Europe Sagl shall immediately bring to an end the infringement referred to in Article 1 insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

Article 4

This Decision is addressed to:

Guess?, Inc., 1444 South Alameda Street, Los Angeles, California, 90021, United States of America

Guess Europe Sagl, Strada Regina 44, 6934 Bioggio, Switzerland

Guess? Europe, B.V., Barbara Strozilaan 101, 1083 H.N. Amsterdam, The Netherlands

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the Agreement on the European Economic Area.

Done at Brussels, 17.12.2018

For the Commission

Margrethe VESTAGER

Member of the Commission